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Integrating Transnational Perspectives into Civil Procedure: What Not to Teach

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Introduction

Anyone who has read my article this far will surely agree with me on one point. I make it **Presumption #1:** legal educators need to pay more attention to transnational,[1] or international and comparative, matters. The

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1. This trendy and Unitedstatesian-sounding term is actually over seventy years old and Germanic in origin. It started out meaning supranational (or rather "a-national") law common to civilized nations, as opposed to what was then called international law. See Claire M. Germain, Germain's Transnational Law Research: A Guide for Attorneys § 1.01.3 (Ardsley, N.Y., 1991). Curiously, some scholars now press to flip this definition by narrowing transnational law to mean domestic law that deals with matters having a foreign component, as opposed to what would consequently be called international law. See, e.g., Thomas O. Main, Global Issues in Civil Procedure: Cases and Materials 2 (St. Paul, Minn., 2006). However, most often today, international law encompasses both the above meanings, and transnational law has become even broader to mean loosely things that transcend borders and hence all matters international or comparative. See, e.g., Mathias Reimann, Taking Globalization Seriously: Michigan Breaks New Ground by Requiring the Study of Transnational Law, Law Quadrangle Notes, Summer 2003, at 54. I too shall employ the term "transnational law" in this broad way.

   The term "private international law," despite its European tone, originated in the United States. In this country today, it means conflict of laws, broadly defined to include territorial authority to adjudicate and treatment of foreign judgments as well as choice of law, and so it is an important subset of transnational law. See Kevin M. Clermont, The Role of Private International Law in the United States: Beating the Not-Quite-Dead Horse of Jurisdiction, 2 CILE Studies: Private Law, Private International Law & Judicial Cooperation in the EU-US Relationship 75, 75-76 (2005).

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supporting arguments are familiar.[2] Awareness of the international aspects of law is a very practical thing to impart, benefiting public thinking, private practice, and ordinary life. Indeed, both litigators and office lawyers need some familiarity therewith to function in today's increasingly global society. Meanwhile, and much more importantly, exposure to comparative aspects of law helps the student to understand the home system's values and rules, while aiding the scholar to evaluate reforms.

Coming up with transnational topics to teach is easy. They roll off the tongue. The planning e-mail for the AALS panel on integrating transnational perspectives into civil procedure listed the "subject-matter parts of the course with transnational aspects, such as personal jurisdiction over foreign companies and citizens, service abroad, alienage jurisdiction, discovery in aid of foreign proceedings and discovery abroad for domestic litigation, enforcement of judgments, American civil procedure in comparative perspective, etc."[3] Potential subjects leap from today's newspaper headlines as I compose this paragraph of my response.[4]

This very richness leads me to **Presumption #2:** the civil procedure course is bursting at the seams, so that anything new will force out something established. All sorts of contenders are trying to squeeze into our syllabi, even as many schools are diminishing the number of credit hours for the course.

Other perspectives and attempts at providing context might be more worthy than transnationalism. Transnationalism will likely prompt a major shift in the overall law school curriculum, but perhaps not for its civil procedure course. I see as an inevitable development the broadening of perspectives from which to view civil procedure. Instead of thrashing about within the traditional confines of the subject, with a principal reliance on the pointillist case method, proceduralists will view a part or the whole from some new angle. The three most promising perspectives so far are law and economics, law and psychology, and empirical legal studies. A second trend, compatible with taking a broader

2. See, e.g., Franklin A. Gevurtz et al., Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum, 19 Pac. McGeorge Global Bus. & Dev. J. 267, 273-77 (2006); Symposium, Globalizing Legal Education, 23 Penn. St. Int'l L. Rev. 741 (2005); Jay Lawrence Westbrook, International Developments in Commercial Law and in Civil Procedure and Arbitration, 46 J. Legal Educ. 579, 585 (1996) ("In the midst of globalization of the nation's business, it will grow increasingly difficult to teach competently commercial law, civil procedure, or arbitration without reference to international developments. That fact adds to the burden of staying abreast, but also offers fascinating opportunities for students and teachers alike."); Margaret Y.K. Woo, Reflections on International Legal Education and Exchanges, 51 J. Legal Educ. 449, 449 (2001) ("In this era of economic and technological globalization, the benefits of international legal education exchanges are perhaps self-evident.").

3. E-mail from Thomas D. Rowe, Jr., Professor, Duke Law School, to Kevin M. Clermont (Feb. 9, 2005) (on file with author).

4. See, e.g., Marcia Coyle, Cruise Ships Resist Docking with ADA, Nat'l L.J., Feb. 21, 2005, at 4 (discussing the impending legislative-jurisdiction decision in Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005)).

view from many different perspectives, will involve breaking down conceptual and doctrinal boundaries to understand civil procedure in a fuller context. The subject of civil procedure is much bigger than its curricular pigeonhole. One should start the more expansive study by pursuing inquiry outward along any of the three principal dimensions of the subject: time (legal history and reform), type of forum (administrative/criminal and other comparative procedures), and type of dispute (public-law litigation/ADR and international litigation).[5]

However, the professor cannot do it all and, in fact, can try to do too much. Over the course of my career, I have heard calls for redirecting the content of the basic civil procedure course: calls to center the course on public-law litigation or ADR or to include noncivil procedures, or to convey some currently hot theoretical or political perspective, or, of course, to shift more to practical lawyering. My feeling is that the majority's recurrent reaction, yielding slightly to these pressures toward being inclusive but declining to jettison most of the course's traditional content, has been a wise one. Also, I feel that our motivation rests on more than a desire to preserve intellectual capital.

