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Incorporating Transnational Materials into Traditional Courses

Franklin A. Gevurtz*

This essay discusses the efforts by professors at the University of the Pacific, McGeorge School of Law (“Pacific McGeorge”), and at a number of other law schools, to ensure that all law school graduates have some familiarity with international, transnational and comparative law by introducing these subjects pervasively throughout traditional law school courses. This essay takes as a given that in an era of increasing globalization, all law school graduates should have some exposure to international, transnational and comparative law.¹ The focus, instead, is on how to accomplish this goal.

In discussing how to expose all students to international, transnational and comparative law, this essay will address two broad questions. First, in Part I, this essay will explain why my colleagues and I at Pacific McGeorge chose to attempt such exposure through a pervasive approach under which students confront international, transnational and comparative law issues in traditional law courses, rather than in a new required course devoted exclusively to these areas of

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1. For a discussion of the utility, if not necessity, of exposing all law students to issues involving international, transnational and comparative law, see Franklin A. Gevurtz, Linda E. Carter, Julie A. Davies, Brian K. Landsberg, Thomas O. Main, Michael P. Malloy & John G. Sprankling, *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 PAC. MCGEORGE GLOBAL BUS. & DEVELOPMENT L.J. 1 (2006) [hereinafter “*Report*”]; Elizabeth Rindskopf Parker & Franklin Gevurtz, *A Curricular Core for the Transnational Lawyer*, <http://www.aals.org/international2004/papers.html> (last visited Apr. 10, 2006); Mathias Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 PENN. ST. INT’L L. REV. 397 (2004); M.C. Mirow, *Globalizing Property: Incorporating Comparative and International Law into First-Year Property Classes*, 54 J. LEGAL EDUC. 183 (2004); Hiram E. Chodosh, *Globalizing the U.S. Law Curriculum: The Saja Paradigm*, 37 U.C. DAVIS L. REV. 843 (2004); Stephen H. Legomsky, *Globalization and the Legal Educator: Building a Curriculum for a Brave New World*, 43 S. TEX. L. REV. 479 (2002); Charlotte Ku & Christopher J. Borgen, *American Lawyers and International Competence*, 18 PENN. ST. INT’L L. REV. 493 (2000).

study. Then, in Part II, this essay will explore the means to overcome obstacles facing this pervasive approach.

I. Incorporation in Traditional Courses versus a Specialized Required Course

Law schools that are seeking to introduce all students to international, transnational and comparative law have taken a number of different approaches. At one end of the spectrum, the law school at the University of Michigan, for the last several years, has required its students to take a course in Transnational Law, which Mathias Reimann discussed in his presentation on this panel. At the other end of the spectrum, professors at a number of schools, including Pacific McGeorge, are working to establish a pervasive approach. Under this pervasive approach, professors teaching traditional domestically-oriented core courses—such as Civil Procedure, Constitutional Law, Contracts, Corporations, Criminal Law and Procedure, Torts, and Property—integrate international, transnational and comparative law issues relevant to their particular subject matter into these traditional domestically-oriented core courses. Through such coverage of subject-specific international, transnational and comparative law issues, students also should gain exposure to general concepts in international, transnational and comparative law in much the same manner that subject-specific coverage of domestic law in these traditional core courses also exposes students to the fundamental concepts in United States law (e.g., federalism, the adversary system, common law reasoning).²

When all is said and done, it turns out that there are two overall criteria by which law schools choose between these two approaches: policy and politics.

A. *Policy*

The “policy” issue in this context refers to which approach, if implemented, is best able to achieve the pedagogic objectives for exposing law students to international, transnational and comparative law. The pervasive approach seeks to have students view international, transnational and comparative law as an integral part of the overall context of issues, and tools of analysis, with which the attorney might need to deal. By contrast, the concern with a separate required course is that it might reinforce a student perception that international,

2. In between the separate required course and the pervasive approach are other variations, such as the “Week-One Program” at Georgetown described in a later presentation on this panel.

transnational and comparative law are something separate and apart from the “normal” practice of law, which can be counterproductive if the goal of introducing such topics into the core curriculum is for students to develop a consciousness of issues they might confront without warning, and for students to use international, transnational and comparative law as part of their basic tools for analyzing and understanding domestic law.

