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The Crisis in Legal Education: Embracing Ethnographic Approaches to Law

Eve Darian-Smith*

Abstract: There is general consensus amongst many laws schools around the world that legal education is in crisis and needs to be reformed. This crisis is very evident in the United States where the cost of legal education and the concurrent decline in law firm employment has placed pressures both on law students and law schools. Some legal educators argue that legal education needs to teach vocational and technical skills applicable to the current job market. Others argue legal education should be more attentive to transnational legal processes and should be training global citizens. In this essay I argue that whatever particular reformist trajectory, an ethnographic approach underscores the connections between laws, skills and values that is said to be lacking in much legal education. Drawing primarily on the US legal system and an illustrative case study within it, I argue that all legal training, be it in family law or corporate law, and be it for practicing at local, national, regional, international or transnational levels, could benefit from a bottom-up grounded ethnographic approach. An ethnographic approach makes legal education more relevant and applicable in today's complex world that involves, amongst other things, increasing multi-ethnic and multi-religious tensions and various forms of legal pluralism. I contend that ethnographic approaches provide one pedagogical strategy to better train and prepare young lawyers to deal with the pressing legal challenges of the 21st century that are manifesting in interconnected ways at home and abroad. I conclude with some recommendations for legal educators to think about in shaping a more inclusive, rich and relevant law school curriculum that also concurrently underscores the integrity of the legal profession and the democratic institutions and principles of social justice that lawyers supposedly uphold.

Keywords: legal education, ethnography, legal pluralism, globalization

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In recent years, there has been a growing and insistent call to reform legal education in many countries around the world. This call has been to a large degree driven by the crisis in the legal services market brought on by the global economic recession, and the subsequent decline of jobs in conventional law firms in common law countries such as the USA, UK, Canada, Australia, and across northern Europe.¹ This crisis in the job market for lawyers has helped generate a period of intense self-reflection within law schools about how best to train law students and re-build a robust market for legal services beyond the needs driven by corporations and big business.²

This essay speaks to the perceived crisis in legal education within the United States, arguably the loudest but by no means the first country to seek educational reform. Many US legal educators focus on the relationship between law as taught in the classroom and

¹ “In the six and a half years since the onset of the Great Recession, the market for legal services has changed in fundamental – and probably irreversible – ways. Perhaps of greatest significance has been the rapid shift from a sellers’ to a buyers’ market, one in which clients have assumed control of all of the fundamental decisions about how legal services are delivered and have insisted on increased efficiency, predictability, and cost effectiveness in the delivery of the services they purchase. This shift in the dynamics of the market, coupled with at best modest growth in the demand for legal services, the decision of many corporate clients to shift more legal work in-house, the growing willingness of clients to disaggregate services among many different service providers, and the growth in market share of non-traditional competitors, have all combined to produce a much more intensely competitive market for legal services than existed prior to 2008”. Report of the State of the Legal Market (2015) *The Center for the Study of the Legal Profession at the Georgetown University Law Center*. <http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/FINAL-Report-1-7-15.pdf>.

² According to the controversial book *Failing Law Schools* by Brian Tamanaha, professor at Washington University School of Law, American law schools “are failing society. While raising tuition to astronomical heights, law schools have slashed need-based financial aid, thereby erecting a huge financial entry barrier to the legal profession. Increasing numbers of middle-class and poor will be dissuaded from pursuing a legal career by the frighteningly large price tag. The future complexion and legitimacy of our legal system is at stake”. Brian Z. Tamanaha, *Failing Law Schools* (University of Chicago Press, 2012) xiii; Not all legal educators agree with Tamanaha. That being said, the *National Jurist* magazine named him the most influential person in the in US legal education in 2013. *Failing Law Schools* and other critical analyses such as Steven Harper’s *The Lawyer Bubble* (2013) have heightened widespread reflection about what a legal education should be teaching students and how best to prepare future practitioners. See also Timothy T. Clydesdale, ‘A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage’ (2004) 29(4) *Law & Social Inquiry* 711.

law as practiced in the real world. Clinical education, experiential learning, practical application, real-world experience – all of these elements have been argued as necessary in making legal education more relevant to today’s complex social and legal relations.³ In contrast to the call for vocational training, there is another group of educators calling for a different or additional response to legal education reform. These educators are keenly aware that law schools need to embrace international law and transnational legal processes in order to better deal with pressing global issues such as climate change and immigration that are beyond any one state’s capacities to regulate.⁴ Moreover, many of these educators are aware that legal education should – at least in theory – be educating students to become global citizens and leaders of the future. As Susan Sturm, professor at Columbia Law School has urged, law students are uniquely placed to make a difference as “boundary-spanning actors who are embedded in multiple networks and have the legitimacy, knowledge, relationships and cultural fluency enabling them to reframe understanding and practice”.⁵ A few law schools are now calling themselves “Global Law Schools” in an effort to brand themselves as sites of new legal learning.⁶

Whether one supports the **vocational skills movement** or the **transnational/global citizenship movement**, there is currently within many US law schools, and to a lesser degree around the world, heated debates about how to improve legal education and in

³ See Carnegie Foundation Report (2007) *Educating Lawyers: Preparation for the Profession of Law*. A Publication of the Carnegie Foundation for the Advancement of Teaching; also Special Issue: The Future of Law School (2014) 51(4) *Alberta Law Review*; Hilary Sommerland, Sonia Harris-Short, Steven Vaughan and Richard Young (eds) *The Futures of Legal Education and the Legal Profession* (Hart Publishing 2015); Stephen Wizner, ‘The Law School Clinic: Legal Education in the Interests of Justice’ (2002) 70(5) *Fordham Law Review* 1929.

⁴ See Roger Cotterrell, ‘What is Transnational Law?’ (2012) 37 *Law & Social Inquiry* 500; Detlef Von Daniels, *The Concept of Law from a Transnational Perspective* (Ashgate, 2010).

⁵ Susan Sturm, ‘Law Schools, Leadership, and Change’ (2013) 127 *Harvard Law Review* 49.

⁶ For instance, Jindal Global Law School (India) and McGill Faculty of Law (Canada) are two law schools that pride themselves on teaching a globally oriented curriculum. In 2012, these two law schools helped to establish the Law Schools Global League. The Global League is a worldwide network of leading law schools who aim to “promote legal education and scholastic research from a global prospective... and share a commitment not only to the globalization of law, but also to integrating global law in their teaching and research.” www.lawschoolsgloballeague.com/#about-lsgl.

the process make the legal profession more attractive. As mentioned, these debates are fueled by the dismal job market for new lawyers. But they are also fueled by a less publicized concern to reinstate the integrity and respectability of the legal profession which in the United States is viewed by ordinary people with increasing distrust. A 2013 Pew Research Center survey asked people what they thought about certain professions. It ranked lawyers behind 9 other professions with 34% of the respondents saying that lawyers contributed not very much or nothing at all to society.⁷ Legal educators are becoming increasingly aware that they are facing a legitimacy crisis in law as widespread public distrust of lawyers and the legal institutions that they represent is growing, alongside the growing gap between the super wealthy and the poor.⁸ Outside the United States, there is similar disillusionment in law which is widely viewed as an instrumental mechanism of power and a technical apparatus that serves special group interests. In short, there is a looming crisis in the legitimacy of western legality as the checks and balances envisioned by a system of representative governance are proving to be clearly inadequate.⁹ What we are now facing, argues Brian Tamanaha, is “the rule of some groups over others *by* and through the law, more so than a community united under a rule of law that furthers the common good”.¹⁰

Against the background of the United States’ declining law school applications and growing public distrust in law, this essay offers a modest contribution to the pedagogical debates that seeks to speak to both the vocational educational reformers and the transnational educational reformers. I interpret both calls for reform as seeking to make law more responsive, relevant and applicable to the complexity of social issues facing domestic national jurisdictions as well as the emerging transnational global

⁷ Pew Survey, ‘Public Esteem for Military Still High’ (2013), www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/ (accessed 1 July 2014).

⁸ Frederick Reese, ‘Americans Are Distrustful Of ‘Big Business’: Is Change In The Air? (2013), www.mintpressnews.com/americans-are-distrustful-of-big-business-is-change-in-the-air/46054/ (accessed 5 February 2015); Joseph Stiglitz, *The Price of Inequality: How Today’s Divided Society Endangers Our Future* (W.W. Norton & Company, 2012).

⁹ Richard Falk, Mark Juergensmeyer, and Vesselin Popovski (eds) *Legality and Legitimacy in Global Affairs* (Oxford University Press 2012); Heidi Boghosian, *Spying on Democracy: Government Surveillance, Corporate Power and Public Resistance* (City Lights Publishers, 2013).

¹⁰ Brian Z. Tamanaha, *Law as a Means to an Ends: Threat to the Rule of Law* (Cambridge University Press, 2006) 225.

order. In this context of legal complexity, I argue that an ethnographic approach to law enables legal professionals trained in elite and non-elite law schools, and operating in both domestic and transnational arenas, to be better prepared to deal with the variety of legal challenges emerging in the 21st century.¹¹

In **Part II** I discuss more fully what is meant by ethnography and why it is so pertinent to understanding contemporary legal practice. At this point it is important to note that today ethnographic approaches are widely used across the social sciences and increasingly present in research promoted in advanced law school degrees. An ethnographic approach has come to be associated with a qualitative interpretation of people in action – how they behave, what they say, and the ways that they make meaning in their lives. With respect to legal practice, an ethnographic approach very simply foregrounds the cultural and social contexts in which people encounter law, make sense of law, and think of law in various ways. Hence an ethnographic sensitivity underscores that not all laws operate according to plan but in fact are received differently by diverse cultural communities, and in turn influence and shape various understandings of the law that may be counter-intuitive and unforeseen. Ethnographic approaches are invaluable for forcing us to ask ourselves not only what constitutes “law” and “legality” in particular political, economic, religious, cultural and historical contexts but also whose interests does law represent and serve.¹² As succinctly stated by law professor Riaz Tejani, “Legal ethnography offers an empirical method by which students can leave ‘law in the books’ to observe and document ‘law in action’ in the complicated social environments in which they reside”.¹³

The complexity of “law in action” includes laws and regulations related to such things as

¹¹ John Flood, ‘Socio-Legal Ethnography’ in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 33-48.