Consider, for example, the current championing of ADR. Interest has shifted toward those litigation alternatives whereby most real-world grievances conclude short of judicial adjudication—whether by privately negotiated settlement, arbitration, mediation, or conciliation. The argument that ADR by force of numbers is societally more important than litigation, that it will be practically more important in our students' careers, or that it is more in need of scholarly attention is not a pedagogic argument. Pedagogy counsels that ADR needs to be introduced in the first-year course, but its real study should be left to upper-class courses that build, in a comparative way, on the solid foundation of the basic civil procedure course.

Retaining a principal focus on ordinary litigation *during the first year of law school* makes sense. Early mastery of the ordinary procedural system helps in comprehending the cases read in other law courses. Moreover, ordinary litigation is no backwater: it remains extremely important to society, and essential to practitioners. First, through ordinary litigation the courts act as the default enforcer of law and resolver of disputes. Second, ordinary litigation not only produces singular decisions that restructure society but also serves as a major vehicle for lawmaking and for articulating societal values. Third, adjudication enunciates the law that sets the standards under which potential litigants resolve their disputes by nonlitigation processes, as by "bargaining in the shadow of the law"[6] to reach outcomes that generally conform to the law's standards and thereby further achieve the law's goals. The primary reason for focusing on ordinary litigation, however, is that it provides a better setting in which to achieve the pedagogic purposes of the basic course, as discussed below.

5. See Kevin M. Clermont, Prof. Clermont on Civil Procedure, Cornell L.F. (Cornell University Law School), Feb. 1989, at 10.

6. See Robert H. Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 950 (1979).

Combining Presumptions #1 and #2 means that professors are not doing enough transnationally, but in remedying that shortcoming we risk doing too much. That is, we could just launch into a serious overhaul of the basic civil procedure course to reflect globalization, but that would be a mistake. Deciding what to teach, and especially what not to teach, requires thought, even a plan! And one must perform a cost-benefit analysis to formulate a sound plan.

This decision-making path initially requires sharpening the focus on the pedagogic purposes of the basic civil procedure course. The subsequent steps, specifying ends and then assessing costs and benefits in their pursuit, are more contestable. Accordingly, the final part of this essay constitutes a subjective and tentative reflection about incorporating transnationalism into my course—but a reflection including a good deal of hard information that, I hope, should help others to make their own personal choices.

Approaches to and Purposes of the Civil Procedure Course

Teaching basic civil procedure inevitably produces some quandaries. The first one the professor meets is how to get into a subject so marked by interdependencies. To understand anything, the student must understand everything. Where to approach a truly seamless web makes for a tricky problem indeed. The almost universal solution is not to find a seam, but to present the whole. To do so, civil procedure courses begin with a survey of varying depth. After the survey, teachers blaze many different routes around this seamless web, breaking down civil procedure for systematic study in various ways.

Still, I can generalize. Many courses follow a standard roadmap: present the whole subject in survey fashion (and somehow and sometime flesh out the survey to the level of useful knowledge), then study a freestanding series of fundamental problems of civil procedure, and perhaps finally return to the whole subject by way of conclusion. The opening overview enables and facilitates the subsequent in-depth analytical study of major problems, which will in turn illuminate the opening coverage while it lays the groundwork for any closing synthesis.

I can quickly convey my personal, but far from idiosyncratic, approach by specifying the major problems that I cover as the middle of my six-hour first-year course. I emphasize only three traditional problems: governing law, authority to adjudicate, and former adjudication. This choice aims at informing students about the legal system under which they live, while each problem sketches a dimension of the constitutional structure: one in which the federal and state relation is key, one in which allocation of authority among the states is significant, and one in which the prominent role of the judicial branch is explanatory of the separation of powers. (Selection of these particular problems is all the more appropriate today because they arise in an increasingly globalized setting, and so they remain fresh and important. Accordingly, on

first impression, integration of transnational perspectives could enliven and enrich their study.)

Readily I admit that other teachers choose quite different major problems for good reasons. Following the standard roadmap (or any other approach for that matter), professors have found room for a nearly infinite variety of emphasis, perspective, and scope.

Nevertheless, our widely shared general goal is to build up to a solid grasp of civil procedure. I think that the standard approach, by its very prevalence, reveals more specific but still widely shared goals. First, we want students to perceive the essence and ultimately the thematic coherence of the adversary system prevailing in U.S. courts. The survey is the tool here. Second, we want to convey an understanding of the constitutional and legal structure in which those courts operate. Selecting certain major problems for in-depth study can facilitate this goal. Third, I believe that the whole course serves another purpose, namely, to develop a sense of the importance of any given procedural system in constructing the surrounding body of substantive law. Indeed, all U.S. civil procedure professors recognize that no one can begin to understand any legal system without a careful dissection of its procedural component.

Transnationalism does not appear expressly in that statement of the course's goals. Nevertheless, some integration of transnational perspectives could help reach those goals, while helping also to satisfy the presumed need to increase the overall coverage of transnationalism.

Appropriate Transnational Components of the Civil Procedure Course

The question that remains before me is how optimally to integrate transnational perspectives into the standard approach, without sacrificing the civil procedure course's goals.

