

# Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum\*

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\* Squaw Valley, California, near Lake Tahoe, August 3-4, 2005.

\*\* PROFESSORS OF LAW, UNIVERSITY OF THE PACIFIC MCGEORGE SCHOOL OF LAW. WE WISH TO EXTEND OUR APPRECIATION TO ALL OF THE PARTICIPANTS AT THIS WORKSHOP. WE ALSO WISH TO THANK THE FOLLOWING STUDENTS, WHO TOOK NOTES OF THE PROCEEDINGS AT THE WORKSHOP: CHRISTINA MORKNER-BROWN, KEN CHIU, CHAD COUCHOT, CHANDRA FERRARI, BREANN HANDLEY, DAVID KEYZER, ADAM KOSS, AND MATTHEW LOPAS.

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I. INTRODUCTION

On August 3rd and 4th of 2005, the Pacific McGeorge Center for Global Business and Development sponsored a workshop at Squaw Valley, California near Lake Tahoe. At this workshop, professors from thirty-one law schools in the United States and Canada met to discuss how to introduce international, transnational and comparative law issues into the core curriculum. This Report provides a summary of those discussions.

For many years, the curriculum at most law schools has included courses addressing issues in international, transnational and comparative law. These courses, however, traditionally have been electives, and only a fraction of law school graduates have taken such electives. In recent years, a growing number of faculty at various law schools have become convinced that increasing globalization makes exposure to international, transnational, and comparative law topics important to the vast majority, if not all, of law school graduates.<sup>1</sup> In order to design curricular changes to ensure that the vast majority, if not all, of law school graduates have exposure to issues of international, transnational, and comparative law, the Pacific McGeorge Center for Global Business and Development decided to organize this workshop.

The participants at the workshop (who are listed in Table 1) were invited based upon two criteria: They are leading professors in one of the seven subjects traditionally considered to make up most of the core law school curriculum—Civil Procedure, Constitutional Law, Contracts, Corporations, Criminal Law and Procedure,<sup>2</sup> Property and Torts—and (or) they have expertise in international, transnational, or comparative law. In other words, these professors generally have a foot planted both in the domestic and in the international arenas. The workshop consisted of both small group discussions, in which professors teaching the same core subject explored issues unique to their subject, and plenary discussions, which addressed issues relevant to all participants. There were four sessions. The first addressed the goals for introducing international, transnational, and comparative law issues into the core curriculum. The second

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1. Elizabeth Rindskopf Parker & Franklin Gevurtz, *A Curricular Core for the Transnational Lawyer*, available at <http://www.aals.org/international2004/papers.html>; Louis Del Duca, *Suggested Discussion Topics: Strategies for Internationalizing Law School Curricula—Challenges & Opportunities*, available at <http://www.aals.org/international2004/papers.html>; Mathias Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 PENN ST. INT'L L. REV. 397 (2004); M.C. Mirow, *Globalizing Property: Incorporating Comparative and International Law into First-Year Property Classes*, 54 J. LEGAL EDUC. 183 (2004); Hiram E. Chodosh, *Globalizing the U.S. Law Curriculum: The Saja Paradigm*, 37 U.C. DAVIS L. REV. 843 (2004); Stephen H. Legomsky, *Globalization and the Legal Educator: Building a Curriculum for a Brave New World*, 43 S. TEX. L. REV. 479 (2002); Charlotte Ku & Christopher J. Borgen, *American Lawyers and International Competence*, 18 DICK. J. INT'L L. 493 (2000).

2. We are treating this as one subject matter, recognizing, however, Criminal Law and Criminal Procedure typically are taught in separate courses. The overlap in the faculty teaching these courses made it more practical to have one group at the workshop for Criminal Law and Procedure.

session considered implementation strategies for introducing such issues into the core curriculum in order to achieve the goals identified in the first session. The third session identified, and considered ways to overcome, challenges to implementing the strategies suggested in the second session. The fourth session wrapped up with concrete steps that participants would take to follow up on the workshop. This Report follows this four-part organization.

**TABLE 1**  
**LIST OF PARTICIPANTS**  
**(By Subject Area)**

**Civil Procedure**

*Thomas O. Main*, Associate Professor of Law, University of the Pacific McGeorge School of Law

*Richard L. Marcus*, Distinguished Professor & Horace O. Coil ('57) Professor of Law, University of California, Hastings College of the Law

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*Louis F. Del Duca*, A. Robert Noll Professor of Law, Associate Dean & Director, Center for International and Comparative Law, Pennsylvania State University, Dickinson School of Law

**TABLE 1**  
**LIST OF PARTICIPANTS**  
**(By Subject Area)**

*Victor P. Goldberg*, Thomas Macioce Professor of Law and Co-director of the Center for Law and Economic Studies, Columbia Law School.

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*Franklin A. Gevurtz*, Professor of Law, University of the Pacific McGeorge School of Law and Director of the Pacific McGeorge Institute for Global Business

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*Peter J. Henning*, Professor of Law, Wayne State University Law School

*Stephen H. Legomsky*, Charles F. Nagel Professor of International and Comparative Law, Washington University School of Law

*William T. Pizzi*, Professor of Law, University of Colorado School of Law

**International (General)**

*Mathias W. Reimann*, Hessel E. Yntema Professor of Law, University of Michigan Law School

*Elizabeth Rindskopf Parker*, Dean and Professor of Law, University of the Pacific McGeorge School of Law

**TABLE 1**  
**LIST OF PARTICIPANTS**  
**(By Subject Area)**

**Property**

*Duncan Baker Hollis*, Assistant Professor of Law, Temple University, James E. Beasley School of Law

*Errol E. Meidinger*, Vice Dean for Interdisciplinary Studies & Professor of Law, State University of New York at Buffalo School of Law

*Matthew C. Mirow*, Associate Professor of Law, Florida International University College of Law

*Patrick A. Randolph, Jr.*, The Elmer F. Pierson Professorship and Professor of Law, University of Missouri-Kansas City School of Law

*John G. Sprankling*, Distinguished Professor and Scholar, University of the Pacific McGeorge School of Law

**Torts**

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*Rogelio A. Lasso*, Professor of Law, John Marshall Law School

*Lawrence C. Levine*, Professor of Law, University of the Pacific McGeorge School of Law

*Ellen S. Pryor*, Homer R. Mitchell Professor of Law & University Distinguished Teaching Professor, Southern Methodist University Dedman School of Law

*Anthony J. Sebok*, Centennial Professor of Law, Brooklyn Law School

*Ernest Weinrib*, University Professor & Cecil A. Wright Professor of Law, University of Toronto, Faculty of Law

*Ellen Wertheimer*, Professor of Law, Villanova University School of Law

Before turning to the substance of the Report, it is useful to address a couple of matters of definition. During early planning for the workshop, it was common to refer to globalizing the curriculum as introducing “international issues.” The imprecision in this terminology often produced questions: Was this just about issues involving public international law? What about so-called private international law? What about comparative law? Does dealing with a treaty such as the United Nations Convention on the International Sales of Goods, which is part of U.S. law for cross-border sales, constitute international law or comparative law or otherwise fit within the intent of the initiative to “globalize the curriculum?” After fielding such questions, we realized that it was important to be more precise and to indicate the breadth of our intent by using the expression “introducing international, transnational, and comparative law issues.” International law and comparative law are (we hope) commonly understood

categories, while transnational law picks up any transaction or dispute that, in some manner, crosses national boundaries.

We also have been referring to introducing international, transnational, and comparative law issues into the “core curriculum.” We might have used the term “required curriculum,” except that many law schools do not require courses beyond the first year—even though the faculty at such schools typically expect virtually all students to take certain fundamental courses during their second or third year. For the most part, core curriculum can be defined by our objective, which is to familiarize the vast majority, if not all, students with international, transnational, and comparative law issues—in which case, core curriculum refers to required courses or courses which the school expects virtually every student to take. While we recognize that the seven traditional core subjects around which we organized the workshop do not constitute the entire core curriculum at most schools, we felt that this would give us a critical mass, without reaching an unwieldy size, for the workshop.

## II. GOALS

In creating the agenda for the workshop, we decided it would be useful to have the participants articulate clearly what they hoped to accomplish by “globalizing the curriculum” before launching into a discussion of how to do so. Accordingly, the first session of the workshop addressed the goals to be achieved by introducing international, transnational, and comparative law issues into the core curriculum. There were two aspects to this discussion. To begin, the participants engaged in a broad pedagogic discussion of why law schools should, if indeed they should, introduce international, transnational, and comparative law issues into the core curriculum. Next, given the purposes identified for introducing international, transnational, and comparative law issues to most all students, the participants asked whether it was possible to construct a canon of what the well educated law school graduate should know about international, transnational, and comparative law.

### *A. Purposes for Globalizing the Curriculum*

Not surprisingly, given the nature of professors attending a workshop on globalizing the law school curriculum, the consensus of the participants was in favor of introducing international, transnational, and comparative law issues into the core curriculum. The participants, however, differed in their reasons for encouraging this action. There were three basic reasons expressed by the participants. While these three reasons are by no means mutually exclusive, not all of the participants subscribed to all three of the reasons.

1. *Improved Understanding and Application of Domestic Law*

Most of the participants favored introducing international and comparative law issues into the required curriculum for the purpose, at least in part, of improving student understanding and application of domestic law; indeed for many participants this was *the* reason for such an initiative. This rationale reflects the governing tenet among law professors that students will have an impoverished understanding and ability to apply the law, even as currently adopted in a single jurisdiction, without being aware of alternatives to the current law in the jurisdiction.

Exploring alternatives allows students to see that human societies face common problems and that there are often multiple ways in which the law can address those problems. As one participant put it, exploring how other nations address a particular legal issue allows students to see that “there is more than one way to build a car.” This counteracts the tendency among law students to assume that rules currently adopted in their jurisdiction are necessarily the only, or at least the best, way to address an issue. For instance, the participants teaching Civil Procedure wanted students to recognize the unusual nature of the rules of Civil Procedure in the United States, and thereby to “upset the students’ unquestioning acceptance of American legal principles.” Beyond opening students’ minds to alternative choices, exploring why different jurisdictions have selected other approaches allows students to see the policy tensions that exist in picking between the different rules.

Sometimes, instead of illustrating variation, introduction of international and comparative law will demonstrate a substantial convergence between the laws of different jurisdictions on a particular issue. In this event, making students aware of such convergence can help students to understand why the balance of policy favors the commonly adopted approach. Moreover, to the extent that jurisdictions are moving from different approaches to converge upon a particular rule, this might help students to appreciate the probable direction in the law in their jurisdiction. Of course, whether there will be convergence between different approaches, and, if so, in what direction, can become (as it has, for example, in corporate law) the subject of substantial scholarly debate.

During the discussion, the participants considered a challenge to this rationale for introducing international and comparative law issues into the core curriculum; specifically, that there are other ways in which students can become aware of alternatives. For example, students can read dissenting opinions, consider approaches followed by various states within the United States, and explore the historical development of the law on the issue. Indeed, one advantage to these means of exposing the students to alternate legal approaches is that they do not require that students become aware of the broader context in which a foreign legal rule on a particular issue operates.

Nevertheless, the participants generally concluded that there are advantages to adding comparative and international law to these more traditional approaches



to showing alternatives. Sometimes, variations between states within the United States are minor to non-existent—as, for example, in areas governed by the Uniform Commercial Code. Sometimes, variations between states within the United States fail to raise the fundamental issues exposed by the more substantial differences found outside the United States, where, for example, many nations do not employ the adversary system central to United States Civil and Criminal Procedure. Dissenting opinions (for example in Supreme Court opinions dealing with Constitutional Law) often can be a very dense source for considering alternative approaches when such opinions are highly focused on the case and doctrine at hand—with the result that the students can lose sight of the broader policies and possibilities. Exploring the historical development of the legal rule—at least for students who subconsciously associate change with improvement—reinforces a built-in bias that the current rule is necessarily the best.

2. *Preparing for the Practice of Law in an Era of Increasing Globalization*

A second rationale for introducing international, transnational, and comparative law issues into the core curriculum came from the view of many participants that increasing globalization makes it likely that a substantial proportion of law school graduates will confront future situations in which they must deal with such issues. Most participants seemed to agree that the prospects for this occurring vary with the subject matter. Contractual transactions present a significant likelihood for this occurrence. The United Nations Convention on the International Sale of Goods (“CISG”) is the governing law for contracts dealing with the sale of goods between the United States and other countries (unless the parties contract for a different choice of law),<sup>3</sup> and, participants teaching Contracts pointed out, any purchase of goods over the Internet these days could easily involve such a cross-border contract. In the area of Criminal Law, some participants expressed the concern that many defense attorneys, whose clients are foreign nationals, currently fail to provide competent defense due to the attorneys’ ignorance that international and transnational law might be relevant to their clients’ cases. At the other end of the spectrum, there is probably less prospect that real estate attorneys will need in the foreseeable future to apply international, transnational, or comparative law—and so coverage of international and comparative law in a Property course serves principally as a tool to increase understanding of domestic law.

It turned out, however, that the notion of introducing international, transnational, and comparative law into the core curriculum for the purpose of preparing students for issues that graduates increasingly may encounter in practice engendered disagreement among the participants. There were two bases

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3. *Infra* text accompanying notes 53-55.

for this disagreement. The first involved the question of what proportion of future attorneys will confront such issues. Many participants believed that this might depend upon the student profile and geographic location of each law school. Other participants, however, believed that international, transnational, and comparative law issues will confront a much broader swatch of practitioners than just those working in large law firms in coastal cities or otherwise specializing in international practice. One participant noted that the family law clinic operated by his law school in a small mid-western town faced numerous transnational issues. One participant concluded that this was ultimately an empirical question upon which it might be useful to gather data (albeit, the forward-looking aspect of this question makes such data collection less than straightforward).

A second basis for this disagreement was more fundamental insofar as it reflected different educational philosophies, rather than different empirical assessments. Many participants, at least to varying degrees, were of the view that the purpose of legal education was to develop analytical skills, rather than to teach students any particular set of legal rules. As one participant put it, the effort to introduce international, transnational, and comparative law issues into the core curriculum “is part of the larger enterprise of preparing students to enter a profession where they will be applying rules that do not yet exist to problems that have not yet occurred.” Under this philosophy, it is not important that students graduate from law school with any particular knowledge of international, transnational, or comparative law issues, since they can research such areas of law (or refer the matter to specialists in the applicable law) as issues arise in practice. Indeed, one participant expressed the concern that a lawyer, who had received a superficial introduction to international, transnational, or comparative law, might be more of a hazard than would the lawyer who recognized that he or she was completely ignorant on the topics.

On the whole, the participants agreed that law schools could not hope to provide students with sufficient details concerning international, transnational, and comparative law issues—at least through core courses, rather than in specialized electives—so that graduates could address such issues based upon coverage in law school. Rather, as is also true with many, if not most, issues in domestic law introduced in core courses, the goal is to warn students that the issues exist so that graduates are on notice to research issues instead of missing them. Moreover, just as this notice function with respect to domestic law probably would not be fulfilled if students in Contracts, for example, simply learned that there are unspecified requirements in the United States for the formation of a contract, the notice function as far as international, transnational, and comparative law issues might not be fulfilled if what students simply hear is that international and foreign laws might be relevant and different, without any effort to provide some examples of where and how such laws might be relevant and different.

*3. Other Goals: Leadership in the Global Community*

During welcoming remarks by Dean Elizabeth Rindskopf Parker, the participants heard a very different goal expressed for introducing international and comparative law issues into the core curriculum. This goal did not focus on the role of lawyers in practicing law, as did the goals of improving the understanding of domestic law or preparing graduates to deal with legal issues raised by increasing globalization. Instead, it focused on the role of lawyers as members, if not leaders, of the broader community of citizens. In this role, knowledge of international and comparative law might make graduates less insular in their outlook on the world and on the U.S. role in the world. Of course, one might ask why this function should be limited to law schools, as opposed to the university in general, and, indeed, among the guests at the workshop was a dean from the University of the Pacific's College of the Pacific, who is seeking to globalize the liberal arts curriculum.

*B. What Should the "Well-educated" Law School Graduate Know About Global Issues?*

Disagreement about the purposes for introducing international, transnational, and comparative law issues into the core curriculum precluded developing a consensus on a canon of what the well-educated law school graduate should know about such issues. As one participant summed up the opposition to the idea of such a canon, "Asking what the well-educated lawyer should know is asking the wrong question. The focus must be methodological: Do students know how to think about legal problems, how to argue, how to find sources of law and argument?" Nevertheless, a large number of participants did express views on what the well-educated law school graduate should know about international, transnational, and comparative law.

As a starting point from which to explore what the well-educated law school graduate should know about international, transnational, and comparative law, the participants heard a presentation from Professor Mathias Reimann, in which he set out the contents of the course in Transnational Law that all students at the University of Michigan's law school are required to take. This course covers five basic subject areas:

- (i) Actors on the international scene: Here, the students receive an introduction to who the players are in international and transnational law, including nation states, regional and other international organizations, non-governmental organizations (NGOs), individuals and corporations;
- (ii) Sources of law: Here, the students learn what are the major sources of law with which an international lawyer would deal—including

treaties, customary international law, general principles, regulations, “soft law,” and private contracts—and where these sources have power and where they do not;

- (iii) Basic principles of international law: Here, students are introduced to state sovereignty and its limits, comity, the major bases of international jurisdiction, as well as the rights of individuals under international law;
- (iv) Resolution of disputes in the international arena: Here, students receive an introduction to specialized international, regional, and ad hoc tribunals that deal with transnational disputes; and
- (v) Interplay between international and domestic law: Here, students are exposed to constitutional law issues involving international law and the impact of international law on domestic law (but do not receive an introduction to comparative law generally).

