“Transnational Legal Education in the 21st Century: Two Steps Forward, One Step Back”

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Good afternoon.

I must begin by sharing with the Suenobu Foundation and the Japanese American Society for Legal Studies the emotion that I felt in preparing this lecture: the emotion of profound anxiety. I felt profound anxiety for two separate reasons.

First, I felt profound anxiety because the first two Suenobu Foundation Distinguished Lecturers were Sandra Day O’Connor and Linda Greenhouse, two of the most important figures in American legal culture over the past half century. It is not wise to walk in the footsteps of legends.

And second, I felt profound anxiety because I knew that I was being asked to speak after Lance Liebman, a man whose commitments to the craft of scholarship, to the value of legal education, and to the role of institutions like the American Law Institute in promoting the healthy evolution of the law have been a model to me for nearly 30 years. It is not wise to stand in the shadow of a giant.

And yet, as profound as my anxiety may be, I must also say to the Suenobu Foundation and the Japanese American Society for Legal Studies that it is far exceeded by a different emotion – the emotion of gratitude. To be invited to speak here is a profound honor and a remarkable

opportunity. I have been looking forward to today for quite some time, and I am delighted to be with you this afternoon.

Lance and I have divided responsibilities this afternoon, but while we did not rehearse our performance, I was reasonably confident that our comments would be complementary, as I knew he would speak about the crisis in American legal education, while I am speaking about transnational legal education.

I have entitled my remarks, "Transnational Legal Education: Two Steps Forward, One Step Back," and I should make clear at the outset that the title is not intended to be negative. The fact that progress is not always smooth does not keep it from being progress.

My remarks this afternoon are divided into three parts. First, I will talk about the construction of a transnational society – the steady adjustment of economic, political, and cultural structures so as to facilitate movement across national borders. Second, I will talk about the construction of a transnational legal order – the steady development of both national and supra-national legal institutions, including a transnational legal profession, that tend to support the construction of a transnational society. And third, I will talk about the construction of a transnational vision of legal education.

So let me begin first with the construction of a transnational society. We are all intimately familiar with the manner in which developments in transportation, communication, and computing technology over the past 40 years, together with periodic reductions in legal trade barriers, have remade the world. A simple measure of the change considers global trade as a percentage of global gross domestic product. According to World Bank data, exports and imports accounted for less than 30% of global GDP before 1970; today they account for more than 60%.

But when I speak of a transnational society, I am thinking of more than just trade. The principles of David Ricardo suggest that two completely different societies, in which people share no common tastes or values, can each be better off if they specialize specialized their productive activities according to the principle of comparative advantage and

then trade with one another. That would be a world of high trade, but it would not be what I consider to be a transnational society.

When I use the phrase, "transnational society," I am thinking of a world in which tastes become more similar and, even more importantly, a world in which fellow-feeling becomes stronger. This is a world in which there is an expanding desire to connect – to experience other cultures and to concern oneself with the well-being of people who are far away. I believe this is the world we are inhabiting more and more, and that this is the world to which our global legal system must respond.

About ten years ago the university known as ETH in Zurich, Switzerland, developed a new measure of globalization. It is called the KOF Index, and it measures globalization along economic, social, and political dimensions. Naturally it measures flows of trade and of capital along with restrictions on those flows. But more significantly, it also measures personal contacts across borders, information flows across borders, and something it calls cultural proximity. Moreover, it also measures countries' participation in international politics and governance through embassies, treaties, international organizations, and the like.

The KOF index has been calculated for the period from 1970 to the present. You can view it online, and I commend it to you for your exploration. According to the index, economic globalization has proceeded most quickly during the period since 1970. And it is interesting to observe the importance of the end of the Cold War. The year 1989 was a key moment, when the pace of economic globalization accelerated.

Over this same period, the index suggests that social and political globalization have also increased significantly. Admittedly, they have increased more slowly than economic globalization. But the increases described are substantial.

Some interesting scholarly papers have been written using the KOF data. Not surprisingly, the KOF data suggest that globalization has been good for average living standards worldwide. Perhaps somewhat more surprisingly, the data also suggest that globalization has been good for the environment. On the other hand, the data suggest that globalization

has been bad for levels of inequality within countries and also for the strength of labor unions.

I am sure you will agree with the central point. The world we inhabit is not the world we were born into. Forty years ago, the things we touched and the people we interacted with generally came from close by. Our sense of society was national, or perhaps regional. Our many networks were, to a very significant extent, bounded. Today we feel much more globally connected.