¹² Eve Darian-Smith, *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law* (Hart, 2010); Jeffrey A. Redding, ‘The Case of Ayesha, Muslim ‘Courts’, and the Rule of Law: Some ethnographic lessons for legal theory’ (2014) 48(4) *Modern Asian Studies* 940.

¹³ Riaz Tejani, ‘Fielding” Legal Realism: the Law Student as Participant Observer’ in Stewart Macaulay, Elizabeth Mertz and Thomas Mitchell (eds), *The New Legal Realism: Translating Law-And-Society For Today’s Legal Practice* (Cambridge University Press 2016).

immigration, drug trafficking, corporate finance, and labor laws that transcend national jurisdictions and conventional geopolitical boundaries. And it also includes the increasing complexity of law at national and sub-national levels (i.e. family law, property law) that has to engage with cultural and religious diversity, non-state legal norms, and local implementation of international directives such as the UN Declaration on the Rights of Indigenous Peoples.¹⁴ Moreover, an ethnographic approach to “law in action” suggests that in some instances the very meaning of “law” itself is changing with shifting assemblages of territory, authority and rights, and the impacts of an interconnected global political economy.¹⁵ The turn to grounded ethnographic approaches and empirical research suggests that legal scholars are increasingly aware that doctrinal approaches are no longer adequate in analyzing law or identifying new forms of contemporary legality.¹⁶ As Roger Cotterrell has argued with respect to the social sciences in general, “legal analysis that lacks any sensitivity to what social science can offer is likely to be inadequate and blinkered, because it cannot gain an informed understanding of the currents of socio-political change in which legal problems arise and legal aspirations are formulated”.¹⁷

To be clear, I am not suggesting that incorporating ethnographic insights into the law school curriculum will solve the crisis in legal education in the United States or other legal educational systems which vary tremendously across countries and regions. Nor am I arguing that an ethnographic approach in legal education will necessarily improve a young lawyer’s job prospects in the legal services market which “has changed in

¹⁴ Laurel S. Terry, ‘The Legal World Is Flat: Globalization and Its Effect on Lawyers Practicing in Non-Global Law Firms’ (2008) 28(3) *Northwestern Journal of International Law & Business* 527.

¹⁵ Saskia Sassen, ‘Neither Global Nor National: Novel Assemblages of Territory, Authority and Rights’ (2008) 1(1-2) *Ethics & Global Politics* 61; Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge University Press, 2013).

¹⁶ Victoria Nourse and Gregory Shaffer, ‘Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?’ (2009) 95 *Cornell Law Review* 61; Mark Suchman and Elizabeth Mertz, ‘A New Legal Empiricism? Assessing ELS and NLR’ (2010) 6 *Annual Review of Law and Social Science* 555.

¹⁷ Roger Cotterrell, ‘Socio-Legal Studies, Law Schools, and Legal and Social Theory’ (2012) Queen Mary University of London, School of Law, Legal Studies Research Paper No. 126/2012, 4.

fundamental – and probably irreversible – ways”.¹⁸ Finally, I am not suggesting that adopting an ethnographic approach is the only way to ground legal training in complex everyday realities. Other educators are involved in improving the quality and relevance of law schools such as inviting practitioners into the classrooms or restructuring their clinical training programs.

However, I am arguing that an ethnographic approach offers a relatively easy, accessible, and inexpensive way to change the overall quality of training that law schools offer, be these elite or parochial law schools and be these located in London, Jakarta, Sao Paulo, Tokyo, Johannesburg or Sydney. My argument is that whether the law course is focused on family law, criminal law, or constitutional law, giving attention to the wider contexts in which law is embedded is a positive addition across the entire law school curriculum. Thinking about context forces all law students to engage with issues of legal access, political power and social justice, not just those students already committed to incorporating this awareness into their career goals. Thinking about context may even open up and valorize new career trajectories for young lawyers beyond the legal services market driven by corporations and global capitalism – a career trajectory that is pushed particularly hard in elite law schools.¹⁹ Moreover, by equipping young lawyers with the capacity to better think about and serve the legal needs of people living in increasingly cosmopolitan and legally pluralistic societies, a broadened legal education may even help to revive the integrity, relevance and reputation of the legal profession and legal institutions as a whole.

In **Part I**, I discuss the myriad of challenges confronting legal practitioners in the 21st century who are increasingly dealing with the realities of our multi-cultural, multi-ethnic and multi-religious societies. **Part II** discusses how legal educators are responding to these challenges, and how an ethnographic approach is emerging as one strategy for training informed lawyers who may be better equipped to deal with the messy realities of their client’s lived experiences. I refer to an illustrative case study to underscore the desirability for an ethnographic sensitivity in understanding

¹⁸ Report of the State of the Legal Market (2015) *The Center for the Study of the Legal Profession at the Georgetown University Law Center*.

¹⁹ Eve Darian-Smith, ‘Global Law Firms in Real-World Contexts: Practical limitations and ethical implications’ (2015) 6 *Beijing Law Review* 92.

overlapping and interconnected legal domains. In **Part III**, I explore the need to rethink the “science” of law and approach legal training in ways that better reflect the complexities of our current era. I then list a few general suggestions for improving law school curriculums. I conclude that ethnographic approaches that train lawyers to be more attentive to social contexts in a myriad of local, national and transnational arenas are essential in helping to shore up the legitimacy of the legal profession and related legal institutions. This is extremely important given that lawyers and legal systems in general are increasingly viewed as serving big business and leaving the 99% of ordinary people with little access to justice (to use the terminology of the global Occupy Movement). This sense of distrust in law is corrosive to furthering democratic aspirations in local communities, national agendas, and the multitude of conflict regions around the world.

Part 1: The Crisis in Legal Education

In recent years, there has been a growing and insistent call to reform legal education in law schools so as to meet the increasingly complex legal challenges of our current times. As noted by Mike McConville and Wing Hong Chui, one of these challenges is the “increasingly global character of legal life”. This demands, they argue:

that research and scholarship pay attention to alternative perspectives and consider their relevance to the local situation. Additionally, it is now inescapable that trans-jurisdictional instruments, such as Conventions relating to human rights, increasingly penetrate domestic legal systems and stimulate those responsible for operating or interrogating national systems to have regard to wider considerations than was possible when the world was considerably large and less easily navigated.²⁰

The increasingly global character of domestic jurisdictions is now widely acknowledged and is forcing law schools in the United States and elsewhere to reassess their modes of training.²¹ Amongst many legal educators there is a growing sense that law schools

²⁰ McConville, Mike and Wing Hong Chui (eds), ‘Introduction and Overview’ in *Research Methods for Law* (Edinburgh University Press 2007) 1, 1.

²¹ See for instance US Supreme Court Justice Stephen Breyer’s book *The Court and the World: American Law and the New Global Realities* (2015). See also Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing, 2013).

over-emphasize legal specialization and technical expertise, and under-emphasize the imperative to connect education with today's challenges such as global inequality, regional conflict and increasing cultural and religious tensions. It is generally accepted that law schools need to adapt to be more attractive to prospective students and to better prepare those students to meet the demands and needs of rapidly changing societies.²² In practical terms, this means training law students to be attentive to cultural contexts and recognizing that law does not necessarily apply the same way across different legal cultures and contexts. And it means rethinking law school course offerings that are typically taught as discrete legal fields of positive rules and regulations such as labor law, corporate law, environmental law, health law, family law and immigration law. It is now widely recognized that many areas of law are at some level interrelated, involve state and non-state normative orderings, and to varying degrees cross national and transnational jurisdictions.²³

A growing sensitivity to the importance of law's cultural contextualization has encouraged innovative legal educators to embrace the insights of ethnographic inquiry to better understand contemporary legal issues.²⁴ These insights promote a bottom-up grounded approach that seeks to understand law as a site of dynamic cultural exchange involving multiple state and non-state legal cultures and legal actors. Giving sufficient attention to non-state legal practices is essential given that "recent studies of transnational corporations, commercial networks and business transactions seem to

²² Susan Sturm, 'Law Schools, Leadership, and Change' (2013) 127 *Harvard Law Review* 2013; See Flood (n 11) 33-48.

²³ See Terry (n 14) 527-559; William Twining, '*Globalization and Legal Scholarship*' (2009) 4 Tilburg Law Lecture Series, Montesquiet Seminars; John Flood, 'Legal Education in the Global Context: Challenges from Globalization, Technology and Changes in the Government Regulation' (2011) Report for the Legal Services Board. University of Westminster School of Law, Research Paper No. 11-16.

²⁴ June Starr and Mark Goodale (eds) *Practicing Ethnography in Law: New Dialogues, Enduring Methods* (Palgrave Macmillan 2002); Harry Arthurs, 'Law and Learning in an Age of Globalization' (2009) 10(7) *German Law Journal* 629; Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism' in Gunther Handl, Joachim Zekoll and Peer Zumbansen (eds) *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 53-87; Peer Zumbansen, 'The Politics of Relevance: Law, Translation and Alternative Knowledges' (2013) Osgoode CLPE Research Paper No. 45/2013; Riaz Tejani, 'Little Black Boxes: Legal Anthropology and the Politics of Autonomy in Tort Law' (2013) 11 *New Hampshire University Law Review* 129.

provide incontrovertible evidence that ‘law without the state’ prevails even – perhaps especially – in the most privileged precincts of global business, finance, communications and transport”.²⁵ According to Ann Griffiths, these diverse actors include transnational corporations, corporate executives, non-governmental organizations (NGOs), religious organizations and movements, as well as refugees, asylum seekers, and undocumented workers and immigrants.²⁶ I would add that it also includes actors such as environmental activists, pan-indigenous networks, as well as mercenaries, corrupt officials, drug cartels and terrorist organizations.

