

# SYMPOSIUM

## Enriching the Law School Curriculum in an Increasingly Interrelated World – Learning From Each Other\*

Edited by Louis F. Del Duca

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\*\* Council of Bars and Law Societies of Europe

\*\*\* European Law Faculties Association

## Enriching the Law School Curriculum in an Increasingly Interrelated World – Learning From Each Other

### **Participants**

#### **Introduction:**

Carl Monk

*President, International Association of Law Schools*

*Executive Director, Association of American Law Schools*

#### **Moderator:**

Louis Del Duca

*The Pennsylvania State University Dickinson School of Law*

#### **Panelists:**

Bruce Carolan

*Dublin Institute of Technology*

Mary Daly

*St. Johns University*

V.S. Elizabeth

*National Law School of India University, India*

Franklin Gevurtz

*University of the Pacific McGeorge School of Law*

Claudio Grossman

*American University Washington College of Law*

Charlotte Ku

*University of Illinois College of Law*

Julian Lonbay

*University of Birmingham Law School*

Mathias Reimann

*University of Michigan School of Law*

Frans Vanistendael

*K.U. Leuven, Belgium*

Francis S.L. Wang

*Kenneth Wang School of Law, China*

## Enriching the Law School Curriculum in an Increasingly Interrelated World – Learning From Each Other

Carl Monk

### Introduction

As the first footnote to this symposium issue indicates, this issue is devoted to the first program offered by the new International Association of Law Schools, the title of which was “Learning from Each Other: Enriching the Curriculum in an Interrelated World.” I congratulate and thank the editor, Professor Louis Del Duca, and the staff of the *Penn State International Law Review* on the publication of this symposium issue.

The International Association of Law Schools was founded in October 2005. It has about 160 member law schools from almost fifty countries. Its mission, as stated in its Charter, is “to foster mutual understanding of, and respect for, the world’s varied and changing legal systems and cultures as a contribution to justice and a peaceful world.” Among the activities which the Association will undertake is the sponsorship of conferences that will bring together legal educators throughout the world to discuss how to educate students about how legal problems would be approached either similarly or differently in different cultures or legal systems. The articles in this symposium issue discuss what is, or should be, included in the curriculum in order to educate students about these issues. They also discuss teaching methods employed to accomplish this goal, and how collaborative and exchange programs can help accomplish this goal.

It would be difficult to overstate the importance of achieving the goals of the new International Association. Lawyers in future generations will be dealing not only with more transnational transactions, but also domestic legal issues that may require knowledge of the law or culture of different countries. Whether a lawyer is working with a client engaged in an international business transaction that requires research on the law of a different country, or a client with a family law issue that may require sensitivity to Sharia law or Customary law, the world’s law schools should at least expose students to the fact that there may be different approaches to these or similar issues. Dispute resolution itself involves different approaches in different cultures, and students should

be aware of the fact that their clients may be as concerned about how a dispute is resolved as they are about whether they “win or lose.”

Law schools are educating not only the next generations of lawyers, but also the next generations of national and world leaders. It is critical that those leaders not only support basic fundamental human rights that should be observed throughout the world, but also that they be sensitive to the need to distinguish between what is a basic fundamental human right that should be respected worldwide, and what is a legitimate cultural difference. That line is not easy to draw, but as lawyers we should be sensitive to the need to be thoughtful about trying to draw it.

This symposium issue is an important contribution to the dialogue that will help achieve the mission of the International Association of Law Schools.

## Achieving Optimal Use of Diverse Legal Education Methodologies

MR. DEL DUCA: Welcome.

Our program today is an extension of the historic three-day conference on *Enriching the Law School Curriculum in an Increasingly Interrelated World – Learning From Each Other* presented by the International Association of Law Schools (“IALS”) at the Soochow University, Kenneth Wang School of Law in Suzhou, China in October 2007. Sixty-five delegates from thirty-nine countries representing a broad diversity of legal systems and legal education methodologies participated. This conference was the first of many future conferences which we anticipate the IALS will sponsor to facilitate exchange of ideas and information amongst law schools and legal education professionals around the world in our increasingly interrelated world.

### Different Modes of Legal Education and Legal Thinking

We are indebted to our distinguished IALS president Carl Monk, for his imaginative leadership in facilitating the creation of the IALS. Carl was scheduled to lead our opening panel this morning as the discussion facilitator on the subject of *Different Modes of Legal Thinking and Legal Education*. He ably led a similar discussion by a panel of legal education experts representing varying common and civil law cultures and systems from around the world at the October Soochow, China meeting. Their discussion highlighted similarities and differences in issue-spotting, substantive outcomes, and use of different sources of law and different teaching methodologies.

As much as Carl wanted to be here this morning, he regrettably is not able to be with us and has requested me to read this note to you:

Due to illness and a fever that worsened overnight, I regret that I will be unable to participate in this morning’s program. I apologize to my colleagues on the panel and the audience for this late withdrawal. Nevertheless, I know that this will be an excellent program, and I congratulate Professor Del Duca and the others who put it together. Thank you for your understanding.

Sincerely,

Carl Monk, Executive Director

In Carl's absence, I will serve as the discussion facilitator for this opening session.

Our distinguished panelists this morning (most of them participated in the Soochow University, Kenneth Wang School of Law China program) will today share with us the substance and spirit of the discussions that occurred at that meeting and also provide additional perspectives on *Enriching the Law School Curriculum in an Increasingly Interrelated World—Learning From Each Other*.

Carl and Harvard Law School Professor Todd Rakoff prepared the following Good Samaritan hypothetical case to initiate discussion by our distinguished panelists:

A man who is in good health and is an excellent swimmer passes by a lake and hears someone, apparently a boy, calling for help from the middle of the lake. The man is dressed for an important business meeting to which he is hurrying. He does not stop. Can the family of the boy successfully sue him for damages if the boy drowns?

This problem can be considered from the perspective of how a common law court and a common law trained lawyer would identify and address the issues. It can also be considered from the perspective of a civil law court or a civil law trained lawyer to see how they would identify and address the issues. Let's start with the common law perspective. Frank Gevurtz, what is your thought?

MR. GEVURTZ: How would a common law lawyer look at this case? My understanding is that there is no duty to rescue in the common law cases, so I therefore assume the passerby can walk on by.<sup>1</sup>

MR. DEL DUCA: Frank Wang? Do you want to address it from the viewpoint of Chinese law?

MR. WANG: I would not look at it only from a perspective of common versus civil law but rather in a cultural context. If the fellow walked by and did not assist in China, I don't see any imposition of

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1. Ed. Note: *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965). The general rule stated in this Section was supported by the Reporters in the 1965 Restatement by the following cases: *Gautret v. Egerton*, L.R. 2 C.P. 371 (1867); *Toadvine v. Cincinnati, N.O. & T.P. Ry. Co.*, 20 F. Supp. 226 (E.D. Ky. 1937); *Gilbert v. Gwin-McCollum Funeral Home, Inc.*, 106 So. 2d 646 (Ala. 1958); *Louisville & N.R. Co. v. Scruggs & Echols*, 49 So. 399 (Ala. 1909); *Allen v. Hixon*, 36 S.E. 810 (Ga. 1900); *Hurley v. Eddingfield*, 59 N.E. 1058 (Ind. 1901); *Osterlind v. Hill*, 160 N.E. 301 (Mass. 1928); *O'Keefe v. W.J. Barry Co.*, 42 N.E.2d 267 (Mass. 1942); *Matthews v. Carolina & N.W. Ry. Co.*, 94 S.E. 714 (N.C. 1917); *Schichowski v. Hoffmann*, 185 N.E. 676 (N.Y. 1933); *Stager v. Troy Laundry Co.*, 63 P. 645 (Or. 1901); *Prosper v. Rhode Island Suburban Ry. Co.*, 67 A. 522 (R.I. 1907); *King v. Interstate Consolidated St. Ry. Co.*, 51 A. 301 (R.I. 1902); *Riley v. Gulf, Colo. & S.F. Ry. Co.*, 160 S.W. 595 (Tex. Civ. App. 1913); *Sidwell v. McVay*, 282 P.2d 759 (Okla. 1955); *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959).

liability by the law.<sup>2</sup>

However, substantial social pressure would exist in China for the passerby to assist the boy as a result of the way that Chinese society controls behavior by social pressures and gossip. However, I don't think there is a remedy in China under the law.

MR. DEL DUCA: Bruce Carolan, you have a foot in both the United States and Irish common law systems.

MR. CAROLAN: I am basically from the common law jurisdiction of Ireland. I think my understanding would be the same as expressed by my colleague, namely that there wouldn't be an obligation under common law as I understand it in that jurisdiction to assist the boy.<sup>3</sup>

MR. DEL DUCA: What thoughts does our friend Claudio Grossman have?

MR. GROSSMAN: I think we have to take a look not only at the text of the applicable case law, statutes or codes, but also the personnel in charge of applying the rules, the relationships between the parties, and the cultural traditions within each legal system. As we have heard, in China and Japan, suing would be a problem but other sanctions would apply. I, accordingly, make a case for broadening the inquiry into these other areas.

MR. DEL DUCA: Claudio, the cultural context and the social context become very important from your perspective and Frank Wang's perspective.

We next hear from Frans Vanistendael who is from Belgium and comes to us with a civil law perspective.

MR. VANISTENDAEL: From a civil law point of view there is no basis under which the passerby has the obligation to rescue the drowning boy.<sup>4</sup> However, in my country, which is Belgium, there may be a criminal law liability, because we have a basic criminal law rule requiring a person to help another person in need as illustrated by the fact situation in the hypothetical.<sup>5</sup>

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2. Ed. Note: Chinese tort law does not contain a Good Samaritan provision. *See* General Principles of the Civil Law of the People's Republic of China, arts. 119-33 (promulgated by Order No. 37 of the President of the People's Republic of China, Apr. 12, 1986, effective Jan. 1, 1987).

3. Ed. Note: The Law Reform Commission of Ireland, in a report given in November 2007, noted that Ireland, like most common law jurisdictions, does not impose an affirmative duty to come to the aid of someone in distress. *Civil Liability of Good Samaritans and Volunteers*, Law Reform Commission of Ireland (LRC CP 47-2007). It recommended against creating such an affirmative duty in law, in the context of commenting upon proposed legislation that would eliminate liability for "rescuers." *See* Good Samaritan Bill, 2005.

4. Ed. Note: The Belgian Civil Code codifies tort liability in six articles. None of these articles contain a Good Samaritan provision. *See* C. CIV. BELG. arts. 1382-1386bis.

5. Ed. Note: Belgisch Strafwetboek [Belgium Criminal Code] (1961), art. 422bis.

The question, therefore, can be raised whether under the criminal law the person should have helped. This criminal law liability was introduced in Belgium in particular with respect to traffic accidents. It requires persons to assist injured victims of traffic accidents stranded on the roadside of the road.

For example, if there is a traffic accident and you pass by injured persons, you are obliged under the criminal law to stop to provide help. Therefore, if you ever come across an accident in Belgium, be sure that there are other people on the side of the road tending to injured persons before you drive by.

Of course, this raises a lot of questions about the facts and circumstances under which you can oblige a person to jump into the lake to try to save the boy. For example, if the passerby cannot swim or is a very bad swimmer, then of course there would not be any obligation even under the criminal law. However, in the hypothetical, I assume the passerby was a good swimmer.

MR. DEL DUCA: We next hear from Mathias Reimann from Michigan Law School who has a foot in both the common law and civil law camps, as well as sensitivity to the cultural context in which the fact situation occurs. Mathias, may we have your observations?

MR. REIMANN: This is, of course, the paradigmatic case for the first-year torts course (which I used to teach at Michigan).

In terms of actual outcome, there would not be much difference between US-American and most European laws. From a common law point of view, there is clearly no duty to rescue and thus no civil liability. German law,<sup>6</sup> like Belgian law, would not probably make the businessman liable for damages. There is no general duty in private law to aid others in distress, i.e., absent special circumstances. There is a criminal statute making failure to rescue where it can be reasonably demanded a misdemeanor (punishable by up to one year in prison or a fine) but whether its violation can support a private cause of action is subject to debate.<sup>7</sup>

The truly interesting differences between the US-American and the continental European legal systems with regard to this case lie elsewhere. They are of two kinds.

First, US-American law schools routinely teach this kind of case in their first year torts course, but I have never heard of such a case being

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6. Ed. Note: German Civil Code codifies tort liability in thirty articles (arts. 823-53 (BGB)). None of these articles contain a Good Samaritan provision.

7. Art. 323c German Penal Code (StGB). On the debate of whether a violation of this article can support a private cause of action under art. 823 sec. 2 BGB, see Palandt, *Bürgerliches Gesetzbuch (Kommentar)* (67th ed. 2008), marginal note 69 to art. 823 BGB.

taught in a civil law context in German universities (where I not only studied but also taught private law for a total of more than a decade). The reason is that American law schools want to convey lessons about the moral implications of law, about its boundaries, about the (slippery slope) consequences of trying to do good through the law, and, nowadays, also about the economic (efficiency) implications of legal rules. German law teaching is not much interested in any of these perspectives. It is by and large still limited to teaching the basic rules, the underlying doctrine (which can be quite complex), and the case law filling the gaps. Thus, we can see a significant difference here between the broad, contextual, and pragmatic American approach and the narrow, positivist, and doctrinal style in Germany. When I came to the United States as a graduate student and took torts, I thought I would learn new rules. Instead, I learned ways of thinking about the law that I did not know existed.

The other interesting aspect is that US-American law would by and large not punish such a failure to rescue criminally (there are some exceptions in form of a few state laws but they apply only in particular situations and impose decidedly low-level fines) while German law would. This raises interesting questions about the respective attitudes towards the duty to rescue. From an American point of view, one is not one's brother's keeper, and the duty to rescue is of a purely moral character. From a German perspective, the duty to rescue where it is reasonably possible is a legal one, sanctioned by criminal law. We see different degrees of state involvement here—a more hands-off attitude on this, a more heavy-handed approach on that side of the Atlantic. This reflects different historical experiences, different roles of the state, different conceptions of the relationship between law and morality, and different understandings of social responsibility. In the background, there are also institutional and procedural implications. For example, American criminal law is, by and large, much harsher than continental European criminal law so that one must be more careful before one invokes it. And there are, so to speak, philosophical differences as well. For example, German law does not assume as easily as its American counterpart that loss of life can be meaningfully compensated with money. To be sure, exploring the reasons for the differences will not lead to many easy answers. One cannot say, for example, that American law is generally less moralistic than European law—in many instances it is much more moralistic—but it can make for stimulating class discussions leading to a deeper understanding of the respective context of the legal rules.

MR. DEL DUCA: Thank you very much, Mathias. Mary Daly is Dean at the St. Johns Law School.

MS. DALY: Well, being a law professor, I want to change the hypothetical. The reason I want to do so really has to do with what both Frank Wang and Mathias just said regarding the relationship between criminal law and the moral boundaries of the law.

Now, change the hypothetical to reflect an actual case [from Nevada] that some of you in this room may be familiar with that occurred a couple of years ago—a very sad set of facts. Two young men—one of them sees a young girl—pulls her into the men’s room, and rapes her. The other man stands outside and does nothing. He does not assist—but does nothing to help the young woman. The perpetrator is, of course, ultimately arrested.

The hue and cry was what do we do with the fellow who stood outside and did nothing? Did he have a duty to intervene to prevent this criminal act? What are the moral boundaries of the law in terms of protecting the very young and very innocent?

At the end of the day, after a great discussion, no action was taken against that individual for the very reasons that we have just discussed.<sup>8</sup>

The second part of the story is the one that I have found engages many of us in this room even more, and that is what action, if any, should the university that the second young man attended take. There was a tremendous pressure to kick the person out, to say he was not entitled to the degree which he was about ready to complete on the grounds that he lacked good moral character. That became a whole other issue.

So I think that my hypothetical, the hypothetical that we have just heard, raises terrific opportunities to discuss the relationship between civil law, criminal law, common law, and the moral boundaries of the law, and to talk about context. Why is it, as you raised the question, that in the United States, for this horrific set of circumstances, no action was taken, and indeed in the view of most lawyers, no action could in fact be taken?

The other part of the hypothetical, though, that I wanted to change has to do with damages. This is an area that is becoming very interesting in New York in particular, because as we become an even more diverse population, we are beginning to see various actions arising out of malpractice or wrongful death where the individual is coming from a civil law country, perhaps an Arab country. The courts have been grappling with who is entitled to get, and the amount of damages.

We have a major case here in New York.<sup>9</sup> Normally when a young person dies, parents’ recovery is very limited. Courts now are grappling

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8. Ed. Note: *Strohmeyer v. McDaniel*, 221 F. App’x 632 (9th Cir. 2007).

9. *In Re Air Crash Near Nantucket Island, Massachusetts, on October 31, 1999*, 462 F. Supp. 2d 360 (E.D.N.Y. 2006).

with consequences which would result if the person had Egyptian nationality, or perhaps was a US citizen or was not a US citizen. In the Egyptian culture, there are not only immediate family members who are absolutely dependent on the individual but extended family members are also dependent on the individual.

You therefore can actually, in New York, have the same accident and have a very, very different set of damages because of the different nationalities of the decedents. These cases are very provocative and provide a wonderful opportunity to raise some of the issues in which we are interested.

MR. DEL DUCA: Thank you very much, Mary. The damages observation that you make leads me to suggest another aspect of the case. As a law professor, I also am privileged to change the facts a bit. Mathias and I, in a telephone conversation preceding the program, got into this aspect of the case.

Suppose this passerby was attired in an expensive suit—a two thousand dollars business suit—and he is on his way to a very important meeting. If he goes to that meeting and it actually turns out subsequently that had he been to the meeting, not only would he have had the two thousand dollars suit in its original condition, he also would have landed a five million dollar deal by being there to negotiate the deal. Assume these are the facts.

Let's make a few other changes in the hypothetical. He jumps in and saves the boy. However, because he does not close the five million dollar deal he is now short five million dollars and a two thousand dollar suit. What about that aspect of the damages?