But if we are to lay a proper groundwork for thinking about the implications of globalization for our legal systems, we should reflect on whether we want this process to continue unchecked. Do we want KOF indices to reach 1 on a scale from 0 to 1, or do we want to stop short of that? Do we want a world that is flat, fully united, as a single community under a single sovereign? Or do we want to preserve some elements of the Westphalian commitment to multiple nation-states, legally equal, sovereign over their respective territories, and committed not to intervene in one another's internal affairs?

Speaking for myself, my dream world is not perfectly flat. It is, instead, a mix of the universal and the particular. It includes variation around a shared core. To me, the best world that human beings are capable of constructing incorporates the following balance:

On one side of the balance are a set of universal commitments. To my mind, these include prohibitions against state or private enslavement; prohibitions against torture; and prohibitions against discrimination on the basis of race, religion, gender, or sexual orientation. They include protection against state or private deprivations of life, liberty, or property without just cause and due process. They include individual rights to become educated, to marry, to procreate, to travel domestically, to read, to write, to speak, and to emigrate from the country. They include basic protections for workers against employers who would unfairly exploit their disadvantaged bargaining position because they need to survive. And they include protection for the environment against intolerable levels of damage by people who would, to use the economists' term, "externalize" the costs that their activities entail.

When I say that these commitments should be universal, I am saying that no community of people should be allowed to form a nation-state that violates them. That means I believe there should be international governance mechanisms to decide whether a given nation-state is attempting to violate these norms, as well as international mechanisms for intervening to bring any such violations to an end.

But on the other side of the balance I would place a commitment to variety, to cultural diversity, to the ability of communities of people to define themselves in different ways, as long as they respect the fundamental universal commitments.

For example, I think that communities should be able to make different choices about how they will decide who is given the power to act as a trustee for the public interest – that is, to govern. I also think communities should be able to make different choices about the extent to which the government regulates the private economy, the extent to which the government participates in the production and distribution of goods and services, the scale of welfare state the government will maintain, the extent of wealth inequality they will tolerate, what kind of duties strangers will owe one another, and more generally the balance between the idea that a person's identity should be shaped by his or her individual desires and choices and the idea that a person's identity should be shaped by his or her relationship to others.

It is crucially important in this regard that we not think of cultures as static, unchanging monoliths, that we not "reify" them. Cultures are dynamic, they evolve on their own, and they evolve as they interact with one another. So in my ideal, balanced world, it is critical that communities be able not only to define themselves within the constraints of universal commitments, but that they be able also to redefine themselves.

In this kind of a world, law is a critically important institution. National laws are an essential mechanism through which fundamental universal commitments are fulfilled, and also through which different nation-states implement their unique and evolving cultural choices. At the same time, transnational legal institutions also have an important role to play, both as vehicles through which universal commitments are adopted

into national legal structures, and also as vehicles through which different national systems might be harmonized with one another.

My ideal version of the globalization does not require global uniformity. But it does cry out for global harmonization.

A world without harmonization is a world where the act of crossing a border carries high transaction costs.

We see these transaction costs immediately when we encounter different measurement conventions. The facts that some countries use the metric system and others use the British imperial system, and that some countries drive on the right and others drive on the left, inhibit free trade in goods and they inhibit free movement of people.

These same transaction costs arise when systems of legal regulation diverge. If there are dramatic differences among countries' approaches to competition law, intellectual property law, and contract law, for example, free trade in goods is inhibited. If there are dramatic differences among countries' approaches to financial instruments law, securities law, and bankruptcy law, for example, free movement of capital is inhibited. If there are dramatic differences in property law, family law, and health law, for example, then free movement of people is inhibited.

Since law is an outgrowth of culture, such transaction costs are sometimes inevitable in a world where cultural diversity is cherished and respected. But when the transaction costs loom large, the spirit of globalization encourages societies to ask themselves, "Just how committed are we to this idiosyncrasy of ours?" And often they will find it worthwhile to harmonize.

The past 40 years have indeed been an impressive era of legal harmonization. At the level of substantive law, the most dramatic example has been the movement from the General Agreement on Tariffs and Trade to the WTO. But that has not been the only example. The Convention on Contracts for the International Sale of Goods, the Unidroit Principles of International Commercial Contracts, and the International Chamber of Commerce's Incoterms definitions have all served to reduce the friction

that different legal regimes used to create for participants in the global economy.

Perhaps most importantly, systems have emerged that enable private parties to at least partially construct relationships using legal tools that are independent of the particular laws of particular nations.

The world of arbitration is, in significant part, a special legal system that governs relations among the world's most transnational individuals and organizations. In 1976, the United Nations Commission on International Trade Law adopted a set of arbitration rules that contracting parties may use to "opt out" of un-harmonized national commercial legal systems and to "opt in" to a transnational structure for dispute resolution. And today as a matter of domestic law, most countries respect the rights of parties to contract their way into the UNCITRAL world.

