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# On Nourishing the Curriculum With a Transnational Law Lagniappe

Anita Bernstein

Law schools use their first-year curricula to tell their constituencies—students, regulators, donors, faculty, and other interlocutors—which aspects of legal education they think matter most.<sup>1</sup> When they look over the three-year span of the typical student's enrollment, persons who govern schools expect enthusiasm to dwindle. They have seen goodwill run thin, distractions build up, focus dissipate, money get spent somewhere else; they know that central messages become less audible over time. Triage assigns the most crucial material to Year One: *Before you leave*, the plan tells students and the audiences around them, *that is, before you start forgoing the curricular for the extracurricular, here are some things we really want you to learn. We know you will probably tune out later, but for these items, please tune in.*<sup>2</sup> Proposals to reform the first-year curriculum come to stand in for curriculum reform generally, a one-third share of time bearing more weight than the two-thirds ahead.<sup>3</sup>

Joining a broader discussion of curriculum reform, I start with a theme that the Association of American Law Schools announced for its 2006 annual meeting: “[I]t is important for first-year law students to gain experience in transnational law, both for purposes of their later legal education and to prepare them for the kind of law practice they are likely to engage in after

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1. See, e.g., Bethany Rubin Henderson, *Asking the Lost Question: What is the Purpose of Law School?*, 53 J. Legal Educ. 48, 75 (2003) (proposing drastic revisions in the first-year curriculum to embrace law and society and legal norms); Todd D. Rakoff, *The Harvard First-Year Experiment*, 39 J. Legal Educ. 491 (1992) (noting discontents with pedagogical traditions at Harvard).
2. For a challenge to this approach from a recent law school graduate, see Christophe G. Courchesne, “A Suggestion of a Fundamental Nature”: *Imagining a Legal Education of Solely Electives Taught as Discussions*, 29 Rutgers L. Rec. 21, 51-53 (2005) (proposing to reverse “the impulse in law school faculties” to add more requirements to the second- and third-year curricula by eliminating requirements in the first-year curriculum).
3. For example, in his essay reflecting on being a dean after five years in the job, Allan W. Vestal equated “curriculum reform” with changes in the first-year curriculum. “A River to My People...”: *Notes From My Fifth Year as Dean*, 37 U. Toledo L. Rev. 179, 190 (2005).

graduation.”<sup>4</sup> The proposition implicitly disparages as inadequate the venue where most instruction in transnational law for American law students now takes place: the sprawling, ill-supervised upper-level menu of elective courses. Electives in transnational law suffer another insult by being sited outside the circle of upper-level courses that includes trusts and estates, family law, and commercial law: “bar courses,” that is, which a student immediately after graduating might feel relieved to have taken.<sup>5</sup> Thus while law schools could impart the benefits of transnational law—gains to “later legal education” and practice—via a required course later on, course placement inside the first-year curriculum would emphasize the seriousness of the venture.

Seriousness is my concern, and to broach the subject I use “lagniappe” as a way to think about deficiencies in many versions of this proposal to change law school pedagogy. Around the Gulf Coast of the United States, a lagniappe is a small frill, gift, or bonus, often of an edible nature.<sup>6</sup> Though often enjoyable to give and receive, a lagniappe can never be important. This particular lagniappe—among reform notions, not all that new—will

4. See American Association of Law Schools, 2006 Annual Meeting Program Brochure, What is Transnational Law and Why Does it Matter?. The AALS likes to troll in these waters.

The term “transnational law” is, according to one scholar in this field, even “more nebulous” than “comparative law” and “international law.” Catherine Valcke, *Global Law Teaching*, 54 J. Legal Educ. 160, 163 (2004). Valcke notes a common “technical” understanding of this phrase: “an amalgam of legal relations and instruments that, while involving private citizens directly, cross national boundaries.” *Id.* This understanding is present in the online Transnational Law Database, operated out of the University of Cologne. See Central’s Transnational Law Digest & Bibliography, available at <<http://www.tldb.de>> (last visited May 3, 2007). It is close to my own working definition of what law school curricula call “international business transactions.” In this forum, however, I believe that many contributors regard “transnational law” as extending beyond “private citizens” to cover comparative law and international law as well. See Gerald Torres, *Integrating Transnational Legal Perspectives Into the First Year Curriculum*, 23 Penn St. Int’l L. Rev. 801, 802-05 (2005) (offering reflections from a recent president of the AALS on adding international law to his property course).

5. See *infra* notes 65-66.

6. A classic of American literature offers an amiably extended definition:

We picked up one excellent word—a word worth traveling to New Orleans to get; a nice limber, expressive, handy word—“Lagniappe.” They pronounce it lanny-yap.... It is the equivalent of the thirteenth roll in a “baker’s dozen.” It is something thrown in, gratis, for good measure.... When a child or a servant buys something in a shop—or even the mayor or the governor, for aught I know—he finishes the operation by saying,—

“Give me something for lagniappe.”

The shopman always responds; gives the child a bit of liquorice-root; gives the servant a cheap cigar or a spool of thread; gives the governor—I don’t know what he gives the governor; support, likely.

Mark Twain, *Life on the Mississippi* 450 (1891). The 2006 AALS Annual Meeting was originally scheduled to be held in New Orleans. Well housed in our Washington, D.C., substitute location, some speakers at the meeting adverted to the devastation of Hurricane Katrina, a catastrophe that I wish to remember here.

have almost no impact on legal education or the practice of law until curricular reformers commit to linking the measure with consequences.<sup>7</sup>

In these reflections I am indebted to, but also veer a little from, the thesis that Catherine Valcke offered in this journal a couple of years ago.<sup>8</sup> Valcke used an epigraph about the importance of seriousness—"Knowledge tourism is ruled by laws of surface that capitulate at the first signs of rigor"<sup>9</sup>—to launch her critique of "global law teaching," most of which I applaud. I do not share all the premises of that article, however, and so hope to persuade readers who may also not share them. Valcke begins with the proposition that the purpose of law school is to make a student capable of "thinking like a lawyer," a tautology-tinged phrase that in my view adds little weight to her critique. Here I eschew claims about the purpose of law school and stick to the smallest premise I can identify: Law schools seek, or should seek, to educate their students. Valcke's views on what law school is for lead her to make "specific recommendations" about curricular design;<sup>10</sup> my stance of agnosticism prevents me from evaluating these recommendations and offering any of my own. I confine myself to urging caution before embracing proposals that purport without specific detail to make the law school curriculum more transnational, international, comparative, or global.