In addition to the subjects covered in the University of Michigan’s required course, a number of participants in the workshop expressed the view that the well-educated law school graduate should be familiar with the following general aspects of international, transnational, and comparative law:

- (i) The basic differences between the civil and common law systems;
- (ii) How legal systems in different nations may differ in their views regarding the role of law;
- (iii) How different philosophies and ideas of justice affect the law in different nations;
- (iv) How world events affect legal systems;
- (v) The limits of their understanding and knowledge regarding international, transnational, and comparative law;
- (vi) The basic techniques and sources for conducting legal research and otherwise finding answers for legal problems in different nations; and
- (vii) The impact of culture on dealing with foreign laws, lawyers, and organizations.

In addition to these broad concepts, participants in the Contracts discussion group had some goals specific to Contracts as to what the well-educated law school graduate should know. Because these subject-specific goals overlap with

the question of what examples of international, transnational, and comparative law issues might be introduced in a Contracts course, they will be addressed in the discussion of implementation.

### III. IMPLEMENTATION

The second session of the workshop addressed methods for introducing international, transnational, and comparative law issues into the core curriculum in order to meet the goals outlined in the first session. This session operated on two levels: On a macro level, the session considered the broad curricular question of whether to introduce international, transnational, and comparative law issues through a separate course or courses devoted to these topics, or whether to introduce these issues through coverage in what traditionally have been domestically focused core courses. On a micro level, seven break-out discussion groups composed of participants who taught the same core subjects explored what international, transnational, and comparative law issues could be introduced into their core courses.

#### *A. Overall Methods for Globalizing the Curriculum*

Law schools that are presently seeking to introduce international, transnational, and comparative law issues into the core curriculum have taken a number of different approaches. At one end of the spectrum, the law school at the University of Michigan, for the last several years, has required its students to take a course in Transnational Law—the broad contents of which were set forth earlier in this Report. While students can complete this course in any year of their legal education, most opt to take the course during their first year. (During the course of the workshop, participants, as convenient shorthand, began referring to requiring a course in Transnational Law as the “Michigan model.”)

At the other end of the spectrum, professors at a number of schools, including the University of the Pacific, McGeorge School of Law, are working to establish a pervasive approach. Under this pervasive approach, professors teaching traditionally domestically oriented core courses integrate international, transnational, and comparative law issues relevant to their particular subject matter into these traditionally domestically oriented core courses. Through such coverage of subject-specific international, transnational, and comparative law issues, students also should gain exposure to general concepts in international, transnational, and comparative law, in much the same manner that subject-specific coverage of domestic law in core courses also exposes students to the fundamental concepts in United States law (e.g., federalism, the adversary system, common law reasoning). (During the course of the workshop, participants, as convenient shorthand, began referring to such a pervasive approach as the “McGeorge model.”)

In between these approaches, there are other variations. For example, at Georgetown University's law school, students are required to select among mini-courses in international, transnational, and comparative law topics, which the students take between the fall and spring semesters. Unlike Michigan's required course in Transnational Law, these mini-courses are designed to coordinate with a particular domestic core course—so, for example, one of the options students might select is a mini-course raising international, transnational, or comparative law issues involving perhaps tort law. In contrast, however, with the pervasive approach, students cover international, transnational, and comparative law issues related to one of their core courses in a separate course, rather than as part of the students' study of domestic law.

The participants recognized that each of these approaches has advantages and disadvantages, and that different approaches may work better at different schools. The possible advantages of the required course in Transnational Law are that it ensures coverage of basic concepts in international and transnational law in a manner that avoids the gaps and duplication possible in a pervasive approach; it uses professors expert in international and transnational law, instead of domestically oriented professors, to cover these topics; and it avoids adding additional coverage to already burdened domestic core courses. Among the disadvantages of the required course in Transnational Law are that it adds a required course to the curriculum at a time in which faculties generally favor reducing the number of required courses.<sup>4</sup> It also imposes resource demands on faculties, who must find enough "internationalists" on the faculty to staff multiple sections of a required course in Transnational Law. Perhaps most significant, it might reinforce a student perception that international, transnational, and comparative law issues are something separate and apart from the "normal" practice of law. That result is counterproductive if the goal of introducing such issues into the core curriculum is for students to develop a consciousness of such issues, as part of situations they might confront without warning and as part of their basic tools for analyzing and understanding domestic law. Indeed, the hope expressed by those responsible for the Michigan course was that it be accompanied by the introduction of international, transnational, and comparative law issues into core domestically oriented courses.

The advantages and disadvantages of the pervasive approach are the flip side of the advantages and disadvantages of the required course in Transnational Law. The pervasive approach seeks to have students view international, transnational, and comparative law issues as part of the overall context of issues, and tools of analysis, with which the attorney might need to deal; it takes less faculty resources, and it avoids controversy in seeking to add another required course to

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4. Columbia's law school has addressed this problem by adding a first year elective in Transnational Law. Because there are only a limited number of electives that students at Columbia can take during their first year, Columbia can encourage the vast majority of students to take the course in Transnational Law if the other first year electives are sufficiently unattractive to students.

the curriculum. On the other hand, without cooperation between faculty, there may be gaps and overlap in coverage of basic concepts in international, transnational, and comparative law. Also, the pervasive approach may encounter resistance from professors who feel that they have insufficient units to cover domestic material or who may be concerned about their expertise to cover these topics. The workshop participants addressed these concerns in a later session in which the participants discussed the challenges confronting efforts to introduce international, transnational, and comparative law issues into the core curriculum.

The consensus of the participants was that, in an ideal world, law schools would combine both the required course in Transnational Law with the pervasive introduction of international, transnational, and comparative law issues throughout the traditionally domestically oriented core courses. The consensus also was that this ideal was not realistic for most law schools.<sup>5</sup> In fact, politically, it would mean asking professors to add international, transnational, and comparative law issues to their existing courses, at the same time the school might need to ask some professors to reduce the units allocated to their existing courses in order to make room for a new required course in Transnational Law.

One question that arose in discussing the pervasive approach was just how pervasive professors should attempt to be. Specifically, some participants began breaking down the pervasive method into a less pervasive approach, in which professors introduce international, transnational, and comparative law issues in a separate unit—which might not be that dissimilar from the Georgetown mini-courses, except that it occurs within the core course—versus a completely pervasive approach, in which professors introduce international, transnational, and comparative law issues as the subjects naturally arise in dealing with the issues otherwise covered in the core course. (These two approaches converge if professors decide to be highly selective and only introduce one or two international, transnational, and comparative law issues into the core course.) An advantage of the separate unit (assuming it occurs toward the end of the course) is that it may avoid overwhelming students with international, transnational, and comparative law issues until they have mastered domestic material in the course. A conceptual disadvantage of the separate unit is that it may isolate international, transnational, and comparative law issues in the students' minds, thereby undermining one of the advantages of the pervasive approach. A practical concern is that leaving the unit on international, transnational, and comparative law issues until the end of the course often will mean running out of time and not covering these issues at all.

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5. This approach is feasible, and has been followed, at Florida International University, where both the law school and the university as a whole have international concerns as their central focus.

B. Subject Specific Examples

1. Civil Procedure

The Civil Procedure discussion group faced a situation rather different than those groups who gathered to discuss *how* their subjects could be globalized. Indeed, the globalization of the American Civil Procedure course has been underway for quite some time.<sup>6</sup> For decades, Civil Procedure students have studied the doctrine of personal jurisdiction with cases involving foreign defendants,<sup>7</sup> and the doctrine of *forum non conveniens* with a case involving foreign plaintiffs.<sup>8</sup> Most contemporary Civil Procedure casebooks already offer some overview of the differences between the common law and civil law traditions.<sup>9</sup> Many Civil Procedure casebooks include a discussion of the unique issues raised by foreign defendants in the context of subject matter jurisdiction.<sup>10</sup> Some casebooks already include a fair amount of comparative, transnational, and international materials interspersed throughout the text.<sup>11</sup> With each new edition, all casebooks appear to be expanding their global perspective in breadth and depth of coverage.<sup>12</sup> Hence, the question is how to improve upon the current coverage of international, transnational, and comparative law issues in Civil Procedure.

In a forthcoming essay in the *American Journal of Comparative Law*, a participant in the Civil Procedure discussion group reviews several recently-published texts that can inform Americans about the procedures of other countries.<sup>13</sup> This review offers a sketch of English, German, and Japanese

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6. See generally Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005).

7. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *Asahi Metal Indus. Co. v. Super. Ct. of Cal.* 480 U.S. 102 (1987).

8. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

9. See, e.g., RICHARD D. FREER & WENDY COLLINS PERDUE, *CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS* 877 (Lexis Nexis 4th ed. 2005); RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, *CIVIL PROCEDURE: A MODERN APPROACH* 13 (West 4th ed. 2005).

10. See, e.g., DAVID CRUMP, WILLIAM V. DORSANEO, III & REX R. PERSCHBACHER, *CASES AND MATERIALS ON CIVIL PROCEDURE* 161 (LexisNexis 4th ed. 2001); Allan Ides & Christopher N. May, *Civil Procedure: Cases and Problems* 323 (Aspen 2002); Stephen C. Yeazell, *Civil Procedure* 236 (Aspen 6th ed. 2004).

11. See, e.g., Geoffrey C. Hazard, Colin C. Tait & William A. Fletcher, *Civil Procedure: State and Federal* (Foundation 9th ed. 2005).

12. Compare STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN & THOMAS O. MAIN, *CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT* (Aspen 2000) with STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN & THOMAS O. MAIN, *CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT* (Aspen 2d ed. 2004) (adding global perspectives in personal jurisdiction, subject matter jurisdiction and discovery chapters). See also RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, *2005 DIGITAL SUPPLEMENT TO MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* (Foundation 8th ed. 2003) (including comparative law materials).

13. Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, \_\_ AM. J. COMP. L. \_\_ (2006) (forthcoming) (reviewing ALI/UNIDROIT, *Principles and Rules of Transnational Civil*



procedure—three countries profiled in four of the works reviewed—and distills certain themes that should be of interest to American proceduralists. The reviewer’s insights and careful citation of other authorities make this essay an excellent starting point for Civil Procedure professors seeking to develop comparative perspective.

Specific ideas for expanding and improving upon course coverage of international, transnational, and comparative law issues can be found in a pair of books (to be published by Thomson-West) by two other participants in the Civil Procedure discussion group. A forthcoming reader collects a variety of perspectives about comparative Civil Procedure.<sup>14</sup> Another forthcoming book entitled *Global Issues in Civil Procedure* offers cases and materials intended specifically to supplement the first year Civil Procedure course with comparative, transnational, and international perspectives.<sup>15</sup> The *Global Issues* manuscript was circulated among participants at the workshop. This book includes ten stand-alone chapters introducing issues regarding access to justice, pleadings, discovery, the jury, personal jurisdiction, service, subject matter jurisdiction, conflict of laws, and enforcement of foreign judgments. The following examples from the book suggest ways in which to increase and improve coverage of international, transnational, and comparative law issues in a Civil Procedure course.

*a. Pleading*

Comparing pleading requirements provides a concrete context in which to introduce students to comparative Civil Procedure. For example, the *Global Issues* book includes a translated excerpt from Article 399 of Spain’s Ley de Enjuiciamiento (LEC). Professors can compare and contrast Spanish pleading requirements with the pleading requirements of the Federal Rules of Civil Procedure on such subjects as the role of pleadings, the requirement of factual specificity, the demand for legal precision, and the pleading of evidence. To facilitate such a comparison, the *Global Issues* book follows the translation of the LEC with a series of explanations and questions comparing the LEC with the Federal Rules of Civil Procedure.

Such comparisons in a concrete, if technical, context can serve a couple of goals. Comparative law is often described as providing both a window into other cultures as well as a mirror for one’s own. Increased tolerance, respect, and

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Procedure (2005); Neil Andrews, *ENGLISH CIVIL PROCEDURE* (2003); Carl F. Goodman, *JUSTICE AND CIVIL PROCEDURE IN JAPAN* (2004); Kuo-Chang Huang, *INTRODUCING DISCOVERY INTO CIVIL LAW* (2003); Peter L. Murray & Rolf Stürner, *GERMAN CIVIL JUSTICE* (2004); Adrian Zuckerman, *CIVIL PROCEDURE* (2003)).

14. LINDA J. SILBERMAN, OSCAR G. CHASE, HELEN HERSHKOFF, YASUHEI TANIGUCHI, VINCENZO VARANO, AND ADRIAN A. S. ZUCKERMAN, *COMPARATIVE CIVIL PROCEDURE: A BOOK OF READINGS* (West 2006).

15. THOMAS O. MAIN, *GLOBAL ISSUES IN CIVIL PROCEDURE: CASES AND MATERIALS* (West 2005).

understanding are among the values that comparativism promotes; that others can do things differently yet still succeed is an important reminder. But there are other more concrete benefits: to be an effective advocate, students must be prepared to deal effectively with foreign systems and foreign lawyers. Our students are unlikely ever to practice in a Spanish court, but their clients may well find themselves there (perhaps even voluntarily, as plaintiffs). Moreover, foreign legal systems can be sources for data and ideas about the causes of and solutions to universal problems. Indeed, comparative inquiry may be especially worthwhile since the pleading requirement of Fed. R. Civ. P. 8(a) is again on the agenda of reforms under consideration by the Advisory Committee on Civil Rules.

*b. Discovery*

Discovery is an area in which law school graduates may increasingly confront international, transnational, and comparative law issues. Moreover, foreign resentment at discovery practices under United States civil procedure, at least when the impact of such practices spills over to foreign defendants and jurisdictions, makes this an area in which students could benefit significantly from understanding comparative perspectives. Hence, this is an area in which additional materials looking at international, transnational, and comparative law issues would be most useful.

As an example of how to approach the international, transnational, and comparative law issues raised by discovery, the chapter on discovery in the *Global Issues* book begins with a comparative focus—specifically, a look at various national practices for gathering evidence. Not only does such a comparative look have a practical import for future attorneys, who might face the need to acquire evidence located abroad, but also, by understanding the difference in national practices for gathering evidence, students may come to understand some of the foreign resentment directed toward United States discovery practices. (Such a comparative analysis may also give students greater perspective into resentment in the United States directed at liberal domestic rules for discovery.) With this comparative background in place, the professor can then consider issues of transnational law by exploring the conflicts that can develop when documents or other evidence are located in a foreign country that has a more restrictive approach to discovery. Materials to explore here (and dealt with in the *Global Issues* book) are the basic mechanics of the Hague Evidence Convention,<sup>16</sup> and the challenges introduced by *Société Nationale Industrielle Aérospatiale v. United States District Court*.<sup>17</sup> It is also highly useful to consider (as does the chapter in the *Global Issues* book) international reform efforts to

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16. Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, available at [http://www.hech.net/index\\_en.php?act=conventions.text&cid=82](http://www.hech.net/index_en.php?act=conventions.text&cid=82).

17. 482 U.S. 522 (1987).

find common ground for discovery; particularly, the discovery rules that are part of the Rules of Transnational Civil Procedure proposed by the ALI and UNIDROIT.

*c. Service*

Service of process is another subject that easily lends itself to the incorporation of a transnational perspective. Because Federal Rule 4 has procedural minutiae uncharacteristic of the Federal Rules of Civil Procedure, its exploration can be a worthwhile endeavor; and the mechanics of service upon a foreign, as opposed to a domestic, defendant can generate greater student interest. Even if one does not use class time for a discussion, students can be asked to consider, on their own, the steps of analysis for serving a foreign individual or corporation. Step one requires consideration of “internationally agreed means reasonably calculated to give notice.”<sup>18</sup> Students can find such internationally agreed means in the Hague Service Convention, which is available on the Internet.<sup>19</sup> Sometimes, the first step fails to provide an answer. For example, Austria is not a party to the Hague Service Convention. How, then, could one serve OPEC, which is headquartered in Vienna?<sup>20</sup> In this event, one proceeds to Step two. Step two invokes the internal laws of the foreign country.<sup>21</sup> At this point, the instructor might ask the students how they intend to ascertain the internal laws on service. This, in turn, allows students to recognize some practicalities of transnational practice. For instance, does asking for assistance from some international law firm with offices in that country pose any risk from the perspective of client management or maintenance? What is the alternative? Finally, step three authorizes courts to permit service by certain “other means.”<sup>22</sup> Service by e-mail and other extraordinary measures can be explored in this third step of the analysis.

*d. The Interplay of Culture and Procedure*

There are many excellent articles that reveal the interrelation of procedure and culture. These can be assigned as additional or optional reading. In particular, Professor Oscar Chase’s *American “Exceptionalism” and Comparative Procedure*,<sup>23</sup> provides a very accessible overview of how discovery, the jury and other core procedural mechanisms both reflect and project a

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18. FED. R. CIV. P. 4(h)(2) & 4(f)(1).

19. [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=17](http://www.hcch.net/index_en.php?act=conventions.text&cid=17)

20. *See Prewitt Enterprises v. Org. of Petroleum Exporting Countries*, 353 F.3d 916 (11th Cir. 2003) (finding no means available for service upon OPEC).

21. FED. R. CIV. P. 4(f)(2).

22. FED. R. CIV. P. 4(f)(3).

23. 50 AM. J. COMP. LAW 277 (2002).

society's values. *The International View of Attorney Fees in Civil Suits*<sup>24</sup> by W. Kent Davis offers law students a comparative tour de force that connect contingency fees, legal aid, and fee-shifting, which can be among procedure's mine run, to profound issues about a society's commitment to access to justice.

