

OVER THERE: TEACHING INTERNATIONAL AND COMPARATIVE LAW AT WEST POINT

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I. INTRODUCTION

The 2013 International Law Weekend panel discussion, “Teaching International Law Outside Law Schools,” was considered by many present to be a novel reflection on the challenges of transplanting a law school-level course in international law to non-law students. At the United States Military Academy¹ (Academy), an undergraduate institution, the teaching of law, particularly international law, has been a staple of cadet education for almost 200 years.²

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The title of this article refers to GEORGE M. COHAN, *OVER THERE* (William Jerome Publ’g Corp. 1917). Cohan wrote *Over There* to recognize the consequences of the German declaration of war on the United States on April 6, 1917, spurring our involvement in World War I. Cohan purportedly lived near West Point in Central Valley, New York in a house that burned down in the 1960s. See Dick Moomey, *A Yankee Doodle Dandy*, WRITER WORKING (June 30, 2013), <http://www.writerworking.net/yankee-doodle-dandy/> (last visited Mar. 5, 2014). That property is now part of West Point. See *The Gatehouse Committee*, WOODBURY HIST. SOC’Y, <http://www.woodburyhistoricalsociety.org/gatehouse.html> (last visited Feb. 5, 2014).

1. The United States Military Academy is also known as West Point (technically both its physical location and the name of the Garrison), USMA, and especially where athletics are concerned, Army. Students at the United States Military Academy are denominated “cadets.” The Academy is a federal institution created by statute, 10 U.S.C. § 4331 (2006), which details governance of the Academy and the process for selection of cadets and faculty.

2. Colonel Patrick Finnegan, *The Study of Law as a Foundation of Leadership and Command: The History of Law Instruction at the United States Military Academy at West Point*, 181 MIL. L. REV. 112, 112 (2004).

The Academy, a storied institution,³ was founded by Thomas Jefferson in 1802 at West Point, New York,⁴ the spot chosen by George Washington as pivotal to the defense of the fledgling country during the Revolutionary War.⁵ Cadet education remains driven by the Academy's mission of preparing students for a career in the United States Army.⁶ In this unique setting, cadets undergo rigorous military training while completing a Bachelor of Science degree at what is ranked among the nation's finest liberal arts colleges.⁷

Law is currently taught to all cadets in the form of a "core" (required) course in Constitutional and Military Law (Law 403).⁸ Taught by the Academy's Department of Law, which was chartered in 1874,⁹ the course currently incorporates the teaching of basic international law largely for the purpose of teaching all cadets the laws of armed conflict.¹⁰ While this Article will recount some of the history of teaching law at West Point, and will detail the reasons for its continued necessity in the education of leaders of character,¹¹ much of it will detail the current needs of the Army and how that translates into specific curricular needs. The current required and elective course offerings in this area will be described in some detail, and special attention will be paid to the Author's course in Comparative Law.

3. Cadet life at West Point has been the subject of multiple films, including classics such as *THE WEST POINT STORY* (Warner Bros. 1950) and *FRANCIS GOES TO WEST POINT* (Universal 1952); documentaries such as *A GAME OF HONOR* (CBS Sports 2011); a television series, *WEST POINT* (ZIV Programs 1956–58) (aired on CBS 1956–57 and ABC 1957–58); and a reality show, *SURVIVING WEST POINT* (Nat'l Geographic 2002).

4. 7 ANNALS OF CONG. 1312, §27 (1802).

5. William F. Prosser, *A Visit to West Point*, 2(2) THE WASHINGTON HIST. Q. 105, 105 (1908), stating that: "[West Point] was the favorite fortress of General George Washington because of its military importance, and it gave him more trouble and anxiety than any other, knowing as he did that the British forces in the neighboring city of New York also realized its immense value for strategic purposes"

6. Cadets are members of the United States Army, receiving pay during the forty-seven months they will spend as cadets at the Academy.

7. The Academy is rated seventh in this particular ranking of universities, below top-rated Stanford, but above eighth-rated Harvard. See *America's Top Colleges*, FORBES (2014), <http://www.forbes.com/top-colleges/list/> (last visited Feb. 22, 2014).