Legal harmonization and integration have taken place through more than just the adoption of legal rules. They have also taken place through the construction of a new community of transnational lawyers. The legal profession has been restructured, the better to help clients manage the legal challenges of a globalized world in which legal systems have been only partially harmonized.

Businesses need to be able to sell their goods worldwide. They need to be able to protect their intellectual property worldwide. They need to be able to deploy and redeploy their workers around the globe. They need to be prepared for the ways in which national legal systems can have extraterritorial reach. To do these things, they need a certain kind of legal assistance, and law firms have scaled up dramatically in order to provide that assistance.

In 1987, the world's largest law firm, Baker & McKenzie, had 1000 lawyers. Today that firm has 4000 lawyers in 44 countries. Thirty firms worldwide have more than 1000 lawyers, including firms that are based in the U.S., the U.K., China, Spain, and Australia, and all those firms have overseas offices. Here in Japan, Nishimura and Asahi has about 500 lawyers and offices in four other countries; the other Big Four firms have more than 300 lawyers each.

Within these firms, lawyers need a skill set that has expanded tremendously from the skill set that was required a generation ago. And that, finally, brings me to my primary topic – transnational legal education. If legal systems – both substantive and procedural – have been transformed by globalization, and if the legal profession has been similarly transformed, one would certainly anticipate that the institutions responsible for legal education would be transformed as well.

From my own perspective, I might wish that global legal education had evolved more rapidly than it has. But even I have to admit that it has changed significantly over the past two decades. As you all know, I now have the privilege of leading the remarkable new institution called NYU Shanghai. NYU Shanghai is not engaged in the world of legal education, but until two years ago my primary professional home was that world, and so I feel comfortable discussing it. Indeed, I would like to use my remaining time this afternoon to talk about how the changing world of transnational legal education appeared to me, on a personal level.

Twenty years ago this month, I was teaching a course on the jurisprudence of the American Supreme Court to graduate students at the University of Paris 2, also known as Pantheon-Assas. The experience was wonderful in many ways. My students were wonderful. My colleagues at Paris 2 were smart and kind. I had the opportunity to do some very satisfying research concerning poverty in France and the changing French welfare state. And most importantly my family and I had the incomparable pleasure of living in Paris.

But the experience was also profoundly illuminating for me. It gave me a much deeper appreciation for legal difference. I understood in a way I had not previously understood the differences between French and American conceptions of law, the differences between French and American conceptions of the lawyer's role, and most especially the differences between French and American conceptions of the aims of legal education.

In America, the legal realist movement in the 1920's and 1930's helped to completely refashion the general understanding of what legal education is for. Law came to be understood as a domain of human activ-

ity where competing interests struggle for control as lawyers and judges interpret ambiguous words in the light of their own position in society. The study of law became a process through which students learn to recognize ambiguity, to relate statutes and judicial opinions to the promotion of deeper social objectives, and to be comfortable participating in a world where ambiguities abound and the lawyer's role is to help resolve them in ways that promote the sense of a just and coherent society.

The core of American legal pedagogy remains a set of pedagogic techniques that were pioneered by Christopher Columbus Langdell at Harvard – the study of judicial opinions using the Socratic method. It is designed to teach students to question their assumptions about meaning, to develop their abilities to engage sympathetically with more than one approach to a problem.

During the 1960's and 1970's, this core of American legal education expanded to include professors whose primary intellectual discipline was not law but was rather a domain with a well-defined intellectual methodology, such as economics, philosophy, or sociology. And it also expanded so as to place students in real-life situations in which the ethical dimensions of their daily decisions as lawyers would be explored under the direction of experienced clinical professors.

Nothing like that had happened in France. In France the lawyer's role was understood to be a source of factual and theoretical expertise concerning a complex system; legal education was designed to help students acquire that expertise. The dominant pedagogy remained the lecture, in which synthesis and robust theory were dispensed with confidence by practitioners of legal science. But there was virtually no interaction with the world-famous sociologists of law who worked down the street at the College de France. Their work did not intersect.

I completed my sabbatical with a much deeper appreciation for the gulf between conceptions of the lawyer on opposite sides of the Atlantic, as well as for the concomitant gulf between conceptions of legal education. I also had a deeper appreciation for the fact that neither system of legal education was paying much attention to the growing importance of law and of a transnational legal profession.

That was twenty years ago today. The following month, I was appointed to be the dean of the University of Michigan Law School. One of the law school's most significant curricular initiatives during my time as dean came in the field of transnational law.

