More Drops, More Buckets: What a More Integrated Transnational Legal Profession Implies for U.S. Law Schools

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Good morning, everyone.

Our era is defined by a variety of forces – environmental, political, cultural, and economic. But high on everyone's list of the forces that define our time is globalization. Technological and cultural changes have made national boundaries less significant than they were fifty years ago. Those changes have changed every aspect of our lives – from where and how we work, to who we choose to be our friends, to the kinds of fears we have about our children's futures.

Globalization has intensified the demand for a harmonized global legal infrastructure. In the first instance, and most powerfully, the demand comes from commercial actors – buyers and sellers of financial capital, goods, and services in the world's marketplaces. But it does not stop there. Demand for a harmonized global legal structure also comes from outside the commercial sphere – from governments, NGO's, and private individuals who want to move around for noneconomic reasons.

What does it mean to develop a harmonized global legal infrastructure?

At a minimum, it means eliminating those circumstances under which a single individual might confront strongly inconsistent rules -- irreconcilable mandates from different sovereigns, true conflicts of law. So, for

example, if sovereign A says, "Any company incorporated in A must guarantee to all its employees worldwide the right to work in a smoke-free environment," and sovereign B says, "Any factory located in country B must guarantee that employees have the right to smoke on the job," we have a conflict that needs to be reconciled.

But a harmonized global legal infrastructure means more than that bare minimum of freeing individuals from the dilemma of being subject to irreconcilable mandates. It also means, to the greatest extent possible, promoting uniformity of substantive rules – eliminating what might be called "weak inconsistency": differences that are, all things considered, more trouble than they are worth. We have some experience with this problem in the United States. Throughout most of the nineteenth century, interstate commerce was inhibited by the fact that each sovereign state had its own rules. The mere fact of variation from state to state made it a pain to do interstate commerce, it increased what the economists call "transaction costs."

These kinds of inconsistencies can be eliminated if one sovereign acts unilaterally, choosing to copy or imitate the rules of another sovereign. It might believe that the other sovereign's approach is better, a best practice. Or it might believe that, even though the other sovereign's approach is no better, this kind of unilateral harmonization will be in the best interests of its citizens.

But often these kinds of inconsistencies will only go away as the result of cooperative effort by multiple sovereigns, each of which is committed to creating a new, uniform approach.

So, to carry forward my example from nineteenth century America, in 1892, the National Conference of Commissioners on Uniform State Laws was established to promote greater uniformity of legal rules from state to state. It produced many careful sets of uniform rules in different subject areas, and its efforts were generally accepted by almost all states. In 1940, the NCCUSL, together with the American Law Institute, took on the biggest and most important challenge – the development of a Uniform Commercial Code. It took ten years to draft, and another 14 years

before it was adopted across America. But it has been central to the American economy for the past half century.

On the international scale, there are many similar examples. One simple one is the work to create harmonized system of nomenclature to describe goods for purposes of tariffs in different countries. This project was an important bit of work for the League of Nations, beginning in 1927. In 1983, that project reached fruition in what is known as the Harmonized Commodity Description and Coding System, which entered into force in 1988.

So, in addition to eliminating strong inconsistencies between legal rules from different sovereigns, a harmonized global legal infrastructure entails the promotion of more uniform substantive rules from country to country.

That work is proceeding apace, but it will go slowly – much more slowly than parallel efforts within a single country or region, because of important historic cultural differences that naturally reflect themselves in legal rules.

To put it slightly differently, the world of legal rules is getting flatter. But it is not flat today. And it will not be completely flat within any of our lifetimes.

And what I have described about substantive rules, applies in similar ways to the institutions and procedures of the law. There are obviously substantial transaction costs for transnational businesses that arise because there are adversarial processes in some jurisdictions and inquisitorial processes in others. There is a forum shopping industry out there, but I think few people other than lawyers and economists would want to include it in the world's total output of goods and services.

Still and all, those procedural differences are not going away soon. Once again, I daresay, not within our lifetimes.

So while it might in some ways be attractive to embrace an aspiration to develop a single global legal system, for the foreseeable future a harmonized global legal infrastructure must mean something different. What might that be?

I believe that, to count as a reasonably attainable reasonably harmonized global legal infrastructure, we need a system that satisfies two important conditions.

First, it must recognize the ongoing significance of a world in which multiple sovereigns have the legitimate authority to create different legal rules and different legal regimes. And second, it must also recognize the legitimate interests of private individuals who want to cross national borders for benign commercial and noncommercial reasons.

How can these conditions be satisfied? No one sovereign has the power to will such a system into existence. And I cannot foresee any circumstance in which the nations of the world join together to establish such a system by treaty.

And yet, slowly but surely, step by step, it is happening.