Separate Unit?

For my basic course consisting of survey, three major problems, and synthesis, I rely on a casebook, as is typical. I use some supplementary readings, but the materials must illuminate the course's core and not distract.[7] For that reason, I am not inclined to tack onto this scheme a freestanding unit on transnational litigation, to be treated in addition to domestic litigation.[8]

7. See Kevin M. Clermont, Teaching Civil Procedure Through Its Top Ten Cases, Plus or Minus Two, 47 St. Louis U. L.J. 111 (2003).

8. I am not attracted, for my course, to any kind of transsystemic, or mixed, approach as is sometimes used in bijural or blended settings to convey multiple systems of thought. See Nicholas Kasirer, Legal Education as *Métissage*, 78 Tul. L. Rev. 481 (2003). Significantly, the civil procedure course seems to have initially escaped the integrated approaches used even in those bijural settings. See John J. Costonis, The Louisiana State University Law Center's Bijural Program, 52 J. Legal Educ. 5, 9 (2002); Yves-Marie Morissette, McGill's Integrated Civil and Common Law Program, 52 J. Legal Educ. 12, 20-21 (2002). However, McGill has recently converted its civil procedure course into an integrated "Judicial Institutions

Instead, I think that the subject of transnational litigation can and should be left in major part to an upper-class course, or perhaps to some new first-year course on transnational law. Indeed, we should all strive to ensure that our schools offer a course that covers transnational litigation. It is an important subject, and a separate course would alleviate the pressure on coverage during the basic course.

Some very good casebooks exist for such an upper-class course.[9] Looking at those books suggests the range of what we are talking about possibly treating in the basic course. The books' coverage reaches the following eight subjects, usually in the setting of U.S. litigation but with some comparative study, and often in addition to arbitration:

- territorial authority to adjudicate (including forum non conveniens and forum selection clauses);
- service abroad;
- parallel proceedings;
- treatment of foreign judgments;
- subject-matter jurisdiction (such as alienage jurisdiction and the Alien-Tort Statute[10]);
- legislative jurisdiction (and application of foreign law);
- foreign sovereign immunity and act of state doctrine; and
- transnational discovery (and provisional protective measures and other judicial assistance).

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and Civil Procedure" course. See McGill Faculty of Law, <http://www.mcgill.ca/law/> (last visited Mar. 11, 2007). Moreover, some reformers are now beginning to voice support for an approach in top U.S. law schools that would analogously integrate national and transnational studies. See, e.g., Peter L. Strauss, Transsystemia—Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?, 56 J. Legal Educ. 161 (2006) (arguing that those schools face a critical juncture because the current focus on national law will not serve to train tomorrow's lawyers, who will have to shift in competency among countries just as today's lawyers shift among states).

9. Charles S. Baldwin, IV, Ronald A. Brand, David Epstein, and Michael Wallace Gordon, International Civil Dispute Resolution: A Problem-Oriented Coursebook (St. Paul, Minn., 2004); Gary B. Born, International Civil Litigation in United States Courts: Commentary and Materials (3d ed., The Hague, 1996); Thomas E. Carbonneau, Cases and Materials on International Litigation and Arbitration (St. Paul, Minn., 2005); Andreas F. Lowenfeld, International Litigation and Arbitration (3d ed., St. Paul, Minn., 2006); Jordan J. Paust, Joan M. Fitzpatrick, and Jon M. Van Dyke, International Law and Litigation in the U.S. (2d ed., St. Paul, Minn., 2006); Ralph G. Steinhardt, International Civil Litigation: Cases and Materials on the Rise of Intermestic Law (Newark, N.J., 2002); Russell J. Weintraub, International Litigation and Arbitration: Practice and Planning (4th ed., Durham, N.C., 2003). For a comparative review of the earlier editions of the three pioneering casebooks in this group, see Linda J. Silberman, International Litigation: A Teacher's Guide, 89 Am. J. Int'l L. 679 (1995).

10. 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

Although the feeling grows that transnational litigation just might be a distinct field,[11] just as ADR is a field distinct from civil procedure, I still teach the upper-class course on transnational litigation as a doctrinal and thematic extension and deepening of the first-year course. My upper-class thematic focus is on procedure as an allocation of conflicting authority, in accordance with reasonableness and hence balancing, across four dimensions: (1) the course builds on the civil procedure course's federalism concern with accommodation of state and national interests, but now with additional consideration of the federal interest in foreign relations as it confronts the still major roles of state courts and state law; (2) the course offers new vistas on the vertical conflict between domestic law and international law; (3) the course introduces the need to resolve in litigation the horizontal conflict between U.S. interests and foreign interests, both governmental and private; and, likewise, (4) the upper-class course further develops the first year's separation-of-powers concern with the proper role of courts in transnational lawmaking.

Supplementary Context?

Because I perceive the upper-class subject as an extension of the first-year subject, I see no logical reason against, and several in favor of, injecting some of these upper-class books' concerns into the basic course—not as a unit tacked on, but as additional context for studying some aspects of major problems such as governing law, authority to adjudicate, and former adjudication.