8. This course is also referred to as "Law 403."

9. Finnegan, *supra* note 2, at 115.

10. See U.S. MILITARY ACAD., ACADEMIC PROGRAM 209 (Aug. 20, 2013), available at http://www.usma.edu/curriculum/SiteAssets/SitePages/Course%20Catalog/RedBook_GY2016_20131216.pdf (last visited Feb. 22, 2014) [hereinafter REDBOOK].

11. *The West Point Mission*, U.S. MILITARY ACAD. WEST POINT, <http://www.westpoint.edu/about/SitePages/Mission.aspx> (last visited Feb. 5, 2014) [hereinafter *The West Point Mission*].

Teaching cadets is a unique and rewarding experience. They wear their meticulously kept uniforms, address their instructors as Ma'am or Sir, come to attention when the class is called to order, and exhibit a well-honed sense of discipline day-in and day-out. Cadets are generally very bright and motivated undergraduate students, achieving the Academy's rigorous admissions requirements, and completing a summer of basic training commonly referred to as "Beast Barracks."¹² The classes are punctuated by star cadets, who literally wear stars on their uniforms for superior academic performance, earning a wide-array of prestigious scholarships including Rhodes, Marshall, and Truman Scholarships.¹³

The mission of the Academy is "[t]o educate, train, and inspire the Corps of Cadets so that each graduate is a commissioned Leader of Character committed to the values of Duty, Honor, Country; and prepared for a career of professional excellence and service to the Nation as an officer in the United States Army."¹⁴ The academic side of the Academy is the province of the Dean of the Academic Board and is carried out by the academic departments.¹⁵ Each course has a "course director" whose job is to craft the syllabus and manage the faculty that will be teaching individual classes. Classes are held on a traditional semester basis, with summers reserved for military training and enrichment activities.¹⁶ They consist of forty "lessons" that generally last for fifty-five minutes. Conversely, Law 403 lasts for seventy minutes and the idiosyncratic calendar, known as the "buff card" at West Point, labels days as a "1-day" or "2-day," rather than employing the more conventional Monday through Friday schedule.

The faculty at West Point is comprised of three basic groups: Permanent military faculty; rotating military faculty; and civilian faculty.¹⁷ Despite their position in the military organization, faculty members are assured of their academic freedom. Nonetheless, faculty members are

12. See Jesse L. Germain, *Physical Program Leadership: From Kinesiology in the Classroom to Fitness Training in the Field*, 62 *QUEST* 287, 287 (2010).

13. *Rhodes Scholarships: Number of Winners by Institution*, RHODESSCHOLAR.ORG, http://www.rhodesscholar.org/assets/uploads/2013_Institutions_Winner%20Count_10_8_13.pdf (last visited Feb. 5, 2014) (West Point has had eighty-nine Rhodes Scholars to date.).

14. *The West Point Mission*, *supra* note 11.

15. FRANK BORMAN, REPORT TO THE SECRETARY OF THE ARMY BY THE SPECIAL COMMISSION ON THE UNITED STATES MILITARY ACADEMY 49–50 (Dec. 15, 1976), available at <http://www.west-point.org/publications/borman.html#2> (last visited Feb. 22, 2014).

16. U.S. MILITARY ACAD. WEST POINT, ADMISSIONS CATALOG 5 (2013–2014), available at http://www.usma.edu/admissions/shared%20documents/wp_admissions-catalog_2013-14.pdf (last visited Feb. 5, 2014).

17. See *New Faculty Guide*, U.S. MILITARY ACAD. WEST POINT, <http://www.usma.edu/law/SitePages/New%20Faculty%20Guide.aspx> (last visited May 7, 2014).

aware of the overarching mission of the Academy and the needs of their students to function successfully within their chosen careers as professional soldiers.