It is happening because, after the collapse of the world's largest planned economies, a working consensus has emerged in favor of regulated market economies, interacting with one another under the WTO's regime of regulated free trade.

That working consensus was sufficient to generate enormous private demand for a sophisticated transnational legal profession. Such a profession reflects a double reality: on the one hand, there are and will continue to be multiple sovereigns, creating multiple legal regimes; but, on the other hand, there are and will continue to be clients who work across borders and want to be served by lawyers with different databases of primary knowledge, but common intellectual skills, and common understandings about what it means to be a lawyer.

This demand has led to a number of rapid changes in the global practice of law. Most significantly, we have witnessed the rapid emergence of huge multinational law firms. There are now 25 law firms in the world that employ more than 1000 lawyers each. 16 are based in the U.S., 7 in London, 1 in Madrid, and 1 in Paris.

To grow this large, the firms departed from prior models of growth. Historically, American firms opened overseas branches by sending American lawyers overseas. But since 1990, they have needed to grow

more quickly, and, in the words of Carole Silver, they have done it by "going local" – by looking for local lawyers or local firms, following the so-called Baker & McKenzie model.

But these firms have not gone completely local. They have been eager to engage lawyers with substantive expertise concerning the law of the local jurisdiction. But at the same time, the anecdotal evidence I have from speaking with dozens of lawyers in such firms, and in the in-house counsel's offices of multinational companies that hire them, is that they are not interested in merely deferring to local understandings of what it means to be a lawyer.

It is important to recognize that people who were called "lawyers" have not always done the same things in different societies. In some societies, the role of a lawyer was historically rather passive and reactive. A client described a situation. And the lawyer was supposed to fit the situation – the facts – into the official rules – the law – and report to the client his conclusion. People in other professions, such as accounting, would play the kinds of roles that lawyers have come to play in the U.S. and the U.K.

But that is not the model of lawyering that has been embraced by the transnational law firms. It should not be a surprise – after all, recall that 23 of these 25 firms are based in the US or the UK. But I think that the reason is more than just parochialism. I believe that these firms are responding to demand from their clients for a particular kind of service.

So what does it take to be a transnational lawyer? Let me caution that the answer cannot be determined simply by looking at today's transnational legal profession. What you see today was jerry-built, as an amalgam of lawyers from different jurisdictions who have committed themselves to working in the transnational sphere.

I think it makes more sense to ask, "What are the essential skills and values that should define a transnational lawyer in the future?"

This is the transnational analogue to the question addressed by the McCrate Report in 1992. Whatever one may think about the McCrate Report's ultimate answers, or the way in which it allocated responsibili-

ties between law schools and the practicing bar, it is difficult to find fault with that report's opening questions: what lawyering skills are essential for competent representation, and what constitute the essential values of the profession?

So … what lawyering skills are essential for competent transnational representation, and what constitute the essential values of the transnational profession?

These are questions that I worry about all the time nowadays. And the reason is because of my involvement with the Peking University School of Transnational Law. So before I talk directly about those questions I would like to give you a little more background on the school, which we refer to by its initials, "STL."

Peking University, also known as Beida, is China's oldest and most prestigious university. Its main campus is in Beijing, and is home to a law school that is one of China's best. In the 1970's, China had only 2 law schools, today it has more than 600 law schools, all organized primarily on the continental European model. By that I mean they treat law as an undergraduate subject, whose study is oriented primarily towards the mastery of doctrinal rules, based upon reading and lecture classes.

In 2001, the city of Shenzhen, which is the mainland's twin to Hong Kong and has a population of about 10 million people, gave a campus to three of China's top universities, including Beida, to be used exclusively for graduate and professional education. The leader of Beida's Shenzhen campus is an economist named Hai Wen.

Hai Wen grew up in China, did graduate economics work in the US, and became a tenured faculty member at an American university before returning to Beida about 12 years ago.

Hai Wen's philosophy for the Shenzhen campus is to make it as internationalist and Western-oriented as possible, and his goal is to have all six of Beida's Shenzhen graduate schools teach in English, and draw faculty from overseas.

At the end of March 2007, Hai Wen came to see me in New York. He wanted me to explain to him why the graduates of Beida's law school

in Beijing could not get jobs at multinational firms as real, partner-track associates, without first doing advanced study in the US. And he wanted me to think with him about whether Beida could develop an experimental law school on the Shenzhen campus that could deliver more of what multinational firms are looking for. We had two days of discussion then, and that led into three months of back-and-forth, and the result was STL.

[Click] So you are now looking at the Peking University Shenzhen campus. [Click] I guess the right thing to say is that it is instantly recognizable as a university campus.

[Click] This building is our library, shared by Peking University and the other two universities in the area called "University Town." It has a healthy budget for book acquisitions, [click], and it also has a lot of computer workstations [click] that don't seem to get a lot of use because the students have their own laptops.

