

**The University of Florida Levin College of Law  
Comparative Law  
Spring 2012  
Professor Pedro A. Malavet**

**First Reading Assignment**

**For our first week of classes,  
please read the attached essay draft.**

**We will go over my basic expectations and the course rules and grading standards on Monday, January 9, 2012.**

**After that, we will discuss how comparative law can assist you in bridging the cultural gap between our legal system of those of other nations, as well as how it can help you to reach a better understanding of the Legal System of the United States.**

***Comparative Law as Looking Glass: What Foreign  
Legal Systems Can Teach us About Ours***  
**(December 27, 2011)**

**By Pedro A. Malavet\***

## **I. Introduction**

This essay was my contribution to the panel titled *Comparative Legal Systems in the Americas: What We Can teach each other* in the University of Florida's *Legal and Policy Issues in the Americas Conference* held in Montevideo, Uruguay, in May of 2010.<sup>1</sup> My participation in these international exchanges has always been strongest when I am a facilitator of legal communication and understanding between my students and colleagues and our international counterparts. I am effective in this regard because I have a reasonable command of comparative methodology and knowledge of the language and institutions of both the common law and the civil law traditions. I have honed these skills mostly by teaching a comparative law course that I design to be as effective as possible in transmitting some basic aspects of this cross-cultural knowledge to the broadest possible audience of United States law students and, occasionally, international law students and practitioners. My experience has taught me to maintain a general focus that can be translated, usually on the basis of historical experience, to the broadest number of situations and international exchanges.

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<sup>1</sup> See generally <http://www.law.ufl.edu/cgr/conference/> (last visited April 14, 2010).

As an academic, I can best accomplish these goals through my general comparative law course. Accordingly, this essay will explore my pedagogical approach to comparative law.

I have taught comparative law at the University of Florida College of Law for fifteen years. For the past six, I have used my own selected and edited texts to teach the course because the text that I had been using —John Henry Merryman’s “*The Civil Law Tradition*”— which was new when I started my full-time teaching career, had not been updated since 1994.<sup>2</sup> The readings that I chose reflect my appreciation for the old Merryman text, and my years of experience as a comparative law teacher, especially my interest in an historical, jurisprudential and ultimately cultural approach to the subject.<sup>3</sup> I dedicated part of a sabbatical to writing a proposal to turn these readings into a comparative law textbook and as part of that process I was asking: what is the pedagogical utility of comparative law in a United States classroom?

I start answering that question by defining the field, which I prefer to do along the lines of Professor Rudolph B. Schlesinger’s excellent description of Comparative Law:

Comparative Law is not a body of rules and principles. Primarily, it is a method, a way of looking at legal problems, legal institutions, and entire legal systems. By the use of that method it becomes possible to make observations,

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<sup>2</sup> See John Henry Merryman, David S. Clark, John O. Haley, *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICAN AND EAST ASIA* (1994) (hereinafter “Merryman, Clark & Haley”). The casebook is often confused with the compact introductory overview originally published by Professor Merryman in 1969 and referenced in note 49 *infra*. However, in the Summer of 2010 a new edition of this classic textbook was produced. John Henry Merryman, David S. Clark, John O. Haley, *COMPARATIVE LAW: HISTORICAL DEVELOPMENT OF THE CIVIL LAW TRADITION IN EUROPE, LATIN AMERICA, AND EAST ASIA* (Lexis-Nexis 2010).

<sup>3</sup> You may review my Syllabus, reading assignments and detailed class notes at <http://nersp.osg.ufl.edu/~malavet>, follow the “comparative law” link on the top left.

and to gain insights, which would be denied to one who limits his study to the law of a single country.

Neither the comparative method, nor the insights gained through its use, can be said to constitute a body of binding norms, i.e. of “law” in the sense in which we speak of “the law” of Torts or “the law” of Decedents’ Estates. Strictly speaking, therefore, the term Comparative Law is a misnomer. It would be more appropriate to speak of Comparison of Laws and Legal Systems. . . .<sup>4</sup>

While I emphasize to the students that my course is not “trade law,”<sup>5</sup> I point out that doctrinal comparative legal analysis is essential in today’s growing international market, particularly when society considers the globalization of legal practice.<sup>6</sup> This occurs, for example, in the context of many U.S. law firms representing clients with offices abroad. “The increasing rate of interaction across national borders is one trend that is clearly correlated with certain aspects of growth in law.”<sup>7</sup> Indeed, at least before our recent financial meltdown, transnational law practice has been an increasing source of revenue for American

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<sup>4</sup> Rudolph B Schlesinger, et al., *COMPARATIVE LAW* 1 (5th ed. 1988) (footnotes and italics omitted). An updated definition appears in the newest edition of this textbook. See Ugo A. Mattei, Teemu Ruskola and Antonio Gidi, *SCHLESINGER’S COMPARATIVE LAW* 7 (7th ed. 2009).

<sup>5</sup> By “trade law” I mean two general areas. First, the public international law regime governing trade, such as the World Trade Organization or the North American Free Trade Agreement. Second, the private transactions that are often covered in International Business Transactions courses. I explore this further in section II-A below.

<sup>6</sup> See Hans W. Baade, *Comparative Law and the Practitioner*, 31 *AM. J. COMP. L.* 499 (1983) (providing a general discussion of the practical importance of Comparative Law).

<sup>7</sup> Robert C. Clark, *Why so many lawyers? Are they good or bad?*, 61 *FORDHAM L. REV.* 275, 288-90 (1992). “A survey appearing in the *International Financial Law Review* in October 1985 listed eight law firms with more than four offices in foreign countries, and listed over forty additional law firms with offices in at least three different countries.” Roger J. Goebel, *Professional Qualifications and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 *TUL. L. J.* 443, 508 (1989).

lawyers. According to the U.S. International Trade Commission: “Worldwide legal services revenue increased from \$363.6 billion in 2003 to \$458.2 billion in 2007. U.S. legal service firms are very competitive in the global market, accounting for 54 percent of global revenue in 2007 and 75 of the top 100 global firms ranked by revenue.”<sup>8</sup> In 2007, the U.S. enjoyed a trade surplus in legal services of \$4.9 Billion.<sup>9</sup>

A lawyer in international or transnational practice ought to provide her client with a full understanding of the law in its proper context using comparative methodology.<sup>10</sup> “Law, taken alone and considered only in its strict theory, would give a false view of the way in which social relations, and the place therein of law, really operate.”<sup>11</sup> Understanding the “cultural, social, political and economic systems” in which the law must be applied is essential when instructing a client on the “relevant considerations” of international legal transactions.<sup>12</sup>

Thus, my first forays into comparative law writing had produced a fundamentally practical and practice-oriented an-

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<sup>8</sup> U.S. Int’l. Trade Comm’n, RECENT TRENDS IN U.S. SERVICES TRADE—2009 ANNUAL REPORT at 6-1 (2009) (footnotes omitted) (found at <http://www.usitc.gov/publications/332/pub4084.pdf>) (last visited April 6, 2010).

<sup>9</sup> *Id.* at 6-8. See also Euromoney Publications PLC, 3 INT’L FIN. L. REV. vii (1993). This represents a very substantial increase since I first studied the subject in the 1990s, when the value of legal services exported by U.S. firms jumped from \$ 147 million in 1987 to nearly \$1.2 billion in 1991, while during this same period purchases of foreign legal services by US citizens increased from 55 million in 1987 to \$ 222 million in 1991. Int’l Trade Comm’n, INDUSTRY AND TRADE SUMMARY: LEGAL SERVICES 2, 3 (Feb. 1993).

<sup>10</sup> Goebel, *supra* note 7, at 447. Professor Goebel notes that this is not a universally accepted tenet. *Id.* at 454. Goebel correctly concludes that this is an important, even essential requirement for properly carrying out the attorney’s professional responsibility to their clients. *Id.* See generally Schlesinger et al., *supra* note 4 for a general discussion of the importance of understanding a legal system in its proper context.

<sup>11</sup> See Rene David & John E.C. Brierley, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (3d ed. 1985).

<sup>12</sup> Goebel, *supra* note 7, at 444-54.

swer to the question of the utility of comparative law: comparative law study bridges the cultural gap between our legal system and those that are foreign to us in order to complete certain legal transactions. Accordingly, my first law review publications addressed how the notarial monopoly sometimes presents an insurmountable obstacle to foreign-country practice by American lawyers, in certain crucially important areas of the law.<sup>13</sup> However, with a proper understanding of this legal profession, American lawyers could turn this exclusivity to their benefit. By working with foreign notaries, American lawyers, and my future-lawyer students, could expand client-counseling and representation abroad, while ensuring that transactions are legally proper and more easily enforceable. In transnational practice, the Latin Notary should be seen as an ally to an American legal professional, not as a competitor. I was thus using my scholarship and classroom to give the U.S. a view of legal systems that are foreign to it, with my students' future law practice in mind.