B. Politics

In an ideal world, curricular decisions would result entirely from a policy assessment of which approach best achieves the pedagogic results desired. But, we are dealing with law schools, and whether it is Michigan or Pacific McGeorge, we must practice the art of the possible. Hence, the “politics” in this context refer to which approach can command the support of a law school’s faculty. After all, it takes faculty support to implement either approach, and an approach which is not implemented accomplishes nothing, no matter how sound in pedagogic theory.

In this regard, it is important to recognize that different schools have different political dynamics. At Pacific McGeorge, we have a curriculum characterized by a generous allotment of units to required courses. Personally, I think this is a strength of the school, particularly insofar as it allows professors to provide considerable “value added” to their courses without as much concern about the loss of basic content that exists when core courses are significantly compacted to allow for more elective offerings. One “value added” is to cover international, transnational and comparative law issues in required courses. Pacific McGeorge also has, at least by law school standards, a highly collegial faculty, which makes it a little bit easier to “herd the cats,” and get professors to cooperate in introducing international, transnational and comparative law into their required classes.

At the same time, the generous allotment of units to the current required courses at Pacific McGeorge has resulted from a dynamic under which faculty members zealously guard against any effort to take away units from existing required courses, and, at the same time, it has also resulted in a dynamic under which the faculty as a whole resists any effort to increase the overall number of required units. Dean Elizabeth Rindskopf Parker learned the implications of this in terms of introducing international, transnational and comparative law into the core curriculum when she took over as Dean of Pacific McGeorge. Seeking to replicate an approach for which she had given strong support as a member of an advisory board at Michigan, Dean Parker wished Pacific McGeorge to adopt a required course in transnational law. When she floated this idea,

she received advice that gaining faculty support for a new required course that would entail either an increase in the total number of required units, or a diversion of units from existing required courses to the new course, would be like getting the Democratic Party to privatize social security. Demonstrating more sense than perhaps some leaders, Dean Parker chose not to expend her political capital on such a quixotic effort. Instead, she threw her support behind an idea embedded in a strategic plan drafted shortly before her arrival by a number of my colleagues on the faculty at Pacific McGeorge and myself, which is to encourage coverage of international, transnational and comparative law issues throughout traditional law school courses.

As this example illustrates, different law schools will undoubtedly pursue different mechanisms to introduce international, transnational and comparative law to all their students, depending upon their faculty's overall attitudes about curriculum as reflected in the structure of the school's existing curriculum.

II. Overcoming Barriers to Incorporating Transnational Issues into Traditional Courses

Regardless of the political dynamics of any given law school's faculty, there are a couple of barriers that all schools will face if they undertake the approach of incorporating international, transnational and comparative law materials into traditional courses. One barrier is the need to have materials that professors can incorporate, and the other is the need to encourage professors to incorporate such materials.

A. *Materials*

Law professors are, more than most of us would choose to admit, captives of the casebooks in terms of the materials we assign our students and the issues we cover in our courses. At most law schools, junior faculty receive advice not to spend too much time developing unpublished materials for use in their classes. This advice creates a particularly strong barrier when it comes to preparing materials for incorporating international, transnational and comparative law into one's class, because (as I have learned the hard way) gathering these foreign source materials entails more effort than gathering domestic materials.

Moreover, even if the legal educator is willing to expend the time and energy necessary to put together his or her own materials introducing international, transnational and comparative law issues into his or her traditional course, students all too often perceive such handouts as less legitimate than the published casebooks—the student attitude often being that the published materials set the national standard as to what is

important to cover and what is just extra work from an idiosyncratic professor. Hence, if professors are going to incorporate international, transnational and comparative law materials into traditional classes, they need to have published materials available to do it.

Designing such materials forces one to confront two broad questions: What form should the materials take, and how should the materials function?