What this complex picture of actors engaged in hard/soft and legal/illegal practices tells us is that law is not something that hovers abstractly above human activities. Law does not exist as an autonomous and closed system.²⁷ To the contrary, law is shaped by, and shapes, a diverse network of cultural, political and economic relations that crisscross local, national, international, regional and global domains and spatial scales.²⁸ As ethnographers know very well, the process of translating a particular legal meaning or practice across these domains and scales is always precarious,²⁹ and the implementation of law is always contingent upon a range of social and political factors that may not be obvious and may differ dramatically across particular contexts.³⁰

Recognizing the range of legal actors operating across new sites and spaces of legal activity is in turn promoting scholarly research on legal hybridization and legal pluralization.³¹ This scholarship seeks to problematize conventional state-based

²⁵ Harry Arthurs, ‘Law and Learning in an Age of Globalization’ (2009) 10(7) *German Law Journal* 629, 635.

²⁶ Anne Griffiths, ‘Reviewing Legal Pluralism’ in Reza Banakar and Max Travers (eds), *An Introduction to Law and Social Theory* (2nd edition, Hart 2013) 269.

²⁷ See footnote 92.

²⁸ Eve Darian-Smith, ‘Locating a Global Perspective’ Symposium: Legal Scholarship and Globalization: Engagements with William Twining (2013) 4(4) *Transnational Legal Theory* 524.

²⁹ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006).

³⁰ Sally Falk Moore, ‘When International Authority is Contingent: The African Instances’ in Roger Cotterrell and Maks Del Mar (eds), *Authority in Transnational Legal Theory* (Edward Elgar 2015, in press).

³¹ Prakash Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law* (Glasshouse, 2005); Sally Engle Merry, ‘International Law and Sociolegal Scholarship:

conceptualizations of law that are increasingly incapable of dealing with contemporary global challenges. Law, of course, “has always been pluralistic and hybrid”, but in the drive to claim that law has universal application in recent decades “law’s diversity and plurality, as well as its ‘indeterminacy’ ...have been overlooked, suppressed, and denied”.³² Against attempts to deny legal pluralism, growing numbers of legal scholars and practitioners are pushing back and arguing that legal pluralism both reflects lived realities and forces us to confront new questions about how law is produced and functions.³³ According to Peer Zumbansen, “transnational law prompts us to investigate the assumptions with which we associate particular legal fields, instruments, and understandings of legitimacy with specific actors or categories of norms...The current interest in ‘law and globalization’ should thus be seen as a welcome and most timely return to insights into the legal pluralist nature of law proposed by legal sociologists and anthropologists long before”.³⁴

Toward a spatial global legal pluralism’ (2008) 41 Special Issue: Law and Society Reconsidered *Studies in Law, Politics and Society* 149; Ralf Michaels, ‘Global Legal Pluralism’ (2009) 5 *Annual Review of Law and Social Science* 243; Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012); Peer Zumbansen, ‘Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism’ in Gunther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 53-87; William Twining, ‘Globalization and Legal Scholarship’ (2009) 4 Tilburg Law Lecture Series, Montesquieu Seminars 7.

³² See Griffiths (n 26) 268.

³³ The idea of intersecting and plural legal rules and legal knowledge lies at the heart of an ethnographic approach. Unfortunately, the concept of legal pluralism remains still a rather novel idea in most law school curriculums. Law schools typically present legal subjects as discrete and largely disconnected, and legal knowledge as framed by national jurisdictions. Today this seems a rather parochial and outdated way of thinking given the increasingly complex world we all live in. While the “university is not the world”, as Anthony Bradney argues, universities are not entirely isolated from reality and it is inevitable that the world will encroach upon and influence (one would hope!) thinking within the university. See Anthony Bradney, ‘A University is Not the World: And Nor is its Law School’ in Zenon Bańkowski, and Maksymilian Del Mar (eds), *The Moral Imagination and the Legal Life: Beyond Text in Legal Education* (Ashgate 2013) 85-109. See also, Brian Z. Tamanaha, Caroline Sage, and Michael Woolcock (eds), *Legal Pluralism and Development* (Cambridge University Press, 2012).

³⁴ Peer Zumbansen, ‘Law and Legal Pluralism: Hybridity in Transnational Governance’ in Paulis Jurcys, Pul F. Kjaer and Ren Yatsunami (eds), *Regulatory Hybridization in the Transnational Sphere* (Martinus Nijhoff Publishers 2013) 49, 56 and 58; see also Pue, Wesley ‘Globalisation and legal education: Views from the outside-in’ (2010) 8(1) *International Journal of the Legal Profession* 87.

However, while there may be a growing consensus around the need “to connect the redesign of law schools to a broader vision of law” there remains much debate about how this redesign should translate into legal education.³⁵ Some argue that legal practice should dictate what is taught in law schools and “skill sets” should more adequately prepare students for the real world; others argue that law schools should provide a more critical platform from which to assess the success of law in action. Those educators with a long-term vision have argued that the mission of legal education is ultimately to help students think critically about law as part of larger social relations in which it operates.³⁶ They argue that this mission is essential if law schools aspire to train global citizens, future leaders, and innovative problem solvers.³⁷ Thus, the argument goes, law schools are doing their students and society a disservice by increasingly tailoring their curriculum to teach skill sets and technical competencies geared for future employment in large city law firms.³⁸ In this vein Harry Arthurs, former Dean of Osgoode Hall Law School, argues that law schools should promote legal thinking and scholarship, public advocacy, law reform, and a liberal education in law. Arthurs goes on to say:

The future of law schools, then, is to embrace their vocation as knowledge communities, and to embed their JD and other educational programs within their larger mandate of aggregating, critiquing and disseminating knowledge, in the context of rapid and profound changes in society and in law... To summarize: law schools should be teaching students to think like lawyers, to contextualize and critically evaluate their legal experiences, to adapt to change and, especially, to learn how to learn. If law schools don't do these things, no one will, and their graduates will be worse lawyers, worse citizens and worse people as a result.³⁹

My argument speaks to both sides of the legal education debate; an ethnographic

³⁵ See Sturm (n 22).

³⁶ An interesting project nurturing critical thinking was conducted by law students at Osgoode Hall Law School in Toronto under the supervision of Peer Zumbansen titled ‘Not-Yet’ Cases in Transnational Legal Education” presented at King’s College London, July 2015, as part of the as part of the *Transnational Law Summer Institute* (<http://www.kcl.ac.uk/law/tli/tlsi.aspx>).

³⁷ ‘Symposium on the Future of Legal Education’ (2007) 60(2) *Vanderbilt Law Review*.

³⁸ Susan Sturm, and Lani Guinier, ‘The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity’ (2007) 60(2) *Vanderbilt Law Review* 515.

³⁹ Harry Arthurs, ‘The Future of Legal Education: Three Visions and a Prediction’ (2014) 51 *Alberta Law Review* 705.

approach to law helps teach law students about real-world legal practices, as well as to “learn how to learn” to use Arthurs’ terminology. Specifically, I argue that the value of an ethnographic approach to legal education is that it underscores the connections between laws, skills and values that the Carnegie Foundation Report on educating lawyers expressly said was lacking in most US law school programs. In the words of the Report, we need to find better ways to “engage the moral imagination of students” and show how “moral concerns may be relevant to their work as lawyers”.⁴⁰ By presenting a grounded law-in-action approach through ethnographic engagement, students, I suggest, will be better positioned to appreciate first-hand that there exist deep relations between laws, cultures, politics and economies. This appreciation will in turn enable students to think about the “the rich complexity of actual situations that involve full-dimensional people” as well as the importance of “social consequences or ethical aspects” involved in legal interactions.⁴¹ Of course some legal educators see little need to think creatively about the way law operates in contemporary society and are frankly frightened of the possible “revolution” it may open up in the minds of law students.⁴² But many others – and dare I say that these educators tend to be of a younger generation – see the need to engage with a moral imagination as vital for the continuing relevance and ongoing transformation of the legal profession.⁴³ These educators view the exercising of an ethical approach as enabling the legal professional to “respond to the complexity and particularity of the situation, and to come up with just and imaginative ways of going forward”.⁴⁴

In the next section, I suggest that ethnographic approaches to law better prepare students for changing realities by underscoring the social and cultural complexities, as well as the ambiguities, contingencies and contradictions in which various forms and levels of law operate. At the same time, ethnographic approaches provide a more critical

⁴⁰ See Carnegie Foundation Report (n 3) 6.

⁴¹ *Ibid*, 6

⁴² See Bradney, (n 33).

⁴³ Zenon Bańkowski, and Maksymilian Del Mar (eds) *The Moral Imagination and the Legal Life: Beyond Text in Legal Education* (Ashgate, 2013).

⁴⁴ *Ibid*, 2. In my mind to argue that a moral imagination (whether this be good or bad in its implementation) is not necessary in legal education suggests that a law degree is little more than technical training – a view that most legal educators would strongly denounce.

perspective from which to assess the implementation and impacts (both positive and negative) of law in local, national and transnational jurisdictions. In short, ethnographic approaches to law take seriously the perspectives of ordinary people and their interaction, engagement, and influence on legal processes, as well as how legal processes may be affecting them. This constitutive approach to analyzing the inter-relations between law and people is a hallmark of socio-legal scholarship.⁴⁵

Part II: Ethnographic Approaches in Legal Education

Ethnographers of law have historically constituted a small academic community. In line with the general anthropological discipline, throughout most of the 20th century these scholars studied “exotic” people in far-away places. Bronislaw Malinowski’s work in the Trobriand Islands at the outbreak of World War I epitomized the anthropology of law genre and its insistence that so-called primitive people had complex legal systems even if not recognized as such by mainstream lawyers. Legal anthropology further developed in the interwar years with collaborations and between anthropologists and legal scholars engaged in the legal realist movement. Notable in this regard was Columbia Law School professor Karl Llewellyn who with the anthropologist E. Adamson Hoebel wrote *The Cheyenne Way* (1941). This book, and a range of other similar studies, epitomized lawyerly concerns with alternative legal processes and in particular disputing in colonial contexts.⁴⁶ The interest by law professors in legal anthropology coincided with a period of great transformation in law in the United States with the emergence of the administrative state under the policies of the New Deal. Karl Llewellyn was very concerned with reforming legal education through a legal realist perspective and in 1935 gave a talk at Harvard titled “On What is Wrong with So-Called Legal Education” where he called for an integration of legal theory and practical legal experience.⁴⁷

⁴⁵ Menachem Mautner, ‘Three Approaches to Law and Culture’ (2011) 96 *Cornell Law Review* 839.

