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Learning from Others: Sustaining the Internationalization and Globalization of U.S. Law School Curriculums

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ADDRESS

LEARNING FROM OTHERS: SUSTAINING THE INTERNATIONALIZATION AND GLOBALIZATION OF U.S. LAW SCHOOL CURRICULUMS

Address to the JOINT STUDY INSTITUTE 2008 AMERICAN ASSOCIATION OF LAW LIBRARIES

HARMONIZATION AND CONFRONTATION: INTEGRATING FOREIGN AND INTERNATIONAL LAW INTO THE AMERICAN LEGAL SYSTEM

June 28, 2008, Georgetown University Law Center, Washington DC

*James R. Maxeiner**

INTRODUCTION

The theme of this conference is “Harmonization and Confrontation: Integrating Foreign and Domestic Law into the American Legal System.” The formal conference began with plenary sessions discussing the use of international and foreign law in interpreting the U.S. Constitution and regarding the application of international law, rules, and norms in American law. It is appropriate that it concludes today with a discussion of “Internationalization and Globalization of U.S. Law School Curricula.” One cannot well integrate international and foreign law unless one knows what those laws are. But, as we shall see, just as the curriculum may limit what we can integrate, so too, can the legal system limit what the curriculum can practically address.

In my address today I have three principal points for you to consider: (1) An overview of how we are going about internationalizing the law school curriculum today in the United States; (2) Whether we are making as much progress as we should and

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how learning from others is central to sustaining our progress such as it is; and (3) What some of the obstacles to such learning are.

I. INTERNATIONALIZATION OF THE CURRICULUM

If we go strictly by a dictionary definition of curriculum, many American law schools have already internationalized their curriculums. They have introduced “a set of courses constituting an area of specialization.”¹

A. Current Developments

When I went off to law school in 1974, I wanted an international curriculum. Then, the law school world did not have much to offer me. What a change since I went to law school!

	1974	2008
J.D. International Programs	Four— <i>This is why I went to Cornell—there were few opportunities to get a J.D. with specialization in International Legal Affairs</i>	Numerous
Summer Abroad Programs	Five ² — <i>I went to one of a handful to finish off an LL.M.</i>	160 ³
Credit for Foreign Study?	No— <i>not even when sponsored by Humboldt, Germany's most prestigious foundation, at a Max Planck Institute</i>	Many possibilities
Semester Abroad Programs	None	Some
Joint Degree Programs	None, not Cornell	Some, e.g., Cornell + Paris
LL.M. in International Law	In 1978 I enrolled in an LL.M. program. <i>Not international, but general. Combined three schools—started GWU—then Georgetown—ended McGeorge</i>	Georgetown, George Washington, McGeorge all offer such programs.

Since the fall of the Berlin Wall in 1989 and the end of the Soviet Union in 1991 we have seen a remarkable internationalization of U.S. law school curriculums. It is no longer a question of whether U.S. law school curriculums will be internationalized, but how.

1. Curriculum—Definition, <http://www.merriam-webster.com/diction-ary/curriculum>.

2. James P. White, *A Look at Legal Education: The Globalization of American Legal Education*, 82 IND. L.J. 1285, 1287 (2007) (noting that in 1975, there were five summer abroad programs and in 2006, there were 160 summer abroad programs).

3. *Id.*

In speaking of internationalization, I am addressing the place of international and foreign law in American law schools. This is the terminology of the overall conference—"Integrating Foreign and International Law into the American Legal System"—and for reasons that time does not permit exploring, I believe should be the preferred choice of terminology.⁴ So I do not plan to speak about "globalization" or "transnational law;" I will speak of "internationalization" as encompassing both international and foreign law.

What would I like to see? If we are to integrate foreign and international law into our legal system and if we are to deal well with our foreign and international colleagues around the world, all law graduates should have a minimum grounding in foreign and international law. While they need not and cannot be practitioners of that law, they should be able to recognize issues that arise in those areas. Is this too much to ask? I do not think so. We already expect as much of lawyers who are regularly engaged in international practice. As international issues now almost inevitably come to every lawyer, we must expect everyone to recognize them. It is not so different from what we expect general practice medical doctors to know of all the various medical ailments that their patients may encounter.⁵

There should be an important side-benefit of such diffusion of knowledge: openness to foreign solutions that may inform our own.

Beyond all lawyers having a minimum knowledge of international knowledge, some lawyers should have a deeper knowledge of international and especially foreign law. These lawyers might be practitioners or they might be academics. They need not be licensed to practice in foreign systems, but they should have a deep knowledge of how those foreign systems work. Foreign legal systems cannot be understood correctly without an appreciation of the system as a whole. Our foreign law experts need to

4. See Catherine Valcke, *Global Law Teaching*, 54 J. LEGAL EDUC. 160, 164 (2004) (choosing to speak only of foreign and international law and eschewing the terms comparative, transnational and global law; the last mentioned she holds to be merely a "flashy label").

5. See James R. Maxeiner, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method*, 35 INT'L J. LEGAL INFO. 1, 26-27 (2007), reprinted in JAMES R. MAXEINER, *EDUCATING LAWYERS NOW AND THEN, AN ESSAY COMPARING THE 2007 AND 1914 CARNEGIE FOUNDATION REPORTS ON LEGAL EDUCATION* 32-33 (2007) (discussing the general practical training all physicians receive).

know what it means to think like a lawyer in different foreign systems.⁶ My goals, as we will discuss, are to some extent reflected in the goals of internationalization.