## 2. Constitutional Law

The Constitutional Law discussion group developed a number of ways to incorporate international and comparative law into the basic Constitutional Law course. In its discussions, the group recognized that it was important to distinguish between international law, which may be a direct source of Constitutional Law, and comparisons with foreign law, which provide, at most, persuasive authority, a reality check, or a point of useful contrast.<sup>25</sup>

### a. International Law as a Direct Source of Constitutional Law

The United States Supreme Court's reference to international law in cases covered in Constitutional Law courses is longstanding. For example, in 1862, the Supreme Court based its holding in *The Prize Cases* on international law: "[W]e are of the opinion that the President had a right, *jure belli*, ["under the law of war"] to institute a blockade of ports in possession of the States in rebellion, . . ."<sup>26</sup> Even earlier, in 1823, the Supreme Court cited *Marten's Law of Nations* for the proposition that "[d]iscovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives."<sup>27</sup> While Constitutional Law courses typically cover international law implicitly in cases regarding executive authority and separation of powers, existing coverage often fails to provide sufficient background in the underlying international law.

In a Constitutional Law course, there are several ways to provide students with a basic understanding of potentially binding international law. For example, while *Hamdi v. Rumsfeld* superficially touched on treaty obligations,<sup>28</sup> more in-depth coverage of foreign affairs could provide students with a better understanding of when and how courts will treat treaties as binding law. Further, an introduction to the concept of sovereignty could highlight the sovereign powers that the World Trade Organization takes from the United States. The North American Free Trade Agreement could also be integrated into a discussion

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24. 16 ARIZ. J. INT'L & COMP. L. 361 (1999).

25. One of the workshop participants recently published a very informative article suggesting a variety of subject areas in which reference to foreign law might be helpful. Mark Tushnet, *How (And How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 ST. LOUIS U. L.J. 671 (2005).

26. *The Brig Amy Warwick*, 67 U.S. 635, 671 (1862).

27. *Johnson v. M'Intosh*, 21 U.S. 543, 567 (1823).

28. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 534, 124 S.Ct. 2633, 2649 (2004) (stating that, "[b]ecause we hold that Hamdi is constitutionally entitled to the process described above, we need not address at this time whether any treaty guarantees him a similar access to a tribunal for determination of his status").

on congressional-executive agreements. Lastly, constitutional implications of United States involvement in international covenants and international human rights tribunals could be addressed.

*b. Using Foreign Constitutional Law to Illuminate the United States Constitution*

Comparative study of foreign constitutional law can enrich students' understanding of the United States constitutional system. For example, a student can better comprehend the historically fixed qualities of the United States Constitution by comparing it to one of the many constitutions that are more easily amended.<sup>29</sup> Alternatively, instead of making a direct comparison to one country on a particular subject, one workshop participant has each student read a constitution from a different country. Each student then can bring at least one other perspective to his or her analysis and class contributions. Counter-posing a United States Supreme Court majority opinion with an opinion from a foreign country is another way in which foreign law may serve to illuminate United States constitutional jurisprudence. The foreign opinion either serves as a substitute for the dissent in the United States case or serves to enhance understanding of the dissent.

For example, with *R.A.V. v. City of St. Paul*,<sup>30</sup> it is easier to understand Justice Stevens' concurring opinion on hate speech after exploring the way the Canadian court decided a similar issue in *R. v. Keegstra*.<sup>31</sup> Such comparisons can familiarize United States law students with different ways of conceptualizing rights protection. In this example, the contrast would be between different ideas as to the ways in which guarantees of freedom of speech connect to various understandings of the flourishing of democracy. Other examples would differentiate the U.S. conceptualization of rights protection as based upon a list of unconnected text-based guarantees (the Bill of Rights), as opposed to other national systems that circumscribe the interaction of the individual, the group, and the state in order to fulfill a core commitment to respect for inherent, equal human dignity.<sup>32</sup> Such differentiation would expose students to alternative methodological possibilities and, more broadly, different understandings of separation of powers. Lastly, these foreign examples would assist students in understanding more deeply the work of those members of the Supreme Court (Justices Kennedy and Breyer) who have developed approaches similar to those now operative in other constitutional systems.

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29. S. AFR. CONST. 1996.

30. 505 U.S. 377 (1992).

31. [1996] 1 S.C.R. 458.

32. German Basic Law of 1949, Art. 1, Sesc. 1 ("Human dignity is inviolable. To respect and protect it is the duty of all state authority").

c. *Using Foreign Constitutional Law to Evaluate the United States Constitutional System*

Reference to foreign law also enhances the ability and willingness of students to critically evaluate the American system. After expressing concern for how uncritical many American students are of our system, a workshop participant explained that one solution is to make students more aware of alternatives. For example, while most law students easily accept judicial review as an inherent part of our system, there are both democratic (e.g., the United Kingdom<sup>33</sup>) and totalitarian (e.g., the Peoples Republic of China<sup>34</sup>) countries without judicial review. The burning controversy in the United States as to the propriety of judicial review within a federal republic can be illuminated by the study of the structure and operation other systems. While the United Kingdom does not have judicial review in the sense of invalidation of a statute, that method is no longer the only kind of constitutional judicial review. The new British Human Rights Act empowers the judiciary to issue declarations of incompatibility with rights guarantees, which triggers a “fast track” amendment process that lies in the hands of the executive. Further review under the European Union Treaty and the European Convention on Human Rights is then possible. Familiarity with this variant as a national and national/supra-national example, suggests an accommodation between courts, legislatures and the executive that is less confrontational than in the United States. Wider familiarity with institutional roles and constitutional review processes elsewhere would encourage students to evaluate our approach to the protection of fundamental rights within our judicial framework. An even fuller analysis is accomplished by including countries, such as Germany and South Africa, whose constitutions explicitly follow the United States practice of judicial review.<sup>35</sup> On the other hand, they do so by establishing a specialized court, with the possibility of abstract review. Those differences can serve as useful topics of discussion.

It would also be instructive for students to know that the famous insight delineated in *Marbury v Madison*<sup>36</sup>—that a Constitution with the status of

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33. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1902).

34. The Chinese constitution establishes that a legislative committee determines constitutional challenges. XIAN FA art. 67, § 1 (1982) (P.R.C) (Standing Committee of the National People’s Congress has the power to “interpret the Constitution and supervise its enforcement”).

35. See Grundgesetz für die Bundesrepublik Deutschland [GG] [federal constitution] May 23, 1949, art. 93 § 1 (granting, in part, the Constitutional Court the power to decide cases “on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a highest federal organ . . .” and cases when there are “differences of opinion or doubts on the formal and material compatibility of federal law or Land law with this Basic Law, . . .”); see also S. AFR. CONST. 1996, ch. 8, § 167 (1)-(7) (establishing, for example, that the Constitutional Court “makes final the decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter” and that it may “decide on the constitutionality of any parliamentary or provincial Bill, . . .” and “decide on the constitutionality of any amendment to the Constitution”).

36. 5 U.S. 137 (1803).

supreme law requires judicial review—is often cited at the initiation of judicial review in other nations.<sup>37</sup> New constitutions include statements of their supreme law status and also expressly delineate the judicial review power.<sup>38</sup> Study of other systems also demonstrates that judicial review, often with adjustments not present in the United States system, is now a basic feature of the constitutional structure of almost all liberal democracies. It is the remaining non-democratic systems that do not permit judicial review and do not respect the independence of the judiciary. With this insight, American students will be better prepared to consider the counter-majoritarian dilemma, passive virtues, differentiation of law and policy, and similar issues.

*d. Using Foreign Constitutional Law to Prepare Students for Practice in a Globalized Society*

As practicing lawyers, many students might be faced with cases that involve foreign constitutional law. For example, if representing a foreign or international newspaper, a lawyer needs to understand foreign countries' varying protections of expression and freedom of the press. A workshop participant illustrates such differences by giving students a copy of a brief article reporting a Canadian injunction, later overturned, that banned publication and broadcast of a certain film and enjoined the media from reporting about the ban.<sup>39</sup> While an American Constitutional Law course could not begin to cover the breadth of differences among foreign jurisdictions, highlighting a few foreign examples potentially provides students with a foundational awareness so that they will not assume another country shares similar constitutional rules. Accordingly, when faced with a problem in practice, lawyers might not know the constitutional difference off-hand, but will be inclined to determine if one exists.

*e. Using Foreign Law as Persuasive Authority*

Lastly, and most controversial, is to explore the extent that students, lawyers and the Supreme Court should use foreign law as persuasive authority. Students should be aware of the current debate on this topic. Justice Scalia and Justice Breyer voiced differing views on this issue in a recent discussion about "Constitutional Relevance of Foreign Court Decisions."<sup>40</sup> Characterizing himself as an originalist who turns to old English cases to interpret our Constitution,

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37. C.A. 6821/93 United Mizrahi Bank Ltd. v. Migdal Village [1995] IsrSC 49(4) P.D.221 (Supreme Court of Israel).

38. See note 35 *supra*.

39. The Toronto Globe & Mail, article on file with *Pac. McGeorge Global Bus. & Dev. L.J.*

40. Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, Constitutional Relevance of Foreign Court Decisions, American University Washington College of Law (Jan. 13, 2005), available at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>).

Justice Scalia argued that citing foreign law invites manipulation and assumes the judge is to find the “correct answer.” For Justice Scalia, a judge’s role is to “say what the Constitution provided, even if what it provided is not the best answer” according to foreign law or opinion. Justice Scalia also emphasized that Americans do “not have the same moral and legal framework as the rest of the world, and never have.” Further, he believes foreign law is often cited blindly: “One of the difficulties of using foreign law is that you don’t understand what the surrounding jurisprudence is so that you can say . . . ‘Russia follows *Miranda*,’ but you don’t know that Russia doesn’t have an exclusionary rule.”

Responding to these opinions, Justice Breyer recognized that foreign law is not binding; however, he believes it is “from time to time relevant.” For example, on issues that confront human questions, such as cruel and unusual punishment, Justice Breyer feels that reading and citing foreign law often provides an “empirical light on the consequences of different solutions to a common legal problem” and an avenue to “reach out beyond myself to see how other people” have addressed the same issue. In doing so, Justice Breyer is still interpreting our constitution, but believes that “Franklin and Hamilton and Jefferson and Madison and maybe even George Washington all would have thought that we, on occasion at least, can learn something about our country and our law and our document from what happens elsewhere.” Further, in response to criticisms that looking to foreign law is undemocratic, Justice Breyer points out that the Court looks to numerous undemocratic materials, such as law professors’ works.

In responding to this issue during his Senate confirmation hearings, newly appointed Chief Justice Roberts expressed concerns similar to Justice Scalia. Chief Justice Roberts explained that citations to foreign law is a “misuse of precedent” that allows a judge to “incorporate his or her own personal preferences, cloak them with the authority of precedent . . . and use that to determine the meaning of our Constitution.”<sup>41</sup> The Chief Justice also criticized citations to foreign law as undemocratic: “If we’re relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge. And yet he’s playing a role in shaping the law that binds the people in this country.”

Despite the difference of opinions about citing to foreign law, there are several reasons it should be integrated into a Constitutional Law course. First, based on the value of universal interpretation, even Justice Scalia recognizes that foreign law is relevant when interpreting a treaty.<sup>42</sup> Accordingly, Justice Scalia believes the court “should defer to [reasonable] views of other signatories, much as we defer to the view of agencies.” Thus, when interpreting treaties and other

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41. Transcript of U.S. Senate Judiciary Committee hearing on the nomination of John G. Roberts Jr. to be chief justice of the Supreme Court (Sept. 13, 2005), *available at* <http://www.post-gazette.com/pg/05257/571043.stm>.

42. Transcript of Scalia & Breyer, *supra* note 40.



sources of international law, foreign law is likely to be highly persuasive. Second, since the majority of the Court has found foreign law relevant or persuasive in some cases, lawyers should be aware of its potential use. In fact, Justice Breyer noted that lawyers have the responsibility to research foreign law, explain it to the court, and give the Court “a clue as to what is important and what isn’t.”

Several avenues exist to integrate discussion of the persuasive value of foreign law into a Constitutional Law course. First, students could watch or read Justice Scalia and Justice Breyer’s discussion. Second, a note or discussion about the Court’s use of foreign law could be added after *Lawrence v. Texas*.<sup>43</sup> In that case, the majority struck down criminal penalties for homosexual sodomy, stating that “[t]he right petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”<sup>44</sup> *Roper v. Simmons*,<sup>45</sup> when the Court struck down the death penalty for juveniles, presents a similar opportunity for such discussion. In *Roper*, Justice Kennedy, writing for a 5-4 majority, stated: “It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty \* \* \*. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”<sup>46</sup>

Discussion about the use of foreign law in *Lawrence* and *Roper* could also be contrasted to Justice Rehnquist’s use of foreign law in *Washington v. Glucksberg*.<sup>47</sup> Specifically, after criticizing the majority in *Lawrence* and *Roper*, one scholar found that, when upholding the state’s legislative prohibition of assisted suicide, Chief Justice Rehnquist’s use of foreign law was more reasonable and acceptable.<sup>48</sup> In *Glucksberg*, Chief Justice Rehnquist stated that in “almost every state—indeed, in almost every western democracy—it is a crime to assist suicide.”<sup>49</sup> Overall, these cases, and others, provide the opportunity to debate the use of foreign law as persuasive authority.

One might also compare the controversy in the United States to practices elsewhere. For example, the South African Constitution requires judicial reference to international law and expressly permits reference to foreign law as an aid in interpreting the bill of rights.<sup>50</sup>

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43. 539 U.S. 558 (2003).

44. *Id.* at 577.

45. 125 S. Ct. 1183 (2005).

46. *Id.* at 1200.

47. 521 U.S. 702 (1997).

48. Mary Ann Glendon, *Judicial Tourism*, WALL STREET J., Sept. 16, 2005, at A14.

49. *Glucksberg*, *supra* note 47, at 710.

50. S. AFR. CONST. 1996, Sec. 39(1)(b) and (c).

Further, student reflection upon the American debate about the propriety of looking for guidance to other constitutional systems could highlight the distinctiveness of Scalia's understanding of the United States Constitution, as a concrete product of historical events and processes, vested with supreme law status, completely self-referential, and subject to change only by formal amendment.<sup>51</sup> This understanding may be contrasted with the approach of other modern, liberal democratic countries, which do not view their constitutions in this way. Rather, they regard their constitutions—e.g., separation of powers, rights protection, judicial review, interpretation, even amendment—as the expression of abstract values of liberal morality within a national text.<sup>52</sup> They, therefore, find the democratic argument against judicial review, as well as against comparative engagement, much less decisive. In that view, the possibility of using insights garnered from other constitutional texts, interpretation and theory becomes much less problematic. The debate on these questions would be much enriched by broadening the conceptual underpinnings of constitutional possibility.

### 3. *Contracts*

The Contracts discussion group had the following ideas regarding the introduction of international, transnational, and comparative law issues into a basic course on Contracts.

#### a. *Positioning Contract Law within the Globalization Discussion*

The participants in the Contracts Group began their discussion with the realization that globalizing the core Contracts course involves a different situation from most other subject matter areas under consideration in the Workshop. The corpus of U.S. contract law *already* includes basic, globalizing federal law, i.e., the Convention on the International Sale of Goods (“CISG”),<sup>53</sup> negotiated by the U.N. Commission for International Trade Law (“UNCITRAL”). As one writer has described the situation, “The United States has two laws of contracts: a state law of contracts, represented by the UCC, and a ‘federal’ law of contracts, the CISG.”<sup>54</sup> The CISG, which was ratified by the

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51. *Roper v. Simmons*, 125 S. Ct. 1183, 1217 (2005) (Scalia, J., dissenting).

52. *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989) (European Court of Human Rights).

53. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18 (codified at 15 U.S.C. App.), reprinted in 19 INT'L LEG. MATERIALS 668 (1980).

54. Larry A. DiMatteo, *The CISG and the Presumption of Enforceability*, 22 YALE J. INT'L L. 111, 156 (1997). See also Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT'L L. 1, 9 (1996) (“the [CISG] is not merely a form of restatement of (international) contract law, nor is it simply a ‘model law’ which would be subject to modification by contracting states to address local concerns; rather, upon ratification CISG applies of its own force to all proposed contractual relationships that satisfy its ‘internationality’ requirements” (footnotes omitted)).

United States in 1986 and entered into force as to the United States in 1988, is automatically applicable to international transactions between parties located in two CISG states unless the parties agree otherwise.<sup>55</sup> The CISG includes some surprises; for example, its battle-of-the-forms provisions are quite different from those of the Uniform Commercial Code's Article 2.<sup>56</sup> Because the CISG might well intrude into a contract relationship through the inadvertence or ignorance of counsel, minimal knowledge of the convention's potential applicability becomes an issue of basic professional competence.<sup>57</sup> Hence, for many of the participants the basic question was not *whether* globalized issues should be included in a core Contracts course, but *to what extent* should they be explored.

Beyond the CISG, which is binding U.S. law for the transnational contracts to which it applies on its own terms, the participants recognized that the contract law rules of individual jurisdictions other than the U.S. states may be useful sources of comparative study and analysis. In this regard, one potential source of pertinent contract law principles in the comparative context is the product of the Institute for the Unification of Private Law (commonly known by its French acronym "UNIDROIT"). Following completion of the CISG, many of the scholars involved in the negotiating process of the convention thereafter turned their attention to the drafting, under the auspices of UNIDROIT, of an integrated set of international contract law rules now known as the UNIDROIT Principles of International Commercial Contracts.<sup>58</sup> The UNIDROIT Principles are in some

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55. For background and discussion, see J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1982); H. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code: The Common Law and the Uniform Commercial Code*, 49 BUS. LAW. 1053 (1994); J. Honnold, *The Sales Convention: Background, Status, and Application*, 8 J.L. & COM. 1 (1988); A. Rossett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO STATE L.J. 265 (1984); *Symposium on International Sale of Goods Convention*, 18 INT'L. LAW. 3 (1984); *UNCITRAL Symposium*, 18 INT'L. LAW. 3 (1984). One of the first U.S. cases discussing the Convention is *Filanto v. Chilewich International Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992), which considered using the Convention's "battle-of-the-forms" rule to require arbitration in Russia. Since it first entered into force, the CISG has been cited or applied in hundreds of international trade cases worldwide, although surprisingly few in U.S. courts. See, e.g., *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'agostino, S.P.A.*, 144 F.3d 1384, 1389 (11th Cir. 1998), cert. denied 526 U.S. 1087 (1999) ("surprisingly few cases have applied the Convention in the United States"). For discussion of the CISG in the courts, and extensive supporting analytical tables, see MICHAEL R. WILL, *CISG—THE FIRST 464 DECISIONS* (1998) (finding only 13 U.S. decisions from 1988 through 1997).

