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A Response to Mathias Reimann: More, More, More But Real Comparative Law

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A RESPONSE TO MATHIAS REIMANN: MORE, MORE, MORE BUT *REAL* COMPARATIVE LAW

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Professor Reimann's provocative and insightful piece contains a dramatic challenge to law faculties around the country. Even though, as he admits himself, his argument is not entirely novel,[1] it is more detailed and proactive than most of the other proposals directed at "internationalizing" the curriculum.[2] And his suggestions come at an opportune time, close to the turn of the twenty-first century, the time of Star Trek and intergalactic travel. He goes even further than that by venturing into the "brave new world" of substantive curriculum reform. In doing so, he attacks the status quo, throws out a realistic challenge to his noncomparative colleagues and rattles fellow comparativists.

In reading his piece, I found myself nodding in agreement with many, if not most, of Professor Reimann's remarks. He is an astute observer of the dismal situation of what is generally referred to as comparative law, in teaching and scholarship, in the United States. His critique of the status quo seems to be borne out of a heartfelt desire to reinvigorate comparative law. He sees its survival as crucial to twenty-first century legal practice which will grow increasingly international in scope. While his idea of integrating comparative law elements into the mainstream curriculum, especially during the first year, is desirable, his call for abolishing comparative law as a course, albeit under a more

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1. It also does not require as radical a restructuring of the curriculum as some other proposals. *See, e.g.*, W. Michael Reisman, *Designing Law Curricula for a Transnational Industrial and Science-Based Civilization*, 46 J. LEGAL EDUC. 322, 327 (1996) ("the legal curriculum should be based upon a notion of a comprehensive transnational legal system rather than an autonomous national system that connects to other states and an international system through certain formal linkages").

2. *See, e.g.*, Robert A. Stein, *The Future of Legal Education*, 75 MINN. L. REV. 945, 958-59 (1991).

descriptive heading, goes too far and even threatens to undermine the positive effects that could come from integration.

I. A DEFENSE OF THE TRADITIONAL COMPARATIVE LAW COURSE ON PEDAGOGICAL GROUNDS

Reimann's suggestions for a new comparative law curriculum attack not only the status quo in comparative law teaching but go to the core of legal education. Traditionally in the United States, law has been viewed in essentially parochial terms, as a matter of local (state) or (at most) national concern. While the proliferation of international and comparative law reviews and the rhetoric of academics and bar leaders on "globalization" and "internationalization" seem to indicate that this narrow perception of law has changed dramatically, everything other than domestic law—often referred to generically as international law[3]—still fits only uneasily into the curriculum. Even though law schools offer more upper-level electives in international and comparative law, the enrollments remain small, often because students' course selection is driven by the subject matter of the bar examination.[4] Because of the continuing tension in U.S. legal education between law schools as trade schools or as academic (graduate) institutions, comparative and even (public) international law are often marginalized because they tend to be perceived as too academic and nonessential or even irrelevant to "American" law practice.

Despite the rhetoric about the globalization of law, only a few law schools in the country offer any international or comparative law training in the first year. Here it is "pervasive silence [that] speaks louder than formal policies or commencement platitudes."[5] To make matters worse, the traditional first-year curriculum still retains at least the appearance of the curriculum in 1890. It continues to be built more around the myth of

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3. Jay M. Vogelson, *A Practitioner Looks at Globalization: II*, 46 J. LEGAL EDUC. 315, 315 (1996). Even though he describes issues, such as "What are the differences between legal systems?", that generally would be classified as falling under the heading comparative law, the author refers to them as questions of international law.

4. The marginalization of the comparative study of foreign systems might not undergo a radical change unless those skills will be tested on bar examinations which, admittedly, is unlikely in the near future. *Cf.* Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 125 (1994) (separate examination on professional responsibility indicates that ethics is side issue on bar).

5. Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1561 (1993) [hereinafter Rhode, *Missing Questions*] (statement applied to teaching of ethics by allegedly pervasive method).

the common law—and the requirements of the bar examination—than the realities of today's practice.

