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Recommended Citation
Shulman, Mark R., "Exile or Opportunity? The Benefits of Mastering U.S. Law" (2006). *Pace Law Faculty Publications.* Paper 312.
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EXILE OR OPPORTUNITY?

THE BENEFITS OF MASTERING U.S. LAW

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September 16, 2008

This essay was originally delivered a conference at the Federal University of Rio Grande do Sul in Porto Allegre, Brazil in 2005. It has been revised for publication on the website of Pace University School of Law's Institute of International Commercial Law. Because it was delivered originally to an audience of Brazilian law students and lawyers, some of the references appear to be specific to Brazilians. However, the lessons of this essay are applicable to law students and lawyers from all around the world who are interested in studying abroad and gaining meaningful experience of another country's legal system.

* * *

Introduction

Protecting and preserving our shared environment is the critical issue that your generation faces. Professor Tuiskon Dick proposed dealing with polluters by sending them into exile in Antarctica. He said that in early 17th century Europe, numerous laws mandated banishment for those who despoiled the environment. Those people who paid insufficient respect to the environment by tearing down fruit trees were to be sent to the African colonies or–if they were really terrible–to Brazil. Professor Dick continued, "What do we do now?" Where do we send people who do not treat the environment with the respect that it is due and who do not understand the implications for future generations? And he left us with this rhetorical question that I will address: where do we send these people? Rather than banish the despoilers into exile, I propose sending them–or at least their lawyers–to the United States for a year of advanced study.

After the wonderful experience that a budding lawyer receives in her home country, her education is more than half complete. Advanced study of comparative and environmental law in the United States would complement the lessons she learned here and ensure her readiness to practice in an increasingly globalized world. She will face a legal marketplace in which the Common Law system is increasingly influential, one in which the commercial and environmental issues require lawyers to practice across borders and legal systems. She would be well served to come to the United States and learn some of the complementary lessons we have learned through long experience.

Accordingly, my task today is to explain what benefits a non-American trained lawyer could learn from sustained exposure to the U.S. legal education system.[1] I will briefly touch on five points about (*A*) the role of dialogue; (*B*) the differences and distinctions between our systems; (*C*) the U.S. legal systems and their relationship to international law; (*D*) the impact of U.S. laws on non-U.S. activities; and then (*E*) the opportunities that U.S. domestic law creates for innovation. To provide a few useful insights of my own, I will draw heavily on my own personal experience at Pace Law School.

A. Dialogue

First, a word on the importance of constructive and skillful dialogue. Lawyers are constantly striving to communicate with each other–to express their clients' interests and to comprehend the other side. The ability to communicate effectively is a critical function of a lawyer and the key to making a difference. This is how we protect the environment that each man, woman and child should be able to enjoy. Only through a frank dialogue can we generate the optimal solutions to the varied and enormous challenges that we face.

At the risk of sounding chauvinistic, I believe that law schools and legal education play unique roles in establishing this sort of dialogue. Moreover, I believe that two educations are better than one. Significant exposure to another legal system is tremendously valuable in enabling cross-border dialogue. One's knowledge of the legal system in one country alone may prove insufficient for those seeking to negotiate, execute, or litigate a complex cross-border transaction. Though an expert in one jurisdiction, she may not have the tools required to master issues raised by cross-border matters. She will be limited in her ability to engage in meaningful and creative dialogue and to take full advantage of conversations such as those we are so privileged to enjoy today. For the sake of expanding her ability to participate in a true dialogue, for the sake of enabling her to communicate her clients' interests most successfully, it is important to experience another legal system, preferably one radically different from her own. To accomplish this, of course, she will generally be required to master an entirely different legal language, legal research and substantive law.

Fortunately, many young lawyers go on for graduate degrees or doctoral degrees in a country other than their home. I am blessed to have studied in different countries and participated in forums like this on four continents over the past few years. Having had these opportunities to listen and learn from lawyers around the world, I think I became a more capable lawyer and scholar. So the first lesson is that study of law in another country gives one powerful tools and insights into how to engage in constructive dialogue.