⁴⁶ See Paul Bohannan’s *Justice and Judgement Among the Tiv* (1957), Max Gluckman’s *The Judicial Process Among the Barotse of Northern Rhodesia* (1955), and John Comaroff and Simon Roberts’ *Rules and Processes: The Cultural Logic of Dispute in an African Context* (1981).

⁴⁷ Karl Llewellyn, ‘On What Is Wrong with So-Called Legal Education’ (1935) 35 *Columbia Law Review* 651.

In recent decades legal ethnographers have turned their academic gaze away from colonial contexts and homeward to study industrialized western societies.⁴⁸ As a theoretical and methodological approach, this new focus of inquiry examines such things as consumer's legal complaints,⁴⁹ legal language,⁵⁰ intellectual property law,⁵¹ global finance,⁵² international human rights law,⁵³ the impact of the European Union⁵⁴, and United Nations indicators.⁵⁵ These studies typically take a bottom-up approach in exploring how formal and informal practices of law are practiced by ordinary people in their everyday interactions, yet at the same time are also attentive to top-down institutions of power and law.

With this turn toward more familiar western legal subjects and terrain, anthropologists have been central in forging new lines of inquiry about the relationship between law, culture, authority, legitimacy and power. Importantly, these scholars are concerned with how people think about and engage with law, and how they accommodate, negotiate and change legal practices over time. As Fernanda Pirie notes in her book *The Anthropology of Law* (2013),⁵⁶ ethnographers study the nature of law and the assumptions and conventions that inform a society's legal relations. This is vital in

⁴⁸ Sally Falk Moore, 'Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999' (2001) Huxley Memorial Lecture, 7 *Journal of the Royal Anthropological Institute* 1.

⁴⁹ Laura Nader, *The Life of the Law: Anthropological Projects* (University of California Press, 2005).

⁵⁰ Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford University Press, 2007).

⁵¹ Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law (Post-Contemporary Interventions)* (Duke University Press, 1998).

⁵² Bill Maurer, *Mutual Life, Limited: Islamic Banking, Alternative Currencies, Lateral Reason* (Princeton University Press, 2005).

⁵³ See Merry (29); Annelise Riles, *The Network Inside Out* (University of Michigan Press, 2000).

⁵⁴ Eve Darian-Smith, *Bridging Divides: The Channel Tunnel and English Legal Identity in the New Europe* (University of California Press, 1999); Gustav Peebles, *The Euro and Its Rivals: Currency and the Construction of a Transnational City (New Anthropologies of Europe)* (Indiana University Press, 2011).

⁵⁵ Sally Engle Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance' (2011) *Corporate Lives: New Perspectives on the Social Life of the Corporate Form*.

⁵⁶ Fernanda Pirie, *The Anthropology of Law* (Oxford University Press, 2013).

helping to understand how law develops as a form of reasoning, authority, symbolism, and interpretation in all societies, including one's own.⁵⁷

What is ethnography?

This question has attracted serious reflection by scholars since the 1980s when the field of anthropology underwent a major transformation as it came to terms with its colonial past and western-based methodologies.⁵⁸ Today, the field is flourishing as scholars seek to better understand our culturally pluralist 21st century world and the conflicts and tensions such pluralism may bring. As all the standard texts in socio-cultural anthropology reiterate, ethnography is an in-depth study involving “firsthand, detailed, description of a living culture based on personal observation,” and “experiences gained by going to the place of study and living there for an extended period”.⁵⁹ Through field work and face-to-face communications, anthropologists attempt to understand people, their foundations of knowledge, and their particular cultural worldview. In ways that are different from other scholarly methods, anthropologists approach their research admitting that they do not know everything and may not have the tools to do so.

⁵⁷ I will never forget my first law class in 1990 with Professor Sally Falk Moore titled “Anthropological Approaches to Law”. She told us captivating tales of dispute resolution and customary law on Kilimanjaro in northern Tanzania, and we read books such as *Pigs for the Ancestors* which analyzed the regulatory dimensions of ritual among the Tsembaga Maring tribe of Papua New Guinea. As a lawyer who had practiced commercial litigation for three years, I was amazed, appalled, and totally entranced. I had imagined many things going on in the hallowed halls of Harvard Law School but nothing like that class. The message I took away – and one that has stuck with me ever since – is that what I regarded initially as quaint rituals in far-away places reminded me of elements within my own Australian legal system. Conversely, and more disturbing to me at the time, I also learnt that what I recognize as “law” may not be viewed as law at all by people from different cultures and religions and governance systems. In light of these revelations it became clear that my legal education up to that point – and the assumptions and understandings of law that such training embodied – was glaringly inadequate.

⁵⁸ George E. Marcus and Michael M.J. Fischer, *Anthropology as Cultural Critique: An Experimental Moment in the Human Science* (University of Chicago Press, 1986); James Clifford and George E. Marcus (eds), *Writing Culture: The Poetics and Politics of Ethnography* (University of California Press, 1986); Akhil Gupta, and James Ferguson (eds), *Anthropological Foundations* (University of California Press, 1997); Michael Herzfeld, *Anthropology: Theoretical Practice in Culture and Society* (Wiley-Blackwell, 2001).

⁵⁹ Barbara Miller, *Cultural Anthropology* (Allyn & Bacon, 2002) 5.

“Ethnography,” writes John Flood, “starts from a point of learning and enquiry that recognizes we know little rather than supposing a state of knowledge which is subject to *ex post facto* ratification”.⁶⁰

Conventionally, anthropologists live for a year or more with the group of people they are attempting to understand, becoming fully integrated into their way of life, speaking their language, participating in their rituals and so forth, in an attempt to understand “the native’s point of view”. This requires the ethnographer to build trust with his or her “informants” through empathy and patience. The goal is to reveal the taken-for-granted cultural assumptions of any group of people, and to make more accessible what at first may appear strange or different. The underlying rationale for this kind of investigation is that by understanding other people the ethnographer will be better equipped to return to his/her own society and ask of it similar questions that de-familiarize the familiar and lead ultimately to better understandings of ourselves.

Ethnographer’s fieldwork typically takes a bottom-up perspective in exploring everyday interactions amongst a group of people as they move about their social and material worlds. Through a range of interviews and participant observation, the ethnographer listens to what people say and observes what they do (which may be very different to what they say they do). The ethnographer records over time how people make sense of their lives and give meaning to their social interactions. The ethnographer also draws on a wide range of other forms of data depending on what questions are being asked and this may include historical records, legal cases, government documents, news reporting, cultural references, political cartoons, police activities, and so on.⁶¹

It is important to note that an ethnographer does not just report and record people’s experiences and the events that mark their lives. The ethnographer seeks to explain how these experiences represent and constitute what Clifford Geertz called “webs of

⁶⁰ See Flood (n 11) 34; Susan Coutin and Véronique Fortin ‘Legal Ethnographies and Ethnographic Law’ in Austin Sarat and Patty Ewick (eds), *Wiley Handbook of Law and Society* (John Wiley & Sons, 2015) 71-84.

⁶¹ Bruno Latour, *The Making of Law: An Ethnography of the Conseil d’Etat* (Polity Press, 2009); Cornelia Vismann, *Files: Law and Media Technology (Meridian: Crossing Aesthetics)* (Stanford University Press, 2008)

meaning” that shape people’s everyday existence. In this way, ethnographic methods are intrinsically engaged in the process of understanding the personal and intimate, and from that finely-grained focus locating individuals and groups within holistic frameworks that take into account encompassing relations of political, economic, social and legal power. So while most people think of ethnography as referring to a particular set of qualitative methods, it also presents a perspective that privileges people and their individual and collective agency, and not just the texts and objects that people produce. Hence an ethnographic approach can also be thought of as an ethical positioning that “implies a commitment to social justice”⁶², providing a platform for people to “speak” for themselves rather than seeing people as the passive receivers of law.

Today ethnography as a mode of inquiry is not confined solely to anthropologists and is increasingly adopted by a range of scholars in sociology, communication studies, cultural studies and public history. In the push toward interdisciplinarity it has become relatively widespread across the social sciences and humanities. Ethnographic methods have also become increasingly evident in MA and PhD law school programs which may be the result, in part, to the increasing impact of socio-legal scholarship within law school curriculums. According to legal education scholar Anthony Bradney, socio-legal studies in the UK have “taken the place of doctrinal studies as the dominant mode of working within law schools”.⁶³ As academic legal scholars produce more research, spurred on by the audit culture of many law schools, so too has increased the prominence of ethnographic approaches to understanding contemporary legal situations.⁶⁴

⁶² See Coutin and Fortin (n 60) 80.

⁶³ See Bradney (n 33) 96; with respect to Canadian legal education see Arthurs, Harry and Annie Bunting ‘Socio-legal Scholarship in Canada: A Review of the Field’ (2014) 41(4) *Journal of Law and Society* Volume 487.

