

Draft of January 10, 2006

## **Integrating Transnational Perspectives into Civil Procedure: What *Not* to Teach**

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### INTRODUCTION

Anyone who has read this far will surely agree with me on one point, even if some unenlightened nonreaders might not so readily accept it. I take as **Presumption #1** that we legal educators need to pay more attention to transnational,<sup>1</sup> or international and comparative, matters.

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<sup>1</sup>This trendy and Unitedstatesian-sounding term is actually over seventy years old and Germanic in origin. It started out meaning supranational (or rather “a-national”) law common to civilized nations, as opposed to what was then called international law. See CLAIRE M. GERMAIN, *GERMAIN’S TRANSNATIONAL LAW RESEARCH: A GUIDE FOR ATTORNEYS* § 1.01.3 (2004). Curiously, some scholars now press to flip this definition by narrowing transnational law to mean domestic law that deals with matters having a foreign component, as opposed to what would consequently be called international law. *E.g.*, THOMAS O. MAIN, *GLOBAL ISSUES IN CIVIL PROCEDURE: CASES AND MATERIALS* 2 (2006). However, most often today, international law encompasses both the above meanings, and transnational law has become even broader to mean loosely things that transcend borders and hence all matters international *or* comparative. *E.g.*, Mathias Reimann, *Taking Globalization Seriously: Michigan Breaks New Ground by Requiring the Study of Transnational Law*, *LAW QUADRANGLE NOTES*, Summer 2003, at 54. I too shall employ the term “transnational law” in this broad way.

Interestingly, the term “private international law,” despite its European tone, in fact originated in the United States. In this country today, it means conflict of laws, broadly defined to include territorial authority to adjudicate and treatment of foreign judgments as well as choice of law, and so it is an important subset of transnational law. See Kevin M. Clermont, *The Role of Private International Law in the United States: Beating the Not-Quite-Dead Horse of Jurisdiction*, 2 *CILE STUDIES: PRIVATE LAW, PRIVATE INTERNATIONAL LAW & JUDICIAL COOPERATION IN THE EU-US RELATIONSHIP* 75, 75-76 (2005).

The supporting arguments are familiar.<sup>2</sup> Awareness of the international aspects of law is a very practical thing to impart, benefiting public thinking, private practice, and ordinary life; indeed, both litigators and office lawyers need some familiarity therewith in order merely to function in today's increasingly global society. Meanwhile, and much more importantly, exposure to comparative aspects of law helps the student to understand the home system's values and rules, while aiding the scholar to evaluate reforms and the practitioner to decide where to sue.

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

Yet this very richness leads me to **Presumption #2**, which is

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<sup>2</sup>See, e.g., Franklin A. Gevurtz et al., *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. J. 1, 7-11 (2005); Jay Lawrence Westbrook, *International Developments in Commercial Law and in Civil Procedure and Arbitration*, 46 J. LEGAL EDUC. 579, 585 (1996) ("In the midst of globalization of the nation's business, it will grow increasingly difficult to teach competently commercial law, civil procedure, or arbitration without reference to international developments. That fact adds to the burden of staying abreast, but also offers fascinating opportunities for students and teachers alike."); Margaret Y.K. Woo, *Reflections on International Legal Education and Exchanges*, 51 J. LEGAL EDUC. 449, 449 (2001) ("In this era of economic and technological globalization, the benefits of international legal education exchanges are perhaps self-evident.").

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

<sup>4</sup>E.g., Marcia Coyle, *Cruise Ships Resist Docking with ADA*, NAT'L L.J., Feb. 21, 2005, at 4 (discussing the impending legislative-jurisdiction decision in *Spector v. Norwegian Cruise Line Ltd.*, 125 S. Ct. 2169 (2005)).

that the civil procedure course is bursting at the seams, so that anything new will force out something established. All sorts of contenders are trying to squeeze into our syllabi, even as many schools are diminishing the number of credit hours for the course.

Among these contenders, certain other perspectives, as well as certain other attempts at providing context, might even be more worthy than transnationalism. Transnationalism will likely prompt the near future's major shift in the overall law-school curriculum, but perhaps not for its civil procedure course. If called upon to envisage the future of that course, I would first see as an inevitable development the broadening of perspectives from which to view the subject. Instead of thrashing about within the traditional confines of the subject, with a principal reliance on the pointillist case method, proceduralists will more often have to step back and view a part or the whole from some new angle. The three most promising perspectives so far are law and economics, law and psychology, and empirical legal studies. A second future trend, compatible with taking a broader view from many different perspectives, will involve breaking down conceptual and doctrinal boundaries to understand civil procedure in a fuller context. The subject of civil procedure is much bigger than its curricular pigeonhole. One should start the more expansive study by pursuing inquiry outward along any of the three principal dimensions of the subject: time (legal history and reform), type of forum (administrative/criminal and other comparative procedures), and type of dispute (public-law litigation/ADR and international litigation).<sup>5</sup>

However, the teacher cannot do it all. In fact, the teacher can try to do too much. Over the course of my career, I have heard many calls for redirecting the content of the basic civil procedure course in major ways: calls to overhaul the course to center on public-law litigation or ADR or include noncivil procedures, or to convey some currently hot theoretical or political perspective, or, of course, to shift more to practical lawyering. My own feeling is that the majority's recurrent reaction, which was to yield slightly to these pressures toward being inclusive but not to jettison most of the course's

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<sup>5</sup>See *Professor Clermont on Civil Procedure*, CORNELL L.F., Feb. 1989, at 10.

traditional content, has been a wise one. And that feeling's motivation rests on more than a desire to preserve intellectual capital.

Consider, for example, the current championing of ADR. Naturally, interest has shifted toward those alternatives to litigation whereby almost all real-world grievances conclude short of judicial adjudication—whether by privately negotiated settlement or by other alternative dispute-resolution mechanisms such as arbitration, mediation, and conciliation. But ADR is not suitable for principal attention in first-year civil procedure. The argument that ADR by force of numbers is societally more important than litigation in real life, or that it will be practically more important in our students' careers, or that it is more in need of scholarly attention, is not a pedagogic argument. Pedagogy counsels that ADR needs to be introduced in the first-year course, but its real study should be left to upperclass courses that build, in a comparative way, on the solid foundation of the basic civil procedure course.

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

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<sup>6</sup>See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

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

This decision-making path initially requires sharpening the focus on the pedagogic purposes of the basic civil procedure course in its pedagogic context, a task to which I now turn. The wisdom of so considering ends, before integrating transnational perspectives into civil procedure, is what I believe with conviction.

The subsequent steps, selecting ends and then assessing costs and benefits in their pursuit, are more contestable. Accordingly, the rest of this essay constitutes a subjective and tentative reflection about incorporating transnationalism into my course—but a reflection including a good deal of hard information that, I hope, should help others to make their own personal choices.

## I. APPROACHES TO AND PURPOSES OF CIVIL PROCEDURE COURSE

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

Still, I can generalize. Many courses follow a standard roadmap: first to present the whole subject in survey fashion (and somehow and sometime to flesh out the survey to the level of useful knowledge), then to study a freestanding series of fundamental problems of civil procedure, and perhaps finally to return to the whole subject by way of conclusion. The opening overview enables and

facilitates the subsequent in-depth analytical study of major problems, which will in turn illuminate the opening coverage while it lays the groundwork for any closing synthesis.

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

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

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

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

## II. APPROPRIATE TRANSNATIONAL COMPONENTS OF CIVIL PROCEDURE COURSE

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

### A. Separate Unit?

For my basic course consisting of survey, three major problems, and synthesis, I rely on a casebook, as is typical. I use some supplementary readings, but consistently with the principle that any supplements illuminate the course's core and not distract.<sup>7</sup> For good and obvious reasons related to that principle, I am not inclined to tack onto this scheme a freestanding unit on transnational litigation, which would be treated briefly in addition to domestic litigation.<sup>8</sup>

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<sup>7</sup>See Kevin M. Clermont, *Teaching Civil Procedure Through Its Top Ten Cases, Plus or Minus Two*, 47 ST. LOUIS U. L.J. 111 (2003).