Global-teaching initiatives, which, as Valcke notes, "remain largely disjointed, piecemeal, [and] lacking in overarching design,"<sup>11</sup> raise questions about what their designers hope to achieve: If integrating transnational perspectives into the curriculum is the solution, what is the problem? Let us postpone for now—I'll get there—consideration of the possibility that the measure consists of only faddishness with no objective or window dressing to make a law school look like something it is not.<sup>12</sup> To engage with integrating transnational perspectives into

7. For my earlier exploration of this point see Anita Bernstein, *Conjoining International Human Rights Law with Enterprise Liability for Accidents*, 40 Washburn L.J. 382, 410-11 (2001).

8. Valcke, *Global Law*, *supra* note 4. Grossman may intend a point similar to Valcke's when he recommends "a qualitative rather than a quantitative change in legal education." Claudio Grossman, *Building the World Community: Challenges to Legal Education and the WCL Experience*, 17 Am. U. Int'l L. Rev. 815, 818 (2002). A plateful of lagniappes might be an example of quantitative rather than qualitative change. In his summary of curricular reform at his own institution, however, Grossman refers to large numbers of options and offerings—see, e.g., *id.* at 838-39 (enumerating eight clinical programs); *id.* at 844-50 (reporting on the large number of projects undertaken by the Center for Human Rights and Humanitarian Law)—suggesting that he cares about quantity too. On hefty buffets for students, see *infra* notes 34-40 and accompanying text.

9. In the original, "La fonction de touriste de la connaissance se conforme à des lois de surface qui capitulent devant les premières rigueurs." Valcke, *Global Law*, *supra* note 4, at 160 & n.1 (quoting René Char, *Recherche de la base et du sommet* 741 (1965)) (translation by Catherine Valcke).

10. Valcke, *Global Law*, *supra* note 4, at 176-81.

11. *Id.* at 160.

12. See Bernstein, *Conjoining International Human Rights Law*, *supra* note 7, at 410.

the first-year curriculum as a solution to a problem, I move to another law review article and borrow the framework presented by Patrick M. McFadden.<sup>13</sup> McFadden addresses what might be called a macro problem related to the practice of law in the United States—that is, what crystallizes around U. S. courts. A “micro”-counterpart of his thesis can be extracted and applied to reform of the law school reform: I agree with McFadden that provincialism is an unfortunate condition and a good condition to ameliorate. I seek to join his larger project by applying the McFadden diagnosis of U.S. courts to U.S. law schools.

Lagniappes, however, offer more than a cure for provincialism—recall Mark Twain’s identification of a lagniappe in anything from “liquorice-root” to a cheap cigar and support for the Louisiana governor—and so it becomes necessary to worry about overuse and misapplications. To express this concern, I turn to Michael Ramsey’s essay on foreign sources in United States constitutional law. Ramsey reflects on a “serious project” whose credibility becomes eroded when practitioners withhold rigor.<sup>14</sup> Here I contend that improving the curriculum, however mundane an administrative task it may seem, calls for clarity—maybe even rigidity—similar to what Ramsey deems integral to cogent argument about abstractions like human rights.

### **The Problem, Macro Version: Provincialism in American Legal Theory and Practice**

McFadden argues that the United States judiciary manifests ignorance of, and resistance to, transnational law. He identifies three faces of provincialism that marginalize doctrines and methods that ought to be central rather than peripheral in U.S. courts. The first of these “three faces” is *jurisdictional* provincialism, an inclination that causes courts to decline cases containing references to international law. Jurisdictional provincialism begets a tendentious reading of doctrines—among them the political question doctrine, forum non conveniens, and foreign sovereign immunity—that cause the wrongful ejection of disputes from American courts. Correctly understood, these doctrines often will not prevent a case from being heard, but judges reach for them to ease their uncomfortable encounters with foreign material.

The second of the three faces is *doctrinal* provincialism, whereby courts reject and downplay the force of international law as it emerges from its main sources: “treaties, custom, and general principles of law.”<sup>15</sup> A doctrinally provincial judge might treat such long-standing sources of law as suspect, without good reason. For example, the judge can limit the effects of treaties and custom by insisting that these sources be “self-executing.”<sup>16</sup>

13. Provincialism in United States Courts, 81 Cornell L. Rev. 4 (1995).

14. Michael D. Ramsey, International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*, 98 Am. J. Int’l L. 69, 69 (2004).

15. McFadden, Provincialism, *supra* note 13, at 11.

16. *Id.* at 11.

When manifesting the third face, *methodological* provincialism, courts overrely on American-style precepts and patters of analysis to adjudicate classes of cases that call for a wider range of methods. Differing from foreign and international law traditions, American-style legal analysis places heavy weight on published decisional law, especially appellate-level opinions, to the neglect of statutes and scholarship. This emphasis has its virtues but will not always lead to the right result. In further illustration of methodological provincialism, American judges have interpreted treaties as if they were statutes or contracts and used domestic citations to support claims that have a stronger foundation in international law.<sup>17</sup>

Among the judicial opinions that McFadden gathers to support his claim about provincialism, *United States v. Alvarez-Machain* is especially pertinent because it illustrates the jurisdictional, doctrinal, and methodological "faces" of the phenomenon—a hat trick, perhaps, when compared to cases that illustrate only one or two.<sup>18</sup> Humberto Alvarez-Machain was a Mexican physician who resided in Guadalajara. A federal indictment alleged that he had participated in the torture and murder of an American law enforcement officer in Mexico. Frustrated by Alvarez-Machain's inaccessibility in his homeland, United States officials encouraged Mexican nationals to kidnap him so that he could be brought to California for a trial. After his kidnapping and removal to the United States, Alvarez-Machain was tried and convicted, the vehement complaints of the Mexican government (and onlookers in other countries) about his abduction notwithstanding.<sup>19</sup> The district court for the Central District of California ruled that the abduction violated an extradition treaty between the United States and Mexico, and thus United States courts lacked jurisdiction.<sup>20</sup> The Ninth Circuit agreed and ordered Alvarez-Machain repatriated to Mexico.<sup>21</sup> The Supreme Court reversed, holding that U. S. courts had jurisdiction to try Alvarez-Machain for violating United States law.