This approach serves the pedagogic purposes of the basic course, fits with the current content of that course, and thus illuminates it without grossly expanding it. True, providing supplementary context will not give a working knowledge or even an overall sense of transnational litigation, but that is not a purpose of the basic course. Yet, even this limited exposure manages to deliver some of the side benefits of studying transnational litigation, such as widening the students' and professor's horizons and creating interest in further study, while overcoming the parochialism that so affects U.S. procedure.[12]

If this approach were adopted, which features of transnational law merit supplementary inclusion in the basic civil procedure course? One might look at what a range of professors have decided. By looking for pertinent headings

11. Compare Samuel P. Baumgartner, Is Transnational Litigation Different?, 25 U. Pa. J. Int'l Econ. L. 1297 (2004) (stressing the potential contributions of international relations theory and comparative procedural study to improvement of lawmaking for transnational litigation), with Stephen B. Burbank, The World in Our Courts, 89 Mich. L. Rev. 1456 (1991) (seeing the subject of transnational litigation, at least to date, as a cross-fertilizing extension of the subject of civil procedure), and Stephen B. Burbank, The United States' Approach to International Civil Litigation: Recent Developments in Forum Selection, 19 U. Pa. J. Int'l Econ. L. 1 (1998) (updating his thesis).

12. See Antonio Gidi, Using the Transnational Rules to Teach Comparative Civil Procedure, AALS Annual Meeting (Jan. 6, 2001), <http://www.aals.org/am2001/mat_gidi.html> (last visited Mar. 13, 2007) ("The truth remains that American proceduralists are among the most parochial in the world.").

in their casebooks' detailed tables of contents, we can learn what parts of transnational law they treat with seriousness in written teaching materials.[13] This method gives only a rough measure. First, I do not cite any incidental treatment of transnational law in casebook notes, even though such notes are common, and desirable to the extent that distraction does not exceed illumination. Second, I do not cite inclusion of transnational cases like *Piper Aircraft Co. v. Reyno*[14] if they appear in treatment of basic subjects like forum non conveniens and without a heading that stresses an independent look at their international aspects.

13. Barbara Allen Babcock, Toni M. Massaro, and Norman W. Spaulding, Civil Procedure: Cases and Problems 37-39, 64-65, 187-88, 515-19 (3d ed., New York, 2006) (international service; transnational rules; foreign judgments; international discovery); John T. Cross, Leslie W. Abramson, and Ellen E. Deason, Civil Procedure: Cases, Problems and Exercises 79-80 (St. Paul, Minn., 2006) (alienage jurisdiction); David Crump, William V. Dorsaneo, III, and Rex R. Perschbacher, Cases and Materials on Civil Procedure 113-14, 435-36 (4th ed., New York, 2001) (international service; international discovery); Richard H. Field, Benjamin Kaplan, and Kevin M. Clermont, Materials for a Basic Course in Civil Procedure 314-21, 588-93, 772-77 (8th ed., New York, 2003) (German procedure; international jurisdiction; foreign judgments); Owen M. Fiss and Judith Resnik, Adjudication and Its Alternatives: An Introduction to Procedure 46-49, 755-64, 1122-61 (New York, 2003) (international tribunals; German procedure; universal jurisdiction); Richard D. Freer and Wendy Collins Perdue, Civil Procedure: Cases, Materials, and Questions 153-55, 877-89, 898-905 (4th ed., Charlottesville, Va., 2005) (comparative jurisdiction; German procedure; Japanese ADR); Jack H. Friedenthal, Arthur R. Miller, John E. Sexton, and Helen Hershkoff, Civil Procedure: Cases and Materials 209-11, 664-65 (9th ed., St. Paul, Minn., 2005) (international service; comparative class actions); Joel W. Friedman, Jonathan M. Landers, and Michael G. Collins, The Law of Civil Procedure: Cases and Materials 172-82 (2d ed., St. Paul, Minn., 2006) (alienage jurisdiction); Geoffrey C. Hazard, Jr., Colin C. Tait, William A. Fletcher, and Stephen Bundy, Cases and Materials on Pleading and Procedure: State and Federal 32-35, 246-49, 881-84 (9th ed., New York, 2005) (comparative perspective; international jurisdiction; German procedure); Allan Ides and Christopher N. May, Civil Procedure: Cases and Problems 227-28, 323-36 (2d ed., New York, 2006) (international service; alienage jurisdiction); A. Leo Levin, Philip Shuchman, and Charles M. Yablon, Cases and Materials on Civil Procedure (2d ed., New York, 2000); Richard L. Marcus, Martin H. Redish, and Edward F. Sherman, Civil Procedure: A Modern Approach 13-15 (4th ed., St. Paul, Minn., 2005) (German procedure); Jeffrey A. Parness, Civil Procedure for Federal and State Courts (Cincinnati, 2001); Thomas D. Rowe, Jr., Suzanna Sherry, and Jay Tidmarsh, Civil Procedure 5-8, 26-28, 94-98 (New York, 2004) (German procedure; comparative perspective; comparative discovery); Linda J. Silberman, Allan R. Stein, and Tobias Barrington Wolff, Civil Procedure: Theory and Practice 219-25, 273-74, 357-62, 667-72, 930-32 (2d ed., New York, 2006) (comparative jurisdiction; international service; alienage jurisdiction; international discovery; foreign judgments); Stephen N. Subrin, Martha L. Minow, Mark S. Brodin, and Thomas O. Main, Civil Procedure: Doctrine, Practice, and Context 352-60 (2d ed., New York, 2004) (international discovery); Larry L. Teply, Ralph U. Whitten, and Denis F. McLaughlin, Cases, Text, and Problems on Civil Procedure 118-22, 1177-79 (2d ed., Buffalo, N.Y., 2002) (alienage jurisdiction; foreign judgments); Stephen C. Yeazell, Civil Procedure (6th ed., New York, 2004).