As thrilled as I am by increased interest in internationalization, let us not make too much of what we have done, what we are doing, and what we should be doing. Let us be modest in our goals. At the outset I would like to dispel one overly ambitious misconception of today's "internationalization" of American law schools. It is not truly analogous to the perceived "nationalization" of American law schools in the nineteenth century.⁷ From its start in the nineteenth century, American legal education prepared students for "the bar in any of the United States."⁸ It is fantastical to think that American law schools might seek to prepare students for the bar of any nation in the world.⁹ We will not soon teach our students a law common to all the nation-states of the world the way we do and long have taught our students a law common to all the states of the United States. The legal systems of the world and the different language demands they impose rule out such multi-jurisdiction instruction in the United States. That is not to say that such instruction is not possible. It is already taking place just to the north at McGill University in Montreal, Canada, where they teach, using both French and English, what they call "trans-systemic law." And such an institution is conceivable in some European states, where there are now some casebooks that teach contract and tort law in English in three systems.

While no one has introduced trans-systemic law in the United States, American law schools are enhancing the place of foreign and international law in their curriculums in a variety of other ways. No single approach has achieved leadership. In-

6. See William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1947-48 (1995); Valcke, *supra* note 4, at 175.

7. See, e.g., Peter L. Strauss, *Transsystemia—Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?*, 56 J. LEGAL EDUC. 161 (2006), reprinted in 24 PENN ST. INT'L L. REV. 763 (2006).

8. See, e.g., CATALOGUE OF THE OFFICERS AND STUDENTS OF HARVARD UNIVERSITY, FOR THE ACADEMICAL YEAR 1839-40 (1839) [hereinafter HARVARD CATALOGUE]. The first sentence reads: "The design of this Institution is to afford a complete course of legal education for gentlemen intended for the bar in any of the United States." *Id.* at 28.

9. American law schools have gone into the business of preparing foreign jurists for admission to the bar of those states that permit them to sit for the bar examination based on a foreign bar admission and a U.S. LL.M.

deed, we are still working on developing specific models. On the other hand, rarely, if ever, are different approaches mutually-exclusive. They may compete for resources and may seek to achieve somewhat different goals, but usually they are mutually-supportive.

The internationalization of the curriculum raises some of the same pedagogic issues that recur in law school curricular planning generally. Two of the most important are:

(1) Should international education be for all students, i.e., required, or only for those who choose it, i.e., elective. If required, at what point in the curriculum should it be required?

(2) Should education be experiential, i.e., sometimes called practical, or should it be didactic, i.e., academic. As someone who spent more than twenty years in practice before settling into academe, I hate this supposed dichotomy between practical and academic, for it is not true.

Beyond curricular issues common to law school curriculums generally there are certain issues that are more or less peculiar to internationalization. These include:

(1) Should internationalization focus on foreign or on international law?

(2) Should internationalization be concerned only with solutions to legal problems or with the different methods by which those solutions are reached, i.e., with different ways of "thinking like a lawyer?"

(3) Should individual courses be internationalized, i.e., should courses in domestic law *integrate* foreign and international components? Should they be required to do so?

Internationalization of the curriculum also raises a new a social issue: the class nature of legal education. Until the *U.S. News and World Report* ranking of law schools came along, we might have thought that the differences among law schools—so pronounced at the beginning of the twentieth century—had been much reduced by the end of the century. Internationalization, critics observe, promotes product differentiation.

I see two developments of the last few years as particularly noteworthy:

(1) An increasing willingness to make international courses mandatory or semi-mandatory.

(2) A developing willingness to integrate international com-

ponents into law school classes generally, especially into first year classes.

B. *Approaches to Internationalization*

For convenience, I will describe approaches to internationalization as of three types: additive, integrative and immersive.¹⁰ While I am discussing different approaches, I do not mean to suggest that any one of them is inconsistent with any one other. They clash only in their competition for resources.

1. Additive

The new Carnegie study of legal education, *Educating Lawyers*, has little to say about internationalization of legal education, but criticizes legal education generally for taking an “additive” rather than an “integrative” approach. That means that legal education, to meet a new need, adds a new course to its general offerings. This is a long-standing practice; indeed, Harvard took a similar approach to international and foreign law before the Civil War.¹¹

The reasons for the additive approach are easily understood. It fits well into what has been called the “consumer model of the law student.” If courses are elective, but not mandatory, the faculty need not reach accord on pedagogic objectives. The box office can determine which courses survive and which do not. The institutional commitment and faculty and student resistance are minimized.

The growth of additive international offerings appears to have been fairly steady throughout the last thirty-five years. That growth has been enhanced by the development of “concentrations” such as I myself completed over thirty years ago. More and more schools are offering ways in which an ever growing

10. In characterizing international legal studies I have found particularly useful: Larry Catá Backer, *Parallel Tracks?: Internationalizing the American Law School Curriculum in Light of the Principles in the Carnegie Foundation's Educating Lawyers*, in 3 *IUS GENTIUM: THE INTERNATIONALIZATION OF LAW AND LEGAL EDUCATION* 101 (2007); Mathias W. Reimann, *Two Approaches to Internationalizing the Curriculum: Some Comments*, 24 *PENN ST. INT'L L. REV.* 805 (2006); and Valcke, *supra* note 4.

11. See *HARVARD CATALOGUE*, *supra* note 8, at 28. The 1839 Harvard catalogue lists international studies available for those students who wished to remain in attendance beyond two years. See *id.* at 28-31.

offering of international and foreign law courses can be combined together into a coherent program.

In more recent years, summer programs have achieved particular popularity; wags question the academic value of such programs particularly when they are located in popular tourist locations. They have the benefit, however, of raising awareness of other legal systems.