Would there be any recovery in the civil law system, Mathias? Let's look at the civil law before we look at the common law result.

MR. REIMANN: In principal, yes. Under a doctrine that has been generally accepted since Roman law times—*negotiorum gestio*, i.e. taking care of another's affairs without a particular mandate—and codified in the German BGB (articles 677-87), he would be entitled to reimbursement for reasonable expenses incurred. This is not a claim for damages but for compensation for his expenditure. Everything would then turn on the reasonableness of the extension of help, which would be beyond doubt here, and on whether the helper was entitled to consider the expenditure necessary.

I also think that at least a German court (and I would say probably most continental European courts) would not blink an eye before awarding the two thousand dollars for the suit. Whether they would go so far as proposing a five thousand dollar liability —

MR. DEL DUCA: Five million dollars.

MR. REIMANN: Five million dollars?

MR. DEL DUCA: Let's make it worthwhile.

MR. REIMANN: I see no hard and fast rule that would exclude even such a claim but, without having researched the issue, my guess is that virtually every continental European court would fight hard for a way to avoid imposing that kind of liability.

MR. DEL DUCA: How about \$5,000?

MR. REIMANN: That might be more reasonable. Ultimately, the question is how far down the road you are willing to travel with this reimbursement claim. How much consequential damage would you include? Most legal systems will have rules or criteria to gauge what is within appropriate limits. The courts would have to draw a line and then provide hopefully convincing reasons for it. These reasons would be more doctrinal—or at least clothed in doctrinal garb—in Germany than in the United States.

MR. DEL DUCA: Before we get to our last speaker here, I would like to get back to that damages issue that might come out in a common law jurisdiction. Of course, there are common law jurisdictions and common law jurisdictions. They are not necessarily going to come out the same way in every common law jurisdiction.

But, Frank, two thousand dollar suit, five million dollar loss of income or five thousand dollars—how would you come out on those three?

MR. GEVURTZ: As a volunteer, I don't think there would be any recovery under circumstances in which you couldn't say that the person was misled. I don't think there would be any recovery.

MR. DEL DUCA: No recovery —

MR. WANG: Let me give it to you from China's point of view. China has incorporated many of the civil law concepts, mostly from the German Civil Code. However, at this time I don't believe that a Chinese court would award any damages based upon an application of relevant statutory provisions in a case like this.

General principles are applicable. A Chinese court may look upon this situation and be moved by the morality of the issue—were the facts to be extreme, were they to be stark, a Chinese judge may attempt to “shoe-horn” a remedy under some general principle of law which would afford a remedy where the judge feels that traditional social pressure would not have resolved the matter in a manner conducive to good social order.

China is changing, and that's what is interesting. It is adopting more of what we may consider to be a Western approach—litigation—to resolve disputes. The number of lawsuits among the local citizenry has skyrocketed within the past five to ten years. So it wouldn't surprise me over the course of time that cases like this will erupt and judges will

attempt to resolve them by creating remedies by employing the general principles of law read in a more expansive manner than is done today.

That's wonderful in terms of a civil law jurisdiction where you have these general principles of law. If you are a clever lawyer, you can certainly weave an argument. But right now I would say even at this stage of development in Chinese law, no, you wouldn't recover. There is no duty that they would look at, nor would there be imposed a duty of reimbursement.

MS. KU: Can I just add to that? Wouldn't there be enormous social pressure on the family of the rescued boy?

MR. WANG: Absolutely, and that usually is the way that these things are resolved. There will be visits to the family by friends, neighbors, relatives and even the local party secretary. At the end some money normally will change hands.

MR. GROSSMAN: I think we have to elaborate a little bit more on damages. If a person rescues someone and, as a result, missed an important business meeting (where there was a possibility of a five million dollar profit), a skillful lawyer would request another meeting. If the other party declines, the defense could argue *force majeure*.

I think then that in both situations, there would be damages if there were a refusal to re-engage in the conversation on the basis that you missed your opportunity because you were rescuing a person who was drowning. So the differences are more apparent than in the other situation.

MR. DEL DUCA: Any other comments about that?

Well, we are very fortunate to have with us from the National Law School of India University in Bangalore, in India, Professor V.S. Elizabeth. Would you share with us the Indian perspective?

#### Impact of Common Law in India

MS. ELIZABETH: Yes. Since we follow the common law system as a result of our colonial history, we generally borrow the principles that are applicable in England or in the USA.

There are two things that I wish to draw to your attention. One is that because in India we have tribal communities, or as you would refer to them, "indigenous people," the Indian law does not apply to them. Their own law and legal systems have been protected and respected by our Constitution. So within those communities, it wouldn't be the principles of law as we find in common law which would be applicable.

It was very interesting hearing the discussion on the role of social pressure in China, Africa and New Zealand. In a society where the community and the group are more important, you have societal

pressure. This pressure talks about obligation and the fact that obligations are applicable. Although there is no obligation in the common law system for anybody to rescue, I would say that this approach would not work within the tribal communities. However, for the rest of India, the same common law principle applies. There is no obligation to rescue.

Going to the changed fact situation that Professor Mary Daly was referring to, and Claudio Grossman's earlier comments, I think the solution depends upon who is sitting there in the court and who are the lawyers. Just recently, when I was at a seminar conducted in one of the premier institutions of the country, a fact situation based upon an imaginary rape case was given to judges and they had been asked to discuss the facts and write their decision.

The conviction rate amongst the judges was low. Only approximately forty percent of judges called for a conviction and approximately sixty percent of the judges called for acquittal.

The objective behind the exercise was to enable the judges to realize how subjectivity creeps into their decision making and instead to use an objective criteria to arrive at a more objective result. As professors, we advocate that lawyers and judges are objective. We are constantly teaching that. However, the fact of the matter is that it isn't true. The person who makes the law is not the one who applies it. The particular judge sitting in the courtroom at a particular time makes a difference. Why do lawyers constantly juggle and try to get their cases transferred to a particular court where a particular judge is presiding?

This exercise that was conducted at this premier institution was just too good to be true. It informed the judges about themselves. The judges said that the same set of facts should produce the same decision. It was demonstrated that this was not the case.

You have to go beyond the strict black letter law to something like the Constitution, which speaks of a greater morality and value. You have to ask the question, under the Constitution, does that person have a remedy.

You have to go beyond the question of what does the law say on a particular point, you cannot stop there.

Thank you.

MR. DEL DUCA: Thank you very, very much. We now go to the next part of the program.

Balancing Use of Teaching Methodologies – Case Law, Case Problem,  
Lecture, Simulation, Clinical and Other Methodologies

MR. DEL DUCA: We leave the subject of *Different Modes of*

*Legal Education and Legal Thinking* and address the question of *Balancing Use of Teaching Methodologies – Case Law, Case Problem, Lecture, Simulation, Clinical and Other Methodologies*.

To introduce that subject, we quote from an article just recently published in the *Vanderbilt Law Review* by Todd Rakoff and Martha Minow. The article is entitled *A Case for Another Case Method*. Here is what they say about current use of the case law methodology:

The plain fact is that the American legal education, and especially its formative first year, remains remarkably similar to the curriculum invented at the Harvard Law School by Christopher Columbus Langdell over a century and a quarter ago. Invented, that is, not just before the internet, but before the telephone; not just before man reached the moon, but before he reached the North Pole; not just before Foucault, but before Freud; not just before *Brown v. Board of Education* but before *Plessy v. Ferguson*. There have been modifications, of course; but American legal education has been an astonishingly stable cultural practice.<sup>10</sup>

Today, there is a rare opportunity to influence worldwide optimal use of legal education methodologies. Not only in our own legal system but around the world, attention is being focused in developing countries and Eastern European block countries, in Japan and China (with its more than six hundred law schools all created since the re-opening of law schools in 1977 after the closure in 1949).

It is a pleasure to have Professor Charlotte Ku, recently the distinguished Executive Director of the American Society of International Law and currently the Director of International Programs at the University of Illinois Law School.

MS. KU: Thank you very much, Louis.

#### *The Scope and Approach to Law Teaching Today*

It is a pleasure to join you this morning. I will just at the outset say that my comments come principally from the lens of trying to think about the LLM program and how to integrate our fifty LLM students into the regular courses at the University of Illinois.

I had to think a little bit about the methods that are being used in the classroom, what the students coming into these programs are typically accustomed to, and how, essentially, to facilitate their most effective receiving of these styles of instruction in a very short period of time in the one year that they are there.

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10. Todd Rakoff & Martha Minow, *A Case for Another Case Method*, 60 *VAND. L. REV.* 597 (2007).

*Usefulness of The Socratic Method*

What I learned was that the dialogue method, Socratic method, of course, is used but largely modified, and not perhaps as exclusively as the quote that Louis Del Duca read to us. Nevertheless, there are some very useful objectives that this style of teaching meets, and the students do relate to this. It clearly sharpens analytical skills. It gives you the ability to really mount your argument and use information in a way that can persuade, identify questions, and sharpen, also, reasoning. So I think whatever the vintage of the Langdell approach, it does, I think, still serve useful purposes, and certainly very important ones, for the foreign lawyers who come into the US legal system. The second point that I have learned is that in legal education, we have already struck a number of balances, and nothing is exclusively one or the other. The dialogue method itself was meant to widen the apprenticeship approach that had also been a tradition of US legal education and to make it in some ways a more intellectual academic discipline. So I think we have already struck a balance between the skills, the techniques, the technical requirements of performing as a lawyer as well as the more intellectual grounding that we feel lawyers may need. We have seen variations on this theme in the inclusion of a clinical approach in law schools.

*Balancing Multiple Objectives in Legal Education*

We, of course, now in law schools are all thinking about the research activities that graduate students in law might engage in and how that works within the traditional law teaching environment. So balances have already been struck, and indeed professors don't individually use any one method exclusively. And I think just for the sake of interest and enthusiasm, don't do so.

*Including the Multi-disciplinary and Multi-dimensional Nature of Global Law Practice*

I will just make one observation in terms of what I think might be missing. What I think might be missing is a transactional experience of some kind in the course of the legal education. This is not just for the LLM students, but perhaps also for the JDs. We have trial advocacy. We have moot courts. We have many things that simulate the litigation aspect of the practice of law, but certainly all of us sitting here know that most of law is not practiced in this way, and indeed most lawyers don't engage in litigation.

The transactional approach not only would provide a taste of what law practice in the United States and perhaps increasingly on a global

basis encompasses, but also begins to, I think, introduce the idea that nothing is exclusively within its own realm. Typically, when you study a subject, it is presented in perhaps an overly or somewhat artificially evolutionary manner that you go from point to point to point in terms of indicating how a subject matter, whether it is environmental law or international law or other subjects of law, actually come to be what they presently are.

Of course, in the practice of law, which gives rise to all of this, we know that it is not quite as neat and tidy as that and there are a lot of balances and trade-offs that need to be made.

The more I think students can get a taste of that, just as a matter of what law really is, and some of the important factors that ultimately conditioned the law will be important. From a foreign student's standpoint, I think this is particularly important because there is such a short period of time in which to understand really what gives rise to the jurisprudence that they see as the outcome of US legal practice.

Such transactional experience would also be of value to the JD students and perhaps even more so if the JDs and foreign students can undertake such work together. Our incoming JD students seem to have a hunger for understanding the international system and regularly fill short courses and lectures on subjects related to transitional societies, international human rights or developments in specific regions of the world. The legal academy would do well to capitalize on this interest to ensure that the global character of legal practice today is introduced to the student as early in his or her career as possible.

Global law practice might be enhanced by language facility, but it would definitely be enhanced by a basic appreciation of the transnational dimension of all fields of law. If competitive advantage is created by flexibility and adaptiveness—two strengths of the US legal system; these now need to include adapting to global conditions and equipping our students to do so effectively. This perhaps can be done most efficiently through some kind of experiential learning in a foreign location, but can also be done in the traditional doctrinal courses using the dialogue method of teaching. The key is to recognize the need and to respond to it in as efficient and profound a way as possible for the student. There are many ways to accomplish this as others on this panel will demonstrate.

MR. DEL DUCA: Well, our good friend and distinguished friend Claudio Grossman, the dean at the American University School of Law, has done wonderful things there, as you all know, expanded their programs, enriched it in many, many ways, and done wonderful things internationally.

In any event, I took thirty seconds of your five minutes, but I said nice things about you, Claudio, so go ahead.

MR. GROSSMAN: Thank you, Louis. Thank you for your generous words and for limiting my presentation by only 30 seconds.

Before I begin, I would like to reciprocate and say that we are all here because of Louis Del Duca's commitment to international education. I want to thank him for including me in his important endeavors.

*Problems with the Traditional Case Law Method*

Referring to the case method, we know that it was born in a particular set of political circumstances, isolationism, that lead to the notion of sovereignty. At that time, the actors (states) of the international community thought that, mostly, they could solve the problems facing their respective countries on their own, essentially unilaterally guaranteeing the well being of their citizens.

We are witnessing dramatic changes in the world. In contrast to the past, the nature of problems currently facing humankind, ranging from security to the environment and the struggle against terrorism, requires more than ever before, an integrated approach by the international community, as no country acting alone can resolve those problems. This new environment poses a variety of serious challenges for law schools as new skills must be developed that take into account the current world reality, including inter-cultural and language skills to effectively interact with individuals from different legal backgrounds.

We also know that law is not a science. While rigorous analytical thinking is important, the law has elements of art. We cannot present to our students the idea that syllogistic analysis will suffice. We also know that historical perspectives and theoretical understandings are always important, but especially in the current context where the institutions and procedures required for the new world reality are not yet fully developed.

Hence, the traditional case method falls short of adequately equipping law students and future lawyers, while nevertheless showing tremendous resilience even though the circumstances in which it arose have changed dramatically. One reason for this endurance is, perhaps, that the case method promotes analytical thinking and an ability to consider issues from different perspectives, skills that are essential in the legal profession. However, whatever its merits, certainly it is insufficient in and of itself to educate and train individuals who will help shape the world in the 21<sup>st</sup> century.

Already, from a purely domestic point of view, the case method has been criticized for not training professionals in necessary skills such as negotiation, interviewing, and counseling. It would be enough to note that, as we know, over ninety percent of criminal cases are plea

bargained.

From a world perspective, inter-cultural skills take on great importance. These types of skills cannot be reduced to a matter of learning a foreign language or getting a proper “translation.” They require openness to difference, not merely a question of literal “translation,” but also being open to different meanings and ways of thinking. Please allow me a personal anecdote. When I came to the United States, to American University Washington College of Law in 1982, I asked a colleague about an individual applying for a research assistant position, and he advised that the person was not “aggressive,” and so I proceeded to hire that individual. Later, my colleague asked me why I hadn’t followed his advice. Well, you see, I was coming from the Netherlands at that time and the worst thing you could say about a person was that he/she was “aggressive.” Accordingly, I had interpreted my colleague’s observations positively, while he had meant them in a negative light. So translation is not strictly a question of words, but of understanding. I’m sure we can all come up with examples of how things are “lost in translation.”

In a world that requires the development of new institutions and procedures, as well as the promotion of values, for many of us it is imperative that law schools address the issue of ethics. While law schools should not be “politically correct” and attempt to indoctrinate students, we are entitled to promote discussion on values and ask people to develop their own assumptions.

What strategies can law schools pursue to achieve our goals in the new world reality? One strategy is to create links between the study of domestic and international law. Rather than treating international law as an isolated discipline, it is worth presenting issues or problems that require appropriate identification and interconnection of what, thus far, has been considered domestic versus international topics.

For example, at WCL, we have developed integrated sections in the first year. In the first year torts class, for example, students are exposed to the Paquete Habana case and the Alien Tort Statute, challenging assumptions that overlook the existing connection between international and domestic legal issues.

A second strategy is the study of different legal systems, including summer and semester abroad programs and dual JD programs. Again, at WCL, we have dual JD programs with distinguished universities in Spain, France, and Canada, and are expanding to Australia and other areas around the world. Students in these programs are not merely “scratching the surface” of another legal culture, but rather are immersed in it. Dual JD programs result in students who are trained to practice in two different jurisdictions. As it happens in other realms, these

programs, in turn, influence not only the participants but also the fabric of legal education as a whole. Alumni of these dual JD programs bring a wealth of knowledge that can be tapped in the form of adjunct teaching, lectures, participation in special events, and so on, further multiplying the effect. While devising forms and strategies that tap these new phenomena may present their own challenges, this avenue offers much promise for the promotion of legal education's curricular components in the 21<sup>st</sup> century.

Thirdly, in a diverse society and world, issues of ethnicity, gender and culture must be part of an institution's academic agenda. There are different methodologies to achieve this goal: various forms of experiential learning (clinics, supervised externships), as well as a diverse student and faculty body that anticipates, in the corridors and the classroom, the world in which we live.

A fourth strategy is the development of inter-disciplinary projects, connecting with other schools (e.g., of business, of communication, of international relations). Business schools have proven to be very innovative, and there is much we can learn from them. At WCL, we developed a JD/MBA and LLM/MBA, the only one in the country, that have allowed us, in mutually beneficial relationships, to enrich our ways of thinking about complex phenomena.

A fifth strategy is to instill transnational and international components in pro bono and public interest programs. At WCL, we have a variety of programs to achieve that goal. Our International Human Rights Clinic, the United Nations Committee Against Torture Project, our Impact Litigation Project, and our UNROW Human Rights Impact Litigation Clinic, just to name a few examples, enable students to be exposed to lawyering in multi-cultural environments in both the US and abroad. These programs enable us to meet students' expectations to contribute to justice while in law school.

In our school, sixty percent of the students mention, upon admission, that one of their main purposes is to contribute to a better world. While we don't have statistics when they graduate, I'm afraid that the percentage is not quite so high.

Now, let me finish by recognizing that we are in a moment of transition. I don't think we are ready to articulate an overall theoretical understanding of the premises as to what a law school will look like, but I think this is a moment to increase tolerance for experimentation and flexibility in the 21<sup>st</sup> century, essential fertile grounds for new theoretical developments.

