

SPECIAL REPORT

Reclothing the legal emperor: Justice, equity, and governance in the flat world

Palma Joy Strand, B.S., J.D., LL.M.

Professor of Law, Creighton University Negotiation and Conflict Resolution Program,
palmastrand@creighton.edu

Abstract In *Rules for a Flat World*, Hadfield delivers a paradigm-shifting wakeup call about law coming up short in today's world and proposes creating markets for legal rules to enable the development of broad-based legal infrastructure that can meet current and future demand. I am less confident that markets are the preferred pattern for the emperor's new wardrobe because law hearkens to non-market values. Aspirations to justice and equity lie at the heart of the enterprise of law, and they should be touchstones in transforming law for today's flat world. Moreover, governance today – beyond the government-based governance generally acknowledged by lawyers – is more flat-world-friendly than we may initially realize, and our quest to transform law should be grounded in the robust and vibrant network of deliberation, policy-development and policy-implementation arrangements, and conflict engagement and resolution that already exists.

Keywords: *legal infrastructure, justice, equity, governance*

Gillian Hadfield, in *Rules for a Flat World* (2017), delivers a paradigm-shifting wakeup call about law coming up short in today's world. She describes how law and lawyers aren't available to most ordinary folks in the U.S. (Hadfield, 2017, pp. 113-126) and how foundational legal infrastructure isn't available to the vast majority of people worldwide who make up the "base of the pyramid" (Hadfield, 2017, pp. 281-298). At the same time, she details how law isn't up to the task of regulating cutting-edge businesses, which are rapidly innovating new institutional arrangements in the supercharged 21st-century global marketplace (Hadfield, 2017, pp. 167-195).

Hadfield's diagnosis is systemic. Our *system* of law, designed for the big-box business environment of the mid-20th century, cannot keep pace with today's networked world. Our *system* of providing legal services renders lawyers unavailable to individuals who are not rich, while boxing non-lawyers out of the market. An essential *system* of legal infrastructure enabling people to plan and invest in themselves and their lives simply doesn't exist in much of the world.

Hadfield's diagnosis is profound and profoundly disruptive, her description and documentation of that diagnosis searching and sophisticated. The legal emperor has no clothes – though lawyers, the ABA, and legal education are all busily engaged in fabricating fictional pomp and finery.

This description is also a call to action. As law professor Bill Henderson writes, Hadfield is "speaking to us as political and social actors...telling us that the legal institutions that we operate within – and take for granted like the air we breathe – are ... on a collision course with complexity wrought by globalization and a rapidly flattening world" (Henderson, 2017). If we think she is right, then those of us who are lawyers are part of the problem and are called to be part of the solution.

Hadfield's market-based prescription for this dysfunction is deeply rooted in her background and training in economics as well as law. She proposes creating markets for legal

rules to enable the development of broad-based legal infrastructure that can meet current and future demand (Hadfield, 2017, pp. 246-277). Government will be a super-regulator of the regulators, protecting the public's interest (Hadfield, 2017, pp. 275-277). She also proposes breaking apart the lawyer/ABA monopoly on legal services and opening up access to the legal system to a broader range of legal professionals.

I am less confident that markets are the preferred pattern for the emperor's new wardrobe because law hearkens to non-market values. Aspirations to justice and equity lie at the heart of the enterprise of law, and they should be touchstones in transforming law for today's flat world. Moreover, governance today – beyond the government-based governance generally acknowledged by lawyers – is more flat-world-friendly than we may initially realize, and our quest to transform law should be grounded in the robust and vibrant network of deliberation, policy-development and policy-implementation arrangements, and conflict engagement and resolution that already exists.

Justice

Hadfield follows Lon Fuller in defining law as “the enterprise of subjecting human conduct to the governance of rules” (Hadfield, 2017, p. 19). This definition, however, ignores questions that are foundational and fundamental to law – the “ought” and “should” normative questions with which law struggles.