Military training is in the hands of the Academy's Commandant, a Brigadier General assigned to train around 4400 members of United States Corps of Cadets (Corps).¹⁸ The Corps is organized as a military brigade, divided into four regiments, and further divided into battalions and companies.¹⁹ Military training continues throughout the year with much more intensive training over the summer.²⁰

In addition to academics and military training, cadets have significant physical fitness requirements, including the Army's personal fitness test. Cadets are physically tested regularly and have to maintain high standards in those activities. Most cadets play competitive sports. On graduation, cadets will be commissioned as Second Lieutenants in the Army, and shortly thereafter, will be placed in leadership positions where they will lead troops and play their role as officers in the military justice system.²¹

II. TEACHING LAW AT WEST POINT: A BRIEF HISTORY

West Point is located a mere thirty-five miles from New York City. Its position, which is high above the western bank of the mighty Hudson River²² and overlooks the spot where the river changes its north-to-south course to run west-to-east for a short distance, was what prompted General Washington to establish a garrison to defend this critical waterway.²³ This is the same military garrison that Benedict Arnold sought to betray by selling its plans to the British.²⁴

18. *About the Brigade Tactical Department*, U.S. MILITARY ACAD. WEST POINT, <http://www.usma.edu/btd/SitePages/About.aspx> (last visited Feb. 5, 2014).

19. *Id.*

20. ADMISSIONS CATALOG, *supra* note 16, at 5.

21. *See generally* ROBERT J. GOLDSTEIN, ET AL., *SERVICEMEMBER AND VETERANS RIGHTS* (Brian Clauss ed., 2013).

22. The Hudson River is really an estuary below the Federal Dam at Troy, New York. This means the River is tidal, enhancing its navigability and making it a major channel of travel and commerce to this day.

23. *POUGHKEEPSIE JOURNAL*, WEST POINT: LEGEND ON THE HUDSON 34 (2003).

24. *Id.* at 32–33. General Washington also understood the importance of law, and in particular, Army lawyers. He founded the Judge Advocate General's (JAG) Corps in 1775, and is known to have sent a pressing letter asking for legal advice from his JAG attorney as one of his first acts after discovering that Benedict Arnold had defected to the British. RICHARD VARICK, *THE VARICK COURT OF INQUIRY TO INVESTIGATE THE IMPLICATION OF COLONEL VARICK (ARNOLD'S PRIVATE SECRETARY) IN THE ARNOLD TREASON 208–09* (Albert Bushnell Hart ed., 1907).

In 1802, President Thomas Jefferson founded the Academy as the first school of engineering in the country.²⁵ Regulations provided for “a course in Ethics [which] shall include Natural and Political Law.”²⁶ According to Brigadier General Patrick Finnegan’s authoritative history of the West Point Department of Law, “[t]he study of natural and political law was intended to foster the intellectual and cultural growth of the cadets, as well as to develop their reasoning ability, and instill in them the basic principles of a society based on the rule of law.”²⁷ This charter for legal education at West Point most closely resembled what Professor Charles R. McManis called the “Virginia Model” of legal education, derived from the contributions of Thomas Jefferson to American legal education.²⁸ It is followed at the other school founded by Jefferson, the University of Virginia, and is characterized by McManis as providing “Practical Training for Citizenship and Public Service.”²⁹

The teaching of law at the Academy began in earnest in 1821, according to Finnegan, when a treatise called *The Law of Nations* by M^{onsieur} De Vattel, was adopted as a textbook.³⁰ Constitutional Law was soon added.³¹ In 1858, additional topics were added to the law curriculum,

25. POUGHKEEPSIE JOURNAL, *supra* note 23, at 35.

26. Finnegan, *supra* note 2, at 112 (quoting REGULATIONS OF U.S. MILITARY ACAD. 10, July 1816).

27. *Id.* at 112–13 (citing Charles W. West, *Department of Law, U.S.M.A., Assembly XII* (Apr. 1953): 3).

28. Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L. Q. 597, 621 (1981).

29. *Id.*

30. Finnegan, *supra* note 2, at 112 (referring to EMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAWS* (1758)).

31. As Finnegan notes, “[t]he study of American constitutional law replaced natural law (which emphasized international law) in 1827, but by 1838 the course of study in law provided for instruction in both constitutional and international law.” Finnegan, *supra* note 2, at 113. Finnegan also relates the intriguing story of the role that the use of the text *A View of the Constitution of the United States of America* by William Rawle, in teaching law at antebellum West Point played in the Civil War. *Id.* As he notes:

Rawle’s treatise concluded that a state has a legal right to secede from the Union, and this was most likely the basis for the post-Civil War argument that West Point had taught “secession” for decades and thus was responsible for many West Point graduates fighting for the Confederacy. Although it is impossible to know the precise extent of Rawle’s influence, his ideas had a profound effect on at least some cadets. Gen. Robert E. Lee, Class of 1829, confided in Bishop Joseph Wilmer of Virginia that, if he had not read Rawle’s work as a cadet, he would never have left the Union.