B. Relevance of the Common Law

The second lesson is that while the uniquely American Common Law system is not quite so exotic as civil law trained attorneys might think, much is made of the distinction between Common Law and the Civil Law. The former was derived over centuries of haphazard evolution, while the latter was drafted and enacted systemically. The former is articulated or revealed through formal, written and reasoned judicial opinions, the other by detailed and well-organized statutes. The former is highly localized, and the latter is more cosmopolitan in approach. Yes, these legal systems are different, and the distinctions are tremendously significant. Their divergent approaches to regulating human behavior dictate how we live our lives and the opportunities that we enjoy. All written constitutions follow the United States in time, but the drafters of each learned from their own civilizations and experience. They reflect their culture's tragedies and their successes. They have learned also from some of the mistakes that the United States made.

Several notable issues arise in virtually every constitution. Just briefly, I would note three: the balance between liberty and equality; the tension between constituent regions (or states or provinces) and the nation; and the extent to which and the ways that popular democracy determines governmental policy.

Liberty v. Equality

How does a constitution balance individual autonomy with equality? Compared to most, the United States Constitution tends to give priority to freedom over substantive equality. *Liberté, equalité, fraternité*: these are not

the defining American principles. I respect these principles heartily, but they are not articulated in the U.S. constitution which consistently gives priority to freedom over equality (let alone fraternity). Moreover, the form of equality that the U.S. Constitution does vigorously protect is an equality of opportunity and protection from state action seeking to diminish one's freedom. Often, it is the way we strike this balance between liberty and equality that seems to define the American constitutional spirit. By studying how the U.S. weighs these values, one may come to better understand how one's own country makes its own valuations.

Federalism

Second, it is important to understand that at the formation of our union we had thirteen independent autonomous and sovereign states that ceded power to a federal government. In some significant ways, the states of the European Union are attempting to do the same–or at least were until the Irish voters rejected the Lisbon Convention. As a pact among sovereign states, the U.S. Constitution is one of limited and expressively granted authority. That was true in 1787 when the Founders wrote it. It was even more expressly true in 1791 when the United States adopted the first ten amendments to the Constitution (the Bill of Rights). The limitations on the federal government's authority waxed somewhat during the middle decades of the Twentieth Century as the nation faced the challenges posed by the Great Depression, the Second World War, and the Cold War. Restoring meaningful constitutional constraints on the federal government's ability to overrule or preempt the states was probably the principle objective of the late Chief Justice William Rehnquist. But as Pace Professor David Cassuto has noted, the tide appears be turning on the growth of the federal authority.[2] There is still no general federal authority. And since the 1995 Lopez case, the trend may be returning authority back to the states at the expense of the federal government's capacity to regulate in such important areas as environmental protection and gun control.[3]

For those who are particularly interested in individual autonomy and freedom, the receding tide may prove welcome in the face of the so-called "War on Terror" and its implications for the ability of the government to subsume individual rights for the sake of homeland security. Such a change in positions would be archly ironic because of the role increasing federal authority played in securing individual rights during the Twentieth Century (for freedom of expression, reproductive rights, and equal rights for women and racial, ethnic and sexual minorities). Few Americans alive today can recall a time when states were seen as the best protection for individual liberties.

The "proper" balance between the states and the union is ultimately elusive and should continuously evolve with new social and technological situations. I would not hazard a guess as to where the United States will be a generation from now–let alone the direction your country is going. But I do think that it is important to understand what this principle of federalism means for Americans and the process by which we adjust it. History tells us that changes in the U.S. political and legal institutions are frequently copied by other states. Witness the wide-spread adoption of written constitutions and the subsequent embracing of fundamental rights in the Universal Declaration of Human Rights. In many other countries, of course, the balance is currently cutting the other way, but this sort of system is fluid as the U.S. experience teaches. So lawyers trained outside the U.S. would be well-served by study of this transformation in the United States context.

Republicanism v Democracy

And finally the third principle that I think distinguishes the American legal order from other representative forms of government is a distinct preference for a republican form of government over that of popular democracy.