Rather than focusing on the underlying reason that helps prevent the mainstreaming of comparative law—the pressure on law schools to train lawyers to pass the licensing examinations—Mathias Reimann seems to hold the existing general comparative law overview course responsible for the sorry state of comparative law teaching in the United States. He accuses it of lacking in focus, of superficiality, and of not being comparative. In addition, in his view the existence of a separate course contributes to the marginalization of the subject matter, as has been said of courses like "Race and the Law," "Feminist Jurisprudence" and "Sexual Orientation and the Law."[6]

By distinguishing the law inside the United States from that outside its borders and disregarding the latter in "mainstream" courses—similar to the segregation of "Professional Responsibility" in a separate course—we create an increasingly artificial distinction between "us" and "our law" and "other" and "their law" in the curriculum. In doing so, we send a subliminal message to students indicating our assessment of the value, importance and relevance of the study of foreign and comparative law as well as the value of foreign legal systems.

Reimann notes that most courses currently named "Comparative Law" are introductions to foreign legal systems rather than comparisons. He implies that those course titles are misleading, and that their scattered focus and lack of a methodology further dilute comparative law as a discipline. He concludes, therefore, that these courses should be taught as and called "Introduction to x Foreign Legal System." He seems to believe that many teachers of comparative law should simply rename their courses to reflect the material covered rather than pretend to engage in any deep comparative analysis.[7] Assuming that Reimann is correct in his assumptions as to what occurs in most "Comparative Law" classrooms, such a renaming would establish some truth in advertising and assist the students during registration by revealing at least the

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6. *See, e.g.*, Susan Bisom-Rapp, *Contextualizing the Debate: How Feminist and Critical Race Scholarship Can Inform the Teaching of Employment Discrimination Law*, 44 J. LEGAL EDUC. 366, 368-69 (1994).

7. Based on Reimann's analysis of the status of comparative law in the United States, any possible prestige attached to the teaching in this area appears limited. Contrary to his assumption, why should comparativists not be excited about teaching the same course with a new, and possibly even more interesting, title?

geographic focus of the courses, even though it is unlikely to boost the enrollment in those courses.

Though I sympathize with his perspective and whole-heartedly support his attempts to integrate comparative law issues into the entire curriculum, Reimann's proposal to abolish general overview courses in comparative law overshoots the mark. While I agree that the goals generally outlined for comparative law are too numerous to be achieved in one course, it is possible to develop a coherent, well thought out course that accomplishes what he considers some of the goals of comparative law.

Abolishing a truly comparative overview course—which might be named more descriptively "Civil and Common Law Systems in Europe and North America" or "A Comparison of the U.S. Legal System with Selected Asian Legal Systems"—would be a real loss to the legal curriculum in American law schools. First, one of the most frequently heard laments about the first-year curriculum is that it does not provide a coherent and cohesive picture of the law but rather feeds students' incoherent snapshots of individual decisions.[8] In fact, these snapshots are not even very complete pictures of the particular cases they represent. When we now follow Reimann's suggestions and throw a dash of comparative law into the boiling pot and abandon the traditional comparative law course, we will have a thicker but not necessarily tastier or more desirable brew. As the American law school curriculum is now structured, a student's first year of legal education is not informed by even a moderately deep understanding of the place and meaning of law in *American* (or any other) society. Unless we somehow devise a means of giving students an opportunity to acquire a more complete picture of legal culture—American and "foreign"—mixing comparative law in as part of other courses and abolishing existing comparative law survey courses simply adds another layer of detail to what is for the average student already a confusing and incoherent image of law.

Second, in inserting comparative issues in a pervasive way into the curriculum, we recreate and reinforce the existing structure of our law school curriculum. This would give the impression that all legal training is similar to ours and that everyone employs analogous techniques of legal reasoning and/or legal sources. After all, since most law schools do not teach courses on legal education, in the absence of a general

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8. *See* Alan Watson, *Introduction to Law for Second-Year Law Students?*, 46 J. LEGAL EDUC. 430, 437-38 (1996).

comparative law course, students might assume that all legal education is patterned after the U.S. model. Equally importantly, foreign systems often classify legal issues very differently than we do—some of our legal issues might not even be considered part of law in other systems. Should we address those in our classes, or rather should we not cover them at all? If we choose the former, the question arises where to insert those issues; in case of the latter, we perpetuate our particular thinking about law and the categorization of legal issues. These problems indicate that in the absence of a general comparative law course, crucial elements of foreign legal cultures might never be discussed and compared with our system.