My years of teaching and writing experience, however, have also led me to emphasize to my students that at this early stage in their careers in law comparative methodology is most useful because it gives us a lens through which to look at our own legal system and study it in a level of detail that we would not otherwise consider. While this pedagogical approach teaches the methodology that will allow practitioners to effectively

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<sup>13</sup> See Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, a Historical and Comparative Model*, 19 HASTINGS INT'L & COMP L. REV. 389 (1996) [hereinafter *Counsel*]; Pedro A. Malavet, *The Non-Adversarial, Extra-Judicial Search for Legality and Truth: Foreign Notarial Transactions as an Inexpensive and Reliable Model for a Market-Driven System of Informed Contracting and Fact-Determination*, 16 WIS. INT'L L. J. 1 (1998) [hereinafter *Non-Adversarial*]; and Pedro A. Malavet, *The Foreign Notarial Legal Services Monopoly: Why Should We Care?*, 31 J. MARSHALL L. REV. 945 (1998). PDF versions of all these articles are available at: [http://works.bepress.com/pedro\\_malavet/](http://works.bepress.com/pedro_malavet/) and <http://ssrn.com/author=624526>.

bridge the gap across legal professions, systems and cultures,<sup>14</sup> it also fits within the broader goals of educating United States lawyers to understand their own legal system. Additionally, it contributes to expanding the theoretical foundations of American legal scholarship.

The comparison of laws and legal systems is an essential part of the proper development of legal theory. To the French, for example, comparative law (*droit compare*) “is not a branch of the law, but very specifically a part of the science of law (*science du droit*).”<sup>15</sup> This is not to suggest that doctrinal uses of comparative methodology are unimportant; there is a strong need for both theoretical and doctrinal comparative analysis. Indeed, there will often be a great deal of overlap between the doctrinal and the theoretical. The distinction between doctrinal comparative methodology and comparative legal science will depend on the purpose of the comparative study. One example that is especially pertinent to this conference is that the comparative method will give a national scholar “a better understanding of his own law, assist in its improvement, and ... open[] the door to working with those in other countries in establishing uniform conflict or substantive rules or at least their harmonization.”<sup>16</sup> International legal reform efforts require particular emphasis on comparative methodology, and a general acceptance that it should be a *multilateral* process.

I will use the remainder of this essay to describe what I believe to be the pedagogical utility of comparative law in a United States law school as a lens through which to re-view our own legal system. I will first provide a general overview of a comparative law course, with a narrative of my pedagogical ap-

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<sup>14</sup> See generally Goebel, *supra* note 7 at 508.

<sup>15</sup> Jean-Luc Aubert, INTRODUCTION AU DROIT 55 (Pedro A. Malavet trans., 5th ed. 1992).  
See also David & Brierley, *supra* note 11 at 2-3, 11-13.

<sup>16</sup> David & Brierley, *supra* note 11, at 11-12.

proach to and objectives for each subject. I will then use a typical exam question about comparative constitutionalism to illustrate how I ask students to consider fundamental differences between the western European approach to the public order and ours, and to show how our system reflects very specific choices regarding constitutional ordering that are not often considered in American legal studies. Having a better understanding our legal system by looking at it through our knowledge of systems foreign to us will produce better legal professionals, and this experience will make us better international legal practitioners and ambassadors.

## **II. Comparative Law Coverage and Pedagogy**

I teach comparative law as a two- or three-credit course, which naturally affects the depth of coverage, because this flexibility allows me to better fit within my school's curricular needs. The reading materials that I currently use and the book that I hope to write, cover subjects designed to allow my students to develop the methodology of comparative law to understand some comparative case studies of foreign legal systems, and then to use that knowledge better to understand the legal system of the United States. I will illustrate my approach by providing a narrative description of each subject covered in my course. I will do so by describing the chapters of a comparative law textbook as I would write it. Unless otherwise indicated, in this section I will generally use chapter titles as the subheadings.

### ***A. Comparative Law: Objectives, Definitions and Methods***

As I have already stated, I emphasize to my students that I will not cover “trade law.” By this I mean that I do not cover public international law generally, nor the treaty regimes that govern trade among nation states. I also do not cover the field that is generally labeled “international business transactions” in many law school curricula. Those are subject matters of separate courses at my school. I have learned that I need to explain this to my students in order to avoid the disappointment that may result from enrolling in a course that is not quite what the student expected. Comparative law is an elective course, and the classroom dynamics and pedagogical experience are greatly improved by having students who self-select to be in the course. This should be incorporated into the book’s introduction and should be emphasized in the course description at schools with substantial Public International Law and IBT curricular offerings.

As noted in the introduction to this essay, I have always approached comparative law as Schlesinger defined it in his textbook: as method for comparison. In my first chapter, I explain my method approach to the students in order to bring their attention to what the course is all about. I then provide them with some historical background on the origins of comparative law and its objectives. The objective of any law study is of course dependent on its purpose and desired results, but the comparative method is dynamic enough to be adapted to many purposes by a thoughtful law student or practitioner. I emphasize to the students that for a law geek like myself, there is always the simple enjoyment of studying law because I find it endlessly amusing and entertaining (students generally do not seem as giddy as I was when I was a law student, so I often tell

them that for me this whole exercise is fun; otherwise, they find that my light-hearted attitude is not directed to the subject-matter of the course, but at them). This is followed by an overview of multiple comparative law methodologies. This gives the students a way to structure their study of the assigned readings that we will cover, and their own research, in the manner that is best adapted to their learning style and objectives.

I finish this chapter by pointing out that my typical students spend three years studying the law of the United States and I will have two to three hours per week in a one-semester course to teach them about the rest of the world. Something has to give, so I choose to focus on what Professor Merryman eloquently described as the Civil Law Tradition rather than the Civil Law system:

The reader will observe that the term used is “legal tradition,” not “legal system.” The purpose is to distinguish between two quite different ideas. A legal system, as that term is here used, is an operating set of legal institutions, procedures, and rules. In this sense there are one federal and fifty state legal systems in the United States<sup>17</sup> separate legal systems in each of the other nations, and still other distinct legal systems in such organizations as the European [Union] and the United Nations. In a world organized into sovereign states and organizations of states, there are as many legal systems as there are such states and organizations.

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A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and polity, about the

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<sup>17</sup> And several territorial legal systems in the United States Territorial Possessions. See generally, Pedro A. Malavet, *AMERICA’S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO* (2007).

proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.<sup>18</sup>

I try to incorporate as many examples of particular legal phenomena as possible into my lectures, but there must be a fundamental focus for the course that the students — and I— can use to gauge their progress. For my basic comparative law course, that is the western European legal tradition, its historical evolution, current form, and modern development, most especially as seen in France, Germany and, to a lesser extent Spain.

With the methodology and course parameters thus defined, I move on to some specific methodological case studies.

### ***B. The Special Hazards of Comparative Law***

This chapter is a warning for the students not to overreach with the methodology discussed in the first chapter and with comparative law in general. It is in an important way a specific refinement of comparative methodology: whereas chapter one covers what to do, chapter two warns about what not to do. I emphasize the distinction between law and legal systems, and between official legal systems and actual practices within the official legal system and the possible existence of informal legal systems.<sup>19</sup> I then move on to more specific challenges, such as language. I point out to my students that they will spend three years in an American law school learning American Legal English, and they immediately understand that

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<sup>18</sup> Merryman, Clark & Haley, *supra* note 2 at 3-4.

<sup>19</sup> For one of the most influential case studies on informal legal systems, see generally Hernando de Soto, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1989).

simple fluency in another language is not enough for legal work.

This chapter would include several specific examples of language challenges. For example, as discussed later in this essay, I point out that they will recognize the word “notary” easily, but that if they understand it to mean a person who certifies documents, such as the secretaries in the Office of Student Affairs at our law school, they will fail to understand that for the rest of the planet “notary” means a specialized legal professional. Consistent with my practice of providing examples relevant to purely domestic law practice, I also point out that they may well run into the need for legal translation here in the United States, when representing clients who speak languages other than English. It is especially important when litigating with the use of simultaneous translation, where errors in translation that are allowed to make it into the transcript may create a misleading record of the proceedings.<sup>20</sup>

Language poses a major pedagogical challenge for the course. My students have repeatedly reported that they found the readings difficult to understand because they were written in “awkward” language. This seems to be most directly related to a general lack of skill in languages other than English on the part of the students. By contrast, the readings are often translations from languages other than English, or the works of persons familiar with multiple legal languages who purposely choose words that may appear awkward to a monolingual English speaker, but that are common in the international language of law, especially because of the legal institutions and concepts that are common to the civil law tradition. This is the cultural

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<sup>20</sup> While clerking in the United State District Court for the District of Puerto Rico, I observed many trials in which simultaneous translation was required, and heard many “objections to the translation” made by multi-lingual counsel, and even corrections that had to be made by the presiding judges.

gap that is most pertinent to a college or law school classroom in the United States, and one that I will strongly strive to bridge in my book. On the other hand, becoming even rudimentarily familiar with the common institutions and concepts can improve transnational legal communication immensely, even when the parties speak multiple languages.

### ***C. The Comparative Method in United States Cases***

In this chapter I currently use two cases to illustrate how the comparative method might be needed in U.S. courts. One illustrates our treaty obligation to apply law or legal terms in the manner that they would be defined in a system foreign to us. Consistent with the Merryman cabook, I use *Eastern Airlines v. Floyd*,<sup>21</sup> a U.S. Supreme Court case to illustrate how the United States has obligated itself to apply certain legal terms as they were defined by the French legal system, and illustrate how a merely literal approach is simply not possible. I point out to the students that a good advocate could have used comparative methodology, particularly explanations about the hierarchy and strength of legal sources in the French legal system, to construct a more effective argument for the Supreme Court. I then use a case from the U.S. District Court in Puerto Rico to illustrate how a civil code provision must be applied,<sup>22</sup> and point out that in Florida, Louisiana and many parts of the U.S. Southwest, there are old Spanish and French legal rules that are still in ef-

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<sup>21</sup> 499 U.S. 530 (1991). This is one of the cases Professor Merryman included in his case-book. Merryman, Clark & Haley, *supra* note 2 at 171.