56. See, e.g., DiMatteo, *supra* note 54, at 154-56 (discussing battle-of-the-forms issues, modification, etc.); Michael P. Van Alstine, 37 VA. J. INT'L L. at 21-27 (discussing formation issues).

57. See, e.g., Ronald A. Brand, *Professional Responsibility in a Transnational Transactions Practice*, 17 J.L. & COMM. 301, 336 ("If . . . the lawyer determines that the [CISG] applies to the transaction, he or she then has a duty to understand fully the rules of the Convention and the application of those rules to the transaction in question").

58. See MICHAEL J. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994) (providing commentary by leading continental proponent of UNIDROIT principles); Joseph Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281 (1994) (providing analysis and critique by leading U.S. contracts scholar).

respects a “Restatement” of international contract law, but in other respects they represent an approach to international contract law that is independent of CISG principles.<sup>59</sup>

Other transnational sources are also relevant to Contracts in a globalized context. For example, supplementing applicable binding sources of transactional law are standard agreement forms developed by the International Chamber of Commerce, now called “Incoterms.” Like many of the provisions of part 3 of UCC article 2,<sup>60</sup> Incoterms permit easy reference to detailed rules governing the performance of the parties to a transnational sales contract. There are a variety of available arrangements for different allocations of obligations, such as those allocating risk with respect to delivery or allocating such costs as freight and insurance.<sup>61</sup> Unlike the UCC provisions, however, Incoterms are not default provisions imposed as a matter of law when the contract is otherwise silent; they are “pre-fabricated” or modular standard terms that must be incorporated by reference into a contract to be applicable and effective.<sup>62</sup>

At least one participant in the Contracts Group has already embraced the pervasive method (“McGeorge model”) in his Contracts course, incorporating hypotheticals and problems that require students to apply the CISG to situations that factually parallel the preceding discussion of issues arising under U.S. common law or the UCC. So far, however, there are some limits to this practice. For example, none of the participants currently makes significant use of comparative analysis or of the Incoterms or UNIDROIT principles in the basic Contracts course. The participant who reported extensive inclusion of the CISG enjoys the advantage of a two-semester, six-credit course configuration in Contracts; the Contracts Group expressed strong concern about the feasibility of extensive inclusion of globalized issues in a Contracts course that followed, for example, a one-semester, four-credit configuration.

#### *b. Issues and Objectives to be Targeted*

The Contracts Group spent considerable time discussing the general and specific substantive and pedagogical targets to be included in a globalized core

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59. See, e.g., UNIDROIT Principles of International Commercial Contracts, arts. 2.19-2.22 (1994) (concerning variant acceptance). For discussion of the UNIDROIT approach, see Van Alstine, *supra* note 56, at 9 n. 20.

60. See, e.g., UCC §§ 2-305 (concerning open price terms), 2-306 (interpreting output, requirements and exclusive dealing provisions), 2-307 (concerning delivery in single or several lots), 2-308 (concerning place of delivery), 2-309 (concerning time for shipment, delivery, or other action), 2-310 (concerning, *inter alia*, open time for payment), 2-311 (concerning options and cooperation with respect to performance), 2-312-2-318 (concerning warranties) (official text, 2005).

61. See, e.g., INTERNATIONAL CHAMBER OF COMMERCE, GUIDE TO INCOTERMS: *FOB Free on Board* (2000); *id.*, *CIF Cost, Insurance and Freight*.

62. *But see* Calzaturificio Claudia S.N.C. v. Olivieri Footwear Ltd., 1998 WL 164824 (no. 96 CIV 8052 (HB) (THK)), at 1, n.2 (S.D.N.Y. 1998) (assuming that term “ex works” in contract subject to CISG was to be interpreted in accordance with *Incoterms* 1990).

course in Contracts. As mentioned previously, one practical concern that was viewed as important by all participants was the fact that in most U.S. law schools, the first year Contracts course is now limited to four credits. This naturally raised the question of where and to what extent a professor can fit in international topics. The group also considered whether at least some issues could be left to coverage in upper division courses. The answer to this question is obviously dependent upon where in the law school process one thinks students should be exposed to these concepts, and to what degree. So, for example, the Group considered it likely that one would want coverage of basic CISG concepts in the Contracts course (scope, contract formation, battle of forms, remedies) and more extensive discussion of complex topics in upper division courses like Sales, Payments Systems, and the like.

This allocation of issues and concepts among courses might vary somewhat from school to school, depending upon the number of credits allocated to the basic course, the range and frequency of upper division offerings in commercial law, and the availability of upper division offerings specifically related to transnational contract law. In terms of identifying the minimal coverage the group would hope for in the basic Contracts course, the key question appeared to be what concepts would one want introduced at the beginning level, for the many students who might not take any appreciable number of upper division offerings in the commercial law area. In this light, a basic, modest objective of a globalized Contracts course could be expressed as follows: "I would like my Contracts students, at a minimum, at least to be able to identify a global issue if they encounter it, to know at least enough to do damage control, preferably to have an accurate sense of what would be different about a Contracts issue in the globalized context." Put another way, one would hope that, after exposure to the basic Contracts course, students would not have the impression that this was a finite, concrete concept—that at a minimum students should come out of the course with a clear understanding of the real world process that occurs, even beyond the traditional common law boundaries.

What the Contracts Group came to identify was a cascading set of objectives, arranged in terms of relative exigency. Among others, these objectives would include:

- (1) Assuming that appropriate materials were available, no student should leave first-year Contracts without knowing that there is federal law that may be applicable to transactions (CISG), just as today one would hope that no student would leave first-year Contracts without knowing that there is a uniform state law that governs sales of goods (UCC).
- (2) Students should be alerted to the fact that there are other, upper division courses tracking the issues to which they were minimally exposed in the basic Contracts course.

- (3) At a somewhat deeper level, one would hope that students (and their professors as well) would come away from (or approach) the first-year experience with some breadth in their ways of thinking about Contracts law and concepts, rather than being locked into a sort of caricature of Contracts as a common law subject.<sup>63</sup>

*c. Implementation Issues*

The Contracts Group then considered how best to implement such objectives in the Contracts curriculum. Would all or any of them be best realized by adopting the Michigan Method or the McGeorge Method? The former would create serious strain on instructional resources at most schools, and would not necessarily lead students to integrate the global issues into specific substantive areas like Contracts. On the other hand, the latter method would not necessarily reach all students throughout the curriculum, unless you could rely on the professors in all Contracts sections to adopt the approach. (Of course, the same problem of inconsistent scope affects the first model as well, depending upon the individual instructor's inclination to emphasize Contracts issues.) Ultimately, the Contracts Group came to the view that the McGeorge Model would better serve the objectives identified for Contracts, but only if you could assume that adequate supplementary materials were publicly available.<sup>64</sup>

The third objective targeted by the Contracts group raised the issue of whether Contracts should seek to incorporate international, transnational, and comparative materials and perspectives, and in what proportions. Beyond the obvious distinction suggested by the term comparative law, the connotations among these various terms are fluid and inherently ambiguous.<sup>65</sup> These terms and

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63. While the text ranks this comparativist objective last among the three, this order is not intended to suggest any devaluation of the importance of comparative analysis, but only the practical reality of a limited time for treatment of a wide range of issues within the typical Contracts course. As Professor Perillo has stated:

Comparative law is a humanistic discipline. A comparison of legal systems expands the mind. Provisions within Principles regarding issues on which the common law and civil law systems have different conceptual frameworks (*e.g.*, specific performance and penalty clauses) show that the drafters were able to break out of their respective conceptual straitjackets to reach common ground. This only could have happened by a process of mutual education and the expansion of understanding.

Perillo, *supra* note 58, at 284.

64. Furthermore, in order to deal with the limited credit allocation available to the Contracts course in most law schools, such materials should favor substitutional material—modules that could be popped into the principal assignments in place of the usually assigned cases—rather than supplementary material to be added to already overburdened reading assignments.

65. This is particularly the case with respect to Contracts law in the global context, an area that is variously referred to as “international commercial law,” “transnational law,” or “private international law.” The concept of “transnational law,” first popularized by the late Wolfgang Friedemann and by Phillip Jessup, now has a well understood term-of-art status in international legal studies. It identifies a range of subject matter emphasizing private transactional and regulatory law in an international or regional context, and the intersection of public and private law concerns in an internationalized economic setting. The term “private international

their definitions are not necessarily critical distinctions for contracts law where it is at present, as compared with, for example, civil procedure or property law, where one might question whether there was any significant body of applicable law beyond national law. As a result, in these other areas comparative analysis may be of greater relevance than an existing body of substantive, applicable international law.

As applied to contract law itself, however, there is a globalized body of law that would need to be introduced to students, whether characterized as “international” or “transnational” law. Beyond that, in the service of the third objective, comparative law materials and analysis would have obvious utility. Again, the critical issue in the Group’s view was the availability of credible materials that would support the inclusion of global issues in the basic Contracts course.

#### *4. Corporations*

The Corporations discussion group came up with the following examples of transnational and comparative law issues involving corporate law, which members of the group already have introduced, or are planning to introduce in the future, into their basic Corporations classes:

##### *a. Choice of Law*

In the basic Corporations class, students learn that, under the internal affairs rule, the law of the state of incorporation governs the rights and obligations of shareholders, directors and officers vis-à-vis each other, even though the only contact between the company and the state of incorporation may be that the founders of the company chose to file the corporation’s articles with that state.<sup>66</sup> This, in turn, typically leads to a discussion of whether the states have engaged in a “race to the bottom” by enacting ever more lax corporate laws in order to attract corporate charters.<sup>67</sup> Several members of the group have expanded this discussion in their basic Corporations class to consider choice of corporate law between different nations, rather than just between different states within the United States.

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law” is very attractive, in light of its conceptual symmetry with the term “public international law.” However, the use of this term can be ambiguous, because in many legal systems the term refers to what is usually called in U.S. terminology “conflict of laws” and “choice of law,” i.e., the body of rules regarding the choice of law governing a transaction and the determination of the proper jurisdiction and forum. A more neutral term, such as “international commercial law” or “transnational law” therefore recommends itself.

66. MODEL BUS. CORP. ACT § 15.05 (1979) (Official Comment).

67. William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

One participant suggested using the Delaware Supreme Court's decision in *McDermott, Inc. v. Lewis*,<sup>68</sup> to introduce the internal affairs rule into the basic course. Although written by a less authoritative source, *McDermott* can substitute for the United States Supreme Court's decision in *CTS Corp. v. Dynamics Corp of America*,<sup>69</sup> on the issue of whether the United States Constitution compels states to follow the internal affairs rule. At the same time, *McDermott* shows students how this rule can result in applying the corporate laws of a foreign nation (in that case Panama) to govern the rights of U.S. shareholders in a largely United States' business if the firm chooses to incorporate in a foreign country (as occurred in that case for tax reasons).

Another participant uses recent events in the European Union in his discussion of the internal affairs rule and the resulting competition between jurisdictions seeking to attract corporate charters. Traditionally, a number of nations in Europe had required companies to incorporate in, and thus follow the corporate laws of, the nation in which the company had its central office (the *siege social* rule).<sup>70</sup> A series of decisions by the European Court of Justice<sup>71</sup> dealing with the obligations of nations in the European Union toward companies formed in other member nations may preclude European Union members from continuing to use this approach. The facts in the *Centros* case—in which a Danish couple, to avoid Danish minimum capital rules, formed an English corporation to conduct their Danish wine importing business—show how the result can be to water down creditor protection rules.

Other participants in the group introduce a different choice of law aspect by discussing how United States securities laws can apply to foreign corporations, particularly if the foreign corporations choose to list their securities for trading on the New York Stock Exchange. In fact, the desire to bond the quality of a company's disclosure may be a partial motivator for foreign companies listing on the New York Stock Exchange, thereby subjecting themselves to the more rigorous standards of United States securities laws.<sup>72</sup> Congressional enactment of the Sarbanes-Oxley Act in 2002 has added a new wrinkle on this. Certain provisions in the Sarbanes-Oxley Act do not mesh well with other nations' corporate governance rules. For example, without a special exemption from the

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68. 531 A.2d 206 (Del. 1987).

69. 481 U.S. 69 (1987).

70. LARRY C. BACKER, *COMPARATIVE CORPORATE LAW: UNITED STATES, EUROPEAN UNION, CHINA AND JAPAN* 467 (2002).

71. *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, ECJ Case C-167/01, [2003] E.C.R. I-10155; *Überseering BV v. Nordic Construction Company Baumanagement GmbH*, ECJ Case C-208/00, [2002] E.C.R. I-9919; *Centros Ltd. V. Erhvervs-og Selskabsstyrelsen*, ECJ Case C-212/97, [1999] E.C.R. I-1459.

72. Edward B. Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 *CARDOZO L. REV.* 675, 687 (2002). *But see* Ariel Yeheziel, *Foreign Corporations Listing in the United States: Does Law Matter? Testing the Israeli Phenomenon*, working paper, available at [http://papers.ssrn.com/pape.tar?abstract\\_id=797505](http://papers.ssrn.com/pape.tar?abstract_id=797505).



Securities Exchange Commission, the requirement that New York Stock Exchange listed companies have an audit committee composed of independent directors<sup>73</sup> conflicted with the German requirement for control over audits by a supervisory board, up to half the members of which must be representatives of the corporation's employees (and thus not "independent" under U.S. standards).<sup>74</sup> Moreover, the added expense of compliance with Sarbanes-Oxley apparently has led some foreign corporations to consider delisting from the New York Stock Exchange;<sup>75</sup> thus showing the problems of attempting to export overly rigorous requirements.

Overall, this material should serve to alert the students to when the corporate lawyer must be aware of the laws of other nations, as well as the application of United States laws to foreign companies. It also serves to raise the policy questions underlying much of the debate about the merits of globalization and deregulation resulting from the ability of corporations to choose the law that will govern their management and the rights of their owners.

*b. Limited Liability*

In the basic Corporations class, students explore the consequences and limitations of the fundamental rule of corporate law that stockholders are not personally liable for the debts of the company (limited liability). A major component of that discussion involves considering when courts in the United States will take away the protections of limited liability—in other words, "pierce the corporate veil."<sup>76</sup> Several members of the group have expanded this discussion to include consideration of the situation in which potential claims involve foreign companies or foreign laws.

One participant has a problem in her casebook<sup>77</sup> based upon an action brought against members of the Royal Dutch Shell Group pursuant to the Alien Tort Claims Act. As the problem in her book explains, the so-called Royal Dutch Shell Group is an affiliated group of corporations resulting from an alliance between a Dutch and an English company, who hold, on a 60-40 basis, stock in three holding companies, which, in turn, own various service and operating companies. One of the operating companies allegedly violated the plaintiffs' human rights in Nigeria. The problem asks the students whether the plaintiffs should be able to pierce the corporate veil. This allows students to apply this

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73. Sarbanes-Oxley Act § 301.

74. Sabyasachi Groshray, *Impact of Sarbanes-Oxley on Multiple Listed Corporations: Conflicts in Comparative Corporate Laws and Possible Remedies*, 10 J. INT'L & COMP. L. 447 (2004).

75. Daniel Epstein, *Goodbye, Farewell, Auf Wiedersehen, Adieu...*, WALL ST. J., at A10 (Feb. 9, 2005).

76. Franklin A. Gevurtz, *Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*, 76 OR. L. REV. 853 (1997).

77. D. GORDON SMITH & CYNTHIA A. WILLIAMS, BUSINESS ORGANIZATIONS: CASES, PROBLEMS AND CASE STUDIES 213-14 (2004).

doctrine to a classic multinational business enterprise (and also to see that the so-called multinational “corporation” is often a group of affiliated companies in which the actions of a local subsidiary can lead to efforts to impose liability on the foreign parent company).

Another participant has been adding the Southern District Court of New York’s opinion in *George Abu-Nasser v. Elders Futures, Inc.*,<sup>78</sup> to the cases he uses to cover piercing the corporate veil. In this case, a New York creditor of a Lebanese limited liability company sought to hold the Lebanese owners of the company personally liable for the company’s debt. Instead of resolving the question of whether New York or Lebanese corporate law governed the case, the court found material issues of fact sufficient to deny summary judgment under either law. The resulting exploration by the court of both piercing the corporate veil under New York law, and the alleged non-compliance with various creditor protection requirements of Lebanese law—which is fairly typical of corporate laws found outside the United States—provides a nice opportunity to compare approaches used in different nations to protect creditors of entities whose owners normally have limited liability.

These discussions serve to alert students to issues that increasingly might arise in a global economy when domestic creditors (either in the United States or in other nations) seek to hold the owners of foreign (from the creditors’ perspective) firms personally liable for the company’s debts, as well as to deepen the students’ understanding of the various mechanisms that laws might use to prevent abuse of limited liability at the expense of creditors, including involuntary victims of corporate wrongdoing.

