SIX UNEASY PIECES

International Conference on Legal Education Reform: Reflections and Perspectives

Keynote Address

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Conference participants and distinguished guests: good morning. What kinds of special challenges and opportunities does globalization present for those of us in legal education? Given the international dimensions of this conference, this question would seem a very appropriate starting point, and thus, I will make it the focus of this keynote address.

I see these special challenges and opportunities as sourced in two principal developments, both familiar to all of us. The first, the political reforms and economic liberalization of the last decade and a half, have converted billions of people into potential and hopeful participants in the market economy. Leaders in many of these countries have seen the "rule of law" as the key to their nations' full and equal participation in the global marketplace, and have thus promoted both legal reform and more and better trained lawyers as means to that end. As a result, law schools in the United States and many other developed countries have witnessed both substantial increases in applications from foreign lawyers and law students who desire our training, and enhanced interest from foreign law schools and justice ministries who see us as useful models and consultants for how to build or to revise their own legal educational systems.

The second source is the dramatic changes in communications, transportation, and information technologies, which have slashed the costs of doing business on a global scale. As a result, more and more of a typical lawyer's workload is likely to entail matters that were once relegated to the boutique specialty of international law. Cross-border transactions have exploded, not only in number but also in scope. Almost every week, it seems that at least one giant business chooses to acquire another business located halfway around the world, with the potential for frictions between their conflicting legal systems on multiple

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fronts. More and more, our standard admonition to students to learn to "think like a lawyer" will give way to needing to "think like a transnational lawyer."

If you will allow me a moment of nostalgia, I am struck by the "inversion" that has resulted since I practiced with a large Washington, D.C. firm during the mid-1970s, and did a fair amount of corporate and tax work on international transactions. Only a few of us then did work that could be described as international, and it typically entailed Western Europe—countries with well-developed and stable legal systems, in which we had the benefit of very sophisticated and experienced local counsel. The biggest barriers we and our clients faced in these international matters arose from the physical (that is, non-human) infrastructure: communications and transportation technology. To interact with local counsel, we would carefully draft and edit our inquiries, in the form of a telex to be sent out that evening U.S. time, in the hopes of getting a response sometime the next business day. As I recall, the firm had an entire room devoted to bulky telex equipment and the specialized staff who operated it. Only when matters were particularly dicey or intricate would we consider imposing on the client the substantial cost of a transatlantic telephone call.

In other words, circa 1975, it was the physical technology that stifled the pace of global dealings. Now it is exactly the opposite, and that is what I mean by the inversion. Technology is fueling and supporting the drive for greater globalization, and it is the human institutions that need to catch up. By that, I refer to those human institutions that provide the certainty, predictability, and assurance of fair treatment so important to people contemplating putting their property, capital, or person at risk in an unfamiliar culture or distant part of the world. Again, as law schools, we often find ourselves at the center of the process of both developing these institutions and training people how to work with them.

What, then, do we, as law schools, need to be doing and thinking about to meet these new challenges and opportunities? Let me discuss what I see as the six most important categories. Because I can offer at least as many questions and problems as answers and solutions, I have termed them—with apologies to

Richard Feynman's classic lectures on physics[1]—the "Six Uneasy Pieces." My hope, though, given the number of excellent presentations scheduled over the next two days, is that by the end of our conference, at least some of these pieces will seem a bit easier.

I. The Student Experience

In terms of our law students at the University of Wisconsin, I am repeatedly struck by two things. One is how many now have a career interest in practicing international law, very often without any clear notion of what that kind of practice might entail. For them, I have two standard pieces of advice. First, if you are pursuing this for the glamour, do something else. The hotel rooms and international air travel will grow tedious far more quickly than you might expect. The second is that there are very few jobs in "international law" per se, but far more that involve the practice of domestic law in an international context, and for the reasons I mentioned above, these latter sorts of opportunities will likely continue to grow dramatically.

If these students then ask how they can prepare themselves for such a career of practicing domestic law in an international context, I have a more difficult time with my answer. For it is not a question of taking particular courses. Rather, it is a question of developing a professional and cultural sophistication in dealing with lawyers rooted in different legal systems. And how, as law schools, do we go about teaching this to our students?