Id.

including Military Law, which according to Finnegan became “a subject of great professional interest to future Army officers.”³² During this period, the Chaplain was assigned to teach law, until 1874 when the Department of Law was established.³³

The Department of Law is nearing its 140th year and currently teaches every cadet that graduates from the Academy. The professors are all lawyers with practical experience. Military members of the faculty are handpicked from the ranks of the Judge Advocate General’s Corps (JAG), who are the lawyers for the Army. Civilian professors have also been part of the West Point Law faculty since the 1970s.

The Department of Law, in fulfilling the role of educating leaders of character for the Army, has the very specific role of preparing those leaders to assume their role within the military justice system. Under Uniform Code of Military Justice (UCMJ), officers in the chain-of-command bear legal responsibility for the criminal justice system.³⁴ This responsibility includes attending to administrative actions geared toward rehabilitating service members who have misbehaved, presiding over non-judicial punishment adjudications, and the convening of courts-martial.³⁵ Officers managing this system are charged with maintaining “good order and discipline” in their units, and these are the administrative and legal tools afforded to accomplish that goal.³⁶

Additionally, officers in the military that wield extraordinary power must understand and respect the concept of civilian rule of the military and recognize their oath to defend the Constitution of the United States. As in the dissenting opinion of the case of *Korematsu v. United States*, which is the first case cadets read in their core course, Justice Robert Jackson states, “[i]f the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint.”³⁷ Thus, the aforementioned “Virginia Model” still characterizes legal

32. *Id.* at 114. The Civil War, as Finnegan notes, had brought about a codification of the laws of war by Francis Lieber, which became known as the Lieber Code. *See id.*

33. Finnegan, *supra* note 2, at 115.

34. GOLDSTEIN, *supra* note 21, §1.02.

35. *Id.*

36. *Id.* §1.01.

37. *Toyosaburo Korematsu v. United States*, 323 U.S. 214, 248 (1944). We use this case for multiple purposes including as an introduction to the application of strict scrutiny to cases of racial discrimination; the enormous power that Army officers will wield; and the application of “deference” to the military in cases involving national security. In his classes, the Author emphasizes to cadets that “deference” must be earned by officers with critical thinking and respect for the rule of law.

education at West Point.³⁸ However, it might be rephrased to read that legal education provides practical training for officership, citizenship, and public service.

III. RULE OF LAW AND THE MILITARY

Although rule of law as a conceptual matter has been described as “stand[ing] in the peculiar state of being the preeminent legitimating political ideal in the world today, without agreement upon precisely what it means,”³⁹ the military has crafted a pragmatic interpretation that has been applied to its operations.⁴⁰

The years of war in Afghanistan and Iraq that followed the events of September 11, 2001, led to many revelations of the nature of war fighting in those conflicts.⁴¹ Warfare forced the military to adopt a strategy of counter-insurgency, known as “COIN” to deal with the conflict.⁴² It also laid bare the need to understand how to successfully end conflicts and restore order after them. Key to this understanding was the recognition that rule of law was an essential component of any governmental system left in place at the end of a conflict and restoring rule of law was tantamount to the “winning” of the conflict. The military has defined the rule of law as having seven “effects” including:

- 1) The state monopolizes the use of force in the resolution of disputes;
- 2) Individuals are secure in their persons and property;
- 3) The state is itself bound by law and does not act arbitrarily;
- 4) The law can be readily determined and is stable enough to allow individuals to plan their affairs;
- 5) Individuals have meaningful access to an effective and impartial legal system;

38. McManis, *supra* note 28, at 621.

39. BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 4 (Cambridge University Press, 2004).

40. CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY RULE OF LAW HANDBOOK 3 (2011), available at http://www.loc.gov/tr/frd/Military_Law/pdf/rule-of-law_2011.pdf (last visited Feb. 22, 2014) [hereinafter ROL HANDBOOK].