Neither of the two concerns detracts from the idea of integrating comparative law elements into the first-year curriculum. They do, however, shed some light on the importance of the comparative law overview course which can supply the crucial framework into which students can fit knowledge gathered from first-year courses.

Furthermore, because many students lack an overall perspective on U.S. law at the end of the first year, comparative law often plays the crucial role of coalescing and illuminating certain aspects of our legal system. For example, an overview course, rather than any first-year course, is the appropriate place to discuss the question why courts in the United States, in contrast to many civil law courts, allow the publication of dissenting opinions. In addition, questions about the nature of law, its underlying principles and its operation will arise automatically in a comparative law course even though they might never be addressed during the first year where teachers tend to be especially hard-pressed for time.[9] When a comparativist has developed a way to provide a new, insightful and coherent perspective on the U.S. legal world by using comparative methods in a general overview course, why should she stop doing so? The comparative law course must remain since it can provide a coherent picture of foreign systems and allow for a broader and more searching perspective on our system.

II. THE ELIMINATION OF COMPARATIVE LAW UNDER THE GUISE OF INTERNATIONALIZATION

In a world of perfectly conscientious faculties, unlimited resources and good-will, I would enthusiastically welcome Mathias Reimann's approach of replacing the "Comparative Law" course with an

9. *Cf. id.* at 443 (discussing the classroom methods employed by law professors teaching first-year students).

all-pervasive comparative law element and a number of new, explicitly comparative upper-level courses.[10] While Reimann's proposal is designed to increase the educational value of comparative law by mainstreaming it, a not so benevolent observer, i.e., dean or chair of a curriculum committee, might adopt his proposal as a blueprint for the abolition of comparative law without any substantive replacement of it. More likely, long-term benign neglect of the mainstreaming of comparative law—based on inertia and claims to academic freedom—will have the same effect. To prevent such a development from occurring, some traces of comparative law—in more descriptively named overview courses—should be retained in the curriculum until comparative law has become truly pervasive and until upper-level specialized comparative law courses are firmly established in the curriculum.[11] Otherwise the "pervasive" teaching of comparative law might prove as unsuccessful as the "pervasive method" advocated to teach professional responsibility.[12]

In an attempt to bridle Reimann's enthusiasm, let me highlight a few of the institutional constraints that must be overcome before comparative law is fully mainstreamed. In a footnote Reimann refers to the need to consider the effect on teaching loads of the assistance comparativists will need to give their colleagues in integrating comparative law into first-year courses. This is a critical institutional issue, especially for untenured faculty. In a time of increasing scholarship demands on young faculty and a reluctance, or inability, of most law schools to hire an unlimited number of new faculty, this is no small problem.

Scarcity of time is also a significant problem. Who has not heard the complaints of law professors that they can never make it through their syllabi? Most courses, and especially those in the first year, are overloaded with detailed information that faculty members believe must be covered. In addition, teachers are often expected to address issues of professional responsibility and ethics, of gender, class and race as well as others. How can we now add a comparative law element without

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10. Reimann's arguments for the teaching of comparative law across the curriculum resemble those made with regard to professional responsibility. *See* Re, *supra* note 4, at 124.

11. William B. Aycock, *An Evolving Institution: The Deanship of Robert Gray Byrd (1974-79)*, 73 N.C. L. REV. 622, 628 (1995) (during Dean Byrd's tenure each first-year teacher had to devote three class hours per semester to instruction in professional responsibility and legal ethics, in addition to the traditional course in professional responsibility).

12. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 650 (1985).

expecting some resistance, or at least neglect, from those who attempt to prepare students for the bar examination and practice? It is rather startling that Mathias Reimann, who seems to have rather little faith in the ability of his fellow comparativists, puts enormous trust in his other colleagues whom he assumes to be not only qualified, but more importantly, interested in integrating comparative law into their courses.

