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PROSELYTIZERS FOR OUR RULE OF LAW

*Jack B. Weinstein**

As our society moves into a more aggressive Empire-like role,¹ the United States is meeting increased skepticism abroad about its devotion to democracy and its many elements, including the rule of law in this country.

We cannot ignore our own limited observance of the rule of law, domestically or abroad, when our perceived immediate needs are inconsistent with local or international rules. Can we be a moral preceptor and exemplar when we lack perfection? I think the answer is “yes” — but within limits. It is essential for our own interests, and leadership in the world, that we reconsider how best to teach the American rule of law to people from abroad.

How can we help those abroad develop a favorable understanding of our rule of law?² In a sense, while proselytizers, our

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This Article is based upon a speech at the Bar Association of the City of New York, Nov. 14, 2002, at a meeting of the Association for Study of the United Nations System and the Global Legal Order (“SUNSGLO”), Dr. Yassin El-Ayouty, Esq., organizer, presiding.

1. Michael Ignatieff, *The American Empire; The Burden*, N.Y. TIMES MAG., Jan. 5, 2002, at 22. See also, e.g., Joan Didion, *Fixed Opinions, or the Hinge of History*, N.Y. REV. OF BOOKS, Jan. 16, 2003, at 54.

2. The definition of the rule of law is sufficiently outlined for our purposes in RONALD A. CASS, *THE RULE OF LAW IN AMERICA* (2001). “For most of the world . . . the nation most immediately associated with the rule of law . . . is the United States of America.” *Id.* at xii. The elements, according to Cass, consist of: “1. Fidelity to Rules. [] The first element states the central thesis of the classic conception of the rule of law: in a government of laws, not of men, individuals — including individuals exercising governmental power — must obey laws.” *Id.* at 4. “2. Rules of Principled Predictability. [] The second element . . . is that legal rules have the quality of principled predictability.” *Id.* at 7. “3. Rules from Valid Authority. [] The third element of the rule of law is that the rules that govern must be products of valid authority.” *Id.* at 12. “4. Rules from External Authority. [] The final element of the rule of law, constraints from external authority . . . helps assure that the processes of government, rather than the predilections of the individual decisionmaker,

purpose is not to convert, rehabilitate, or reform others, but rather, to provide a fair view of the American system as we see it operate.

In any such enterprise we would be remiss if we failed to acknowledge what we owe to history, other nations, the United Nations, treaties, and institutions like the European Union ("EU").

We should be aware of the substantial internationalization of our law and legal profession.³ In part this is due to the shrinking of the globe because of advances in communications and the expansion of foreign trade (including legal advice). In terms of travel time, almost any two points in the world are closer today than Philadelphia was to New York when the Constitution was adopted. In terms of the speed of communication, the practical distance between any two points on the globe is less than that between the federal courthouses in Manhattan and Brooklyn.

Teaching about the rule of law is not unidirectional. We have much to learn from foreign legal systems and from the treaties and other sources of international law that have an increasing effect on the United States legal system and on individuals within the United States or under the control of our government. Examples abound.

Professor Cynthia Estlund attributes some of the "ossification" of American labor law to our neglect of transnational and international labor law.⁴

The Patent Cooperation Treaty provides patent protection in member countries, particularly for United States nationals.⁵

The European Court of Justice has recently voided air treaties with our country, exercising greater power over the travel of millions of American citizens than our own courts ever could.⁶

govern." *Id.* at 17. Yet, despite its attractiveness, there is much complaint about details of the American rule of law in practice. *See id.* at 98–144.

3. *See, e.g., Global Crossings*, AM. LAW., Nov. 2002 (multibillion dollar income of United States law firms from legal work abroad).

4. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1587–91 (2002). *See also, e.g.,* SAMUEL L. BUFFORD ET AL., INTERNATIONAL INSOLVENCY (2001).

5. 14 INTELL. PROP. & TECH. L.J. 17 (Weil, Gotshal & Manges ed., 2002); Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231, available at <http://www.wipo.int/pct/en/index.html> (last visited Apr. 17, 2003);

6. Mark Landler, *Europe's Highest Court Voids Air Treaties with the U.S.*, N.Y. TIMES, Nov. 6, 2002, at C1. The Court ruled that the air treaties are void

In a recent opinion ruling on a case of detention of a British citizen, a panel of three senior British judges criticized the United States' program of detaining prisoners incommunicado at Guantánamo Naval Station as a violation of international law and *habeas corpus* law.⁷ Despite this arguable disregard for our obligations under international law, the United States remains deeply dependent on other nations and treaties for protection against terrorism.⁸

Because of objections to our capital punishment laws, the United States increasingly faces reluctance to extradite from countries holding prisoners we want to try for murder. And in *Atkins v. Virginia*, the Supreme Court received many *amicus curiae* briefs, including some from within the European Union and one from nine of our diplomats discussing the adverse effect that executing a mentally retarded individual would have on our diplomatic relations with foreign countries.⁹

The United States utilizes agreements for obtaining and rendering assistance in litigation through child custody orders, foreign depositions, authentication of documents, and enforcement of judgments.¹⁰

Despite these multinational influences, it is my view that it is the American system of justice, equality, and due process that will be remembered as this country's greatest contribution to the improvement of humanity — and I do not ignore our considerable donation to the world of such important cultural items as jazz music and Hollywood films.