⁶⁴ I have been aware of a shift toward ethnographic research over the past twenty years as a teacher in the postgraduate programs in law schools at the University of Melbourne, Australian National University, and University of New South Wales, and an external examiner for numerous law doctorates from law schools around the world including Canada, South Africa, Singapore, United States, Indonesia, and the UK. In my view, this shift toward empirical, qualitative research in advanced law school training is most welcome given that it increasingly involves students conducting ethnographic research in a jurisdiction other than their own. This shift may in part be the result of what Susan Coutin and Véronique Fortin discuss as the affinities between ethnographers and legal practitioners, who both “question people, take notes on

This turn to ethnography and empirical research more generally means that scholars interested in the social and cultural dimensions of law are not bound to doctrinal rules or an examination of how law functions within various institutions. Moving beyond purely instrumentalist concerns, ethnographic methods allows scholars to explore – primarily through the people they talk to and the material practices they observe – how law features in the richly textured arenas of social relationships that shape people’s legal consciousness and self-understanding.⁶⁵ By examining law **inside** the obvious sites of law such as the courtroom, legal office, police station, jail and security checkpoint, as well as **outside** in public squares, corporate boardrooms, schools and shopping centers, ethnographic approaches show us how legal processes inform a range of activities, behaviors and social relations. Hence regulatory institutions, judicial forums, and criminalization processes can all be approached with an ethnographic sensibility since they are all created, enacted, received and interpreted in practice through people, hence forming an integral part of any complex legal system.

Moreover, legal ethnography offers a spatially flexible methodological approach well suited for today’s social landscapes that includes such things as regional conflict, environmental degradation, and increasing cultural and religious tensions around the world at sub-state, state, and trans-state levels.⁶⁶ Through multi-sited fieldwork⁶⁷ and innovative data collection that is sensitive to multiple interpretations of specific events, local interactions can be situated in global contexts that take into account

conversations, produce narrative accounts, and assemble and deploy documentary records as evidence of particular claims. These intersections suggest that there is an unrealized opportunity for ethnography to inform legal practice and vice versa. Figuring out how to take advantage of this opportunity, whether in the training of students, the production of scholarship, or the practice of law may be the next frontier of empirical legal studies”. See Coutin and Fortin (n 60) 72.

⁶⁵ Ewick, Patricia and Susan Silbey *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998).

⁶⁶ Kim Fortun, *Advocacy After Bhopal: Environmentalism, Disaster, New Global Orders* (University of Chicago Press, 2001); David A. Westbrook, *Navigators of the Contemporary: Why Ethnography Matters* (University of Chicago Press, 2008).

⁶⁷ George E. Marcus, ‘Ethnography in/of the World System: The emergence of multi-sited ethnography’ in *Ethnography Through Thick and Thin* (Princeton University Press, 1998) 79-104.

interconnected systems of meaning, actors, institutions and networks.⁶⁸ This often involves appreciating how certain events, concepts or concerns are culturally translated across jurisdictions and legal systems of meaning.⁶⁹ So despite ethnography being very much about talking to people and observing actions at the local level, it can provide an extremely accommodating methodology for analyzing intersecting international and global processes that come down to ground and impact ordinary people's behaviors, meanings, identities, consciousness, actions, and so on.⁷⁰

Finally, it is important to note that an ethnographic approach is not intended to provide full explanations of all that is going on or to propose ready solutions to perceived legal problems.⁷¹ Rather, an ethnographic approach seeks to reveal the complexities of interrelated legalities such that legal practitioners may be able to ask new kinds of questions and possibly form new strategies to respond to those complexities.⁷² In other words, an ethnographic sensibility ideally generates new ways of understanding and thinking about what may be happening in real-world contexts, and seeks to more fully advise a range of people with various legal concerns living and working within those contexts. At this point it is appropriate to remember that lawyers in the Legal Realist movement in the 1930s (such as Karl Llewellyn) turned to anthropologists to understand the rapid transformations in law they were then experiencing. Given that we are arguably in a new moment of paradigmatic transformation with respect to law, it makes sense to turn to ethnography again to ask what "law" is operating in our

⁶⁸ Bill Maurer, (2005) *Mutual Life, Limited: Islamic Banking, Alternative Currencies, Lateral Reason* (Princeton University Press, 2005); Susan Coutin, *Nations of Emigrants: Shifting Boundaries of Citizenship in El Salvador and the United States* (Cornell University Press, 2007); Eve Darian-Smith, *Bridging Divides: The Channel Tunnel and English Legal Identity in the New Europe* (University of California Press, 1999).

⁶⁹ See Merry (n 29).

⁷⁰ Zsuzsa Gille, and Seán Ó Riain, 'Global Ethnography' (2002) 28 *Annual Review of Sociology* 271; Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge University Press, 2015); Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge, 2015)

⁷¹ David A. Westbrook, *Navigators of the Contemporary: Why Ethnography Matters* (University of Chicago Press, 2008).

⁷² "Many lawyers and law professors view law as an instrument for controlling society and directing social change, but most anthropologists are concerned with law as a reflection of a particular social order", Sally Falk Moore, *Law as Process: An anthropological approach* (Routledge & Kegan Paul, 1978) 22.

interconnected globalizing world.⁷³

Keystone XL Pipeline – an ethnographic case study

The Keystone XL Pipeline illustrates the need for lawyers to think with an ethnographic sensitivity regarding the legal complexities involved in understanding any given contemporary “situation”.⁷⁴ Of course, this example does not represent a typical scenario for most law students and practitioners who probably see their legal work as having absolutely nothing in common to the complexities of this particular case. That being said, I am using the Keystone XL Pipeline to highlight the necessity of incorporating an ethnographic approach within law school curricula because it shows the crisscrossing networks of rules, regulations, legal fora and legal concepts. This crisscrossing informs many legal events, even those typically thought of as very local or very contained. So whether a law student thinks he or she will actually work in such a complex legal nexus as the Keystone XL Pipeline, my point is that by appreciating that discrete legal events are often so intertwined will help nurture new ways of thinking and understanding the practice of law and its embeddedness across geopolitical jurisdictions, cultural divides, and asymmetries of economic power.

On the surface, the Keystone XL Pipeline is international/transnational in scale, running between Canada and the United States and involving laws relating to global finance, dual governmental legislation and a vast array of legal activity appropriately needed for the laying down of a huge trans-border crude oil pipeline that cuts across national and inter-state borders. However, the Keystone XL Pipeline project should also be thought of as regional and local in its impacting a range of ordinary people living in its pathway, many of whom are determined to resist its completion. The project cuts across and implicates a wide variety of legal jurisdictions, legal systems, legal meanings, legal avenues and legal modes of implementation and mobilized resistance. And it is this very complex that forced the pipeline to become a divisive political symbol and ultimately resulted in President Obama rejecting the Keystone pipeline on 6 November 2015.

⁷³ Thanks to Matthew Canfield, a fellow at the 2015 Transnational Law Summer Institute, King’s College London, and a PhD candidate at the Department of Anthropology, New York University, for pointing out this historical connection.

⁷⁴ See Westbrook (n 66) 64.

The Keystone XL Pipeline was the fourth and final phase of a project commissioned by the TransCanada Corporation to run a pipeline from Alberta (Canada) to refineries in Illinois and Texas (United States). The Keystone XL Pipeline was proposed to run through Montana and South Dakota to Steele City in Nebraska and was planned to transfer up to 830,000 barrels of crude oil a day. For various reasons, including TransCanada's poor record of project management and pipeline ruptures, the project met with considerable opposition in the United States by Democrats, environmental activists, farmers, tribal communities, and the general public.⁷⁵ Of particular concern was that the route travels over the Sand Hills in Nebraska which is a wild and fragile prairie and for being the largest wetland ecosystem in the United States was designated a National Natural Landmark in 1984. On February 24, 2015 President Obama vetoed an amended Bill that had been passed by the Republican Congress to move ahead on the building of the Keystone XL Pipeline. The Senate was unable to override the Presidential veto which required a two-third voting majority.⁷⁶

The history of the Keystone Pipeline network, of which the Keystone XL Pipeline was the final phase, offers a glimpse of the extensive array of laws, legal expertise and regulations involved at local, regional, national, international and transnational levels that have come into play over approximately a decade. Any analysis of the legal proceedings surrounding this enormous trans-border project would necessarily have to incorporate laws operating within neighborhoods and local municipalities all the way through to international treaty obligations, multinational financial arrangements, and globalized legal concerns about environmental degradation. Moreover, any analysis would have to take into account the global political economy of energy extraction. The Keystone Pipeline is seen by many American politicians as a way to reduce national dependence on Venezuela oil production in favor of a more reliable Canadian oil market. How this volatile energy market in turn relates to internal political conflict within the US Congress over the project's potential contribution to climate change (which some

⁷⁵ Bill McKibben, 'The Fossil Fuel Resistance' (*Rolling Stone Magazine*, 11 April 2013) (2013) www.nwsofa.org/wp-content/uploads/2013/11/Rolling-Stone-The-Fossil-Fuel-Resistance.pdf (accessed 1 November 2015).

⁷⁶ Juliet Eilperin, and Katie Zezima 'Obama vetoes Keystone XL' (*Washington Post*, 2015, Feb 24) www.washingtonpost.com/news/post-politics/wp/2015/02/24/keystone-xl-bill-a-k-a-veto-bait-heads-to-presidents-desk/ (accessed 1 November 2015).

members of Congress still conveniently maintain does not exist) is a fascinating study in itself.

In addition to global geopolitics of energy dependence, analysis of Keystone XL would also have to pay attention to the general public's legal consciousness about the impact of fracking and other extractive processes that are ultimately perceived to benefit big mining corporations and leave local communities to deal with long-term negative outcomes related to contaminated water-tables and toxins in the soil for which companies are ultimately not liable.⁷⁷ Many local communities situated along the routes of the pipeline remember the toxic contamination of the Amazonian rainforest in the 1980s and 1990s by Chevron's crude oil drilling and the company's failure to pay the \$18 billion judgment against it by an Ecuadorian court.⁷⁸ Local communities also remember the more recent Deepwater Horizon oil spill in the Gulf of Mexico in 2010 which killed eleven people and spewed an estimated 4.9 million barrels of oil into the ocean and has not yet been cleaned up.⁷⁹ These localized concerns about environmental impacts have been taken up by social activists who mobilized global media to bring worldwide attention to the negative potentials in terms of oil spills and greenhouse gas emissions of the Keystone project. These environmental concerns are also a great worry to the many Native American tribes whose reservations are crossed by proposed pipeline routes. Indigenous peoples cannot forget centuries of discrimination and colonialism, and specifically remember land grabs by white farmers and property developers, as well as decades of non-compensation for the dumping of toxins on reservation land.