The chief detriment of additive programs is that so long as they remain elective, they reach only a portion of the student body. At some schools that portion may be very small. Critics suggest that additive programs may create an appearance of internationalization rather than a reality.¹²

In the last few years, several law schools have striven to deal with this issue by making at least one international course mandatory. Let me mention three leading examples:

- a) The University of Michigan's program is a pioneer. Since 2001, its Law School has required that all newly matriculated students complete a three-hour course titled "Transnational Law." The course has two purposes: to teach every student an international minimum and to provide a foundation for further international study for those who desire it.¹³ While Michigan permits students to take the course in the first year, it does not require them to.

12. See, e.g., Larry Catá Backer, *supra* note 10, at 133-35; John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 546 (1995) (speaking of a "curricular Potemkin Village"); see generally John A. Barrett, Jr., *International Legal Education in U.S. Law Schools: Plenty of Offerings, But Too Few Students*, 31 INT'L LAW. 845 (1997).

13. See University of Michigan Law School Course Description, http://cgi2.www.law.umich.edu/_ClassSchedule/aboutCourse.asp?crse_id=038594. The course description states:

The course will provide an introduction to the international dimensions of law. It will include the foundations of public as well as private international law with a particular view to the professional needs of current and future lawyers, both in government and in private practice. The course has essentially two purposes. First, it will teach every student the minimum every lawyer should know about law beyond the domestic (American) [sic] orbit in order to be qualified for practice in an age in which virtually every area of law is being affected by international aspects. The basic idea is that every Michigan law student should take at least one serious look at law on the international level. Second, it will be the basic course on which further, more specialized international courses can build.

Id.

- b) Since 2005, Georgetown has required all first year students to take a one credit hour, one week long program between the first and second semester titled “Week One: Law in a Global Context.” This course relies on problem-based learning. It requires that students spend a week dealing with “the multiple facets of one complex problem,” which is integrated into one of their first year courses.¹⁴
- c) In 2007, Harvard followed suit by introducing a requirement that all first year students take one of five, three-credit hour “foundation” courses: Public International Law, Law and the International Economy, The Constitution and the International Order, and two comparative law courses, one focusing on China and the other focusing on the development of private law systems around the world.¹⁵ Harvard rejected a survey course; apparently its faculty considers a survey course “so general as to be almost useless.”¹⁶

All of these programs are at an introductory level; they are not designed to bring intensive knowledge to students. They place relatively small burdens on faculty, who do not have to have much knowledge to place them ahead of their students.

2. Integrative

In an integrated curriculum, students from day one study domestic, foreign and international law together. This approach avoids co-opting students into one way—common law—or another way—civil law—of thinking about legal problems. Different legal systems have distinct ways of approaching legal problems. Students educated in only one tend to think that what they know is somehow the inevitable way of looking at things. Experiences from mixed jurisdictions where common law and civil law are taught sequentially suggest that students

14. See GEORGETOWN UNIVERSITY LAW CENTER, WEEK ONE: LAW IN A GLOBAL CONTEXT: AN INTENSIVE PROGRAM INTEGRATING TRANSNATIONAL LEGAL PERSPECTIVES INTO THE FIRST YEAR CURRICULUM 1 (2008), <http://www.law.georgetown.edu/documents/weekone2008.pdf>.

15. See generally JERI ZEDER, HARVARD LAW BULLETIN, AT HOME IN THE WORLD: THE NEW CURRICULUM EMBRACES LAW'S INCREASINGLY TRANSNATIONAL NATURE (2008), http://www.law.harvard.edu/news/bulletin/2008/winter/feature_3.php.

16. See *id.* para. 7 (quoting Professor Duncan Kennedy).

tend to gravitate toward their own first experience.¹⁷

A fully-integrative approach places the most institutional demands on students and faculty. The most fully integrated such program is that of McGill University. It teaches “trans-systemic” law, i.e., civil and common law together.¹⁸ Demands on faculty and students exceed those that any U.S. law school could meet, at least, for the entire school. The choice of civil law jurisdictions would also pose a problem for U.S. law schools: what should the civil law jurisdiction and language be: French, German, Spanish, Italian, Russian, Japanese or Chinese?

Much less ambitious—but much more achievable—are integrative programs in the United States where the international or foreign components are ancillary to American law. Some schools require first-year faculty to incorporate international or comparative perspectives; others merely encourage faculty to do that. Requiring all to do so sends the message to the students that this is important; if integration is not required, students are apt to resist those faculty members who do seek to integrate such perspectives.

In the process of publication are three series of teaching materials that are designed to support such integrative teaching. What the books in these series and some other books independent of series have in common is that they are subject-specific and are designed to be used in conjunction with a traditional casebook. The books are typically about 200 pages and of modest cost (about thirty U.S. dollars). The three series have somewhat different approaches:

- a) *The Global Issues Series* is published by Thomson-West in its American Casebook Series, under the general editorship of Franklin A. Gevurtz of University of the Pacific McGeorge School of Law. It is the furthest along, having published last year and this some ten titles (in civil procedure, constitutional law, contract law, corporate law, criminal law, employment discrimination law, family law, labor law, professional responsibility law, and property). It provides “cases and materials” to support the program

17. See Strauss, *supra* note 7, at 768.

18. See generally Yves-Marie Morissette, *McGill's Integrated Civil and Common Law Program*, 52 J. LEGAL EDUC. 12 (2002).

developed at McGeorge.¹⁹ It is intended to provide course study materials to teachers *without* international or comparative law knowledge. Of the three series, its focus is most clearly on transnational legal practice as such.²⁰

- b) The *Comparative Law Series*, published by Carolina Academic Press under the series editorship of Michael Louis Corrado, now has six titles supporting basic classes (consumer bankruptcy, contracts, criminal procedure, human rights—expression, and human rights-detention), plus an additional volume on approaches to comparative law. The *Comparative Law Series* likewise takes a “cases and materials” approach. Its approach is, however, more comparative and less international transaction directed than that of the *Global Issues Series*.²¹
- c) *The Contextual Approach Series*, under the general editorship of Andrew J. McClurg, also published by Carolina Academic Press, is the newest of the three new series. So far, only the volume led by Professor McClurg, *Practical Global Tort Litigation: United States, Germany and Argentina*, has appeared. This series takes a rather different approach from the “cases and materials” approach of the other two series. Each book is to consist of parallel ex-

19. See Franklin A. Gevurtz et al., *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 PAC. MCGEORGE GLOBAL BUS. & DEVELOP. L.J. 267, 283, 326 (2005).