*c. Shareholder Primacy versus Stakeholder Models*

Whether couched broadly in terms of the purpose toward which corporations exist, or more narrowly in terms of the duties of corporate directors, the basic Corporations class typically will address the decades long debate<sup>79</sup> about whether the corporate purpose, to which directors must focus their efforts, solely consists of maximizing the wealth of the shareholders (the shareholder primacy norm), or whether the purpose of the corporation and the goals of directors should encompass advancing the interests of other groups, such as employees, creditors, customers, and the community at large (the stakeholder model). In the United States, courts tend to give lip service to the shareholder primacy norm at the same time they grant vast discretion to directors to take into account, if the directors are so inclined, the interests of non-shareholder constituencies.<sup>80</sup> Most

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78. 1991 U.S. Dist. Lexis 3794 (S.D.N.Y. 1991).

79. A.A. Berle, Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

80. Franklin A. Gevurtz, *Getting Real about Corporate Social Responsibility: A Reply to Professor Greenfield*, 35 U.C. DAVIS L. REV. 645, 648-50 (2002).

members of the group have found it useful to introduce corporate laws of other nations that explicitly accept, and even take concrete steps to implement, a stakeholder model.

Most members of the group at least mention co-determination—the system pioneered in Germany, and found in a number of other continental European countries, under which the stakeholder model is given affect by empowering employees of the corporation to elect up to half the members of the corporation’s board of directors.<sup>81</sup> Introducing the students to co-determination, and even asking the students to discuss whether this would be a good system for corporate laws in the United States to adopt, can put the shareholder primacy versus stakeholder debate into a more concrete setting.

*d. Insider Trading and Disclosure*

In the basic Corporations class, students normally learn when trading on non-public information is prohibited under U.S. law, and encounter the debate about when, or even whether, the law should prohibit so-called insider trading.<sup>82</sup> Several members of the group expand the discussion of insider trading by looking at prohibitions on such conduct by other nations.

Some participants mention, by way of comparison to United States law, the very broad prohibition adopted by Australia. Australian law outlaws securities trading while in possession of information (with certain exceptions) that is not generally available.<sup>83</sup> A more defined prohibition worth mentioning is found in the original European Union Insider Trading Directive.<sup>84</sup> This directive requires European Union member nations to ban trading on information, the source for which is, directly or indirectly, a corporate insider or a person that obtained the information through his or her profession. These laws are interesting because they represent roads not taken by the United States Supreme Court in *Chiarella v. United States*,<sup>85</sup> and *Dirks v. SEC*.<sup>86</sup> Of potentially even greater pedagogical utility, several members of the group have found that introducing non-United States insider trading laws can serve to acquaint the students with broader issues of securities disclosure, corporate finance, and the globalization of legal rules.

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81. Klaus J. Hopt, *The German Two-Tier Board: Experience, Theories, Reforms*, in KLAUS J. HOPT, ET AL., *COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH* 246-47 (1998).

82. See, e.g., STEPHEN M. BAINBRIDGE, *SECURITIES LAW: INSIDER TRADING* (1999).

83. Corporations Act, 1998 § 1002G(1), (2)(a) (Austl.).

84. Council Directive 98/592 of November 13, 1989 Coordinating Regulations on Insider Dealing, 1989 O.J. (L 334) 30. A new proposed European Union directive, that would reach anyone knowingly trading on inside information, is reprinted in DONNA M. NAGY, RICHARD W. PAINTER & MARGARET V. SACHS, *SECURITIES LITIGATION AND ENFORCEMENT* 576-577 (2004).

85. See 445 U.S. 222 (1980) (rejecting an equal access rule).

86. See 463 U.S. 646 (1983) (rejecting a rule that would ban trading on any non-public information traceable to a corporate insider).

One participant uses the discussion of non-United States law in order for the students to see the interrelationship between insider trading and overall securities law disclosure requirements. Specifically, the requirement of near continuous disclosure under Australian securities laws<sup>87</sup> results in less inside information—and less prosecutions even under Australia’s very broad prohibition—thereby suggesting a very different way of dealing with the insider trading issue. Another participant uses the discussion of non-United States law in order for the students to appreciate the relationship between insider trading and patterns of stock ownership. Specifically, in many nations other than the United States and England, stock ownership is concentrated so that a relatively few large block holders have a controlling interest even in the largest corporations.<sup>88</sup> If such large block holders are unable to compensate for the added risk they face from their lack of diversified portfolios by trading on inside information, they might turn to more self dealing transactions, or else split up their large block holdings.<sup>89</sup> Hence, insider trading regulation on a global level needs to be looked at as part of a package of regulating the conduct of controlling shareholders, and whether it is wise to discourage concentrated stockholdings. Yet another participant in the group uses the discussion of non-United States law regarding insider trading as a narrative of how law spreads in an era of increasing globalization. Before 1980, few nations other than the United States prohibited insider trading. In the 1980s and 1990s, nations around the world adopted such prohibitions, so that now the vast majority of nations with stock markets prohibit insider trading in many similar circumstances.<sup>90</sup> Understanding the legal, economic, and cultural forces that led to this result<sup>91</sup> can help students appreciate how the globalization of legal rules occurs.

*e. The Importance of Broader Context*

All members of the Corporations discussion group agreed that one of the primary objectives for introducing comparative law issues into the basic Corporations class is to have students gain an appreciation for the importance of the broader legal, economic and cultural contexts in which specific corporate law rules operate. Members of the group have used a number of examples to make this point.

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87. Dale Oesterle, *The Inexorable March Toward a Continuous Disclosure Requirement for Publicly Traded Corporations: Are We There Yet?*, 20 CARDOZO L. REV. 135, 159-65 (1998).

88. Mark Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539, 541-42, 562 (2000).

89. William Bratton & Joseph McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38 COLUM. J. TRANSNAT’L L. 213, 294-95 (1999).

90. Utpal Bhattacharya & Hazem Daouk, *The World Price of Insider Trading*, working paper, available at <http://papers.ssrn.com/sol3/delivery.cfm/991215308.pdf?abstractid=200914> at 3, 11.

91. Franklin A. Gevurtz, *The Globalization of Insider Trading Prohibitions*, 15 TRANSNAT’L LAW. 63, 65-68 (2002).

A simple example involves walking the students through the steps that would be necessary to form a corporation in a civil law country.<sup>92</sup> The existence of greater bureaucratic requirements in many civil law countries (as compared to the relative ease of incorporation in the United States and other common law countries) is symptomatic of differing legal cultures on the government level. On the flip side, there is the difference in legal culture among transactional attorneys in the United States—who tend to write long agreements seeking to anticipate every eventuality—as compared with the more genteel approach practiced among business persons and their attorneys in many other countries. This difference, in turn, may be a function of broader societal differences between nations in which business involves dealings between a limited group comprising society’s elite, who know each other and are repeat players, and nations in which there is much greater social mobility.

The recognition and enforcement of fiduciary duties are also a means to illustrate the importance of broader context. Part of this context is the basic legal system—civil law versus common law—under which the nation operates. Fiduciary duty rules, involving as they do judges developing and applying flexible standards, are something with which judges and legislators in common law systems may be more comfortable than may be judges and legislators in civil law systems.<sup>93</sup> An equally, if not more important, part of this context are the broad rules of civil procedure and the overall legal and business culture of a nation. For example, even nations whose law provides for shareholder remedies such as the derivative suit (in other words, a suit filed by a shareholder on behalf of a corporation against managers who have breached their duty to the corporation) may see little or no use of this procedure if lawyers and shareholders are unwilling to prosecute such actions. This might occur, for instance, because a “loser pays” rule regarding attorney’s fees renders such actions uneconomic.<sup>94</sup>

Another example of the importance of context beyond legal rules involves the concept of “soft law.” A number of nations and organizations have adopted codes of good corporate conduct.<sup>95</sup> These codes lack the force of law—and thus might elicit a “who cares” response among law students in the United States, who often are indoctrinated from the first year of law school to focus on rules that create enforceable rights and obligations. Nevertheless, the view in much of the world is that norms resulting from soft law can influence behavior of corporate managers.

Finally, there is the broad question of whether, in an era of increasing global trade and economic competition, more efficient forms of corporate governance

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92. BACKER, *supra* note 69, at 666-68.

93. Gerard Hertig & Hideki Kanda, *Creditor Protection in* REINER KRAACKMAN, ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 97 (2004).

94. Bernard Black & Brain Cheffins, *Outside Director Liability Across Countries*, 17-18, 79, working paper, available at <http://papers.ssrn.com/abstract=438321>.

95. ROBERT A.G. MONKS & NELL MINOW, *CORPORATE GOVERNANCE* 251-258 (2d ed. 2001).

and finance, built around thick trading markets and widely dispersed ownership, will drive out less efficient forms, thereby producing convergence between the corporate laws of different nations.<sup>96</sup> If so, the implications are far reaching. For instance, this raises the issue of whether nations can preserve the stakeholder model if the shareholder primacy norm turns out to be more “efficient.” The concern that global economic competition will empower multinational business enterprises that focus only on profit maximization for shareholders is, of course, at the heart of the debate about globalization.

### 5. *Criminal Law and Procedure*

The Criminal Law and Procedure discussion group had a plethora of ideas about international, transnational, and comparative law issues that could be introduced into Criminal Law and Criminal Procedure classes.

#### a. *International and Transnational Law Issues Directly Affecting Litigation of Criminal Cases in the United States*

The primary example of an international or transnational law issue that directly affects the litigation of a criminal case in the United States is an applicable treaty right. The International Covenant on Civil and Political Rights (ICCPR)<sup>97</sup> is one of the treaties that can be raised by the defense in American criminal cases. The ICCPR guarantees to accused persons many types of due process rights. To a large extent, the ICCPR duplicates guarantees under the United States Constitution. Nevertheless, there are cases where the defense has raised the ICCPR independently of United States Constitutional claims.<sup>98</sup> At the time the United States ratified the ICCPR, the United States attached a declaration asserting that the treaty was not self-executing.<sup>99</sup> This raises the issue of whether the defense can claim rights under the treaty without implementing legislation. Although complicated, the uncertain legal status of the treaty rights makes the ICCPR an ideal vehicle for teaching the status of treaty rights, the meaning of a “self-executing” treaty, and the effect of reservations, understandings and declarations. This discussion can also serve to introduce students to forums of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

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96. Henry Hansmann & Reiner R. Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439 (2001).

97. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

98. *Domingues v. State*, 961 P.2d 1279 (Nev. 1998), cert. denied 528 U.S. 963 (1999); *State v. Carpenter*, 69 S.W.3d 568 (Tenn. Crim. App. 2001), cert. denied, 535 U.S. 995 (2002); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *United States v. Davis*, 2003 U.S. Dist. Lexis 5745 (E.D. La.).

99. International Covenant on Civil and Political Rights, Ratification by the United States of America, available at [http://untreaty.un.org/humanrightsconvs/Chapt\\_IV\\_4/reservations/USA.pdf](http://untreaty.un.org/humanrightsconvs/Chapt_IV_4/reservations/USA.pdf), at 3.

Another example of a treaty or foreign law directly affecting a criminal case in the United States arises in the context of extradition. If an accused commits a crime in the United States and flees to another country, the American jurisdiction will want to extradite the accused back to the U.S. to stand trial. There may be an extradition treaty that provides the terms of the extradition, which would signal to the students the relevance of treaty law. There also may be foreign national law that would preclude an extradition. For instance, Germany, France, Netherlands, Canada, South Africa, and many other countries have refused to extradite persons to the United States if the accused faces the death penalty because their national law prohibits the death penalty.<sup>100</sup> Here, too, the students would see how foreign law plays a role in adjudicating a criminal case in the United States.

*b. International, Transnational, and Comparative Law Issues that Could Have an Impact on a Client in the United States*

Some of the best examples of international, transnational, and comparative law issues that could have an impact on a client in the United States in a criminal case come from the possible relevance of foreign laws on money laundering, cybercrime, or terrorism. Actions by individuals in the United States may carry penalties in other countries. Similarly, the law of other countries may be relevant in deciding legal issues in the United States, such as whether to extradite an individual to another country. International treaties may also be a source of law on transnational crimes, such as terrorism. The participants in the Criminal Law and Procedure discussion group had two specific suggestions for how to include such issues in a Criminal Law class.

One participant in the group already includes foreign law in a course on White Collar Crime when teaching the areas of money laundering and cybercrime. The references to foreign law could be used similarly in a basic Criminal Law course by including them in a typical section on corporate liability. Another method of inclusion would be to use a crime, such as money laundering or cybercrime, with transnational dimensions when teaching a core concept. For example, if facts and elements of money laundering were used to illustrate mistake of fact or mistake of law, the transnational aspect could be covered directly in the facts of a case or hypothetical, or in notes following a case.

A second suggestion was to develop a module on terrorism. The crime of terrorism in the United States and internationally is, first of all, an exercise in legislative drafting. There are many different definitions,<sup>101</sup> which, in turn, means

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100. See LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW § 23.05 (2004).

101. Compare 18 U.S.C.A. § 2331 (West 2000 & Supp. 2005) (explaining “the term ‘international terrorism’ means activities that—(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within

that the *mens rea* and *actus reus* of the crime would provide an excellent teaching tool for statutory construction and basic formulation of the crime. The basis for punishment—the moral blameworthiness of the individual—could also be explored through a terrorism module. Indeed, a terrorism unit could cover every concept in criminal law, including mistake of fact, mistake of law, accomplice liability, conspiracy, and defenses. One suggestion was to use a terrorism module at the end of the course as a means of review of concepts as well as for an introduction of comparative and international law issues.

In addition to the substantive crimes, another idea for incorporating global issues that could affect lawyering in the United States is to cover the concept of universal jurisdiction. For some crimes, especially genocide, crimes against humanity, and torture, any country may exercise jurisdiction to hear the case under customary international law.<sup>102</sup> The linchpin to jurisdiction is simply the presence of the defendant in the country that wishes to exert its authority. Although these crimes may seem to be unusual, the allegations of these offenses are far less rare than one might realize. For instance, a criminal complaint was filed in Germany in 2004 against Secretary of Defense Donald Rumsfeld and other U.S. military officials for alleged crimes committed at Abu Ghraib.<sup>103</sup> Secretary Rumsfeld was scheduled to go to Munich for an event. Under a universal jurisdiction law, the German authorities could have arrested Rumsfeld and conducted the trial. In today's highly mobile world, American lawyers need to be knowledgeable about the concept and application of universal jurisdiction.

One specific suggestion for how to include universal jurisdiction in a core Criminal Law course was to include the concept when teaching the classic beginning case in Criminal Law, *Regina v. Dudley & Stephens*.<sup>104</sup> *Dudley & Stephens* is a 19th century British case in which three crew members, who were lost at sea, killed, and ate an injured cabin boy. Two of the men were prosecuted for murder, received the death penalty, and later had their sentences commuted to six months imprisonment. The case is used to raise issues of purposes of punishment, and, sometimes, defenses of duress and necessity. The case is also a natural vehicle for the usual approach to domestic criminal jurisdiction. Part of

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the jurisdiction of the United States or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;”), with NEV. REV. STAT. § 202.4415 (2003) (defining “act of terrorism” as “any act that involves the use or attempted use of sabotage, coercion or violence which is intended to: (a) Cause great bodily harm or death to the general population; or (b) Cause substantial destruction, contamination or impairment of: (1) Any building or infrastructure, communications, transportation, utilities or services; or (2) Any natural resource or the environment.”).

102. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 404.

103. ABC News, *Abu Ghraib Torture Complaint Names Rumsfeld* (Dec. 1, 2004), available at <http://www.abc.net.au/news/newsitems/200412/s1255125.htm>.

104. *The Queen v. Dudley & Stephens*, (1884) 14 Q.B.D. 273.



the analysis of *Dudley & Stephens*, however, easily could include issues of which countries would have jurisdiction to try the defendants today under a universal jurisdiction concept. (Indeed, the case can be used to cover all of the bases of “extraterritorial” prescriptive jurisdiction,<sup>105</sup> including nationality, the protective principle, and universal jurisdiction, as well as to introduce the students to concepts of territoriality applicable to ships and planes in an increasingly mobile age.) Jurisdiction is an issue that we do not find typically in Criminal Law textbooks, but the general consensus in the Criminal Law and Procedure discussion group was that jurisdiction should be covered in the basic course and should include the concept of universal jurisdiction.

*c. International and Comparative Law Issues that Provide a General Knowledge of Legal Systems Other than the United States*

There was general agreement in the Criminal Law and Procedure discussion group that Criminal Procedure was an ideal course for introducing comparative materials on a whole range of issues, such as differences among legal systems regarding the existence of a jury, the right to counsel, the right to remain silent, plea bargaining, the role of victims, and the exclusionary rule. An example of what would work well in either a Criminal Procedure or in a basic Criminal Law course is the way in which victims in the German legal system are permitted to participate in rape trials through their own counsel.<sup>106</sup> The goal of including comparative materials is twofold: (1) the students gain background knowledge of other legal systems and (2) the students’ exposure to a different system provides a means for understanding, evaluating, and critiquing the American criminal justice system.

One participant in the Criminal Law and Procedure discussion group teaches a Comparative Criminal Procedure course and incorporates materials from that course into his basic Criminal Procedure course. For example, when he discusses the exclusionary rule for evidence obtained unconstitutionally, he contrasts the approach of the United States with that of Canada under the Charter of Rights and Freedoms.<sup>107</sup> When he discusses jury selection, he contrasts the complicated jury selection practice of peremptory challenges in the United States, with England, where the peremptory challenge has been abolished.

An idea for easily incorporating comparative materials into a basic Criminal Law course was to use statutes from other countries on defenses, such as duress, insanity, and intoxication, and on omissions as a basis of culpability when there is a duty towards another person. Differences among countries in their

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105. See, e.g., Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crime*, 1984 UTAH L. REV. 685, 686-719.