<sup>8</sup>A fortiori, I am not attracted, for my course, to any kind of transsystemic, or mixed, approach as is sometimes used in bijural or blended settings to convey multiple systems of thought. See Nicholas Kasirer, *Legal Education as Métissage*, 78 TUL. L. REV. 481 (2003). Significantly, the civil procedure course itself seems to have initially escaped the integrated approaches used even in those bijural settings. See John J. Costonis, *The Louisiana State University Law Center's Bijural Program*, 52 J. LEGAL EDUC. 5, 9 (2002); Yves-Marie Morissette, *McGill's Integrated Civil and Common Law Program*, 52 J. LEGAL EDUC. 12, 20-21 (2002). However, McGill has recently converted its civil procedure course into an integrated Judicial Institutions and Civil Procedure course. See Course Offerings 2005-2006, <http://www.law.mcgill.ca/register/CourseOfferings2006.pdf>. Moreover, some reformers are now beginning to voice support for an approach in top U.S. law schools that would analogously integrate national and transnational studies. E.g., Peter L. Strauss, Draft of AALS Talk 1/4/2006, <http://www.aals.org/am2006/program/transnational/strauss.pdf> (arguing that those

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

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

- territorial authority to adjudicate (including forum non conveniens and forum selection clauses);
- service abroad;
- parallel proceedings;
- treatment of foreign judgments;
- subject-matter jurisdiction (such as alienage jurisdiction and

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schools face a "Langdellian moment," because the current focus on national law will not serve to train tomorrow's lawyers, who will have to shift in competency among countries just as today's lawyers shift among states).

<sup>9</sup>CHARLES S. BALDWIN, IV, RONALD A. BRAND, DAVID EPSTEIN & MICHAEL WALLACE GORDON, *INTERNATIONAL CIVIL DISPUTE RESOLUTION: A PROBLEM-ORIENTED COURSEBOOK* (2004); GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* (3d ed. 1996); THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON INTERNATIONAL LITIGATION AND ARBITRATION* (2005); ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* (3d ed. 2006); JORDAN J. PAUST, JOAN M. FITZPATRICK & JON M. VAN DYKE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* (2000); RALPH G. STEINHARDT, *INTERNATIONAL CIVIL LITIGATION: CASES AND MATERIALS ON THE RISE OF INTERNATIONAL LAW* (2002); RUSSELL J. WEINTRAUB, *INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING* (4th ed. 2003). For a comparative review of the earlier editions of the three pioneering casebooks in this group, see Linda J. Silberman, *International Litigation: A Teacher's Guide*, 89 AM. J. INT'L L. 679 (1995).

the Alien Tort Statute<sup>10</sup>);

- legislative jurisdiction (and application of foreign law);
- foreign sovereign immunity and act of state doctrine; and
- transnational discovery (and provisional protective measures and other judicial assistance).

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

## B. Supplementary Context?

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

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

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

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

If one were to adopt this approach, then which features of transnational law merit supplementary inclusion in the basic civil procedure course, keeping centrally in mind the course's pedagogic purposes? For help in answering this question, one might look at what a range of expert teachers have decided. After all, our subject enjoys some great casebooks. By looking for pertinent headings in the seventeen casebooks' detailed tables of contents, we can learn, via my footnote, what parts of transnational law they treat with seriousness in their written teaching materials.<sup>13</sup> But for two reasons, this method

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<sup>12</sup>See Antonio Gidi, AALS Annual Meeting, *Using the Transnational Rules to Teach Comparative Civil Procedure* (Jan. 6, 2001), [http://www.aals.org/am2001/mat\\_gidi.html](http://www.aals.org/am2001/mat_gidi.html) ("the truth remains that American proceduralists are among the most parochial in the world").

<sup>13</sup>BARBARA ALLEN BABCOCK & TONI M. MASSARO, *CIVIL PROCEDURE: CASES AND PROBLEMS* 262-65 (2d ed. 2001) (tribal courts); DAVID CRUMP, WILLIAM V. DORSANEO, III & REX R. PERSCHBACHER, *CASES AND MATERIALS ON CIVIL PROCEDURE* 113-14, 435-36 (4th ed. 2001) (international service; international discovery); RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 314-21, 588-93, 772-77 (8th ed. 2003) (German procedure; international jurisdiction; foreign judgments); OWEN M. FISS & JUDITH RESNIK, *ADJUDICATION AND ITS*

gives only a rough measure. First, observe that I do not cite any incidental treatment of transnational law in casebook notes, even though such notes are common and of course desirable to the extent they do not cause a loss of focus, that is, to the extent that the notes' illumination exceeds their distraction. Second, I do not cite any inclusion of transnational cases like *Piper Aircraft Co. v. Reyno*<sup>14</sup> if they appear in treatment of domestic subjects like forum non conveniens and without a heading that stresses an independent look at their international aspects.

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ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 46-49, 755-64, 1122-61 (2003) (international tribunals; German procedure; universal jurisdiction); RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 153-55, 877-89, 898-905 (4th ed. 2005) (comparative jurisdiction; German procedure; Japanese ADR); JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, CIVIL PROCEDURE: CASES AND MATERIALS 209-11, 664-65 (9th ed. 2005) (international service; comparative class actions); JOEL WM. FRIEDMAN, JONATHAN M. LANDERS & MICHAEL G. COLLINS, THE LAW OF CIVIL PROCEDURE: CASES AND MATERIALS 165-72 (2002) (alienage jurisdiction); GEOFFREY C. HAZARD, JR., COLIN C. TAIT, WILLIAM A. FLETCHER & STEPHEN MCG. BUNDY, CASES AND MATERIALS ON PLEADING AND PROCEDURE: STATE AND FEDERAL 32-35, 246-49, 881-84 (9th ed. 2005) (comparative perspective; international jurisdiction; German procedure); ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 228, 323-30 (2003) (international service; alienage jurisdiction); A. LEO LEVIN, PHILIP SHUCHMAN & CHARLES M. YABLON, CASES AND MATERIALS ON CIVIL PROCEDURE (2d ed. 2000); RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 13-15 (4th ed. 2005) (German procedure); JEFFREY A. PARNES, CIVIL PROCEDURE FOR FEDERAL AND STATE COURTS (2001); THOMAS D. ROWE, JR., SUZANNA SHERRY & JAY TIDMARSH, CIVIL PROCEDURE 5-8, 26-28, 94-98 (2004) (German procedure; comparative perspective; comparative discovery); LINDA J. SILBERMAN & ALLAN R. STEIN, CIVIL PROCEDURE: THEORY AND PRACTICE 213-16, 280-81, 369-73, 841-44 (2001) (comparative jurisdiction; international service; alienage jurisdiction; foreign judgments); STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN & THOMAS O. MAIN, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 352-60 (2d ed. 2004) (international discovery); LARRY L. TEPLY, RALPH U. WHITTEN & DENIS F. MCLAUGHLIN, CASES, TEXT, AND PROBLEMS ON CIVIL PROCEDURE 118-22, 1177-79 (2d ed. 2002) (alienage jurisdiction; foreign judgments); STEPHEN C. YEAZELL, CIVIL PROCEDURE (6th ed. 2004).

<sup>14</sup>454 U.S. 235 (1981). For the background of this case, see Kevin M. Clermont, *The Story of Piper: Fracturing the Foundation of Forum Non Conveniens*, in CIVIL PROCEDURE STORIES 193 (Kevin M. Clermont ed., 2004).

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

On the whole, however, my survey reveals that current civil procedure casebooks do not deliver much coverage to the teacher who wants to extend the course transnationally. I would use *Hilton v. Guyot*<sup>16</sup> as the litmus test. I view it as a major case, being the only Supreme Court case ever on foreign judgments and one that

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<sup>15</sup>See *infra* Appendices A(2) & B(2).

<sup>16</sup>159 U.S. 113 (1895), *discussed infra* notes 55 & 59. For the background of this case, see Louise Ellen Teitz, *The Story of Hilton: From Gloves to Globalization*, in *CIVIL PROCEDURE STORIES*, *supra* note 14, at 427, which concludes, *id.* at 451-53:

*Hilton v. Guyot* is the Supreme Court's only pronouncement on foreign judgments. It is *the* case to cite on the subject. In it, the Court clarified the significance of international law as part of national law and as within the province of the judiciary. . . .

Although *Hilton* is a case on enforcement of foreign judgments, its legacy is much broader. Its enduring definition of comity, or deference to another sovereign, continues to dominate the field of transnational litigation in a variety of contexts. . . .

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The Supreme Court's sole foray into the realm of foreign judgments continues to enjoy increased attention not only in national lawmaking and in international treaty efforts, but in increasingly transnational litigation. It is one of those rare cases that grows in significance with each passing year.