Some scholarly writing has defended this decision as consistent with international law,<sup>22</sup> but McFadden finds this defense beside the point: what matters most about *Alvarez-Machain* is that although it contained enough material to fill "a three-day conference on international law, with panels on international human rights, territorial sovereignty, extradition, national jurisdiction to prescribe and enforce domestic legislation, diplomatic

17. *Id.* at 14-15.

18. 504 U.S. 655 (1992).

19. 504 U.S. at 657-60.

20. *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990) (involving Dr. Alvarez-Machain as a co-defendant).

21. *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991).

22. McFadden cites Malvina Halberstam, In Defense of the Supreme Court Decision in *Alvarez-Machain*, 86 Am. J. Int'l L. 736, 737 (1992), and John M. Rogers, Response to President's Notes on *Alvarez-Machain*, ASIL Newsletter, Jan.-Feb. 1993, at 5. McFadden, Provincialism, *supra* note 13, at 16, 21-22.

protection by a state of its own nationals, and the international drug war,” in studying the case the Supreme Court clung to domestic law and American legal-analytic conventions.<sup>23</sup> Jurisdictional provincialism? Check. Justice Rehnquist, writing for the Court, determined that this alleged “violation of general international law principles” was “a matter for the Executive Branch.”<sup>24</sup> In other words, says McFadden, Rehnquist held that a violation of international law could find no remedy from the judiciary.<sup>25</sup> Doctrinal provincialism? Yes, in the same passage: if customary law cannot provide a rule of decision for this case, then as doctrine it is written out of the universe of relevant law.<sup>26</sup> Methodological provincialism? McFadden sees it in an insulting sloppiness: “general international law principles” must mean what international law calls custom, but Rehnquist did not bother to get his nomenclature right, and “[b]ecause international custom has no simple analogue in American law, the Court virtually ignored its importance.”<sup>27</sup>

Harms to legal education attributable to a similar provincialism, this time within the law schools, may now be placed within the McFadden framework.<sup>28</sup>

### **The Problem, Micro Version: Graduating Law Students Ill-Equipped for Global Thinking in the Practice of Law**

Jurisdictional harm, first: the boundary issue. The first-year curriculum is a realm into which international materials typically may not enter. Inaccessibility to instructors cannot explain this unwelcomeness. For example, one researcher published a chart listing international and transnational topics that at least one law school included in a domestic course:<sup>29</sup> adventuresome instructors can add each topic to their own domestic courses with certainty they are not going where no one has gone before. Casual, easy-to-phrase Westlaw and

23. McFadden, Provincialism, *supra* note 13, at 17.

24. *Alvarez-Machain*, 504 U.S. at 669.

25. McFadden, Provincialism, *supra* note 13, at 20.

26. *Id.*

27. *Id.*

28. See generally Larry Catá Becker, Human Rights and Legal Education in the Western Hemisphere: Legal Parochialism and Hollow Universalism, 21 Penn St. Int'l L. Rev. 115, 137 (2005) (“The current state of curricular parochialism in U.S. law schools is well known.”).

29. John A. Barrett, Jr., International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society, 12 Am. U. J. Int'l L. & Pol'y 975, 1011-13 (1997). For example, under Constitutional Law one finds “Treaties”; under Environmental Law, “Transboundary Issues”; under Trusts and Estates, “Foreign Assets.” *Id.* The list is underinclusive: for example, under Legal Ethics it reports zero, but at least one legal ethics teacher has been covering international and comparative material in her course for years, and writing about it. See Mary C. Daly, The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century, 21 Fordham Int'l L.J. 1239, 1252 (1998) (describing a class called “Professional Responsibility in Corporate, Business and International Practice”).

Lexis searches swiftly yield more ideas that an instructor can easily pursue as additions to any course in the curriculum.<sup>30</sup> One dean reported that starting in the fall 1999 semester, instructors at his school “began expanding the scope of their first-year civil procedure, property, constitutional, criminal, contracts, and torts law courses to include components of the international legal system.”<sup>31</sup> The director of an Institute for Global Studies writes that “an organization called Rights International” has “already prepared short paperback supplements that can be used to teach the international aspects of several courses; others are in progress.”<sup>32</sup> Even very traditional, U.S.-focused first-year casebooks typically include references to foreign sources.

Without extensions like these of its current boundaries, the first-year curriculum will continue to declare transnational materials presumptively out of line; when they rule transnational materials out of order in the first-year curriculum, law teachers make these materials literally foreign in courses that have been deemed most fundamental.<sup>33</sup> Students do not learn that the domestic law they encounter in required courses is congruent with—and also occasionally different from—the law of particular foreign nations and international law more generally. They also receive a tacit message that domestic law is superior to its transnational counterparts.

McFadden’s category of doctrinal harm suggests a danger to the training of advocates.<sup>34</sup> At a general level, students may not know what they do not know

30. Search tip: Try “Canad!,” because Canadian scholars and teachers have contributed disproportionately to the literature on global law teaching. See Mark A. Drumbl, *Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders*, 35 *San Diego L. Rev.* 1053 (1998); Aline Grenon and Louis Perret, *Globalization and Canadian Legal Education*, 43 *S. Tex. L. Rev.* 543 (2002); Craig Scott, *A Core Curriculum for the Transnational Legal Education of JD and LLB Students: Surveying the Approach of the International, Comparative and Transnational Law Program at Osgoode Hall Law School*, 23 *Penn St. Int’l L. Rev.* 757 (2005); Valcke, *Global Law*, *supra* note 4.