14. 454 U.S. 235 (1981). For the background of this case, see Kevin M. Clermont, The Story of *Piper*: Fracturing the Foundation of Forum Non Conveniens, *in* Civil Procedure Stories 193 (Kevin M. Clermont ed., New York, 2004).

Some of the cited casebook coverage of transnational law is quite effective. The Silberman, Stein, and Wolff casebook, not surprisingly, provides perhaps the nicest example. It includes effective text on the Brussels Regulation and the Hague negotiations on territorial jurisdiction[15] and on the treatment of foreign judgments under U.S. and foreign law.

On the whole, however, my survey reveals that the eighteen current civil procedure casebooks do not deliver much coverage to the teacher who wants to extend the course transnationally. I would use *Hilton v. Guyot*[16] as the litmus test. I view it as a major case, being the only Supreme Court case on foreign judgments and one that expounded the modern U.S. approach to international law. It appears in only one casebook as either a principal or a squib case,[17] and is mentioned in the text or notes of only five more.[18] This latter datum is shocking and telling. Perhaps the explanation is that *Hilton* is actually a minor case, or just too difficult for some reason.[19] But I believe that its omission is symptomatic of

15. See Kevin M. Clermont, Integrating Transnational Perspectives into Civil Procedure: What Not to Teach, AALS Workshop on Integrating Transnational Perspectives into the First Year Curriculum, Appendices A(2) and B(2) (Jan. 4, 2006), available at <http://empirical.law.cornell.edu/kevin/app.pdf> (last visited Mar. 20, 2007).

16. 159 U.S. 113 (1895), *discussed in* Clermont, Integrating Transnational Perspectives into Civil Procedure, *supra* note 15, at Appendix B(1). For the background of this case, see Louise Ellen Teitz, The Story of *Hilton*: From Gloves to Globalization, *in* Civil Procedure Stories, *supra* note 14, at 427, which concludes:

> *Hilton v. Guyot* is the Supreme Court's only pronouncement on foreign judgments. It is *the* case to cite on the subject. In it, the Court clarified the significance of international law as part of national law and as within the province of the judiciary. ...
>
> Although *Hilton* is a case on enforcement of foreign judgments, its legacy is much broader. Its enduring definition of comity, or deference to another sovereign, continues to dominate the field of transnational litigation in a variety of contexts. ...
>
> The Supreme Court's sole foray into the realm of foreign judgments continues to enjoy increased attention not only in national lawmaking and in international treaty efforts, but in increasingly transnational litigation. It is one of those rare cases that grows in significance with each passing year.

Id. at 451-53. In full disclosure, the Editorial Board of Foundation Press had criticized the inclusion of *Hilton* in Civil Procedure Stories. See Letter from Steve Errick, Publisher, to Kevin M. Clermont (Jan. 5, 2003) (on file with author) ("*Hilton* is an odd case to venture into the transnational litigation realm."). My reaction then was (and so it remains) surprise, which I expressed in the ensuing debate. See E-mail from Kevin M. Clermont to Lewis A. Grossman, Professor, American University's Washington College of Law (Feb. 20, 2003) (on file with author) ("*Hilton*, I must admit, surprised me by its being ignored in casebooks... . I have been doing a lot lately on international litigation and the Hague treaty. *Hilton* is real big in that world (and will get ever bigger). And its context is significant to its understanding. So I guess this was myopia on my part.").

17. Field et al., Materials for a Basic Course in Civil Procedure, *supra* note 13, at 772-75 (surprise!).

18. Cross et al., Civil Procedure, *supra* note 13, at 784; Hazard et al., Cases and Materials on Pleading and Procedure, *supra* note 13, at 1250; Marcus et al., Civil Procedure, *supra* note 13, at 1132; Teply et al., Cases, Text, and Problems on Civil Procedure, *supra* note 13, at 1177; Yeazell, Civil Procedure, *supra* note 13, at 722.

19. My diffidence on this *Hilton* point is growing, as not even Thomas Main's new book uses it as

all the casebooks' spotty integration of transnational perspectives. In fact, most of their coverage of transnational law comes as *background* reading. Only three casebooks include any *teaching* cases at all on transnational law expressly,[20] while a couple more include cases on alienage jurisdiction.[21]

Thus, although with time the casebooks will step up, in the meantime there is need for the new Thomas O. Main book, entitled *Global Issues in Civil Procedure: Cases and Materials*[22] and intended to supplement any basic casebook. Its 200 pages comprise eight chapters following the introductions:

- in a brief pleadings chapter, comparative materials predominate, but there are some international materials on harmonization;
- a discovery chapter utilizes an equal mix of comparative materials (different approaches to gathering evidence) and international materials (conducting discovery abroad, as by the Hague Evidence Convention);
- a brief jury chapter relies on comparative materials (with a focus on the culture-procedure link);
- in a personal jurisdiction chapter, there is an equal mix of international materials (such as Federal Rule of Civil Procedure 4(k)(2) and forum selection clauses) and comparative materials (civil-law traditions);
- a service chapter focuses on serving foreign defendants under Rule 4 or the Hague Service Convention;
- a subject-matter jurisdiction chapter provides an introduction through study of alienage jurisdiction;
- a horizontal-choice-of-law chapter moves from the Restatement (Second) of Conflict of Laws to a quick consideration of European approaches; and,

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a teaching case. But he does discuss it in the notes. Main, Global Issues, *supra* note 1, at 181.