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

expounded the modern U.S. approach to international law. It appears in only one casebook as either a principal or a squib case,<sup>17</sup> and in fact is mentioned in the text or notes of only four more.<sup>18</sup> I find at least this latter datum shocking, and telling. Perhaps the explanation is that *Hilton* is actually a minor case, or just too difficult for some reason.<sup>19</sup> My own belief, however, remains that its omission is symptomatic of all the casebooks' spotty integration of transnational perspectives. In fact, most of their coverage of transnational law comes as *background* reading. Only three casebooks include any *teaching* cases at all on transnational law expressly,<sup>20</sup> besides a couple more casebooks that include a case on alienage jurisdiction.<sup>21</sup>

Thus, there is evident need for the new 200-page book from Thomson-West by Thomas O. Main, entitled *Global Issues in Civil Procedure: Cases and Materials*<sup>22</sup> and intended to supplement any basic casebook. It has eight chapters following the introductions:

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<sup>17</sup>FIELD ET AL., *supra* note 13, at 772-75 (surprise!).

<sup>18</sup>HAZARD ET AL., *supra* note 13, at 1250; MARCUS ET AL., *supra* note 13, at 1132; TEPLY ET AL., *supra* note 13, at 1177; YEAZELL, *supra* note 13, at 722.

<sup>19</sup>My diffidence on this *Hilton* point is growing, as not even Professor Main's new book, *Global Issues in Civil Procedure*, uses it as a teaching case. But he does discuss it in the notes. MAIN, *supra* note 1, at 181.

<sup>20</sup>CRUMP ET AL., *supra* note 13, at 436 (using *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987), as a squib case on international discovery); FIELD ET AL., *supra* note 13, at 588, 772, 776 (using *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), on international jurisdiction, and using *Hilton* and a squib of *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000), on U.S. treatment of foreign judgments); FISS & RESNIK, *supra* note 13, at 1125, 1145 (using *Regina v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte*, [2000] 1 App. Cas. 147 (Eng. H.L. 1999), and *Kadic*).

<sup>21</sup>IDES & MAY, *supra* note 13, at 324 (using *Eze v. Yellow Cab Co.*, 782 F.2d 1064 (D.C. Cir. 1986)); FRIEDMAN ET AL., *supra* note 13, at 165 (using *Coury v. Prot*, 85 F.3d 244 (5th Cir. 1996)).

<sup>22</sup>MAIN, *supra* note 1. On the horizon from the same publisher is OSCAR G. CHASE, HELEN HERSHKOFF, LINDA B. SILBERMAN, YASUHEI TANIGUCHI, VINCENZO VARANO & ADRIAN A.S. ZUCKERMAN, *CIVIL PROCEDURE IN A GLOBAL CONTEXT* (forthcoming 2007).

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

### C. Personal Advice

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

First, some transnational matters are already treated naturally and even inevitably, albeit very briefly. The best example is alienage jurisdiction. However, in the first-year course, I do not go more deeply into transnational aspects of subject-matter jurisdiction,

legislative jurisdiction, or choice of law. For a specific example, I try to avoid treating the Alien Tort Statute in any detail. I speak from some experience. I use *Kadic*<sup>23</sup> to teach international jurisdiction over the person, and it sometimes has led me and the class into the black hole that is the ATS.

Second, I believe that transnational discovery and judicial assistance should be left to the upperclass course. This topic is too practical, or rather not theoretical enough, despite raising some admittedly intriguing issues.<sup>24</sup> Note that my suggestions here concern what actually to “teach”; of course, several pages of background reading will do no harm; but if one teaches discovery in survey fashion only, one hardly yearns for more discovery materials. Needless to say, foreign sovereign immunity and the act of state doctrine are way beyond the first-year students’ reach, and much too exclusively transnational to be appropriate for the civil procedure course.

Third, and contrariwise, for territorial authority to adjudicate and the effect of judgments, no civil procedure course can afford any longer to ignore the transnational implications. Usually jurisdiction and judgments are major subjects of the basic course anyway, and so they can bear this irresistible extension. Those transnational implications illuminate the federal, interstate, and separation-of-powers aspects of the constitutional structure often already under study, while introducing the students to the treaty concept. They reveal the global terrain to the students, while sensitizing them to law’s international dimensions. There are international (U.S. jurisdictional reach and U.S. treatment of foreign judgments) and comparative (how other countries treat jurisdiction and judgments) aspects to both subjects, but what I am stressing as essential is mainly those international aspects of jurisdiction and judgments. What else to cover in this realm? On the one hand, the more ambitious teacher might get into the difficulties of parallel proceedings on the transnational level. On the other hand, I think the teacher should avoid

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<sup>23</sup>*Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995) (holding that an invitee of the United Nations is not immune from personal service of process).

<sup>24</sup>See ABA Section of Antitrust Law, *OBTAINING DISCOVERY ABROAD* (2005).

the practicalities of transnational service, which are just too complicated and which are quite distinguishable and separable from the international requirement of jurisdiction and from the domestic requirement of service. Again, a couple pages of text on transnational service, which is all that any of the casebooks contains, will do no harm, but I do not think that transnational service should actually be taught in the first-year classroom.

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

Here are three bits of advice on how to go about comparative study in the basic civil procedure course: (1) For readings, as opposed to classroom commentary, probably one should not rely on proceeding interstitially and intermittently. After all, the resulting distraction led our predecessors away from a heavily comparative state-federal

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<sup>25</sup>See also Kevin M. Clermont, *Foreword: Why Comparative Civil Procedure?*, in KUO-CHANG HUANG, *INTRODUCING DISCOVERY INTO CIVIL LAW* at ix (2003); Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 *AM. J. COMP. L.* \_\_\_\_ (2006). For all these reasons, comparative civil procedure is becoming quite the hot commodity. In the study of territorial authority to adjudicate and the effect of judgments, as I have suggested, it is verging on impossible to ignore foreign practices. But those subjects offer just the beginning of possibilities for insight. I can give as an illustration the intriguing topic of standards of proof. See Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 *AM. J. COMP. L.* 243 (2002) (comparative study, focusing on France); Kevin M. Clermont, *Standards of Proof in Japan and the United States*, 37 *CORNELL INT'L L.J.* 263 (2004) (another comparative study).

approach and toward a relatively continual focus on the federal procedural system.<sup>26</sup> Moreover, the parts of a foreign system cannot honestly and fairly be understood in isolation from one another, because procedure's inherent interrelatedness makes foreign systems into seamless webs too.<sup>27</sup> (2) Probably, in concentrated readings as part of a renewed overview at some stage of the course, one should focus on a single foreign country, preferably a country that shares some commonalities with us and has plentiful materials in English.<sup>28</sup>

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<sup>26</sup>See William R. Slomanson, *State Civil Procedure Plea*, 54 J. LEGAL EDUC. 235 (2004) (arguing for treating state procedure in an upperclass elective).

<sup>27</sup>See OSCAR G. CHASE, *LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT* (2005).

<sup>28</sup>INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CIVIL PROCEDURE (Piet Taelman ed., 2005) nicely collects in four volumes a series of surveys of various countries' civil procedure systems. See also, e.g., Benjamin Kaplan & Kevin M. Clermont, *Ordinary Proceedings in First Instance: England and the United States*, 16 INT'L ENCY. COMP. L. ch. 6 (1984). For sources on France, see *infra* Appendix C & note 65. On Japan, see TAKA AKI HATTORI & DAN FENNO HENDERSON, *CIVIL PROCEDURE IN JAPAN* (Yasuhei Taniguchi, Pauline C. Reich & Hiroto Miyake eds., 2d ed. 2004); JOSEPH W.S. DAVIS, *DISPUTE RESOLUTION IN JAPAN* (1996); CARL F. GOODMAN, *JUSTICE AND CIVIL PROCEDURE IN JAPAN* (2004); Clermont, *supra* note 25, at 264-67; Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 U. KAN. L. REV. 687 (1998); Masatami Otsuka, *Japan*, in 2 TRANSNATIONAL LITIGATION: A PRACTITIONER'S GUIDE (John Fellas gen. ed., 2004); Tsuneo Sato, *Japan*, in INTERNATIONAL CIVIL PROCEDURE 379 (Shelby R. Grubbs ed., 2003); Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan—A Procedure for the Coming Century?*, 45 AM. J. COMP. L. 767 (1997); Hiroyuki Tezuka, *Trial and Court Procedures in Japan*, in TRIAL AND COURT PROCEDURES WORLDWIDE 39 (Charles Platto ed., 1990); Supreme Court of Japan, *Outline of Civil Litigation in Japan*, <http://www.courts.jp> (last visited Jan. 2, 2006).