My own experience in talking to non-Americans about law is typical of many federal judges: limited.¹¹ Even this minimal

under EU law, because individual EU members cannot negotiate bilateral treaties with foreign nations. *Id.*

7. Neil A. Lewis, *Threats & Responses: Detentions; British Judges Criticize U.S. on the Prisoners Held at Guantánamo*, N.Y. TIMES, Nov. 9, 2002, at A1.

8. See, e.g., M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS, 1937–2001 (2001).

9. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing disapproval abroad). See also Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 248 n.131 (2003).

10. See, e.g., JAMES D. GARBOLINO, HANDLING HAGUE CONVENTION CASES IN U.S. COURTS (3d ed. 2000) (child custody).

11. It includes: Columbia Law School's courses in Amsterdam, the Netherlands, for lawyers from around the world, which supply a survey of American

experience convinces me that there is, first, a hunger overseas for knowledge of our legal system; second, a vast difference in the degrees of sophistication and knowledge, and the reasons voiced for this interest among those we will communicate with; and, third, widespread admiration for the freedom and protection of rights afforded by our lawyers and judges.

Though I seldom experienced it personally, we all recognize the growing resentment of, and opposition to, what some conceive of as the Americanization of the world. Even among our friends we are sometimes referred to as an overlitigious and domineering society. In the view of many we are an imperial superpower, eschewing multilateral paths toward freedom and security. In the future we can expect more suspicion of United States government initiatives in the education of those abroad. We can also expect more restrictions on foreign students coming freely to our schools, particularly from Islamic nations — a development that could do us much harm in the future.

It is now more important than ever to reveal to non-Americans abroad the great depth and scope of our belief in peace, in equality, in the rule of law, and in the freedom that we have struggled to achieve for over three centuries. Under present conditions, the lessons we have learned may be more effectively taught by non-governmental organizations and dedicated individuals than by our own government. They are likely to be received by some abroad with a more open mind.

It seems to me desirable to have subjects for discussion in which a dialogue of equals is encouraged. Such subjects would include developing international standards in arbitration, in substantive law such as antitrust, drug control or intellectual

law designed to improve their professional skills; conferences organized by the American Law Institute, American Bar Association, many law schools, the Ford Foundation, the Association of the Bar of the City of New York, and other Bar Associations in England, Canada, Greece (Crete), Switzerland (and elsewhere on specific common issues such as mass torts or mediation); bilateral meetings with judges, lawyers and others in Peru, Moscow, the former Soviet republics of Central Asia; meetings in chambers with lawyers and judges at the behest of our State Department and Columbia University's LL.M. program for foreign lawyers; teaching judges in China about our American system at the behest of the Ford Foundation; and other sporadic contacts.

property, and in the reduction of procedural differences.¹² Another subject would be international law itself.

Of unique importance is the development over the last half century of international human rights law as a force for change. This area of law is still in its nascency, as courts and attorneys develop legal theories that allow them to respect international law while obeying their own national laws.¹³

In our own and other countries, pro bono legal work for the poor and representation of the impoverished in court and before administrative agencies is essential to ensure due process.¹⁴ In the United States, a number of civil claims have been successfully prosecuted based on violations of human rights abroad — as in the Philippines, Chile, and Nazi Germany.¹⁵ In a number of immigration, abuse-of-women, extradition, and sentencing cases, I have relied upon treaties and international legal standards.¹⁶

Respect for transnational law is fostered by effective teaching of transnational legal norms. As judges, lawyers, professors, and other participants in legal practice and legal discourse become familiar with international law, its terms and expectations will increasingly enter our own domestic legal lexicon and inform effective debate in our own and other countries. We should enhance the cross-pollination of ideas.

Flexibility will be a primary concern for judges and lawyers working out the kinks in the international law system. In general, our courts will probably avoid mechanical application of

12. See, e.g., Jack B Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE U. COMP. & INT'L L. 165 (2001) (comparison of United States and other systems).

13. See, e.g., RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 43–49 (2002) (substantive right to a remedy).

14. See, e.g., William J. Dean, *Pro Bono Conference in Chile*, N.Y. L.J., Jan. 6, 2003, at 3 (pro bono services in Latin America).