<sup>22</sup> In *Re San Juan DuPont Plaza Hotel Fire Litigation*, 687 F. Supp. 716; 1988 U.S. Dist. LEXIS 4603 (U.S. Dist. Ct. P.R., Acosta J. 1988) (granting summary judgment in favor of architects who designed the hotel on the basis of Puerto Rico Civil Code article of repose, Article 1483, 31 L.P.R.A. sec. 4124 (1930)).

fect, and that require comparative methodology, as opposed to the normative U.S. approach, to understand and litigate them properly. In Florida for example, some old land grants still take us back to the *Leyes de los Reynos de las Indias*,<sup>23</sup> the old Spanish laws for their colonies in the Americas, and may well take them back to the *Partidas*, the legal code produced in Spain circa 1265 (which I will then use in the historical part of the course to illustrate the legal evolution of the western European tradition).<sup>24</sup>

#### ***D. Legal Education in the Civil Law World***

This is the first of two chapters designed to use the students' experience in a detailed comparative legal exercise. In reviewing this material, I tell the students that I choose legal education for an initial extended comparison because they are all very familiar with their own legal education. Therefore, they can identify the strengths and limitations of the general statements made in the readings about our own system. This will help them to understand that legal generalizations are often dif-

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<sup>23</sup> See RECOPIACIÓN DE LAS LEYES DE LOS REYNOS DE LAS INDIAS (Francisco de Icaza Dufour, ed. 1987) (a five volume reprinting of the laws sponsored by the Escuela Libre de Derecho in Mexico) and DE LAS LEYES DE INDIAS (ANTOLOGÍA DE LA RECOPIACIÓN DE 1681) (Alberto Sarmiento Donate, ed. 1988) (a succinct, annotated selection of the laws). Both generally and in law, Spanish *conquistadores* referred to the new colonies of the Americas as the “*Indias*” (Indies) and to the indigenous inhabitants thereof as *Indios* (Indians). See IV DICCIONARIO ENCICLOPÉDICO DE DERECHO USUAL 389 (explaining that use of *Indias* was due to Columbus' error in mistaking the islands of the Caribbean and the Eastern coast of the Americas with the Eastern coast of the Indian subcontinent); see also *id.* at 392 (“*Indio*” refers to indigenous peoples of what the Spanish called the Indies).

<sup>24</sup> See generally Robert I. Burns, S.J., *The Partidas: Introduction*, in 1 LAS SIETE PARTIDAS xi (Samuel Parsons Scott, trans., Robert I. Burns, ed. 2001) (providing a description of the making and influence of this legal code in the introduction to a five volume English translation of the laws).

ficult and wrong, but they can also be largely accurate and helpful to the comparativist, provided we are aware of their limitations.

I especially emphasize that legal education outside of the United States is fundamentally an undergraduate degree. Indeed, in Spain and in most of the Americas, a basic law degree and membership in the local *Colegio de Abogados* (the unified bar association)<sup>25</sup> are the usual path to private law practice. However, there are many specialized professions in the Civil Law Tradition — notaries, prosecutors and administrative officials and judges, for example — that require specialized education and have specific requirements for admission. Additionally, in countries like France and Germany, there are specialized graduate schools or curricula for these professions, and this has an important effect on legal culture and performance. For example, historically, most of the members of the Constitutional Council of France are former students or graduates of the *Ecole Nationale D'Administration* (known by its initials as the ENA)<sup>26</sup> or one of the *Instituts D'Etudes Politiques* (the Institutes for Political Studies),<sup>27</sup> which train members of the high bureaucracy and government officials, and relatively few have

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<sup>25</sup> Spain, for example, has multiple local and regional *Colegios*, organized under the umbrella of the national *Consejo General de la Abogacía Española* (National Council of the Spanish Bar). See <http://www.cgae.es/> (last visited April 13, 2010).

<sup>26</sup> <http://www.ena.fr/> (last visited April 13, 2010).

<sup>27</sup> There are nine such institutes throughout France, organized under the umbrella of the *Science Politiques, or SciencePo* structure, which is composed by the National Foundation for Political Science of France and the Paris Institute for Political Studies. <http://www.sciences-po.fr/portail/> (main page) and <http://www.sciences-po.fr/portail/fr-fr/decouvrir-sciences-po/les-gouvernements-de-sciences-po1/> (organizational structure page) (last visited April 13, 2010). For information in English, see <http://admissions.sciences-po.fr/> (last visited April 13, 2010).

experience as ordinary judges or magistrates. This in turn affects the culture of the Council and its operations.<sup>28</sup>

I contrast the long and specialized nature of European law study, with the professional and liberal tradition of law studies in the United States. A U.S. law graduate is able, and even expected to work in different legal disciplines throughout her career. The typical European student will have to make a more specific commitment to a particular professional specialty earlier, and will be required to study and work according to this choice. Over the past few years, I have been lucky to have a number of foreign students in my classroom, and this has allowed me to engage the students in a dialog about the very different expectations of legal education that predominate on either side of the Atlantic or Pacific, and from North to South in the Americas.

This chapter always generates very lively discussion about legal education that I then turn into an in-depth case-study on comparative methodology. I spend most of the time purposely trying to get students to think about the disagreements that they might have with some general statements used in describing the U.S. system such as “meritocratic” admissions, “small” class size, “high-expectations” of students, “interactive” classroom teaching. In addition to finding it unbearably amusing, I have a pedagogical purpose for this discussion: it really teaches them to understand the strengths and limitations of general descriptions of a particular system because they have an experienced frame of reference from which to evaluate the information that they have read. Because I have served on the Membership Review Committee of the Association of American Law Schools, I am also able to explain how accrediting and

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<sup>28</sup> For the current composition, and links to their basic biographies, see <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/the-members/the-members.25737.html> (last visited April 12, 2010).

membership organizations for law schools in the United States have an important effect on legal education in this country.<sup>29</sup> The challenge in this chapter will be to update the readings to account for major changes in legal education, especially in Europe under the guidance of the Union, and in important places such as Japan, which overhauled its system in 2004.<sup>30</sup> But the basic pedagogical value of the discussion should remain strong.

### ***E. Legal Professionalism in the Civil Law World***

This is the second chapter that takes advantage of the students' experience, and of their expectations for their futures after law school, to conduct a more in-depth case-study. I usually start by discussing that passage rates for the examination that allows entry into the official legal professions in Japan was for decades in the range of three percent (03%).<sup>31</sup> Most of my stu-

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<sup>29</sup> The AALS is a voluntary membership organization that groups most law schools in the United States. The requirements of membership have an important effect on how the law schools are organized and managed. See generally <http://www.aals.org> (last visited April 14, 2010). The Membership Review Committee "examines law school applications for membership in the Association and sabbatical evaluation reports of member law schools[; and] makes recommendations to the Executive Committee on the actions it should take."

<sup>30</sup> See generally James R. Maxeiner, Keiichi Yamanaka, *The New Japanese Law Schools: Putting The Professional Into Legal Education*, 13 PACIFIC RIM L. & POLICY J. 303 (2004); Norbert Reich, *Recent Trends In European Legal Education: The Place Of The European Law Faculties Association*, 21 PENN. STATE INT'L LAW REV. 21 (Fall 2002) (discusses the "Bologna process" of reforming legal education in Europe).

<sup>31</sup> In Japan, completion of a two-year apprenticeship program in the Legal Training and Research Institute administered by the Supreme Court is a prerequisite to admission to practice as a litigator as well as for appointment as either a career judge or procurator. In 2004, the legal education system was overhauled to increase the number of persons who could be trained for these professions. See generally James R. Maxeiner, Keiichi Yamanaka, *The New Japanese Law Schools: Putting The Professional Into Legal Education*, 13 PACIFIC RIM L. & POLICY J. 303 (2004). See also Tomoya Ishikawa, Mitsusada Enyo and Daisuke Nakai, *Law Schools Troubled by Bar Exam Failure Rate*, *The Asahi Shimbun*, October 27, 2009 ("The new graduate-level law

dents quickly point out that they would not be in law school if they thought that their chances of becoming members of the bar were that low, but they also immediately figure out that the majority of law graduates in Japan must be doing something other than official practice with their degree. But I also warn students that other limitations such as *numerus clausus* provisions may limit the number of persons allowed to practice any particular profession, regardless of exam-passage.<sup>32</sup> This has important effects on the legal services sector abroad, and may require U.S. counsel to go to a very particular professional in another country — such as a notary or attorney admitted to practice before the French courts of appeal, which have highly limited exclusive bars and compulsory fee schedules.

Additionally, comparative analysis can help achieve social justice in the United States. I illustrate this for my students by pointing out that misconceptions about notaries and their functions here in the United States have allowed unscrupulous persons to take advantage of U.S. citizens of foreign origin and aliens seeking entry to or living in the United States.<sup>33</sup> A simple

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schools are averaging a 27% pass rates, up from the traditional 3%” ... “using the new bar exam introduced in 2006.”) (available at <http://www.asahi.com/english/Herald-asahi/TKY200910270110.html> (last visited April 9, 2010)).