20. See, e.g., the description found on the back cover of the books within the *Global Issues Series*:

Each book in this series contains materials designed to facilitate the introduction of international, transnational and comparative law issues into basic law school courses. The goal of this series is to ensure that all law school graduates have sufficient familiarity with the growing impact of non-domestic sources of law, and the growing potential for transnational legal transactions and disputes, to function in an era of increasing globalization. In addition, introduction of international, transnational and comparative law materials can enhance the students' understanding of domestic law.

JOHN A. SPANOGLE, JR. ET AL., *GLOBAL ISSUES IN CONTRACT LAW* (2007); LINDA E. CARTER ET AL., *GLOBAL ISSUES IN CRIMINAL LAW* (2007); THOMAS O. MAIN, *GLOBAL ISSUES IN CIVIL PROCEDURE* (2006).

21. See the description in one of the publisher's announcements: “The *Comparative Law Series* provides materials for use in domestic law courses. Its goal is to acquaint American law students with specific information about other legal systems.” Press Release, Carolina Academic Press, *Comparative Law Titles* (Spring 2007) (on file with Carolina Academic Press).

aminations in three specific legal systems of a specific fictitious case as sketched out by three co-authors from the three legal systems.²² Of the three series, it most directly addresses foreign law by examining the same legal case in three specific legal systems; the other two series take a more traditional legal topic issue and look at how that issue is handled in international law and in a generic civil law world. Another difference between the *Contextual Approach Series* and the other two is that it targets not only American law students, but non-law students and non-Americans as well. The series grew out of Professor McClurg's experiences teaching in the first year curriculum at Florida International University, where all faculty are required to bring a comparative approach to their teaching.

All three series have just appeared within the last eighteen months or so. Whether faculty will indeed adopt them—and find space for another 200 pages in already crowded courses—remains to be seen. As is the even more basic question, will they succeed in educating their student readers and faculty instructors?

3. Immersive

The immersive approach does not require the involvement of a U.S. law school at all. Just as Americans learn U.S. law in American law schools, they can learn foreign law in foreign law

22. The publisher description of the *Contextual Approach Series* states:

The CAS is designed to explore from a practical, "real world" perspective how law functions in different countries. In a variety of subject areas, co-authors from the U.S. and two other countries will apply the law of their respective legal systems to analyze and solve a set of case/problem facts structured to raise universal legal issues in the area. Relying on authors who are resident experts in the nations under study will enrich the CAS with insider perspectives not usually available. The CAS is designed to bring comparative law to life and make it accessible and understandable to law students by providing a contextual framework to which students can attach what they're learning. The contextual approach also allows for a good balance of breadth and depth. Traditionally, comparative law coverage has tended to be either very broad (survey-type materials) or very narrow (materials focusing on single issues or nations).

Contextual Approach Series in Comparative Law—Publisher Description, <http://www.cap-press.com/books/1657>. In the interest of full-disclosure, I should mention that I have contracted to contribute the volume on civil procedure.

schools. Americans have been studying law abroad without American law school involvement since the early nineteenth century.²³ After the Second World War Harvard Law School sent Arthur von Mehren to study in Switzerland and France with the expectation that he would return to teach at the school.²⁴ In the 1960s and 1970s Max Rheinstein conducted an intensive LL.M. program in foreign law in which he instructed students for one year at the University of Chicago and then sent them to study at a European university for a second year. The program did not survive his death in 1977.²⁵

Today American law schools, following in Rheinstein's footsteps, are facilitating such immersive studies. Many schools now make arrangements for their students to study abroad for a semester or more of credit toward their own law degrees. Others have set up joint-degree programs with foreign partner schools; others have partnerships to grant dual degrees. These programs do not seem to be designed to prepare students to practice in the foreign jurisdiction where they study.

Some form of immersive study is essential to development of lawyers in America who have real knowledge of foreign legal systems. Legal systems remain too disparate to think that pure academic study—divorced not only from foreign practitioners, but even from foreign legal education—could suffice to develop the necessary expertise.

The immersive programs raise a question about sequencing of studies. At what point is it appropriate to immerse oneself in a foreign legal system? Rheinstein was of the opinion that comparative studies presuppose knowledge of one legal system and that therefore they should take place only following completion

23. See, e.g., CARL DIEHL, *AMERICANS AND GERMAN SCHOLARSHIP 1770-1870*, at 155-62 (1978) (providing statistics on American students in Germany alone through to 1870); JAMES MORGAN HART, *GERMAN UNIVERSITIES: A NARRATIVE OF PERSONAL EXPERIENCE, TOGETHER WITH RECENT STATISTICAL INFORMATION, PRACTICAL SUGGESTIONS, AND A COMPARISON OF THE GERMAN, ENGLISH AND AMERICAN SYSTEMS OF HIGHER EDUCATION* (1874); James R. Maxeiner, *Hugh Swinton Legaré*, in *13 AMERICAN NATIONAL BIOGRAPHY* 427 (John A. Garraty & Mark C. Carnes eds., 1999).