20. Crump et al., Cases and Materials on Civil Procedure, *supra* note 13, at 436 (using Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522 (1987), as a squib case on international discovery); Field et al., Materials for a Basic Course in Civil Procedure, *supra* note 13, at 588, 772, 776 (using Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), on international jurisdiction, and using *Hilton* and a squib of Soc'y of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000), on U.S. treatment of foreign judgments); Fiss and Resnik, Adjudication and Its Alternatives, *supra* note 13, at 1125, 1145 (using Regina v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte, [2000] 1 App. Cas. 147 (Eng. H.L. 1999), and *Kadic*).

21. Ides and May, Civil Procedure, *supra* note 13, at 324, 326 (using Eze v. Yellow Cab Co., 782 F.2d 1064 (D.C. Cir. 1986), and Grupo Dataflux v. Atlas Global Group, 541 U.S. 567 (2004)); Friedman et al., The Law of Civil Procedure, *supra* note 13, at 172 (using Coury v. Prot, 85 F.3d 244 (5th Cir. 1996)).

22. Main, Global Issues, *supra* note 1. On the horizon and also from Thomson-West is Oscar G. Chase et al., Civil Procedure in a Global Context (St. Paul, Minn., forthcoming 2007), and from Oxford University Press will come Stephen C. McCaffrey and Thomas O. Main, Transnational Litigation in Comparative Perspective (New York, forthcoming 2007).

- in a preclusion chapter, international materials (recognition and enforcement of foreign judgments) predominate, but some comparative materials make an appearance.

Personal Advice

Main's new book suggests a smorgasbord of materials as candidates for supplementary inclusion in the basic civil procedure course. The existing course books on transnational litigation suggest additional teaching materials. But how actually to choose? Which aspects of transnational law best serve the pedagogic purposes of the basic course, fit with the current content of that course, and thus illuminate it without grossly expanding it? Well, by way of advice, here are four very personal ideas.

First, some transnational matters are already treated, albeit very briefly. The best example is alienage jurisdiction. However, in the first-year course, I do not go more deeply into transnational aspects of subject-matter jurisdiction, legislative jurisdiction, or choice of law. For a specific example, I try to avoid treating the Alien Tort Statute (ATS) in any detail. I speak from some experience. I use *Kadic*[23] to teach international jurisdiction over the person, and it sometimes has led me and the class into the black hole that is the ATS.

Second, I believe that transnational discovery and judicial assistance should also be left to the upper-class course. This topic is too practical, or rather not theoretical enough, despite raising some admittedly intriguing issues.[24] Note that my suggestions here concern what actually to "teach." Several pages of background reading will do no harm, but if one already must teach domestic discovery in survey fashion only, one hardly yearns for more discovery materials. Needless to say, foreign sovereign immunity and the act of state doctrine are way beyond the first-year students' reach, and much too exclusively transnational to be appropriate for the civil procedure course.

Third, for territorial authority to adjudicate and the effect of judgments, no civil procedure course can still afford to ignore the transnational implications. Usually jurisdiction and judgments are major subjects of the basic course, and so they can bear this irresistible extension. Those transnational implications illuminate the federal, interstate, and separation-of-powers aspects of the constitutional structure already under study, while introducing the students to the treaty concept. They reveal the global terrain to the students, while sensitizing them to law's international dimensions. There are international (U.S. jurisdictional reach and U.S. treatment of foreign judgments) and comparative (how other countries treat jurisdiction and judgments) aspects to both subjects, but what I am stressing as essential is mainly those international aspects of jurisdiction and judgments.

23. Kadic, 70 F.3d 232 (holding that an invitee of the United Nations is not immune from personal service of process).

24. See ABA Section of Antitrust Law, Obtaining Discovery Abroad (2d ed., Chicago, 2005).

What else to cover in this realm of jurisdiction and judgments? While the more ambitious professor might get into the difficulties of parallel proceedings on the transnational level, I think the professor should avoid the practicalities of transnational service, which are just too complicated and quite distinguishable from the international requirement of jurisdiction and from the domestic requirement of service. Again, a few pages of text on transnational service, which is all that any of the civil procedure casebooks contains, will do no harm, but I do not think that transnational service should actually be taught in the first-year classroom.

Fourth, if the teacher wants to go farther into transnational perspectives, it should be in the direction of comparative civil procedure. Many students will eventually practice across different procedural systems, so they need to learn others' procedures. Comparative study helps overcome the common misconception that the particular procedural rules of one's home jurisdiction are the only rules that would really work. On a still more theoretical level, the greatest benefit of studying other procedural systems may not be the direct instigation of procedural reform but the attainment of a deeper understanding of one's own system. The reasons for comparative study thus are plentiful.[25] Indeed, it is much easier to justify studying comparative procedure than expanding the basic course into international litigation.