<sup>32</sup> Denis-M. Phillipe & Helen Roberts, *The Legal Professions in Belgium*, in *THE LEGAL PROFESSIONS IN THE NEW EUROPE* 69, 94 (Tyrell & Yaqub, eds., 1993). There is a modern trend towards liberalizing the profession by allowing all law graduates who pass the notary bar to practice as notaries. This trend has been most prevalent in Central America. See Jose Guglietti, *La Comision de Asuntos Americanos (CAA) y los Notariados de America Latina*, in *ATLAS DU NOTARIAT* 334g-334i (1989). Puerto Rico also allows all lawyers who pass the Notary Bar exam to practice both professions at the same time, and they may do so throughout the island. Malavet-Vega, *supra* note 27, at 29.

<sup>33</sup> “Because immigrants are unaware that notaries in the United States simply certify documents [and are not legal professionals], they may be deceived by notaries who charge high fees for services they often cannot perform.” Gail Appleson, *Unscrupulous Notaries Spur Chicago Probe*, 68 A.B.A. J., Nov. 1982, at 1357. This Article

search of news reports that I conducted some years ago disclosed many instances of fraud perpetrated by notaries who took advantage of foreign immigrants or potential immigrants, by misleading them into believing that they could provide legal services, or that their services had the same legal effect in the United States as in the home countries of the duped immigrants.<sup>34</sup> Successful prosecutions for illegal practice of law have also been instituted against persons who have used the title

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lists instances of immigrants being defrauded by US notaries who mislead them into believing that they are the legal professionals that notaries are in their countries of origin. But money is not the only thing that they could lose. "In some cases a notary may intend to help but can't because of his lack of legal knowledge... "Notaries don't inform clients of proper procedure and the aliens are deported,' ...." *Id.* The article reported similar instances of abuse in Chicago and Los Angeles. *Id.*

<sup>34</sup> See, e.g., Patrick McDonnell, *Victimized Brothers Help End Immigration Scam*, Los Angeles Times, San Diego County Ed., Aug. 4, 1991, Metro sec., at 1 (stating Latino immigrants defrauded in part by official-looking notarized documents and by advertisements by "immigration consultants" and "notarios publicos"); Alexander Peters, *Notaries Bilking Immigrants; Aliens Think They're Hiring Counsel, But Buy Trouble Instead*, Recorder, Feb. 1, 1991, Alien Justice sec., at 1 (stating, that notaries have violated advertising and pricing laws, and attorneys representing immigrants in asylum claims estimate that 50 to 80 percent of their cases have been tainted by the work of notaries and non-lawyers. The best case scenario for these aliens is that they only lose their money, but in the worst cases, they are deported); Constanza Montana, *New Immigration Laws Cause New Set Of Problems For Aliens*, Chi. Trib., Dec. 11, 1987, Chicagoland sec., at 14 (reporting that the Cook County state's attorney's office "has filed two "class action-type" suits against two notaries who have committed fraud by posing as attorneys and handing out incorrect information to immigrants"); Bob Schwartz, *Protesters Say Notaries are Defrauding Aliens*, Los Angeles Times, Orange County ed., Apr. 2, 1987, Metro sec., part 2, at 1 (stating that 75 members of an immigrant's rights group protested in Santa Ana, California against fraudulent practices by notary publics, and that a recent investigation by the Los Angeles Times discovered notaries who charged over 100 times the state limit to complete state immigration forms, charged between \$ 300 and \$ 1,000 to process amnesty cases, provided erroneous advice that could potentially undermine amnesty cases, practiced law without a license, and advertised that they were both notaries and immigration consultants, which state law forbids).

“Notario Publico”<sup>35</sup> to mislead clients into believing they could deliver legal services.<sup>36</sup> State laws generally prohibit misleading advertising<sup>37</sup> and the practice of law by notaries.<sup>38</sup> However, this problem has been significant enough to lead several states to enact more specific laws that require notaries to indicate that they are not lawyers when advertising in a language other than English,<sup>39</sup> and to prohibit the literal translation of the title “no-

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<sup>35</sup> In Spanish, the Latin Notary is referred to as “notario publico,” which would literally translate to “notary public” in English.

<sup>36</sup> See, e.g., Fla. Bar v. Isabel Rodriguez, 509 So. 2d 1111 (Fla. 1987) (stating that “the [Spanish-language newspaper] advertisement indicated ABC General Services employed a ‘Notario Publico,’ and offered services in immigration, corporations, divorce, and income tax” (emphasis added)); Fla. Bar, v. Alfredo Borges-Caignet, 321 So.2d 550, 551 (Fla. 1975) (stating that the “Respondent had represented himself to be a Notario Publico (which the witness related her understanding of same to be ‘something with laws’), and in such position could act as her attorney for the purpose of obtaining legal permission to remain in the United States” (emphasis added)); The Florida Bar v. Nicholas F. Fuentes, 190 So.2d 748, 750-51 (Fla. 1966) (stating that using terms, such as “Notaria,” “Notario Publico” and “Consultoria” were misleading to the Cuban clientele of the Respondent and to his clientele native to other Spanish speaking countries, because these terms purported that the Respondent was an attorney authorized to provide services generally rendered by an attorney admitted to the Florida State Bar); and The Fla. Bar v. Marco Tulio Escobar, 322 So.2d 25 (Fla. 1975).

<sup>37</sup> See, e.g., Cal. Gov’t Code 8214.1(f) (West Supp. 1998); Colo. Rev. Stat. 12-55-107(1) (West 1996); Fla. Stat. ch. 117.01(4)(e) (West 1996); Idaho Code 51-112(c) (Michie 1994).

<sup>38</sup> See, e.g., Cal. Gov’t Code 8214.1(g) (West Supp. 1998); Fla. Stat. ch. 117.01(4)(f) (West 1996); Idaho Code 51-112(d) (Michie 1994); Mo. Rev. Stat. 486.390(1) (1987); N.M. Stat. Ann. 14-12-13 (A)(5) (Michie 1997); W. Va. Code 51-1-4a (1997); “A realtor or notary public, who prepares legal instruments for another, is engaged in the practice of law.” 45 Ops. Att’y Gen. 488 (1953); Wis. Stat. 137.01(8) (West Supp. 1997) (“If any notary public shall be guilty of misconduct or neglect of duty in office the notary public shall be liable to the party injured for all the damages thereby sustained.”).

<sup>39</sup> See, e.g., Cal. Gov’t Code 8219.5 (West Supp. 1998) (discussing “advertising services in language other than English”). See also Nev. Rev. Stat. 240.085 (Michie 1995) (stating that “advertisements in language other than English [must] contain notice if notary public is not an attorney”). Whether these statutes are effective is uncertain,

tary public” to the Spanish “Notario Publico.”<sup>40</sup> This problem has been particularly prevalent in my current home state of Florida.

In the United States, there is one kind of lawyer who is generally expected to be an advocate for his client. Generally speaking, legal specialization here is a matter of custom and practice, and the government does not impose legal specialization or exclusivity on practitioners or clients.<sup>41</sup> In most civil law countries, however, governmentally designated legal specialties are the norm.<sup>42</sup> These differ from the voluntary specialty certification systems in the United States because they limit the practitioners to work exclusively in their area of licensed expertise, whereas certifications in the United States do not limit the areas of law that a member of the bar may otherwise practice.<sup>43</sup> Addi-

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however. See also Office of Prof'l Standards, State Bar of Cal., Report of the Public Protection Comm. 8 (1989). This report was discussed in Meredith Ann Munro, Note: Deregulation of the Practice of Law: Panacea or Placebo?, 42 Hastings L.J. 203, 221, n. 91 (1990). The authors of the Report and Ms. Munro advocate, although not with equal enthusiasm, authorizing the lay practice of law, but both caution that special care had to be taken to prevent unscrupulous notaries from misleading immigrants and non-English speakers. Id. at 244-45.

<sup>40</sup> See, e.g., Cal. Gov't Code 8219.5 (West Supp. 1998) (discussing the literal translation of the phrase “notary public” into Spanish is prohibited). See also, 19 Or. Rev. Stat. 194.162 (5) (1991) (stating “[a] person may not use the term “notario publico” or any equivalent non-English term, in any business card, advertisement, notice, sign or in any other manner that misrepresents the authority of a notary public”); Tex. Gov't Code 406.017 (West 1990); *The Fla. Bar v. Nicholas F. Fuentes*, 190 So.2d 748, 750-51 (Fla. 1966) (discussing the court enjoining the literal translation of “Notary Public” to the Spanish “Notario Publico” or the use of the Spanish words “Notaria,” i.e., a notary's office, because they were misleading persons into believing that the user was a legal practitioner).

<sup>41</sup> One rare example of substantive law specialization that is governmentally enforced is the patent bar. 35 U.S.C. sec. 31.

<sup>42</sup> See generally Hamish Adamson, *FREE MOVEMENT OF LAWYERS* (1992) (discussing the extent of legal system specialization within the European Union).

<sup>43</sup> The Florida Bar, for example, has 24 “certified” specialties.

<http://www.FloridaBar.org/certification> (“A lawyer who is a member in good stand-

tionally, clients in the United States are not required to choose a specialist whether they be self-designated or bar-certified. But in Europe clients are legally required to seek the services of certain specialized professionals by governmental mandate. The closest common law analogy that might be drawn would be between the Solicitor and Barrister distinction made in England and Wales in the United Kingdom,<sup>44</sup> although I do not find this an especially helpful example with my U.S. students. I introduce my students to the official, governmentally defined legal specialties that are common outside of the United States and to the admission, regulation and ethical requirements that apply to each.