31. Grossman, *Building the World Community*, *supra* note 8, at 829.

32. Stephen H. Legomsky, *Globalization and the Legal Educator: Building a Curriculum for a Brave New World*, 43 *S. Tex. L. Rev.* 479, 489 (2002). “There has been a movement to introduce international or transnational elements, known as ‘modules,’ into courses that have primarily a domestic law focus, especially courses required as part of the first year curriculum.” John F. Murphy and Jeffery Atik, *International Legal Education*, 37 *Int’l Law.* 623, 624 (2003). In the footnote attached to their sentence, however, Murphy and Atik provide no example of developments in this “movement,” saying only that an article by Phillip Trimble has “provocatively stated” a rationale for this approach. *Id.* at note 4. The Trimble article does not appear to recommend “modules,” however, observing that instructors seem to resent appropriations of their class time to fulfill what they perceive as someone else’s agenda. See Phillip R. Trimble, *The Plight of Academic International Law*, 1 *Chi. J. Int’l L.* 117, 119 (2000) (concluding that “fundamentals” of international law instead “could be introduced in a mini-course of ten or fifteen hours in the first year of instruction”).

33. See generally Barrett, *International Legal Education*, *supra* note 29, at 995-96 (reporting results of an ABA survey that found very little inclusion of international materials in domestic law courses).

34. The danger has not gone unnoticed. See, e.g., Daly, *The Ethical Implications*, *supra* note 29,

about doctrine.<sup>35</sup> At a more particular level, they are likely to miss various precepts of international law—the law of custom, for example—that might enable them to help a client down the road. Of course, if McFadden is correct that provincial American courts will refuse to consider this unfamiliar law, such an invocation of it would produce little gain in these forums. But a pioneering young lawyer could join a larger effort to introduce international law to the provincial judiciary, helping to pave a way to acceptance later. Until that day arrives, lawyers who can exploit transnational material on behalf of clients can advocate more effectively in forums abroad, as well as in the handful of foreign-like forums in the United States.

Finally, methodological harm: Although training in legal research and writing is an accepted part of the first-year curriculum, few students learn transnational legal research in their first year.<sup>36</sup> Nor do they learn alternative conceptions of source material. The “provincial” overemphasis on decisional law at the expense of statutes and scholarship has been extensively critiqued over the decades in these pages and elsewhere.<sup>37</sup> To build on this critique, one

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at 1249-50 (arguing that cross-border work is on the increase for American lawyers, even—especially—within specialties and contexts like family law, criminal defense and prosecution, in-house general counsel positions, and small firms, where newcomers to the profession may have thought they were going into an entirely domestic practice).

Grossman, *Building the World Community*, *supra* note 8, at 826 (2002) (“The continued focus on standard courses, which remain inextricably attached to domestic concerns, is inadequate to prepare lawyers for a new world reality.”).

35. At a panel discussion of the Sarbanes-Oxley statute when it was new, one securities law scholar offered a humorous illustration of the point in another setting:

It reminds me of a student I had many years ago. I failed the student in securities law, and he came around and said, “Oh, I really need these credits to graduate. You’re preventing me from graduating. Can’t you give me a makeup?” Then to try and persuade me, he said, “Professor Karmel, I promise, I’ll never practice securities law.” I said, “The trouble with you is that you won’t know if you’re practicing securities law or not.”

Panel 2: The Evolution of Corporate Governance, 52 *Am. U. L. Rev.* 613, 634 (2003) (remarks of Roberta Karmel).

36. Among American law schools a prominent exception to this generalization is Villanova, where students may opt into an international section for the spring semester of legal writing. Students in this section prepare a memorandum on an international issue for an international tribunal, and argue before judges whom they address as Your Excellency. E-mail from Doris Del Tosto Brogan, Associate Dean, Villanova, to Anita Bernstein, May 29, 2006 (on file).
37. On the neglect of statutes in the American law school curriculum see, e.g., Douglas R. Haddock, *Collaborative Examinations: A Way to Help Students Learn*, 54 *J. Legal Educ.* 533, 534 n.4 (2004); Jack Stark, *Teaching Statutory Law*, 44 *J. Legal Educ.* 579, 579 (1994); see also John F. Manning, *Comment, Justice Scalia and the Legislative Process*, 62 *N.Y.U. Ann. Survey Am. L.* 33, 33 n.2 (2006) (noting and endorsing criticisms of this omission in the curriculum). The neglect-of-scholarship critique, a more diffuse literature, comes from interdisciplinarians who seek to add one or more theoretical perspectives to first-year courses. See Jean Stefancic and Richard Delgado, *How Lawyers Lose Their Way: A Profession Fails Its Creative Minds* 35 (Durham, N.C., 2005) (objecting to formalism in the required curriculum); James E. Krier and Richard B. Stewart, *Using Economic Analysis in Teaching*

might repeat that methodological provincialism can fail a lawyer who would do better as an advocate, a few years later, with the help of these alternative routes to a favorable outcome.

### **The Lagnippe Solution**

Admissions officers in law schools have told me that “international law” is consistently one of the top two curricular interests that prospective students check off on survey forms (typically intellectual property is the other popular subject). Unsurprisingly in a consumer-driven milieu, law schools often claim to offer what they call international or global educational opportunities for students.<sup>38</sup> Looking for specifics, I found some favorites: (1) study-abroad programs;<sup>39</sup> (2) references to a large number of elective courses in international and comparative law;<sup>40</sup> (3) student-edited journals specializing in international, comparative, and transnational law;<sup>41</sup> (4) claims to have attracted many foreign students, especially graduate students;<sup>42</sup> and (5) centers and institutes.<sup>43</sup> This promotional stance makes no overt claims about pedagogy.

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Environmental Law: The Example of Common Law Rules, 1 *UCLA J. Env't'l L. & Pol'y* 13, 17 (1980) (advocating reform of the first-year curriculum to include an introduction to economics for all students who lack minimum training).