The words carved over the majestic doors to the United States Supreme Court – “Equal Justice Under Law” – invoke the ideal of justice in and through law. Similarly, a quotation from Justice Cardozo is emblazoned high on an outside wall of the University of California Berkeley Law School: “You will study the precepts of justice, for these are the truths that through you shall come to their hour of triumph” (Block, 2017). Another definition of law, less august and more down-to-earth, is taken from Kyle Harper's class on law and justice at the University of Oklahoma: “law is the meeting point between the theory and practice of justice” (Harper, 2015).

My own working definition of law is that “law is the project of determining how we will be with each other.” This includes rules; it also includes processes for navigating conflicts of many kinds as well as social norms and customs.¹ This definition includes legislation and regulation, agreements, everyday negotiations. Expansive and sociological, it recognizes the intertwining of formal articulated laws and informal everyday interactions (Strand, 2009; Strand, 2011).

My view of law highlights the bottom-up or civic nature of law and law's grounding in the voice of and resonance with the community law governs. In this view, law emerges from the interactions of and relationships among the governed (Strand, 2009). This understanding of the complex adaptive system nature of law is in tension with a hierarchical top-down view of law. In the latter, law is conducted to preserve elite power and is more centralized and less flexible than the markets to which Hadfield contrasts it. In the former, law already encompasses much of the decentralized flexibility, which characterizes markets, that Hadfield seeks.

If law is the project of figuring out how to be with each other, then justice is an integral part of law. How can we sort this out without notions of what's fair between us as individuals, what's right in terms of relationships between groups, what's healthy and sustainable in terms of how individuals connect to the whole? Law is a continual conversation around how things should be as well as how they are.

One of my favorite stories from Hadfield's book is her description of the evolution of rules to protect claims during the California Gold Rush (Hadfield, 2017, pp. 20-22). These rules emerged from interactions among the gold miners rather than being imposed by an

¹ Compare Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1994) Harvard University Press, for whom norms fall outside of law.

external authority. Hadfield states that “[t]he rules weren’t necessarily what everyone thought was fair” (Hadfield, 2017, p. 22). Yet because there was no external authority and the rules were in fact widely respected and followed, there must have been a widespread sense that they were fair enough, or *just* enough – at least for those who were empowered to assert their own interests.

During the years I taught Professional Responsibility to law students, I required each student to reread the essay that she had submitted with her application to law school and to reflect on her personal and professional journey since that time. Most of the students were 2Ls, about halfway through their legal education.

Many of the admissions essays referred to law and a legal career in terms of justice. And yet quite a number of students observed that they had come to feel alienated from their ideals. They reflected that their foundational legal training had not only not given them a grounding in how law promotes justice; it had instead encouraged them to bracket justice from their legal studies.

There is a hunger for justice and a hunger for conversations about justice that law today is not fulfilling. Law is not only inaccessible, as Hadfield demonstrates; law is also unsatisfying.

Justice is elemental in transforming the system of law. While the practical contours of the flat world call for institutional arrangements that are more supple than 20th-century bureaucracies, human imperatives demand that justice be a core value of law.

Equity

Hadfield highlights legal infrastructure as the “platform on which we build” law (Hadfield, 2017, p. 87). “In our increasingly connected world, more and more of the resources we use to build our businesses, our organizations, and our relationships come from infrastructure” (Hadfield, 2017, p. 87). Today, “law is ubiquitous because there are so many points of contact and potential conflict points between us” (Hadfield, 2017, p. 90).

And yet current legal infrastructure is inadequate to support flat-world needs. Legal infrastructure in the U.S. and other developed countries is tied to the nation-state and is clunky, boxy, and bureaucratic (Hadfield, 2017, pp. 168-169). Legal infrastructure globally is inchoate and embryonic (Hadfield, 2017, p. 283; De Soto, 2000).

An important aspect of infrastructure – including legal infrastructure – is its widespread availability. Because infrastructure is essential, access to infrastructure is an equity as well as an economic issue. Before the word “infrastructure” accelerated into popular usage in the 1980’s, “public works” was the term of the day. Planner Alex Marshall observes, “Building roads and bridges where none existed before – ‘public works’ – is one thing. Viewing such projects as interconnected, mutually dependent systems that move us from place to place and serve as a primary engine of commerce – ‘infrastructure’ – is quite another” (Marshall, 2015).