But, by far, Germany is the most popular choice in the civil procedure casebooks. FIELD ET AL., *supra* note 13, at 314-21, still uses Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 409-14 (1960), and MARCUS ET AL., *supra* note 13, at 13-15, excerpts W. Zeidler, *Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure*, 55 AUSTL. L.J. 390, 394-97 (1981), while some teachers hand out DAVID LUBAN, *LAWYERS AND JUSTICE* 93-103 (1988). But the most popular article to excerpt on Germany is John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). I view this last article as a risky choice. A firestorm of controversy has raged over the general

Focusing on a single procedural system most efficiently presents the essential, while the spotlighting of a complete system enables the student to face those problems of theory and practice that require considering an entire system. It also provides a useful and realistic snapshot for drawing broad comparisons. (3) This concentrated and focused introduction need not be the end of transnationalism for the course. It can open a door, constructed on a solid foundation even if used only occasionally, to comparisons on such important subjects as the function of pleadings or of the jury—or maybe even a look at comparative federalism—or to some thematic study of topics like access to justice or the comparative roles of judge or lawyer.

I suspect that even these suggestions of limited forays into transnationalism might strike the young teacher (and others) as intimidating. I can remember years ago being asked in class by a foreign graduate student about some fairly basic international implication of the territorial-jurisdiction topic under discussion, and feeling my viscera freeze. But in fact one does not need to know all that much. Now, I am not advocating intellectual carelessness. I am simply saying that one should stick to the basics with the students. Moreover, the transnational law on jurisdiction and judgments is not so very different from the domestic law, as this essay's appendices on

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lessons to be drawn from the German comparison. The best route into the literature, which is rather adversarial in tone, lies through Ronald J. Allen, Stefan Köck, Kurt Riechenberg & D. Toby Rosen, *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988). For further words of caution from both sides of the Atlantic, see Konstanze Plett, *Civil Justice and Its Reform in West Germany and the United States*, 13 JUST. SYS. J. 186 (1989), and John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987 (1990). See generally PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* (2004).

Also, my own feeling is that a study of a particular country is more effective than attention to ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE (Proposed Final Draft 2004), which for the purposes of overall comparison proves a bit overwhelming, as well as seeming an artificial patchwork. See Clermont, *supra* note 1, at 95-96. See generally THE FUTURE OF TRANSNATIONAL CIVIL LITIGATION (Mads Andenas, Neil Andrews & Renato Nazzini eds., 2004). But with its rich commentaries, which tell one all there is to know about its own separable provisions, it is ideal for selective reference on policy discussions and reform proposals concerning U.S. law.

jurisdiction<sup>29</sup> and judgments,<sup>30</sup> adapted from my hornbook,<sup>31</sup> try to show; and what little extra one needs to know is readily acquirable.<sup>32</sup> Finally, no one expects the teacher to be an expert on the intricacies of foreign procedure, because the real lessons concern U.S. procedure.

So, expanding one's portfolio toward transnationalism looks like a huge hill to climb, but it turns out to be only a small hump. Once over it, the world looks different, with benefits accruing not only to one's teaching but also to one's thinking, reading, and writing. In short, ignorance of the law is no excuse when it comes to the limited duty to globalize our courses and our minds.

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<sup>29</sup>*See infra* Appendix A.

<sup>30</sup>*See infra* Appendix B.

<sup>31</sup>KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* §§ 4.2(D), 5.1(A)(4)(c), 5.6(C) (2005).

<sup>32</sup>The place to begin is MAIN, *supra* note 1. Then, I would recommend some of the fine treatises available: BORN, *supra* note 9, does double duty here with its exhaustive detail, while GEORGE A. BERMANN, *TRANSNATIONAL LITIGATION IN A NUTSHELL* (2003), and LOUISE ELLEN TEITZ, *TRANSNATIONAL LITIGATION* (1996), are wonderful too. Also very useful are DAVID EPSTEIN, JEFFREY L. SNYDER & CHARLES S. BALDWIN, IV, *INTERNATIONAL LITIGATION* (3d ed. 2004); *INTERNATIONAL LITIGATION* (David J. Levy ed., 2003); JOSEPH LOOKOFKY & KETILBJØRN HERTZ, *TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION* (2d ed. 2004); VED P. NANDA & DAVID K. PANSIUS, *LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS* (2d ed. 2005); LAWRENCE W. NEWMAN & MICHAEL BURROWS, *THE PRACTICE OF INTERNATIONAL LITIGATION* (2d ed. 2005); LAWRENCE W. NEWMAN & DAVID ZASLOWSKY, *LITIGATING INTERNATIONAL COMMERCIAL DISPUTES* (1996); and *TRANSNATIONAL LITIGATION*, *supra* note 28. Bibliographic entrees to the field include GERMAIN, *supra* note 1; Jonathan Pratter & Joseph R. Profaizer, *A Practitioner's Research Guide and Bibliography to International Civil Litigation*, 28 *TEX. INT'L L.J.* 633 (1993); and Radu D. Popa & Mirela Roznovschi, *Comparative Civil Procedure*, [http://www.law.nyu.edu/library/foreign\\_intl/civilproc.html](http://www.law.nyu.edu/library/foreign_intl/civilproc.html) (last visited Jan. 8, 2006).

CONCLUSION

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

## **Appendix A: Transnational Jurisdiction**

### **1. Suits in U.S. Courts**

The U.S. Supreme Court has largely elaborated the country's law of territorial jurisdiction by deciding cases that arose on the interstate level, and in fact it has decided only four international jurisdiction cases.<sup>33</sup> The United States has no general treaties on international jurisdiction.

Consider a suit against a Frenchwoman in a court here. In the absence of a specific treaty, international law imposes no significant restrictions on state-court territorial jurisdiction beyond those restrictions already imposed by the Due Process Clause of the Fourteenth Amendment. Likewise, in the absence of a specific treaty, international law imposes no significant restrictions on federal-court territorial jurisdiction beyond those restrictions already imposed by the Due Process Clause of the Fifth Amendment.<sup>34</sup>

Thus, the Frenchwoman is treated just like anyone else, with no special international protections.<sup>35</sup> Indeed, one might instead wonder why she can even invoke the U.S. constitutional protections.<sup>36</sup> But the Supreme Court has always assumed that a person subject to suit in our courts can demand treatment in accord with the Constitution. Accordingly, the lower courts extend to foreign

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<sup>33</sup>*Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *cf. Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987) (construing Federal Rules of Civil Procedure's implementation of international jurisdiction).

<sup>34</sup>*See generally* ANDREW S. BELL, *FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION* (2003); ROBERT C. CASAD, *JURISDICTION AND FORUM SELECTION* (2d ed. 1999).

<sup>35</sup>*See Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995) (holding that an invitee of the United Nations is not immune from personal service of process).

<sup>36</sup>*See Afram Export Co. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1362 (7th Cir. 1985) (Posner, J.) (raising, without addressing, this question).

defendants all the jurisdictional protections given to U.S. defendants.<sup>37</sup>

## 2. Suits in Foreign Courts

A quick look at the European<sup>38</sup> approach to territorial jurisdiction serves to show how the law can work out differently, given different origins.

Roman law, enjoying unlimited power, embraced the idea of restraint imposed in a spirit of fairness. *Actor sequitur forum rei*, or the plaintiff follows the defendant's forum. Generally, then, the plaintiff had to go to the defendant's domicile, where the courts could entertain any cause of action against the defendant. Eventually, there was additional provision for long-arm-like jurisdiction in actions of tort, contract, and property, so that, for example, a plaintiff could sue for a tort at the place of wrongful conduct. In other words, the Roman law and its direct descendant, the civil law, generated a decent scheme that avoided the headaches of the U.S. territorial power dogma.<sup>39</sup>

*Ordinary International Cases.* Modern French law, for

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<sup>37</sup>See Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 21-22 (1987). *But see* Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident, Alien Defendants*, 41 WAKE FOREST L. REV. \_\_\_\_ (2006). On the treatment in U.S. courts of foreigners, see Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1499-501 (2003) (stressing ethnocentric biases working against foreigners); Utpal Bhattacharya, Neal Galpin & Bruce Haslem, *The Home Court Advantage in International Corporate Litigation* (Feb. 2004), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=509008](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=509008). *But cf.* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1129-32 (1996) (showing a strong case-selection effect in data from 1986-1994).

<sup>38</sup>See also Kevin M. Clermont, *A Global Law of Jurisdiction and Judgments: Views from the United States and Japan*, 37 CORNELL INT'L L.J. 1, 24-26 (2004) (Japanese jurisdiction).