Here are three bits of advice on how to go about comparative study in the basic civil procedure course: (1) For readings, as opposed to classroom commentary, one should not rely on proceeding interstitially and intermittently. The resulting distraction led our predecessors away from a heavily comparative state-federal approach and toward a relatively continual focus on the federal procedural system. Moreover, the parts of a foreign system cannot honestly and fairly be conveyed in isolation from one another, because procedure's inherent interrelatedness makes foreign systems into seamless webs too. (2) In concentrated readings as part of a renewed overview at some stage of the course, one should focus on a single foreign country, probably a legally developed country that exhibits considerable commonalities with us and has plentiful materials in English.[26] Focusing on

25. See also Kevin M. Clermont, *Foreword* to Kuo-Chang Huang, Introducing Discovery into Civil Law ix (Durham, N.C., 2003); Richard L. Marcus, Putting American Procedural Exceptionalism into a Globalized Context, 53 Am. J. Comp. L. 709 (2006); Joachim Zekoll, Comparative Civil Procedure, *in* The Oxford Handbook of Comparative Law 1327 (Mathias Reimann and Reinhard Zimmermann eds., Oxford, 2006). Comparative civil procedure is becoming quite the hot commodity. In the study of territorial authority to adjudicate and the effect of judgments, it is verging on impossible to ignore foreign practices. But those subjects offer just the beginning of possibilities for insight. I can give as an illustration the intriguing topic of standards of proof. See Kevin M. Clermont and Emily Sherwin, A Comparative View of Standards of Proof, 50 Am. J. Comp. L. 243 (2002) (comparative study, focusing on France); Kevin M. Clermont, Standards of Proof in Japan and the United States, 37 Cornell Int'l L.J. 263 (2004) (another comparative study).

26. International Encyclopaedia of Laws: Civil Procedure (Piet Taelman ed., The Hague, 2005) nicely collects in four volumes a series of surveys of various countries' civil procedure

a single procedural system most efficiently presents the essential, while the spotlighting of a complete system enables the student to face those problems of theory and practice that require considering an entire system. It also

systems. See also, e.g., Benjamin Kaplan and Kevin M. Clermont, Ordinary Proceedings in First Instance: England and the United States, *in* 16 Int'l Encyclopedia of Comparative Law ch. 6, at 3 (Mauro Cappelletti ed., The Hague, 1984). For sources on France, see Clermont, Integrating Transnational Perspectives into Civil Procedure, *supra* note 15, at Appendix C. On Japan, see Takaaki Hattori and Dan Fenno Henderson, Civil Procedure in Japan (Yasuhei Taniguchi, Pauline C. Reich, and Hiroto Miyake eds., rev. 2d ed., Huntington, N.Y., 2002); Joseph W.S. Davis, Dispute Resolution in Japan (Cambridge, Mass., 1996); Carl F. Goodman, Justice and Civil Procedure in Japan (New York, 2005); Clermont, Standards of Proof, *supra* note 25, at 264-67; Takeshi Kojima, Japanese Civil Procedure in Comparative Law Perspective, 46 U. Kan. L. Rev. 687 (1998); Masatami Otsuka, Japan, *in* 2 Transnational Litigation: A Practitioner's Guide (John Fellas ed., Dobbs Ferry, N.Y., 1997); Tsuneo Sato, Japan, *in* International Civil Procedure 379 (Shelby R. Grubbs ed., The Hague, 2003); Yasuhei Taniguchi, The 1996 Code of Civil Procedure of Japan–A Procedure for the Coming Century?, 45 Am. J. Comp. L. 767 (1997); Hiroyuki Tezuka, Trial and Court Procedures in Japan, *in* Trial and Court Procedures Worldwide 39 (Charles Platto ed., London, 1990); Supreme Court of Japan, Outline of Civil Suit in Japan, <http://www.courts.go.jp/english/proceedings/civil_suit_index.html> (last visited Mar. 13, 2007).

But, by far, Germany is the most popular choice in the civil procedure casebooks. Field et al., Materials for a Basic Course in Civil Procedure, *supra* note 13, at 314-21, still uses Benjamin Kaplan, Civil Procedure–Reflections on the Comparison of Systems, 9 Buff. L. Rev. 409, 409-14 (1960), and Marcus et al., Civil Procedure, *supra* note 13, at 13-15, excerpts W. Zeidler, Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure, 55 Austl. L.J. 390, 394-97 (1981), while some teachers hand out David Luban, Lawyers and Justice: An Ethical Study 93-103 (Princeton, N.J., 1988), and some should try Peter L. Murray, A Morning at the *Amtsgericht*: German Civil Justice in Practice, *in* Law and Justice in a Multistate World 779 (James A.R. Nafziger and Symeon C. Symeonides eds., Ardsley, N.Y., 2002). But the most popular article to excerpt on Germany is John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823 (1985). I view this last article as a risky choice. A firestorm of controversy has raged over the general lessons to be drawn from the German comparison. The best route into the literature, which is rather adversarial in tone, lies through Ronald J. Allen, Stefan Köck, Kurt Riechenberg, and D. Toby Rosen, The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship, 82 Nw. U. L. Rev. 705 (1988). For further words of caution from both sides of the Atlantic, see Konstanze Plett, Civil Justice and Its Reform in West Germany and the United States, 13 Just. Sys. J. 186 (1989), and John C. Reitz, Why We Probably Cannot Adopt the German Advantage in Civil Procedure, 75 Iowa L. Rev. 987 (1990). See generally Peter L. Murray and Rolf Stürner, German Civil Justice (Durham, N.C., 2004); Astrid Stadler and Wolfgang Hau, The Law of Civil Procedure, *in* Introduction to German Law 365 (Mathias Reimann and Joachim Zekoll eds., 2d ed., The Hague, 2005).