The campus is quite beautiful. [click]. This is an unretouched picture that I took myself from the balcony of the dormitory building where the faculty apartments are located. As you can see, it is very green, and the mountains are right nearby.

[click]. I suppose if you were to look very quickly at what is going on inside the law school, you might not sense that there is anything particularly unusual going on here, even for China. You might see professors talking, just as you would at any of China's 604 other law schools. You might notice that the mix of nationalities among the faculty is a little bit different from what is typical in China – in these pictures, the top two faculty members were born in the US, bottom left in China, and bottom right in Germany. The fact of westerners teaching here in Chinese law schools is not unusual, but the percentage at STL is higher than normal.

And if you looked out into the classroom, you might see scenes like this [click] of students looking baffled, which you could see in any law school, anywhere in the U.S. or China.

Yet STL is being described as a new model for China, so prominent people from inside and outside China have been stopping by this year to

have a look, and really, to celebrate the school's launch. Here we have Justicce Kennedy, and Judge Diarmud O'Scannlun of the 9th Circuit, [click] here we have Justice Kennedy, CH Tung (the former Chief Executive of Hong Kong), Zou Yu (China's former Minister of Justice), and Xu Zhihong (Peking University's president until the end of 2008). [click] They were in town along with many other dignitaries to dedicate the school last October.

So what really is the new model they are celebrating?

I think they would all say that they are celebrating the decision to experiment with a set of different pedagogies that have been developed over the past century outside China and have become more and more popular over the past two decades, perhaps even becoming seen as a kind of international best practice.

At the core of this approach to teaching law is what Bill Sullivan and Judy Wegner described as the "signature pedagogy" of American legal education in their Carnegie Foundation book a couple of years ago, the case-dialogue or so-called Socratic method.

[click]

To me, the key feature of the Socratic method is actually not what the professor is doing at the front of the class, but what the students are doing. Instead of passively receiving information – whether data or theory – they are actively practicing the skills that they will be called upon to deploy as lawyers. They are speaking, they are inferring principles from patterns of decisions and applying them to new situations, they are describing rules in terms of the policy values that they promote and the policy values they frustrate.

[click]

They are attacking problems in teams. [click] And they are having the experience of standing up and defending a position to a professor / judge.

Why is this important?

Well, in the first instance it is important because as a matter of pedagogy I think the best learning is active, not passive. LeBron James did not learn to play basketball by reading a book by Larry Bird, or taking notes on lectures by Scottie Pippen. He learned by studying and also by practicing. And I guess I am persuaded by the theories of Jeff Hawkins, that our brains learn intellectual things in a remarkably similar way to the way they learn athletic things.

But still, that doesn't answer the question of what it is that law students should be practicing. What are the skills and values they should be mastering?

The McCrate Report some of the answers, when it speaks of the lawyer as a problem solver, as one who is adept at criticizing and synthesizing legal argument, and as one who is skilled at communicating, and in particular at assessing the perspective of the recipient of a communication. But more often when I speak with transnational lawyers, they emphasize:

- the ability to think creatively about law as a dynamic, evolving structure
- an ability to think critically and skeptically about ideas and information that is presented to them
- an ability to see a problem from multiple perspectives at the same time, and
- an ability to communicate with subtlety and power in the English language, which has become the language of international commerce and the language of transnational legal practice.

These are all skills that our students are forced to rehearse in the STL classroom. And they are part of what make STL a new experiment for China.

STL has other features that are unusual in China. The students are older and have received bachelor's degrees before coming to STL to pursue a Juris Doctor. All of the faculty have experience teaching outside of

China, including places like Amsterdam, Jerusalem, Hong Kong, and in the United States at Harvard, Yale, Stanford, and Michigan.

All of which makes this slide important.

[click] March 12 is Arbor Day in China, and we planted trees on campus. And this image made me think of how tempting it is to believe that the right metaphor for STL is that of transplanting a fully grown tree, into an environment that accepts the tree without change. An American law school plopped down in South China.

[click] But I don't think that is right. Here are two pictures that hint at why. We celebrate holidays at STL that are celebrated in the U.S. Here are scenes from Halloween and St. Patrick's Day.

But these were scenes that were not exactly what you could have seen in the U.S.

For Halloween, the best costume prize went to the young man in the middle, who wore his pants with the waist up around his armpits. Why did he do that? He was dressing up as a caricature of former president Jiang Zemin.

And for St. Patrick's Day, the students wore green and painted shamrocks on their cheeks, but I will say that green beer tastes a little different when it's Tsingtao beer, and that Irish stew definitely tastes a lot different when it's eaten with chopsticks.

You see, despite the attributes of STL that are familiar to people in an American school, we are charged with being more than just a clone of a US law school. We are charged with being an experimental school, and we take that charge seriously.