<sup>39</sup>See generally RUDOLF B. SCHLESINGER, HANS W. BAADE, PETER E. HERZOG & EDWARD M. WISE, *COMPARATIVE LAW* 379-80, 405, 413-34 (6th ed. 1998); Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1203-12 (1984).

example, builds on the Roman restraint idea. Domicile is thus the foundation of French jurisdiction. But socio-economic-political pressures similar to those prevailing in the United States, as well as the usual procedural policies of accuracy, fairness, and efficiency, have pushed France to reach defendants whose acts have caused harm in France. The territorial power idea was absent from France, with telling implications. On the one hand, without the impulses of that power idea, France has not produced such excesses as tag or attachment jurisdiction. On the other hand, without the restraints of that power idea, France has succumbed even more blatantly to parochial impulses, so that as construed article 14 of its Civil Code authorizes territorial jurisdiction over virtually any action brought by a *plaintiff* of French nationality (while article 15 treats as excessive any foreign state's exercise of jurisdiction over an unwilling French *defendant*). Thus, a French person can sue at home on any cause of action, whether or not the events in suit related to France and regardless of the defendant's connections and interests. This French approach to jurisdiction has emigrated with French law to other countries. The forum-shopping potential of jurisdiction based on the plaintiff's nationality is evident, even though in practice this exorbitant jurisdiction is not abused all that often.<sup>40</sup>

A different example from the German system further shows that foreign is not always better than American when it comes to jurisdiction. Germany follows the usual civil-law approach, which makes no distinction between jurisdiction over things and jurisdiction over persons, but gets to a similar result through the notion of exclusive local jurisdiction for certain kinds of suits that intrinsically involve things. Nevertheless, article 23 of Germany's Code of Civil Procedure authorizes ordinary *personal jurisdiction* given only the presence in Germany of a tangible or intangible thing belonging to the defendant, thus going considerably further than the U.S. authorization in certain circumstances of *jurisdiction over a thing* based upon presence of the thing. Recovery in a German case founded on presence of goods is not limited to the value of the goods, although

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<sup>40</sup>See Kevin M. Clermont & John R.B. Palmer, *French Article 14 Jurisdiction, Viewed from the United States*, in DE TOUS HORIZONS: MÉLANGES XAVIER BLANC-JOUVAN 473 (Société de Législation Comparée 2005).

obviously the plaintiff might have trouble enforcing the judgment outside Germany. Traditionally, the cause of action did not have to relate to the thing or even to Germany, but the German Supreme Court has recently invented a vague requirement that the plaintiff be domiciled in Germany or the cause of action be linked to Germany. The forum-shopping potential here too is frightening, as many enterprises have assets in countries with German-based law.<sup>41</sup>

Still, when all is said and done, the civil law of today is not so different from the common law of territorial jurisdiction, at least if one ignores the exorbitant bases of jurisdiction on both sides. This evolution demonstrates how different legal systems tend toward so-called convergence, given similar influences. Even in the doctrinal details of exorbitant jurisdiction, where national peculiarities peak, the differences are smaller than they first appear. French nationality-based jurisdiction or German property-based jurisdiction may not look much like U.S. tag or attachment jurisdiction, but in fact they share a common core: all nations tend to disregard defendants' interests in order to give their own people a way to sue at home, if the home country will be able to enforce the resulting judgment locally.

***Brussels Regime Cases.*** The civil-law courts long ago developed the jurisdictional rules just described for ordinary international cases, usually by extending their venue rules for domestic cases. But more recently the European lawmakers have partially preempted those rules from above. They did so by an enlightened, albeit far from perfect, treaty dating from 1968. That treaty was the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which morphed into a European Union regulation on March 1, 2002. The European Court of Justice has supranational authority to decide questions arising thereunder.<sup>42</sup>

By the Brussels Convention, the member states agreed to provide virtually automatic recognition and enforcement of the

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<sup>41</sup>See LOWENFELD, *supra* note 9, at 283-84, 294-97.

<sup>42</sup>See generally PETER STONE, CIVIL JURISDICTION AND JUDGMENTS IN EUROPE (1998).

judgments of the other member states. This provision was like the Full Faith and Credit Clause of the U.S. Constitution. In order to make this agreement on judgments acceptable, the Brussels Convention was a “double convention” that also defined the bases of territorial jurisdiction—jurisdiction being the doctrine that must, in any judgment-respecting agreement, serve almost alone in ensuring adjudicative restraint. That is, the European member states could give respect to the others’ judgments because they knew that the Brussels Convention restricted the others to appropriately limited jurisdictional reach. This latter restriction worked as the Due Process Clause does in the United States.

Today, the Brussels Regulation’s jurisdictional bases follow the civil-law approach. The defendant’s domicile is the usual place for suit. There is additionally long-arm-like jurisdiction for tort and contract actions; tort actions can be brought “where the harmful event occurred or may occur,” and contract actions at “the place of performance of the obligation in question.” Certain disadvantaged plaintiffs, such as consumers, often can sue at home. Moreover, there is authorization for forum selection clauses, and there is exclusive local jurisdiction in actions concerning real property and the like.

Further on the prohibited side, each member state gave up its exorbitant jurisdiction, so that for example France gave up its personal jurisdiction based on the plaintiff’s French nationality, and Germany gave up its property-based jurisdiction. The United Kingdom gave up tag jurisdiction and attachment jurisdiction. The Brussels Regulation not only prohibits exorbitant jurisdiction, but also makes mandatory the permissible bases of jurisdiction. So, the United Kingdom abandoned its judicial practice of sometimes declining jurisdiction on expressly discretionary grounds such as *forum non conveniens*.

### **3. Comparative Evaluation**

As already said, the Brussels Regulation is enlightened but imperfect. For one thing, it applies only to defendants domiciled in another member state. Indeed, it openly discriminates against outsiders. Accordingly, although France cannot use its exorbitant jurisdiction in a suit by a French person against an English person, it can still use it when the defendant is an American instead. Moreover,

the resulting French judgment gets recognition and enforcement in England, Germany, and elsewhere in the European Union against the American or the American's assets there. Admittedly, this example is an extreme one, without much actual use in practice to date, but it works to illustrate the legal context.

Moreover, any suggestion that European Union law on jurisdiction has achieved markedly greater certainty than U.S. law seems unfounded.<sup>43</sup> This suggestion is improbable on its face. The Brussels regime attempts to satisfy and reconcile the needs of a variety of different countries and legal systems, using vague and simple formulas sometimes foggily drafted and always in multiple languages. It necessitates the complicated interplay of European and national laws. In application, the picture is no prettier. The Brussels regime operates without the benefit of a great deal of authoritative clarifying case law. There is consequently a lot of litigating throughout the European Union about where to litigate.<sup>44</sup> So the European Union is nowhere close to the perfect-certainty end of the spectrum running from uncertainty to certainty. It may be that the European Union enjoys somewhat greater certainty in its jurisdictional law, but in fact the United States is not really that far behind.

After all, jurisdictional problems remain problems because they are hard problems. A nice way to demonstrate this point is to reconsider comparatively two of the classically unclear cases from the U.S. Supreme Court: *World-Wide Volkswagen Corp. v. Woodson*<sup>45</sup>

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<sup>43</sup>E.g., Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 122, 146 (1992); Juenger, *supra* note 39, at 1207-09.

<sup>44</sup>E.g., *BL Macchina Automatiche SpA v. Windmoller & Holscher KG*, [2004] I.L. Pr. 19 (It. Cass., 26 nov. 2003) (holding no Italian jurisdiction under the Brussels Regulation's tort provision for action by Italian company against a German company for declaration of noninfringement of defendant's patent for bagging machines); see C.G.J. Morse, *International Shoe v. Brussels and Lugano: Principles and Pitfalls in the Law of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 999, 1012-25 (1995).

<sup>45</sup>444 U.S. 286 (1980). While passing through Oklahoma on a move from New York to a new home in Arizona, plaintiffs had a car accident. They suffered

and *Asahi Metal Industry Co. v. Superior Court*.<sup>46</sup>

In *World-Wide*, which supposedly engendered a jurisdictional law that is “a hopeless mess,”<sup>47</sup> the Court made the close call that Oklahoma did not have constitutional power over New York car dealers if the plaintiffs drove the car to Oklahoma and had a horrific accident there, because the defendants had not conducted sufficient

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burns allegedly resulting from their car’s defective design. While still hospitalized in Oklahoma, they sued in state court there. They included as defendants the regional wholesale distributor for New York, New Jersey, and Connecticut and the retail dealer from whom they had bought the car in New York, both those defendants being incorporated in New York and also having their place of business there. These two defendants’ only connection with Oklahoma was selling the car involved in this accident. The U.S. Supreme Court held against jurisdiction over these two defendants. They did not have minimum contacts with Oklahoma, which therefore had no power over them. Admittedly, one could argue that these defendants sell cars predictably to be used in Oklahoma, plaintiffs have an interest in litigating at the scene of the accident, and Oklahoma has an interest in enforcing its highway safety laws, and so one could further argue that all this makes jurisdiction reasonable; however, under current law, reasonableness is irrelevant if there is no power.