1. Form

In an ideal world, the casebooks used to teach traditional law school core courses—the Contracts casebooks, the Criminal Law casebooks, the Torts casebooks—would incorporate materials introducing international, transnational and comparative law issues into these subjects. Incorporation into the overall casebook is the best case scenario, both because it gives the introduction of such issues legitimacy to the students, and because it makes the introduction of such issues convenient for the professors. As one participant put the matter during a workshop Pacific McGeorge conducted last August on the topic of introducing international, transnational and comparative law into the core curriculum: “If faculty and students stumble across international, transnational and comparative law issues as they read through the casebook, then they are likely to cover the issues.”³ (One caveat to this conclusion, however, is that relegation of international, transnational or comparative law issues to brief notes or to a segment buried at the end of the casebook can create a different reaction).

The problem is that, with some exceptions, casebook authors have not chosen to incorporate international, transnational and comparative law issues into their books for traditional law school courses. This leads to a choice: either we can wait for casebooks to change, or we can try a second best solution. A number of my colleagues at Pacific McGeorge and I, and a number of faculty at various other law schools, have joined together to provide such a second best solution. This solution is to create supplements which contain materials that allow professors using any casebook to incorporate international, transnational and comparative law issues into their traditional courses.

Thomson-West will publish these supplements, which we are calling the “Global Issues” series. The first book in the series, *Global Issues in Civil Procedure*, by my colleague, Thomas Main, is now available. Other books under contract with Thomson-West include: *Global Issues in Property*, by John Sprankling, Raymond Coletta and

3. See *Report*, *supra* note 1, at 59.

Matthew Mirow; *Global Issues in Contracts* by Michael Malloy, John Spanogle, Keith Rowley, Louis Del Duca and Andrea Bjorklund; *Global Issues in Corporate Law* by myself; *Global Issues in Criminal Law*, by Linda Carter, Peter Henning and Christopher Blakesley; and *Global Issues in Professional Responsibility*, by George Harris and James Moliterno. The books in Property, Contracts and Corporate Law will be available before fall 2006, while the books in Criminal Law and Professional Responsibility should be available before spring 2007.

2. Function

Having described the choice to publish materials in the form of supplements, it might be useful to discuss generally what the supplements will contain. Illustrating one of the guiding principles mentioned below, this discussion will not address the detailed contents of each supplement. Rather, this description will look at the contents of the supplements in broad terms of how the contents are supposed to function.

As series editor, I confess that I have not been very responsive to questions from the various authors about the nitty-gritty details of layout, font, heading style and the like. Instead, there are some basic guidelines that I hope each author strives for in terms of content.

a. The flow of the river

The first guideline is to try to convey to the student what I will refer to as “the flow of the river.” In other words, the object of the supplements is not to attempt to inform the student about all the details of international, transnational and comparative law that might be relevant to a given traditional course—for example, what is the Chinese law regarding independent directors—or, to use the river metaphor, not to examine all of the complex eddies and currents, and the various flotsam flowing downstream. Any such effort simply will drown the students in details they soon forget and are often too complex to grasp, especially in the first year when students are having enough trouble just understanding law in the United States. Instead, the supplements should expose the students to where there are fundamental divergences in law as one moves outside the United States, and where are there fundamental similarities in law as one moves outside the United States. To put this in the river metaphor, students should see where the main flow of the river is and where the outer banks are.

In fact, this is the way we teach traditional courses. We now convey to the students what the dominant domestic law on an issue is, be that approach found in a Restatement, a Model Code, a leading case, or whatever. We now also try, or should try, to expose students to some of

the outlier rules. After all, if students come out of law school thinking that there is just one rule on every topic, they and their clients could suffer some unfortunate surprises if the applicable rule on a particular issue in the relevant jurisdiction turns out to be different from the mainstream. Moreover, constantly exposing students to alternative ways of approaching common problems develops in future lawyers the mental dexterity and imagination that is essential to a life of quality practice. Hence, we now expose students to comparative law in the sense of what different states in the United States do, as well as making students aware of relevant federal laws. Yet, even within the domestic arena, we pick and choose so as to give the students an idea of where the mainstream is, and where the more fundamental outliers on select key issues might lie—particularly ones that reflect basic philosophic disagreement—rather than make any effort to expose students to all the variation they will encounter within the United States.