MR. DEL DUCA: Well, thank you very much, Claudio, for those remarks. You have anticipated some of our next topic here on internationalizing the curriculum, but we will get to that in the next few

minutes.

On the question of balancing use of teaching methodologies, it is more than just a question that is raised in the context of what we do in our United States law schools. This is one of the beauties of having the IALS, because when you bring together people from different cultures, legal traditions and value systems, you inevitably get into a broader perspective—a broader approach to identifying and analyzing problems.

Therefore, whether we have too much case law, too little, too much lecturing, not enough lecturing, whether we have too much simulation, not enough simulation etc., in the context of our culture is something different from what it might be in a different legal system or legal culture. We are therefore fortunate to have people who can tell us about how this works within the framework of their legal systems, their traditions and their cultures.

Frans, do you want to tell us a little bit about how it works on the other side of the Atlantic in the civil law countries?

MR. VANISTENDAEL: I would like to address the question been raised by Dr. Rakoff and Martha Minow in their article.

*Problems with the Traditional Case Law Method*

MR. VANISTENDAEL: Professors Rakoff and Minow are pleading for another type of case method. One of the problems with the case method is that the setting in which the legal analysis and the discussion take place in class is kind of pre-fabricated in the sense that in each case the courts and the lawyers have taken positions. This is illustrated very well with the case we had this morning, the case about the boy drowning in the lake.

That is not the type of case which you will get when you use the case method in class with cases taken from case books. The result is also that you get very different questions, because the questions raised this morning in the drowning boy case are of a totally different nature as the case, compared to the type of questions which you would raise in a normal case decided by the appellate court.

The solution which Rakoff and Minow suggest in their article is to widen our case law approach and to look into case study methodology used by business schools, as Claudio was saying in order to provide a wider perspective. What is missing in the traditional case method, if you limit yourself to court decisions, is the wider implication of policy issues and the legislative issues. They do not come to the fore, and, therefore, we have to look to other methods.

Of course, if you are lecturing, you can do that because you can mention all of the policy issues and give them to your students, but that

is not a very active method of teaching, and I will give you some alternatives which we have been practicing in Europe.

*Alternative One: Collective Cross Border Seminars*

One of them is running simultaneously a collective seminar of fifteen law schools in Europe. We have been doing that over fifteen years now. It is an active seminar in the sense that it starts at the beginning of the academic year with a list of questions. There are about six students per law school, so all in all you have about ninety to one hundred students participating in the exercise.

The students get a list of questions, and are required to write a report on the questions. The questions, of course, are not appellate decision questions, but legislative issue questions, particularly on European law. They deal with harmonization and approximation of tax law. The students are requested to write a seminar paper from their national point of view on a separate set of questions, so that we collect about ninety different papers.

There are also some US schools involved in this game. The Georgetown University Law Center in Washington, DC is such a player. We bring the students together during one week. They interact for seven days together with their professors, and they discuss all the issues, raised in the questions and discussed in the papers. At the end of the week, the students are supposed to come up with proposals to resolve the questions that have been submitted at the beginning of the course.

In that type of setting, you get a discussion of policy issues, which you really need. The students are emulating what a legislator would do. This takes place in a tax setting in our law school, but of course it could be done in a setting of corporate law, of labor law etc. I think it would be even more interesting in other settings, because the solutions are much more diverse than in the field of taxation.

*Alternative Two: Negotiating International Treaties*

Another method that we sometimes use involves tax treaty negotiations. There are more than two thousand tax treaties in the world, and the question is, how do you negotiate a tax treaty. In this way, students get immediately involved in a set of basic questions which are typically not questions which you will find in an appellate tax case.

So the questions are, for instance, if you are negotiating a treaty between the US and your own country: what is the volume and type of investments in your country and vice versa in the US, what do we import from the United States, and what do we export to the United States? How many US expatriates do we have in the country, and how many

expatriates are there in the US? Do we follow the OECD Model Convention or the United Nation Convention, which are two different conventions?

Do we need special rules for contractors or for short-term assignment by US companies? Do we go for maximum exchange of information which has to do with banking privilege and so on? There are indeed very different policy issues and practices, with respect to banking privileges.

Within a given set of facts students are requested to negotiate. It always helps, of course, if you can integrate in your class a real tax negotiator from your own country.

Of course there are not only tax treaties in the world. There are many other types of treaties in the world. This type of exercise develops students' negotiating skills which are totally different from what you do in normal legal procedures before an appellate court.

*Alternative Three: Problem Socratic Method in a Basic Course*

You also can use the Problem Socratic Method, which is not the case method, in a very basic setting of a basic tax course.

I have been teaching comparative income tax for more than thirty years to many students. Most of the students do not have any tax knowledge to start with. So how do you teach comparative tax to students who have no tax background?

You start with basics. What is a tax? Because there is nothing—you are not going to believe me—there is nothing that looks like a tax system of a country like a tax system of another country. The policy issues are all the same. So you start with lots of questions. Here are some examples:

1. Some say that tax is robbery. So when Al Capone robbed a bank, did he collect a tax?
2. When I crash into an army truck and I have to pay for damages, do I pay a tax?
3. When I fulfill my obligations in military service under the draft system, do I pay a tax in kind?
4. When I pay an environmental levy on plastic bottles, do I pay a tax?
5. If an individual is charged on indices of wealth and is assessed on the number of horses and the size of his swimming pool, is that a tax?

By raising those questions, you raise a lot of additional issues. For instance, there is also the question: when I am an autoworker and I make my payment to the pension fund, is that a tax?

By raising these types of questions, you assemble the basic elements of your concept, and then of course, after some time, the students themselves will come up with the idea of what a tax is all about.

Once you are there then of course the major—normal questions will follow. What do we tax? What should be the subject of taxation, et cetera, et cetera? Students will present you with all kinds of different solutions.

These short examples illustrate differences between the use of the problem case method and the case law method. The case problem method, like the case law method, includes active teaching but also allows you to deal with all of the policy and legislative issues, which very often are not to be found in use of a case law method. The broader scope of the case problem business studies addresses economic, social, psychological questions and policy issues which are not necessarily raised in the traditional case law methodology.

Thank you.

MR. DEL DUCA: Thank you very much for those very perceptive remarks. Professors Rakoff and Minow, in their article, bemoan the fact that teaching our students utilizing primarily the traditional Langdellian case law method has very substantially decreased the number of law school trained policy makers that have essentially law school training as the basis of their professional preparation.

They suggest that training to make decisions solely on the basis of legal norms rather than the broader perspective required by the problem case law methodology may account for this decrease in the number of law school trained policy makers in private industry and government. This is reinforced by the comments just made by Frans. There is a broader perspective within which the Harvard business law problem method and the problem method that Frans has just indicated, conditions, trains, and sensitizes students and prospective policy makers to factor into their decision making more than just legal norms.

Claudio was also addressing these factors when he was talking in terms of the cultural context in which the decision making should occur. The norm producing training that we currently give students tends to be isolated to the legal norms involved, exclusive of other norms—other factors which are relevant to decision making. As a consequence, more and more decision makers are coming from the Harvard Business School problem type of training than from the Harvard Law School case law type of training.

My apologies. I am only a moderator here. We therefore invite questions from the audience. Please identify yourself for purposes of the written transcript which we are preparing.

MR. APONTE-TORO: My name is Roberto Aponte-Toro. I am

the dean of the University of Puerto Rico School of Law. As many of you may know, we are constantly looking to find people outside of Puerto Rico to join our educational programs.

We decided years ago that we would not be requiring interviews into the law school. Why? The pressures upon those making admissions decisions were socially too strong. Politicians call. Judges call. Bringing unqualified people into a law school is not good policy.

So we prefer exams. However, this also creates a problem because pre-legal education differs from school to school. People who go to the better schools have a better chance to do well on the exams. We are in a kind of a trap. So I speak to bring to your attention examples of how these institutions work out in our society.

MR. DEL DUCA: Thank you very much. We are going to take only two or three more questions here, because we have time limitations requiring us to move on to the next subject. Let's get two or three questions briefly for the panel.

MS. RAIGRODSKI: I will try to be very brief. I am Dana Raigrodski from the University of Washington in Seattle. I concur with Professor Ku's call for more transactional experiential learning, and I just want to offer two modest and manageable ways in which we have tried to address all of the themes of our session today.

We have been offering two courses. One is international contracting, and the other one a merger and acquisitions practicum, which we video conference, the first one with Tucker University and the second one with Wasata University, and that really exposes the students to having to negotiate and draft and do that in a cross-cultural setting and learn from each other. So these are just two ways that we have tried it. I make another observation, just to make sure that we don't conflict between the dialogue or the active learning and the case methods. The two are not the same. Some work in some settings, others in other settings. There are a lot of practical considerations such as class sizes, cultural differences, etc. I just want to make sure that our discussion addresses these differences.

Thank you.

MR. DEL DUCA: The article by Minow and Rakoff also makes this point, namely that we should not confuse the case law methodology and assume that it is identical to a Socratic method. The case law methodology uses the Socratic method. However, the Socratic method can be used in many other contexts. It can be utilized in the context that Frans indicated. It can be used in the context of the Harvard Business School methodology.

Questions, yes, two questions quickly, please.

MS. KESSEDJIAN: I am not sure it is a question. My name is

Catherine Kessedjian, and I am from the University of Paris II in Paris, and I am also a Hauser Global Professor at New York University here in the United States.

MR. DEL DUCA: Welcome. Welcome.

MS. KESSEDJIAN: The observation that I have is mostly on the amount of personal work that is required of the students. I have an LLM from the University of Pennsylvania Law School. I was really surprised when I first came to this country and up to now, I continue to be surprised by the fact that in American law schools, in my experience, ask very little for personal research by the students, unless they do a paper. In the normal classroom, there seems to be very little room for personal research. In France, however, from the very first year of law school, students have to do their own research.

We give them basic documents. We give them basic questions. Apart from that, not only do they have to refine the questions by themselves (we do not birdfeed them with questions), they have to find the question by themselves, and also have to find the law. They have to find the documents. They have to find the case law. They have to find whatever will bring them to the discussion. I am telling you that foreign students who come to France find it very difficult, very, very difficult, and that's one of the adaptations that is the most difficult for foreign students.

MR. DEL DUCA: Any reactions from the panel on that? Yes. Go ahead. Claudio?

MR. GROSSMAN: A general comment. First of all, I think many schools are doing interesting things in the second and third year of legal education. However, I would say that increasingly the crucial question is what happens in the first year because of its formative nature. Allow me to publicize an upcoming and relevant event: WCL will be hosting a conference in March on "Innovations in the First Year Curriculum" (including integrated sections, electives, international law, and so on).

A second issue, which we have not yet addressed, is the speed of change. It took eighteen hundred years since the beginning of the Common Era (year 1 of the Gregorian Calendar) to double human knowledge. In the year 2025, it will take seventy-two days to double human knowledge. This illustrates the increasing relevance of flexibility and adaptability as an educational goal.

In the past, a key concern was to have access to information. Now, the issue is how to select information.

Now, what are the problems? Lawyers are better trained to ask legal questions than to ask questions about the role that the law plays. Knowing that limitation, we need to plea for experimentation and flexibility. If we don't create that space, the risk of obsolescence

increases exponentially.

MR. DEL DUCA: We are behind schedule, and there are three comments on this topic that people have requested to make. I suggest we take all three questions and then ask the panel to comment.

MR. ASOLI: I am Marcus Asoli. I teach international law at the University of Geneva, so very much in a civil law system, and I have to plead for the case method, perhaps because we tried to introduce it, and the main resistance is from the students. Be conscious that in practice, and although we have to experiment many other things, in practice, it is the only method which permanently gets students active.

While, yes, we can make other experimental methods, but that is a method which is permanently applied to get them active and be conscious that in the majority—no. In many countries of the world, in particular, the Francophone world and his paraphone world, most courses are still a professor telling the truth and students taking note of the truth, and then an exam which you prepared last week knowing as much as possible of the truth, and then reproducing this truth, and after three weeks, you have forgotten that truth.

And that's the very strong point of the case method that you learn during the whole year. From my specific branch, international law, nevertheless there is a shortcoming in the case method, because in most cases we don't have court, and I think for international lawyers it is important not to see international law simply as a question of argument.

There are also some truths, and I think the case method can have the result that people think well, there is an argument in favor of torture, and there is an argument against torture, and so it depends who is my client. And this is much more difficult in civil law training where you get principles and you apply principles.

Thank you.

MR. DEL DUCA: Thank you for those very perceptive remarks. And in fairness to the article that we have been talking about, the Rakoff and the Minow article, they do recognize the strength of the case law method, using case law in the context of studying actual legal decisions of courts.

And they make the point that utilizing the case law system does move the whole relationship between teacher and student to one of exchange. A Socratic kind of dialogue is inherent in the use of the case law method. But that's not what they are criticizing. They want the case law method in that context to continue to be used, but what they are asking for is a movement beyond that.

The article is titled "A Case For Another Case Method." The authors want to expand the case method into real life problems in which the decisional components include more than just the legal norm that is

involved. But thank you for your very perceptive remark.

It would be helpful to perhaps have some comment on the extent to which it is feasible to use the case law method in different legal cultures. Your comment that civil law jurisdictions are more oriented towards a lecture method rather than a case law method is relevant. Any comments on that?

In the order in which the hands went up, one, two, three, and then I think we will move on to the next subject.

MR. WANG: A couple of comments. First, case method, case dialogue method, Socratic method, and I think it is a very good point. You can't conflate them. There are aspects of it in the case method. You use the Socratic method perhaps with cases. However, you can use the Socratic method certainly when you are doing statutory interpretation, et cetera.

In China, you expect your students to be prepared for class, do you not? Okay. In China, once again, that's a mountain to climb. Students do not come to class prepared. They come to class to listen, to take notes.

I will give you a contrast, though, in terms of how this plays out. In our summer law institute, which is our experiment—our test tube—you can hear this from the students themselves: Chinese students, after the first or second week, come up to us as we chat with them and ask, "Professor, can you tell me what do they teach in American law schools?" And you say, "well, they teach law, certainly." The Chinese students answer: "Well, the American law students really don't seem to know about the law."

How about American law students commenting on Chinese law students to the effect that, "Gee, these kids are really good. You recall the hypothetical you had out there. It's a long complicated problem for us. However, our Chinese student colleagues tend to say that is s. 36 of the Company Law. That's the answer. Let's go out and have a beer."

Of course, we know that it can't be. What about Chinese students commenting on American students to the effect that, "They really don't know the law. What do they do? They ask questions. They ask more questions, and more questions, and they also ask questions about some of the things that are not about the law."

American students say, "We are impressed by the Chinese students' knowledge, but we don't think it is very deep." Chinese students at the end of the three weeks, and the good ones at least admit, "You know, I think the American students think more deeply about the problem than we do."

We do something right, I think, in American law schools in the first year, and this is making them think like lawyers as every law school

professor would say, and it is very rigorous in teaching analytical thinking.

MR. CAROLAN: Self financing education costs from ten to forty thousand US dollars per year. In my country, education is free. In much of Europe, it is open enrollment to law school, first year of classes, and certain European contexts can have up to two thousand students per class. And the notion you can have an individual dialogue with students in that context can be a little farfetched.

MR. DEL DUCA: So the economics are relevant.

MR. CAROLAN: Well, yes—no, because education, third level education, which is primarily law school education, undergraduate, is not going to be financed for seven years by these European governments. In Dublin, the Dublin City University has recently eliminated tutorials, the small group problem solving exercises that compliment the large lecture halls in which law is delivered.

If you talk to a seventeen-year-old on a Monday morning and expect him to have read thirty-five or fifty pages of law over the weekend, you may have an unpleasant surprise.

I recently helped the Law Society redesign some of their tutorials and use sort of a Socratic light method and just pepper questions at an audience asking them to respond to the questions I have asked. And they have given me a nickname in that context. They call me Jerry Springer, because they really are not familiar with this style of education, and really they think well, I am paying money—I am paying with my time to be here, why am I being asked questions, aren't you here to provide information and answers to me.

So there is a cultural difference, perhaps, in the approaches that I wanted to highlight.

MR. DEL DUCA: Thank you very much. And now we have the point of view from India.

MS. ELIZABETH: Legal education in India used to be similar to what you were saying in the context of the European continent. Classes are basically a lecture method.

But when my law school was set up it was, you know, the bar council of India, and the judges who believed that there was a need for change in the legal education system.

About twenty years ago, my law school was set up, and since then, there are a dozen other law schools or what we call the law-school-type institution. The fact is that we are called law schools and they are called law colleges. These were set up over the last twenty years.

We have been called the Harvard of the east, because we were this model law school using the case law Socratic method.

These were all completely new methods of teaching which were

introduced into the legal curriculum in India. They have worked wonders. Things began to change in our law school because instead of coming to us after their first undergraduate degree, they now come after high school after taking a common entrance exam. They are really young people. Their first year is extremely crucial. One thing that we did that is different is to introduce the degree that they get at the end of the five-year program in the National Law School. This is the LLB honors degree, which is an interdisciplinary approach to the study of law.

I myself teach history of women in law related courses, trying to teach them, from different perspectives, trying to make them appreciate that there can be different ways of solving the same problem. I would agree that a lot of this comes from the use of a Socratic method. Which is one of the situations in which the Socratic method can be used.

In my own discipline, I am using the Socratic method just to basically make them think, and that is the most difficult thing. As Frank Wang was saying, you know, to get them to come to class prepared, to read the cases, to read the articles is a challenge.

Of course one uses one's position as the teacher because we have total evaluation system to keep. The kind of questions one asks at the end of the course is related to what goes on in class. You have the specific reading material, which they may not be reading. You ask a question from the reading material on the final examination. After the first year you do so and then you acquire a reputation that if you don't read the reading material she distributes, you might get a question, so you have to read it for that purpose.

But students, of course, are very creative and original, so they always find ways to circumvent that, because they divide up into groups. So some people read this particular article, and they make short notes of that, and some people read others. They haven't read the article all together.