The United States is the oldest continuously functioning democracy in the world (assuming that the United Kingdom did not become a democracy in any meaningful sense until the 19th century). This is, however, a particular form of democracy that filters the popular impulse through a variety of mechanisms designed to insulate the government, indeed to protect the elite and their property. It is in fact a republican political order.

Several implications flow from this fact. Until the early 20th century, senators were not directly elected. They were elected by state legislators. And as much of the world learned late in the year 2000, the President is not directly elected by the people. Instead, the people vote by state, and then the candidate with the most votes in a given state receives the right to name electors who in turn are supposed to cast their ballots for him or her.[4] Because of this arcane system, there have been several instances when the winning presidential candidate had not received the majority–or sometimes even the plurality–of the popular vote.

Therefore, the United States enjoys a republican form of government. This is an important principle. It is an organizing principle for understanding how we govern ourselves, much like the Common Law is a system of stare decisis. In the U.S. legal system, interpretation of the law is guided and constrained by previous interpretations. In this way, the law is able to react to social, technological or political change gradually by reinterpreting the law at the margins. Stare decisis provides a mechanism by which society can change itself gradually but peaceably. Likewise, the republican institutions moderate political change and thereby ensure enough continuity for the system to hold together. One sees that many of the elements that distinguish the U.S. system have also helped to enable it to endure so long and (in many ways) be so much more stable than other forms of government. At the same time, the U. S. Constitution is still one of the briefest in the world. Its seven articles have been amended only seventeen times since 1791 (two of which cancelled each other out).

A Civil system-trained lawyer will find the Common Law system distinctive in one other additional and significant way that further enables U.S. law to bend to accommodate to changed circumstances. Many of its standards are based on the actions of an unnamed and "reasonable man" (which is similar to the *bon père de famille*). How does one legislate a reasonable man standard? And what about reasonable women, reasonable children or reasonable people of diminished capacity? This is an old standard. It was adopted in the English courts in the 19th century, and we have barely adapted since then. The reasonable person standard is an important tool in the Common Law system–one uniquely suited to a system of judicial interpretation of the law.

The U.S. legal system offers some valuable comparative insights into ordering a society. At the same time it can be most informative about how (and how not) to affect international law.

C. American Legal System's Unique Relationship to International Law

The temperate effects of having a republican form of government, along with the flexibility afforded by a brief constitution and by the Common Law methods for adapting law to changed circumstances have afforded the American people a great deal of stability. Ironically, flexibility begets stability. In light of what I have just said, what is one to make of the fact that this reasonable man standard is increasingly incorporated into international law? How is that? Some of you are probably familiar with the United Nations Convention on Contracts for the International Sale of Goods (the "CISG)" adopted by seventy nations since 1980.[5] The CISG is uniquely important to the regulation of commerce, particularly when something goes wrong. Who cares about a contract when everything goes right? When goods are destroyed or if the

contract is somehow breached, then you have the Convention to look to.

To address these questions we at Pace Law School have built a unique internet database. Some of you will likely contribute to it. Pace's CISG database collects thousands of arbitral, judicial and academic interpretations of this key U.N. convention. These interpretations are used by administrators and judges to interpret the convention. These interpretations are essential precisely because they enjoy some form of value as controlling precedent–i.e. for common law style interpretation and use of what otherwise looks like a code. With the CISG database, lawyers around the world have equal opportunity to access the precedent upon which to base their arguments. It is an important tool for leveling the playing field. But the field would remain tilted if we did not also provide non-U.S. lawyers with the opportunity to develop the skills required to argue from precedent.

To fill the gap, Pace educates non-United States lawyers, both in its residential LL.M. program (a post-graduate one-year degree) and also through the Willem C. Vis International Commercial Moot that it launched many years ago. Each Easter week in Vienna students from over 200 law schools around the world come to participate in a simulated arbitration.[6]

Familiarity with the way American lawyers craft arguments based on precedent is uniquely helpful for non-United States lawyers with commercial enterprises for clients.