41. Captain Ronald T. P. Alcala, *Vanquishing Paper Tigers: Applying Comparative Law Methodology to Enhance Rule of Law Development*, 2011-MAR ARMY LAW. 5, 5–6 (2011), available at http://www.loc.gov/tr/frd/Military_Law/pdf/03-2011.pdf (last visited Feb. 22, 2014).

42. See generally DANIEL MARSTON, *COUNTERINSURGENCY IN MODERN WARFARE* (Osprey, 1st ed. 2011).

- 6) The state protects basic human rights and fundamental freedoms; and
- 7) Individuals rely on the existence of justice institutions and the content of law in the conduct of their daily lives.⁴³

Identifying the importance of rule of law to the military, the JAG has dedicated considerable effort to what are termed “rule of law operations.”⁴⁴ They are defined as “any project, program, or planned action whose specific goal is to help a host nation move toward the realization of one or more of the seven effects [of the rule of law].”⁴⁵ The placement of this importance on the concept of rule of law in the military has enhanced its role in the law courses taught at West Point, as demonstrated in the core course and the Comparative Law elective described below.

IV. INTERNATIONAL LAW IN THE CORE COURSE

Cadet curriculum includes a wide range of core courses, including a series of engineering courses in sequence. The Law Department’s class, Law 403, is among the core courses.⁴⁶ Taken by most cadets in their “firstie” (senior) year, Law 403 covers basic constitutional law, including the powers and limitations of the federal government, its branches, and individual rights.⁴⁷ The course then covers the military justice system, which is criminal law for the military.⁴⁸ Finally, there is a focus on the law of armed conflict.⁴⁹

In teaching this last part of the course, good use is made of earlier lessons that have laid the ground work for understanding international law, and in particular, the role of international law domestically. For instance, a critical case used in teaching the jurisdiction of the UCMJ, which is the statute that contains substantive military criminal law, is *Reid v. Covert*.⁵⁰ The facts in that case involve murders of service members on military bases in England and Japan and defendant spouses who were tried by courts-

43. ROL HANDBOOK, *supra* note 40, at 3.

44. *Id.* at 10.

45. *Id.*

46. Curriculum, UNITED STATES MILITARY ACAD. WEST POINT, <http://www.usma.edu/law/SitePages/Curriculum.aspx> (last visited Feb. 5, 2014).

47. See Mark L. Toole, *LW403 Constitutional and Military Law Syllabus, Class Schedule and Reading Assignments 1* (Fall 2013) [hereinafter LW 403 Syllabus].

48. *Id.* at 3.

49. *Id.* at 5.

50. See generally *Reid v. Covert*, 354 U.S. 1 (1957).

martial.⁵¹ While the Supreme Court was delineating the UCMJ's jurisdiction, they were also outlining limitations of the Constitution's treaty power with regard to fundamental rights.⁵² Specifically in *Reid*, the Fifth Amendment right to a grand jury (excluded by the Amendment for the military) and the Sixth Amendment right to a trial by jury, for which the UCMJ substitutes a "Trial Panel" composed of military service members, not peers of civilians.⁵³ The Court ruled that this was not permissible regardless of the fact that a treaty, the NATO Status of Forces Agreement, (which applied to the military posts where the murders were committed) was "the supreme law of the land."⁵⁴

Similarly, notwithstanding the limitation of fundamental rights, the United States Supreme Court in *Missouri v. Holland*⁵⁵ held that the Migratory Bird Treaty⁵⁶ could limit other rights, such as the right to hunt and take birds under the treaty power.

In addition, in teaching the basics of criminal law and procedure, cadets have a broad enough background to understand the role of international law as it concerns the law of armed conflict. The first lesson is very similar to an introduction in a law school course that covers the sources of international law and the organization of the international legal system. For instance, the case of *The Paquete Habana* is taught⁵⁷ to relate its primary message that "[i]nternational law is part of our law."⁵⁸ *The Paquete Habana* is also useful in identifying the sources of international law other than those found in treaties, as "resort must be had to the customs and usages of civilized nations, and as evidence of these, to the works of

51. *Id.* at 3–4.

52. *Id.* at 8–9.

53. *Id.* at 5.

54. *Reid*, 354 U.S. at 17 ("It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights . . . to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.").