106. William T. Pizzi, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J INT’L L. 37, 59-64 (1996).

107. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

approaches to defenses and omissions would provide a rich discussion of purposes of punishment, societal, and cultural contexts for levels of culpability, and general knowledge of other approaches. Some textbooks already include “Good Samaritan” statutes from other countries in a section on omissions.

A third area discussed was the idea of incorporating the parallel system of international criminal law and tribunals into the basic Criminal Law course. Although the genesis of the concept of an international criminal tribunal is the Nuremberg and Far East tribunals of fifty years ago, it is only since 1993 that another international criminal tribunal has come into existence. In the years since 1993, there has been a proliferation of various types of international criminal tribunals. The two that are the most established, although with limited life spans, are the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”), both ad hoc courts created by the United Nations and populated by judges approved through the United Nations.<sup>108</sup> A second model of an international criminal tribunal is the International Criminal Court (“ICC”), created by treaty and established as a permanent court as of 2002. (The United States is not a party to the treaty creating the ICC, but ninety-nine countries are presently states parties.) Although several cases are under investigation by the Prosecutor of the ICC, the court has not yet heard a case.<sup>109</sup> Nevertheless, the statute of the ICC represents a detailed compilation of crimes, defenses, and procedure.<sup>110</sup> A third model is a “hybrid” court, composed of both national and international judges. Hybrid courts were created in Sierra Leone, East Timor, and Bosnia, and such a court will soon be established in Cambodia. All of the courts that have heard cases are generating jurisprudence on international crimes and procedure. The primary crimes addressed in these courts are genocide, crimes against humanity, and violations of the laws and customs of war.

Two participants in the Criminal Law and Procedure discussion group incorporate these international developments into their basic Criminal Law courses. One participant adds a stand-alone unit of eight classes on international criminal law to the basic Criminal Law course. This unit covers substance and procedure. The history of Nuremberg sets the stage for the study of the more recent ICTY and ICTR jurisprudence. The unit covers substantive crimes of genocide, crimes against humanity, and war crimes, as well as some of the procedure in the tribunals. The goal is to expose the students to the existence of international criminal law and to provide an intellectual challenge outside the usual panoply of crimes.

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108. International Criminal Tribunal for the Former Yugoslavia, <http://www.un.org/icty>; International Criminal Tribunal for Rwanda, <http://65.18.216.88/default.htm>.

109. International Criminal Court, Situations and Cases, *available at* <http://www.icc-cpi.int/cases.html>.

110. Rome Statute of the International Criminal Court, 37 I.L.M. 999 (July 17, 1998), *available at* <http://www.un.org/law/icc/statute/romefra.htm>.

The second participant uses the statute for the ICC,<sup>111</sup> especially the provisions in the “general part” in Part 3 of the statute, at selected points in the course. This provides students with a current example of the development of both the general principles and the specific elements of crimes. The contrast and similarities between the ICC and the Model Penal Code assists understanding of both the general and specific. An additional benefit is providing the students with a basic knowledge of civil law approaches to criminal law. (Since the ICC statute was negotiated by parties to the treaty from around the world, it reflects civil law approaches.)

In addition to providing knowledge of other legal systems, these last examples can accomplish the purpose of educating students about international law in general. Specifically, they can help students gain an understanding of the sources of international law, the methodology of interpretation, the actors (judges, prosecutors, defense, victims), jurisdiction, and other general topics that would allow students to recognize and evaluate international law issues in practice.

## 6. *Property*

The Property discussion group concluded that it was relatively easy to incorporate comparative and transnational perspectives into the basic course.<sup>112</sup> The participants agreed that there were fewer areas where international law principles applied directly to the traditional property canon, though they noted that some change was occurring even here. For instance, an increasing number of professors introduce intellectual property concepts into the basic Property course, and international law principles are relevant to intellectual property concepts (as, for example, through the Berne Convention for the Protection of Literary and Artistic Works). However, the group felt that international perspectives from such areas as human rights and expropriation would assist students in understanding domestic property law.

### a. *Property as a Human Right*

Many property casebooks begin with the well-known case of *Johnson v. M'Intosh*,<sup>113</sup> where the United States Supreme Court held that Native American tribes lacked the power to transfer title to their traditional lands to any grantee other than the United States.<sup>114</sup> As part of this opinion, Justice Marshall, writing for the majority, confronted the issue of why the title claims of Native Americans

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111. *Id.* art. 22-23, 37 I.L.M. at 1015.

112. See generally M.C. Mirow, *Globalizing Property: Incorporating Comparative and International Law Perspectives into First-Year Property Courses*, 54 J. LEGAL EDUC. 183 (2004).

113. 21 U.S. (8 Wheat.) 543 (1823).

114. See generally JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 3-4 (2000).

should not be respected under the traditional English principle which validated “first in time” ownership—and his analysis always prompts student debate. Exploration of international law on property as a human right can inform this student debate.

A number of international conventions recognize a human right to property. For example, Article XXIII of the American Declaration of the Rights and Duties of Man<sup>115</sup>—an agreement ratified by most nations in the Western Hemisphere, including the United States—provides: “Every person has a right to own such personal property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.” One participant explores Article XXIII in the context of *Dann v. United States*.<sup>116</sup> There, Carrie and Marie Dann, members of the Western Shoshone Tribe, filed a complaint before the Inter-American Commission on Human Rights alleging that the refusal of the United States to recognize their title to tribal lands in Nevada violated their right to property under Article XXIII. After lengthy proceedings, the Commission held that the United States had “failed to ensure the Danns’ right to property under conditions of equality” in violation of Article XXIII and other provisions of the American Declaration.<sup>117</sup> This participant assigns both *Johnson* and *Dann*, which produces a rich classroom discussion as students attempt to explain the different outcomes and to debate the extent to which international human rights precepts should shape domestic law.

*b. Comparative Real Property Sales Transactions*

Another group member supplements his casebook with materials on residential real estate sales transactions based on home ownership in the barrios of Caracas, Venezuela. The casebook contains a fairly standard section that discusses the key elements of a residential real estate transaction in the United States. Students are also asked to read Kenneth Karst’s study of property law in Caracas barrios,<sup>118</sup> which chronicles how barrio residents establish and transfer rights to their homes. Accordingly, issues such as security of title, marketability, and title assurance can be examined from contrasting perspectives.<sup>119</sup> The Property discussion group saw substantial value in this approach.

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115. O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. LV/II.4 Rev. (1965).

116. Report No. 75/02, Case 11.140, Inter-Am. C.H.R. (2002).

117. *Id.* at para. 172; See generally Derek de Bakker, Note, *The Court of Last Resort: American Indians in the Inter-American Human Rights System*, 11 CARDOZO J. INT’L & COMP. L. 939 (2004).

118. Kenneth L. Karst, *Rights in Land and Housing in an Informal Legal System: The Barrios of Caracas*, 19 AM. J. COMP. L. 550 (1971).

119. For a more complete description, see Mirow, *supra* note 111, at 188-92.

c. *International Takings*

The Supreme Court's landmark decision in *Pennsylvania Coal Co. v. Mahan*<sup>120</sup> made it clear that a regulation will be a compensable taking if it "goes too far." However, it is quite difficult to determine when a regulation goes too far and thus requires that compensation be paid. If time permits, many Property professors cover regulatory takings in the basic course, in part because it is one of the most murky—and hence challenging—topics in the Property area.

Members of the group agreed that insight into the domestic law of regulatory takings could be gained by examining international principles. There was particular interest in the expropriation provisions under the North American Free Trade Agreement,<sup>121</sup> notably Article 1110, because these provisions are directly relevant to lawyers practicing in the United States. One participant explores this area by having students read the arbitral decision in *Metalclad Corp. v. United Mexican States*.<sup>122</sup> This decision involved the attempt of a United States corporation to establish a hazardous waste landfill in the Mexican state of San Luis Potosi. With support from the national government of Mexico, extensive construction work occurred on the project, only to be halted by the claim of the local government that a building permit had not been obtained and by the San Luis Potosi governor's later designation of the site as a preserve for cacti. Finding that these actions violated Article 1110, the tribunal awarded the corporation over \$16,000,000 in damages. Had the case been tried in a United States court, the outcome might well have been the same. However, the language used by the tribunal in interpreting Article 1110 is broad. The tribunal stated that it would find a NAFTA violation for any "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. . . ."<sup>123</sup> Accordingly, the decision raises an issue for student discussion which is both interesting and eminently practical: is a U.S. entity with a regulatory takings claim better off in a NAFTA tribunal than in a domestic court? More importantly, it is useful to compare and contrast the different regulatory takings standards.

7. *Torts*

Participants in the Torts discussion group came up with the following examples, which illustrate the opportunities to introduce the law of other countries into a basic course on Tort law.<sup>124</sup>

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120. 260 U.S. 393, 415 (1922).

121. 10 32 I.L.M. 289.

122. 1 Case No. Arb(AF)/97/1, 40 I.L.M. 36 (2001).

123. *Id.* at para. 103.

124. Several participants have casebooks that raise some examples in notes. *See e.g.*, DAN DOBBS &

a. Damages

The law of damages is conducive to a comparative approach. A couple of participants in the Torts discussion group pointed out that even the labels given to items of damages are different in other countries. Punitive damages remain a source of great mystery and fear in many parts of the world, where they are perceived as oppressive and inappropriate.<sup>125</sup> The entire system of damages in the United States, with its wide variability in awards, is a puzzle to persons from outside the United States—as one of our participants observed from his interactions with Germans and the German legal system.<sup>126</sup> These same issues arise in the context of the domestic debate on tort reform, and the ability to step outside of one's own frame of reference is immensely useful in understanding the debate.<sup>127</sup>

A practical issue regarding damages raised by one participant concerns the limitations on recovery imposed by the Warsaw Convention in the event of personal injury or death resulting from airplane accidents involving international flights. This example illustrates to students that international law is relevant to their own lives (international travel) and also raises the damage limitation issue in a context outside of the highly charged domestic tort reform debate.

In addition to differences in legal rules pertaining to damages, the impact of nationalized health care and other systemic differences, such as funding of personal injury litigation, could be raised here. The inclusion of this information offers the opportunity to look at U.S. domestic law from another

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PAUL HAYDEN, *TORTS AND COMPENSATION* (5th ed. West 2005) [hereafter DOBBS & HAYDEN]; VETRI, LEVINE, FINLEY & VOGEL, *TORT LAW AND PRACTICE* (2d ed. Lexis Nexis 2003) [hereafter VETRI ET AL.]. One participant has a casebook that is widely used in Canada and which situates Canadian law within the broader context of the common law world. See ERNEST J. WEINRIB, *TORT LAW: CASES AND MATERIALS* (2d ed., Emond Montgomery Publications, 2003). Another participant is preparing for submission to publishers a casebook on comparative products liability. ROGELIO LASSO, *PRODUCTS LIABILITY & SAFETY: AN AMERICAN AND COMPARATIVE APPROACH* (UNPUBLISHED MANUSCRIPT).

125. See, e.g., Lord Griffiths, DeVal & Dormer, *Developments in English Product Liability Law: A Comparison with the American System*, 62 TUL. L. REV. 353, 391-96 (1988) (discussing the reasons for the English disinclination to punitive damages); WALTER VAN GERVEN, JEREMY LEVER, PIERRE LAROCHE, *CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL TORT LAW* 753-760 (Hart Publishing 2000) [hereafter VAN GERVEN] (discussing the German focus on reparation as the goal of tort damages, and incompatibility of punitive damages with German law.); Volker Behr, *Punitive Damages in American and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI. KENT L. REV. 105 (2003) (providing a thorough discussion of Germany's position on punitive damages, which argues that damages provided by German law, while not recognized as punitive, include damages provided under certain exceptions that can be understood as a form of punitive damages).

126. Anthony J. Sebok, *Translating the Immeasurable: Thinking about Pain and Suffering Comparatively*, \_\_ DEPAUL L. REV. \_\_ (forthcoming); Anthony J. Sebok, *Why Tort Plaintiffs Bluff When They Claim Damages, And Why Juries Should Get to Hear What Similar Plaintiffs Received*, FINDLAW, Aug. 27, 2001, at <http://writ.news.findlaw.com/sebok/20010827.html>.

127. See, e.g., Anthony J. Sebok, *Litigating A German Tort Disaster in the U.S.: The Difference Punitive Damages Make*, FINDLAW, (Jun. 14, 2001), at <http://writ.news.findlaw.com/sebok/20010614.html> (profiling a case in which German plaintiffs brought suit in the United States, motivated in part by the availability of punitive damages, and discussing what these damages mean to the plaintiffs).

perspective. For example, the existence of government-financed health care coverage lessens the necessity of the tort system serving as a means to cover the costs of accidents. Where such health care systems are in place, there is a tension between imposing accident costs on negligent parties, and society's interest in leaving relatively unimpeded a non-fault based system that covers health care at a relatively low cost.<sup>128</sup> Students from outside the United States, and even domestic students who have grown up with negative images of the tort system in the United States, will find it easier to understand certain features of law in the United States if they understand differences between the United States and nations which provide universal health care and other benefits to an injured person.<sup>129</sup>

The difficulty with using damages as an area to illustrate differences between tort laws in the United States versus in other nations is that some professors teaching Torts skip, or cover only cursorily, the subject of damages. In this event, the course in Remedies could cover the difference between tort damages in the United States versus in other countries.

*b. Parental Liability for Torts of Children*

Most courses on Torts will study the issue of parental liability for torts of their children, either through a mini-unit on vicarious liability or through its integration in other units. In the Dobbs & Hayden casebook,<sup>130</sup> for example, the topic of vicarious liability for torts of children is dealt with in the first chapter, as part of covering intentional torts. The law in the United States provides that parents generally are not liable for the torts of their children, with fairly minor statutory exceptions.<sup>131</sup> The law in other countries is different. For example, parental liability for torts of children is more extensive in France.<sup>132</sup> According to Van Gerven, French law has undergone much change in the last fifteen years, so that the French Civil Code now makes only causation relevant.<sup>133</sup> Specifically, parents under current French law can exculpate themselves by showing that the injury was caused by a *force majeure*, or through the victim's fault.<sup>134</sup> Van

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128. VAN GERVEN, *supra* note 124 at 22-25 (featuring excerpts of articles about the French, German and English systems focusing on the role of social insurance and the tension with fault-based liability).

129. Mike France, *How to Fix the Tort System*, BUSINESS WEEK, (Mar. 14, 2005), at 74-75 (pointing out that while "Corporate America" would welcome certain attributes of the Western European tort systems, such as lack of punitive damages, wages of the injured person paid by employers and the government, and a legal system that makes lawyers far less relevant than in the United States, such comparisons are deceptive because countries such as Britain, Germany and Japan all have nationalized healthcare).

130. DOBBS & HAYDEN, *supra* note 123.

131. DAN B. DOBBS, THE LAW OF TORTS § 340 (2000) [hereafter THE LAW OF TORTS] (the usual rule is that parents are not vicariously liable for the torts of their children in the absence of an employment relationship, joint enterprise or the like).

132. VAN GERVEN, *supra* note 124 at 515-16.

133. *Id.* at 522.

134. *Id.*

Gerven includes a few interesting French cases, including one where a father was held liable when his son caused a bicycle accident dashing across a road.<sup>135</sup>

These differences raise questions as to why the U.S. rule is different. Do we in the United States have different cultural assumptions about the family or the role of children? Is this difference a reflection of a focus on individualism in the United States (as is the case in so many tort doctrines) that is greater than in other countries? One participant warned, however, that it is very difficult and frequently inaccurate to speculate about why the law is the way it is in any legal regime; empirical work on these issues is rare. Nonetheless, even if one does not have a definitive explanation for the differences, just seeing that various legal systems answer the same question differently, and thinking about possible justifications for those differences, may be useful from a policy perspective.

*c. Duties to Control the Conduct of Others or to Protect*

Most first year Torts books spend a fair amount of time on the issue of when a defendant has an affirmative duty to protect someone from third parties or otherwise to control others. The law in the United States has been very cautious in this regard, proceeding, for the most part, by narrow exceptions.<sup>136</sup> The law in other countries is more expansive. Dobbs and Hayden's casebook uses the United States Supreme Court's opinion in *DeShaney v. Winnebago County Dept. of Social Service*,<sup>137</sup> to illustrate the view in the United States that there is no affirmative duty on the part of state actors to rescue.<sup>138</sup> (*DeShaney* construes the Due Process Clause, but uses tort law concepts that appear in duty decisions.) The casebook includes a note after *DeShaney*, which informs the students of *A. v. United Kingdom*.<sup>139</sup> This is a case from the European Court of Human Rights involving Article 3 of the European Convention on Human Rights. Article 3 provides that "No one shall be subjected to torture or to inhuman or degrading punishment." In *A v. United Kingdom*, the European Court of Human Rights held that England had violated the European Convention on Human Rights when an English jury acquitted a child's stepfather, who unquestionably had delivered severe and repeated beatings. The court required England to pay the child £10,000.<sup>140</sup> In essence, an international convention had created a legally enforceable duty on nations subject to the convention to control some persons for the protection of others.

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135. *Bertrand v. Domingues*, Cass.civ. 2e, 19 February 1997.

136. THE LAW OF TORTS, *supra* note 130, at 874-875 (the rule that the defendant has no duty to control (or to protect) the plaintiff is subject to exceptions that have generated a considerable amount of litigation).

137. 489 U.S. 189 (1989).

138. DOBBS & HAYDEN, *supra* note 123, at 493.

139. 27 E.H.R.R. 611(1999).

140. DOBBS & HAYDEN, *supra* note 123, at 499.



As with the earlier example regarding liability for one's children, it might be useful to explore with students whether this difference in law reflects a difference in broader societal values (perhaps reflecting more communitarian societies). Perhaps it reflects differences in perception about the consequences of imposing civil responsibility on governmental entities.