But what saves you is because you need the case law method and the Socratic methods to be used. But I think also using an interdisciplinary method enables them to see things from these different perspectives rather than only from the written materials, because in India we still follow very strongly a positivist approach to the study of law.

That is a way in which our courts themselves see the law. Therefore, for students to get into any of these other realist—legal realism or to look at a feminist perspective or any of these things, like critical legal studies, I think is very difficult. But I think that's why trying to do a comparative approach or the interdisciplinary approach is worthwhile and you can try to make change, because the main thing, I think, is to teach them to think and ask questions.

MR. GROSSMAN: Louis, a brief comment?

MR. DEL DUCA: Sure. Go on.

MR. GROSSMAN: I am an early student of the civil law tradition. My first law degree was —

MR. DEL DUCA: This is Claudio Grossman.

MR. GROSSMAN: I started to study law in Chile when I was seventeen years old, right after high school. We often hear that being too young is the problem. For me, age is not the issue. I believe that much creativity can take place during high school. The issue is that there is an ideological vision, an educational philosophy for lack of a better word, that doesn't stress creativity and flexibility, but rather rigidly focuses on memorization.

MR. DEL DUCA: All right.

MR. GROSSMAN: However, I think that we can do things, and that the Socratic method is not the only way to improve. Clinics, supervised externships, and other experiential learning opportunities are also very important.

MR. DEL DUCA: Very good.

On to the next topic, we are now moving from procedural techniques into the question, into the area of substantive content, and the next part of the program addresses how do we teach similarities and differences in legal systems and internationalize the law school curriculum.

#### How Do We Teach Similarities and Differences in Legal Systems and Internationalize the Law School Curriculum

MR. DEL DUCA: We now address the topic of pervasive and integrated model methods of teaching and internationalizing the law school curriculum. Two of the strongest exponents of these approaches are with us today.

Frank Gevurtz is heading up a project at the University of the Pacific McGeorge School of Law to provide teaching materials to accomplish this, and Mathias Reimann is at the University of Michigan Law School. We will ask them to address these topics.

PROF. GEVURTZ: Thanks, Louis. I have three things to accomplish in these remarks. The first is to thank everyone in the audience for attending a Sunday morning session at the very end of the annual meeting of the American Association of Law Schools ("AALS"). As a concrete expression of gratitude, and in the spirit of the ubiquitous provision of free samples and gifts that seems to attend every annual meeting of the AALS, I brought a number of the books in the *Global Issues* series, which I will mention at a couple of points in my remarks. Please feel free to help yourself to any of these books.

*The Pervasive Method of Introducing International and Comparative Law Issues Into Legal Education*

My main task is not to thank the audience or dispense gifts. Instead, the second, but most important, objective of these remarks is to address the pervasive method of introducing international and comparative law issues into legal education in the United States. It is worth noting, however—particularly as part of a panel designed to follow up the inaugural meeting of the IALS—that there is no inherent reason to confine the pervasive method of introducing international and comparative law so that it occurs only in legal education in the United States. Rather, such a pervasive method may have a place in legal education throughout the world. Indeed, I will return to this theme in the final portion of these remarks, which engages in a brief speculation about the future of legal education around the world.

Instead of describing the pervasive method in the abstract, we can take advantage of the two hypothetical fact patterns that Louis has employed to structure much of this morning's discussion. By doing so, we can see not only how the pervasive method works to introduce international and comparative law issues to all law students, but also how this approach enriches the students' understanding of domestic laws and policies.

Before proceeding, however, I should acknowledge a couple of members of the audience, who have far more expertise in the domestic and comparative law analysis of the two hypothetical fact patterns Louis employed in this morning's discussion than do I. Paul Hayden is one of the co-authors of *Global Issues in Tort Law*, which, I believe, contains materials addressing the differing views on the duty to rescue issue presented in the first hypothetical. The restitution law issue presented in the second hypothetical does not fit as comfortably into a core law school course currently offered in the United States—which, itself, might be saying something profound about our curriculum. To the extent the subject of restitution comes up as quasi contract, then Keith Rowley and Louis Del Duca, who are both with us today and are among the co-authors of *Global Issues in Contract Law*, could speak with more authority than I as to the domestic and comparative law analysis of this hypothetical.

In any event, let us return to how I, like a startled first year law student, responded, after Louis called upon me to state the result under typical common law in the United States with respect to the two hypothetical factual situations. The one word I would use to describe my response was “flat.” With regard to the failure to rescue situation, I gave a simple open and shut answer that there is no duty. I had a bit of a

pause and caveat with the restitution situation while I considered the less certain boundaries of unjust enrichment. Nevertheless, in the end, the hypothetical seems pretty clearly to fall into the mere volunteer realm so that once again there is no duty and no liability.

After getting these typically flat student answers, what is the teacher's response? He or she too often finds that the class degenerates into an exercise in "pulling teeth." Because (particularly in the failure to rescue situation) the rule and its application are so simple, the instructor will attempt to engage the students in a policy discussion as to the merits of the rule. The reactions of students in the class thereupon break down into one of two camps. Half the class does not care about the policy discussion, because they have learned the rule, and that is all they figure they need to know for the exam. The other half of the class is offended by what they perceive as an immoral rule, and they are beginning to question their entire career choice. In either event, the classroom discussion is not very satisfactory to professor or students.

Now let us compare what can happen if the instructor introduces a comparative or international law perspective into the discussion of either of these two hypothetical fact patterns. Reducing the matter to oversimplified essentials, one of two things will happen: the students will discover divergence or they will discover convergence (more typically, there are both, but this is an oversimplified discussion).

Let us start with the prospect that students discover through a comparative or international law discussion that there is some divergence on the particular issue. In other words, some jurisdictions outside the United States have rules which create a duty to rescue in the first hypothetical or lead to a claim for restitution in the second hypothetical. Specifically, as I understood the earlier discussion, there is a duty under some civil law jurisdictions that would have at least compensated for the suit, if not for the loss of the business opportunity, in the second hypothetical, and at least have imposed criminal sanctions, if not civil liability, in the first hypothetical.

So, what does introducing such divergence accomplish? To begin with, students are now alerted not to ignore the possible application of different rules should they confront a transnational issue in an increasingly globalized economy. This is not to suggest that the goal of a pervasive approach is for students to remember all of the different approaches nations around the world might follow to torts, or to restitution, or to my area of corporate law. After all, students do not learn or remember all of the domestic law rules. Rather, the objective is to disabuse the students of the notion that they have learned THE LAW that they can assume will apply wherever a dispute arises, and, instead, to suggest some other possibilities that the students, later as lawyers,

might encounter.

Equally, or more valuable, is to create the basis for a better discussion of domestic law and policy in the classroom. Specifically, we can use comparative law to challenge the students' natural inclination to view law as something descended from Mount Sinai, and, instead, help the students to recognize that law often involves accommodating difficult policy tensions as to which different jurisdictions might reasonably give different answers. True, we can seek to have the students realize the policy tensions that underlie legal rules—as we struggle to do year after year when covering the duty to rescue hypothetical in torts classes—despite only covering the common law rule. But there is nothing like the validation of seeing a jurisdiction actually adopt a competing approach to dispel the abstract quality that all too often undermines such discussions when confined to domestic law.

Suppose, however, instead of illustrating divergence, an examination of comparative or international law demonstrates convergence. In fact, the two hypothetical fact situations suggest convergence can occur in a couple of different ways, each of which contains a potentially profound lesson for law students. First, convergence can occur by jurisdictions following essentially the same rule, as illustrated by the possible general refusal to impose civil liability for damages (as opposed to criminal sanctions) for failure to rescue (to make a point about pedagogy, I am ignoring some of the caveats and alternate theories suggested by my fellow panelists asked to comment about the result in this hypothetical under civil law).

Being aware of convergence is helpful to prepare attorneys to confront transnational problems in the future. As stated above, it is important for attorneys to be aware of the possibility of different rules when dealing with transactions involving other jurisdictions. Yet, it is also important that attorneys—lest they adopt the attitude of Victorian explorers—recognize that many rules and institutions will not be different when dealing abroad.

In instances of convergence, one should lead the students to consider why the rules turned out to be the same. In many instances, this suggests that the balance of policy tilts strongly in one direction. In other instances, however, students should be aware that convergence of legal rules has a force of its own. In the corporate law area, I make this point with two examples—one very old (legal requirements for corporate governance under a board of directors) and one rather new (prohibiting trading by insiders on insider information). This discussion of convergence as a force of its own, in turn, helps our graduates prepare for a career in law. Specifically, while legal education examines the law in the past and present, in the end, our graduates will deal with the law in

the future. An awareness of other approaches, and an understanding of how law migrates, might help our students to anticipate where the law will evolve during the course of their careers.

While convergence often means the rule is the same, in other instances, functional convergence occurs despite different rules on a particular legal issue. So, for example, the inability to collect damages for the lost business opportunity in the second hypothetical under civil law, as I understand it, may not arise from a lack of duty to the gratuitous volunteer (as under the common law analysis), but rather from the speculative nature of the damages (in contrast to the claim for the damage to the suit).

Here, students should come to see that much like water takes different routes to flow to the sea, oftentimes the result in different jurisdictions ends up in the same place despite having taken different routes in terms of specific rules to reach that point. This serves as an important warning not to characterize a jurisdiction's law without looking at the entire context, which is important for dealing with transnational transactions and disputes; and domestic ones as well.

Overall then, where the domestic discussion of the two hypothetical fact patterns was flat, globalizing the discussion with comparative and international law can lead to a much richer classroom experience. This suggests an advantage of using a pervasive method to introduce comparative and international law into torts, contracts, and remedies classes. This is not to assert, as Mathias will discuss, that introduction of transnational law cannot be done through a separate class, but I leave that discussion to Mathias.

Before turning the microphone over to Mathias, I want to talk more broadly about the future of legal education, which is the third objective for my remarks. In order to speculate on the future, however, it is important to start by looking at the past. Specifically, we need to return to an assessment of Langdell and the revolution in legal education he brought about at Harvard over a century ago.

The session began with a quotation critical of Langdell. I do not wish to engage in more debate about the use and abuse of the case method or the Socratic dialogue. There is another part of Langdell's revolution, however, which we should note in our discussion today. The Langdell revolution ultimately nationalized legal education in the United States. Specifically, instead of students at Harvard studying Massachusetts law, and students at Penn State studying Pennsylvania law, and students at Pacific McGeorge studying California law, as one long-term result of Langdell's revolution, students at all three schools study pretty much the same rules of law from the same books. This means that an applicant from California might attend Harvard confident

of his or her ability to return to Los Angeles to practice law, while an applicant from Pennsylvania might attend Pacific McGeorge and return prepared to practice law in Philadelphia, while an applicant from Massachusetts might attend Penn State and return to Boston prepared to practice law.

Interestingly enough, Langdell's original casebook not only chose to look beyond Massachusetts cases and Massachusetts law, but, in fact, was "globalized" insofar it was mostly composed of English court opinions.

More broadly, the publication of casebooks that could be used anywhere in the nation was a key component in the movement toward a national legal curriculum in the United States. This, in turn, suggests that the availability of books that allow the introduction of international and comparative law materials throughout the law school curriculum may provide a key element in a move toward a global legal curriculum.

This brings the discussion full circle to the *Global Issues* series of books, which I mentioned at the beginning of these remarks, and for which I am privileged to serve as series editor. This series published by Thomson-West, as well as similar series by other publishers, contains materials that instructors can use to introduce comparative and international law into traditionally domestic law school courses—thereby facilitating the use of the pervasive method.

So, where is this leading? I confess to an agenda, which is not to sell books. Rather, it is to facilitate the next revolution in legal education, in which law schools and law faculties around the world will evolve from the national to the global.

While Dean Elizabeth Rindskopf Parker of Pacific McGeorge was attending the meeting of the IALS, I was speaking on a panel on the Internationalization of Legal Education at the International Bar Association Annual Meeting in Singapore. One panelist there predicted a future in which there would be thirty global law schools. Another panelist described how his law school in Brazil had adopted a globalized curriculum (perhaps to be among the thirty). I took a more extreme view.

My prediction is that, within a decade or two, we are going to see a globalization of the legal curriculum at the vast majority of law schools around the world similar to the movement of law schools in the United States to a national curriculum.

MR. DEL DUCA: Thank you very much, Frank, for those very perceptive remarks. Mathias?

*The Integrated Model Method of Introducing International and Comparative Law Issues Into Legal Education*

MR. REIMANN: McGeorge on one hand and Michigan on the other, pursue approaches that are both alike and different. They are alike in that both force law students to be exposed to significant amounts of international and comparative material. That is the most important thing to do – as well as the hardest to accomplish. I do not want to waste our time here explaining why that is so because both the importance and the difficulty are probably fairly obvious by now.

The approaches are different in how they structure this exposure. At McGeorge, international and comparative materials are fed to the students piecemeal, i.e., in little bits, throughout the first year and throughout much of the upper class curriculum as well. This approach has the advantage that students come to see international and comparative perspectives as a matter of course and as something that pervades all fields of law. This is, in a sense, ideal. It has two downsides, however. First, the students never see the larger picture, i.e., the overall structure of the current world legal order. Second, it entails considerable logistical difficulties and requires a high degree of cooperation among the faculty. As a result, it can work only if the faculty as a whole is dedicated to this endeavor.

At Michigan, we take a different approach. We teach one mandatory course called “Transnational Law.” The title serves to distinguish it from (classic, public) international law because what we teach is much broader. Our course encompasses not only the very basics of public international law but also much of private international law, as well as the interplay between the international and the national level. It is one of the purposes of the course to show how the traditional boundaries (between public and private, and between international and domestic law) have become blurred, often to the point where we may be better off without them.

While all students at Michigan must take the course, they do not have to do so in their first year, and in fact, the majority takes it as an upper-class course. Whether the course works better as a first-year elective or in the second or third year is a serious question in its own right, which I do not want to pursue here. The most important point is that every student graduating from Michigan has taken a three-credit-hour course that serves as a general introduction to public and private international law, international elements in domestic law, and that also shows them that other legal systems often view and handle problems quite differently from the way we view and handle them in the United States.

That approach also has its upsides and downsides. Its advantages are mainly two. First, it gives the students a chance to see the larger picture, especially the development from a completely state-centered (“Westphalian”) international legal order to a much more diverse and complex situation. Second, it is logistically easier than the McGeorge approach because all it requires is the creation of one course carried by a handful of faculty. At Michigan, we have now taught it for seven years and it has become a matter of course. Its status is essentially no different than other mandatory parts of the curriculum like criminal law, civil procedure or our legal writing program. The two main downsides of this approach are that it separates the international and comparative perspectives from the rest of the curriculum (which is not ideal), and that it is hard to teach mainly because the material is so diverse and often difficult to grasp for the students.

Let me give you a more concrete illustration of what our transnational law course is trying to accomplish, especially of the way in which it mixes public and private international law, by explaining a question on the final exam which I am currently grading. The question asks the students to represent a Detroit car manufacturer which is about to enter into a contract with a Chinese supplier of automotive parts. In particular, what dispute resolution elements should the Detroit company’s lawyer want to put into such a contract? The answer is that you have to think about at least five elements. First, you need to decide whether, in case of a dispute, you want to litigate or arbitrate, i.e., whether you want an arbitration clause. Here, you have to know something about the nature of international commercial arbitration, its advantages and disadvantages vis-à-vis litigation; about the institutional and procedural framework, especially about the 1958 New York Convention (you will need to find out whether or not only the US but also China is a member), UNCITRAL rules, and the recognition of foreign arbitral awards. Second, if you do not want, or cannot get, an arbitration clause, you need a forum selection clause. You need to understand what the effect of such a clause is and to what extent it is permitted. You have to realize that you have to look at the matter not only from the American but also from the Chinese side. Also, if you cannot get the Chinese to agree to litigation in the United States, you may have to settle for a neutral (third-country) forum. In any event, you have to make sure that the clause sticks in the country selected. You will also have to know that so far, there is no international convention between the US and China on the matter but you should realize that there is one on the horizon (the Hague Convention on Choice of Forum Agreements). Third, you need a choice of law clause. Thus, you need to understand, again, the rules governing such clauses, their effect, and how

to think about what law you would want to apply. Fourth, you have to make a decision whether to opt out of the Vienna Sales Convention (i.e., The Convention on the International Sale of Goods—CISG) under its Article 6. In particular, you have to understand that if you do not opt out unequivocally you will be bound by the CISG as a self-executing treaty to which both the US and China are parties and which has the rank of force of a federal statute that (partially) displaces the Uniform Commercial Code (being state law). You should also have a sense of what the CISG covers and where it differs most significantly from the UCC. Fifth, you need a waiver of sovereign immunity. There is always a possibility that the Chinese company is majority owned by a public entity so that it is protected under the Foreign Sovereign Immunities Act (“FSIA”). You need to understand how that statute works, realize that reliance on the “commercial exception” is potentially dangerous, and recognize that you may run not only into jurisdiction problems but also issues of judgment execution. Finally, at least the better students will consider looking into whether various international treaty regimes have an impact on our contract, such as the World Trade Organization Agreement or a potential bilateral investment treaty. In all this, you can see that we want our students to understand how private and public, international and domestic law interact on the practical level. The goal is not to turn them into experts. It is merely to make them, as we call it, “literate” in these matters, i.e., cognizant of the main issues to think about and wary of the many pitfalls. In fact, most students do this very competently—not on a high level but with enough understanding to avoid fatal mistakes and to ask the right questions.

Whether one believes in such a single-course approach or rather in a McGeorge-type piecemeal strategy depends largely on whether one considers it possible and desirable to show the students a larger picture in which the whole is more than the sum of its parts. Thus, it ultimately comes down to whether one believes that there is a “global legal order” out there that is more than just a loosely organized chaos. That is a question reasonable people can, and will, differ about. I tend to believe more and more that there is such a “global legal order” that makes some overall, roughly coherent sense, but I constantly question myself whether this is because I am gradually recognizing it or because I am simply persuading myself.

