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The Case for a Flat-Earth Law School

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ESSSAY

THE CASE FOR A FLAT-EARTH LAW SCHOOL

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"Globalization" is an omnipresent buzzword in the legal academy. We're all actors on a world stage, and the goal of legal education is to prepare students for future starring roles in global (or even intergalactic) productions.

Or so we're told. For example, Harold Koh, Dean of Yale Law School, says that one of his school's "four key challenges" is "how to incorporate a truly global perspective into *every facet* of [its] intellectual program."[1]

The effects of globalization on the legal academy can be seen everywhere, not just at Yale. International, transnational, and comparative courses are overwhelming law school curricula. Teachers of the most pedestrian courses are being pushed to find global components to "enrich" their offerings.[2] And law schools in the middle of cornfields are establishing international law journals and centers for the study of international law[3]—to go along with the centers for hopscotch law and cosmetology that everyone now seems to have.

Who, except for those who are off-center, can resist the allure of the exotic? Besides, isn't it great to think of all those trips to Paris and the Cayman Islands that await the international law specialists when they graduate from law school?

In this decidedly off-center essay, I dissent from the prevailing

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1 Letter from Harold Hongju Koh, Dean, Yale Law School, to Graduates and Friends (June 13, 2005) (on file with author) (emphasis added). The other challenges are: "how to maintain and renew our world-class faculty; how to reconnect with the profession; and how to strengthen our commitment to public service." *Id.* Given what I know about the Yale Law School, I'm surprised Dean Koh didn't add "how to get our students to come to class every semester or two; and how to convince students that they should know something about the law."

2 And for pedestrian courses, that can be a problem. Comparative jaywalking maybe?

3 I guess the signal being sent to students is that, even though the faculty is stuck, *you may be able to get out of here.*

wisdom. I argue for provincialism and parochialism—for a return to what was the dominant conception of legal education not so very long ago. I argue, that is, for a re-grounding of legal education in—gasp!—the law, and, more particularly, in American law.[4]

Looking askance at globalization in law schools makes me a "flat-earther," I guess—hence the title of this essay. Maybe "flat-earth" isn't the best term to use since the globalizers seem to have appropriated even the word "flat" for their own purposes. (No matter what language we use—global or flat—it supposedly supports an international focus.[5]) But I'll use the term "flat-earth" the way I want to, thank you very much, to mean the antithesis of globalization.

I hasten to add that this isn't an argument to eliminate international law curricula in law schools, nor is it an argument for doing away with the more esoteric of the new international courses—those dealing with war crimes and such. I concede that those subjects are worthy of serious study in a university setting.[6] But they aren't the core of legal education, and we need to reestablish a sense of perspective. We do our students a disservice if we signal to them that these areas of study are more important than anything else in preparing to be a lawyer. And we do an even greater disservice if we require students to immerse themselves in international concepts before they have learned the local ones—those that are the building blocks of good lawyering and that will occupy most of the students' professional lives.

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4 I understand that will sometimes mean *Anglo*-American law. I do have some international sensibilities.

5 We're global *because* we're flat? For example, columnist Thomas Friedman (who isn't writing about law school curricula, of course) has concluded that "the world is flat" because international economic pressures are leveling the playing field. *See* THOMAS L. FRIEDMAN, THE WORLD IS FLAT 7 (2005). More important for present purposes, Justice Anthony Kennedy, author of the majority opinion in *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Court looked to international practice in concluding that executing minors would violate the Eighth Amendment, *see id.* at 575–78, picked up on Friedman's book in a speech, and said, "The world is now flat, and the U.S. is beginning to be involved in international law." Justice Anthony Kennedy, Address at the 11th Circuit Judicial Conference (May 13, 2005), *quoted in* Harris Meyer, *Kennedy Wades into International Waters*, LEGAL INTELLIGENCER, May 18, 2005, at 4.

6 Of course I'm not arguing in favor of shutting down the LL.M. programs for foreign lawyers that are providing American law schools with a seemingly endless stream of students paying full tuition. Who can complain about a combination of money and, because those students' credentials are ignored by *U.S. News & World Report*, no (obvious) negative effects on institutional reputation?