*d. Duty to Rescue*

As explained in the Reporters' Notes to Proposed Final Draft No. 1 of the THIRD RESTATEMENT OF THE OF LAW, TORTS, LIABILITY FOR PHYSICAL HARM,<sup>141</sup> a number of European countries impose a duty to rescue. Many have criminal statutes, a few of which can yield compensation. By contrast, the general rule in the United States is that there is no duty to rescue, and exceptions are made through incremental expansion of special relationships and limited exceptions.<sup>142</sup> While most Torts courses cover this topic, as it is of great interest to students and is central to the study of negligence, some observers of legal education have expressed concern about the student alienation that can occur when dealing with this topic, since the law seems so divorced from most students' sense of morality. In this light, introducing laws from nations that impose a duty to rescue, but then considering the practical problems that might arise in trying to apply such laws, could be very useful in counteracting the problem of students getting an impression of law as seemingly inherently unconcerned with morality.<sup>143</sup>

*e. Mental Incompetence*

Students of law in the United States are often shocked to find that the strong majority rule requires the mentally disabled (referred to as insane in many opinions) to act as a reasonable prudent person under the same or similar circumstances. Where exceptions exist, they are very narrow.<sup>144</sup> By contrast, some modern civil law jurisdictions have exempted the mentally disabled from tort liability, either by explicit provisions or through the application of general

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141. Draft of April 6, 2005, submitted to the Members for discussion at the Annual Meeting on May 16-18 (2005), p. 725.

142. For a now classic article on the topic written by one of the participants in the Torts discussion group, see Ernest J. Weinrib, *The Case for the Duty to Rescue*, 90 YALE L. J. 247 (1980).

143. Sources to consult on duty to rescue in Europe include: VAN GERVEN, *supra* note 124, § 3,1,5m, at 297-300; Alberto Cadoppi, *Failure to Rescue and the Continental Criminal Law*, in THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID 93-130 (Michael A. Menlowe & Alexander M. Smith eds., 1993); Edward A. Tomlinson, *The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y. L. SCH. J. INT'L & COMP. L. 451 (2000); and JEROEN KORTMANN, ALTRUISM IN PRIVATE LAW: LIABILITY FOR NONFEASANCE AND NEGOTOIRUM GESTIO 38 (Oxford University Press 2005).

144. THE LAW OF TORTS, *supra* note 130, at 284-285 (characterizing exceptions as arising from "limited and somewhat peculiar authority").

principles.<sup>145</sup> However, the exemption of responsibility of the mentally disabled is accompanied by the imposition of liability on curators and others having the legal custody of mentally disabled persons. This liability varies from absolute liability to a presumption of negligence.<sup>146</sup> Thus, supplementary provisions for equitable compensation operate against the background of a likelihood of liability being imposed, if not on the mentally disabled person him- or herself, on those having charge of him or her. This contrast between law in the United States versus that of some other countries can allow the instructor to engage the students in a discussion of who should bear the costs of accidents resulting from the acts of the mentally disabled, keeping in mind the purposes of compensation, deterrence, and moral responsibility.

*f. Defamation Law*

One participant suggested that it is useful to introduce English law when covering defamation. Although originally modeled on the English law, the law of defamation in the United States now substantially diverges from the law in England. One note in the casebook of which that participant is a co-author<sup>147</sup> describes the difference in outcomes in the United States versus England by using the example of the noted recent libel case against the American academic, Deborah Lipstadt. English military historian and author, David Irving, sued Lipstadt for stating in her book that Irving was “one of the most dangerous spokespersons for Holocaust denial.” Irving, who denied the existence of gas chambers or that Hitler had a systematic plan to exterminate the Jews, commenced the libel case in England. If he had brought the case in the United States, Irving, as a public figure, would have had to prove that Lipstadt’s statement was made with “knowing and reckless disregard of probable falsity,” whereas, in England, falsity is presumed. As a result, in order to prevail (as she ultimately did), Lipstadt called a throng of experts establishing that Irving mischaracterized historical information; in essence, Lipstadt had to prove the reality of the Holocaust.<sup>148</sup> The contrast between law in the United States and England set up by this example allows students to see in a concrete setting the central policy tensions existing in the law of defamation, such as the significance of who bears the burden of proof on the issue of truth or falsity. It also illustrates the prospect, in an increasingly interconnected world, for the defamation law of other nations to apply to American authors.

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145. *Id.* at 286 (citing GERMAN CIVIL CODE § 827, which excludes civil responsibility by a person unable to exercise free will (except where brought on by temporary disability such as use of alcohol), and Mexico’s CÓDIGO CIVIL PARA EL DISTRICTO FEDERAL § 1911, which imposes liability on a mentally disabled person unless a person responsible for the mentally disabled person is held liable).

146. The Law Reform Commission, *Report on the Liability in Tort of Mentally Disabled Persons Ireland*, 1985, available at [http://www.lawreform.ie/publications/data/volume5/lrc\\_37.html](http://www.lawreform.ie/publications/data/volume5/lrc_37.html).

147. VETRI ET AL., *supra* note 123, at 1165.

148. For a discussion of this lawsuit, see D.D. GUTTENPLAN, *THE HOLOCAUST ON TRIAL* (2002).

g. *Products Liability*

Although some schools no longer include products liability in their basic Torts class due to reductions in the units allocated to the subject, products liability remains a wonderful avenue to introduce ideas from other countries. Additionally, it is a topic of interest to lawyers and law students in other countries because of the ever-increasing globalization of product markets. There are many materials available in translation. Several professors have prepared materials for courses on the topic; one of our group's participants has allowed a number of professors to utilize portions of his casebook as he has prepared it for submission.<sup>149</sup> One interesting issue relating to substantive products liability law stems from the conflict between the approach to design defects in the Restatement (Third) of Torts: Products Liability, and the approach to design defects in the European Union's Directive on Liability for Defective Products.<sup>150</sup> Section 2(b) of the Third Restatement imposes liability for design defects only when the injured plaintiff can prove a safer, reasonable alternative design ("RAD") was available at the time the product was sold.<sup>151</sup> The requirement of a RAD and elimination of the consumer expectation test for design defects stands in stark contrast to the European Union's Directive, which utilizes language similar to the Restatement (Second) § 402A's consumer expectation test.<sup>152</sup> A wonderful debate developed between the reporters of the Restatement (Third)—who seemingly wanted to "enlighten" the European Union and Japan about the benefits of the Restatement's approach versus the dangers of the European and similar Japanese approaches<sup>153</sup>—and scholars from other countries, who criticized the Restatement (Third)<sup>154</sup> and rejected the perspective of the Restatement's reporters as "less than compelling."<sup>155</sup> From a teaching perspective, the debate is of interest not so much because it critiques the Restatement (Third)—after all, many domestic scholars have done so as well—but because it shows how similar

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149. LASSO, *supra* note 123.

150. COUNCIL DIRECTIVE OF 25 JULY 1985 on the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States Concerning Liability for Defective Products (85/374/EEC)

151. James A. Henderson, Jr. & Aaron D. Twerski, *What Europe, Japan and Other Countries Can Learn from the New American Restatement of Products Liability*, 34 TEX. INT'L L.J. 1,7 (1999) [hereafter Henderson and Twerski].

152. Article 6 of the Directive provides that "1. a product is defective when it does not provide the safety which a reasonable person is entitled to expect, taking all circumstances into account, including: (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; (c) the time when the product was put into circulation."

153. Henderson & Twerski, *supra* note 150. The Reporters discuss the new Restatement, the dated thinking in the Directive, and finally conclude with a warning that the drafters of the Directive, as well as the drafters of the Product Liability Act in Japan, have made a rather substantial mistake in adopting a page from a former law in the United States that has been relegated to the trash basket. *Id.* at 19.

154. Geraint G. Howells & Mark Mildred, *Is European Products Liability More Protective Than the Restatement (Third) of Torts: Products Liability?* 65 TENN. L. REV. 985, 1018-1028 (1988).

155. See, e.g., Jane Stapleton, *Restatement (Third) of Torts: Products Liability, An Anglo American Perspective*, 39 WASHBURN L. J. 363, 398 (2000).

language, utilized in a different legal system, is interpreted, and how scholars in other countries think about our law and our legal system's handling of products liability.

There are many other differences in products liability laws inside and outside the United States that could be referenced in a Torts class or a Products Liability elective. One pertains to the issue of liability for unknowable danger, which has been a contentious issue in the European Union. In the United States, the trend has been to back away from imposing liability for unknowable danger, thereby rendering strict liability virtually identical to negligence.<sup>156</sup> In the European Union, the defense of unknowable risks varies among member states—despite the European Union's directive seeking to harmonize member state product liability laws—because the Directive gives member states the option of whether or not to adopt an unknowable risk defense.<sup>157</sup> Although most member states have adopted it, some do not, and Germany excludes it for medicines, as does Spain for food.<sup>158</sup> Exploring with the students how and why these differences arose can provide a fascinating insight into matters such as differences in regulatory law between nations and the political compromises that led to the form of the European Union Directive as enacted.

#### IV. OVERCOMING CHALLENGES

In the third session of the workshop, the participants sought to identify, and then develop strategies to overcome, obstacles to implementing the ideas devised in the second session for introducing international, transnational, and comparative law issues into the core curriculum. These discussions produced a list of eight basic challenges confronting efforts to introduce international, transnational, and comparative law issues into the core curriculum, as well as a number of suggestions for how to deal with each challenge listed.

##### A. Faculty Incentives

The first challenge identified by the participants was the need to provide faculty with incentives to introduce international, transnational, and comparative law issues into the core curriculum. Four factors suggested to participants that many faculty teaching core courses would be hesitant to introduce international, transnational, and comparative law issues into their courses. To begin with, introducing such issues would entail extra work to prepare classes covering new

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156. See, e.g., Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CINN. L. REV. 1183, 1206 (1992).

157. Christopher Hodges, *Development Risks: Unanswered Questions*, 61 MOD. L. REV. 560, 563 (1998).

158. *Id.* Germany was influenced by the massive birth defects experienced as a result of thalidomide, and Spain by a toxic syndrome resulting from poor quality cooking oil.

material. Closely coupled with this, many faculty teaching core courses are unfamiliar with international, transnational, and comparative law, either generally or as these subjects relate to their core subject area, and could be concerned about their ability to teach such unfamiliar material. Professors teaching core courses might also be concerned about negative student reactions to such new material. Finally, unless the units allocated to core courses are increased to accommodate the introduction of international, transnational, and comparative law issues, professors teaching core courses must be convinced that the value of international, transnational, and comparative law issues justifies shortening or sacrificing other topics.

Many of the factors that would lead to faculty reluctance—the faculty members' lack of knowledge of the material, concerns over negative student reactions, and limited time—were identified by the participants as challenges, in and of themselves, to introducing international, transnational, and comparative law topics into the core curriculum, and are addressed separately. The participants had a number of ideas for providing faculty with the incentives to undertake the necessary work to introduce new material into their core courses. One could, of course, appeal to reason by seeking to convince faculty teaching core courses of the educational value of introducing international, transnational, and comparative law issues into such courses. Alternately, one could appeal to self-interest by providing rewards to faculty members for introducing such issues. The rewards could range from priority for overseas summertime teaching opportunities, to financial enticements, to simply free lunches at meetings where faculty teaching the same section plan how to introduce international, transnational, and comparative law issues into their core courses. Since professors often introduce into their classes topics about which the professors are writing—as illustrated by the example of law and economics analysis moving from scholarship into the classroom in many courses—increasing scholarship on international, transnational, and comparative law issues relating to core subject matter should translate over time into increased coverage of such issues in core courses. If so, encouraging more scholarship into international, transnational, and comparative law issues related to core subjects should cause coverage of such issues in the classroom to increase. Increased scholarship on international, transnational, and comparative law issues relating to core subjects could occur, for example, through symposia, or by senior faculty, who are writing on such topics, co-authoring with domestically-oriented junior faculty. Finally, the most important incentive may be institutional commitment—as reflected in the attitudes of administrators, peers, and students—to the introduction of international, transnational, and comparative law issues into core courses.

#### *B. Student Incentives*

The second challenge identified by the participants was the need to provide students with incentives in order to overcome opposition from many students to

the introduction of international, transnational, and comparative law into the core curriculum. Many students will react positively to the introduction of international, transnational, and comparative law issues into core courses. These are the students, however, who often will sign up for electives covering international, transnational, and comparative law in any event, and, hence, are not the primary audience for introducing international, transnational, and comparative law issues into the core curriculum. Regrettably, many students have a narrower focus. For such students, as some participants observed, the legitimacy of course coverage depends on what is covered in the casebook, what is tested on the final examination, and what is tested by the bar examination. Moreover, many students have a desire for simplicity, whereas the addition of international, transnational, and comparative law to a core course results in added complexity. While some of this desire represents a unfortunate degree of short-sighted thinking—what one participant characterized as the rational-student’s near-term-utility-maximizing behavior—there is also, as participants recognized, the legitimate difficulty students, especially in their first year of law school, will have in understanding additional material dealing with international, transnational, and comparative law when students are having a difficult enough time just trying to understand law in the United States.

Participants had a couple of suggestions to deal with student incentives.<sup>159</sup> To the extent that the legitimacy of course coverage in the eyes of many students depends on what is in the casebook and what is tested on the examination, then it is important that international, transnational, and comparative law issues be covered in the casebook and tested on the examination. Given the necessarily abbreviated introduction to international, transnational, and comparative law issues that can occur in a core course, such testing might only see if the students can spot international, transnational, or comparative law issues in a fact pattern. Alternately, asking a policy question on the examination (for example, asking the students to consider a Tort law reform proposal) could allow the students to call upon their introduction to comparative law in the core subject. In any event, one participant pointed out that it is important to clearly communicate the instructor’s expectations to the students—to address, for instance, whether students inclined to engage in outside research and reading on domestic issues in order to prepare for an exam should, or should not, do the same for international, transnational, and comparative law issues. The need to provide students with materials, ideally by incorporating international, transnational, and comparative law issues into casebooks, was discussed by the participants as its own challenge. The question of whether it would be a good or bad thing if the bar examination were to start testing on international, transnational, and comparative law issues relating to core

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159. One suggestion in a small group discussion that went beyond the scope of the workshop would be to decrease the importance attached to student evaluations of professors, both in promotion and tenure decisions and in post tenure compensation decisions, thereby decreasing the impact of student resistance to the introduction of international, transnational and comparative law into core courses.

subjects was the subject of spirited discussion in the context of providing incentives for law school administrators. Finally, one participant suggested a “Noah’s Ark approach”: If at least two professors teaching any given core subject introduce international, transnational, and comparative law issues into their core courses, then it will not strike the students as idiosyncratic behavior by an odd professor.

One suggestion to deal with the legitimate student concern with added complexity was the admonition that professors introducing international, transnational, and comparative law issues into the core curriculum need to keep it simple. On the other hand, just to show nothing is ever that simple, a number of participants pointed out that, to accomplish its purposes, introducing comparative law must do more than merely lay out contrasts and similarities to domestic law. Instead, this discussion should serve as a tool for the students to explore why there are differences and why convergence occurs.

### *C. Administrator Incentives*

The third challenge identified by the participants was the need to provide incentives for the leadership in the law school to support the introduction of international, transnational, and comparative law into the core curriculum in the face of conflicting pressures for law school resources and attention. Introducing international, transnational, and comparative law issues into the core curriculum in most law schools would require support from the Dean, both financially, and, equally important, in terms of throwing the dean’s political capital behind the initiative. Deans, however, as pointed out by one of the participants who had functioned in that role, face constant pressure to allocate limited resources between conflicting demands. While most deans might feel personally that introducing all students to international, transnational, and comparative law would be desirable, all other things being equal, so might be greater attention to improved student writing, other practice skills, professional responsibility, issues of diversity, economic analysis of the law, or other subjects.

Participants had a number of suggestions for giving incentives to the law schools’ administrators to support introducing international, transnational, and comparative law issues into the core curriculum—besides, of course, arguing for such an action on its educational merits. Some of these suggestions were fairly controversial. One suggestion that was not controversial (other than the question of whether it would work) was to try to convince deans that introducing international, transnational, and comparative law issues into the core curriculum would be advantageous in attracting student applicants. A more controversial suggestion was to convince deans of the advantage in terms of institutional prestige and rankings by focusing on persuading so-called elite law schools to introduce international, transnational, and comparative law issues into the core curriculum. A number of participants, however, disagreed with the implication that successful curricular innovation depends upon leadership, or at least buy-in,

from so-called elite law schools. Another suggestion was to encourage the American Bar Association and the American Association of Law Schools to take into account in accrediting or membership standards the degree to which the law school introduces most or all students to international, transnational, and comparative law issues. More draconian might be to encourage bar examiners in the states to start testing such subjects on the bar examination. These last two suggestions met with strong concern from a number of participants—one of whom summed up the reservations with the comment, “be careful what you wish for.” The worry is that even though participants at this workshop may be convinced of the utility of introducing most or all students to international, transnational, and comparative law issues, the philosophical question remains whether different law schools should have the flexibility to reach different conclusions on this question.

*D. Time Limitations (Coverage)*

The fourth challenge identified by the participants was the need to overcome the limited time faculty have in core courses to cover domestic material, let alone add international, transnational, and comparative law issues. This problem is particularly acute in courses such as Criminal Law and Criminal Procedure, which often have fewer units than other core courses, and in the growing number of schools which have reduced other first year and core courses from the traditional one year to just one semester.