24. See Daniel R. Coquillete et al., *In Memoriam: Arthur T. Von Mehren*, 119 *HARV. L. REV.* 1949, 1949-50 (2006).

25. See Bernard D. Meltzer, *The University of Chicago Law Schools Ruminations and Reminiscences*, 70 *U. CHI. L. REV.* 233, 251-52 (2003).

of a basic law degree.²⁶ The McGill “trans-systemic” model clearly challenges this view and seeks to teach both concurrently.

II. *REALISM ABOUT INTERNATIONALIZATION OF AMERICAN LAW SCHOOL CURRICULUM*

I am supposed to comment on “whether American law schools are making a true place for comparative and international law in their curriculums.” Before I address that question directly, let me put it in perspective. On the one hand, while we may have come far, we have not come nearly as far as contemporary developments have warranted. On the other hand, we have in the past enjoyed such a boom in internationalization only to see it fade from the scene.

A. Contemporary Perspective

I began this talk by remarking how much more U.S. law school curriculums treat foreign and international law today than they did when I was in law school in the 1960s and 1970s. But before we educators congratulate ourselves, we might ask, how far *should* we have come? Internationalization of economies and societies, if you will, has proceeded much further than our inadequate attempts to deal with it have. Think of:

1960s and 1970s	2008
The world was divided by Communism; the Berlin Wall went up in 1961, <i>détente</i> did not begin until 1972.	The Berlin Wall did not come down until 9 November 1989, but then—in that year—the “satellite” states gave up Communism. Within two years the Soviet Union itself dissolved.
We worried about MAD, not WMD, i.e., Mutual Assured Destruction—MAD. In the Cuban Missile Crisis we were on the brink of thermonuclear war.	Now we look for, but cannot find Weapons of Mass Destruction—WMD—let alone nuclear weapons.
Memories of total city destruction were fresh. In the last ten weeks I participated in conferences on legal education in three cities: Leningrad/St. Petersburg, Warsaw, and Hamburg. In the decade before my birth each was destroyed with horrific loss of life. ²⁷	I was in Manhattan on 9/11. As terrible as that crime was, it was in no way comparable to what these three and dozens of other cities in Europe and Asia experienced in the Second World War.

26. See Max Rheinstein, *Teaching Comparative Law*, 5 U. CHI. L. REV. 615, 616 (1937-38).

27. See *Siege of Leningrad*, in 7 THE NEW ENCYCLOPEDIA BRITANNICA 265 (1994) (stating the loss of life at 500,000+); *Warsaw Ghetto Uprising*, in 12 THE NEW ENCYCLOPEDIA BRITANNICA 502-03 (1994) (stating the loss of life at 200,000+); *Air*

1960s and 1970s	2008
Apartheid was the law in South Africa.	Apartheid is long gone: without major violence. We worry about truth and reconciliation.
The United States was divided by race; <i>De facto</i> segregation was practiced in the U.S. <i>De jure</i> prohibition of interracial marriages survived to 1967.	Barack Obama—Ho-hum for those under forty-five.
Small pox and polio ravaged the world	Both have been almost completely eradicated.
Information exchanges were by hand and computers just beginning to be used—my high school had a portable computer with 48 K memory	Internet
Gender inequality—1960s law schools: less than 10% women	Law schools: 50% women

B. Historical Perspective

The 1950s and 1960s too were a time when law schools turned their attention to international matters, only to turn away from them in the 1970s and 1980s. In the 1950s and early 1960s law faculty had the same kind of optimism for study of foreign law that they do now and that they had then for racial integration, i.e., that things were well on the way to transformation and to resolution of fundamental questions.

In the 1950s the Ford Foundation poured a good deal of money into American legal education with the idea that the time for transformation had come.²⁸ That money induced many distinguished professors to retool themselves to direct themselves into foreign and comparative law to look at what the rest of the world was doing. It seemed obvious that this was the beginning of a movement. Professor Whitmore Gray, who experienced that boom, has reminded us that “in the 1960s the money stopped, the interest stopped and the faculties turned to domes-

Warfare, in 29 THE NEW ENCYCLOPEDIA BRITANNICA 1008 (1994) (stating the loss of life at 40,000+). These events happened to be the two and a half years between the birth of my older sister, June 8, 1942, and that of my older brother, February 8, 1945.

28. See THE PROFESSIONAL SCHOOL AND WORLD AFFAIRS: A REPORT FROM COMMITTEE ON THE PROFESSIONAL SCHOOL AND WORLD AFFAIRS 183 (1968). The law school report in this collection, made at the end of the period of support, recommended a very modest additive approach: “there is no need for most law schools to offer a spectrum of courses in international legal studies. A few school can provide facilities for the limited number of students who will become specialists. At other schools, one or two well-conceived courses will suffice.” *Id.* at 196. The law school committee was chaired by Derek C. Bok, who later that year and university president three years later.

tic problems. Young people on the faculties, even those with excellent backgrounds in foreign studies, did nothing to carry on with this work. They were directed by their colleagues to focus on domestic problems.”²⁹ It was to him a surprising shock.

What is to prevent such a similar shock occurring again?

C. *Why We Should Internationalize the Curriculum*

We need to ask this question, “why should we internationalize the curriculum?”³⁰ That we should ask it to plan our curriculums is not troubling. That we need to ask it to justify an international curriculum is.

I have little patience with all this talk about something that was obvious to me forty years ago as a boy growing up in St. Louis, Missouri. Now, St. Louis is hardly a place where one is confronted automatically with internationalization; it’s hard to find a large American city further removed from the foreign countries of Asia, Latin America, Canada and Europe. But by the time I was sixteen years of age, by 1969, it was obvious to me that the United States had to deal with foreign countries. In my teenage years I saw the United States gradually embroil itself in Vietnam. I worried that my older brother or, later, that I, might be called upon to fight there. My father had served in the Pacific at the very beginning of our involvement in the Second World War. My uncle had done a “John McCain” in Europe: he was shot down over Italy and ended the War in a German prisoner of war camp. He had a problem McCain did not have: concealing his German birth from his Nazi captors. More pacific family experiences in the 1960s brought internationalization home directly to me and gave me the opportunity to visit Europe and to venture beyond the “Iron Curtain.” My brother took a Greek bride and my sister a German groom.