Michigan had been offering courses in the international and comparative law fields for many decades. But they were divided into very distinct categories. Public international law concerned the legal relationships between nation-states. Comparative law introduced students to the differences among systems of domestic law. Choice of law concerned the rules used by domestic courts to determine which sovereign's pronouncements should govern a particular dispute. And international trade law concerned interpretations of the general agreement on tariffs and trade.

And so, in the late 1990's, Michigan developed a new course called Transnational Law. Transnational Law was designed to be an introduction to all those topics and more. The central premise of the course was that lawyers should be aware of all the ways in which clients might be affected by legal regimes that emanated from outside their home country's borders, no matter whether those regimes are embedded in international institutions, multinational treaties, regional institutions, or even nation-states asserting jurisdiction over actions outside their own territorial borders.

That conception was then implemented in quite spectacular fashion by Mathias Reimann, a comparativist, and Tim Dickinson, a practicing attorney who had been president of the international law section of the American Bar Association.

Most importantly, the course was immediately made into a graduation requirement. Once again, the premise was that globalization had progressed to the point where the legal lives of clients were rarely lived within the boundaries of a single nation. Even a small business client in the middle of the United States could be affected by a larger legal universe, and so competent legal representation meant that a lawyer should at least be able to recognize potential issues and know to seek assistance from an expert.

From that moment on, every person who has graduated with a Juris Doctor degree from Michigan has had at least that much exposure to the transnational legal regime. I must confess that I did not think that situation would last long. I believed that our understanding of the changed legal environment was almost self-evident, and so I expected the movement to mandate transnational law would soon sweep the country.

How wrong I was! Today the Hofstra Law School also requires students to take transnational law, Harvard requires students to take a course in international and comparative law during the first year, but otherwise very few American law schools require their students to take anything in the international space. Consider this the first point of evidence that American legal education is not adjusting to globalization and to the changes in the legal profession as quickly as people like me might like.

Two other moments during my deanship helped me to better understand the way that transnational legal education evolves. In 1998, I had my first visit to China, as part of a delegation of American law school deans sent by the U.S. state department to meet with our Chinese counterparts. The visit was reminiscent of my time in France; I came to appreciate both how different the conception of the lawyer was in America and in China, and also how different the conception of legal education was in the two countries. Indeed, the Chinese understanding was much closer to my memory of the French understanding than it was to the American.

In February 2002, several of my colleagues and I were asked to make a presentation to the Nichibenren about American legal education. This was of course during the planning period for the revision of Japanese legal education that was to come the following year.

A number of things struck me about that experience, and they contrasted with my experiences in France and China. Through my prior visits to Japan and my relationships with Japanese alumni, I had come to appreciate how, in Japan, the term Bengoshi was reserved for a very small number of people, performing only a few of the tasks carried out by people who in the United States are called "lawyers."

During this visit I learned of the near-consensus within Japan that legal education should be adjusted in response to the changing landscape that globalization had created. Even recognizing how many people who were not bengoshi had studied law and were contributing to the rule of law in Japanese society, there was still a sense that Japan should have more bengoshi. In addition, there was a desire to adjust the training that bengoshi receive by incorporating elements of American-style legal education.

I appreciate the fact that the changes made the following year have received significant criticism, and of course some of that criticism may be very well founded. But what I want to note this afternoon is that, from a somewhat abstract perspective, the spirit that was motivating the reformers back in 2002 was quite remarkable. It was a spirit that was (a) welcoming of globalization, (b) appreciative of the pace of change in what was expected of lawyers, and (c) eager to harmonize legal education with American legal education, on the assumption that a harmonized legal education was going to be essential, as substantive legal doctrines became harmonized as well.

After leaving Michigan I served as president of Cornell, and in that role I did not engage much with the world of legal education. But afterwards I was drawn back into that world, even more intensely than ever before.

Seven years ago next week, I was visited in New York by my friend Hai Wen, an economist who was also Vice President of Peking University. Hai Wen was not a lawyer, but as an economist he deeply understood the implications of China's accession to membership in the World Trade Organization. At the same time, he had looked closely into the experience of the graduates of Peking University's Law School in Beijing, which was at that time the best law school in China. Those graduates were not employable at top international law firms, so those who wished to work in that arena moved to the U.S. and received advanced training from American law schools.

Hai Wen was responsible for Peking University's experimental branch campus in Shenzhen, and he came to see me to see if I would help

him to design a new kind of law school for China, one that would better prepare Chinese students for a globalizing legal profession. The result of our discussions was the Peking University School of Transnational Law, generally known as "STL."