55. *Missouri v. Holland*, 252 U.S. 416 (1920). The court in *Reid v. Covert* contrasted *Missouri v. Holland* noting that it concerned the Tenth Amendment: "To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government, and the Tenth Amendment is no barrier." *Reid*, 354 U.S. at 18.

56. *Holland*, 252 U.S. at 430–31 (This case was brought by the state to "prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same.").

57. *The Paquete Habana*, 175 U.S. 677 (1900). It should not be surprising that many of the cases that we study in this course have military-focused fact patterns, these engage cadets, and also provide for many dimensions of the lessons we take from them in addition to the court's ruling.

58. *Id.* at 700.

jurists and commentators . . . not for their speculation of what the law ought to be, but for trustworthy evidence of what the law really is.”⁵⁹ This provides a strong foundation for understanding and applying the laws of armed conflict.

Because of its impacts on the law of armed conflict, cadets are shown a documentary on the Nuremberg Trial.⁶⁰ Then each aspect of the law of armed conflict is addressed in detail, which includes military necessity, distinction, proportionality, and unnecessary suffering by using cases and practical exercises.⁶¹ There is a separate lesson to discuss command responsibility and the defense of obedience to orders. Finally, this knowledge is used to explore the Guantanamo cases and their implications.⁶²

In teaching Law 403, great pains are taken to make it a law school-level course. The goal is to stimulate critical thinking among the cadets and have them apply it to their decision-making. Many law faculty members use different versions of the Socratic Method in reviewing the case excerpts that are part of each lesson’s reading. Earlier in their education, West Point cadets study the American political system, which is a focus on the constitutional conflicts that present themselves, and the law used in their resolution. Finally, the faculty is also responsible for teaching the understanding that the military is subservient to civilian authority and must operate in the context of rule of law. The Department of Law currently teaches several other courses that incorporate international law in their curriculum, including International Law, it includes Comparative Law (discussed below), Environmental Law, Law of Armed Conflict, and Advanced Law of Armed Conflict.⁶³

59. *Id.*

60. NUREMBERG: TYRANNY ON TRIAL (History Channel 1995).

61. It is important to note that we pay great heed to teaching the law of armed conflict, and are constantly updating the practical exercises and lessons to coincide with developments in the law. The faculty of the Department of Law is constantly engaged in research and scholarship in this area, such as the Author’s proposal to create an affirmative duty of servicemembers to prevent war crimes by members of their own units. This would hold soldiers who witness war crimes by their colleagues, and take no action to prevent them, liable as accessories. *See generally* Robert J. Goldstein, *Enlisting an Army to Combat War Crimes*, ABA SECTION OF LITIGATION, MILITARY LAWYERS (Mar. 21, 2013).

62. LW 403 Syllabus, *supra* note 47, at 5. The LW 403 Syllabus assigns the case edited versions of *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. 723 (2008), in two consecutive lessons; while we reference *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), in each class.

63. REDBOOK, *supra* note 10, at 417–18.

V. COMPARATIVE LAW

The course in Comparative Law, which became part of the curriculum for the class of 2005, took full cognizance of the needs of the military with regard to the rule of law but was primarily an academic exercise focused on providing cadets with an understanding of different strains of law that were very much unlike American law.⁶⁴ To that end, a broadly focused text, *Legal Traditions of the World*⁶⁵ by H. Patrick Glenn, was assigned to lay the foundation for diverse legal traditions with its emphasis particularly on tribal tradition or “chthonic” law. Supplementing this text were articles (all of which were accessible on the Internet) that evaluated a variety of legal systems using the rule of law criteria.

A challenge in delivering this course was that few of the cadets had yet studied Law 403, so the introduction to Comparative Law had to serve the purpose of an introduction of law in general. To accomplish this dual purpose, the faculty used the example of the French experience with the question of Muslim women wearing head coverings in public schools—what became commonly known as the “Headscarf Affair.”⁶⁶ It proved to be a topic that engaged cadets in lively discussion of justice, law, and the profound differences in legal systems, with its idiosyncratic journey through the French concepts of “Laicite.”⁶⁷

With that introduction, varying definitions of the rule of law were broken down into a menu of components that was used to evaluate each legal system. The components used were based on those identified by Lord Bingham in his article, *The Rule of Law*.⁶⁸ Despite referencing this well-reasoned and respected definition, it was understood that not all components would be absolutely necessary to achieve that critical mass that was identified as rule of law. Importantly, cadets were urged to be critical of the amalgam offered by any particular system. The idea of constitutionalism was also studied, and a lecture by Harvard Law Professor Noah Feldman, entitled *Imposed Constitutionalism*, was viewed.⁶⁹

64. Finnegan, *supra* note 2, at 137 n.151.

65. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (4th ed. 2010).