I also point out that in the United States the government is not a major employer of legal professionals — with about eleven to thirteen percent of our law-trained people being employed by the government— when compared to Europe, where

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ing of The Florida Bar and who meets the standards prescribed by the state’s Supreme Court may become board certified in one or more of the 24 certification fields.”) (last visited April 17, 2010).

<sup>44</sup> “A solicitor acts as a legal adviser to his clients and conducts legal proceedings on their behalf, instructing a barrister to advise and to conduct cases in court when necessary.” Stephen O’Malley, EUROPEAN CIVIL PRACTICE 1456 (1989). The Barrister, generally speaking, is the legal expert and litigator; he “is to act as legal consultant and as an advocate in court.” Id. at 1458. The barristers are increasingly specialists in particular fields of law who advise solicitors and present cases in court. Zahd Yaqub, *The Legal Professions in the United Kingdom*, in THE LEGAL PROFESSIONS IN THE NEW EUROPE 300, 303 (Allan Tyrell & Zahd Yaqub eds., 1993). The solicitors do not have a mandatory monopoly over legal advice, just their status as certified legal professionals. Id. at 325. In litigation, both solicitors and barristers are allowed to subscribe pleadings. Id. at 311. The barrister is sometimes given the exclusive right to appear in court, although solicitors may also appear in certain lower courts or on appeals. Id. The Barrister must usually be brought in to represent a client by a solicitor, but he may also be retained by a foreign attorney in certain cases. O’Malley, *supra*, at 1458-59. Other than the the foreign-lawyer exception, however, the solicitor, effectively acts as a barrier between the barrister and the general public, since the barrister may not approach clients directly and must be brought in by a solicitor. Yaqub, *supra*, at 317.

the government may employ almost half of law graduates.<sup>45</sup> This employment picture reflects fundamental differences in the allocation of legal resources, with the Europeans dedicating a larger portion to publicly funded uses of legal services. I like to relate the readings for my comparative law class to other courses that I teach, so I point out how these choices might reflect the contrasting values of the different civil procedure systems. In Europe, they may have to hire larger numbers of judges required to manage judge-driven inquisitorial fact-gathering in civil litigation. In the United States, on the other hand, we shift discovery in civil cases to the initiative and financing of the parties, rather than the court, and a majority of cases settle without the need of a trial; thus, we need relatively fewer judges.

I finish this chapter with a discussion of the ethical concerns, and dangers, posed by the multiple legal professions outside the United States. In particular, I warn students that the adversarial ethic generally, and attorney-client privilege rules in particular, may be radically different for some of the legal professionals with whom they may interact as counsel. Notaries, for example, will have a duty to disclose facts to the other parties to the transaction that an American lawyer would not. The secrecy of notarial transactions could be analogized to the attorney-client privilege only as to third parties not involved in the juridical act contained in the public document.<sup>46</sup> For exam-

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<sup>45</sup> The American Bar Foundation reported that for the year 2000 general government and judiciary employment of attorneys accounted for 11% of overall legal employment, the same as it was in 1991 and up from 13% in 1980. The numbers are taken from the American Bar Foundation's Lawyer Statistical Report for 2004, and are summarized in the "Demographic information" page in the ABA's statistics page. [http://new.abanet.org/marketresearch/PublicDocuments/Lawyer\\_Demographics.pdf](http://new.abanet.org/marketresearch/PublicDocuments/Lawyer_Demographics.pdf) (last visited April 13, 2010).

<sup>46</sup> The contents of a public document are secret material that may not be shown or otherwise divulged to third parties. Copies of public documents in the *protocolo* (the col-

ple, a notary has an obligation to notify a buyer of a defect in the seller's title, and of any encumbrances over the property. The notary is also allowed to inform non-parties to a transaction of defects in title and encumbrances that should be reflected in a public registry, even if a party to the transaction conveys this information to the notary.<sup>47</sup> Even more importantly, the notary has an affirmative obligation to search the public registry for information relevant to the transaction, and to disclose it to the parties.<sup>48</sup>

Therefore, an attorney may inadvertently disclose client-confidential information to someone he or she believes is covered by the privilege, simply because they are a fellow legal professional. This is just one example of the ethical landmines that comparative law can help us to avoid.

### ***F. The Magical History Tour***

After covering subject areas that are particularly within the students' level of experience and interest, I take them back to the historical origins of the Civil Law Tradition for five chapters. Professor Merryman divided the Civil Law Tradition into a series of historical subtraditions, namely: 1) Roman civil

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lection of original public documents that must be maintained by each notary or notarial office) may be issued only to interested parties as discussed below. Likewise, information from the *protocolo* may be read or divulged only to interested parties, as defined by law. Pedro Malavet-Vega, *MANUAL DE DERECHO NOTARIAL PUERTORRIQUEÑO* 121 (1987). Notarial wills, however, must remain totally confidential until after the death of the testator. *Id.* The one exception to this rule is that the notary may divulge the admission of paternity of a "natural child." *Id.* Violation of the secrecy of the *protocolo* may result in criminal prosecution. *Id.*

<sup>47</sup> See, e.g., Jean Yaigre & Jean-Francois Pillebout, *DROIT PROFESSIONNEL NOTARIAL* 134-136 (1991).

<sup>48</sup> See, e.g., *In re Ramos Melendez y Cabiya Ortiz*, 120 P.R. 796 (1988) (holding that a notary who failed to make his own title search and instead relied on a three-month-old certification violated professional ethics standards).

law; 2) Canon Law; 3) Commercial Law; 4) The Revolution; and 5) Legal Science.<sup>49</sup> This part of the course attempts to educate my United States students to understand what these subtraditions mean.

I start with Roman law in a chapter titled *The Roman Law Roots of the Civil Law Tradition*. I want the students to understand that the civil law tradition very much sees itself, accurately, as the legal heir of 25 centuries of legal development, and that we can identify still-active legal rules that date back at least to the Twelve Tables in the middle of the 5<sup>th</sup> Century BCE.<sup>50</sup> I also want to show them how to conduct historical legal research, which, I point out, may well be relevant to their own practices. For the latter I use the example of the recent line of cases on the Sixth Amendment that have revolutionized the field of Evidence — another of my basic courses — in majority opinions authored by Justice Antonin Scalia who makes extensive use of historical analysis to justify the court’s ruling.<sup>51</sup>

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<sup>49</sup> John Henry Merryman, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* at 6 (2d ed. 1985). See also John Henry Merryman, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (1969) (the seminal first edition of this influential book), and John Henry Merryman and Rogelio Pérez-Perdomo, *THE CIVIL LAW TRADITION, AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* (3<sup>rd</sup> ed. 2007). As I discuss in the conclusion, I eschew commercial law from my coverage.

<sup>50</sup> See <http://www.fordham.edu/halsall/ancient/12tables.html> (an online database on ancient law, including the Twelve Tables) (last visited April 14, 2010).

<sup>51</sup> See, e.g., *Crawford v. Washington*, 541 U.S. 36 (2004) (adopting the “testimonial” view for applying the Sixth Amendment’s Confrontation Clause); *Davis v. Washington*, 547 U.S. 813 (2006) (fully overruling *Ohio v. Roberts* by applying the “testimonial” view whenever out of court statements are offered into evidence over a hearsay and confrontation objection); *Giles v. California*, 128 S. Ct. 2678 (2008) (defining the “forfeiture by wrongdoing” exception to the Confrontation Clause’s bar on the use of testimonial statements); *Melendez v. Massachusetts*, 129 S. Ct. 2527 (2009) (applying *Crawford* and its progeny to bar the use of certificates signed by state laboratory analysts in evidence as violative of the Confrontation Clause).

The next chapter is *The Legal Renaissance: Legal Custom, Local Compilations and the Birth of Canon Law*.<sup>52</sup> Preliminarily, I discuss the survival of Roman law and its displacement as living law by customary law following the fall of the western roman empire. Then I discuss how a Legal Renaissance produced the modern European liberal arts university. Starting in Bologna in the Twelfth century,<sup>53</sup> rediscovered Roman texts generate an academic study of law. This is quickly supported not only by temporal rulers in need of trained professionals to serve in their courts, but also by the Roman Catholic Church. However, conflicts between the Church and the temporal rulers lead to the development of competing Roman and Canon laws, although they were studied side by side in Bologna where the typical graduate would become a “doctor of both laws.” It is difficult to understand the development of European law generally, and in certain fields fields in particular — especially criminal, family, inheritance, and contract substantive law, and of procedure generally— without a rudimentary understanding of Canon law and its development and influence.

Substantively, I focus on family and inheritance law subjects, which I illustrate with references to Roman and Canon law sources. I also use one particularly well-developed medieval code, the Spanish *Siete Partidas*, to illustrate how the law was incorporated into the national legal order during this transi-

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<sup>52</sup> The current Code of Canon Law is that of 1983, which was produced as a result of the Second Vatican Council. The code is available for review at [http://www.vatican.va/archive/ENG1104/\\_INDEX.HTM](http://www.vatican.va/archive/ENG1104/_INDEX.HTM) (last visited April 9, 2010).