The question also ties into the mentalities of civil versus common lawyers. If you are, as I am, a civil lawyer by training and mental habit, you will constantly look for, and ultimately find, some kind of order in, and coherence among, the various elements. If you are, as most of you are, a common lawyer by training and mental habit, you will more likely remain skeptical of such a view and rather tend to see insurmountable

messiness and contradiction which makes teaching a single course more questionable or, at best, a smorgasbord exercise. Ultimately, one's perception will also turn on whether one has a more traditional or a more postmodern view of the world at large, i.e., whether one tends to believe more in order than in chaos. If the former, trying to put together a single course makes sense, if the latter, a piecemeal approach recommends itself.

Both approaches require teaching materials. McGeorge has now put out a series of mini-casebooks covering international and comparative aspects in a large and growing number of areas. They can be used along with traditional casebooks centered on US-American law. At Michigan, I am working on completing a casebook for our course which we hope to have on the market in the spring of 2009. If you have an interest in seeing the table of contents, I will send it to you.

Let me conclude. It is less important which of the two approaches you pursue than to pursue one or the other. The most important move is to give international and comparative perspectives a central place in the curriculum, ideally by making their study mandatory.

MR. DEL DUCA: Thank you very much. We might pick up on that theme. How do you go about persuading the faculty and the dean to allocate the resources to accomplish the goal of internationalizing the curriculum.

Some ten years ago at the AALS meeting there was a program in which then Dean Clark of Harvard, and then Dean John Sexton of NYU got into this discussion.<sup>11</sup> I think, Frans, you were on that panel. Those were the early days in terms of concerted efforts to internationalize the curriculum, and Dean Clark and John Sexton were at the forefront of that movement.

There was much agreement on accomplishing the goal, but the technique—the implementation of that goal was quite a challenge. Dean Clark, along with John Sexton advocated the pervasive method very eloquently at that meeting. Mathias has more recently strongly advocated the integrated method.

What about teaching materials to accomplish the goal and what about trained personnel—that is law professors who are interested in and equipped to teach these courses. Some law professors were interested, but then the question was what about the teaching materials.

That's where Frank Gevurtz and his group have picked up the ball.

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11. *Symposium on Emerging Worldwide Strategies in Internationalizing Legal Education*, 18 DICK. J. INT'L L. 411 (2000); Robert C. Clark, *Bases and Prospects for Internationalization of Legal Education in the United States*, 18 DICK. J. INT'L L. 429 (2000); John Sexton, *Structuring Global Law Schools*, 18 DICK. J. INT'L L. 451 (2000); Louis F. Del Duca, *Introduction and Overview*, 18 DICK. J. INT'L L. 411 (2000).

While the earlier group talked about developing teaching materials to achieve this result, they did not produce the materials. It took ten years to really get into a systematic approach to develop these teaching materials.

Frank, Do you want to comment a little bit about this? What subjects are covered in the Global Law series?

MR. GEVURTZ: We now have twelve books. We have the basic courses covered at this stage, except for evidence.

MR. DEL DUCA: List them.

MR. GEVURTZ: Contracts, civil procedure, torts, property, and criminal law. Getting into some upper class electives courses already completed, you have constitutional law, corporations, professional responsibility, labor law, employment discrimination, as well as employment, and family law. Additional topics under development include antitrust and intellectual property.

There is quite a variety of teaching material already available and additional materials are in preparation. A teacher's manual is being provided for each of the books. They are designed to be self-contained. My view is that you should not need to go out and read a lot of other material.

We have provided training workshops in the use of these materials. Last year we put on a workshop with lectures in the morning and in the afternoon at the AALS Annual Meeting. If there is interest, we will do it again. We're more than happy to put on training workshops if there is interest. Ask your deans. Go back to your law schools. If there is interest, let us know. We are more than happy to put on training workshops.

MR. DEL DUCA: Okay. We are going to take two or three questions. Come up front here if you want to make a comment and identify yourself. We are transcribing it. Let's take three questions. Come on up front, please. Go ahead.

MR. ACKERMANS: My name is Bram Ackermans. I am from Maastricht Law School in the Netherlands, and I want to directly connect to this and the wonderful work on the case which you are doing. We have the similar project ourselves. I don't know if you know about this.

Together with the University of Leuven, where Frans Vanistendael is from, we have developed course books on the common law of Europe, and they are edited by Prof. Dr. Walter van Gerven, (a former Advocate General of the European Court of Justice).<sup>12</sup> These are major time

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12. Ed Note: The Jus Commune Casebook Project was initiated in 1994 by Professor van Gerven. This ongoing project has already completed casebooks on *Tort Law (Scope)*; *Tort Law (I)*; *Contract Law (I)*; *Unjustified Enrichment*; and Non-

consuming research projects.

I am working on a book on property law involving translation and use of materials from French, German, Italian, Austrian, and Swiss sources.

That connects to your question here because in Maastricht, this has led to a complete change in the curriculum, faculty structure, and how we teach. Since last September, we now have a four year comparative law degree in which the entire curriculum is comparatively taught.

We do it fully in English, sacrificing our Dutch language. This comparative program is offered as a separate law degree in parallel with the normal law degree. Students can choose their program. The first year it was offered, seventeen students enrolled. This year, we have 170 and we are expecting over 250 next year. The program is a huge success. I want to congratulate you on your efforts, because it is actually the production of these new course books that has made the change in curriculum and faculty possible to internationalize the legal education we offer.

MR. DEL DUCA: Wouldn't it be wonderful if these materials could be prepared jointly by civil law and common law trained authors? This approach could be explored and developed through a group such as the IALS as well as additional interested parties?

DEAN DALY: How is the local bar reacting to the new educational programs?

MR. ACKERMANS: Very well, actually.

MR. DEL DUCA: Thank you Mr. Ackermans. Our best wishes to Dean Heringa.

MR. OPPENHEIMER: I am David Oppenheimer from Golden Gate in San Francisco, and I co-direct our summer creative law program in at the University of Paris X.

We faced the question when we started designing our program with how to effectively teach comparative law, and although in this room there are many people who really are experts in two or more legal systems, if we look more broadly at the American legal teaching profession, most of us are not, and our conclusion for the experiment that we began was to use team teaching in our summer program.

We encourage all of our students to take a summer program abroad, either ours or one of the other ABA programs. We affirm that the team teaching, with an American law professor and a French law professor, and with mixing American and European students in the classes, have

produced a really very rich experience for the students, and frankly, for the faculty.

We are trying to use a problem method in which we give the students a series of problems and then materials which tend to be cases on the American side, and statutes and commentary on the European side, and then ask them to engage in problem solving looking at both the approaches.

The discussions between co-teaching faculty and students are greatly enriched. I know my own class in which I co-teach comparative equality law and the discussions in Paris about the law regarding the head scarf, and comparing that to how such a law or practice will be treated in the United States have produced some really fabulous classes that have been a very rich teaching experience and learning experience.

MR. DEL DUCA: Excellent. Thank you for that very perceptive remark, and we might just say that the team teaching technique doesn't have to be limited to overseas programs. John Sexton, you remember Frans, in one of our early internationalization programs made the comment of how his personal experience in team teaching with Professor Song from Korea was so enriched on campus in New York.

MS. RINDSKOPF PARKER: Professor Del Duca, I would like to make a comment and then ask a question. I am Elizabeth Rindskopf Parker, the dean at Pacific McGeorge, to whom Frank Gevurtz, I think, was referring earlier.

I want to share with you what I think is a nice story about the origin of these two different approaches to introducing more international material into the curriculum of US Law Schools—the pervasive and the “stand alone” approach. I was on Michigan's comparative and international law advisory board which encouraged Professor Mathias Riemann in the work that he did to create a required course in transnational law; this is the model for the stand alone approach. That was seven years ago.

At the time, I was appalled at what seemed to be an incredibly difficult project—persuading law school faculty to require a class in international law. I thought most schools would not be able to do what Michigan had done. That was why I was delighted when Frank was prepared to go forward to develop a pervasive method at Pacific McGeorge, one which provides supplemental materials that all faculty could use to add international materials to any basic law school course they might be teaching.

The fact is, I think both approaches are terrific. Mathias, I'm going to pester you a little bit and say it is time to get your book out, because Mathias has almost finished a fabulous book, and when that comes out, I think everybody will really have a template for a stand alone course that

will be wonderful.

The origin of this effort to provide international materials and focus for the US law curriculum really came from the fact that I felt, and I think most in this room share the view, that we Americans are far behind our European colleagues. We just have not absorbed the fact that law is becoming global and we need to prepare our students for this new legal reality.

I think some of us attended the meeting of the IALS last October in Suzhou, China with the view that maybe there was a possibility of expanding what we are doing to globalize the American curriculum into a truly global approach that would work for law schools everywhere. We asked what were some of the essential elements that law students, no matter where they might be learning, would need and be able to assume they would receive in their law school studies? I learned something that disturbed and surprised me at that meeting.

We had a colleague there from the country of Georgia who talked about the lack of *any* materials and the dependence that his law school had on either American or European materials. Can we publish cooperatively produced integrated materials which can be used by civil and common law trained lawyers in all law schools transnationally? Isn't that a second need we must address?

I think this is an important question appropriately raised to this group, because I think almost everyone here, perhaps Professor Elizabeth from India is the only exception, is really from either an American or Western law school. We need to think about the rest of the world as well as ourselves; we need to work with law schools the world over collaboratively to address what should be a global concern: the lack of adequate global materials for a truly global law school curriculum.

MR. DEL DUCA: Thank you very much for those perceptive remarks Dean Parker.

We will now proceed with the next portion of our program.

*Maximizing Cultural Interchange In Exchange Programs – (The Wang School of Law Summer Programs – A Case Study)*

*Theoretical Model of Intercultural Competence*

MR. CAROLAN: My name is Bruce Carolan, and I am head of law at the Dublin Institute of Technology in Dublin, Ireland. I will take a slightly different perspective today. My presentation will describe a theoretical model of intercultural competence that might provide a framework against which to assess efforts directed to enriching the law

school curriculum in an increasingly interrelated world.<sup>13</sup>

What is intercultural competence? According to Dr. Milton Bennett in the 1993 paper,<sup>14</sup> intercultural competence includes cultural self awareness, other cultural awareness, and various skills in intercultural perception and communication.

#### Ethnocentric Stage of Intercultural Experience

Collier's paper in the '90s<sup>15</sup> approached intercultural competence from a communications perspective. Intercultural competence, according to Collier, is recognizing the cultural identity being communicated and negotiating an appropriate communication stance.

Bennett has described a model of intercultural competence, a developmental model of intercultural competence, which comprises two primary stages, ethnocentric and ethnorelative. Each primary stage has various substages, each with its own several components.

Now, on the accompanying slide you can see that the ethnocentric stage comprises denial, defense and minimization, while the ethnorelative stage comprises acceptance, adaptation, and integration. The model is linear but not unidirectional, meaning people can regress, although in regressive moves individuals typically retain knowledge and attitudes gained at a later stage of this developmental model.

Ethnocentric, as one might suspect, is the belief that one's world view is central to all reality. Ethnocentric stages vary from denial of cultural differences to a minimization of the importance of these differences.

By contrast, an individual who has reached the ethnorelative stage appreciates that cultures really can only be understood in relation to each other. And a significant contribution of Bennett's model is that he provides suggestions as to how to move an individual along the scale from an ethnocentric position to an ethnorelative position.

The ethnocentric substages commence with denial. Denial can take the form of separation, which I have particularly observed in short-term study abroad programs run by US law schools, where US law students socialize only with fellow US students or seek establishments that provide a familiar setting.

I have taught in Buenos Aires where a wonderful steak dinner is

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13. These comments are part of a longer paper available by e-mailing the author at professorcarolan@yahoo.com.

14. Milton J. Bennett, *Towards Ethnorelativism: A Developmental Model of Intercultural Sensitivity*, in *EDUCATION FOR THE INTERCULTURAL EXPERIENCE* 21-71 (R. Michael Paige ed., Yarmouth, ME: Intercultural Press 2d ed. 1993).

15. N.J. Collier, *Cultural Identity and Intercultural Communication*, in *INTERCULTURAL COMMUNICATION—A READER* 36-44 (Larry A. Samovar & Richard E. Porter eds., Wadsworth Publishing 7th ed. 1994).

available for very little money, and I heard a student come in to the hotel lobby and say ‘Awesome—so and so found a Burger King!’ And the students all rushed off to Burger King.

Defense, the next substage in development, can take three forms, and this is where I think we often find our students at the end of a short-term program. The forms of defense are denigration, superiority, or reversal. Defense represents a slight progression over the previous stage, because there is an acknowledgment of cultural differences and thus a progression from outright denial. However, this acknowledgement is combined with the adoption of a strategy to ‘combat’ the perceived differences.

Superiority is the second stage of defense. This stage emphasizes the positive aspects of one’s own culture and is preferable to denial when it is not accompanied by denigration.

The following anecdote might illustrate the concept of superiority. I asked a student in Ireland what she found most stark about the differences between the US and Ireland. She said, with a look of shock on her face, “Do you know moisturizers in Ireland don’t have a mandatory SPF factor!?” She clearly was acknowledging a “cultural” difference, and finding the American approach superior.

Reversal, the third major substage of defense, is a situation where an individual “goes native,” so to speak, and everything about his or her home culture is denigrated and everything about the host culture is held up as a wonderful example of how we should all really live.

Minimization is the final form taken by ethnocentrism. Cultural differences are buried under an alleged similarity between cultures, i.e. that individual motivations drive behavior or that we are all “God’s children.”

We see, I think, a lot of that at conferences where everybody is from a similar background. At this AALS conference, for example, it seems that most speakers assume that “freedom”—usually associated with some form of representative democracy—is desired by all people in the world. But there are cultures where freedom is not of primary importance. The consensus in these cultures might be that what is most important is aligning one’s life with the will of Allah. The emphasis on a particularly Western value, however, represents a form of minimization and could be seen as a regression from superiority and denigration.

Bennett notes it is difficult to move people from an ethnocentric to an ethnorelative position, and he recommends an inductive approach, developing an awareness of one’s own culture in order to progress notions of relativity. He also recommends facilitated discussion groups with trained participants from another culture who can assist with this progression.

In a program I ran in Belgium, although most of the speakers were from the European Commission talking about what they did in the various directorates, we had someone whose specialty was intercultural competence. In feedback we received from the students that was the session that the students seemed to enjoy most. So I think express training and intercultural confidence could be folded into these types of programs.

#### Ethnorelative State of Intercultural Experience

In ethnorelative development, the first stage is acceptance. At this stage, an individual accepts and respects the fact of cultural difference.

Adaptation is the next stage of ethnorelative development. There are two stages to this adaptation—empathy, that is, the ability to experience some aspect of reality differently than what is given by one's own culture, and pluralism, the ability to experience cultural differences from within another cultural frame. It can often take a substantial length of time—a semester, a year, or perhaps even several years, to reach a pluralist appreciation of culture.

The final stage of ethnorelative development is integration. The integrated person understands that his or her identity merges from the act of defining identity itself.

Various criticisms could be leveled against Bennett's model. For one, it lacks some aspects of practicability. He fails to specify the time frames for various stages of development with few exceptions. He does not give practical examples of how to move the hypothetical participant from one developmental stage to the next.

He cautions against proceeding too rapidly without giving practical tips on how to spot recalcitrant subjects, and the model would seem impractical to apply in group settings where there might be different speeds at which a group develops.

But nevertheless, by being aware of at least one developmental model of intercultural competence, that is Milton Bennett's 1993 paper, academics engaged in seeking to enrich the law school curriculum might proceed with a particular goal in mind.

Very often, we do these things with an instinctive feel that it is going to produce a certain outcome. But if we have an outcome in mind and then thought about how we would assess the achievement of that outcome that could lead us to a developmental strategy to progress people along Bennett's model of intercultural sensitivity.

So academics engaged in seeking to enrich the law school curriculum might keep a goal, a model like this in mind, and assess the outcome of the enrichment procedure against a defiant set of parameters such as that provided by this model.

MR. DEL DUCA: We will now hear from Professor Wang.

Summer Law Institute at the Kenneth Wang School of Law, Soochow University in Suzhou, China – International Business Transactions with Chinese Characteristics

Purpose – Fostering Cross Cultural Learning Experiences in the Law

In 2003 we embarked upon a project to create an educational experience where law students from China and the West will come together to learn the basic techniques of problem-solving in an international business setting while learning from each other the variations in approach, reasoning and expression which they will confront as lawyers in international practice.

Background

In 2003 there were approximately ten international summer law programs hosting foreign law students in China. These were mainly organized by American law schools for their students. These programs followed a variety of formats. Some were taught by the sponsoring school's faculty. Others were taught by a more diverse faculty including practitioners and faculty from other schools. On the whole, the majority of students came from the organizing school with the remainder coming from other American law schools. Some programs provided a Chinese law perspective, on the whole taught by an American faculty. Some included a few Chinese faculty members. Other programs had very little of a China law component. Instead, they were standard law school doctrinal classes. The cultural aspects of these pioneering programs consisted mainly of visiting the standard tourist sites as well as visits to judicial and administrative venues. There was limited interaction with the environment or the people of China.

While benefiting from the experiences of these pioneering programs, we decided to give special emphasis on fostering a robust cross-cultural experience for our Chinese and Western students as well as faculty.<sup>16</sup> We, therefore, insisted on having a balance of Chinese and Western students. We incorporated Chinese faculty along with Western

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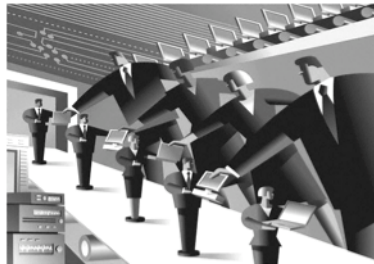
16. The Summer Law Institute at the Kenneth Wang School of Law is now the largest and most complex summer program in China. Each year it hosts approximately one hundred law students. Fifty are from various law schools in China (this past year over thirty-four Chinese law schools were represented). The other half is split between American law students (this year representing about fourteen different American law schools), and European law students (this year representing eight European law schools).

faculty.<sup>17</sup> To force an interaction among the students we divided them into teams maintaining a balance of approximately one-half Chinese and one-half Westerners on each team. While the language of instruction was English, we presented some materials in our hypothetical package in Chinese. This, once again, forced team members to rely on each other in understanding the problem, as well as working with each other.