I am reminded of a conversation I had a few years ago with a partner in a leading Frankfurt-based law firm. He was stressing the importance of a U.S. LL.M. for career success at his and other large German firms. I assumed the prestige of the particular U.S. law school was likewise important, but he was quick to disagree. What they were looking for, he said, was neither the credential nor any specific body of knowledge, but rather the experience that comes from working intensely within another country's legal system. This—what I will refer to as the "immersion" approach to globalized legal education—leads me to the second

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[1] Richard P. Feynman, Six Easy Pieces: Essentials of Physics Explained by Its Most Brilliant Teacher (1995); *cf.* Richard P. Feynman, Six Not So Easy Pieces: Einstein's Relativity, Symmetry, & Space-Time (1997).

thing that strikes me about our current Wisconsin students. Increasing numbers of them want to study abroad as part of their three-year J.D. program. And by the number of foreign students wanting to participate each year in our various exchange programs, I gather that this interest is mirrored in many other countries. I see this as a practical and relatively low-cost (at least from the school's point of view) solution to the problem of providing the kind of professional and cultural legal education that I referred to earlier, but it does give rise to a few problems.

One is, of course, language-an obvious hurdle in a field as word- and text-based as law. My experience is that many of our Wisconsin law students who would otherwise consider themselves proficient in a particular foreign language are nonetheless reluctant to plunge, midstream, into a foreign country's law curriculum, which will often include a specialized vocabulary with which they have no prior experience. Thus, they tend to opt for those programs where instruction is in English. If "immersion" is the goal, one cannot help but wonder whether this dilutes the experience.

Less obvious is the need for a more intensive counseling relationship with these students. This includes a frank discussion about their objectives for participating in the exchange, and how to take maximum advantage of it, lest they gravitate to what is most accessible or least threatening. For example, a visitor at Université Robert Schumann in Strasbourg was struck by the number of exchange students who concentrated their coursework on E.U. law to the exclusion of the law of France.[2] Also, the disruption of a semester or year abroad often makes it more difficult for the students to meet the requirements or take full advantage of their home law school curriculum, such as the advanced learning experiences that require taking a sequence of courses.

To a considerable extent, these challenges are symptomatic of the fact that most law schools—at least most U.S. law schools—have tended to handle these exchanges on an ad hoc basis. In the future, it seems likely that the number of law students around the world, who both desire an intense international educational experience and have the resources to afford it, will

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[2] Adelle Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. TRANSNAT'L L. 57, 73 (1998).

grow. As a result, many of us will find ourselves replacing these ad hoc arrangements with more structured programs that address the issues of language and course-selection in more systematic ways. In this development, the smaller European countries with their own languages, such as Belgium, Denmark, Greece, and the Netherlands, have been among the leaders.[3] They have encouraged their students to spend a full academic year in another country and now teach a substantial part of their curriculum in English.[4] Again, the challenge will be to find ways to facilitate accessibility without compromising too much of the opportunity for professional and cultural sophistication that a purer immersion experience might provide.

II. CURRICULUM

That brings me to the issue of the curriculum generally. In the United States, there has been some effort in recent years to incorporate international perspectives and units into the various traditional law school courses. I would imagine that is true of many other countries as well. Indeed, on my desk in Madison is a brochure for a January 2006 Workshop at the annual meeting of the Association of American Law Schools, entitled "Integrating Transnational Legal Perspectives into the First Year Curriculum." It observes that

> increasingly, it has come to seem important to ensure that students begin to assimilate transnational perspectives early in their education—in the first year rather than in specialized upper-class courses—so that students, faculties, and law schools will collectively understand transnational law as an integral, rather than peripheral, part of legal education.[5]

This is altogether a good thing, but it does give rise to something of an irony. As U.S. law teachers, we tend to deemphasize teaching law as *information*. Instead, we devote our classes to applying legal principles to address issues and solve problems, all

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[3] *See* Frans J. Vanistendal, *Blitz Survey of the Challenges of Legal Education in Europe*, 18 DICK. J. INT'L L. 457, 458 (2000).