⁷⁷ Nnimmo Bassey, 'Leaving the oil in the soil – Communities connecting to resist oil extraction and climate change' *Development Dialogue* September (2012) www.whatnext.org/resources/Publications/Volume-III/Single-articles/wnv3_bassey_144.pdf (accessed 1 November 2015).

⁷⁸ "While drilling for oil in Ecuador's Amazon rainforest region, Texaco – which merged with Chevron in 2001 – operated without concern for the environment or local residents. The company deliberately dumped billions of gallons of toxic wastewater into rivers and streams, spilled millions of gallons of crude oil, and abandoned hazardous waste in hundreds of unlined open-air pits littered throughout the region. The result is widespread devastation of the rainforest ecosystem and local indigenous communities, and one of the worst environmental disasters in history" (Amazon Watch 2014).

⁷⁹ Cutler J. Cleveland, 'Deepwater Horizon Oil Spill' *The Encyclopedia of the Earth*. (2013) www.eoearth.org/view/article/51cbf0267896bb431f6a0797/ (accessed 1 November 2015).

In the following I briefly discuss some of the more obvious legal arenas that are pertinent to the Keystone XL Pipeline project. Perhaps one of the most obvious is that of **international finance laws** and regulations specifically relating to energy. As a major transnational project, teams of Canadian and US lawyers were involved from the very first negotiations about what was required in terms of investment, financial securities, taxation, and so on. Following quickly behind issues of international finance is that of **labor and employment law**. The Keystone project was originally blocked by the Canadian Communications, Energy and Paperworkers Union because it was argued that the project would primarily serve the US and hinder jobs and investment in the Canadian energy sector.⁸⁰ Over the years, Keystone has been constantly subject to legal oversight and contestation by unions, labor organizations, health and safety regulations, and so on.⁸¹

In 2011 the Global Labor Institute at Cornell University issued a report noting the pipeline's impact on the interrelated issues of labor and employment opportunities, environmental sustainability, and related economic interests.⁸² This and other reports highlighted the **environmental law** concerns of running pipeline over an active seismic zone, of potential oil spillages and contamination of fragile ecosystems and watersheds. In 2010 the US Environmental Protection Agency (EPA) demanded revisions to a draft environmental impact study of Keystone XL because it had been prepared by the environmental contractor Cardno Entrix that has been previously employed by TransCanada and was allegedly biased.⁸³ Additional legal reviews suggested that the Federal National Environmental Policy Act had been violated in that the EPA's

⁸⁰ Anthea Pitt, 'Union calls on Ottawa to block Keystone' (2007) www.upstreamonline.com/live/article1147981.ece (accessed 1 November 2015).

⁸¹ www.peoplesworld.org/unions-jump-into-the-controversy-over-keystone-pipeline/; (accessed 1 November 2015).

⁸² Cornell University Global Labor Institute, 'Pipe dreams? Jobs gained, jobs lost by the Keystone XL Report' (2011) https://www.ilr.cornell.edu/sites/ilr.cornell.edu/files/GLI_keystoneXL_Reportpdf.pdf (accessed 1 November 2015).

⁸³ See Elisabeth Rosenthal and Dan Frosch, 'Pipeline Review Is Faced With Question of Conflict' (*New York Times*, 7 October 2011) www.nytimes.com/2011/10/08/science/earth/08pipeline.html?_r=2 (accessed 1 November 2015).

environmental assessments were not impartial.⁸⁴

Environmental activists and climate change protestors have over the years been quick to pounce on the inadequate environmental assessment reports. Activists made somewhat unlikely alliances with more conservative small farmers and conservative political bodies collectively opposed to the local impacts of the Keystone project. **Property law** and respective rights over who has access to land became central in legal challenges to resist the pipeline by local communities. For instance, in June 2012 the Sierra Club, Clean Energy Future Oklahoma and the East Texas Sub Regional Planning Commission filed a joint lawsuit against the US Army Corps of Engineer's issuing of permits for a portion of the pipeline. More recently, Nebraskan property owners challenged in the Nebraska Supreme Court the constitutionality of a law (LB1161) that granted TransCanada the right to lay the pipeline through the state and across their lands. The activist group Bold Nebraska stated that TransCanada made threats to use eminent domain if they did not consent to the pipeline running across their properties. While Bold Nebraska had its first challenge dismissed, they then brought a second challenge that will take up to two years to decide in the Supreme Court.

In some instances environmental activists and small farmers also worked with indigenous communities who are generally outraged at the disregard by TransCanada and the US government with respect to their **Indian treaty rights** over land holdings. For instance, the prospective route for the pipeline runs through the Rosebud Sioux reservation in south-central Dakota. Cyril Scott, tribe president, declared war on the Keystone XL Pipeline in 2014 stating, "I pledge my life to stop these people harming our children and our grandchildren and our way of life and culture..."⁸⁵ A number of tribes worked in solidarity with indigenous communities across the United States and Canada in preparing to implement civil disobedience strategies and resist possible

⁸⁴ See John Stansbury, 'Analysis of Frequency, Magnitude and Consequence of Worst-Case Spills From the Proposed Keystone XL Pipeline' (2011) <http://watercenter.unl.edu/downloads/2011-Worst-case-Keystone-spills-report.pdf> (accessed 1 November 2015).

⁸⁵ Amanda Holpuch, 'South Dakota Sioux tribe calls Keystone XL pipeline approval 'act of war' (*The Guardian*, 17 November 2014) www.theguardian.com/environment/2014/nov/17/sioux-tribe-keystone-xl-pipeline-south-dakota-act-of-war (accessed 1 November 2015).

encroachments on their lands. The Canadian *Idle No More* movement gave advice and assistance on this front, having gained international recognition through its savvy use of social media to bring attention to mining construction on the lands of First Nations. At the heart of the property law issue raised by indigenous peoples is the issue of sovereignty and control of natural resources that include air, water, and land. These tribes feel that the Keystone XL Pipeline proposed to run through their treaty properties was the latest event in a long history of colonial oppression in which native peoples were not given adequate consideration, and their legal rights were overridden by government and corporate interests.

Criminal law and issues of human security have also loomed large as small communities, and in particular rural Native American communities, fear that they will suffer great disruption and possibly violence by the influx of large numbers of TransCanada's male employees living in "man camps" set up to accommodate workers associated with extractive industries.⁸⁶ The man camps "not only burden local infrastructure, but also undermine social networks and governance structures while precipitating increases in crime and prostitution".⁸⁷ Fear for the safety of young women is not a far-fetched concern given the increasing attention to sexual violence and human trafficking of indigenous women around extractive industries. According to Lisa Brunner, a Program Specialist for the National Indigenous Women's Resource Center, with respect to oil fracking and the establishing of man camps in Fort Berthold, North Dakota, "there has been a doubling and tripling of numbers of sexual assaults, domestic violence and human trafficking incidents since 2008".⁸⁸ These abuses have gained the attention of international human rights organizations, and the increasing recognition that "human

⁸⁶ 'Ominous 'Man Camps': Another troubling aspect of a troubling oil project' *Indian Country Today*. August 19, 2015:6-7.

⁸⁷ United Nations, Interagency Framework Team for Preventative Action 'Extractive Industries and Conflict' (2012) www.un.org/en/events/environmentconflictday/pdf/GN_Extractive_Consultation.pdf (accessed 14 July 2015).

⁸⁸ Lisa Brunner, 'The Devastating Impact of Human Trafficking of Native Women on Indian Reservations' Hearing on "Combating Human Trafficking: Federal, State, and Local Perspectives" before the Committee on Homeland Security and Governmental Affairs (2013) (accessed 14 July 2015).

rights problems are intrinsic to oil and mining corporations”.⁸⁹

As a case study, the Keystone XL Pipeline illustrates the need to “unpack” the range of overlapping legal jurisdictions and legal arenas involved that may come into play in context-specific ways when advising a legal client. The transport of crude oil by train and truck across national, state, county, and municipal borders, and the various parties affected as transport networks cross privately owned farms, First Nations and Native American reservation lands, national parks, county lands and so on vividly illustrate an extraordinarily complex network of inter-legality. The picture is further complicated when factoring into account domestic politics and international diplomacy, the global political economy of the oil industry, as well as a vast range of cultural, social and economic realities that all play a part in how laws and regulations are ultimately negotiated and received on the ground by ordinary people.

The Keystone XL Pipeline case study highlights the desirability of adopting an ethnographic approach to law in that it shows how legal areas are interconnected, mutually shape each other, and certainly should not be approached as discrete bodies of law and application. An ethnographic approach necessarily entails a greater sensitivity to wider social, cultural, political and economic contexts which legal practitioners typically overlook or not see as relevant in advising their clients.⁹⁰ My central point is that appreciating the “big picture” will always better serve a client irrespective of whether it is a multinational mining company, local municipal agency, indigenous tribe, labor union, small farmer, environmental activists group, or a victim of sexual violence. The big picture may involve formal and informal law, various international legal regimes, federal and state law, non-state law, as well as diverse cultural values and social sensibilities and a variety of political objectives and economic interests that

⁸⁹ Victoria Sweet, ‘Extracting more than resources: Human security and Arctic Indigenous women’ (2014) 37(4) *Seattle University Law Review* 1228.