38. Several law schools devote large sections of their websites to our subject. See, e.g., Internationalism, available at <<http://www.law.umich.edu/prospectivestudents/graduate/international.htm>> (last visited May 3, 2007); Welcome to International Programs at Duke Law, available at <http://www.law.duke.edu/internat>; Center for Global Law and Policy (Santa Clara), available at <<http://www.scu.edu/law/international>> (last visited May 3, 2007); and the especially vast Hauser Global Law School Program at NYU, available at <<http://www.nyu-lawglobal.org>> (last visited May 3, 2007).
39. Comparative law scholar David Clark found the number of programs circa 1997 “substantial.” David S. Clark, Transnational Legal Practice: The Need for Global Law Schools, 46 *Am. J. Comp. L.* 261, 271 (1998). There were 122 then; there are 206 now. See American Bar Association Foreign Study Programs, available at <<http://www.abanet.org/legaled/study-abroad/foreign.html>> (last visited May 3, 2007).
40. See Barrett, International Legal Education, *supra* note 29, at 993-94 (suggesting that law schools tend to overcount their offerings).
41. When Ugo Mattei was surveying U.S. law schools to rate them on a 100-point scale that measured their commitment to comparative law, he gave points for “comparative” and “foreign” law journals but not international ones. Ugo Mattei, Some Realism About Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction, 50 *Am. J. Comp. L.* 87, 94 (2002).
42. The majority of ABA-accredited law schools offer the LL.M.; while lawyers trained in the United States are eligible for this graduate degrees, LL.M. programs tend to orient their offerings toward foreign students. See generally Masters of Laws Programs Worldwide, available at <<http://www.llm-guide.com/usa>> (last visited May 3, 2007) (describing 132 American LL.M. programs).
43. These indicators align fairly well with what Mattei examined. Mattei also counted the number of foreign professors teaching regularly at each school—a datum that pertains to how comparative a school is but not, usually, to its presentation of itself to student consumers. Mattei, Some Realism, *supra* note 41, at 94.

Without accusing any school of insincerity, I suggest that the promotional stance, at least as it is aimed at American audiences, presents transnational law as if it were, you should forgive another food-metaphor, a dim sum brunch—that is, a change of pace for cosmopolitans to sample by nibbling until they have had enough. American students who grew up holding the remote are invited to choose a school where they can switch to the transnational channels when the fancy strikes and then click to the next diversion when the fancy retreats. Nothing is taken away; no obligations arise. Painless options promise to assuage the boredom and stress that applicants have been told to expect when they arrive at law school.

How terrible is that? Why not build a transnational curriculum by lagniappe? A spokesperson for a law school might continue: *All right, maybe there's a degree of self-promotion and hustle in our claim to offer transnational legal education. But we have to start somewhere, don't we? A few more choices, a little dim sum on our menu, a tentative set of steps to lift us beyond our provincialism—what would be wrong? We can always ramp up the sincerity, rigor, seriousness and so on later, if we conclude that's the way to go.*

It is true that the lagniappe strategy does offer the virtue of an easy exit. Law schools that go on record as committed to fundamental change away from the pedagogies and subjects associated with Christopher Columbus Langdell—one thinks of Tulane, winner of a “gold medal” in 2002 for pursuing comparative legal education more than any other law school,<sup>44</sup> or New York University, which has been calling itself the global law school since 1994<sup>45</sup>—might face embarrassment were they to retreat from this mission. More modest measures, by contrast, can be erased without attracting attention. Nevertheless, curriculum reformers should be careful as they pursue experimentation because no experiment can succeed without a plan followed by observation. Here are a few questions and points to consider when trying out a little more transnational material in one's curriculum:

1. *Which Supplements Count as Active Constituents of the Reform?* Ugo Mattei's study measuring, with numbers, how American law schools compared to one another is recommended reading for any reformer embarking on a path of transnationally inclined curricular change. Cheerfully acknowledging no pretense of doing hard social science, Mattei states what he looked for and offers many of his premises explicitly. For example, Mattei chose to count comparative and foreign law journals, but not international law journals, a decision that emphasizes his commitment to separating international from

44. *Id.* at 95 (awarding Tulane 89 out of a possible 100 points; the “silver medal” went in a tie to Columbia, Texas, and Illinois, which all scored 71).

45. John Edward Sexton, *The Global Law School Program at New York University*, 46 J. Legal Stud. 329 (1996). In October 2006, the original home of Langdell took a bold step by announcing a new first-year required course “introducing global legal systems and concerns.” Harvard Law School, *HLS Faculty Unanimously Approves First-Year Curricular Reform*, Oct. 9, 2006, available at <[http://www.law.harvard.edu/news/2006/10/06\\_curriculum.php](http://www.law.harvard.edu/news/2006/10/06_curriculum.php)> (last visited May 14, 2007)—more than a lagniappe-sized move, but not yet the Tulane-sized commitment to comparative legal education.

comparative law.<sup>46</sup> He gave relatively few points for having only one overseas exchange program, but relatively many for more than two—an anti-lagniappe methodology—because he wanted to gauge each school’s “comparative commitment” to comparative law.<sup>47</sup> Overt declarations like these (which need not be announced to the world but should be made in some internal gathering of planners) help to keep innovators accountable.

2. A related question: *How Will You Know Whether You Are Succeeding or Failing?* The experiment in transnational education stays relatively pure, and thus more informative for the future of a school, when reformers can keep it separate from, say, *X*’s frequent-flier mileage account, *Y*’s long-standing campaign to hitch his domestic hobbyhorse to a more popular initiative at the law school, *Z*’s midlife search for something new to do, and the need to give *W* some quick chair or center or honorific. I do not mean to say that transnational-materials reform should be more exalted or pristine than any other kind of change; instead my suggestion—which applies to any curricular experiment but may have particular application to something that grabs attention—is that serving *W* and *X* and *Y* and *Z* should not be confused with a school’s substantive ambitions about education and research. Reformers who seek more than pork-barrel budgets or the resolution of office politics should be able to declare benchmarks in advance of the changes they will install, and resolve to review these criteria, perhaps after a couple of years.