[4] *See id.*

[5] Ass'n of Am. Law Sch., Integrating Transnational Legel Perspectives in the First Year Curriculum Brochure (Jan. 9-16, 2006) (on file with the author).

in context. One has to wonder, therefore, whether encouraging U.S. students to consider how the particular problem under discussion would be dealt with under, for example, the Taiwanese Civil Code—a discussion almost always led by a professor schooled exclusively in the common law—will leave them better equipped to deal with Taiwanese counsel sometime down the road. Or does discussing the Taiwanese rule free from the rich context in which it developed and will be applied risk leaving the students with an oversimplified impression of what the Taiwanese law is all about?

Still, as one might say, the perfect should not be the enemy of the good.[6] Discussing the German approach may well add to the quality of the classroom policy debate over the wisdom or inevitability of the U.S. approach, but are there alternative ways, within our own curricula, of preparing our students for careers in which they will increasingly be confronting other countries' legal systems? At the other extreme is an approach that has been described as learning foreign law "from within."[7] Just as we now try to train our students to "think like a lawyer," this form of instruction seeks to teach them more directly what it is like to "think like a Taiwanese lawyer."[8] It requires a significant commitment of resources in terms of bilingual instruction, faculty trained in the particular foreign nation's law, integrated coursework, and the like. To my knowledge, only a few law schools today offer these kinds of opportunities within their general curriculum.[9] But there can be little doubt about their potential educational value.[10] Again, the objective is not to make the student an expert in the law of Taiwan (or Japan or Germany), but to make him or

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[6] *See* THE OXFORD DICTIONARY OF QUOTATIONS 716 (Angela Partington ed., 4th ed. 1996) (translating "le mieux est l'ennemi du bien" to mean "the best is the enemy of the good," attributed to VOLTAIRE, DICTIONNAIRE PHILOSOPHIQUE (1770)).

[7] Catherine Valcke, *Global Law Teaching*, 54 J. LEGAL EDUC. 160, 170-71, 175-76 (2004).

[8] *See id.*

[9] Many of these efforts have been in law schools located in cities or regions with strong bilingual traditions. *See* Blackett, *supra* note 2, at 76-78 (Montreal and Strasbourg). **R**

[10] *See*, *e.g.*, John Sexton, *Structuring Global Law Schools*, 18 DICK. J. INT'L L. 451, 455-56 (2000) (discussing pedagogical benefits of NYU's bilingual course in Japanese law).

her much better equipped to appreciate how a lawyer from one of those countries approaches a problem, and therefore better able to work with that lawyer in dealings that cross their borders. As the student demand for this kind of transnational sophistication increases, we might expect more and more such programs, particularly as the basis for advanced degrees.

While on the subject of curriculum, I want to raise one other topic that I suspect will be dealt with in some of the presentations that follow. One area where I think legal education has been a laggard, at least in the United States, is in requiring our students to engage in cooperative or collaborative projects. While we rarely encourage our students to work in isolation, we do typically evaluate their performance on that basis. This hardly equips them for a professional career in which, more often than not, they will be producing work product jointly with others, whether colleagues, supervisors, clients or co-counsel. From this perspective, globalization simply adds even more scenarios in which collaborative enterprise will be the norm, not the exception. This too presents something of a resource challenge to law schools, since collaborative projects tend to require more intensive supervision and feedback than solo ventures, such as a lecture-based class where the student is evaluated on the basis of his or her performance on an exam. In other words, student-faculty ratios tend to be much lower. Thus, for law schools in poorer countries, or schools otherwise facing resource constraints, this exacerbates the challenge of adequately preparing their students for careers in a more global economy.

III. Faculty Collaboration

One possible solution to some of the resource constraints and other problems identified above is to take advantage of the very forces that are driving this demand for a more global student experience and curriculum. One can imagine innovative new courses and teaching materials, capable of being taught over the internet or through video conferencing, which could give students a firsthand experience in working with lawyers from other countries, all without leaving their home institutions. We are beginning to experiment with this kind of teaching at Wisconsin, and I am sure that many of you are doing likewise.

The key hurdle is finding the faculty willing to commit the significant time and effort necessary to develop these courses and materials. And, to be successful, the effort will require a team of faculty from two or more countries, with a shared vision of what the course or materials should look like. While, as I noted, some such efforts are underway, I think few would dispute that the track record of transnational faculty collaboration in the production of teaching materials comes nowhere close to the level of such collaboration in the production of scholarship.