66. See generally Elise T. Beller, *The Headscarf Affair: The Conseil D'Etat on the Role of Religion and Culture in French Society*, 39 *TEX. INT'L L.J.* 581 (2004).

67. See generally *id.*

68. See generally Lord Bingham, *The Rule of Law*, 66 *CAMBRIDGE L. J.* 67, 69–82 (2007).

69. See generally Noah Feldman, *Imposed Constitutionalism*, 37 *CONN. L. REV.* 857 (2005) (lecture delivered Mar. 28, 2012).

Particular attention was paid to the idea of due process of law by the initial reference to *Trial* by Franz Kafka.⁷⁰

To begin looking at individual systems, a variety of theories were introduced dealing with rule of law and constitutionalism. Following Professor Glenn's lead, Chthonic law and Jewish law were tackled before spending a significant amount of time on Islamic law.

Islamic law has been an important topic to a military that has been repeatedly deployed in the Middle East since the first Gulf War. In the post-September 2011 deployments, service members were cast in roles requiring governance of areas under military control. Attempts that were made to apply American legal ideas in regions that had long followed traditions, both Chthonic and Islamic, were met with local resistance, at best. As Feldman notes, "even though Islam never eliminated tribalism or its identities, it has, at least in cities, historically been very successful at replacing tribal dispute resolution with Islamic legal institutions."⁷¹ The lack of understanding on the part of the military, regarding the fact that local rule of law was not anything like western rule of law, resulted in a reevaluation of those efforts and an intensified attempt to better understand their legal systems.⁷² In addition, the prolonged Arab Spring presented the unique opportunity to observe the precipitous changes in Islamic countries.⁷³

Islamic law presented several challenges in teaching. The greatest of these were the misconceptions that permeated discourse in the media and dramatically on the Internet.⁷⁴ These misconceptions were faced head-on by the following: First, by the understanding that many of the negative opinions were based not on Islamic law and practices, but on Chthonic traditions that persisted in many of these regions; and second, by the similarities with Jewish law that were emblematic of mainstream Islamic society, and could be seen as Biblical and not heretic. Importantly, a closer examination of the more conservative Islamic law countries, including

70. THE TRIAL (Paris Europa Productions 1962).

71. See NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 140–41 (Princeton University Press, 1st ed. 2008).

72. Thomas Ayres, *The JAG Corps and Rule of Law Reform: An Interview with Brigadier General Thomas Ayres*, 14 U. PA. J.L. & SOC. CHANGE 391, 391–92 (2011).

73. See generally Rosa Brooks, *Lessons for International Law from the Arab Spring*, 28 AM. U. INT'L L. REV. 713, 714–15 (2013).

74. This kind of rhetoric was quickly condemned by General Martin Dempsey, the Chairman of the Joint Chiefs of Staff, when it came to light that an instructor at the Joint Forces Staff College had characterized Islam as a "barbaric ideology." *Pentagon Condemns 'War on Islam' US Training Class*, BBC NEWS US & CANADA (May 11, 2012, 12:12 PM), <http://www.bbc.co.uk/news/world-us-canada-18032968> (last visited Jan. 29, 2014).

Saudi Arabia and Iran, showed that the strict application of traditional Shari'a (Islamic law) was not in fact, synonymous with militancy.⁷⁵ These conservative Islamic systems, while plainly deficient in terms of rule of law, were also not emblematic of much of the rest of the Islamic world, especially with regard to equal protection of women and non-Muslims.⁷⁶

The semester continued with a series of readings and class discussions on a variety of legal systems including the People's Republic of China and the now-defunct Soviet Union. For each system, the cadets were tasked with evaluating the quality of the rule of law afforded by the system in practice. This effort was to be replicated in a final paper evaluating a chosen and faculty approved legal system. Finally, we evaluated aspects of international law to analyze its rule of law dimensions.