I. INTERNATIONAL LAW CONCEPTS AND THE TYPICAL AMERICAN LAWYER

At the vast majority of American law schools, only a small percentage of graduates will have practices with significant international, transnational, or comparative content.[7] No one wants to admit this—who (other than me) wants to appear provincial?—but it's true.[8]

Oh sure, wheat grown and consumed on a farm in Ohio is part of a global market.[9] That's a truism, and it's also true that the United States can't insulate itself from international economic pressures. But none of that means legal issues associated with a global market are necessarily international or transnational in character.[10] Regardless of world markets, American lawyers—including the Yale-trained ones—will be advising on American law in the overwhelming majority of situations. The Ohio farmer's wheat may wind up in China, but that possibility is unlikely to affect the nature of the contract when the farmer sells his wheat. More generally, American clients are going to insist, as much as they can, that legal principles they know and understand will govern transactions—even unquestionably transnational transactions[11]—in which they participate.

In addition, when transnational issues do arise in planning a transaction, they aren't likely to be broad ones of international law. Instead, they'll arise under the laws of other nations or under provisions of particular treaties. That's "international," to be sure, but the details aren't ones you're likely to learn in a typical American course in international law.

Given that no lawyer can be expected to know the relevant laws of every conceivable jurisdiction or the provisions of every

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7 To Dean Koh's comment that one of his school's challenges is "how to reconnect with the profession," *supra* note 1, one might suggest that not trying to find a global perspective on *everything* would help the process of reconnection.

8 Foreign travel will happen for some, but not for many. Anyway, travel doesn't necessarily connote influence or power. (Ask any junior associate who has spent a week or two on a due diligence assignment in London.) The travelers are often those doing the grunt work, while the thinking is done back home.

9 *See* Wickard v. Filburn, 317 U.S. 111 (1942). Or, on a somewhat higher note, see also *Gonzalez v. Raich*, 545 U.S. 1 (2005) (dealing with, but not dealing, medical marijuana).

10 To conclude that the world is "flat" because of economic integration, *see* FRIEDMAN, *supra* note 5, is not necessarily to conclude that the world is one big legal system, as Justice Kennedy seems to think. *See* Meyer, *supra* note 5, at 4.

11 Saying that five times fast earns you a certificate of concentration in international business transactions.

conceivably relevant treaty, how should a student prepare herself for a life in the international transactional arena? The traditional answer to that question—still right, I think—is to study commercial transactions generally. Learn what the legal concerns are in the U.S. context, and you'll have a leg up on understanding what is needed to put a deal together internationally. If a recent graduate skipped over the basics of U.S. transactions in law school, however, how in the world can she advise an American client on an international deal, or a foreign client on the U.S. aspects of the deal? Taking a few courses on international death penalty policy won't help her at all.[12]

Even when we were openly and notoriously provincial in our legal training, we made no effort to train students in the laws of all fifty state jurisdictions. We let them know that they might have to check the law (and probably seek local counsel) in jurisdictions other than their own—and to ask for advice about substantive areas outside their own specialization.[13] The same principles apply here. We can sensitize students to the need to secure help with the law of Zamboni if Zamboni law is relevant. (We ought to be able to make that point in five minutes of class time—or less.) And no one should have to complete a concentration in international law to know that transaction-specific research is likely to be necessary for any sophisticated deal.

If we try to teach everything (assuming we have the capability to do that in the first place[14]), we'll inevitably give short shrift to the basics. If our graduates aren't grounded in U.S. law, they're a disaster waiting to happen—regardless of their training in international esoterica.

In a recent article, Professor Raymond J. Friel of the University of Limerick makes several points that are, to my mind (because I agree with them), incontestable:

> Transnational legal education needs to start from a solid base: the study of a relevant national legal system. Students need to have mastered the intricacies and nuances of at least one national legal system. The lack of such knowledge would threaten both the students and the program with a quagmire of

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12 She'll be at sea, which is international, I admit, but not where a graduate should want to be. *See* R. v. Dudley & Stephens, (1884) 14 Q.B.D. 273 (noting a dog-eat-dog world, *and worse*, at sea).

13 A tax lawyer may have to ask questions of a corporate law specialist, and vice versa. No one knows everything (although the tax lawyer is likely to come close).

14 We don't.

uncertainty.[15]

As it is, we're approaching the quagmire fast.