On the public international law side, there are also many examples where understanding how the United States system works will enable one to be a more successful lawyer – whether one seeks to protect the environment, consumers, or a client's commercial interests Briefly we need to mention the Universal Declaration of Human Rights which was adopted in 1948.[7] Former United States first lady Eleanor Roosevelt (1884-1962) was a leading champion of this path-breaking project,[8] and many of the rights embodied in this declaration descend directly from the U.S. Bill of Rights (the first ten amendments) of the Constitution and from interpretations of that Bill of Rights in the century and a half following its passage in 1791. For a lawyer to make a claim based on the Universal Declaration, therefore, one must understand not only the Constitution and its brilliant Bill of Rights but also how domestic courts have interpreted them.

The second set of examples from public international law is the tribunals established at The Hague for prosecuting those accused of war crimes, genocide and crimes against humanity. These international tribunals–and now the International Criminal Court also established at The Hague–share Common Law respect for precedent which has been developed particularly since 1995 by judges from various legal systems including socialist legal systems, the Civil Law traditions, the Common Law, and from mixed systems. The judges have recognized that in order to understand the crimes enumerated in their respective charters, the judges need to turn in elements of the crime.[9] Prior to the establishment of these courts, the law governing these crimes was relatively inchoate and based on sporadic events over the centuries.[10] So we are working with a Common Law style of interpretation based on customary international law that evolves from the practice of states and various treaties, each with contested meanings.

The U.S. style of making legal arguments should inform how one makes international law arguments. At the same time, U.S. substantial law may also affect your clients in important ways.

D. Influence of U.S. Law on Your Clients

American law has a significant impact on the ability of people around the world to engage in their own business. For this reason it is important to understand how to employ the Common Law system for the benefit of your client, for her environment,

for the consumers and for her fellow citizens. This is particularly true since September 11, 2001.

The U.S. Trading with the Enemy Act of 1917 has been in great part adopted by the United Nations Security Council Resolution 1373 passed in the wake of the attacks of September 11.[11] To understand how to comply with U.N. Security Council Resolution 1371 (passed not just by the Security Council but under the Chapter VII authority) it is a good idea to understand how the United States has been interpreting and enforcing laws about money laundering and fighting terrorism in general over the past century. Also the U.S. domestic legal system provides and encourages innovative solutions and engaging with our system may help lawyers in other countries to derive creative solutions, to create the responses for the enduring chronic problems that degrade the environment today. For instance, U.S. non-profit law, providing as it does the tax deductibility for donations [12] and the powerful protection for freedom of association and expression afforded by the First Amendment [13] foster a great variety of philanthropic institutions and organizations to grow and prosper, each creating new opportunities for civil society to meet ever-changing social challenges.

The complex interrelationship between the U.S. and international law is also instructive–if imperfect. Over the past few years, the U.S. has quickly eroded its long-standing and well-deserved reputation for being respectful and supportive of international law.[14] Prior to September 11, 2001, the Bush Administration abandoned negotiations on START II, decided not to ratify the Comprehensive Test Ban Treaty, and soon thereafter withdrew the United States from the Anti-Ballistic Missile Treaty. It stalled efforts to improve the Biological Weapons Convention regime. It failed to encourage ratification of the U.N. Convention on the Law of the Sea, despite strong support in Congress, the Department of State, and the Department of Defense. The Bush Administration took the unprecedented step of "un-signing" the 1998 Rome Charter of the International Criminal Court. The Administration's antipathy to exposing Americans to charges in international tribunals is so strong it expended considerable diplomatic capital to ensure blanket exemptions for Americans before the new International Criminal Court despite the Rome Statute's provisions and political considerations making any such prosecution exceptionally unlikely. And yet many would argue that the U.S. is so hesitant to enter into treaty obligations precisely because we take them so seriously. They are, after all, the supreme law of the land. So the way the U.S. interprets international law affects the evolution and prospects for its success, much as the U.S. domestic law affects the patterns of law evolving elsewhere in the world.

E. Domestic Law and Innovation

As discussed above, an examination of domestic U.S. law will provide a young lawyer with powerful tools to serve her clients in a variety of forums. Likewise the unique U.S. federalism system means that states and municipalities throughout the nation are each able to develop their own solutions to local problems. Through this experimentation, states and localities are able to serve as laboratories for change. Much of the most interesting experimentation takes place in the administration of real property by local governments.