The shift away from “public” de-emphasizes the overall purpose of infrastructure: benefitting the population as a whole. Infrastructure – including legal infrastructure – should be available to all. “Equal Justice Under Law” promises equity as well as justice. Equal justice under law means that everyone has access to law, which includes being able to pay for it.

Law professor and economist Brett Frischmann has delved deeply into the economics of infrastructure, concluding: “Society is better off sharing infrastructure openly ... [A]lthough many people question the feasibility of sharing, worrying that sharing will destroy incentives to invest or will lead to overuse, such concerns are greatly overrated” (Frischmann, 2012, p. xiii). Frischmann asserts that managing infrastructure as a commons “creates a spillover-rich environment, where spillovers flow from the many productive activities of users” (Frischmann, 2012, p. xv). Moreover, consumers of infrastructure “generally dislike and react negatively to discrimination” (Frischmann, 2012, p. xv).

In prior work, I have explored how scarcity in quality public education invites well-off parents to invest in private educational supplements for their children, solidifying inequality and dampening social mobility (Strand-St. Louis, 2015). Failure to provide quality educational infrastructure for all children is discrimination, yet this kind of discrimination in the provision of infrastructure is not actionable under current law (Strand-Hastings, 2015).

Law currently fails to grapple in any satisfying way with the privatization of infrastructure. Private security forces now outnumber police. Defense contractors outnumber military personnel. In terms of legal infrastructure, private arbitration as an alternative to public litigation has been enthusiastically endorsed by the U.S. Supreme Court.

The lack of access to legal services and legal infrastructure that Hadfield describes constitutes an equity issue, an issue that marketizing will not address. When educational infrastructure is available to some and not to others, the rich stay rich and the poor stay poor. What is the result when legal infrastructure is available to some and not to others? Tenants without lawyers get evicted, and landlords benefit (Desmond, 2017). Criminal defendants without resources plead guilty when those with private lawyers would not. Families lose property because they don't have access to estate planning (Strand 2010).

Equity is a fundamental aspiration in law, and equity should be a lodestone in designing and providing legal infrastructure.

Governance

Hadfield's advocacy of markets for rules to keep up with the 21st-century flat world rests on the view that government-based rulemaking leads to ever-increasing complexity, while "these rule-making machines don't experience much of ... the costs of the complexity they produce" (Hadfield, 2017, p. 209). She concludes: "The pressure to...find the sweet spot between increased complexity costs and increased benefits [comes] from the market..." (Hadfield, 2017, p. 211). We are "looking for...the iPhone of law. We shouldn't expect to get it without figuring out how to get more markets into the legal infrastructure business" (Hadfield, 2017, p. 211).

Hadfield's analysis implicitly recognizes the distinction between government and governance. Government consists of the lumbering and creaky bureaucracies of the nation-state and its subsidiary jurisdictions, the current "legal infrastructure" (Hadfield, 2017, p. 86), which generates the rules and regulations commonly considered "law." Governance, however, encompasses not only government but also non-government entities as well as networks of government and non-government entities.

Lawyers often exhibit two biases vis-à-vis governance. First, lawyers focus on top-down national government rather than on bottom-up local government. Every law school in the country requires its students to learn Constitutional Law – the law of the U.S. Constitution. No law school in the country requires students to learn state constitutional law and the law of local governments. And yet states, and local governments to an even greater degree, are the much-bruited "laboratories of democracy" (*New State Ice*, 1932). State and local governments already constitute, to a significant degree, a market for rules (Tiebout, 1956). The State of Delaware, for example, competes successfully in regulating corporations. Cities provide a dizzying array of rules in a wide range of arenas – a living wage, gun control, civil and human rights, environmental regulation, and more (Frug et al, 2015).