<sup>53</sup> Hence the choice of Bologna by the European Union for its “Bologna Initiatives” on the future of legal education in the Union. See generally [http://ec.europa.eu/education/higher-education/doc1290\\_en.htm](http://ec.europa.eu/education/higher-education/doc1290_en.htm) (last visited April 13, 2010). See also Reich, *Recent Trends In European Legal Education*, supra note 30 (discusses the “Bologna process” of reforming legal education).

tional period.<sup>54</sup> I use the power of *patria potestas*, for example, to illustrate the evolution of absolute, male dominated parental power, to the modern obligation to provide for your children. I use inheritance generally, and the concept of forced heirship in particular, to illustrate the civil law tradition's approach to obligations, both formal and moral. Pedagogically, I also find that I need to account for widely varying degrees of historical education among my students. This means using every means available, especially with this generation of students online, web-based systems, to supplement the readings. I provide students with basic summaries of historically significant events and figures, maps, and listings of reliable online resources that might help them to understand the assigned reading.

In the next chapter of the tour I reach the modern civil codes in a chapter titled *The Codification Process*. Here I focus on the French code, and to a lesser extent on those of Germany and Spain. But first I particularly emphasize the French Revolution, and its influence on French attitudes towards the judiciary as a case study in legal culture and its historical roots. In this area I discuss the fiscal crisis of the French state and how it was largely related to their financing of *our* revolution. I also explain the convocation of the Three Estates as a result of the actions of the *Parlement* of Paris by providing a more general dis-

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<sup>54</sup> The *Código de las Siete Partidas* has been described as “a work generally known as a medieval legal treatise and called ‘the first extensive compilation of western secular law since Justinian.’ ” MARILYN STONE, MARRIAGE AND FRIENDSHIP IN MEDIEVAL SPAIN 1 (1990), citing Charles Sumner Lobingier, *Introduction*, in ALFONSO EL SABIO, *LAS SIETE PARTIDAS* vi (Samuel Parsons Scott, trans. 1931). They were drafted under the patronage and probably the supervision of King *Alfonso X, El Sabio*, of Spain during the thirteenth century. Id. at 1-22. Some experts believe that the Partidas did not become effective law until the 1348 *Ordenamiento de Alcalá*, see, e.g., David & Brierley, *supra* note 11 at 57, but others hold that they “were being used extensively as a book of reference by royal judges before 1348.” STONE, *supra* at 10, citing EVELYN S. PROCTER, ALFONSO X OF CASTILLE PATRON OF LITERATURE AND LEARNING 51 (Reprint 1980).

cussion of the regional *Parlements* and how these bodies were seen by the revolution as the power of judges run amok, hence the French aversion to a *gouvernement de juges*.

I conclude this section by discussing the passage of the French *Code Civil* under the careful attention of Napoleon Bonaparte to illustrate the very particular conditions under which the early Codes were passed. Although the revolutions of this period produced the Declaration of the Rights of Man and the Citizen and several constitutions, the most enduring legal product of the period are the civil codes, and in particular the French *Code Civil*. In France, the revolution ingrains in the French legal psyche a particular attitude towards the role of the judiciary in a truly free society of elected legislators and executive officials that is quite hostile to a powerful judiciary in general and to *stare decisis* in particular.<sup>55</sup>

I will also include a section on the development of the German code, as it is related to the concept of “legal science” in comparative law, and thus is a very important variant of the civil law tradition. I also hope to include a section on the Spanish Civil code and on the influence of Spanish law in its former colonies, especially in the Americas. I would cover these two subjects in the three-credit version of the course and would likely not do so in the two-credit course. But I would hope to provide useful information on two important historical variants of the civil law tradition.

The final chapter of the tour is *The Modern European State: From Positivism back to Universalism?* This chapter

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<sup>55</sup> See, e.g., Article 5 of the French Civil Code: “Judges are forbidden to pronounce decisions by way of general regulatory provisions on cases that are submitted to them.” Compare Article 1 of the Swiss Civil Code: “The law regulates all matters to which the letter or the spirit of any of its provisions apply. In the absence of an applicable legal provision, the judge pronounces in accordance with customary law and, in the absence of a custom, according to the rules that he would establish if he had to act as legislator. He is guided by the solutions consecrated by juristic opinion and case law.”

brings the course into the modern age. It is a transitional chapter in which I describe the role of the state and state-formation in the civil law tradition.

The modern European nation states on which I focus are the product of a spirit of nationalism and the notion of state positivism as the only legitimate source of national law that developed mostly during the 18<sup>th</sup> and 19<sup>th</sup> centuries. The nationalization of law displaced the old universal systems of Roman and Canon law — and to a lesser extent of regional customs — with new laws enacted by the central state. But today Europe has returned to a limited but very important type of Universalism mostly as a result of the obligations of membership in the European Union.<sup>56</sup> At the same time, many countries also face internal challenges to the power of the central government that have an important effect on law. This latter phenomenon is developed further in the federalism discussion of the next chapter.

In the United States, we have the unfortunate habit of teaching law as if it were made fresh daily by judicial decisions. We therefore tend to ignore the importance of statutory law, which is indeed quite influential in and prevalent throughout the United States. But these chapters are intended to counter the dehistoricizing of law generally and of our long constitutional legal history and stability in particular. We can therefore benefit from studying rules of law that are still in effect today, even in

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<sup>56</sup> See generally, Josephine Steiner, Lorna Woods and Christian Twigg-Flesner, *TEXTBOOK ON EC LAW* (Oxford University Press 8<sup>th</sup> ed. 2003). See also *Van Gend en Loos*, case no. 26/62 (European Court of Justice 1962) (the highest court in the EU rules that “the Community [now the EU] constitutes a new legal order in international law, for whose benefit the [member] States have limited their sovereign rights, albeit within limited fields.”); and *Costa v. ENEL*, case no. 6/64 (ECJ 1964) (ECJ rules that “The transfer, by Member States, from their national orders in favour of the Community order of the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the Community, cannot prevail.”)

the United States, that have ancient roots. More generally, we can and should learn that current rules and attitudes towards law are framed by the historical experiences that produced them. I emphasize, for example, that federal court jurisdiction was greatly expanded following the Civil War, when for the first time the U.S. courts are given jurisdiction over Federal Question cases, something that had not been granted in the original Judiciary Act of 1789.<sup>57</sup> Understanding the importance of historical awareness makes us better students of all law, even, or perhaps especially, our own.

### ***G. Contemporary National Legal Systems***

This chapter starts a new part of the course that covers the modern states, their basic political and legal structure, and the role of constitutional law and its enforcement in the lives of its citizens.

I cover this subject as a fundamentally twentieth century phenomenon generally and as post-World War II reality in particular. The birth of the modern constitutional states in western Europe was fundamentally affected by the World War everywhere except possibly Spain, which provides a more recent development of a new constitutional culture. I purposely avoid the eastern European experience generally, and the socialist law variant in particular. I focus rather on the constitutional structure of the country's government and in the organization of its legal system in western European democracies. Federalism is a

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<sup>57</sup> Currently, these jurisdictional statutes are in 28 U.S.C. sec. 1332 (diversity and alienage subject-matter jurisdiction) and 28 U.S.C. sec. 1331 (federal question subject-matter jurisdiction). While diversity had been included in the first judiciary act, it was not until 1875 that federal question was added as a basis of original subject matter jurisdiction for federal trial courts. See generally, Erwin Chemerinsky, *FEDERAL JURISDICTION* at 18 and 24 (1989).

matter of special interest and I try to impress upon my students that there are many approaches that are different from our own. My primary case studies have been France's 1958 Constitution of the Fifth Republic and Germany's Basic Law of 1949.

By way of introduction, I remind students that the revolution produced a particularly French approach to the concept of separation of powers. Whereas in the United States we have it as dogma that there are three separate and co-equal branches of government, the French see only two. Specifically, the French system eschews the ordinary judiciary from the listing of government powers, leaving the democratically elected branches, legislative and executive, as the only ones with constitutional legitimacy, especially when judging the legality of administrative or legislative acts. This is reflected in a general prohibition against *stare decisis* and the allocation of judgments over the legality of administrative action to the administrative courts headed by the Council of State,<sup>58</sup> rather than to the ordinary judiciary, and the allocation of constitutionality review of legislation to the Constitutional Council.<sup>59</sup> By contrast, most other European nations take a very different view of these concepts, and allocate the power over constitutionality review to their ordinary courts, although Germany, Italy and Spain, for example, have given the final word on constitutionality to specialized constitutional courts.

This brief overview is followed by a more detailed look at court structure and procedure, with particular emphasis on their relationship with the legislative and executive powers. I start the process with readings dedicated to the structure of the French legal system. Initially, I present a description of appel-

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<sup>58</sup> See generally <http://www.conseil-etat.fr/cde/> (last visited April 13, 2010).

<sup>59</sup> See generally <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/homepage.14.html> (the council's own English-language website) (last visited April 13, 2010).

late procedure generally by using texts specific to France's ordinary and administrative appellate procedure, as they have been attacked in, and modified as a result of, litigation before the European Court of Human Rights.<sup>60</sup> I then use the controversy over the banning of religious symbols in French public schools, particularly as applied to the muslim *hijab* (veil or headscarf), to illustrate the administrative process in that country, and its limited power to protect a religious minority.<sup>61</sup> The ordinary court process in the system headed by the Court of Cassation, and administrative adjudication in the system headed by the Council of State, offer an illustration of the French distrust of the ordinary judiciary to decide the legality of administrative action. The existence of the Constitutional Council — which is anticipated here, but discussed in the next chapter — illustrates the severe limitations imposed by the French constitution on the possible invalidation of legislation.