To promote this experimentation and learning, Pace Law School created a Land Use Law Center in 1993 which takes the advantage of the fact that the State of New York has ceded to Westchester County and to the City of White Plains, considerable latitude to determine how best to develop and use its land. "The Land Use Law Center is dedicated to fostering the development of sustainable communities in New York State. Through its many programs, the Center offers lawyers, land-use professionals,

citizens and developers assistance that enables them to achieve sustainable development at the local and regional level."[15] The Center's full-time faculty and staff have studied many communities to create the innovative Gaining Ground Information Database.[16] Pace Law students – including students in our new LL.M. in Real Estate Law program – conduct research on cutting-edge land use topics. More than sixty student papers have been produced under this program, many of which have been published in prestigious law reviews and journals. To put this learning to good effect, the Land Use Law Center brings developers together with environmental activists and local governing officials to try to come up with creative solutions that will allow for development in a sustainable way.

Conclusion

In conclusion, I would claim that the Common Law, as taught by law professors in the United States, provides highly complementary and useful insights and tools for those working to preserve the environment whether locally, nationally or internationally. Come see for yourself!

Notes:

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1. With all due respect for citizens of other countries throughout the Americas, and for the sake of simplicity this essay uses the word "American" as an adjective to indicate a person or institution of the United States of America.

2. See David N. Cassuto, Jordan Young Lecture, published in *Globalização Econômica, Meio Ambiente E Sociedade Civil / Economic Globalization*, The Environment and Civil Society Claudia Lima Marques, ed., (Federal Univ. Rio Grande do Sul, 2006).

3. See Ilya Somin "Rehnquist's Federalist Legacy" (Sept. 13, 2005) <https://www.cato.org/pub_display.php?pub_id=4689>.

4. U.S. Constitution, art 2.

5. For more on the United Nations Convention on Contracts for the International Sale of Goods (1980) including the complete text as well as commentary, opinions and an extensive bibliography see <http://www.cisg.law.pace.edu/>.

6. See Mark R. Shulman, "Moot Court Diplomacy" *International Herald Tribune* (April 15, 2006) available at <http://www.iht.com/articles/2006/04/14/opinion/edshulman.php> and "Moot Court in Global Language of Trade" *New York Law Journal* (April 2, 2007) available at <http://www.cisg.law.pace.edu/cisg/biblio/shulman.html>.

7. Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A (III) (December 10, 1948). For more, see <http://www.unhchr.ch/udhr/>.

8. For biographical information, see <http://www.whitehouse.gov/history/firstladies/ar32.html>. For more context, see Mark R. Shulman, "The Four Freedoms as Good Law and Good Policy in an Age of Insecurity," *Fordham Law Review* (Fall 2008).

9. For more on the International Criminal Tribunals for the Former Yugoslavia and Rwanda, see <http://www.un.org/icty/> and <http://www.un.org/ictr/>. For the International Criminal Court, see <http://www.icc-cpi.int/home.html>. For interpretation and the significance of precedent, see the Rome Statute of the International Criminal Court, art. 21 §2 (1998) ("The Court may apply principles and rules of

law as interpreted in its previous decisions.") available at <http://www.un.org/law/icc/statute/99_corr/cstatute.htm>.

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10. See generally, Michael Howard, George Andreopoulos and Mark R. Shulman, *The Laws of War* (1994)

11. Trading with the Enemy Act of 1917, 50 U.S.C. CH 106, 40 STAT. 411, United Nations Security Council Resolution 1373, S/RES/1373 (September 28, 2001). See also <http://www.un.org/sc/ctc/>.

12. See 26 U.S.C. §501(c)(3).

13. U.S. Constitution, art. I.

14. See generally, James R. Silkenat and Mark R. Shulman, *The Imperial Presidency and the Consequences of 9/11: Lawyers Respond to the Global War on Terror* (2007).

15. See <http://www.law.pace.edu/landuse/>

16. See <http://www.law.pace.edu/landuse/>