<sup>46</sup>480 U.S. 102 (1987). In this case, the Supreme Court split badly on the question of power in the stream-of-commerce context, with a minority arguing that, to bestow jurisdiction, the manufacturer must have had an active purpose to serve the market in the forum state where the product was sold. That case’s actual holding, however, was that regardless of power, jurisdiction in California was unreasonable because of the unusual facts: the state could not inflict on a Japanese valve manufacturer the burden of defending this third-party claim by a Taiwanese tire-tube manufacturer, when the main product liability claim had settled and neither the Taiwanese company nor the forum state had adequate interests in sustaining jurisdiction for the remaining indemnity claim. Given this ambiguous guidance, the lower courts are now shaping a new consensus that only slightly shortens the prior jurisdictional reach down the stream of commerce. Their decisions currently appear split, but the better ones hold that the purchaser’s state has power over a seller with an actual awareness of its products’ being regularly sold there and that such personal jurisdiction normally is not unreasonable. See Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 533, 554-55 (1995); cf. LARRY L. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE* 254-55 (3d ed. 2004) (saying that jurisdiction would exist if the injured motorcyclist were to sue Asahi directly).

<sup>47</sup>Borchers, *supra* note 43, at 143.

Oklahoma-directed activities. The result would apparently be different under the Brussels Regulation's tort jurisdiction "where the harmful event occurred."<sup>48</sup> But the European Union achieved that "clear" result only after suffering through judicial creation of redundant jurisdiction at the places of act and of injury, as well as having addressed such questions as whether product liability actions involve tort or contract, whether such harm is sufficiently direct, and whether supranational or national law governs such issues.<sup>49</sup> Incidentally, without the moribund power test, the U.S. Constitution, like the European Union's law, would allow jurisdiction in the *World-Wide* setting (and properly so).

The European Union's relative clarity starts disappearing as one wades deeper into stream-of-commerce cases, such as *Asahi*. In that case brought by an injured motorcyclist, the U.S. Supreme Court made the close call that California's exercise of jurisdiction was constitutionally unreasonable in the peculiar circumstances involving a stranded third-party claim by a Taiwanese manufacturer against a Japanese supplier. Curiously, on the cases's facts involving a claim that happened to arrive by third-party procedure, jurisdiction would clearly exist in a European Union country by virtue of the Brussels Regulation's strange *jurisdiction dérivée* over additional defendants;<sup>50</sup> but that result is clarity by fluke, and it is not necessarily a desirable outcome.<sup>51</sup> Consider instead the more general situation of the tort victim suing the Japanese supplier. Although jurisdiction at the place

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<sup>48</sup>See SILBERMAN & STEIN, *supra* note 13, at 214; Ronald A. Brand, *Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention*, 24 BROOK. J. INT'L L. 125, 152 (1998).

<sup>49</sup>See Borchers, *supra* note 43, at 144-46 (discussing the ECJ's key cases).

<sup>50</sup>Brussels Regulation art. 6(2) (extending jurisdiction to third-party defendants); see Weintraub, *supra* note 46, at 550-51.

<sup>51</sup>Compare Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 96-97 (1999), with Kevin M. Clermont & Kuo-Chang Huang, *Converting the Draft Hague Treaty into Domestic Jurisdictional Law*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 191, 213-17 (John J. Barceló III & Kevin M. Clermont eds., 2002).

of a sufficiently direct tortious harm would seem to exist under the construed words of the Brussels Regulation,<sup>52</sup> it is hard to know what the European Court of Justice would actually do with regard to the stream of commerce as it dilutes in this way.<sup>53</sup> For what it is worth, the national law of some European Union countries would likely view such jurisdiction, without any sort of foreseeability condition, as impermissibly exorbitant.<sup>54</sup> The current U.S. approach seems about as clear as the European Union approach, while both stumble toward permitting foreseeable, and only foreseeable, jurisdiction in the general stream-of-commerce situation (and properly so).

## **Appendix B: Transnational Judgments**

### **1. Current Law**

International law itself plays no real role in U.S. treatment of foreign judgments, except to the extent that the U.S. approach is already a manifestation of any generally recognized principles that constitute part of international law. The United States has not a single treaty on the subject. So, for foreign judgments, no binding law comparable to full faith and credit exists to take them out of the normal background rule: the acts of foreign governments have no effect within another government's territory, unless the latter government *chooses* to give them effect.

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<sup>52</sup>See Linda J. Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension*, 28 VAND. J. TRANSNAT'L L. 389, 401-02 (1995); Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 191 (1998).

<sup>53</sup>See Brand, *supra* note 48, at 145-54.

<sup>54</sup>See Tapio Puurunen, *The Judicial Jurisdiction of States over International Business-to-Consumer Electronic Commerce from the Perspective of Certainty*, 8 U.C. DAVIS J. INT'L L. & POL'Y 133, 252 (2002) (e-torts); cf. Catherine Kessedjian, *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conf. Prelim. Doc. No. 7, at 70-72, 82 (Apr. 1997) (discussing desirable treaty provision).

Yet U.S. courts at the federal and state level do give respect to foreign judgments, not only because finality is a fair and efficient policy even as to foreign judgments, but also because U.S. courts hope to encourage abroad similar respect for their own judgments. That is, freed from constitutional, statutory, and treaty obligations but motivated by similar policies, U.S. courts generally respect foreign judgments that are valid and final under the foreign law. Accordingly, the foreign *res judicata* law should be applicable, and the foreign judgment should be enforceable, in the United States.

The U.S. courts' approach to foreign judgments can still be somewhat flexible, precisely because their respect flows from "comity" rather than from external legal obligation.<sup>55</sup> A closer look at

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<sup>55</sup>*See* *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."). *See generally* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

As to the governing law on the treatment of foreign judgments, the matter is regulated by general principles of comity under the law of the recognition court. Thus, the state's common law on comity and its related statutes, *see, e.g.*, UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13(pt. II) U.L.A. 39 (1962), *discussed in* 18 SUSAN BANDES & LAWRENCE B. SOLUM, MOORE'S FEDERAL PRACTICE § 130.52 (3d ed. 1999), govern in state court, and federal common law on comity governs on federal claims in federal court. However, on a state claim the federal court under *Erie* looks to state law on how to treat a foreign judgment. *See, e.g.*, *Bank of Montreal v. Kough*, 612 F.2d 467, 469 (9th Cir. 1980) ("Recognition and enforcement of the British Columbia judgment in this case depends upon the proper construction of the Uniform Foreign Money Judgments Recognition Act . . . adopted by California . . ."); *Svenska Handelsbanken v. Carlson*, 258 F. Supp. 448, 450 (D. Mass. 1966) ("Although the Massachusetts cases are very old, the Massachusetts rule appears to be that a judgment of a court of a foreign country is only prima facie evidence of the underlying claim, and that defendant is entitled to all the defenses he might have made to the original action."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c (1971) (amended 1988). *But see* John D. Brummett, Jr., Note, *The Preclusive Effect of Foreign-Country Judgments in the United States and Federal Choice of Law: The Role of the Erie Doctrine Reassessed*, 33 N.Y.L. SCH. L. REV. 83 (1988). An argument could be made that in all federal cases, and even in all

the actual holdings and opinions suggests that U.S. courts apply slightly different standards to judgments of foreign nations, as compared to those they apply to domestic, state, or federal judgments. The principal reason for difference is that a U.S. court has no guarantee that a foreign judgment, although comporting with the basic requirements of the foreign nation, is minimally acceptable to Americans. The foreign laws concerning validity vary widely. Moreover, the Due Process Clause and the rest of the U.S. Constitution do not control foreign sovereigns, of course, and so the workings of the foreign legal system could be too foreign to tolerate.

From this realistic insight follow four corollaries. First, while a U.S. court can ask whether jurisdiction existed under the foreign law, the U.S. court more importantly may examine whether the foreign assertion of jurisdiction satisfied the U.S. tests of substantive due process.<sup>56</sup> A U.S. court, for example, would disregard a French judgment for which personal jurisdiction was based solely on the plaintiff's French nationality. Second, a U.S. court will give no respect to a foreign judgment that it views as repugnantly unfair.<sup>57</sup> A U.S. court will not recognize or enforce a foreign judgment resulting from proceedings that failed to meet the basic notions of U.S. procedural due process, such as adequate notice, and so prevented the parties from having a fair day in court. Third, a U.S. court might apply other limitations, such as refusing recognition or enforcement if the prior judgment rested on fraud or if the original claim is directly contrary to strong local public policy.<sup>58</sup> For a procedural example of those

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state cases as well, federal law should control because of the federal interest in foreign relations, *see* John Norton Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, but that is not how the law has worked out. At any rate, both state and federal law will most often refer to the foreign law in specifying treatment, and so state and federal approaches are basically similar.