### Course Structure

The course is a problem-solving exercise based upon a hypothetical international business situation. In the hypothetical, three high-tech companies (Chinese, American and German), each meet at the Shanghai Hi-Tech Trade Show. The students have been hired as summer associates to work in the legal counsel's office of their respective companies. Instructions from the General Counsel are provided as general guidelines of the tasks the summer associates must perform.

#### You've Been Hired Work Rules



You've Been Hired as:

- Associates in the General Counsel's office to work for a division of a large company.
- General Counsel and other Attorneys are on Summer Holiday.
- You've been asked to "mind the store" while they are away.
- You will be working in a team of other associates also hired for the summer.
- You will be dealing with various business people.
- You have an opportunity to "hire" experts. However, you will need to keep within a budget.
- The experts will not give you the answers to your questions. Rather, they will assist in guiding you.

Each day, students are presented with a new package of materials (emails, contracts, documents, memos, etc.), which lay the foundation for the specific problem of the day. Each day's unit explores a different aspect of international business transactions. Each day's morning session is focused on the doctrinal area of law around which that day's

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17. This past year, 2007, the program had close to thirty faculty members in the three weeks. Our full-time faculty consisted of the following: Barbara Holden-Smith, Associate Dean, Cornell Law School; Karsten Thorn, Professor of Law, Bucerius Law School; the authors from the Kenneth Wang School of Law; Leo Martinez, Professor of Law, University of California, Hastings College of Law; and James Li, Professor of Law, Tsinghua University. These full-time faculty members were the core of the program, tying together each individual unit. The part-time faculty were engaged for periods varying from one day to one week. They may give a lecture or conduct a class on their specific area of expertise. Some would participate in panel discussions on specific topics. This put faculty and students in the challenging and stimulating environment which results from a high degree of intellectual exchange among the participants.

problem focuses. During the course of the three week program, the students are presented with five separate team tasks. These include drafting a memo, making a presentation to the board of directors, negotiating a joint venture arrangement, drafting a brief, and finally appearing for oral argument before both a Chinese court and an American court. The students work on these tasks in the afternoons and evenings.

#### Team Structure

The students are divided into twelve separate teams, each of which represents one of the three companies in the hypothetical. The twelve teams are divided into six Red teams (Chinese company), three Blue teams (US company), and three Gold teams (German company). Each team has approximately one-half Chinese members and one-half Western members. Teams are judged on the effectiveness of their representation of the client. The teams work with, and compete with, each other in negotiations, depth of analysis, client relations, and strategic approaches to issue definition and problem-solving.<sup>18</sup>

#### Pedagogical Rationale

The focus is not to teach, nor test, the students on substantive areas of law. Rather, it is to familiarize them with the intricacies and vagaries of international legal practice in a hypothetical international business transaction. They will need to develop sensitivity to various issues of law and culture which impact this hypothetical fact pattern. As the course continues, the fact pattern changes, and they will learn how these changes affect their legal analysis. They are forced to work with law students from different legal traditions (civil vs. common), as well as distinct cultural traditions.

We decided on a simulation, problem-solving pedagogy as the one which would lend itself best to foster the interactions we believed would yield the most robust educational results for the participants. Aware of the discourse among legal educators that more than a single pedagogy is

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18. In order to ameliorate some of the economic differential between the Chinese and Western students, each team is provided a stipend of RMB one thousand at the beginning of the institute to spend as they as each team decides. The restaurants, bars and coffee shops on Shi Chuan Street have been delighted by this boost to the local economy. It is a team-building device. Another device we used is a treasure hunt. While a small minority of the Western students (particularly a few world-weary, cynical, twenty-something, American students) criticized the exercise as "too summer camp," it did provide for team cohesion and enabled each student to coordinate with their team members as well as discover the city of Suzhou. This was a particular hit with the Chinese and European students as well as most of their American colleagues.

needed to educate law students, we employed a variety of approaches in teaching the doctrinal components of the course. Lectures, panel discussions, as well as case-dialogue and Socratic methods were utilized to supplement the written materials in developing the issues in the hypothetical. Company memos and emails knit together a light hearted narrative which moves through each unit providing texture and meaning to the written documentation presented. This “narrative” approach was important to give the students a sense of “real life” practice. The recent concern expressed in current literature about the need to “contextualize” the training of lawyers sharpens the importance of introducing more simulation-problem-solving approaches to our law schools.<sup>19</sup>

#### Course Materials

Students are provided with two sets of materials: 1) background reading materials for each unit, and 2) the hypothetical case materials as the foundation of their assignments. These readings consist of articles, summaries and other reading materials, including short summaries of various substantive areas to provide the students with a general background for each topic. Students are expected to prepare for class by reviewing these materials. The hypothetical materials contain the facts upon which students must base their analyses, and include company profiles, business memos, emails, business plans, sales contracts, licensing agreements, commercial invoices, correspondence, internal memos, etc. The hypothetical materials are distributed during the progress of the course, to be used by the students in analyzing the issues in the hypothetical.

#### Class

Each day’s class begins with a review of the prior day’s hypothetical problem followed by distribution of new factual materials, such as memos, emails, or form contracts from business partners, announcement of new regulations and/or news events. These new materials will set the stage for that day’s problem. Each day’s new material is added to the students’ respective case files. Teams are expected to sit together in class, and are called upon to answer questions or participate in discussions as a team.

After the review and setup for the current day’s problem, a very general summary of the relevant legal subject area along with the changing hypothetical fact pattern is presented in lecture, with a panel

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19. See generally, Rakoff & Minow, *supra* note 10; WILLIAM M. SULLIVAN, ET AL, EDUCATING LAWYERS (2007).

discussion on the relevant law as it impacts the hypothetical case. The faculty leads the discussions to compare and contrast the substantive law across different jurisdictions, along with its interplay with the facts of the hypothetical. Faculty members act as “expert consultants,” making themselves available to teams on some afternoons, as needed. The experts’ purpose is not to provide the students with answers, but rather, to assist them in the organization, research and presentation of their work. They will also grade each team’s performance.

Teams are called upon to provide their input to the day’s lecture and discussion, and student questions and insights are encouraged. Incentives for classroom participation are provided. The purpose of the morning discussions, and the summaries of law, is not to provide answers to the hypothetical, but to provide an overview of the area of law which each team should explore to determine the issues for analyzing that day’s hypothetical.

#### Problem Solving and Team Work

Using the resources in the case file, as well as information and materials obtained from the resource website, background readings, the library, as well as internet research, the students will work in teams to prepare the assignments. Students are expected to search the web for relevant statutes, agreements and background materials. To encourage participation by all the students, some of the materials are in only one language—English or Chinese—requiring that the team members work together to find the issues. Some of the materials will have translations, but the translations may or may not be accurate and will require review. Each team has different materials with some overlap, e.g., contracts between two of the companies, etc. Initial analysis and negotiations are based upon incomplete information. At the litigation portion of the exercise, the students may face US-style discovery requirements, including the need to turn over materials which may compromise their original positions.

The entire multi-cultural exercise, from attending class to preparing assignments with teammates and faculty from other cultures, is intended to encourage the students to confront their own assumptions, and ultimately to realize that the absolutes of values are not absolute, but dependant upon a multiplicity of factors.

#### Measuring Outcomes

Working with the U.C. Berkeley Culture and Cognition Lab and its director, Prof. Kaiping Peng, we are studying the outcomes of the

program over the last four years.<sup>20</sup> We tested two sets of issues in this study. The first issue we tested was for cultural differences, and how members of different cultures view themselves, their relations with others, and their judgments of legal issues. We examined whether these groups react to cultural values and legal judgments in similar ways. This set of questions builds upon the existing scholarship in the field, and establishes the base line of cultural differences to help us to address the second issue.

The second issue we tested in this study focuses on the effects of cross-cultural interactions and learning: How do culturally diverse people respond to cross-cultural learning? What factors affects the outcomes of cross-cultural learning? By focusing on quantifiable data in this study, we can empirically test some of the most fundamental questions in cross-cultural education.

Informed by the existing scholarship, we predicted that Americans would be more individualistic in their judgments of values and to be more legalistic in their judgments of legal cases while Chinese would be more likely to endorse collectivistic values and be more likely to chose equitable rather than technically correct legal judgments. We also predicted that cross-cultural legal education would fundamentally alter students' value orientations and their ways of judging legal questions, but the magnitude and scores of these effects were the subject of the empirical tests we devised.<sup>21</sup>

For the legal judgment questions, we presented the students with four factual scenarios which represent common examples of legal

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20. We must emphasize that the "results" reported in this paper are very preliminary, as much work still needs to be done in analyzing the accumulated data.

21. A 2x2 Culture by Time Between Subject Design was utilized in this study. Both groups received the test before the cultural training and again afterward.

Subjects were presented with two forms of questionnaires; both forms were matched to test the same psychological variables in questions. Materials were created in English with consideration for cross-cultural understanding of the concepts. The survey was translated into Chinese and translated back into English by separate translators. The authors resolved the few discrepancies that emerged.

We used the most famous individualism-collectivism scale as a measurement of cultural values (Triandis et al, 1988). Individualism, as a psychological concept, is defined by three behavioral components—emotional distance from one's in-group (e.g., parents, siblings, relatives, etc.), personal goals having primacy over in-group goals, behavior regulation by attitudes and cost-benefit analyses, and little avoidance of confrontation (Triandis et al., 1988; 1990). Collectivism, on the other hand, is defined by family integrity, a homogenous in-group along with strong in-group/out-group distinctions, the self being defined in in-group terms, and regulation of behavior by in-group norms, and hierarchy and harmony within an in-group. Previous research has shown that individualism-collectivism affects people's self-concept, (Triandis, McCusker, & Hui, 1990), conflict resolution, (Triandis et al., 1988), and attribution (Morris & Peng, 1994).

disputes. The scenarios are designed to approximate varying types of legal cases. All these cases were tested in a previous cross-cultural study on law and psychology (Levenson & Peng, 2004) that had shown cross-cultural compatibility and validity. Students were asked to evaluate a variety of situations.

While the study is continuing, preliminary results confirm the cultural differences found in prior studies, even though the subjects in this study have legal training. American law students were more individualistic in their self-image than their Chinese counterparts. The concentration on self revealed itself in legal judgments made by the American students that tended to assume more individual control of circumstances, and contrasted with the responses of the Chinese students, who tended to assume individuals had less ability to act on individual free will.<sup>22</sup> Given that base line, we looked at the second issue – the effects of cross-cultural training on our students.

In the Suzhou study, we tested the base line difference between the

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22. Once again, we designed two forms for the same kind of legal scenarios. The first kind of scenario involved individual responsibility and the second kind concerned group responsibility. Form A was administered at Time One before cultural interaction and knowledge training and Form B was administered at Time Two after cultural interaction and knowledge training.

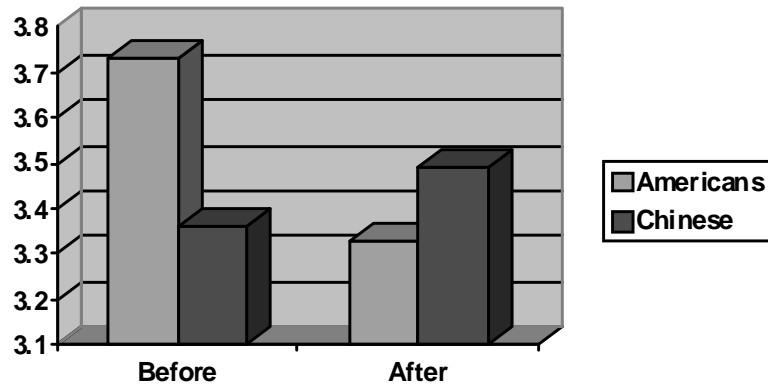
The first case in Form A described psychological research indicating that the perceived moral culpability of an actor affects a lay person's causal determination. Mark Alicke conducted studies in order to show that when multiple potential causes are present, people most frequently select the most morally blameworthy cause as the likeliest cause. In Alicke's studies, when presented with a hypothetical fact pattern relating to a car accident, subjects cited the driver (the actor) as the primary cause of the accident more frequently when his reason for speeding was to hide a vial of cocaine than when it was to hide his parents' anniversary gift. Perceivers also consistently selected the actor as the primary cause of the accident despite the presence of other causal factors, such as an oil spill or tree branch blocking a traffic sign. Alicke described this effect as *Culpable Causation*, "the influence of the perceived blameworthiness of an action on judgments of its causal impact."

The second case in Form A teased out cultural differences in causal explanation. In a series of studies testing cultural differences in attribution, Peng and his colleagues (Morris & Peng, 1994; Morris, Nisbett, & Peng, 1995; Peng & Nisbett, 1997) used descriptions of recent mass murders committed by either a Chinese or an American as the stimuli, and asked American and Chinese college students to explain these events. They found that Chinese indeed place more weight on situational, social, and global causes, as compared with American students. Such cultural differences were also shown to exist in people's counterfactual reasoning about the cause and effect relations of mass murders, as well as in the media reports in a Chinese newspaper (*The World Journal*) and an American paper (*The New York Times*). Such findings are significant as well as provocative, because social psychologists and cognitive psychologists have long argued that there is a strong universal tendency for people to attribute behaviors of humans and objects to internal dispositions of an individual or object, which has been called the "correspondence bias." It is well documented that such a bias exists even when situational influences are obvious, leading to the so-called "fundamental attribution error."

two cultural groups by examining Chinese students and the American students' responses in a before and after test. We found that before cultural interaction and training, there were indeed cultural differences on individualism-collectivism, such that the American students were measurably more individualistic ( $M = 3.73$ ) than the Chinese students ( $M = 3.36$ ).

We then tested the cultural difference after the cultural interaction and knowledge training. We found not only that there were changes, but that the difference was somewhat reversed. While both groups had moved towards each other, the American students' responses had become even less individualistic ( $M = 3.33$ ) than those of the Chinese ( $M = 3.49$ )!

Figure 1 Effects of Cultural Knowledge Training on Chinese and American Students' Beliefs on Individualism



We note that the difference between the two groups narrowed by more than 56% (from .37 to .16). This demonstrates a pronounced movement by both groups towards the mean. What was most compelling was the movement among the students—American students' attitudes of individualism moved three times as much as the Chinese students. We theorize that this large movement owes much to removing the American students from their original environment and placing them in an entirely different cultural setting. The movement of Chinese students to a more individualistic self-perception demonstrates the effects of cross-cultural interactions even when remaining in one's original environment, but interacting with a different population. This measurable change occurred within a three week period of intense multi-cultural interaction. We expect an even greater movement in students who engage in a longer program or have greater opportunities for education abroad programs.

These preliminary “results” will assist in focusing our continuing research. That research will enrich our understanding of how culture and perspectives of law are intertwined. We, as teachers of the law, must inculcate in our students a sensitivity to the vagaries of cultural influence on the legal perspectives and outcomes in this interrelated but diverse world. The research suggests that such a sensitivity can be fostered by intense cross-cultural interactions in a simulated real world legal environment where students from different legal and social cultures must work with each other. It is one way of preparing our students for the world they will inherit and shape. It is a beginning.

MR. DEL DUCA: A commentator at one of the earlier sessions at this Annual Meeting of the AALS noted that much of what has happened in internationalizing legal education in the United States is really window dressing. He referenced so-called “on-place summer programs” which merely transport in toto courses given on campus in the United States to a foreign venue. He also commented on the export of students on semester abroad programs without the student experiencing the local culture in the host country in any significant manner.

These criticisms certainly do not apply to the Summer Law Institute at the Kenneth Wang School of Law. Recall Professor Wang’s description of the techniques they utilize to get the students immersed in the Chinese culture and the almost Machiavellian device of providing mixed teams of Chinese and English speaking students with documents in both languages most of which correctly translate from the original document, but some which are intentionally inaccurately translated. All this to create an environment in which English speaking students are forced to communicate and rely on the expertise of the Chinese students and the Chinese students are forced to communicate and relay on the expertise of the English speaking students—a beautiful almost Machiavellian approach which forces students to communicate with each other on the accuracy of the documents.

MR. DEL DUCA: Julian Lonbay is a past president of the European Law Faculties Association (“ELFA”), founded in 1995, largely under the leadership of Frans Vanistendael, who also is on our program today. ELFA essentially performs the kind of work for European legal education that the AALS performs the kind of work for us here in the United States.

Prior to the creation of ELFA, European law schools were primarily organized on a national basis.

Julian Lonbay is a very distinguished law professor in England, who, in addition to being a past president of ELFA, is currently working very closely with the Council of Bars and Law Societies (“CCBE”) as Chair of its Training Committee. Although there are differences, the

CCBE can be essentially described as doing the kind of work in Europe that the American Bar Association does in the United States.

Professor Lonbay was planning to be with us in person today. Regrettably, he could not join us in person, so we reverted to technology. Our first instinct was to arrange for an instantaneous synchronized audio visual trans-Atlantic connection. Current technology makes this possible relatively inexpensively from one campus to another. However, transmission from a campus in England to a commercial hotel in the United States raises the cost sums quoted at \$2,500 to \$3,500 for a twenty minute presentation. Under these circumstances, we opted for an audio-visual recording transmitted computer to computer which we are pleased to present today.

We are also fortunate to have with us today, Professor Heribert Hirte, the current president of ELFA. Professor Hirte will make brief comments along with Dean Daly following Professor Lonbay's presentation.

(The following is from the above-mentioned videotape.)

## The CCBE and ELFA Projects on Internationalizing Legal Education in Europe

Julian Lonbay

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### Introduction – Internationalizing Legal Education in Europe

Good morning. I am Julian Lonbay from the Birmingham Law School of the University of Birmingham in England. I am very grateful to Professor Louis Del Duca for inviting me to participate in this session, but I am very sorry that I cannot be there in person. I am going to make a short presentation on internationalization of legal education in Europe.