3. You haven’t abolished scarcity: *What Will Be Displaced or Consumed To Make Room (In Money, Time, Physical Space, Faculty Energies) for Your Lagniappe?*<sup>48</sup>

46. Mattei, Some Realism, *supra* note 41, at 94.

47. *Id.*

48. One advocate of increasing the presence of international law in the required curriculum nevertheless acknowledges the cost of this increase. He must be quoted at length because length—or bulk—is his point:

Every course should include an alternative dispute resolution (“ADR”) component because otherwise students will think that all legal disputes have to be settled through adversarial means. Each course should integrate procedure with substance because how can students understand the substantive law if it is set adrift from its procedural moorings? In the United States, despite our common law origins, every course should include a statutory component because otherwise students will erroneously assume from the typical first-year courses that the common law continues to dominate the U.S. legal system. Every course should incorporate an administrative component because we do, after all, live in an administrative state.... Every course should contain an ethics component because we want our students to live ethical lives and to be a credit to the legal profession. Each course should include a social policy component because we want lawyers to contribute to the betterment of society, not become rigid technocrats who think about nothing but the bottom line. Each course should include a law and economics component because future policymakers need to know how to balance competing interests. Every course should have a critical legal studies component because otherwise students will be excessively influenced by law and economics. Every course should have an interdisciplinary dimension because not every problem has an answer that can be found in “F3d”, and besides we want our graduates to be well-rounded individuals. Each course should pay tribute to history because law

The literature on bringing transnational materials to the law school curriculum has paid little attention to the need for tradeoffs.<sup>49</sup> One reformer touts her preferred innovation as cheaper than rival ideas;<sup>50</sup> even this much candor about price is rare. Even less present in published discussion are references to the non-pecuniary costs of innovation that result from faculty hostility.<sup>51</sup>

On the monetary side of cost-predicting, planners might find a helpful analogue in a survey of how to bring in a comparable increment to the curriculum, alternative dispute resolution.<sup>52</sup> From his base at the University of Alberta in Canada, Trevor C.W. Farrow has reviewed ADR-focused innovations and teaching methods tried in Canada, the United States, the United Kingdom, Australia, and New Zealand, and offers a helpful taxonomy of three approaches to ADR that transnational curricular reformers from which can

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is an evolving process that can be understood only in its historical context. Every course should contain a jurisprudential component because how can our students understand the practice of law if they do not understand its theoretical underpinnings? Nowadays every course should incorporate a cyberspace component because we live in an information age, and those who do not know how to access information will be at a distinct competitive disadvantage. Each course should include race and gender components because for too long law courses have been taught, at least in the United States, as if the only people who mattered were white males, and at any rate students will interact with diverse groups of people when they get out in the world.

On top of all this, every course should integrate an international law component because we live in a global village. Each course should also include a comparative law component because we do not want to turn out narrow-minded chauvinists who think that the law of their particular country is God's gift to the world.

Legomsky, *Globalization and the Legal Educator*, *supra* note 32, at 485-86.

49. One dean takes up the question, as part of his larger commentary on business aspects of law school administration. He suggests that both expanding and failing to expand one's international curriculum are potentially costly options. Jay Conison, *Financial Management of the Law School: Costs, Resources, and Competition*, 34 U. Toledo L. Rev. 37, 44 (2002).
50. Elizabeth Rindskopf Parker, *Globalizing the Law School Curriculum: Affirming the Ends and Recognizing the Need for Divergent Means*, 23 Penn St. Int'l L. Rev. 753, 756 (2005) (remarking that adding "modules" to the core curriculum is likely to be cheaper than adding a mandatory course or large numbers of electives).
51. For a polite reference to faculty hostility toward international law, see David J. Bederman and Jonathan C. Hamilton, *Agents of International Discourse: A Conspectus on the Future of International Law Journals*, 40 Va. J. Int'l L. 817, 826 (2000). In the inaugural essay of a new international law journal, one scholar of this field implicitly warns reformers that faculty opponents might fight a transnational-law curriculum reform plan stealthily, without acknowledging (or even being aware of) their aversion. Anthony D'Amato, *The Path of International Law*, 1 J. Int'l Legal Stud. 1, 9 (1995).
52. Trevor C.W. Farrow, *Dispute Resolution, Access to Civil Justice and Legal Education*, 42 Alta. L. Rev. 741 (2005). On alternative dispute resolution as an increment that, like transnational materials as discussed in this symposium, can be imported into every first-year class, see Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution Into Standard Law Courses: A Report on a Collaboration With Six Law Schools*, 50 Fla. L. Rev. 589, 591-95 (1998) (reporting on an experiment that brought dispute resolution exercises into the first-year required curriculum at seven U.S. law schools).

borrow.<sup>53</sup> At the end of his article Farrow faces the problem of cost. Though perhaps too sanguine that new “tuition, research funding, international academic recognition and alumni support” will more than pay for ADR innovations,<sup>54</sup> this discussion of costs provides a model for planners who build transnational-law additions to the curriculum.

4. Without a defined end point, *when will you conclude that you have had enough of your lagniappe?* Will boredom tell faculty, not just student-consumers, when to move on to the next entertainment?

5. Reformers willing to consider detriments that go beyond the interests of their own school might *consider the tragedy of the commons*.<sup>55</sup> Competitions among law schools over who is the transnational-est of them all will eventually breed cynicism.<sup>56</sup> Institutions that claim to be global or international when they are really just like other law schools will eventually sound as silly as those that purport to esteem “excellence.” Without precautions to guard against the rise of a zero-sum rhetorical arms race, cynicism may come to overwhelm imaginative and promising new directions in the law school curriculum.

### A Heartier Meal

Around when Valcke pleaded in these pages for more seriousness in “global law teaching,”<sup>57</sup> Michael Ramsey raised a related query about the use of foreign source material in the adjudication of domestic constitutional rights. “[I]f we are to undertake a serious project of using international materials in this way,”

53. Farrow, Dispute Resolution, *supra* note 52, at 756-68. The three approaches to teaching ADR are the institute or center (centre, to Farrow), working in conjunction with traditional courses; traditional courses alone; and a “pervasive” approach, which seems like the best fit within the first-year curriculum. See Grossman, Building the World Community, *supra* note 8 (describing pervasive efforts at American University); Farrow, Dispute Resolution, *supra* note 52, at 741.