⁹⁰ As noted by socio-legal scholars Patricia Branco and Richard Mohr, “Our legal life is constituted by an intersection of different legal orders, a world of legal hybridizations, a condition present not only at the structural level of the relationship between different legal orders, but also at the level of legal behavior, experiences and representations of citizens and social groups”. Patricia Branco, and Richard Mohr, ‘*Odore di Napoli: What if Jurisprudence Came to us through Smell?*’ (2015) *Law and the Senses Series: Smell. Non Liquet* (The Westminster Online Working Papers) 72.

together are competing, influencing, and transforming legal engagement. For legal practitioners to be more fully cognizant of intersecting legal orders it is vital that they are trained to think in a more encompassing and innovative way that will enable them to serve their clients to the best of their abilities. The lesson that all law operates within overlapping legal, political and social contexts is important, irrespective of whether a law student will ever be involved in his or her legal career in something as complex as the Keystone XL Pipeline.

Part III: Rethinking the “science” of law

Perhaps not surprisingly, some professors in more conventional/conservative law schools are resistant to the rise of ethnographic inquiry and empirical research. These scholars are keen to perpetuate a “true” understanding of law as a body of autonomous rules not subject to “context, experience, and intuition”.⁹¹ What is often argued is that law is a closed system of rules distinct from the social and political environments in which it is practiced, and on that basis draws its unique authority and power.⁹²

⁹¹ Bent Flyvbjerg, *Making Social Science Matter: Why Social Inquiry Fails and How it Can Succeed Again* (Cambridge University Press, 2001) 24.

⁹² In continental Europe in particular, debates on the relative autonomy of law as a closed system have been ongoing for decades. Disagreement among theorists focus on the distinction between doctrinal approaches to law that present an “internal” point of view, and sociological and ethnographic approaches that present an “external” understanding of law as constituted through social relations (see F. Ewald, ‘The Law of Law’ in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter, 1988) 36-50. Scholars such as Niklas Luhmann and Gunther Teubner have to varying degrees tried to move the conversation beyond this false dichotomy by arguing that legal systems are not entirely “closed” but rather informed by their environments (see Niklas Luhmann, ‘Closure and Openness: On Reality in the World of Law’ in Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter, 1988); Gunther Teubner, *Law as an Autopoietic System* (Cambridge University Press, 1993). The degree to which Teubner’s self-regulating autopoiesis theory is convincing to 21st century socio-legal scholars dealing with escalating legally and culturally pluralistic environments is not clear (see however Brian H. Bix, ‘Law as an Autonomous Discipline’ in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 975-987. A more accessible theoretical approach is presented in Sally Falk Moore’s seminal article “The Semi-Autonomous Social Field” in which she underscores the interconnections between formal state-based legal rules and a wide range of “looser” social fields with normative rule-making and rule-enforcing capacities (see Sally Falk Moore, ‘Law and Social

The idea that law operates as an autonomous field suggests that law is impervious to the cultural contexts in which it is practiced. In the past, this view was helpful to European nations who from the 16th century on transferred their law around the world and applied it to the people they colonized.⁹³ As a strategy of imperial power, it was assumed that European law could be universally applied to all subjects of empire be these African tribal communities, South Asian Indians or Australian Aborigines. There prevailed a widespread belief that bringing western law to the “natives” would liberate them from their apparent backwardness and customary rituals. Central to this enterprise was the assumption that law was objective, rational, universal and indeed necessary as part of the “civilizing” process of non-European peoples throughout the colonial period.⁹⁴

Today, albeit in a different form, the idea that law operates as an autonomous field of authority informs much of the development rhetoric which calls for the need to bring the “rule of law” to industrializing societies in the global south.⁹⁵ The concept of the “rule of law”, at least as it is typically conceived in western countries, is one of universal application across a broad range of cultures and societies. As Jeffrey Redding argues, “rule of law ideologues have embraced a view of law – and legal institutions – that frowns upon difference, diversity, and context”.⁹⁶ The rule of law, or what is in reality a Euro-American understanding of law, is widely considered the solution to the insecurity

Change: The Semi-Autonomous Social Field as an Appropriate Field of Study’ (1973) 7 (4) *Law & Society Review* 719).

⁹³ Anthony Anghie, ‘The Evolution of International Law: colonial and postcolonial realities’ (2006) 27(5) *Third World Quarterly* 739; Jean Comaroff, and John Comaroff (eds) *Law and Disorder in the Postcolony* (University of Chicago Press, 2006); Renisa Mawani, *Colonial Proximities: Crossracial Encounters and Juridical Truths in British Columbia, 1871-1921* (UBC Press, 2009); Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Harvard University Press, 2013); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empire 1400-1900* (Cambridge University Press, 2010).

⁹⁴ Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge University Press, 2001).

⁹⁵ Balakrishnan Rajagopal, ‘Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination’ (2008) 49 *William and Mary Law Review* 1347; Nick Cheesman, *Opposing the Rule of Law: How Myanmar’s Courts Make Law and Order* (Cambridge University Press, 2015).

⁹⁶ Jeffrey A. Redding, ‘The Case of Ayesha, Muslim ‘Courts’, and the Rule of Law: Some ethnographic lessons for legal theory’ (2014) 48(4) *Modern Asian Studies* 940.

of developing regions plagued by dictatorships, civil and regional wars, and escalating sectarian violence. Ironically, it should be remembered, these crises are the direct by-products of former colonial eras and botched processes of decolonization. Calling for the “rule of law” provides moral cover while enabling multinational corporations to take advantage of new markets, development projects and resource extraction industries in the global south in a manner echoing previous colonial periods.⁹⁷

A common and enduring belief in the superiority of western law helps explain why some legal scholars in the global north dismiss an ethnographic approach which – implicitly and explicitly – provides a lens through which to critique law’s practice and status.⁹⁸ Euro-American law is the basis of public and private international law and is the authoritative legal framework for a vast range of international and global legal contracts and negotiations. These include the legal and regulatory structures that underpin the global political economy and which seek to facilitate global commercial practices and limit financial risk. Commercial legal practitioners, company executives, policy makers, and those holding political power cannot afford for law to be seen as ambiguous, unpredictable, contradictory and open to challenge. In short, elite players in the global political economy and related international governance mechanisms are highly vested in maintaining the narrative of western law’s dominant authority and argue for its universal application.⁹⁹ And law schools seeking to train future legal practitioners for elite commercial practices with global clientele are typically, and not surprisingly, keen to defend law’s immunity from any form of critical inquiry or scrutiny.

Fortunately, calls for reform in legal education are increasingly sympathetic to empirical

⁹⁷ Jothie Rajah, ‘Sinister Translations: Law’s Authority in a Post-9/11 World’ (2014) 21(1) *Indiana Journal of Global Legal Studies* 107; Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Routledge, 2014); Mark Harris, *Human Rights, the Rule of Law and Exploitation in the Postcolony: Blood Minerals* (Routledge, forthcoming).

⁹⁸ Eve Darian-Smith, ‘Ethnographies of Law’ in Austin Sarat (ed), *Blackwell Companion to Law and Society* (Blackwell, 2004) 545.

⁹⁹ In addition to the claim that western law is universally applicable, it is also argued that western law is secular, rationale and value-free in contrast to people who are seen to believe in local “customs”, “rituals”, and religious-based rules and on that basis deemed less sophisticated and culturally inferior (Ruskola 2013).

and ethnographic approaches that seek to understand law's role and function in complex multi-ethnic contexts be these national, international or global in profile.¹⁰⁰ Reformers are increasingly aware of the limitations of legal education constrained by old paradigms of legal thinking. These old paradigms are linked to the latter half of the 19th century when Euro-American law schools and professional legal education first developed. As a result, older paradigms reflect a modernist state-bound imaginary interested in promoting the "science" of law as a vast array of discrete legal topics and areas of specialization.¹⁰¹ These topics are typically taught as sets of abstract rules of generalizable and replicable application, disconnected from cultural context and human agency. The "reasonable person" test – which first appeared in the common law in 1837 and is still applied in criminal, tort and contract law – is emblematic of the common law's claims of standardization and false universalism.

In the 21st century, conventional approaches to legal education seem increasingly anachronistic and suggest that law schools should reassess their "conservative, rigid, and relatively unchanging" curricula and methods that have been in place for decades.¹⁰² With rising cultural tensions exacerbated by multi-ethnic and legally pluralist societies, earlier debates about law's relative autonomy within centralized state jurisdictions appear overwhelmingly inadequate. Moreover, conventional approaches to legal education mask the political and ethical implications of western legal hegemony and the exploitative dimensions of today's global political economy. Understanding more fully how legal systems and regulatory practices play a role in managing, exacerbating, abating, moderating and modifying complex economic and social relations within states and around the world is arguably an important component of a critical legal education.

¹⁰⁰ Carrie Menkel-Meadow, "Taking Law and ----- Really Seriously: Before, During and After "The Law" (2007) 60(2) *Vanderbilt Law Review* 555; June Starr and Mark Goodale (eds) *Practicing Ethnography in Law: New Dialogues, Enduring Methods* (Palgrave Macmillan, 2002); See Suchman and Mertz (n 16).

¹⁰¹ Robert W. Gordon, "The Geological Strata of the Law School Curriculum" (2007) 60(2) *Vanderbilt Law Review* 339; Willem Witteveen (2009) Introduction to William Twining (n 31).

¹⁰² See Menkel-Meadow (n 100); Edward L. Rubin, 'What's Wrong with Langdell's Method, and What to Do About It' (2007) 60(2) *Vanderbilt Law Review* 609.