Europe is made up of many States. Twenty-seven of them are in the European Union itself; the further three or four attached by way of treaties to the Union rules.

Each of these member States has its own legal order, its own legal professions, its own legal culture and its own tradition of education. What I am going to be talking about is how the recent developments in Europe are affecting these various legal traditions.

### Commonalities

There are many common elements to the European legal education and training in modern Europe. For a start, European Union law itself has over ninety thousand pages of legislation. There is a growing movement towards reinvigorating the ancient *ius commune* and there are groups finding common elements in our contract and tort laws across

Europe.<sup>23</sup> The European Convention of Human Rights also provides a common floor of human rights law.

### The Lisbon Strategy

The Lisbon strategy, sometimes referred to as the Lisbon Agenda or Lisbon Process, is an open method of coordination formally adopted by the Union in 2000 though it had existed prior to that in various sectors. The aim of the strategy is to make the European Union “the most competitive, dynamic, knowledge-based economy in the world by 2010.

In a mid-term review in 2005,<sup>24</sup> the member States recognized that Europe was in fact falling behind rather than surging ahead. They altered the aim slightly and talked about a knowledge-based “society” rather than a knowledge-based “economy.”

The objectives for education and training, in the meanwhile, have been set by Ministers of Education. The objectives were to make European education and training systems a world quality reference by 2010. This is still an ambition, and the Commission and ministers consider that “the knowledge society” is the key to the Lisbon strategy.<sup>25</sup>

The Lisbon Strategy is broader than the autonomous Sorbonne Bologna process. It includes education right from the kindergarten stage though schooling to university level education. There are five key benchmarks; reducing the number of children leaving school early; increasing literacy rates; trying to ensure that at least eighty-five percent of children complete secondary higher education; and that fifteen percent of that number must be in mathematics and that this figure must increase by fifteen percent.

Now, using the twenty core indicators for monitoring progress towards the Lisbon objectives in education and training, member States test themselves against each other and learn from each other’s best practice. You will see in a moment how this process has created the European Qualification Framework for lifelong learning. And when I say created, I mean created the ambition and rules for the emergence of the framework, which is supposed to be ready ideally by 2010, and by 2012 at the very latest. But more of that in a moment.

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23. Julian Lonbay, *Reflections on Education and Culture in European Community Law*, in *CULTURE AND EUROPEAN UNION LAW* (Rachael Craufurd Smith ed., 2004).

24. E.U. Econ. Pol’y Comm., *Mid-Term Review of the Lisbon Strategy: Advancing Reform in Europe*, COM (2004) 289 final (Aug. 31, 2004), available at [http://ec.europa.eu/economy\\_finance/epc/documents/2005/epc\\_lisbon\\_2005.pdf](http://ec.europa.eu/economy_finance/epc/documents/2005/epc_lisbon_2005.pdf).

25. Presidency Conclusions, Brussels European Council (Mar. 22-23, 2005).

### Sorbonne Bologna: New Educational Frameworks

First, an update on the Sorbonne Bologna process, which was started in 1998, when four Ministers of Education met at the 800th anniversary of the Sorbonne University. The process is now followed by forty-six States from right across Europe, including new States such as Macedonia—as well as the usual suspects.

Every two years, Ministers have met to give the process a boost - the last meeting was in London in 2007. In 2009 they will meet in Leuven to discuss whether they are achieving the European higher education area which is meant to be in place by 2010.

The aims of the Sorbonne Bologna process are to increase the mobility of students and the transportability of their qualifications, to increase the competitiveness and attractiveness of the European higher education sector, a major potential market for services, and to improve the employability of graduates.

It makes a more overt link between university studies and employment markets. The Sorbonne Bologna process is concerned with creating a European higher education area. It is not concerned with other sectors in education.

There are many continental jurisdictions, in particular, where the law degree is traditionally four, five or even six years long, and they have been under pressure to reduce to a three-year long degree.

Many States have adopted three years plus two, essentially maintaining their five-year process as a basis for entry to the legal professions. Others have fiercely resisted the reduction to three years. Some, like Italy, having introduced the three plus two structure, then reverted to a consolidated five-year degree, the Italian law degree having been of four years duration previously.<sup>26</sup> All member States either have, or are considering, restructuring of their law degrees. The overall effect is a reduction in the duration required to undertake legal studies and an increasing change of approach to view law degrees not in terms of inputs but rather to view them in terms of competences or as learning outcomes.

This is the approach of the new European higher qualification framework. Some jurisdictions, Luxemburg, most notably, do not have indigenous home-grown law degrees, and they make do very happily with the law degrees of other countries, supplemented with particular national law courses. This implies that it is quite possible to have competent lawyers who have not undertaken a long period of study in one particular national system of law.

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26. Luisa Antonioli, *Legal Education in Italy and the Bologna Process*, 2 EUR. J. LEGAL EDUC. 143 (2006).

One of the first tasks in the Bologna process—is for States to adopt national qualification frameworks. These will set out learning outcomes, expected of those undertaking particular studies. The shift is from entry requirements and length of curriculum to the learning process, and what can you do? This helps to focus on employability due to the emphasis on the learning process or learning outcomes or achievements. These separate national frameworks, which in principle are quite autonomous, will be linked together with an over-arching framework for qualifications in the European higher education area.

This is the Sorbonne Bologna framework which will increase the transparency without affecting national framework as such, and will, with its transparency, increase the understanding of each other's training and educational systems, thereby improving mobility. In principle, it provides a common language to enable misunderstandings to be avoided and will help in eventual certification or accreditation procedures.

The coordinating role of the framework at the European level is emphasized by the fact that there are no qualifications of the European level, as such, nor is there any law regulating them. It is more a meta framework.

#### New Routes to Professional Qualification in Europe

At the same time, as these macro developments are occurring, forcing a re-evaluation of what education regimes are for and how they are talked about and presented there is another wave of reform sweeping through to the European legal education and training systems. These are the new routes to multi-jurisdictional legal practice afforded by the case law and legislation of the European Union. We find that national routes to qualification, not just for law but other disciplines also, are supplemented by additional routes available to those who have qualified to join a legal profession in another EEA jurisdiction.

For law, there is the services directive which allows lawyers to provide services in each other's jurisdictions on a temporary basis.<sup>27</sup> There is also the mutual recognition of qualifications directive.<sup>28</sup> This allows, one could say forces, an assessment of a migrant lawyer's qualifications so that rather than entering a profession completely through the national route, those elements which are common need not be re-taken. One can avoid re-learning or being tested in the areas of

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27. Council Directive 77/249, 1977 O.J. (L 78) 17 (EC), *available at* [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31977L0249&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31977L0249&model=guichett) (a resolution "to facilitate the effective exercise by lawyers of freedom to provide services," as amended).

28. Directive 2005/36, 2005 O.J. (L 255) 22 (EC), *available at* [http://www.aic.lv/bologna/Recognition/dir\\_prof/Directive\\_2005\\_36\\_EC.pdf](http://www.aic.lv/bologna/Recognition/dir_prof/Directive_2005_36_EC.pdf).

knowledge/competence which one already possesses. In the case of lawyers, they may well have similar client-handling skills, accounting skills, and so on. This is not necessarily so, but they may. These must be assessed, and a shortcut aptitude test or adaptation period has to be provided, allowing them to join the host State profession on completion. So the national qualification route is supplemented by additional non-national routes. Finally there is the Establishment Directive which allows for complete assimilation of a migrant lawyer once he has practiced for several years in the host State.<sup>29</sup>

Lastly and more recently, there is the famous *Morgenbesser* route.<sup>30</sup> The *Morgenbesser* case involved a French law graduate who applied to join the legal training in Italy which led to qualification as a lawyer there. Her application was rejected on the ground that she did not have an Italian law degree. This was not acceptable, and Italy found that it was forced to assess her understanding and knowledge and competence effectively to see whether and if anything was missing in her legal training so far, compared to someone who had followed the prescribed Italian route. In this context, assessment did not mean seeing if her French law degree was academically equivalent to an Italian law degree—what the Italian Bar had to do was assess to what extent she had the skills and knowledge necessary to join the Italian regime of legal training. If any missing elements were found they had to be corrected by the applicant. What this essentially means is that the carefully crafted national routes to legal qualification can be circumvented by migrants wielding their EU law rights.

So there is a whole wave of EU-inspired re-assessment of legal education and training. What is it we really need our lawyers to know? What are the necessary legal competences? This is driven at one level by the macro events I explained earlier—the creation of the European higher education area and additionally by the internal market law which I have just explained.

Supplementing these pressures are the queries from competition authorities across Europe, led by the European Commission, on why there are such strong entry controls for access to the legal professions?

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29. Directive 98/5, 1998 O.J. (L 77) 36 (EC), available at [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=31998L0005&model=guichett&lg=en](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=31998L0005&model=guichett&lg=en).

30. Case C-313/01 *Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova* 2003 E.C.R. I-13467, available at [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?Smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=62001J0313&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?Smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=62001J0313&model=guichett). The CCBE Guidance to the case can be found at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/morgenbesser\\_guidanc1\\_1183976940.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/morgenbesser_guidanc1_1183976940.pdf).

How can these be justified?<sup>31</sup>

#### The Response of the Legal Professions

These pressures have combined to cause the national regulators of Bar admissions from across Europe to consider whether or not some common training outcomes might be conceivable at the European level for lawyers.

The CCBE, the Council for Bars and Law Societies of Europe, represented three quarters of a million lawyers and set to work to see whether some common outcomes might be conceivable. It took a considerable length of time and intense debate in some cases to come up with such common outcomes.<sup>32</sup>

Initially, the research was done to assess what was required at the national level in the various national routes to becoming a lawyer. A lengthy report of over two hundred pages was produced setting out what was needed. *This mode of looking at legal education and training in terms of inputs—how many years must you study and how many hours are to be spent on particular subjects—is a recipe for finding differences. Looking at the question in terms of outcomes is much simpler, though complicated enough.* The CCBE, having already determined the core requirements of the legal profession,<sup>33</sup> one of which turned out to be “competence,” devised a common set of training outcomes, which were finally agreed to and published in November 2007, which can be found in annex 1. The document sets out common training outcomes in three parts.

#### CCBE Recommendation on Training Outcomes for European Lawyers

The recommendation starts with a short preamble giving the legal and other background to the development of the set of outcomes. The next part of the document sets out the conceptual and analytical abilities considered necessary to be a successful lawyer. The third section sets out the managerial, personal skills, knowledge and competences, necessary to be an effective lawyer. These are the ethical requirements of being a lawyer, often referred to as the deontological requirements,

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31. E.C., *Report on Competition in Professional Services*, COM (2004) 83 final (Feb. 9, 2004), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0083:EN:NOT>.

32. CCBE, *RECOMMENDATION ON TRAINING OUTCOMES FOR EUROPEAN LAWYER* (2007), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_Training\\_Outcomes1\\_1196675213.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Training_Outcomes1_1196675213.pdf) (attached hereto as Annex 1).

33. CCBE, *CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION* (2006), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/Charter\\_of\\_core\\_prin1\\_1207642537.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Charter_of_core_prin1_1207642537.pdf).

dealing with matters such as professional secrecy, client confidentiality, respecting the collegiate nature of the profession, and the rights and duties arising out of the giving of legal advice. These are considered to be essential.

The next part is implementing the work of the lawyer, and this focuses on the substantive knowledge and understanding and skills needed by lawyers. Here we find the basis of the core knowledge requirements though there is no great detail to be found here; rather knowledge and understanding of the core principal features including the main concepts of the legal orders, including European dimensions, are considered necessary together with further detailed knowledge in some specialized fields of law without specifying any particular field of law. The only detail is in a short footnote that sets out that core knowledge should include knowledge of civil law, constitutional law, human rights law, criminal law, and European law. The idea that they should be able to think like a lawyer, be able to do research, be able to find materials and be able to apply knowledge effectively, is considered very important.

Finally, there is a set of skills indicating how to acquire knowledge and how to analyze it, which focuses on the needs of the client and communication skills. The document is fairly short, just eight pages long, and was adopted unanimously in November 2007.

The next stage of work on this will be to see how it fits into the European qualification framework for life-long learning.<sup>34</sup> The CCBE will eventually need to assign level indicators and also perhaps see whether and how “assessments” of whether one has achieved these outcomes can be worked out.

#### The Responses of European Law Schools

Finally, we turn to see what the European Law Faculties Association (“ELFA”) has said about these matters. Firstly, there were some ELFA resolutions<sup>35</sup> in the early 2000’s welcoming the developments of Sorbonne Bologna and suggesting various ways in which law schools might adapt their curricula. More recently, the Qualification, Accreditation and Quality Assurance Committee of ELFA (“QUAACAS”) has joined in with the tuning process.<sup>36</sup>

This has rather, in the case of law, been a long, and so far,

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34. Recommendation, On the Establishment of the European Qualifications Framework for Lifelong Learning, 2008 O.J. (C 111) 1 (Eur. Parliament and Council), available at [http://ec.europa.eu/education/policies/educ/eqf/rec08\\_en.pdf](http://ec.europa.eu/education/policies/educ/eqf/rec08_en.pdf).

35. See generally ELFA, <http://www.elfa-afde.org/> (last visited Aug. 5, 2008).

36. See European Lawyers’ Information Exchange & Internet Resource, <http://elixir.bham.ac.uk/menu/FreeMovement/frameset.htm> (last visited Aug. 5, 2008).

incomplete process. “Tuning”<sup>37</sup> is essentially a consultation exercise, using cluster analysis, where a set of competencies, skills of a generic sort, and a second set of more specific legal related skills and competences, are set out in questionnaires to graduates, employers, and academics. They are asked to rank the competences in order of importance.

The questionnaires were devised by the QUAACAS in consultation with a wide set of national representatives from many European jurisdictions. The generic set of competencies is common across many academic disciplines; the specific competences are geared just to law. The process cannot be said to be effectively completed yet. QUAACAS will be reporting to the Hamburg general assembly of ELFA, though, giving their initial report on this phase of the tuning legal studies process.

Essentially, not all of the jurisdictions are represented, and for some that are represented, we do not have sufficient numbers of responses to give a realistic perspective on their views on which set of competencies will be most important. Nevertheless, the tuning report, which is not finalized yet, should set out some recommendations on the way forward in this area.

### Conclusions

It is clear from the processes as I have described, that the national qualification frameworks have in many cases, still to be developed. Currently, the UK, Ireland, and Denmark already have such frameworks. Spain has in part, and others are in the process of developing them. As they are developed, more law schools should participate in the process, and it would be good if the European Law Faculty Association took the lead and advised on how this might be done.

The tuning legal studies report should give an indication of some of the skills and outcomes that might be expected as a result of study at law school. Of course, at the higher level, the level of the professions of lawyers, they have already adopted a set of training outcomes, focusing on the deontological side. When these two are combined, we might get a realistic picture of what might be common competences of future European lawyers. This certainly might be helpful in terms of coming to an understanding of what lawyers should be able to do. I hope I have given you an idea of the rather significant amount of movement that there has been on development of commonality in European legal education and training, this despite the fact that the European Union itself has no powers to harmonise legal education and training.

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37. See generally Tuning Educational Structures, <http://www.unideusto.org/tuning/> (last visited Aug. 5, 2008).

Most of the work has been carried out through the Open Method of Coordination (“OMC”) and directly by interested parties. This has its drawbacks in terms of transparency and democracy, and yet nothing agreed through OMC is binding unless States agree. It is merely setting out views and assisting convergence of education and training regimes.

We still have a lot of work to do. (End of videotape.)

MR. DEL DUCA: We now will hear from our colleague Heribert Hirte, the current president of ELFA and a distinguished professor of law at the University of Hamburg.

MR. HIRTE: Thank you very much. Good morning.

First of all, Julian made quite a concise but accurate presentation of the actual situation of what is being done on the process of cross-border internationalization of legal studies in Europe. I want only to highlight that he is actually working with the CCBE, and thus not speaking on behalf of ELFA. The principles which he was presenting here are principles to be presented by the CCBE, which is the Council of Bars of Europe.

As representatives of ELFA, we can easily agree with most of his principles, but the question is where and how to enact them within the European framework, and how we as the European Law Faculty Association, can take a position on this matter.

The problem is that the interaction between bars on the one hand and the law schools on the other hand is completely different in the United States and Europe and in the common and civil law traditions. Self regulation of the bar does not occur to the same extent in continental European countries.

Coming from a common law country, Julian has a different approach to this subject. It is difficult for the European Law Faculties Association to adopt the proposed recommendations as such for European Law Schools. We trust more traditionally in states to regulate indirectly the legal profession.

This involves another related matter which comes up in comparative law discussions. Who is a lawyer, and what are lawyers for?

The classical common law approach is that you have to learn litigation and that they are mainly litigators. The civil law approach, i.e., the continental European approach, is that they are educated as persons for the judiciary and for administrative positions within the government.

That makes the regulation of lawyers completely different. The CCBE proposed regulation would not apply and cannot apply to civil law lawyers like me.

Let me then give you some actual examples of what we are doing in the field of internationalization of legal education in Europe. Julian Lonbay already mentioned the Bologna process, and this Bologna

process focuses on the areas of compatibility of the law studies within Europe.

One key point is that the structure of legal studies should be changed into a three plus two structure, three years to get a bachelor and then two additional years to get a master's degree. It may optionally be a four plus one structure.

But the problem with this is, once again who is being harmonized. You can easily harmonize law studies, but the outcome will be what do these law studies help for.

In some countries, it is just that you have a law degree and that you then have to apply at the bar to be admitted to the bar. In other countries, like Germany and Switzerland, and some other central and eastern European countries, the qualification by the law school automatically admits you to the bar. There is no second step. There is no bar examination in addition to this. That means applying this Bologna structure creates a horrible bunch of problems in this type of country. So it is not as easy as it seems to be.