Also, my own feeling is that a study of a particular country is more effective than attention to ALI/UNIDROIT Principles of Transnational Civil Procedure (Cambridge, 2006), which, for the purposes of overall comparison, proves a bit overwhelming, as well as seeming an artificial patchwork. See Clermont, The Role of Private International Law in the United States, *supra* note 1, at 95-96. See generally The Future of Transnational Civil Litigation: English Responses to the ALI/UNIDROIT Draft Principles and Rules of Transnational Civil Procedure (Mads Andenas, Neil Andrews, and Renato Nazzini eds., London, 2004). But with its rich commentaries, which tell the teacher all there is to know about its own separable provisions in its closed world, it is ideal for selective reference on policy discussions and reform proposals concerning U.S. law.

provides a useful and realistic snapshot for drawing broad comparisons. (3) This concentrated and focused introduction need not be the end of comparativism for the course. It can open a door, which must be constructed on a solid foundation even if used only occasionally, to comparisons on such important subjects as the function of pleadings or of the jury—or maybe even a look at comparative federalism—or to some thematic study of topics like access to justice or the roles of judge or lawyer.

I suspect that even these suggestions of limited forays into transnationalism might strike the young teacher (and others) as intimidating. I remember years ago being asked in class by a foreign graduate student about some fairly basic international implication of the territorial-jurisdiction topic under discussion, and feeling my viscera freeze. But in fact one does not need to know all that much. Now, I am not advocating intellectual carelessness. I am simply saying that one can and should stick to the basics with the students. Moreover, the transnational law on jurisdiction and judgments is not so very different from the domestic law, as this essay's appendices summarizing transnational jurisdiction and judgments,[27] adapted from my hornbook,[28] try to show in just a few pages; and what little extra one needs to know is readily acquirable.[29] Finally, no one expects the teacher to be an expert on the intricacies of foreign procedure, because the real lessons should concern U.S. procedure.

So, expanding one's portfolio toward transnationalism looks like a huge hill to climb, but it turns out to be only a small hump. Once over it, the world looks different, with benefits accruing not only to one's teaching but also to

27. See Clermont, Integrating Transnational Perspectives into Civil Procedure, *supra* note 15, at Appendix A and B.

28. Kevin M. Clermont, Principles of Civil Procedure §§ 4.2(D), 5.1(A)(4)(c), 5.6(C) (St. Paul, Minn., 2005).

29. The place to begin is Main, Global Issues, *supra* note 1. Then, I would recommend some of the fine treatises available: Born, International Civil Litigation, *supra* note 9, does double duty here with its exhaustive detail, while George A. Bermann, Transnational Litigation in a Nutshell (St. Paul, Minn., 2003), and Louise Ellen Teitz, Transnational Litigation (Charlottesville, Va., 1996), are wonderful too. Also very useful are David Epstein, Jeffrey L. Snyder, and Charles S. Baldwin, IV, International Litigation: A Guide to Jurisdiction, Practice and Strategy (3d ed., Ardsley, N.Y., 2004); International Litigation: Defending and Suing Foreign Parties in U.S. Federal Courts (David J. Levy ed., Chicago, 2003); Joseph Lookofsky and Ketilbjørn Hertz, Transnational Litigation and Commercial Arbitration: An Analysis of American, European, and International Law (2d ed., Huntington, N.Y., 2004); Ved P. Nanda and David K. Pansius, Litigation of International Disputes in U.S. Courts (2d ed., St. Paul, Minn., 2005); Lawrence W. Newman and Michael Burrows, The Practice of International Litigation (2d ed., Huntington, N.Y., 1992); Lawrence W. Newman and David Zaslowsky, Litigating International Commercial Disputes (St. Paul, Minn., 1996); and Transnational Litigation: A Practitioner's Guide (John Fellas ed., Dobbs Ferry, N.Y., 1997). Bibliographic entrees to the field include Germain, Germain's Transnational Law Research, *supra* note 1; Jonathan Pratter and Joseph R. Profaizer, A Practitioner's Research Guide and Bibliography to International Civil Litigation, 28 Tex. Int'l L.J. 633 (1993); and Radu D. Popa and Mirela Roznovschi, Comparative Civil Procedure, <http://www.law.nyu.edu/library/foreign_intl/civilproc.html> (last visited Jan. 8, 2007).

one's thinking, reading, and writing. In short, ignorance of the law is no excuse when it comes to the limited duty to globalize our courses and our minds.

Conclusion

My convictions are that civil procedure teachers need to integrate transnational perspectives into their course, but that in doing so they must stay focused on the pedagogic purposes of their course. The discipline imposed by that pedagogic focus actually renders the task of deciding on transnational coverage definable and doable—and yet personal. At the current time and with an understanding that the future will likely demand more, I personally submit that a marked, sufficient, and arguably optimal improvement would involve only (1) coverage of transnational implications of territorial authority to adjudicate and the effect of judgments and (2) a representative foray into comparative civil procedure.