Of course we should internationalize the law school curriculum. Of course we should prepare our students to deal with lawyers and clients from foreign legal systems.

- Foreign and international law are important for American

29. Globalizing Law Faculties, Address by Whitmore Gray at Teaching the First Generation of Global Lawyers, 1993 Annual Meeting of the Association of American Law Schools.

30. See generally Elizabeth Rindskopf Parker, *Why Do We Care About Transnational Law?*, 24 PENN ST. INT’L L. REV. 755 (2006).

businesses and American private persons. The United States and its citizens are active around the world. They encounter other legal systems. American lawyers need to know about the foreign legal systems that they encounter. If this once was non-obvious, the Internet now puts even the smallest consumer into international transactions.

- To facilitate those international dealings we turn to international conventions and agreements. Since I was in law school, for example, the U.N. Convention on the International Sale of Goods has come into force. The Hague Evidence and Service of Process Conventions have come into widespread use. The Internet poses challenges for government guidance.

But foreign contacts alone will not sustain foreign and international law in the American law school curriculum. What we need is an appreciation of how much we can learn from foreign law. That is how we will inoculate ourselves from today's "globalization" frenzy becoming tomorrow's fad of yesterday.

The idea that the American legal system might learn from foreign systems is not foreign to the United States. The three jurists most responsible for creating an American legal system, Justice Joseph Story, Chief Justice Marshall, and Chancellor James Kent, all were keenly aware of foreign legal systems. In 1821 Justice Joseph Story told his colleagues: "There is no country on earth, which has more to gain than ours by the thorough study of foreign jurisprudence Let us not vainly imagine, that we have unlocked and exhausted all the stores of juridical wisdom and policy."³¹ Justice Story saw that in foreign legal systems we can find solutions to our own legal problems.

This is hardly remarkable. Would we reject small pox inoculation because it was first widely used in England? Or pasteurization because it was first introduced in France? Or X-rays because they were developed in Germany?

But finding solutions to our problems neither begins nor ends the benefits of study of foreign legal systems. We learn much from study of foreign systems even if we never contem-

31. Joseph Story, *Progress of Jurisprudence, Address at the Suffolk Bar on their Anniversary* (Sept. 4, 1821), reprinted in *THE MISCELLANEOUS WRITINGS, LITERARY, CRITICAL, JURIDICAL, AND POLITICAL OF JOSEPH STORY, LL.D.* 405, 434 (James Munroe & Co. ed., 1835).

plate borrowing their solutions. The study of foreign legal systems is central to understanding our own legal system. Already in 1820, Caleb Cushing, a contemporary of Story's, then a youth of but twenty years and later United States Attorney General from 1853 to 1857, saw the obvious: "[I]t is by comparison of our rules and practice with those of foreigners, that we become fully sensible of what is defective or excellent, and therefore of what is to be cherished and upheld, or to be disapproved and abolished in our institutions."³²

I believe that study of foreign law flourishes best when it is valued for the insights it brings to domestic law. For two decades we have seen such learning at work in the European Union in the fashioning a new European legal order. There, "[w]hoever advocates turning one's view across borders—to substitute a global for a national horizon"—can be sure of broad approval. He is riding a mighty wave of the *Zeitgeist*.³³ It is indeed high time to learn from foreign legal systems.³⁴

III. INSTITUTIONAL BARRIERS TO LEARNING FROM FOREIGN AND INTERNATIONAL LAW

But will the United States in general and American law schools in particular learn from foreign legal systems? Such learning will not come easy. There are very real obstacles.³⁵

There are, however, grounds for optimism.

A. Two Institutional Barriers May Be Diminishing in Importance

- Lack of language skills; and,
- The attitude that there is little to learn from foreign law.

32. Caleb Cushing, *On The Study of the Civil Law*, 11 N. AM. REV. 407, 408 (1820).

33. Abo Junker, *Rechtsvergleichung als Grundlagenfach*, 1994 JURISTENZEITUNG 921, cited in Ernst C. Stiefel & James R. Maxeiner, *Why are U.S. Lawyers not Learning from Comparative Law?*, in THE INTERNATIONAL PRACTICE OF LAW 214 (Nedim Vogt et al. eds., 1997) ("Wer heute dafür eintritt, den Blick über die Grenzen zu öffnen—den nationalen Horizont durch Weltweite zu ersetzen—, der kann sich breiter Zustimmung sicher sein. Er schwimmt ganz oben auf einer mächtigen Woge des Zeitgeistes.").

34. See generally James R. Maxeiner, 1992: *High Time for American Lawyers to Learn from Europe, or Roscoe Pound's 1906 Address Revisited*, 15 FORDHAM INT'L L.J. 1 (1991); see also Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States: Opportunity for Learning from 'Civilized' European Procedure Instead of Continued Isolation?*, in FEST-SCHRIFT FÜR KARL BEUSCH, 853 (1993), reprinted in 42 AM. J. COMP. L. 167 (1994).

35. See Ernst C. Stiefel & James R. Maxeiner, *Why are U.S. Lawyers not Learning from Comparative Law?*, in THE INTERNATIONAL PRACTICE OF LAW 221 (Nedim Vogt et al. eds., 1997).