Cadet feedback after the semester, demonstrated that they generally enjoyed learning Islamic law because it is something that they had little knowledge of and because it is relevant to our future jobs.⁷⁷ They also related that they came to understand the importance of the rule of law.⁷⁸ One cadet mentioned that the most valuable aspect is the concept of rule of law and learning how to use it to compare different legal systems.⁷⁹ Finally, the cadets appreciated the broad array of systems that were covered and the cultural aspects that drove many of the differences they witnessed.

VI. THE PANEL, "TEACHING INTERNATIONAL LAW OUTSIDE LAW SCHOOLS"

Among the questions raised during the panel discussion during International Law Week were issues related to substantive content of undergraduate (as well as non-law school graduate) courses and the pedagogical methods. As discussed above, the substance of law courses at West Point, while supportive of the mission, is left to the course director's discretion. This allows for a great deal of customization based on the background of the cadets enrolled and the predilections of the instructor.

75. While it is as difficult to arrive at an objective definition of militancy, as it is to define terrorism, the Author suggests that a functional definition might suffice. Those whose methods are in violation of the laws of armed conflict might be defined as terrorists. Militancy merely describes the use of violence and force to achieve their ends.

76. See generally Reza Aslan, *The War for Islam*, BOSTON GLOBE (Sep. 10, 2006), http://www.boston.com/news/globe/ideas/articles/2006/09/10/the_war_for_islam/ (last visited Jan. 29, 2014).

77. Comments are reported through the USMA Course End Feedback Report—AY2013 (on file with Author).

78. *Id.*

79. *Id.*

That goes for both the course materials chosen and the pedagogical methods employed.

Since the cadets taking this course tend to have no prior law classes (although some were taking law classes contemporaneously with Comparative Law), the use of a traditional law school casebook was displaced by a more general descriptive text complimented with articles. In choosing those articles, practical pieces were preferred over theoretical ones, but theory was not entirely eschewed. Striking the right balance, which is particularly important for undergraduates, is critical. This required the juggling of some reading assignments, since suitable articles were substituted for those that the students found to be impenetrable.

It should be clear that law is a necessary part of a military officer's education, and West Point provides that component through its Law Department's core and elective classes. It is also important to understand that an officer, especially one who is likely to be deployed to a combat setting, must have carefully honed critical thinking skills to allow for rapid decision making. A high level of critical thinking is essential in making decisions based on rules that can have life-or-death consequences.

Imagine the consequences of applying the law of armed conflict regarding distinction in an urban battlefield. Split-second application of the use of deadly force is required to ensure the protection of an officer's soldiers while engaging an enemy. Then the next vehicle turning into the street or the next person emerging from a doorway is either an enemy combatant or an innocent civilian, who are not in uniform. Having in mind that even innocent civilians carry firearms. Now try to apply the law.

Certainly the officer who is known as the father of West Point, Colonel Sylvanus Thayer, understood this need for critical thinking when he was appointed superintendent in 1817.⁸⁰ His "Thayer Method" was a pedagogy that made cadets responsible for their own learning, by requiring advance preparation, and using classroom time for active learning.⁸¹ This method of teaching closely resembles the Socratic Method, which is used primarily in law schools, but is also a staple of law teaching of West Point undergraduates. The "Thayer Method" develops critical thinking skills, and in the Author's experience, cadets are able to thrive in that atmosphere.

The upshot is that West Point cadets, who will be the future leaders of the United States Military, need to learn and understand law. They also need to understand how to apply it. This is something that Washington,

80. POUGHKEEPSIE JOURNAL, *supra* note 23, at 103.

81. See generally Amy E. Shell, *The Thayer Method of Instruction at the United States Military Academy: A Modest History and a Modern Personal Account*, in 12 PRIMUS: PROBLEMS, RESOURCES, AND ISSUES IN MATHEMATICS UNDERGRADUATE STUDIES 1, 27–38 (2002).

Jefferson, and Thayer understood and evolved into a cornerstone of the education of officership. While these courses are not geared to law schools, they are taught at a very high level that would be a rewarding and suitable challenge to most law students.