II. ESOTERIC QUASI-LEGAL CONCEPTS

The above discussion focused on transactional practice, which is what most lawyers will wind up doing (whether they want to or not). It's also what law schools are paying much less attention to these days. Where international matters are emphasized, it's usually not in relation to commercial deals, the bread-and-butter of the bar. Instead, it's whatever is currently glamorous.

Of course it's hard to resist the issues that wind up as front-page news. What law student wouldn't get caught up in the glamor (yes, the glamor) of war crimes trials, especially if the alternative is learning about estate planning? What would happen to Saddam Hussein was a fascinating subject.[16]

It was fascinating, but, as is true with many subjects now emphasized in American law schools, the fascination wasn't in the "legal" issues involved. Does anyone really think the "trial" of Saddam was fundamentally a legal exercise?

Yes, with lawyers and judges around, the legal trappings were there, and international lawyers did a lot of posturing about the "rule of law" in working on, and commenting about, the "case." But the trial was a political one, with the outcome on the merits not in doubt. Apart from determining the appropriate penalty (or unless someone really screwed up), what uncertainty could there have been about the legal outcome of Saddam Hussein's trial?[17]

Having political trials isn't necessarily a bad thing, I suppose,[18] and whatever their nature, war crimes trials are worthy of intellectual analysis. But much of what is involved in "trials," where only one result is possible, isn't "law" as that term has been

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15 Raymond J. Friel, *Special Methods for Educating the Transnational Lawyer*, 55 J. LEGAL EDUC. 507, 508 (2005).

16 Actually, in his case the estate planning might have been interesting too.

17 I wrote much of this before the proceedings had been completed, and events could have proven me wrong. Had I been wrong, I had promised to incorporate war crimes jurisprudence into my federal income tax class. I'm safe.

18 But it's not necessarily a good thing either. *See* ARTHUR KOESTLER, DARKNESS AT NOON (Daphne Hardy trans., The Folio Society 1980) (1940). It might have been desirable to have a forum in which the heinousness of Hussein's crimes could be presented to the world. And we might have wanted to give him a chance to "defend" his actions, if only to make the horror clearer. But it did not take a phony "trial" to do either of those things.

understood in the U.S. system.[19] It's nice to be interdisciplinary, but, in the law school setting, it's also nice to have a little law involved.

III. MORE UNHAPPY CONSEQUENCES OF AN OVEREMPHASIS ON GLOBALIZATION

What else is wrong with overemphasizing international, transnational, and comparative law in law schools? I'll note four other concerns, although there are others too. (Some of this may overlap with what I've already said, but if I repeat myself, so what? Redundancy isn't a war crime, at least not yet.)

First, although international law is law—I don't question that proposition[20]—it has its own, distinctive characteristics. (If it didn't, why would we have all those journals and centers?) The new emphasis on international and transnational law in law school has the unhappy effect of diminishing the significance of the "law," as it is traditionally understood, in the minds of many impressionable law students. The international law concepts are too soft and too malleable to guide behavior in the way that we ordinarily expect the law to operate.[21]

Second, the overemphasis on international and transnational law helps convince students that all issues, including those of

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19 In a speech at my school in 2001, Justice Richard Goldstone, who had been chief prosecutor of the United Nations Tribunals for the former Yugoslavia and Rwanda, and who is a brilliant and honorable man, spoke approvingly about participation by Rwanda Tribunal judges in eliciting testimony about sexual abuse. The result was that *during trials* indictments which had included no sexual abuse charges were amended to add such charges. *See* Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277, 282 (2002). In Justice Goldstone's view, one of the functions of the "judges" was to make sure the defendants were charged and convicted of everything possible. In the American legal system, such judicial behavior would be viewed as an outrage, but the largely student audience seemed to be sympathetic to Goldstone's we-already-know-they're-guilty perspective.

20 *See* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 3 (2005) (rejecting the proposition that international law is not law, but then questioning international law's importance).