Americans are not suddenly doing a better job of learning foreign languages, but the need for foreign language skills is diminishing. For very rational reasons—namely the dominance of English—Americans do not learn and do not need to learn foreign languages. But the very dominance of English is leading to the development of a civil law system—the European Union—and an international legal discussion whose language is English.

American reticence to learn from foreign experiences is also diminishing as the recollection of our overwhelming superiority following the Second World War diminishes and as the limits of our power become apparent.

But there are also grounds for pessimism:

B. *Two Institutional Barriers Continue in Full Force*

- American legal structures resist foreign law influences; and,
- American law faculties have not internationalized themselves.

1. American Law-Making Methods Leave Little Room for Comparative Law

Although the United States may have entered an “era of statutes,”³⁶ American lawmaking is still dominated by common law thinking. Common law thinking and law creation are not receptive to comparative law, whether the lawmaking takes place in the context of judicial decision or legislation.

Insofar as judges make law, there is not a great deal of room for comparative law. This is the source of the current tempest over Supreme Court use of foreign law. Case law deals with authoritative points and does not seek to create a rational system; it is not abstract. In litigation, the initial search is for binding precedent: the decision of the court superior to the one determining the case. If that can be found, no lawmaking is necessary. Obviously, a superior court’s decision does not involve comparative law. If no superior court decision is found and judicial law making becomes necessary, the law making involved is interstitial, that is, the judge is only filling in the “gaps.”³⁷ Again, there is no obvious role for comparative law.

36. *But see* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

37. *See* JAMES R. MAXEINER, *POLICY AND METHODS IN GERMAN AND AMERICAN ANTI-TRUST LAW: A COMPARATIVE STUDY* 30-31 (1986); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113-14 (1921).

Even when the United States turns to legislation, however, the form of its legislation is not generally conducive to comparative studies. Its pragmatic approach to legislation means that it tends to legislate like it decides cases: one particular point at a time. The United States prefers to minimize legislation and disperse the authority for it.³⁸

When American lawyers think of forward-looking legislation, they normally think of one of three forms of legislation: federal legislation, “Restatements of the Law,” and uniform state legislation. Restatements of the law, by their nature, offer the least room for learning from foreign law. A restatement is supposed to “restate” the law with only a gentle motion to reform of law; that does not allow room for major departures from prior practice.³⁹ In most instances, the only need for foreign law might be to help choose the “better” solution from several options, but that could only occur where the foreign example would fit right in. Unfortunately, uniform state legislation does not offer substantially better opportunities for learning from foreign law. Uniform legislation, to be effective, requires that most of the fifty different state legislatures adopt the same law. That requirement is not conducive for substantial departures from existing law and practice; the political exigencies require an appeal to that which we already have. That leaves federal legislation. But federal legislation scarcely offers better possibilities for use of foreign examples. Federal legislation is usually even less systematic and less painstaking than is uniform legislation. We have no practice, as is common in other countries, of conducting studies of foreign law before we legislate.⁴⁰

38. See the following articles discussing, respectively, products liability law, immigration law, and whistleblower protection law: Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 *GEO. WASH. L. REV.* 449, 450 (2008); Daniel M. Kowalski, *Things to Do While Waiting for the Revolution*, 21 *GEO. J. LEGAL ETHICS* 37, 38 (2008); Mary K. Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 *U. CIN. L. REV.* 183, 232-33 (2007).

39. See Hessel E. Yntema, *The American Law Institute*, 12 *CAN. B. REV.* 319, 323 (1934); see also James Gordley, *European Codes and American Restatements: Some Difficulties*, 81 *COLUM. L. REV.* 140 (1981).

40. This was brought home to me in law school by a professor who was closely involved in the abortive attempt of the 1970s to codify federal criminal law. He told me how his committee, exceptionally, asked the Library of Congress to provide it with information on foreign systems, and was surprised how much the Library came up with. The committee did not commission studies of foreign law.

2. *American Law Faculties Have Not Internationalized Themselves*⁴¹

Although American law faculties tout how international they are—for example, Harvard asserts that more than half of its members “incorporate international and comparative perspectives in their teaching, scholarship, and public service in a significant way”⁴²—few American law professors have systematically studied foreign legal systems. New York University (“NYU”) Law School counts itself “The Global Law School,” yet one looks in vain in the regular faculty for foreign law degrees. There are almost none from outside the common law world. I suspect that in one or two European law firms one will find more lawyers with degrees from both civil and common law jurisdictions than one finds in all American law faculties combined.

It is not as if this shortage comes as a surprise. Through the 1950s and 1960s American law faculties did have a good number of faculty trained in both legal systems. While most were refugees from Europe who then retrained fully in American law, some were Americans who had ventured abroad to study law. But when they retired, despite calls to replace them,⁴³ American

41. See generally Gray, *supra* note 29.

42. International Legal Studies at Harvard Law School—Description, <http://www.law.harvard.edu/news/spotlight/ils/about/index.html>. The website states further:

At Harvard Law School, “international” is not just something we teach. It is something we are . . . Just as Harvard originated much that is now commonplace in American approaches to international legal education—including specialized courses in international law, a student-edited international law journal, and an international law library—Harvard Law School today is reshaping international legal studies for the 21st century.

Id.