Mathias Reimann hides some important information in footnotes. A problem with current comparative law teaching is the existing teaching material. The books send out confusing messages as to the scope and methods of comparative law, and often focus primarily on the description of the foreign system(s) rather than comparison. A text for a comparative law overview course should have a domestic law component, if for no other purpose than to refresh the students' memory on the current state of U.S. law in a particular area. Unfortunately, most of the books seem to assume almost perfect knowledge of domestic law on the part of the students.[13] Clearly, what has proven to be problematic for these overview courses, taught by comparative law specialists, would bedevil Reimann's mainstreaming of comparative law. After all, most first-year casebooks as well as those for domestic upper-level courses do not contain any comparative element,[14] and teachers of those courses have some interest in preserving the status quo, with which they are familiar.[15] Therefore, effective comparative teaching materials are crucial for the success of Reimann's proposal. It is in a footnote that he promises to produce these teaching materials—I presume initially for first-year classes, and maybe later for advanced courses.

In putting together teaching materials, it will be critical to pick topics for comparative purposes that most teachers in domestic law courses tend to cover. For example, while a comparison of foreign and domestic sentencing is fascinating and illuminates larger societal differences between systems, most teachers of criminal law do not discuss sentencing in detail but mention it only in passing. Therefore, any comparative material on sentencing would require them to build not only a comparative law component into their course but also to expand the coverage of domestic materials. Successful integration of a comparative

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13. *See, e.g.*, MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS (2d ed. 1994).

14. The same problem has partially stymied the coverage of ethical issues outside the traditional professional responsibility course. *See* Rhode, *Missing Questions*, *supra* note 5, at 1561.

15. All of us law teachers are "jealous of our prerogatives, comfortable with the way things are, and intensely conservative about matters as central to our selfhood as what and how we teach." Roger C. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 333 (1982).

component across the curriculum would necessarily involve as little inconvenience as possible for domestic law teachers.

Reimann's suggestion to broaden comparative law to upper-level electives is most enticing. However, here he might underestimate the power of the marketplace. Why assume that students would be likely to take comparative securities law or comparative immigration law when they could take domestic securities or immigration law? Only if the latter are no longer offered or if the bar examiners decide to include comparative materials on the examinations will comparative courses lure a large number of students. We should heed the reminder that the failure to appreciate fully the important tie between law schools and the profession through the bar has "underlain all the grand failures in legal education and affected most aspects of legal education in addition to curricular reform."[16]

III. LEGAL PAROCHIALISM AND THE SPECTER OF NEW MARGINALIZATION

In his proposal to revamp the curriculum, Reimann does not ask explicitly what legal systems should provide the comparative examples that are to be integrated into mainstream courses. Since most of his examples are taken from civil law countries in Continental Europe, he seems to imply that those legal systems would be the focus of the mainstreamed comparative law analysis. For comparative purposes the emphasis on those systems especially in the first-year curriculum is understandable. In light of political, economic and even social similarities, many of those countries face legal and social problems comparable to the major issues confronting our system. Also Reimann's assertion that translations and foreign sources are relatively easy to obtain holds true for those systems since much of the comparative scholarship on both sides of the Atlantic has focused on Continental Europe and the United States.

Despite these advantages, an exclusive or even primary focus on (Western) European systems for comparative purposes reinforces the Euro-centric bias that runs through much of our curricula, including the comparative law overview course. To avoid such bias, the selection of the foreign system(s) from which comparative examples are taken must be made cautiously to avoid "invisibility, stereotyping, selectivity and

16. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 270 (1983).

imbalance ..., unreality, fragmentation and isolation, and linguistic bias."[17]

Many non-European systems seem alien to us at first glance. This "otherness" will be reinforced if only small parts of such a foreign system are discussed. Therefore, in introducing a non-European system, the teacher might have to devote more time to the discussion of those materials to provide a more coherent picture of the foreign legal culture and to avoid outright rejection of "alien" concepts of law. Even though more time-consuming, such an approach is preferable to the exclusion of systems that seem "radically different" (at least initially) from the mainstreaming of comparative law. After all, "'[s]tudents learn about the frame as well as the picture; they learn from what we exclude as well as what we include.'"[18] Marginalizing non-Western legal cultures makes our perception of them as less valuable most obvious. Therefore, we should integrate a variety of examples from different legal systems in comparative discussions during the first year. However, such an integration must be premised on a careful selection of case studies that do not reinforce existing biases and stereotypes about foreign systems.