Why such a difference? There is an entire catalogue of possible explanations: the challenges of coordinating classes across different time zones and academic calendars; the fact that the production of teaching materials tends not to be rewarded as highly as the production of scholarship, under the criteria that most universities employ to govern tenure, promotion and compensation; and the fact that academic papers generally have a prescribed and universal format—and therefore may be easier to parcel out among multiple authors—than the creation of a new law school course that, by design, does something that no one has done before.

The unfortunate implication is that no matter how valuable such courses might be in addressing the problems identified above, many reasons exist for them never to be created. I say this not to be unduly pessimistic, but rather as a note to myself and my fellow academic administrators of one more potential benefit to keep in mind when presented with a proposal for a faculty exchange or visiting scholar position. For, in my experience, the impetus for these valuable collaborations rarely occurs without the opportunity for multiple face-to-face discussions through which the participants discover over time that they have both a personal rapport and much in the way of shared interests.

IV. Scholarship

As law professors, we are at the front line of educating those in other countries about how our respective legal systems operate. One implication of globalization is that we can expect a greater emphasis on comparative approaches in the scholarly work being done at our law schools. I have certainly witnessed this in my own field of corporate and securities law.

In order for this scholarship to be most useful, I would offer two suggestions. First, it must go beyond doctrine. Doctrinal work (so-called "law on the books") is certainly valuable, but it is often the easiest dimension of a country's legal system for an outsider to access and evaluate. Far more important, but typically far less visible from the outside, is a critical analysis of how that doctrine works in practice (so-called "law in action"). Thus, in order to be most useful to those trying to understand the inner workings of a foreign legal system, comparative scholarship should have an interdisciplinary dimension as well as a doctrinal dimension, but not too interdisciplinary, and that is my second suggestion. In the United States, there has sometimes been a tendency among interdisciplinary legal scholars to aspire to the methodology and norms of the other discipline, be it sociology, economics, political science, or something else. The scholar might be concerned that if it falls short of those norms the work might be dismissed as too "descriptive" or "applied." The result is that the work becomes less accessible and useful to those outside the academy who are looking for exactly that, a "description," albeit an informed, insightful, and analytical one, but a "description" nonetheless.

As more and more law schools around the world move to full-time faculties and more rigorous scholarly criteria, there may be some tendency to follow the U.S. model. If schools do so, I hope they will be mindful of the following observations, based on my roughly three decades of evaluating faculty scholarship: neither good nor bad legal scholarship knows a specific genre; there is ample room for creative and valuable work that is principally descriptive in its methodology.

V. Informational Technology

Here my advice is simple and straightforward: bandwidth, bandwidth, bandwidth. Often the real skill in dealing with lawyers from other cultures lies in knowing how to interpret their body language or nuances in speech. If we are going to rely on the Internet and on video conferencing to provide our students with affordable substitutes to a full immersion experience, it is important to have the technology and equipment to make the setting as realistic as possible.

VI. Quality Control

I have predicted that the demand for foreign law study will continue to grow and that students from more and more countries will have the resources to afford it. This will create the opportunity for law schools around the world to expand their revenue basis by creating new programs to take advantage of this increased demand. I have also argued that the most effective programs for foreign law students will be those that involve collaboration and joint projects, which will in turn require lower student-faculty ratios and result in higher costs. Some law schools, strapped for resources, will no doubt want to economize on these low-enrollment opportunities. Ensuring that students receive their money's worth will be a growing challenge.

Rest assured that I am not proposing any formal monitoring in this regard. The experience in the United States suggests that it is indeed difficult to measure the quality of an educational program's results, so monitoring instead takes the form of measuring the inputs. It is difficult enough to standardize minimum input levels for schools within a single country, so I am indeed skeptical about doing it across countries. Thus, the burden will necessarily fall to us as legal educators to self-police as to these matters, and I hope it is an obligation we will all take seriously.

Those are my "Six Uneasy Pieces." I am sure you each have several pieces—both easy and uneasy—of your own, and I look forward to learning more about them in the sessions to follow. Thank you.