Globalizing the core courses is essentially a matter of broadening this traditional process. It means exposing students to comparative law in terms of what other nations, not just what other states, do. It means looking at possibly applicable laws from supra-national sources (international law), rather than just from federal sources. To continue with the flow of the river metaphor—and it is appropriate for wintertime in Sacramento—when we worry about the fact that the river rises higher than the surrounding land—if our traditional domestically-oriented core courses look at the flow of the river during the dry season, globalizing the traditional core courses looks at the flow of the river at flood stage when the river overflows its banks. At flood stage, the main flow of the river may remain where it normally is, it could shift, or there may not even be any discernable main stream. Similarly, law within the United States on a particular issue could reflect the dominant view in the world, law in the United States could be an outlier when viewed in a worldwide context, or there may not be any single dominant approach. At flood stage, the outer banks of the river are further out. Similarly, as we globalize the curriculum, the outlier rules will often reflect greater divergence from the dominant view.

One other aspect of this metaphor is worth noting. Regardless of its precise channel, water always flows down to the sea. We want students to see that different legal approaches in nations around the world, strange as they may seem to lawyers in the United States, are often about resolving the same problems, and reach more or less the same end point, as familiar domestic laws. In other words, students should develop a sense for functional equivalence.

b. Substitutability

The other general guiding principle for the function of the supplements is substitutability. We will not get professors to introduce international, transnational and comparative law into core courses if this becomes simply a matter of cramming more material into courses already often bursting at the seams. What we need to look for are ways in which professors can use international, transnational, comparative law materials to accomplish goals for which they would otherwise use more domestic materials. In other words, in designing the supplements, we are on the look out for materials that professors can substitute for, rather than just add to, the domestic materials they otherwise would assign.

An example of this technique comes from a case I have used in teaching my Business Associations class.⁴ It is an opinion from the Southern District of New York involving claims by an unpaid creditor of an insolvent company against the owners of the company. What is different about the case is that the company is a Lebanese limited liability company. Significantly, the court, on motion for summary judgment, refused to decide whether New York or Lebanese law governed the case. Instead, in order to explain why issues of fact existed no matter which law applied, the court went through a very conventional analysis of piercing the corporate veil under New York law, and also discussed at length the plaintiff's claims that the owners of the company had violated various creditor protection rules found in the Lebanese statute.

The court's opinion is as good as any of the opinions found in corporate law casebooks to cover the basic approach in the United States to piercing the corporate veil in favor of unpaid contract creditors of a closely held corporation. Hence, a professor teaching corporate law can assign this opinion in lieu of an opinion in the casebook involving contract creditor claims to pierce the corporate veil against individual owners of an insolvent corporation. At the same time, the court's discussion of Lebanese law illustrates very typical creditor protection rules for corporations in the civil law systems that are found in much of the rest of the world. The students should derive from this comparison how piercing the corporate veil and civil law creditor protection rules often take different-appearing approaches to attack the same conduct. Not only is this helpful to the attorney who, in an increasingly global economy, might need to deal in the future with creditor protection law for a non-United States corporation or in a jurisdiction outside the United States, but the comparison should better help the student understand the

4. *George Abu-Nassar v. Elders Futures, Inc.*, 1991 WL 45062 (S.D.N.Y. 1991).

all too often obtuse topic of piercing the corporate veil in United States law.⁵

B. Encouraging Professors to Incorporate International, Transnational and Comparative Law Materials into Traditional Courses

One of the much remarked upon ironies of this sort of discussion is that it is reaching the wrong audience. Persons reading this essay, or who showed up on a Saturday morning at the end of the AALS Convention to hear the oral version of these remarks, probably need little encouragement to introduce international, transnational and comparative law into traditional courses that they teach. The question is how to get other professors to introduce international, transnational and comparative law into traditional courses. Ignoring the temptation to engage in a bit of humor about the ability of Pacific McGeorge's current Dean, who used to work for the C.I.A., to apply appropriate encouragement, the real answer is to look for models of success.

1. How Did Law and Economics Do It?

One model of success in pervasively introducing new concepts and materials throughout traditional law school courses is law and economics. This raises the question: how did the proponents of law and economics succeed in infiltrating the teaching of traditional subjects? There seem to be several techniques that worked.