In addition to separation of powers, another general topic that I try to emphasize for the students in this chapter is federalism. France is an example of a hyper-centralized state in which the national government has basically all the power to legislate, regulate and judge. Germany, on the other hand, has a strong federalized structure, with its *länders* becoming a major player in the business of national government as a direct participant, rather than with the parallel federal and state systems that prevail in the United States. Spain represents an interesting modern trend of allowing regions to develop local autonomy within a basic national constitutional structure.<sup>62</sup> I would like to greatly

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<sup>60</sup> See Mitchel de S.-O.-l'E. Lasser, *The European Pasteurization Of French Law*, 90 CORNELL L. REV. 995 (2005).

<sup>61</sup> See Elisa T. Beller, *The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L.J. 581 (2006).

<sup>62</sup> Article 143 of the Spanish Constitution of 1978 allows the creation of autonomous communities with authority over matters listed in Article 148 and subject limitations

expand this chapter to provide a more inclusive overview of the governmental and then judicial structure of several countries. I would likely still focus on a few countries, particularly France, Germany and Spain, in order to keep the readings accessible and manageable for the students. But I think that it is important that I develop the text myself, in order to make it easier for my students to understand. I also find that France's purposeful choices regarding separation of powers and constitutionality review make a terrific contrast to our practices that forces students to consider our own system more carefully.

I am considering adding a section on comparative procedure to this chapter, or perhaps creating a separate chapter on comparative procedure. This section or chapter would provide an overview of comparative ordinary civil, criminal and administrative procedures. Constitutional adjudication processes would still be discussed in a separate chapter described below, but I would incorporate cross-references to those processes here whenever pertinent. The most common system of introducing constitutional adjudication into the ordinary processes is the "reference" procedure by which an ordinary court forwards a constitutional question arising in a case before it to a constitutional adjudication body. The German Constitutional court has such a system, and it indeed produces most of the constitutional questions decided by it — initially much to the surprise of the drafters of their constitution.

The French Constitution was amended in 2008 for the first time to permit some type of reference from the ordinary civil and administrative courts to the Constitutional Council. The implementing legislation took quite some time to pass, with the first individual reference cases heard by the council in

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in Art. 149. <http://constitucion.rediris.es/legis/1978/ce1978.html> (last visited April 12, 2010.)

March of 2010. The primary reason for the delay appears to have been how to limit the number of cases that are referred to the council from the ordinary and administrative courts.<sup>63</sup> Although this new system is revolutionary for France, the concern over the volume of appeals and inherent case delay is not unique. In Brazil, for example, many judges express concern about the use of compulsory constitutional review as a delaying tactic in otherwise ordinary processes and are interested in implementing some sort of discretionary review system, such as the *writ of certiorari* used by the U.S. Supreme Court.<sup>64</sup> I use these examples to illustrate how our constitutional experience continues to influence constitutional systems around the world. I also want the students to see that political and governmental structures can vary from our own and ask them to consider the reasons for the differences. Lastly, they once again see our own system from a more theoretical and detailed perspective.

### ***H. Constitutionality Review: Case Studies***

I dedicate the final chapter of my course to “constitutionality review.” I carefully avoid any other label in order to impress upon students the varying nature of review of the constitutionality of acts by the legislative, the executive and judicial powers. I am also mindful of the distinction between the ordinary judiciary and the executive adjudication system, especially in France, as covered in the previous chapter. The chapter currently provides a general overview of constitutionalism and constitutionality review, which I follow by a more detailed look at the German Federal Constitutional Court and the French

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<sup>63</sup> See note 67 *infra* and accompanying text.

<sup>64</sup> See generally 28 USC sec. 1257.

Constitutional Council. I would also like to add references to other constitutional courts, especially that of Spain.

When the German Constitutional court was originally created, it was divided in the two *Senats* that it currently has. But it was generally expected that one Senate would only handle individual complaints in concrete norm control. They expected that the overwhelming majority of claims would come from the political process, meaning that minorities in parliament and dissenting members of the government would use abstract norm control to insert judicial review into the legislative process. But the reality was that over 97% of the filings came from individuals involved in actual cases, i.e., as concrete norm control. So they had to reallocate responsibility over those cases by dividing them more or less equally between the two Senates, using the litigant's last name to split them alphabetically.<sup>65</sup>

In France, the Constitutional Council was not conceived as a judicial body at all. Rather, its is primarily staffed by persons with distinguished careers in political office or the professional bureaucracy. Indeed, few of the appointees have held high office in the ordinary magistrature (judiciary), but almost all are former students or graduates of either the *Ecole Nationale D'Administration* or one of the *Instituts D'Etudes Politiques*, or from both types of graduate schools, and these schools are designed to train future politicians and public servants not associated with the judiciary.<sup>66</sup> But even the French have decided that political minorities should be given the opportunity to access the Constitutional Council. Thus, in 1974, they amended the constitution to allow any 60 members of parliament to summon the Council. But the "veils" controversy, which produced a statute that passed with only 48 dissenting

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<sup>65</sup> See generally <http://www.bundesverfassungsgericht.de/en/index.html> (English language site) (last visited April 13, 2010).

<sup>66</sup> I discussed this above at notes 26-28 and accompanying text.

votes, led to a political reconsideration of the rights of political, and in this case racial, ethnic and religious minorities. Thus, as discussed above,<sup>67</sup> in 2008, the constitution was once again amended to allow some references to the Constitutional Council at the request of individual litigants in both the ordinary and administrative courts. The organic act implementing this legislation took some time to pass and the first referred cases were heard in the spring of 2010.

### III. Pedagogical Assessment: An Exam Question

At the end of the course that I have described in the previous section, my favorite final exam exercise is to ask students to reconsider and, if they wish, redesign the U.S. constitutionality review system by using the comparative European examples that we discussed in class. This forces the students to consider whether the cooperative appointment process of having the President nominate with the advice and consent of the Senate is the best way of doing things in our system. Age or term limits for justices always generate very interesting discussion, with most students favoring one or the other. Almost no student has ever advocated the total elimination of concrete norm control in the U.S., but a large percentage of the class has favored adding some type of abstract norm control. The students are also instructed to discuss the educational qualifications of the members of the tribunal, which forces them to reconsider the general legal education, and ethic, taught in U.S. law schools, and con-

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<sup>67</sup> See generally <http://www.assemblee-nationale.fr/english/8ab.asp> (the text of the constitution in English, with amendments, including those of July 23, 2008, creating the new reference procedure) (last visited April 12, 2010). Article 61-1 of the constitution, passed in 2008, provides: "If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council, within a determined period." *Id.*

trast it with the highly-specialized training and education programs for practitioners, administrative lawyers and judges in many western European countries.

The examination is a take home test and the students are permitted to use any research tool available to them, including discussing the material with each other. This is subject, however, to a strict requirement of academic honesty and originality of their work, which I am easily able to enforce since I personally grade all the papers.

In this section, I will transcribe one of the forms of these exams, and provide a narrative discussion of the pedagogical motivations and expectations that led me to include each topic. The question will be designated by italics and the narrative in normal text. The exercise starts with a set of instructions for the students:

*1) Show that you have a command of the material we covered in class that is pertinent to your answer. To this end, provide references to our casebook, web postings, and to your notes of our class discussion. ...*

*2) Appropriately identify your sources in your answer. ...*

I ask students to reference their work for several reasons. First, it requires them to conduct basic research, if at least to double-check their notes. I also very specifically warn students against plagiarism, which, in this electronic age of cutting and pasting is quite serious, even if sometimes inadvertent. I also try to get them to be thoughtful about their choice of sources, especially when conducting electronic research. The world-wide-web is an incredible resource for any researcher, but we must be very careful. In the notes for this essay for example, I have purposely referenced many online resources, but mostly educational, governmental or organizational, i.e., from institu-

tions that I know to be reliable. (I hope that my textbook and website will become a good bibliography for reliable online resources.) The references made by the students show me if I have been successful in instilling in them a proper weariness of online garbage. But they also show me that they are able to use comparative methodology to conduct their research in a very productive and proper manner.

*3) Show that you can identify analogous United States or Non-U.S. legal concepts and materials that are the proper subject of comparative analysis. This may require you to conduct some modest research outside our class materials. Please keep it simple. ...*

I want the students to use the foreign models that we studied in class to reconsider and review our own. This often requires them to go back to their first year texts, to their university American History textbooks and to other resources. (I increasingly discuss the U.S. aspects with specificity, and I expect to include extensive descriptions of the U.S. system in my textbook.) I am especially delighted when they cite from the Federalist Papers to show how the founding fathers might have considered certain matters at the time of the drafting of our Constitution.

*4) You are permitted to take one of two frames of reference: (1) that of United States law student or (2) that of a non-U.S. student. However, you are limited to the class discussion of the U.S., French and German constitutional systems, in order to keep you focused on a reasonably narrow area that was covered in the class materials.*

This instruction accounts for the significant number of foreign students that take my course. For those students, the

course becomes an introduction to United States law and I want them to be able to write their exam project accordingly.

*5) Finally, you should discuss the factual or legal factors disclosed by your research in a thoughtful and original manner that shows your command of the material related to our course. This last part is especially important if you wish to earn a high grade. Remember the themes, perspectives and emphasis of our class discussions.*

This instruction is a reminder to the students that they have been studying a legal perspectives course and that their individual use of those perspectives and their own take on the material that we covered is the best possible display of their grasp on the methodology of comparative law as I taught it to them.