43. See Richard R. Baxter, *The Present State of the Science of International Law in the United States*, in *THE PRACTICAL STATE OF TEACHING AND RESEARCH IN INTERNATIONAL LAW 1974, A REPORT FOR THE AMERICAN SOCIETY OF INTERNATIONAL LAW 6* (Richard Baxter & Michael Cardozo eds., 1977). Baxter said:

The most alarming problem I have left to the last. I must be very careful to be very precise in what I say of this problem. Many institutions hired specialists in international law and in comparative law shortly after the Second World War, when law schools resumed their normal pace again. A whole generation has or will retire during the decade of the 1970s. Universities—law schools in particular—are looking about for their successors, men and women in, say, their thirties who are desirous of following an academic career. What is being looked for is a good general knowledge of the law, high competence in international law, some practical experience, teaching ability, and published writings which give evidence both of intellect and of scholarly interests. For all of the tremendous educational programs that we put on in the fifties and sixties,

law faculties did not. Since 1980, other than for specific area law specialties such as Japanese, Chinese, or Soviet Law, I do not believe that a single American law faculty has genuinely advertised a position having a focus on foreign and comparative law. My own alma mater is typical. At Cornell, Rudolf Schlesinger retired in 1976. For over two decades, Cornell did not replace him.

The career path for law school faculty members is hostile to foreign law and may have become more so over the last three decades. The natural time for foreign law study is on the heels of American law study. Yet the academic world principally values one kind of "post-graduate" project: the judicial clerkship.⁴⁴ However one values clerking with a trial or appellate judge for learning about the American judicial process, it is of extremely limited value for learning about foreign legal systems. In recent years, elite schools have admitted as an alternative path, preferably as a supplemental credential, a doctorate in another discipline. Thus, while NYU's faculty has few foreign law degrees, it has Ph.D.s in comparative literature, economics, history and sociology. Elsewhere I have discussed how this social science literature about law—valuable as it is, should not be confused with legal scholarship as such.⁴⁵ True international credentials have been little valued in the United States in the last generation.⁴⁶

CONCLUSION

I would like to stress how very practical it is to study foreign law. I have now studied or practiced law for more than thirty-five

for all of the money that was poured into international legal studies, there are few, very few, individuals who fall within the range of consideration. We are not producing requisite numbers of young scholars that we ought to be bringing along into the senior teaching posts now.

See id. Baxter was then President of the American Society of International Law and Editor of its Journal, Professor at Harvard Law School, and later, Justice of the International Court of Justice. *See also* P. John Kozyris, *Comparative Law for the Twenty-First Century: New Horizons and New Technologies*, 69 *TUL. L. REV.* 165, 178 (1994).

44. *See* Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 *U. MICH. J.L. REFORM* 191, 217 (1991) "[T]he percentage of professors teaching today who began teaching in the 1980s and who completed clerkships is more than twice the percentage of professors who clerked and who were hired in the 1960s." *Id.* at 214.

45. *See generally* Maxeiner, *supra* note 5.

46. *See* James R. Maxeiner, *International Legal Careers: Paths and Directions*, 25 *SYRACUSE J. INT'L L. & COM.* 21, 27-34 (1998).

years. In just about every area of American law in which I have been active, I have researched foreign law and I have found American problems there handled and analyzed, often much better than in our own. I apologize if my address today seems a trip down memory lane. But let me have just a few more minutes to tell you how varied they are and to name five areas:

<i>Criminal law.</i> In law school, my law review paper was on the American practice of forfeiting cars for crimes. ⁴⁷	Less than a decade before as part of the German codification of criminal law, there was a complete revision of German law with U.S. constitutional principles in mind. ⁴⁸
<i>Antitrust law.</i> Three years I worked as Trial Attorney in the Honors Program of the Antitrust Division of the U.S. Department of Justice just as Robert Bork came out with his book <i>Antitrust Paradox</i> .	My doctoral dissertation shows how Bork failed to understand how U.S. legal methods caused many of the evils he saw. ⁴⁹
<i>Civil procedure.</i> Nearly ten years I worked in commercial litigation for major Manhattan law firms.	Even before I did that I got practical training in German litigation. I continue to research this area. From applying the law to the testimony of experts, German law provides a rational alternative. ⁵⁰
<i>Data privacy law; & standard terms law.</i> For another decade I was Vice President & Associate General Counsel of the world's leading business information company. I participated in European Union-United States information battles and in the drafting of the Uniform Computer Information Transactions Act.	European law on data privacy provided an inspiration to U.S. lawmakers. European law on unfair terms in standard terms contracts is far ahead of our own attempts at unconscionability. ⁵¹

47. See generally James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768 (1977).

48. See James R. Maxeiner, *Constitutionalizing Forfeiture Law—The German Example*, 27 AM. J. COMP. L. 635, 637 (1979).

49. See generally JAMES MAXEINER, *POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW: A COMPARATIVE STUDY* (1986).

50. See generally James R. Maxeiner, *Guiding Litigation: Applying Law to Facts in Germany* (address Before the Common Good Forum, The Boundaries of Litigation) (Apr. 15, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1230453; James R. Maxeiner, *Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy?*, 15 TUL. J. INT'L & COMP. L. 541 (2007); Stiefel & Maxeiner, *supra* note 34, at 853; James Maxeiner, *The Expert in U.S. and German Patent Litigation*, 22 INT'L REV. OF INDUS. PROP. AND COPYRIGHT LAW 595 (1991).

51. See generally James R. Maxeiner, *Standard Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109 (2003); James R. Maxeiner, *Freedom of Information and the EU Data Protection Directive*, 48 FED. COMM. L.J. 93 (1995); James R.

Let us, in conclusion, recall what a Frenchman, Pierre Lepaulle (1893-1979), the first foreigner to take a J.S.D. at Harvard, and an advocate who founded one of France's leading law firms, wrote in 1922 in the pages of the *Harvard Law Review* that he "never completely understood the French law before coming to the United States and studying another system."⁵² Americans today should learn the same lesson.

Maxeiner, *Business Information and "Personal Data": Some Common-Law Observations About the EU Draft Data Protection Directive*, 80 IOWA L. REV. 619 (1995).

52. Pierre Lepaulle, Note, *The Function of Comparative Law with a Critique of Sociological Jurisprudence*, 35 HARV. L. REV. 838, 858 (1922).