54. Farrow, Dispute Resolution, *supra* note 52, at 801.

55. Garrett Hardin, The Tragedy of the Commons, 162 *Science* 1243 (1968).

56. One law professor—yet another Canadian contributor to this conversation—speaks of “marketing and the unending search for ‘newness’” in North American legal education as a problem of the commons:

In response to the increasing competitiveness of the legal education environment, individual schools are anxious to be able to market their services to prospective students, donors and alumni. Enlarged budgets are devoted to the production of trendy web-sites, glossy brochures, newsletters, invitational open-houses and promotional events. All law schools are constantly on the look out for innovative projects, that can be trumpeted as “the best,” “the only” or “the first.” Placement offices, distance education initiatives, alternative dispute resolution programs, exchange programs, co-operative placements and externships are proudly introduced by one or two schools, and then all or most of the rest swiftly follow suit. The cachet of the initial innovation recedes and the search is on for yet another “one of a kind” initiatives.

Constance Backhouse, The Changing Landscape of Canadian Legal Education, 20 *Windsor Y.B. Access to Just.* 25, 28 (2001).

57. See *supra* notes 8-11 and accompanying text.

he asked, speaking about *Atkins v. Virginia* and *Lawrence v. Texas*, two cases in which the Supreme Court drew attention by making reference to international sources, “what would that project look like?”<sup>58</sup> The question may be more critical for his project than mine. Ramsey joined a live controversy—with Justice Scalia, who in his *Lawrence* dissent had denounced the majority’s use of “foreign views” as a kind of dicta that was both “meaningless” and “[d]angerous,”<sup>59</sup> standing at the helm—whereas there is not (yet) much strife within law schools over whether to add transnational materials to the curriculum. Moreover, now that critics have charged that the internationalism of *Atkins* and *Lawrence* is opportunistic, originating in advocacy rather than any principled regard for international law or foreign sources, only “a rigorous discipline for the use of international materials” can redeem the device he discusses from disrepute.<sup>60</sup> This difference in urgency notwithstanding, Ramsey’s call for rigor applies with equal force to my endeavor and his.

Without rigor, we remain in lagniappe-land. Rigor calls for obligations in addition to options for students and faculty. Transnational law curricular reforms that fulfill the rigor criterion might include compelling students to take a course in international law before they graduate (a commonplace requirement one century ago); empowering an external body (like the American Society of International Law, if it is willing) to sort meaningful change from frills; working to put international law topics on bar exams; and consciously making sacrifices for the sake of the transnational curriculum.

Severity cannot be the only measure of a reform proposal. Some amiable ideas make a lot of sense. Misplaced rigor can do more harm than good. Joy can be just as consistent with proper curricular reform as a tough question about the United Nations Convention on Contracts for the International Sale of Goods in the contracts portion of the multistate bar exam. Ramsey’s tutelage remains on point as we move to the next round of pertinent questions. The transnational-minded curriculum innovator should pause over four Ramsey precepts, slightly modified for this purpose. “If we are not willing to follow such guidelines,” writes Ramsey, “then the project should be abandoned.”<sup>61</sup>

1. *Define the theory: what are you trying to do?* Recall the adjectives in one skeptical assessment of current global law teaching: “disjointed,” “piecemeal,” “lacking in overarching design.”<sup>62</sup> Some transnational-curriculum reformers struggle against the provincialism that McFadden denounced with regard to U.S. courts. I have suggested that anti-provincialism is the most compelling reason to expand transnational materials in the first-year curriculum. But there are goals that might feel more urgent. One school might seek to lure applicants to

58. Ramsey, *International Materials*, *supra* note 14, at 69.

59. *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

60. Ramsey, *International Materials*, *supra* note 14, at 69.

61. *Id.* at 72.

62. See *supra* note 10.

its website. Another might be working to make good use of a new collection of donated library materials. A third might have noticed that other things being equal, an international law specialist on a law faculty is more likely than a domestic law specialist to be a prolific writer, and might relate transnational-curriculum reform with the prospects of boosting scholarly output. It can never hurt to polish one's graduates to a high gloss with sophistication-enhancing experiences during their time in school, to improve their performance in the job market. The possibilities vary and call for distinct measures—for example, building a study abroad program would fulfill some but not all transnational-curriculum agendas.

2. *Take the bitter with the sweet.* Although it is impossible to start a new project without at least a little denial of the chances of pain ahead, innovators should not be surprised when they encounter adversity. Real curricular reform, unlike a lagniappe, is disruptive and likely to pinch. Integrating transnational materials into the first-year curriculum will not come easily to most institutions.

Ramsey makes this point when speaking about the need for principled consistency. In his commentary on debates about the United States Constitution as protector of individuals from law enforcement excesses, Ramsey insists that it is a cheat to use international sources “only in support of rights-enhancing outcomes.”<sup>63</sup> Anyone eager to espouse European views of the death penalty just because they are European must bear in mind European views on, say, free speech, or the prerogatives of police officers to investigate as they like.<sup>64</sup>

Similarly, any curriculum reformer must anticipate a degree of unhappiness in success. I have already remarked on scarcity: To gain one thing in the curriculum is to lose something else. But scarcity is just one type of bitter that must be taken with sweet outcomes. Consider for example the suggestion that the transnational curriculum will remain idle until bar applicants have to show proficiency in foreign or international materials. Where do you stand on this one, O Reformer? Enthusiastic and ready to deploy your lobbying resources? Willing to follow if someone else leads? Opposed, despite your enthusiasm for transnational materials in the curriculum (just as most international law teachers oppose making international law a graduation-requirement course)?<sup>65</sup> Perhaps students from a rival school will fare better on this portion of the revised bar examination. Perhaps you mistrust the bar examiners.<sup>66</sup> It may seem safest not to become engaged with this issue, whereupon “the bitter” becomes an opportunity that you missed.