Second, lawyers largely ignore non-government governance, which already exists in abundance in the form of conflict resolution and engagement processes,² collaborative

² "Non-law" conflict resolution and engagement processes include mediation, negotiation, arbitration, facilitation, restorative justice, truth and reconciliation, dialogue, visioning, civic engagement, and more. For a guide to a small number of the processes that fall in the category of civic engagement for governance, see Melinda Patrician & Palma Strand, *Arlington's Changing Story: Civic Engagement in*

governance (Emerson & Nabatchi, 2015; Ansell & Gash, 2008), and governance networks of government and non-government entities (Salamon, 2002). Perhaps this is because of lawyers' lesser involvement in governance not controlled by the government. Perhaps it is because lawyers have been taught that law is government and government is law and simply don't see or discount non-government governance. Perhaps it is because non-government governance often has a fluidity and improvisational quality inconsistent with the lawyer's traditional emphasis on precedent and continuity.

Governance that arises from local variation and governance that relies on non-government entities already exist in abundance. Moreover, these governance regimes are already enmeshed and coordinating with centralized top-down government, and they already embody many of the characteristics of markets in terms of being bottom-up and self-organizing. And, however imperfectly, they are grounded in the values of justice and equity – unlike markets, which are agnostic to these values.

In transforming our legal infrastructure for today's flat-world needs, we should first acknowledge and inventory the governance infrastructure that already exists. We should develop an understanding of how this governance infrastructure works, alone and in connection with what we currently define as legal infrastructure. And we should expand our definition of legal infrastructure.

Expanding our definition of legal infrastructure will trigger expanding our definition of law. Law is about more than rules; law is about all kinds of processes and relationships that enable us to coordinate and negotiate and live together.

References

- Ansell, C., & Gash, A., Collaborative Governance in Theory and Practice, *Journal of Public Administration Research and Theory*, Vol. 18, Issue 4 (Oct. 1, 2008) pp. 543-571
- Block, K.P. "Can't read the writing on the wall?" Medium (Aug. 16, 2017)
<https://medium.com/@campusdesign/cant-read-the-writing-on-the-wall-262e5201e0a0>
- De Soto, H. *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000) Basic Books.
- Desmond, M. *Evicted: Poverty and Profit in the American City* (2017)
- Emerson, K. & Nabatchi, T. *Collaborative Governance Regimes* (2015) Georgetown University Press
- Frug, G., Ford, R. & Barron, D. *Local Government Law: Cases and Materials* (6th ed.) pp.. (2015) West Academic Publishing.
- Hadfield, G., *Rules for a Flat World: Why Humans Invented Law and How to Reinvent it for a Complex Global Economy* (2017) New York, NY: Oxford University Press.
- Harper, K. <https://janux.ou.edu/course.tag-nextthought-com-2011-10-nti-courseinfo-fall2015-clc-3403.html>
- Henderson, W. "Losing the Scholarly Pose," PrawfsBlawg (Feb. 24, 2017)
https://prawfsblawg.blogs.com/prawfsblawg/2017/02/losing_the_scholarly_pose.html
- Marshall, A. "Why the Word 'Infrastructure' Replaced 'Public Works,'" *Governing* (August 2015)
<http://www.governing.com/columns/transportation-and-infrastructure/gov-the-word-infrastructure.html>.
- New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., for the majority).
- Salamon, L. *The Tools of Governance: A Guide to the New Governance* (2002) Oxford: Oxford University Press.
- Strand, P.J. "Law as Story: A Civic Concept of Law," *Southern California Interdisciplinary Law Journal*, Vol. 18, pp. 603-650 (2009)
- Strand, P.J. "Inheriting Inequality: Wealth, Race, and the Laws of Succession," *Oregon Law Review*, Vol. 89 pp. 453- (2010).
- Strand, P.J. "The Civic Underpinnings of Legal Change: Gay Rights, Abortion, and Gun Control," *Temple Political & Civil Rights Law Review*, Vol. 21, pp. 117- (2011).
- Strand, P.J. "Education-as-Inheritance Crowds Out Education-as-Opportunity," *St. Louis University Law Journal*, Vol. 59, pp. 283- (2015).
- Strand, P.J. "Racism 4.0, Civity, and Re-Constitution," *Hastings Constitutional Law Quarterly*, Vol. 42 pp. 763- (2015).
- Tiebout, C. "A pure theory of local expenditures," *Journal of Political Economy*, Vol. 64 (October) pp. 416-424 (1956).

Arlington County, Virginia (2003) pp. 40-46
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1510267