As discussed with respect to the Keystone XL Pipeline case study, an ethnographic approach to law helps scholars and practitioners gain a more holistic and grounded understanding of legal engagement. Other ethnographic studies highlight the degree to which legality/illegality, state /non-state law, legal/black markets, and security/insecurity are interconnected in ways often unforeseen and overlooked. For instance, anthropologist James Ferguson shows us that the functions of legitimate governments in Africa cannot be disentangled from the dis-functionality of illegitimate governments, or what he calls “shadow states”, and their widespread use of private armies to protect political and economic interests. Many of these armies are supplied with weapons by multinational corporations anxious to secure profits from extractive mining and mineral industries.¹⁰³ Similarly, anthropologist Anna Tsing shows us that wherever legal markets are allowed, for example logging hardwood in Indonesian rainforests, illegal markets will follow.¹⁰⁴ A recent example of such linked legal/illegal market processes is seen in the global garment industry. As anthropologist Rebecca Prentice notes, in this “footloose global industry” multinational companies contract for goods within a network of under-the-table negotiations that include bribery and exploitative labor conditions leading to horrifying disasters as the Rana Plaza garment factory collapse in Bangladesh in 2013.¹⁰⁵ Anthropologists are also well positioned to show us how the structural adjustment policies of the World Bank, imposed on former colonies such as Jamaica (and now Greece and Spain), do not work effectively in promoting local economic development despite that being their ostensible purpose.¹⁰⁶ That austerity measures are not good for business is becoming evident even within the

¹⁰³ James Ferguson, *Global Shadows: Africa in the Neoliberal World Order* (Duke University Press, 2006).

¹⁰⁴ Anna Lownhaupt Tsing, *Friction: An Ethnography of Global Connection* (Princeton University Press, 2004).

¹⁰⁵ Rebecca Prentice, ‘A Year after the Rana Plaza Garment Factory Collapse we are still unearthing its causes’ (2014) <http://www.opendemocracy.net/opensecurity/rebecca-prentice/year-after-rana-plaza-still-unearthing-its-causes> (accessed 1 November 2015); Peer Zumbansen, ‘Happy Spells? Constructing and Deconstructing a Private Law Perspective on Subsidiarity, Law and Contemporary Problems’ (2015) King’s College London Law School Research Paper No. 2015-31.

¹⁰⁶ Daniel Martyn Knight, ‘The desire to blame Greece for the eurocrisis ensures that the Greek people pay the price, while the elites responsible get away free’ (European Politics and Policy at LSE, 9 January 2013) Blog entry; Dimitrios Theodossopoulos, ‘The Ambivalence of Anti-Austerity Indignation in Greece: Resistance, Hegemony and Complicity’ (2014) 25(4) *History and Anthropology* 488.

United States as evidenced by the rising critique by both Democrats and Republicans of the Tea Party's austerity platform.

Ethnographers such as Ferguson, Tsing, and Prentice show us the need for a holistic interpretation of legal practices by suggesting that what are typically labeled as dysfunctional problems such as crimes, dictatorships, financial crises, failed states, strikes and unregulated labor conditions are not really dysfunctional at all but are in fact functioning parts of a 21st century global political economic system. They underscore that legality and illegality often go hand in hand, fueled by global trading networks, expanding markets, unstable governments, and the obvious limitations of corporate self-regulation. These scholars show us the dark underbelly of neoliberal policies as enabled through the authority and dominance of universalized Euro-American law and economic institutions such as the World Bank, International Monetary Fund and World Trade Organization. They highlight that in today's global political economy extreme wealth and devastating poverty are intimately linked, in turn producing "dispensable populations" and exposing people to "precarity" in both the global north and global south.¹⁰⁷ Above all, ethnographic studies show us that without a critical examination of the globally interlinked social, political and economic contexts in which domestic, international and transnational law operates we will not be able to see the whole picture and understand local responses to legal processes. That these interrelated global/local contexts are typically ignored in much legal education is precisely why the alarm is being raised by an increasing number of legal educators.

In our globalizing world, the words of Todd Rakoff and Martha Minow, both at Harvard Law School with Minow being the current Dean and a trail-blazer for the reform of the law school's first-year program, seem pertinent. They argue that law students currently lack sufficient "legal imagination" and ability to "generate the multiple characterizations, multiple versions, multiple pathways, and multiple solutions" needed to deal effectively with today's complex global challenges.¹⁰⁸ Harry Arthurs adds that it is vital that we help students "get used to the fact that they are embarking on a course of

¹⁰⁷ Judith Butler, *Frames of War: When Is Life Grievable?* (Verso, 2010); Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury Academic, 2011).

¹⁰⁸ Todd D. Rakoff and Martha Minow (2007) 'A Case for Another Case Method' 60(2) *Vanderbilt Law Review* 597.

study, and ultimately on a career, that will require them to live at ease with multiple truths, irresolvable conflicts, abundant ambiguities and ironies galore”.¹⁰⁹ An ethnographic approach is essential in this pedagogical endeavor because it highlights the plurality of legal meanings and legal histories involved in any cultural context.¹¹⁰ It highlights alternative legal epistemologies and ways of legal imagining that inform different conceptualizations of terms we often assume are universal such as justice, democracy, human rights, equality and freedom.¹¹¹ Ethnography helps us to challenge taken-for-granted assumptions about what legal terms mean, how they are applied, and how they are constituted and reproduced over time. By presenting an open-ended exploration of legal practice that seeks to describe and understand how law operates in various societies, an ethnographic approach offers a unique opportunity to ground legal studies in the dynamic experiences of people without having to take as a given the “state” as the unit of analysis and “state law” as the only legal system in play.¹¹² In this way, ethnography highlights the multiple ways in which transnational, international, regional, national and local domains “intersect with one another in a whole variety of ways that undermine any grand narrative of globalization and attendant vision of law”.¹¹³

Law school curriculum recommendations

Emerging out of this essay’s discussion about the value of an ethnographic approach, I would like to make a few modest recommendations that I think would enhance all law school curriculums.

- (1) Law schools should offer a general first year law school course that requires

¹⁰⁹ Harry Arthurs, (2009) ‘Law and Learning in an Age of Globalization’ 10(7) *German Law Journal* 62, 639.

¹¹⁰ See Tamanaha, Sage, and Woolcock (n 33).

¹¹¹ Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Routledge, 2014); Laura Nader, ‘Epilogue: The Words We Use: Justice, Human Rights, and the Sense of Injustice’ in Kamari Maxine Clarke and Mark Goodale (eds), *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge University Press 2009) 313; Emma Larking, *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law* (Ashgate, 2014).

¹¹² Redding (n 96).

¹¹³ See Griffiths (n 26) 285.

thinking about and engaging with law in a globalizing world. This course would highlight the existence of various legal cultures, legal systems, and legal concepts pertaining to increasingly multi-ethnic and multi-religious societies, and the problems and tensions that this may bring to our conventional and rather static way of approaching legal knowledge and legal practice.

- (2) Every legal subject taught in the law school curriculum should engage with the concept of legal “context” at various geopolitical scales and across various legal jurisdictions.
- (3) Every legal subject taught in the law school curriculum should deliberately include a comparative component so that students can see differences between legal systems.
- (4) Every legal subject taught in the law school curriculum should engage with the concept of power, and ask students to think about whose political and economic interests are best served in any legal engagement.

I suggest that following these four general recommendations would help to shape new kinds of law students who are not afraid to ask pertinent and applicable questions, be their future client a multinational corporation, city council member, local restaurant owner, undocumented worker, parent in a child custody dispute, or victim of sexual violence. The recommendations could open up the imaginations of law students and provide a platform from which they could envision new legal strategies and approaches applicable to plural legal contexts. Perhaps most importantly, the recommendations could help nurture within the law school curriculum a sense of ethics and exploration of how law works for some and not so well for others.

Concluding Comments

As argued in this essay, amongst law school deans and professors, particularly in the United States, the case is being made that legal education should provide both vocational skills and help create global citizens and leaders able to deal with the complex interrelated legal challenges of the new century. The world is moving at a fast pace, often in directions unforeseen and unplanned. Educational reformers rightly

suggest that we need to think differently if we are to imagine alternative futures and make legal training responsive and relevant to those futures.

Ethnographic approaches to law offers a modest way forward in addressing the crisis in legal education. An ethnographic approach highlights the cultural and social dimensions of all legal practice and so contributes to students' skills in terms of implementing the law, and contributes to students' values in terms of being better able to assess how law works for different sectors of society. An ethnographic approach also shows the need for a holistic interpretation of legal practice by suggesting that what are typically labeled as dis-functional problems such as financial crises, labor strikes, and environmental degradation are not really dysfunctional at all but are in fact functioning parts of our contemporary global political economic system. Moreover, an ethnographic approach grants students exciting opportunities to rethink and reframe their fundamental assumptions and modes of legal practice, in turn helping them to prepare for an increasingly unpredictable multi-ethnic and multi-religious future. Above all, an ethnographic approach to law is vital for helping law students engage with and take seriously plural understandings of law and justice within any given society that inform many of the legal practices of the 21st century.

One could imagine that all legal educators would be keen to encourage pedagogical reforms that call for the grounded insights provided by an ethnographic approach to law. Ethnographic insights have practical application in underscoring the interconnections between the global south and global north. Recognizing these interconnections helps build an appreciation that what is happening "over there" in terms of poverty, inequality, exploitation, environmental degradation, and new types of warfare could also happen back home in what David Held has called a world of "overlapping communities of fate".¹¹⁴ Moreover, ethnographic insights provide ways to think about sustainable regulatory systems at home and abroad, as well as help shape national and global governance systems of greater balance, accessibility and international legitimacy. These are enormously significant potentialities and underscore

¹¹⁴ David Held, 'Culture and Political Community: National, Global, and Cosmopolitan' in Steven Vertovec and Robin Cohen (eds), *Conceiving Cosmopolitanism: Theory, Context, Practice*, (Oxford University Press 2002) 57.

the value of ethnographic approaches in legal education. At stake is the future of democratic aspirations and institutions that will depend upon embracing – rather than denying – the value and relevance of plural legal systems and perspectives wherever they occur. Ethnographic approaches in legal education provide simple, practical, first steps in opening up students’ capacities to imagine more inclusive modes of legal engagement and forge new forms of local, national, regional and global citizenship.