STL's curriculum is more transnational than any American school I know of. In the first three months students are required to take a course called "transnational law," which immediately gets them focusing on the reality of contemporary life, in which we are subject to the dictates of multiple sovereigns, often speaking inconsistently with one another. Instead of studying the civil procedure of one country, they study comparative civil procedure.

Indeed, from the first day of orientation our students were expected to be thinking about the complex relationship among law, language, and culture. They began by reading Antigone, Sophocles' play, in English translation. The goal was to get them to understand immediately that the question of law's authority is an ancient one, along with the question of how one can keep a powerful sovereign from degenerating into an arbitrary despot. On the third day, they staged a performance of the play.

[click] And on the fifth day of orientation they staged a mock trial of Antigone. What you see here is our student Wu Han, playing the role of Crion, who was called as a witness.

I find there to be something very moving about these scenes. I think they capture an important truth about where the transnational legal profession is heading. And ultimately they offer us some insights into where our own law schools here in the US are heading.

American legal education in the twentieth century advanced the state of the art enormously. We improved the way the world helps lawyers to develop skills of critical thinking, of sympathetic engagement with counterargument, of effective problem solving. We strengthened our focus on how we prepare lawyers to be ethical professionals.

But we also have progress to make in the twenty-first century, and we might do well to learn from experiments overseas such as STL. I think that we need to do more to help our students understand that there are multiple legal systems in the world, and multiple legal cultures. I think we need to do more to help them appreciate the relationship between approaches to law and deeper cultural attitudes – such as the way individuals are taught to react to ambiguity, contradiction, and risk. And, especially in an era where English has become the lingua franca of commerce and law, we need to teach our students who are native speakers of English how to understand statements in English by people who are not native speakers. Often they are using English words to express ideas that have their origins outside of Anglo-Saxon culture, and a listener whose frame of reference is limited to Anglo-Saxon culture may miss subtleties and nuances that are important. I fear that too few Americans today have learned how to understand English as it is spoken by others.

All of which brings me back to the title of my talk this morning, "More Drops, More Buckets."

Sometimes when people hear about STL, they express a kind of existential worry. I got perhaps the most articulate expression of that worry from a journalist who called me from California this past Monday. He asked me, "Dean Lehman, isn't the creation of your law school the harbinger of a tidal wave of outsourcing that will destroy the American bar, or at least destroy American law schools?"

Now there is of course something amusing, or perhaps flattering, about asking this kind of question about an unaccredited law school, in a city few Americans have heard of, that will graduate its first class of 54 students in 2011, in a country that already has 200,000 lawyers, when the United States is itself graduating an additional 50,000 new lawyers every year, including many times 54 citizens of China.

If there is significance to what we are doing, it has nothing to do with outsourcing.

It has to do with the point I made at the beginning, the point about demand for transnational lawyers. The STL experiment is premised on the notion that there is now rapidly exploding demand for what we do, and for the students whom we are training. If that premise is correct, then 54 new students from STL – or even 200 students a year when we are fully grown – will be only a tiny drop of response being sent out into an ocean of need.

But aha, the journalist might have asked as a follow-up. What if you are correct? What if you are successful? Then isn't it more than just 54 drops we should worry about? Won't STL itself be copied over and over, like the buckets of paint in Fantasia?

Well, I suppose, although my own sense is that it will be impossible to add very many new STL's very quickly, just as it is impossible to add lots of top law schools in the US very quickly.

If anything, I suspect that, if STL is successful, the impact on American law schools will be quite the opposite. If STL is successful, it will provide even greater legitimacy within China for the kind of education

that takes place here – assuming that American legal education continues to evolve in a more transnational direction.

If anything, that will increase demand for that education beyond what it is today. And American law schools will have to deal with an even greater number of applications for a relatively fixed number of seats.

But, truthfully, I think in many ways all of this misses the most important point. We make a mistake if we speak about our schools and our profession primarily with the economist's vocabulary of supply and demand. Because at bottom the legal profession and our system of legal education are primarily cultural and social institutions. They are the mechanisms through which we develop and sustain societies ordered by the rule of law.

During the 20th century, the most important stimulus for development in legal education came in the United States. That happened for many reasons, but it happened in part because of America's remarkable openness. Our country was simply voracious in its eagerness to absorb talent and ideas from all over the world.

In the 21st century, the favor is being returned. We are observing greater and greater convergence worldwide around a shared appreciation for the value of law. We are seeing greater and greater convergence as well – not just in China, but also in Germany, Japan, South Korea, Australia, and Hong Kong – on the J.D. model of legal education. In the twenty-first century, other countries are doing what America did in the twentieth – looking for best practices elsewhere and then seeing how they can make their own contributions and improvements. If they are successful, all of us will be the ultimate beneficiaries.