15. See, e.g., Jack B. Weinstein, *A Survey of Changes in U.S. Litigation*, 76 ST. JOHN'S L. REV. 379, 390–92 (2002) (American courts as a magnet for Human Rights and other suits).

16. See, e.g., *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd on other grounds*, No. 02-2171, 2003 U.S. App. LEXIS 8279 (2d Cir. May 1, 2003); *Nicholson v. Williams*, 203 F. Supp. 2d 153, 234–36 (E.D.N.Y. 2002); *Maria McElroy*, 68 F. Supp. 2d 206 (E.D.N.Y. 1999); *Pottinger v. Reno*, 51 F. Supp. 2d 349 (E.D.N.Y. 1999); *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997).

legal standards in favor of careful analysis of competing international concerns.

International law is not a monolith. It results from continuous dialogue within and among legal systems. In order to effectively engage in productive discussion, judges and lawyers must understand and respect the differences between national systems of law and the values protected by international law, as agreed upon by the community of nations.

As Vaclav Havel, the former President of the Czech Republic, recently reminded us: "We have a greater chance than ever before in recent times to understand our situation and the ambivalence of the direction we are headed in, and to decide in favor of the way of reason, peace, and justice, not for the way that leads to our own destruction."¹⁷

But, how can we organize lawyers to help us achieve our mission of fostering such understanding? How can we help pay back the world for the marvelous legal system we have in part inherited? How can we use our talents and knowledge of our own system sensitively and effectively to better reveal to others what this nation has learned?

As a result of anti-terrorism measures we can probably expect fewer students from abroad who could act as future supporters of our system. We will thus have to do more by working abroad with future leaders of foreign entities.

As individuals we can, I believe, make a major contribution toward the rule of law and a better world by revealing our deeply felt beliefs, as well as by acknowledging some of our limitations. Lawyers practicing in our nation's great law firms and teaching in our law schools have the talent, experiences, and contacts abroad to contribute individually and collectively to the rule of law throughout the world.¹⁸

17. Vaclav Havel (Paul Wilson, trans.), *A Farewell to Politics*, N.Y. REV. OF BOOKS, Oct. 24, 2002, at 4.

18. Omitted from this version of the Address is the outline and analysis of possible programs, available from the author. Even a census and description of our many overlapping United States programs would prove helpful. Examples of teaching training foreign lawyers include:

Training materials, including educational programs and materials of the Federal Judicial Center, at <http://ww.FJC.gov/newweb/jnetweb.nsf>, and the Administrative Office of the U.S. Courts, at <http://www.uscourts.gov/adminoff.html>.

Training materials for International Programs, National Center for State Courts, at <http://www.ncsconline.org>.

New York University Law School and Columbia Law School syllabi for LL.M. candidates from abroad.

Columbia Law School summer program for lawyers from abroad at the Amsterdam Law School, The Netherlands, at http://www.law.columbia.edu/center_program/intl_progs.

University of Delaware American Law and Legal English Institute for those from abroad, at <http://www.udel.edu/eli/>.

American Bar Association Section of International Law and Practice, at <http://www.abanet.org/intlaw/home.html>.

U.S. Department of State, Bureau of Educational and Cultural Affairs, at <http://exchanges.state.gov>.

Association of the Bar of the City of New York standing committees and delegations to various foreign bodies. See Association of the Bar of the City of New York, *About ABCNY, Committees*, at <http://www.abcnyc.org/aboutus/committees.html>

Symposium on Developing Cooperation in International Legal Education, 20 PENN. ST. INT'L L. REV. (2001).

Carole Silver, *The Case of the Foreign Lawyer; Internationalizing the U.S. Legal Profession*, 29 FORDHAM INT'L L.J. 1039 (2002).

Brooklyn Law School Beijing and Bologna summer programs, at <http://www.brooklaw.edu/academic/abroad/index.php>.

Benjamin N. Cardozo School of Law, U.S. Graduate Law Programs for Foreign Students, at <http://www.cardozo.yu.edu>.

Ronald Dworkin, *Taking Rights Seriously in Beijing*, N.Y. REV. OF BOOKS, Sept. 26, 2002, at 64.

Jack B. Weinstein, *Some First Impressions of the Legal System in Three Chinese Cities*, 24 BROOK. J. INT'L L. 221 (1998).

Jack B. Weinstein, *Notes on the Work of Judges in the U.S.* (Lecture Series, Republic of China, Oct. 1997).

Dr. Yasson El-Ayouty's work in SUNSGLO, at <http://www.sunsglo.org/toc>, devoted to teaching abroad about American rules, included conferences in Cairo and the Bahamas. He was Operations Officer at the United Nations for many years.

Symposium, *Sharing Legal System Objectives as Russia Revives Trial by Jury*, 75 N.Y. STATE B.A.J. 36 (2003).

Our future freedoms may depend upon what we and others like us do now to educate the world about our democratic ideals and processes.