21 *See* ROBERTSON DAVIES, WHAT'S BRED IN THE BONE 212–13 (1985) ("[I]nternational law; I am sure you know what a vague area that can be, if somebody wants to hang around a university."). Goldsmith and Posner argue that international law is less significant than international lawyers would have us believe. As it applies to relationships among states, international law is the product of states acting in their self-interest, rather than "for noninstrumental reasons." GOLDSMITH & POSNER, *supra* note 20, at 14. Despite what you might hear from some international law scholars, when states act "cooperatively" rather than unilaterally (entering into an international agreement, for example), they're still pursuing what they think is their self-interest.

international politics, are fundamentally legal ones. We all want to think that what we're doing as lawyers is the most important thing in the world, and sometimes it is. But not always. Trying to turn all international disputes into legal controversies—you know, wars will end if we just operate under the rule of law and punish the perpetrators—may boost lawyerly self-esteem. But it gives students a misleading impression of international relations and of the real world more generally.

Third, the globalization of curricula pushes students in the direction of the politically correct, but misguided, view that modern, foreign principles and practices should inform the interpretation of historical American documents, including the Constitution—a view now blessed by the Supreme Court.[22] We might be citizens of the world, in some abstract sense, and of course we want to appear wise in the ways of the world. But it's still a peculiar interpretive notion that would use foreign ideas to decipher documents that were adopted (obviously) without the "benefit" of those understandings.[23] Nothing in the language, purpose, or structure of the Constitution supports looking overseas for twenty-first century concepts to interpret that document.[24]

Finally, and most important, the emphasis on international law in American law schools diverts students from understanding their own legal system. Law schools are pushing students into making comparisons with the laws of other nations before the students have any sense of the U.S. rules. Several years ago, my school had a Dutch law professor teach a course on comparative environmental law, and he was surprised to find that he had to teach American students the American law before comparisons could be drawn. In their rush to globalize, the students had skipped the first step—learning their own country's law. Horrifying.

And that was not a situation peculiar to my school: It's now common for international and comparative law to be introduced to

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22 *See* Roper v. Simmons, 543 U.S. 551, 575–78 (2005).

23 Of course we should know what other countries are doing, and Congress or state legislatures might want to use that knowledge in crafting American statutes. But it's quite another thing to use the modern understanding of other countries to interpret an American document in which the foreign concepts played no role at all.

24 The founders imported some principles, particularly from England, and they had read widely about political ideas in many countries. It makes sense to try to understand those principles and ideas in interpreting the Constitution—in that respect, "foreign" ideas are essential in the interpretive process—but that's not what globalizers are talking about today.

students in "perspectives" courses (required or recommended) early in law school. The students are urged to get these new "perspectives" on the law before they know very much about the law. For most students, the law is itself a new perspective on the world, and focusing on the basics of American law should be enough to tax even the most conscientious student. Piling on additional concepts, particularly in the first year of law school, would be cruel and unusual punishment.[25] As a result, what happens (inevitably?) is that international, transnational, and comparative ideas replace, rather than supplement, instruction in the American legal system.[26] Students wind up with the "perspective," but without the substantive knowledge to which the perspective relates. It's that "quagmire of uncertainty" that Professor Friel warns us about.[27]

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I've used some hyperbole in this essay, I admit. I really don't want American law schools to ignore the larger world. As a tax professor, I'm often frustrated at how willing American tax lawyers are to ignore useful data about the way the rest of the world does things. But we can go too far in the other direction, and we often have.

The more you know, the better you'll be as a lawyer. If you have the civil rights law of Zamboni on the tip of your tongue, ready to respond to questions, that's great. All other things being equal, it's better to know the law of Zamboni than not to know it.

But all other things are never equal. Law school time is a scarce resource. Many of our students are misallocating their time, and they're doing so at our direction—or at least with our encouragement. No one is going to become a great international or transnational lawyer without being, first and foremost, a great lawyer. Before we overdo the global, we need to reconsider the merits of the old, flat-earth conceptions of the law.

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25 As interpreted using either U.S. law or foreign principles. *See supra* note 5.

26 The Association of American Law Schools held a workshop on "Integrating Transnational Legal Perspectives into the First Year Curriculum" in January 2006, which indicates that the legal establishment's imprimatur has now been given to globalization. *See also* Lindsay Fortado, *Thinking Globally: Law Schools Expand International Curricula*, Nat'l L.J., Mar. 6, 2006, at 1.

27 *See supra* text accompanying note 15.