A second point regarding what we are proposing. We are establishing now on our home page a list of all European law schools, because we know that information, cross-border information, is lacking, and we want to establish this list of law schools, of all European law schools, as a basis for offering free positions in teaching across borders, because we know that there is a lack of mobility in teaching, of teaching staff, across borders. That will happen relatively soon.

We will discuss in our next annual general meeting in Hamburg the ECTS system. ECTS is the European Credit Transfer System. That means that you get assigned a number of points for a class which you have taken in another European country, and there are many European law students going for some semesters to another European country. However, the way the workload is measured differs extensively from country to country, and we want to set up some recommendations to get the standards harmonized to facilitate student mobility.

A last point which is addressed on our home page pertains to teaching materials. We recommend that specific comparative law teaching materials should be added to each law course (one third is our suggestion) in corporations, contracts, tort law, etc. as also suggested by our Maastricht colleague so that we come step by step to a federal law school system to accomplish what the Americans did before us beginning as early as the end of the 19<sup>th</sup> century and early 20<sup>th</sup> century. We would probably say that it would be a unionized law school system, and we encourage our law schools to use this new approach, because it does not help to have studied contract law as a French lawyer in Spain, because the French law school would say it is nice that you have obtained your

degrees there, but they are not equivalent because the law systems are not equivalent. By requiring, or at least by recommending the use of international material accredited by a European institution we would more effectively achieve this goal.

MR. DEL DUCA: Thank you Professor Hirte for being with us. It is a privilege and a pleasure to have you with us. We hope you are able to be with us on future occasions.

We will now hear from Mary Daly. This is her area of expertise, and her insights are important.

#### Collaboration in Internationalizing Legal Education

MS. DALY: Thank you very much, Louis.

I will keep my remarks very brief, because our guest hit on a number of points that I intended to address.

I would like to try to weave together Julian Lonbay's presentation with one of the important strands about which we have heard a great deal during this meeting, namely the Carnegie Report on Legal Education.<sup>38</sup> What struck me when I read the CCBE recommendations on training outcomes for European lawyers was how similar those recommendations were to the recommendations that were made in the Carnegie Report, and also to those in the best practices report by the Clinical Legal Education Association ("CLEA").<sup>39</sup>

There is an extraordinary convergence, I would say, among the suggestions of the CCBE and the suggestions of CLEA, and the suggestions of the Carnegie report. I see this convergence as presenting an extraordinary opportunity for further collaboration between law schools in the United States and law schools in the European Union, as well as with law schools in other parts of the world.

I think we have a unique opportunity to form a framework for the construct of a global lawyer. We are all interested in the same goals. We share a very similar set of core values and core competencies, and consequently, we should look at this moment as one when the legal professions can come together to advance the common cause of serving justice.

The last remark that I will make today is to speak about the common enemy. In my view, the common enemy is the state. I am deeply worried about efforts by governments outside the United States,

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38. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

39. ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007), *available at* [http://www.cleaweb.org/documents/Best\\_Practices\\_For\\_Legal\\_Education\\_7\\_x\\_10\\_pg\\_10\\_pt.pdf](http://www.cleaweb.org/documents/Best_Practices_For_Legal_Education_7_x_10_pg_10_pt.pdf).

as well as our own, to interfere with the self-regulation of lawyers.

We see, for example, here in the United States a noble effort on the part of the federal government, one which I can applaud in many respects, in the Sarbanes-Oxley Act, to take over certain parts of the regulation of lawyers insofar as they represent publicly traded companies.

We see similar movements in other parts of the world. We should be anxious about efforts that are being made in the international trade community to treat legal services exactly as if they were accounting or insurance services. Our right of self-regulation to determine who is admitted into the profession, what the rules are for staying in the profession, and what the rules are for being told to leave the profession are in serious danger of being bargained away as part of trade agreements.

In short, we should be working together closely to protect self-regulation, to pursue justice, the core competencies, and the common values, and to present a united front against those who would take those rights away from us and attempt to treat legal services as trade services.

MR. DEL DUCA: Thank you. You have been a wonderful audience. Your excellent participation with your comments and questions is much appreciated.

(End of symposium.)



Représentant les avocats d'Europe  
Representing Europe's lawyers

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**CCBE Recommendation on  
Training Outcomes for European Lawyers**

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## CCBE Recommendation on Training Outcomes for European Lawyers<sup>40</sup>

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<sup>40</sup> Ed. Note: The footnotes in this annex have been renumbered to continue the footnote numbering in the Symposium text. The citations and footnote text, however, appear as in the original.

## Preamble

The Bars and Law Societies of the CCBE, taking account of the ongoing construction of the European Qualification Framework and the development of a Higher Education Area in Europe as well as the *CCBE Resolution on Training for Lawyers in the European Union*<sup>41</sup> and wishing to promote the development of national training outcomes and to facilitate the free movement of lawyers hereby recognises<sup>42</sup>

- that free movement of lawyers has now advanced to allow, in appropriate cases, access to professional training as well as to the legal professions themselves; and
- that the exercise of the profession of lawyer requires a very high standard of professional competence of their members, and those aspiring to become members of the legal profession. Such a high standard of professional competence of lawyers is a cornerstone for the furtherance of the rule of law and democratic society; and
- that all CCBE Bars and Law Societies embrace and wish to promote through their training the core principles recognised in the *CCBE Charter of Core Principles of the European legal profession*;<sup>43</sup> and
- that Bars and Law Societies recognise the need to promote, through training, the essential deontological rules and practices of the legal profession;
- and recognising therefore the importance of promoting a transparent set of training outcomes for lawyers in Europe;

hereby sets out its view of the main training outcomes necessary for a European lawyer.

The training outcomes below are organised in three sections.

1. The first section sets out the outcomes relating to deontology and professional rules. Their function is to make future lawyers aware of their professional identity and of the role of the profession within the administration of justice and in society at

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41. CCBE Resolution on training for lawyers in the European Union (November 2000), see [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/form\\_enpdf1\\_1183977205.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/form_enpdf1_1183977205.pdf)

42. In this Recommendation the term “lawyer” is used in the sense mentioned in article 1 of Directive 1998/5/EC (1998) OJ L77/36 as amended.

43. CCBE Charter of Core Principles of the European legal profession (November 2006), see [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/Charter\\_of\\_core\\_prin1\\_1183986811.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Charter_of_core_prin1_1183986811.pdf).

large. Through mastering these outcomes future lawyers learn **who lawyers are**.

2. The second section's outcomes relate to the execution of the mission of lawyers. They describe, in general terms, the theoretical and practical knowledge that lawyers should have in order successfully to perform their functions. Through mastering these outcomes future lawyers learn **what lawyers do**.
3. The third section's outcomes are related to the organisation of the activities of lawyers. If lawyers, fully aware of their mission and role, and in possession of all the necessary technical skills are to perform their functions more effectively, they must understand these outcomes as they explain **how lawyers should work**.

### 1. Deontology and professional status

It is of fundamental importance for lawyers to have full knowledge and understanding of professional and ethical rules, as expressed in national codes of conduct, as well as in the CCBE cross border code of conduct. They must act in accordance with such rules so that they can fulfill their mission in the public interest. Lawyers should not only comply with such rules but also should be able to develop their own professional identity by applying such rules in their everyday actions. Adherence to the principles and values of the profession allows lawyers to serve, in the best possible way, both the interest of their clients and the public interest in the promotion of justice and the upholding of rule of law at the same time. The CCBE believes that the mission of promoting the rule of law can be fulfilled by individual lawyers only if professional rules and principles are used as a guidance for day to day activities of lawyers.

Future lawyers should not only have regard to the specific technical legal problems with which they are dealing, but should also deal with their tasks in a wider ethical context, taking into account that the functions which lawyers perform are not only for the benefit of their clients but also for society at large. Professional rules must be used as a guide to foster the quality of such legal services. In this regard, for instance, a lawyer should be aware of rules on communication and publicity not only to avoid behaviour incompatible with professional ethics but also to learn how to communicate effectively with the public in order to protect the interest of clients.

## **1.1. Substantive knowledge**

### **1.1.1. Deontology**

- [a] understanding of the function and the role of the legal profession;
- [b] understanding of professional and ethical rules, including the meaning of terms like independence, professional secrecy, client confidentiality, legal professional privilege and representation of interests;
- [c] understanding of the rights and duties arising from the collegiate nature of the legal profession, especially those derived from relationships with colleagues, clients, opposing parties courts and other public bodies and Bars and Law Societies;
- [d] understanding of the rights and duties arising out of the giving of advice;
- [e] understanding of rights and duties in the mission of assistance and representation before courts;
- [f] understanding of standards applicable to lawyers' fees;
- [g] understanding of standards applicable to handling clients' funds;
- [h] understanding of rules relating to communication and publicity.

### **1.1.2. Professional status**

- [a] understanding of the organisation of and the services provided by the Bars and Law Societies;
- [b] understanding of the disciplinary and sanctioning regime;
- [c] understanding of professional liability and of professional civil indemnity insurance;
- [d] understanding of the various legal forms which a legal practice may take;
- [e] understanding of the status of colleagues and partners.

## **1.2. Practical knowledge and skills**

- [a] ability to work in the framework of professional deontology and to respect it;
- [b] ability to assess one's own competence regarding the request of a client for advice or representation;
- [c] ability to make a reasoned decision as to the choice of legal

form and mode of governance of the law firm or practice;  
[d] ability to behave professionally and with integrity.

## 2. Implementing the work of the lawyer

A high level of professional competence is one of the core principles of the legal profession. It is confirmed in the CCBE Charter of Core Principles,<sup>44</sup> the Council of Europe Recommendation on the freedom of exercise of the profession of lawyer,<sup>45</sup> the European Parliament resolution on the legal professions and the general interest in the functioning of legal systems<sup>46</sup> and the United Nations Basic Principles on the Role of Lawyers.<sup>47</sup> Lawyers cannot effectively advise or represent the client unless they have had the training necessary to enable a professional to keep pace with continuous changes in law and practice and in the related technological, social and economic environments.

Future lawyers should master the major concepts of the legal system in which they are working and use such concepts to provide their clients with the most effective solutions to their problems. This implies not only a knowledge of the law, but also a mastery of methods which ensure that the law itself is used correctly. Lawyers should be able to orient the client towards timely and cost effective solutions.

Future lawyers should learn not only how to conduct a critical analysis of the law, but also how to ascertain the necessary details of situations which they are asked to handle. After having analysed the facts, and in the light of the law, it is fundamental that they know how to communicate the result of their analysis to their clients and—if necessary—to other parties with an interest.

The credibility of the legal profession, and ultimately of a legal system, is closely linked to the practical ability of individuals and organisations to enjoy the full and effective protection of the law in the most affordable

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44. See footnote 3 above.

45. Recommendation Rec(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer, see <https://wcd.coe.int/com.intranet.InstraServlet?Command=com.intranet.CmdBlobGet&DocId=370284&SecMode=1&Admin=0&Usage=4&IntranetImage=62250>.

46. European Parliament resolution on the legal professions and the general interest in the functioning of legal systems, see <http://www.europarl.europa.eu/sides/getDoc.do?jsessionid=398C892CD33BF59E9DB3BF3AE2362941.node2?language=EN&pubRef=-//EP//TEXT+TA+P6-TA-2006-0108+0+DOC+XML+V0//EN>.

47. United Nations Basic Principles on the Role of Lawyers, see [http://www.unhcr.ch/html/menu3/b/h\\_comp44.htm](http://www.unhcr.ch/html/menu3/b/h_comp44.htm).

and timely manner. Future lawyers should learn how to ensure that such full and effective protection is made available. In so doing they will fulfil their duty of loyalty to the client, and thereby uphold the dignity and honour of the legal profession, the rule of law and the fair administration of justice.

## **2.1. Substantive knowledge**

- [a] thorough understanding of the principal features and the major concepts, values and principles of the legal system, including the European dimension (including institutions, procedures);
- [b] detailed knowledge beyond the core of the basic legal system<sup>48</sup> and knowledge in at least some specialised fields of law;
- [c] knowledge of procedural law and of alternative dispute resolution mechanisms;
- [d] knowledge of techniques of drafting, in particular drafting of contracts;
- [e] knowledge of negotiation techniques.

## **2.2. Practical knowledge and skills**

### 2.2.1. Skills for the acquisition of knowledge

#### 2.2.1.1. Ability in legal research

- [a] ability to identify legal issues;
- [b] ability to locate primary and secondary legal resources.

#### 2.2.1.2. Skills in updating knowledge

- [a] ability to produce a synthesis of relevant doctrinal and policy issues in relation to a legal topic;
- [b] ability to make a critical assessment of the merits of particular arguments;
- [c] ability to identify elements of a problem which need further research;
- [d] ability to apply knowledge of the law to the facts of a new case.

### 2.2.2. Analytical ability

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48. The core knowledge includes in particular knowledge of civil law (obligations, tort, property law and the law of succession), constitutional and administrative law, human rights law, criminal law and European Law.

- [a] ability to analyse problems from various perspectives;
- [b] ability to establish logical relationships between various sub-aspects;
- [c] ability to make a coherent analysis of complex information;
- [d] ability to appreciate the long-term consequences of decisions.

### 2.2.3. Ability to consider the client's needs

#### 2.2.3.1. Ability to listen to the client's request and to analyse the client's request

- [a] ability to make a comparative assessment having taken account of all relevant factors;
- [b] ability to form an opinion in complex situations;
- [c] ability to evaluate the interests of the opposing party;
- [d] ability to form an independent opinion in the interests of the client;
- [e] ability to provide objective advice to the client.

#### 2.2.3.2. Customer focus

- [a] ability to focus on the client's needs and circumstances;
- [b] ability to master the necessary means of communication with the client;
- [c] ability to analyse and be able to offer solutions to legal problems;
- [d] ability to present reasoned advice as to the choice between alternative solutions;
- [e] ability to communicate knowledge to and on behalf of clients in a structured way;
- [f] ability to develop non legal knowledge useful to the understanding of the requests of the clients and the professional practice.

### 2.2.4. Ability to communicate

- [a] ability to provide clear and sound advice;
- [b] ability to communicate effectively both verbally and in writing;
- [c] ability to plead;
- [d] ability to present a coherent argument both verbally and in writing;
- [e] ability to work efficiently either alone or as a member of a team;

- [f] ability to negotiate;
- [g] ability to chair meetings and conduct interviews.

### **3. Means of performing the lawyer's mission**

Efficient and effective organisation is a key element for a lawyer wanting to protect the client's interest.

Clients should be confident that their documents and commercial secrets are well protected, that cases are allocated within a firm according to competence and that they can obtain legal assistance from their lawyer when they need it and in the most effective manner.

Future lawyers should be aware that strict legal competence alone is not enough: they should learn and observe all procedures aimed at protecting clients' interests (notably professional secrecy/client confidentiality, avoidance of conflicts of interests etc.) and at ensuring that the office runs as smoothly and effectively as possible. Future lawyers should learn to observe the duty of loyalty towards their colleagues. This is a basic principle of the profession. Its observance will facilitate their success in the profession and will benefit their clients.

#### **3.1. Substantive knowledge**

Knowledge relevant to the running of a law firm or an individual practice: application of practical elements, inter alia, in accountancy law, tax law, company law, social law, and insurance law.

#### **3.2. Practical knowledge and skills**

##### **3.2.1. Abilities regarding relationships**

- [a] ability to develop and maintain personal relationships with clients, colleagues and other contact persons;
- [b] ability to create a time schedule or establish priorities for personal work or that of others.

### **Conclusions**

Lawyers trained to achieve the outcomes outlined in this document will be able to make a positive contribution to the protection of the interests of their clients as well as to the rule of law and protection of fundamental

rights and freedoms of everyone. This set of training outcomes should ease the free movement of lawyers, as well as free movement for potential lawyers who have not yet completed their training.

## **Annex**

### **Definitions**

#### ***Educational terms***

The diversity existing between the European Member States of the EU, EEA and Switzerland with respect to the education and training of lawyers allows such education and training to be attributed to several discrete phases. The education and training provided in each of the phases has varying contents depending on the country or system of reference. Therefore, with a view to acquiring a better and more uniform understanding and in avoiding errors of interpretation resulting from the use of the same terminology with different meanings, the following definitions are proposed:

#### ***Pre-professional education***

This consists of the education which permits one to obtain a qualification at university level. This is the university law degree or alternative equivalent route usually necessary before commencing professional training.

The aim of university legal studies is primarily to teach the academic knowledge of law rather than its practical application. The latter can be taught during the post-graduate practical legal training which is necessary in most jurisdictions.

We note here that “employability,” a term used in the Bologna-Sorbonne-discussion to describe one aim of academic education, should not be interpreted as the “ability to practice as a lawyer.”<sup>49</sup> In the context of legal education the term should rather be interpreted as “the competence to join the labour market” or “the competence to undertake professional training.”

#### ***Professional training***

Professional training normally starts after university studies and lasts as long as required in order to enable registration in the corresponding professional body as a practising or fully qualified lawyer.

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49. Lawyer as defined in footnote 2 above.

When, in a particular legal system, there are various possible forms of registration, the relevant registration will be the one that does not establish any difference or limitation in the exercise of the legal profession with regard to the senior qualified lawyer, with the exception of access to higher appeal courts, in those countries/systems which require complementary professional experience or training for this purpose.

For the purposes of this document, those registered as apprentices, trainee lawyers or under any similar expression that would have as a consequence a limitation of the exercise of the profession of lawyer shall also be considered as under professional training.

The fact that in certain jurisdictions professional training might involve the granting of an additional academic qualification (e.g. an LLM) would not prevent that training of being considered professional for the purposes of this Recommendation.

### *Continuing education*

This refers to training which is undergone after the completion of professional training for the purpose of maintaining, perfecting and assuring the quality of the service provided to end users, whether it is obligatory or not. Training for a recognised specialised status and its maintenance is also included here.

In those countries in which additional training or exams are compulsory in order to have a right of audience before superior courts, the training undertaken for that aim shall be considered continuing education.