63. Ramsey, *International Materials*, *supra* note 14, at 76.

64. *Id.* at 77.

65. Barrett, *International Legal Education*, *supra* note 29, at 997 (quoting a survey reporting that only 23 percent of professors teaching international law favored this requirement).

66. See Parker, *Globalizing the Law School Curriculum*, *supra* note 50, at 754-55 (describing bar examiners as the only cohort among one school's alumni who would not likely cooperate

3. *Get your facts right; avoid false shortcuts.* Disappointed by amici in *Atkins*, the Supreme Court case about executing mentally handicapped defendants, Ramsey notes their deleterious effect on the Court's decision. When the Court declared that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved," it cited only a brief from the European Union.<sup>67</sup> Amici had exaggerated worldwide opposition to this practice; European nations do indeed "overwhelmingly disapprove[]" of executing the mentally retarded, but then they disapprove of executing almost everyone. The relevant question, writes Ramsey, is "of the countries that impose the death penalty, how many think that the mentally handicapped should get a categorical exemption?"<sup>68</sup>

Here a reader might interrupt to say that the Ramsey criticisms are beside the point of this article: Ramsey indicates his distress at advocates' failures to tell, and the Supreme Court's failure to seek, the whole truth, whereas our present purpose is to improve the process and experience of curricular reform. Would it be correct to conclude that Ramsey is talking about ends rather than means and, from there, that his injunctions do not speak to the concerns about measures and strategies that face reformers who would alter what their schools teach? No. Failing to get one's facts right harms not only an ideal about factual integrity but the more mechanical work associated with changing what law schools offer their students. It is the same for human rights claims in U.S. courts: Ramsey adverts to practical difficulty, not just the betrayal of truth, when he objects to the reliance in *Atkins* on only a European Union brief to support an assertion about what "the world community" thinks: "Surely the Court would never state a proposition of U.S. law and cite only an advocate's brief. That it could do so for a matter of international practice displays a lack of commitment to the empirical project, and a lack of respect for international sources."<sup>69</sup> Like Valcke and me, Ramsey objects to a lack of seriousness—a rush to reach a particular outcome, a quickie version of international law that will erode its credibility later in the adjudication of domestic human rights claims.<sup>70</sup>

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with transnational-curriculum reform); Anne-Marie Slaughter, *The International Dimension of Law School Curriculum*, 22 Penn St. Int'l. L. Rev. 417, 417 (2005) (adverting to "debate" among members of the American Society of International Law over how to present international law to state bar associations and other sources of input on the content of bar exams).

67. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002), *quoted in* Ramsey, *International Materials*, *supra* note 14, at 77.

68. Ramsey, *International Materials*, *supra* note 14, at 78. Ramsey further criticizes the Court for not bothering to look at the actual laws and practices of countries that use the death penalty, which might have presented examples of statutory law providing a categorical exemption. *Id.* (noting the availability of information about "relatively accessible death penalty jurisdictions such as Jamaica and Trinidad").

69. *Id.* at 79.

70. *Id.* at 78 ("[I]t seems plain that the EU brief is not a serious investigation.").

Similarly, reformers inside a law school should pause to tally what they have before declaring their curriculum global or transnational. One starting point is price: are you underestimating the cost of this reform? Consider your faculty. How many will be on board with this program? What will it take to persuade the skeptics? How's your library?

### Conclusion

In pursuit of what I have called "seriousness" in bringing transnational materials to the first-year curriculum, I want to give a penultimate word to Dean Claudio Grossman, whose work in this area is unequaled in law school leadership—and whose inclination to seriousness moves him to articulate a different set of concerns. At a speech on the internationalization of the standard curriculum at his own school, American University's Washington College of Law—"an evolving process," he says, in what sounds like discreet understatement—Grossman made a good implicit case against what might on the surface look like rigor, standards, or criteria in implementation:

I believe that change is easier when it is declaratory of an existing situation. Twelve years ago we had a very polarizing situation on the reform of the first year curriculum. The way in which we proceeded this time was to create positive incentives, and ensure that people had access to materials and that possibilities and opportunities were kept open, while allowing those who want to continue to teach by themselves go on doing what they do very well. However, with incentives, you open possibilities to progress. In our case, we are now ready for our Curriculum Committee to move further—"officializing" the Integrated Sections by the faculty. Law schools are not the best place to give orders. While we all know that there are some implicit orders in the fact that we have structures in education that we need to follow (required courses, credits, etc.), it is better that those structures rest on consensus and, if possible, conviction and enthusiasm.<sup>71</sup>

No disagreement here with me, despite the divergence in emphasis. Grossman has no quarrel with seriousness in curricular purpose, and I have none with bringing transnational materials into the curriculum gently, democratically, inclusively, or by "incentives." Indeed, I think the sunny views of Grossman—including the high value he puts on consensus, conviction, and enthusiasm—are congruent with those of Valcke and Ramsey. All three of these writers, reflecting on transnational materials as the means to other intellectual and pedagogical ends, maintain what every innovator needs to hold: awareness of the possibility that an innovation can fail.

The key difference between a genuine introduction of transnational materials into the law school curriculum and the skimpy alternative of a

71. Claudio Grossman, *Techniques Available to Incorporate Transnational Components Into Traditional Law School Courses: Integrated Sections; Experiential Learning; Dual J.D.s; Semester Abroad Programs; and Other Cooperative Agreements*, 23 *Penn St. Int'l L. Rev.* 743, 744-45 (2005).

lagniappe is this awareness, which originates in self-conscious policy: a plan, observation, assessment, response. Law schools cannot make their curricula more transnational simply by heaping more foreign exotica onto their websites and other menus they offer their constituents. "Curriculum" is, after all, the Latin word for path, related to "current" in noun form: it connotes a direction or vector, and not a *mélange*. To repair its provincialism, or remedy any other gap, the law school curriculum needs better nourishment than "the thirteenth roll of a baker's dozen."<sup>72</sup>

72. See *supra* note 6 (quoting the Mark Twain definition of lagniappe).