Reimann's eminently useful but also dangerous proposal of using comparativists and foreign scholars as co-teachers holds the possibility of further marginalizing foreign and comparative materials.[19] A stranger enters the classroom and literally brings with her alien information. How much clearer could we make the "otherness" of the foreign system? Under those circumstances it will become even more difficult to dislodge prior beliefs about the relationship between our own and foreign law.

Reimann underestimates the power of outside influences on law students prior to and during their law school days. He fears that by the time "Comparative Law" is currently offered in the curriculum, students have already internalized feelings about the superiority of their own system and of legal parochialism. While the first year of law school might reinforce such feelings, many students come to law school with a deeply held belief in the superiority of U.S. law, especially as compared

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17. Christine Boyle, *Teaching Law As If Women Really Mattered, or, What About the Washrooms?*, 2 CAN. J. WOMEN & L. 96, 100 (1986) (internal footnote omitted) (quote applied to gender bias in schools).

18. Bisom-Rapp, *supra* note 6, at 368.

19. *See also* John Edward Sexton, *The Global Law School Program at New York University*, 46 J. LEGAL EDUC. 329, 333 (1996) (describing co-teaching of environmental or constitutional law in Global Law School Program).

with non-Western legal systems.[20] Often this is due to very limited information about foreign systems. In those cases, the mainstreaming of comparative law with its snapshot approach to other legal cultures might merely reinforce such beliefs rather than challenge them. Also by devoting only a disproportionately small amount of class time, for example, ten percent or less to comparative material, we might strengthen the assumption that this information is secondary and less valuable. A comparison with the teaching about gender is instructive. Despite the "mainstreaming" of gender issues, gender is often only discussed in "gender-specific" contexts, such as rape or child custody. In doing so, we might "reinforc[e] the impression that the rest of the law is gender-neutral in its values and impact."[21] To construct a more coherent picture of the role law has played with regard to the position of women in society, many law schools offer courses in feminist jurisprudence or feminist legal theory. A general overview course in comparative law could play a similar role. As a follow-up to the first-year comparative element, it could address misleading assumptions about foreign systems in a more holistic way.

IV. LET'S ACT TO MAKE A RADICAL VISION FOR THE FUTURE NEXT SEMESTER'S REALITY

Despite our disagreement on the abolition of the comparative law overview course and my general skepticism as to the mainstreaming of comparative law, Mathias Reimann is correct that, for practical reasons, the teaching of comparative law must be made more relevant and more pervasive in today's law schools. Since comparative law is much too important to be relegated into one small corner of the legal curriculum, Reimann's critical essay deserves a full discussion in the academy. Truly teaching comparative law across the curriculum as well as within the curriculum will take the commitment of a large number of law teachers. However, we owe it to our students and their future clients to introduce students to legal cultures outside our borders. For my part, I am already looking forward to the teaching materials Mathias Reimann promises us.

And then, the future will be today .... While the Reimann proposal is productive and thought-provoking, why stop there? As

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20. *Cf.* John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 551 (1995) ("powerful ideology of celebration" in the United States "asserts the superiority of Anglo-American legal procedure").

21. Boyle, *supra* note 17, at 108.

Deborah Rhode once suggested the revamping of the entire law school model to practice rather than merely profess the practicing of professional responsibility,[22] we might also have to do more than to add a little here and cut a little there. To build a twenty-first century curriculum, our current framework has to be restructured entirely. We must begin to think harder about the materials that students must master to practice successfully. This will include comparative elements but also other skills that distinguish good from mediocre lawyers. Why do we continue to focus exclusively on the case law method when the development of law in many areas is now dominated by legislation and administrative regulations? Why do we not provide our students with more overview and fewer seemingly unconnected details? Thinking about curriculum reform could become an exercise in comparative legal education which would allow us to set an example for the rest of the profession. After all, Mathias Reimann presumably would want us to make comparative analysis our second nature.

22. Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 734-35 (1994).