<sup>56</sup>*See* BORN, *supra* note 9, at 968-74.

<sup>57</sup>*See* *Society of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000) (applying a restrained "international concept of due process"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(1) (1987).

<sup>58</sup>*See* *De Brimont v. Penniman*, 7 F. Cas. 309 (C.C.S.D.N.Y. 1873) (No. 3715); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. c (1971);

limitations, a foreign default judgment rendered contrary to a forum selection clause's derogation might fall within the public policy exception. For a substantive example, a U.S. court would reject an English judgment for defamation that impinges on U.S. principles of free speech, and also U.S. courts would generally not regard judgments of foreign countries imposing tax obligations or penal sanctions as entitled to recognition or enforcement. Fourth, in principle but not in general practice, a U.S. court may require reciprocity.<sup>59</sup> In sum, U.S. courts treat judgments of foreign nations

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RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2) (1987).

<sup>59</sup>See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. f (1971) (amended 1988); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. d (1987). Compare J. Noelle Hicks, *Facilitating International Trade: The U.S. Needs Federal Legislation Governing the Enforcement of Foreign Judgments*, 28 BROOK. J. INT'L L. 155, 176-78 (2002) (arguing for legislation that would impose reciprocity in all circumstances), with Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239 (2004) (opposing reciprocity). See generally Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELB. U. L. REV. 416 (1999) (analyzing recognition as an iterative prisoner's dilemma game).

In the much-criticized decision of *Hilton v. Guyot*, 159 U.S. 113, 210-28 (1895) (involving French plaintiffs trying to enforce in federal court a French money judgment against U.S. citizens), a sharply divided U.S. Supreme Court gave a ringing endorsement of comity in a notably modernistic tone, but at the same time held that a federal court should not accord enforcement without relitigation of the merits to a judgment of a foreign country if the courts of that country would not enforce judgments of U.S. courts rendered under analogous circumstances. When this reciprocity exception applies, the foreign judgment can be used only evidentially, as prima facie evidence of the underlying claim.

Today, this reciprocity exception is said to apply only when a personal judgment was rendered in favor of a plaintiff who was a national of the rendering foreign country and against a U.S. defendant. The *Hilton* holding is not binding on the states, but merely governs enforcement of judgments in federal courts. And even in federal courts, in view of the later-announced *Erie* doctrine, the exception does not apply in diversity jurisdiction, which is the usual basis of federal jurisdiction for enforcing judgments, unless the state in which the federal court sits has adopted a reciprocity exception itself, which not many states have done.

One can persuasively argue against the *Hilton* holding that courts should not be pursuing a role in foreign relations that belongs to the other branches of

pretty much like U.S. judgments, but not quite.

This U.S. behavior is nevertheless fairly generous compared to most other nations'. Most other nations appear to demonstrate a relatively heightened notion of sovereignty in this regard. Even if the U.S. judgment passes the foreign court's jurisdictional reexamination, which very well might involve meeting all the standards of the foreign jurisdictional law, the foreign court tends to reexamine the merits to ensure that the applied law conformed to local policy.<sup>60</sup> And in the case of recognition, the foreign court tends to apply its own, narrower *res judicata* law.<sup>61</sup>

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government, especially when American courts have failed to present a united front on the reciprocity matter; that the Court's unclear albeit narrow exception of reciprocity undermines the fairness and efficiency of *res judicata* law; that reciprocity seems unlike the other exceptions to comity that rely on due process notions; and that it is unfair to punish a foreign litigant for its government's policy. Still, a feeling lingers that, in the absence of supranational authority, a reciprocity exception is about all that the United States can threaten in order to give foreign courts an incentive to abandon any stinginess in respecting American judgments.

Interestingly, the question of reciprocity has moved to the front-burner again, as the global community has unsuccessfully pursued the broad treaty on judgments at The Hague, as described below. At home, the American Law Institute has drafted in response a proposed federal statute that would federalize the treatment of foreign judgments—and would statutorily impose a reciprocity exception on the country's courts in order to encourage respect for American judgments abroad. *See generally* ALI RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 7 (Proposed Final Draft 2005).

<sup>60</sup>*See generally* ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD (Ronald A. Brand ed., 1992); ENFORCEMENT OF FOREIGN JUDGMENTS (Dennis Campbell ed., 1997); ENFORCEMENT OF FOREIGN JUDGMENTS (Louis Garb & Julian Lew eds., 2001); ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE (Charles Platto & William G. Horton eds., 2d ed. 1993); INTERNATIONAL EXECUTION AGAINST JUDGMENT DEBTORS (Dennis Campbell ed., 2005).

<sup>61</sup>*See* Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53 (1984); Clermont, *supra* note 38, at 12; cf. Robert Wyness Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law* (pts. 1-2), 39 MICH. L. REV. 1, 238 (1940) (studying *res judicata* comparatively). Few teachers take the last step of getting

## **2. Treaty Possibilities**

European countries appear ahead of the United States on the treatment of foreign judgments, or rather on their treatment of European judgments. As already explained, the European Union has an enlightened, albeit far from perfect, system. By that so-called Brussels Regulation, the member states must provide virtually automatic recognition and enforcement of the judgments of the other member states, if rendered on specified jurisdictional bases.

The European Union does not appear superior in all regards, however. The virtually automatic recognition and enforcement does not extend to judgments rendered by countries that are not member states. The European countries, in fact, have traditionally been and continue to be rather stingy in extending respect to foreign judgments not covered by treaty, such as U.S. judgments.

In short, Americans are being whipsawed by the European Union approach. Not only are they still subject (in theory) to the far-reaching jurisdiction of European courts and the wide recognition and enforceability of their resulting judgments, but also U.S. judgments tend (in practice) to receive short shrift in European courts.

The overall international situation, as exacerbated by the Brussels Regulation, is untenable in the long run for the United States. Therefore, in 1992 the United States initiated a push to conclude a worldwide convention on jurisdiction and judgments, naturally choosing to work through the Hague Conference on Private International Law. Drafting and agreeing on a multilateral convention could yield great returns for the United States. A convention would resolve the whipsawing predicament in which Americans today find themselves regarding exercise of jurisdiction as well as treatment of judgments. A convention would rationalize both jurisdiction law and judgments law on an international level. In the specific matter of

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into foreign *res judicata* law. For the purposes of this essay, I take a stab at summarizing French *res judicata* law in Appendix C (on which I am very open to correction by those in the know), but I shall let the reader judge its instructional value.

treatment of foreign judgments, a convention would unarguably be desirable for the United States. It would mean that the United States could get returns for the respect the United States is already according other nations' judgments. As to the jurisdictional side, a convention would cause other nations to renounce their own exorbitant jurisdiction. It also could substantively improve U.S. jurisdiction law in international cases.

Will such a convention come into existence, as opposed to a narrow convention treating a special problem area such as business-to-business contracts containing choice-of-court agreements that select forums for disputes to the exclusion of other forums?<sup>62</sup> Not in the near future. The United States has little bargaining power under the current regime. It needs a convention, while the Europeans have little to gain over their presently favorable situation.

Because of this imbalance of power, the expectation is that any convention of general scope, if ever agreed upon, would be very similar to the Brussels Regulation. This prediction means that the United States would abandon—on the international level, but not necessarily with respect to its courts' actions against its own habitual residents—attachment jurisdiction (other than for security or enforcement), tag jurisdiction (a relic of the power theory), even doing business (as a basis for general jurisdiction), and much of forum non conveniens (too discretionary). The Europeans' objection is to the U.S. proclivity to base general jurisdiction on rather thin contacts, namely, allowing any and all causes of action to be brought on the basis of the defendant's property ownership, physical presence, or doing business in the forum. They do not object to specific jurisdiction, as long as a rules-based approach makes its application nondiscretionary. Thus, jurisdiction under a general convention would exist at the unconsenting defendant's habitual residence or where a specific part of the events in suit occurred, but would not extend to the broader bases of jurisdiction now authorized by U.S. law. In sum,

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<sup>62</sup>For the content of the eventual convention, see the Hague Conference on Private International Law's website, [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98) (last visited Jan. 2, 2006); see also Kevin M. Clermont, *An Introduction to the Hague Convention*, in *A GLOBAL LAW*, *supra* note 51, at 3.

a general convention would agree on certain bases of territorial jurisdiction, but chiefly those palatable to the Europeans—and judgments based thereon would then receive virtually automatic recognition and enforcement in other signatory countries (except those judgments that the Europeans consider too generous or punitive).