This is followed by the actual question:

*QUESTION*

*Draft and explain an amendment to the Constitution of the United States that will govern the resolution of disputes regarding the constitutionality of legislation issued by the United States Congress. In structuring your amendment and its discussion, you should consider and address the French and German constitutional systems and contrast them to the current U.S. system. You must address the following topics both in the language of the amendment and in your discussion of it:*

I vary the specific assignment. Sometimes they write a memorandum to a senator, sometimes they write a law, sometimes they write an amendment to the constitution. I also limit or broaden the number of foreign systems that they may reference in comparison to the United States. This depends on the length of the essays that I want them to produce and will also reflect

whether I taught a two- or a three-credit class. That said, the basic purpose of the question is generally the same.

*(1) What type of body should be responsible for giving the final word on the constitutionality of executive, legislative or judicial action that is based on an act of congress?*

Here I want them to consider whether they want a court at all as the arbiter of constitutionality. They are welcomed to consider the original French system of having courts refer questions of constitutionality to the national assembly if they wish. But they usually focus on the competing models of a non-judicial constitutional council and a specialized court such as the German Federal Constitutional Court, as opposed to our appeals-court model.

*(2) What should be the number, qualifications, length of service and method of selection and appointment of members of this body?*

Here I want them to consider why our Supreme Court is currently composed of nine justices. This usually generates discussion of FDR's "court-packing" attempt and the times when the number of justices was smaller than nine. I also want them to consider that you do not have to be a lawyer to be a justice and that there is no minimum age requirement for appointment. By contrast, the European courts sometimes have very strict minimum age and education requirements or a strict custom applicable to appointments. As for the appointments process, in the Federalist No. 76, Hamilton specifically addresses "co-operation" between the President and the Senate in the appointments process, language that I am happy to see students

reference.<sup>68</sup> In Europe there are often unilateral appointments (in France and Spain for example). A few students will analogize to the French system of having the President of the Republic, the President of the Senate and the President of the National Assembly appoint members of the Constitutional Council, without the need for general legislative acquiescence. Others will follow the German system allocating appointment authority within the two houses of the legislative branch (Bundestag and Bundesrat) and requiring a supermajority for appointment. A few will analogize to the supermajority requirement to simply add a two-thirds majority requirement to the U.S. Senate's advice-and-consent role. In class, I generally discuss the confirmation votes for the *current* members of the Supreme Court, and point out that only Justices Thomas and Alito would have failed confirmation if a two-thirds vote was required.<sup>69</sup> Although term-limits, which are the norm in Europe, have not been very popular with students, compulsory retirement ages have proved very common in the answer essays.

*(3) Should the state and/or federal courts be allowed to determine the constitutionality of executive, legislative or judicial action that is based on an act of congress? If so, how? (e.g., the German Reference Procedure, or the U.S. "case and controversy" standard.)*

Here the students have to consider whether or not to allow all courts at all levels to consider questions of constitution-

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<sup>68</sup> Alexander Hamilton, *The Federalist No. 76*, <http://www.constitution.org/fed/federa76.htm> (last visited April 13, 2010).

<sup>69</sup> I limit my class discussion to the current members of the court, though others in the past have also failed to garner a two-thirds majority and some were disapproved. A record of Senate votes on Supreme Court Nominees is available online at <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited April 14, 2010).

ality. They can take such power away completely, and allocate it to a body such as the Constitutional Council, or even to a separate Constitutional Court, but with exclusivity or with a reference requirement. Most students in the U.S. seem comfortable with our current system, but one of the most common additions is some type of abstract norm control to allow members of congress to challenge certain laws, as well as granting certain types of organizational standing to pursue such challenges. The students will usually illustrate these arguments by critiquing standing and case or controversy decisions by the U.S. Supreme Court. The “reference” procedure is not very popular with the U.S. students, although occasionally some may impose it on the state courts.

*(4) How and when will matters be submitted to this body? (e.g., appeal from lower courts, reference procedure, citizen complaint, request for advisory opinion by those with special standing, like the President, the Speaker of the House, President of the Senate, any number of congressmen and senators, or equivalent state officials).*

Here students have to decide how matters will reach their Supreme Court, Constitutional Court or Constitutional Council. Most U.S. students are comfortable with some kind of discretionary system in which the court itself exercises jurisdictional discretion. Variants usually cover exceptions to the case and controversy and standing rulings of the U.S. Supreme Court.

*(5) What will be the effect of the decisions of the constitutional review body when interpreting the Constitution of the United States? (Please consider three areas: (1) In the same case, as to courts and parties involved; (2) Within the judiciary generally as “precedent”; and (3) As to the other branches of government (legislative, executive and judiciary) at both the state and federal levels.*

The first item reminds the students that in France an appellate decision is not even binding on the lower trial or appellate court, until the court of appeals or of cassation issues a second concordant ruling. They also need to consider whether cases will be returned to a different court upon remand, as is common in France, though it is unheard of in the United States. Then they often discuss the concept of precedent and *stare decisis*, as well as how and by whom they are defined. In the European examples that I show them, I emphasize that the legal effect of rulings is generally expressly set out in constitutional or statutory provisions. But in the United States the courts themselves define what *stare decisis* means. Lastly, they have to consider the effect on the legislative and executive branches. This last issue requires them to consider other concepts such as equitable remedies and against whom they may be directed, since in many civil law countries such remedies, especially injunctions and contempt, are severely limited and may even be unavailable against the other branches of government.

*Finally, your discussion should be critical. In particular, you must acknowledge comparative alternatives and explain why you selected a particular method or structure over the alternatives illuminated by our comparative law course.*

This general instruction is the most important one when it comes to grading. I need them to be as specific as possible in acknowledging the material that we covered. I make it very clear that they may choose or reject any model at their sole discretion, but their discretion must be knowingly exercised. More importantly, each student must write knowledgeably about the material, so that I may assess the pedagogical effect of the readings and of our class discussion. The students' well-crafted es-

says usually show me that I have largely succeeded in getting them to use foreign legal systems to understand our own in a level of detail that they had not considered before taking my course. I have had to impose strict length limitations in order to keep the essays from being too long.

#### **IV. Conclusion**

My motivation for offering this essay at this conference is that believe that having more students and lawyers who are trained in the basics of comparative law will make international exchanges such as this one more effective. Moreover, I believe that in the United States there is a special need to have a strong, basic comparative law course that is a part of the curriculum certainly at the law school level, and perhaps even starting as an advanced undergraduate subject. Unfortunately, the biggest challenge to having such classes is course design and pedagogy generally, and having access to an appropriate textbook in particular.

My comparative law course, and hopefully my textbook on the subject reflecting the content and values that I have articulated here, can be divided into three parts. The first part covers basic comparative methodology and uses increasingly complex case studies to provide domestically-relevant examples of their use. These chapters are also intended to capture the students' interest in and to generate enthusiasm for the course.

The second part of the course is essentially an introduction to the legal history of western Europe. Recall that Professor Merryman divided the Civil Law Tradition into a series of historical subtraditions, namely: 1) Roman civil law; 2) Canon Law; 3) Commercial Law; 4) The Revolution; and 5) Legal

Science.<sup>70</sup> I cover those areas that I believe to be highly relevant to a new course in comparative law in my “magical history tour” part of the course. Readers will note that I eschew commercial law. The reasons for this are the “slow death” of the commercial codes in most countries, and the fact that I very purposely want my course *not* to be trade law. Therefore, I leave that subject matter for other courses.

The final part of the course covers chapters on the organization of the modern constitutional nation state and the role of law and legal structures in the functioning of a country. I also cover legal procedure and constitutionalism in this part of the course. In the two-credit variant of the class in particular, I must keep a careful focus on just a few countries and I find it most effective to use western European states for that purpose. I therefore mostly refer to France and Germany in this section. Time and book-space permitting, I would like to expand this coverage, but too much expansion is probably undesirable for the general comparative law course, and should probably be left instead to more country- or region-specific courses.

Pedagogically, the challenge for all instructors and for me as a textbook author is to be well-prepared to explain the historical context of the readings that are assigned to the students. Providing students and faculty with the resources needed to achieve this level of understanding is probably the most daunting task of the book project that I am developing. On the one hand, it will require my own expository notes of the subjects to be extensive and written in clear language designed for U.S. law students. On the other hand, writing those notes will demand that I study and summarize very extensive amounts of reading material.<sup>71</sup> While I look forward to the task, it will be

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<sup>70</sup> See note 49 *supra* and accompanying text.

<sup>71</sup> I am seriously considering the possibility of enrolling in a doctoral program in legal history as part of this book project.

the most difficult part of the research and writing process for my comparative law textbook. More generally, the challenge for the comparative law teacher is to study the current law and legal history of multiple nations, I hope to make a contribution to simplifying these efforts.

But I must come back to the original question that motivated this essay: what is my pedagogical purpose in teaching comparative law at a law school in the United States?

I want my students to be great ambassadors of U.S. law and to bridge the cultural gap for their clients and colleagues in translational legal transactions. But as their law school professor I am happiest using comparative examples to improve their understanding of their own legal system. The students' well-crafted essays in response to the question discussed in the previous section often show me that I have succeeded in getting many of them to use foreign legal systems to understand our own in a level of detail that they had not considered before taking my course. To be sure, understanding their own legal system makes them better able to communicate with foreign clients and counterparts, and this makes them better ambassadors of law because they are better exponents of the laws of the United States, especially for foreign clients and colleagues.

Which brings me back to the start of this essay as my contribution to the conference: if we are to engage in international legal exchanges, we must become better comparativists. I have spent the past fourteen years trying to educate better comparativists in my classroom, and I hope to continue to do so both as a teacher, as a writer, and as a contributor to these international exchanges. Thank you.