The basic conception of STL was that it would provide students with a dual qualification. Like American law schools, it would be open only to students who had received an undergraduate degree in another subject. It would provide these students with a complete J.D. education, taught in English, using the Socratic method, by a small permanent faculty, together with professors visiting from elite American law schools. But unlike the education provided at most American law schools, its course offerings would be heavily weighted towards the world of transnational law. In addition to introductory courses in transnational law, the curriculum would be rich with courses pertaining to arbitration, to international trade, and to European Union law. Mandatory legal writing courses would extend over two years and include contract negotiation and drafting. The program would extend over four years instead of three, so that the students would be able to complete a Juris Masters degree in Chinese law, taught in Chinese by professors from Peking University in Beijing. Finally, and perhaps most importantly, the school was structured to operate at a tuition cost of only $10,000 per year, less than ¼ the price of a typical American law school.

The program was designed in consultation with staff at the American Bar Association, in compliance with the ABA's standards of accreditation, on the understanding that STL would apply for accreditation by the ABA. This would enable STL's graduates to take bar examinations in both China and the United States.

This summer STL will complete six years of operations and will graduate its third class of students. From the day it opened it was able to attract the best law students in China, and it has rapidly established itself as the best law school in the country. Its students have won the lion's share of competitions inside China and acquitted themselves extremely well on the international stage. Its graduates all have jobs as lawyers, working at top international and domestic employers. And it has devel-

oped a faculty of superb scholar-teachers who are publishing cutting-edge research across a broad range of transnational legal subjects.

In many ways, STL would seem to be a fairy tale story of the evolution of transnational legal education. But the school's history does include one important setback that illuminates another, less attractive dimension of globalization.

As I mentioned a moment ago, STL was designed in compliance with the American Bar Association's accreditation standards, in consultation with the ABA's professional staff. Unfortunately, the accreditation process is not in the hands of that professional staff, but rather in the hands of a committee of lawyers, law professors, and judges who make up the "Council of the Section on Legal Education and Admission to the Bar."

Back in the 1990's, the United States Justice Department had filed an antitrust action against the ABA over its accreditation practices, alleging that the Council had been using its accreditation powers illegally to elevate the salaries of law professors. The ABA had settled the lawsuit by entering a consent decree that changed the way the Council operated. But it is in the nature of accreditation processes that entry into the world of accredited schools is always controlled by the schools that have already been admitted, and it is difficult to prevent the stresses those institutions are facing from infecting the accreditation process.

And there can be no doubt that the moment STL applied for ABA accreditation was one of the most stressful moments in modern times for American law schools. The 2008 financial crisis had been devastating for the world's most profitable law firms, and they had responded by dramatically reducing the number of new lawyers they were willing to hire. That meant that law schools were suddenly facing unprecedented rates of unemployment for their new graduates, which in turn meant that the number of new law school applicants plummeted.

I will not describe all the unsavory details of the behavior of the Council. But in the end the Council adopted a policy saying that it would simply not accept any applications from law schools that are physically located outside the territorial boundaries of the United States.

Fortunately for STL graduates, there are other paths they might choose to take if they wish to sit for an American bar examination. But the incident is illuminating. STL's application might have been viewed as an opportunity. The school exemplifies the diffusion of educational standards across national boundaries, to support the creation of a more harmonized global legal profession. The application for accreditation offered the ABA an opportunity to influence the way such standards develop.

But perhaps the Council's refusal to participate in this diffusion is a good thing. This past week I was visited in China by Raj Kumar, the founding dean of the OP Jindal Global Law School in India. The Jindal School was founded the year after STL, and it is an exceptionally innovative program, one that is also operating according to the highest intellectual standards and had also applied for U.S. accreditation. Freed from any need to worry about the American Bar Association, schools like Jindal and STL might now be able to focus in a more single-minded manner on the ultimate question – what kinds of education will best prepare professionals to serve a world in which the processes of globalization – economic, social, and political – are likely to continue accelerating in the decades to come?

My conclusion is both simple and hopeful. I believe that life is more beautiful today than it was 40 years ago, in significant part because each of us has far greater opportunities than our parents did to sample the tremendous variety of human culture. I believe we want our world to be one where that variety is preserved, even as we continue to extend the ability of all people to enjoy it.

I also believe that law and lawyers have a critical role to play in enabling that kind of a world. At the national and international level, they can facilitate a way of thinking that promotes harmonization and mobility without sacrificing national cultural priorities.

And I remain hopeful that legal education will also play an enabling role, helping to ensure that lawyers from around the globe share these values, and possess the skills they will need to build the legal foundation on which this more interesting, more harmonious world will stand.