Regardless of ultimate outcome, however, the fruits of negotiation to date have definitely been worth the effort. Merely negotiating a draft Hague Convention has taught all sides a lot about jurisdiction. For example, exorbitant jurisdiction looks different when viewed through foreign eyes. In particular, it has given the United States an opportunity to untangle its jurisdictional law for domestic cases on its own.<sup>63</sup>

### **Appendix C: French Res Judicata Law**

France, of course, is a prototypical civil-law country in most

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<sup>63</sup>See Clermont, *supra* note 1; Clermont, *supra* note 51; Clermont & Huang, *supra* note 51.

respects,<sup>64</sup> including its civil procedure.<sup>65</sup>

French *res judicata* (*la chose jugée*, or the thing adjudged) is embodied in its *Code civil* art. 1351, which appears in the part of the code treating presumptions:

*L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.* [The authority of *res judicata* extends only to what was the subject matter of the

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<sup>64</sup>See generally JOHN BELL, *FRENCH LEGAL CULTURES* (2001); JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, *PRINCIPLES OF FRENCH LAW* (1998); WALTER CAIRNS & ROBERT MCKEON, *INTRODUCTION TO FRENCH LAW* (1995); CHRISTIAN DADOMO & SUSAN FARRAN, *THE FRENCH LEGAL SYSTEM* (2d ed. 1996); BRICE DICKSON, *INTRODUCTION TO FRENCH LAW* (1994); CATHERINE ELLIOTT, CAROLE GEIRNAERT & FLORENCE HOUSSAIS, *FRENCH LEGAL SYSTEM AND LEGAL LANGUAGE* (1998); CATHERINE ELLIOTT & CATHERINE VERNON, *FRENCH LEGAL SYSTEM* (2000); EVA STEINER, *FRENCH LEGAL METHOD* (2002); FRANÇOIS TERRÉ, *INTRODUCTION GÉNÉRALE AU DROIT* (1991); ANDREW WEST, YVON DESDEVICES, ALAIN FENET, DOMINIQUE GAURIER & MARIE-CLET HEUSSAFF, *THE FRENCH LEGAL SYSTEM* (2d ed. 1998); MARTIN WESTON, *AN ENGLISH READER'S GUIDE TO THE FRENCH LEGAL SYSTEM* (1991); Claire M. Germain, *French Law Guide* (July 2004), <http://www.lawschool.cornell.edu/library/encyclopedia/countries/france>. A good source for actual French law, in French and English, appears at <http://www.legifrance.gouv.fr/> (last visited Jan. 2, 2006).

<sup>65</sup>See generally PETER HERZOG & MARTHA WESER, *CIVIL PROCEDURE IN FRANCE* (1967); 2 *EUROPEAN CIVIL PRACTICE* 139-77 (Alexander Layton & Hugh Mercer gen. eds., 2d ed. 2004); *EUROPEAN TRADITIONS IN CIVIL PROCEDURE* 25-68 (C.H. van Rhee ed., 2005); JEAN VINCENT & SERGE GUINCHARD, *PROCÉDURE CIVILE* (24th ed. 1996); Thierry Bernard & Hedwige Vlasto, *France*, in 2 *TRANSNATIONAL LITIGATION*, *supra* note 28; Robert W. Byrd & Christian Bouckaert, *Trial and Court Procedures in France*, in *TRIAL AND COURT PROCEDURES WORLDWIDE*, *supra* note 28, at 138; Clermont & Sherwin, *supra* note 25, at 247-51; Christine Lécuyer-Thieffry, *France*, in *INTERNATIONAL CIVIL PROCEDURES* 241 (Christian T. Campbell ed., 1995); Raymond Martin & Jacques Martin, *France*, in 1 *INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CIVIL PROCEDURE*, *supra* note 28; Renée Y. Nauta & Gerard J. Meijer, *French Civil Procedure*, in *ACCESS TO CIVIL PROCEDURE ABROAD* 131 (Henk J. Snijders ed. & Benjamin Ruijsenaars trans., 1996); Xavier Vahramian & Eric Wallenbrock, *France*, in *INTERNATIONAL CIVIL PROCEDURE*, *supra* note 28, at 213.

judgment. The thing claimed must be the same; the action must be based on the same ground; the action must be between the same parties, and brought by and against them in the same capacities.]

That is to say, French *res judicata* is based upon presumption of correctness: when raised by a party, a prior judgment is presumed to be correct and should not be contradicted in a subsequent suit. A French judgment acquires the authority of *res judicata* once it is rendered, but a direct attack such as an appeal suspends its *res judicata* effect. A reversal will deprive a judgment of its *res judicata* effect, while an affirmance will render stronger the presumptive force of *res judicata*. The judgment becomes irrebuttable when all means of direct attack have expired.

In general, only issues advanced in contested *conclusions* (the issues that the parties submit as necessary to decision, such as the existence of some right) and definitively decided by the court will have *res judicata* effect in a subsequent suit. A defendant must advance *conclusions* in the nature of a declaratory counterclaim on necessarily involved issues in order to get *res judicata* effect on other than the plaintiff's *conclusions*. Consequently, *res judicata* effect attaches only to the judgment's decretal portion accepting or rejecting the *conclusions* of the parties (*le dispositif*), and not to its briefly stated rationale portion (*les motifs*); however, if the rationale is closely intertwined with the decree, the second court may consult the rationale to determine the scope of *res judicata*.

Thus, unlike common-law *res judicata*, which is based heavily on the idea of extinguishing previously asserted claims and defenses in the pursuit of efficiency, the French concept of *res judicata* relies more exclusively on issue preclusion to avoid undoing decisions. For such preclusion, French law requires three identities between the lawsuits: of the parties, of the object demanded, and of the *cause*. These identities together suggest that the France deals more in direct estoppel than in collateral estoppel:

1. Identity of parties requires not physical identity but identity of quality, or legal capacity. Thus, privies represented in the prior suit have the same identities as the parties, but the same person who later sues in a different capacity does not.

2. The second required identity is the identity of object demanded. This difficult concept means that the suits must involve generally the same juridical right sought as to the same matter. For close but contrary examples, a person who has lost an action in which he claimed title to a building may later sue freely for a life estate, but a person who has unsuccessfully claimed a debt owing cannot later sue for interest thereon.<sup>66</sup>

3. The last required identity, and probably even more troublesome, is the identity of *cause*. On the one hand, it is generally accepted that this concept of *cause* is broader than the old common-law concept of cause of action, or theory of recovery. *Cause* refers to the ultimate facts and legal principle upon which the action is grounded, such that a loan is a *cause*. On the other hand, all agree that the concept of *cause* is more restrictive than the new common-law transactional view of a claim. For French examples, a party who has unsuccessfully attacked a will for a defect of form may renew the attack for lack of testamentary capacity, but that party cannot raise different formal defects in successive actions.<sup>67</sup>

If these three identities are present, *res judicata* attaches, preventing the losing party from asserting new evidence or theories to change the outcome.

In comparison, U.S. *res judicata* is distinctively a good deal more expansive than the *res judicata* law of other countries, including civil-law countries like France.<sup>68</sup> Most interestingly, to affect other causes of action as well as other persons, civil-law countries broadly allow an evidential use of prior judgments, rather than expand their

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<sup>66</sup>See HERZOG & WESER, *supra* note 65, at 554.

<sup>67</sup>See *id.* at 555.

<sup>68</sup>Interestingly, by a different path to a similarly restrained scope, Japanese *res judicata* law comprises a variant of claim preclusion applicable only to narrow claims actually asserted, with no true issue preclusion. See MINSOHO [CODE OF CIVIL PROCEDURE], arts. 114-115 (Japan); HATTORI & HENDERSON, *supra* note 28, § 7.06[8]; cf. J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 144-45 (1999) (attributing the narrowness of Japanese preclusion law to the low cost of proving anew in a system that relies on documentary evidence and operates without juries).

preclusive doctrine of *res judicata*. One could argue that the United States should have relaxed its hearsay rule in order to follow the same evidential route as the civilians, and so could have avoided its battles over scope of claim and nonmutuality of estoppel. Following that evidential route in this country would entail giving to all rulings a persuasive effect similar to the effect that *stare decisis* gives to legal rulings. However, there are arguments against extending evidential weight to factual findings: that combining a past decision with new evidence is a bit like combining apples and oranges; that our juries especially would have trouble in weighing a past decision; and that the evidential approach lacks *res judicata*'s advantage of avoiding trial altogether. Therefore, the United States has in the main rejected this civilian solution.