First, the proponents of law and economics made it easy. They provided training workshops at which professors were exposed to the basic methods of economic analysis that could apply to legal issues. Indeed, at one point, professors would actually receive an honorarium to attend such workshops. In this regard, it is useful to mention here one other guideline for the Global Issues supplements, which the earlier discussion did not address. These supplements will seek to be self-contained, and accompanied by a teacher's manual so as to allow the students and the professor to comprehend adequately the international, transnational and comparative law involved, without going to other sources.

Next, the proponents of law and economics made it interesting. Professors prefer to teach what they write. By increasing the number of professors engaged in law and economics oriented scholarship, proponents of law and economics increased the penetration of law and economics into traditional law school courses. Applied to international, transnational and comparative law, this means seeking ways to engage

5. For other examples of such substitutability, see *Report, supra* note 1, at 56.

those teaching traditional courses in scholarship that involves international, transnational and comparative law aspects of their core fields. It also means encouraging a school's existing international, transnational and comparative law scholars to teach traditional core courses, instead of solely teaching international, transnational and comparative law specialty electives.

Finally, the proponents of law and economics made it powerful. Agree or disagree with the approach, law and economics often provided a way of clarifying and understanding often obtuse doctrine. The best encouragement for incorporating international, transnational and comparative law into traditional law school courses is for faculty and students to recognize that international, transnational and comparative law often can provide a lens through which one can better understand often obtuse areas of domestic law.

The example of piercing the corporate veil illustrates the point. This is one of the most befuddled areas of corporate law, in which judicial substitution of rubric for functional analysis has confused generations of law students, not to mention lawyers and judges. Indeed, so great is the chaos that a recent article by Stephen Bainbridge has gained notoriety by advocating abolition of the doctrine.⁶ Without meaning to suggest that other nations necessarily have superior law to the United States in this field, examination of various creditor protection rules found outside of the United States clarifies the fundamental concerns in ways that can take years to distill (as I confess it did for me) from reading just United States source material. For instance, German courts have recognized something that Professor Bainbridge, in advocating abolition of the piercing doctrine, has not: Simply returning (through a fraudulent conveyance action or similar remedy) assets wrongfully taken from a corporation by its controlling shareholder does not work in a situation in which the corporate record-keeping is insufficient for an accurate accounting of how much was wrongfully taken.⁷

6. Stephen Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001).

7. See, e.g., Carston Alting, *Piercing The Corporate Veil in American and German Law—Liability of Individuals and Entities: A Comparative View*, 2 TULSA J. COMP. & INT'L L. 187, 215-16 (1994) (in Germany, whether the court will impose liability for the corporation's debts upon a controlling shareholder who siphoned assets, rather than simply require repayment of amounts improperly taken, depends upon whether it is possible to trace (and hence just repay) specific improper withdrawals, or whether the absence of accurate books and records, coupled with commingling of corporate and personal funds, renders such a targeted remedy impossible).

2. The Power of Pairs

The story of Noah's Ark provides another example of success, and illustrates the power of pairs.⁸ If a single professor introduces international, transnational and comparative law into his or her traditional course, students will resist the undertaking, concluding that it simply reflects an idiosyncratic professor, and the initiative will die off. Yet, if individual professors will not incorporate international, transnational and comparative law into their traditional courses until all professors do, then the initiative becomes hostage to the most recalcitrant members of the faculty, and one quickly discovers the basis for the expression that getting faculty to engage in the same exercise is much like attempting to herd cats. On the other hand, if just two professors per subject agree between themselves to introduce international, transnational and comparative law issues into their traditional course, then you can start something that will spread.

III. Conclusion

When my colleague, Thomas Main, presented me with a copy of his book, *Global Issues in Civil Procedure*, his words were "thus begins the revolution." The effort to introduce international, transnational and comparative law throughout traditional courses is an attempt to produce the Twenty-First Century equivalent to the earlier revolutionary change in legal education from a home state focus to a national focus. It will happen. The question is: when?

8. I am indebted to Richard Buxbaum both for this metaphor and idea.