Participants identified a number of strategies for dealing with time constraints. One approach is to devise ways in which materials introducing international, transnational, and comparative law issues could, at the same time, cover issues otherwise developed through domestic materials. Indeed, a number of the subject-specific suggestions described earlier in this Report seek to employ this approach. So, for example, opinions of courts in the United States dealing with foreign defendants or transnational disputes—particularly if the courts apply both U.S. laws that the core course will cover in detail, as well as international or foreign laws addressing the same general issues—can substitute for court opinions that address solely U.S. laws or lack any transnational aspects. Similarly, modules dealing with international, transnational, or comparative law issues (for instance on terrorism, genocide, or jurisdiction in a course on Criminal Law) can shorten or substitute for coverage of domestic material if the modules are designed to introduce or review key concepts. Moreover, carefully designed modules of international, transnational, and comparative law materials relating to the core course can aid professors to deal with time constraints by providing alternatives so that professors can cover some international, transnational, and comparative law issues relevant to their courses, without feeling compelled to cover either all or none. At the same time, these modules can allow the professor to work in coverage of such issues in the manner in which the professor finds most efficient.



Another manner in which to address time constraints is to coordinate coverage of foundational or basic concepts in international, transnational, and comparative law—assuming such coverage occurs in core, domestically-focused, courses rather than in a required course devoted solely to these topics—so as to minimize duplication. For example, looking at the list of topics covered in Michigan’s Transnational Law course, some participants suggested that Constitutional Law could be a good course to familiarize the students with basic principles of international law and the interplay between domestic and international law; Corporations could be a course that might familiarize the students with some of the actors on the international scene,<sup>160</sup> as well as the concept of soft law; and Civil Procedure could also briefly mention resolution of disputes in the international arena. Faculty also might consider which core courses have more time to cover basic concepts in international, transnational, and comparative law, so that other core courses with fewer units can build upon the students’ preexisting knowledge of basic concepts in international, transnational, and comparative law from other core courses. (Under this rationale, coverage of the CISG in Contracts could be a better place to familiarize students with the legal impact of treaties generally, than would be a discussion of the impact of treaties in Criminal Procedure.) This degree of coordination between different courses, however, may be contrary to the accepted faculty culture in many, if not most, law schools. Moreover, long tradition dealing with domestic issues suggests that introducing foundational concepts in a number of core courses might not be overly time consuming and can aid student comprehension.

A more radical solution to time constraints is to rethink some unit allocations, such as the trend to reduce units allocated to core courses. Finally, one solution is for faculty to recognize that law school graduates over generations have survived the deletion of material that was once considered an essential part of each core course. (For example, one participant pointed out how, a generation ago, state taxation of interstate commerce was a major topic in Constitutional Law courses, but now barely rates a mention by most professors teaching the course.) Hence, if introducing international, transnational, and comparative law issues into core courses means deletion or shortening of some domestic material, this may not be an insurmountable barrier.

#### *E. Educating Educators*

The fifth challenge identified by the participants was the need to familiarize faculty teaching core courses with international, transnational, and comparative

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160. While the actors on the international scene include more than business corporations, these organizations may fit within the broad (medieval or German) concept of the corporation (*e.g.*, Frederic William Maitland, *Translator’s Introduction*, POLITICAL THEORIES OF THE MIDDLE AGE xxv-xxvii (1900)) if an instructor wanted to pursue the topic of the various meanings attached to the term “corporation” over history.

law (both generally and as specifically related to their core subjects) to the degree sufficient to make faculty comfortable adding coverage of international, transnational, and comparative law issues to their courses. Many, if not most, faculty teaching core courses lack background in international, transnational, and comparative law. Even if detailed knowledge of these areas would not be necessary to introduce international, transnational, and comparative issues specifically related to a particular core course, participants pointed out that professors might be nervous about possible ignorance of something that would be relevant. Moreover, the current generation of law professors, by and large, did not take the core courses they are now teaching from professors who introduced international, transnational, and comparative law issues into the courses. Once professors introduce international, transnational, and comparative law issues into their core courses, then the next generation of law professors will have a greater comfort level with such issues. In the meantime, participants identified several strategies for overcoming this challenge.

One suggestion was the publication of materials with a teacher's manual. Unlike the style typical in current teacher's manuals, which tend to assume basic background or simply provide references, teacher's manuals for books designed to incorporate international, transnational, and comparative law issues might need to provide background explanations in foundational international, transnational, and comparative law concepts for the professors. A second suggestion was to conduct training workshops aimed at professors unfamiliar with international, transnational, and comparative law. At such training workshops, domestically oriented law professors could receive instruction both in general concepts of international, transnational, and comparative law and in specific international, transnational, and comparative law issues arising in their core subjects. A number of participants spoke about the Law and Economics Workshops in the 1980s and 1990s organized by Henry Manne. Those workshops provided instruction in economic methods and were influential in spreading the introduction of an economic analysis of law into core and other courses. Yet another approach was to encourage and enable faculty teaching core courses to also teach electives dealing with international, transnational, and comparative law topics related to their core courses—as, for example, professors teaching Civil Procedure also teaching an elective in Transnational Litigation. By virtue of preparing to teach such electives, the faculty members will develop the knowledge necessary to incorporate international, transnational, and comparative law issues into their core courses. Offering such electives in overseas summer programs provides faculty with an incentive to sign up to teach the electives. Finally, cooperation between faculty more familiar with international, transnational, and comparative law issues and faculty less familiar with such issues could help. Such faculty might team teach, trade courses, or combine all sections, when considering international, transnational, and comparative law issues in core courses. This approach is being used by one of the participants in the Criminal Law and Procedure discussion group, where a professor with

knowledge in one particular area teaches that segment to all Criminal Law classes in exchange for another professor teaching a segment to all classes in his or her area of specialty.

*F. Cultural Differences (Barriers to Understanding)*

The sixth challenge identified by the participants was to make sure that efforts to introduce comparative law issues do not simply result in promulgating misconceptions, because professors do not appreciate the cultural and other contexts in which the specific rules of law operate. Suggestions to deal with this problem include: interaction with foreign visiting professors (who might, for example, team teach classes raising comparative law issues); involving foreign students (commonly LLM students) in discussions of comparative law issues; and cooperative efforts with foreign bar associations (who, a participant reports, are actively engaged in producing comparative law materials). One participant reported that she has had success in inviting visiting foreign lawyers and professors—even if not specialists in her area (Civil Procedure)—to engage in a dialogue with her students. An even more radical approach to address this concern would be for law schools in the United States to enter partnerships with foreign law schools, which might involve some sort of distance learning between the partner schools.

*G. Materials*

The seventh challenge identified by the participants was to provide professors wishing to introduce international, transnational, and comparative law issues into core courses with materials they can assign to their students (and use for the professors' own background reading). Since many students, and even professors, attach legitimacy to material found in the casebook, in an ideal world, casebooks for core subjects would include materials introducing international, transnational, and comparative law issues relevant to the subject. As one participant put it, if faculty and students stumble across international, transnational, and comparative law issues as they read through the casebook, then they are likely to cover the issues.

Regrettably, however, current casebooks in core subjects often contain little, if any, coverage of international, transnational, or comparative law issues. For example, a survey of seven leading Constitutional Law casebooks revealed a few unsystematic mentions, at most, of international and foreign law. Moreover, even when the casebooks mentioned international or foreign law, they often contained insufficient background discussion to allow readers to understand the context. Similarly, participants in the Contracts discussion group found that there is, at best, sporadic coverage of CISG in current casebooks. The one leading casebook that does attempt to cover CISG does so through note material only, not through excerpts from CISG decisions (although many are available). Further, in United

States Contracts casebooks, the CISG is introduced, if at all, as some form of “international law,” with its status before courts in the United States not clearly explained, rather than as federal law that displaces the UCC where applicable.<sup>161</sup> Casebooks in most other subjects are similarly inadequate in introducing international, transnational, and comparative law issues.

While the participants at the workshop included a number of the authors of leading casebooks, it may take some time before casebooks generally include sufficient materials covering international, transnational, and comparative law issues. Hence, the participants explored a variety of second best solutions to provide materials before casebooks generally change. One approach is to publish supplements containing materials that professors could use to introduce international, transnational, and comparative law issues into core courses. In fact, Thomson-West has agreed to publish a series of supplements—to be called the “Global Issues” series—designed for this purpose. Prior to the workshop, Thomson-West had agreed to publish supplements in Civil Procedure (by Thomas Main), Criminal Law (by Linda Carter and Christopher Blakesley), and Corporations (by Franklin Gevurtz, who also serves as series editor). In reaction to discussions at the workshop, Thomson-West has agreed also to publish supplements in Contracts (by Michael Malloy, John Spanogle, Ronald Brand, Louis Del Duca and Andrea Bjorklund), Property (by John Sprankling, Raymond Coletta and Matthew Mirow), and Torts (by Julie Davies and Paul Hayden). The first of these supplements (in Civil Procedure) should be available by January 2006, with the remaining supplements available by the Fall of 2006.

A second approach is for professors to post on the Internet the materials that they are using to introduce international, transnational, and comparative law issues into their courses. One participant suggested that there be a collaborative effort to post such materials on the Internet, perhaps under the “brand name” of an organization that could assure quality so that users could trust the materials. A problem with such sharing on the Internet, however, is that this arrangement might not provide sufficient incentives (either financial or by virtue of individual recognition) for the production of materials that involve extensive effort in drafting notes and questions as well as writing a teacher’s manual.

A third suggestion is to take advantage of existing comparative or international law casebooks—as, for example, the existing casebook on Comparative Corporate Law by Larry Backer, who participated in the workshop. While these books may be too long to use as a supplement in a core course, one participant suggested that perhaps publishers could license professors to copy and distribute selected portions of the book in exchange for a fee. Whether publishers would be willing to do so is one question facing this suggestion. Moreover, in light of concerns about faculty incentives, it is unclear how many individuals

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161. *Cf. Genpharm Inc. v. Pliva-Lachema A.S.*, 361 F. Supp. 2d 49 (E.D.N.Y. 2005) (holding that court had subject matter jurisdiction under CISG).

who teach core courses would wish to spend the time selecting and editing portions of a lengthy book designed for a stand alone course. Also, this approach presumably would not provide a teacher's manual instructing domestically oriented faculty teaching core courses on how to introduce international, transnational, and comparative law issues into core courses.

Regardless of the manner used to publish or disseminate materials, participants had a number of ideas regarding the preparation of such materials. To begin with, some participants spoke of the utility of having multiple authors for each set of materials. Having multiple authors, in the view of some participants, adds legitimacy to the materials. Moreover, it can incorporate different areas of expertise (for instance, if each co-author has expertise on the law in a different nation). As stated when discussing the need to educate instructors, it is particularly important in the context of introducing international, transnational, and comparative law issues into core courses that a teacher's manual accompany materials. On a somewhat similar vein, participants recommended that the materials be simple and self-contained; in other words, the materials should avoid leaving students or faculty feeling that they need to spend an inordinate amount of time and energy doing outside reading in order to have the background necessary to understand the specific examples in the materials. Participants also recommended that comparative law materials reach beyond the few nations that often receive a disproportionate amount of attention in the literature (such as Germany and Japan for comparative corporate law materials), and that coverage of the methodologies by which international and comparative law trace their way into legal systems would be useful. Participants in the Contracts discussion group summarized what they were looking for: (1) a rigorously integrated and strongly edited set of substantive and comparative materials; (2) keyed to the basic structure of the typical Contracts casebook; (3) relying as much as possible on readings that were substitutional rather than additive; and (4) accompanied by a rigorous, detailed, and practical teacher's manual.

The Workshop participants engaged in discussions as to the types of materials that one could use to introduce international, transnational, and comparative law issues into core courses. Some participants noted problems with relying on the traditional sorts of cases and materials used in domestic courses. These problems include the need to translate foreign language sources; the different format, as well as significant stylistic and analytical differences between U.S. and foreign cases and commentaries that would make the foreign material practically incomprehensible to first year students; and the lesser amount of case law in non-common law jurisdictions.

Law school libraries also vary in the experience of their staff in locating foreign source material. These problems might necessitate greater reliance on secondary sources. Some participants have experimented with the problem method to introduce international, transnational, and comparative law issues. In addition, using opinions of courts in the United States that involve international,

transnational, and comparative law issues (for example by applying foreign law) may serve as a way to introduce such issues in a manner students find most familiar. Some participants found that referring to newspaper or other media reporting of current events involving international, transnational, and comparative law issues to be a useful source.

#### *H. Reexamining the Premise*

The eighth challenge identified by the participants returned the discussion full circle back to the beginning of the workshop: Were we confident of our reasons for thinking that most students should be exposed to international, transnational, and comparative law issues, so that we could engage in a dialogue with faculty, students, and administrators who questioned not simply the practicality of introducing such issues into the core curriculum, but whether it was even appropriate to do so? Perhaps the most extreme example of this challenge is the debate in the constitutional law area about the legitimacy of using foreign sources to aid in the interpretation of the United States Constitution. The consensus of the group from the beginning of the workshop until the end was that international, transnational, and comparative law issues are an entirely appropriate part of the core curriculum.

### V. NEXT STEPS

The planners of this workshop were determined to avoid the common affliction of workshops, which generate much talk and enthusiasm during the course of the workshop, but little action thereafter. The planners were also aware that the considerable discussion over the years about the need to introduce international, transnational, and comparative law issues into the core curriculum has produced, at the vast majority of law schools, little action. Hence, the final item on the agenda for the workshop was to develop concrete steps for following up on the workshop. This session produced a list of five steps.

#### *A. Workshop Report*

Drafting and disseminating this Report represents the first of the follow-up steps from the workshop. This Report is not only the work of the Pacific McGeorge faculty members listed as authors, but also includes input from the participants at the workshop. We thank all the participants who commented on drafts of various segments of this Report. Our hope is that this Report can provide useful ideas for law school faculty around the country on ways in which to introduce international, transnational, and comparative law issues into the core curriculum.

*B. Increasing Communication Among Faculty Pursuing Globalizing the Core Curriculum*

Needless to say, this workshop can hardly be the last word on ideas for introducing international, transnational, and comparative law issues into the core curriculum. Hence, the participants felt it would be useful if some mechanism existed for law professors interested in this initiative to exchange ideas. In order to meet this need, the Pacific McGeorge Center for Global Business and Development agreed to establish a Listserv for professors interested in exchanging ideas regarding introducing international, transnational, and comparative law issues into the core curriculum. The address for this Listserv is [globalcurriculum@lists.pacific.edu](mailto:globalcurriculum@lists.pacific.edu). We invite all readers of this Report to sign up for this Listserv. To subscribe, please go to the following address: <https://lists.pacific.edu/mailman/listinfo/globalcurriculum>.

Among the content that some participants suggested be exchanged through the Listserv would be copies of syllabi from professors who are integrating international, transnational, and comparative law issues into their core courses, as well as a list of courses and programs various schools are using to introduce international, transnational, and comparative law issues into the core curriculum

*C. Future Workshops and Conferences*

A number of participants suggested that there be further workshops and conferences to promote the introduction of international, transnational, and comparative law issues into the core curriculum. An upcoming workshop noted by a number of participants is the one-day workshop on Introducing International Issues into the First Year Curriculum planned to take place at the beginning of the American Association of Law Schools' ("AALS") 2006 Annual Convention. A number of participants will be panelists at the AALS workshop. Beyond that, participants suggested three types of follow-up workshops or conferences.

Some participants suggested that there should be further planning workshops. The participants at such planning workshops could include more authors of leading casebooks on core subjects, who could discuss how to introduce international, transnational, and comparative law issues into their books. Also, some participants recommended that further planning workshops address introducing international, transnational, and comparative law issues into courses on Professional Responsibility and Legal Research and Writing. (Indeed, several participants observed that research and writing courses would be a good place to introduce international, transnational, and comparative law issues. For one thing, this could give students an introduction on how to find international and comparative law source materials. It could also allow coverage of some international, transnational, and comparative law issues without imposing on the limited time in other core courses—albeit, this could impose on time constraints facing research and writing instructors.)

The second type of workshop would be the training type discussed earlier in dealing with educating educators regarding international, transnational, and comparative law. This would be aimed at junior and mid-level professors without any international or comparative law background. Some participants suggested that practicing attorneys or foreign academics might be useful attendees at such a workshop. This type of workshop would require support. This fact, in turn, led to discussion of possible funding sources and an inquiry as to whether the participants' home institutions would be interested in co-sponsoring such a workshop. One specific request was that each participant should investigate whether the administration of his or her home institution would be willing to cover the costs for faculty members from the institution to attend a training workshop.

A third type of conference would be to conduct symposia on international, transnational, and comparative law topics related to core courses. In this manner, scholarship in these fields would encourage professors to incorporate such issues into their classes (on the theory discussed earlier that professors teach what they write). Such symposia could take place either as part of, or separate from, instructional workshops.

#### *D. Working With Organizations*

The fourth follow-up step was to work with various organizations on joint activities to encourage the introduction of international, transnational, and comparative law issues into the core curriculum. Donald Del Duca and Mark Tushnet agreed to look into asking the AALS to create a new standing or non-standing committee to encourage the introduction of international, transnational, and comparative law issues into the core curriculum. Mathias Reimann and Franklin Gevurtz agreed to explore possible participation by the American Society for Comparative Law in encouraging the introduction of comparative law issues into the core curriculum. While no participants committed to this task, there was also discussion of approaching the American Bar Association and the American Society for International Law ("ASIL") for support in this initiative. (Since the workshop, Franklin Gevurtz has been in communication with the Executive Director of ASIL about involving ASIL in this initiative.) There were expressions of willingness to contact other more specialized organizations, such as the International Association of Constitutional Law.

#### *E. Individual Faculty Efforts*

Each participant was encouraged to return to his or her home institution with the goal of persuading at least one other faculty member in his or her core subject area to join in introducing international, transnational, and comparative law issues into the course (thus following the Noah's Ark principle).