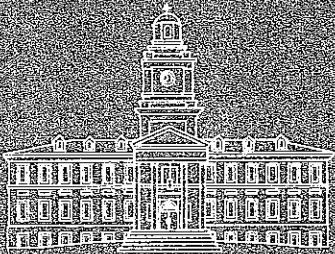


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**HUMAN RIGHTS AND LEGAL EDUCATION IN THE WESTERN HEMISPHERE.  
LEGAL PAROCHIALISM AND HOLLOW UNIVERSALISM**

*Larry Catá Backer*

## Articles

# Human Rights and Legal Education in the Western Hemisphere: Legal Parochialism and Hollow Universalism

Larry Catá Backer\*

### Abstract:

There appears to be a trend towards convergence of individual human rights norms. Universal individual human rights has become an increasingly accepted part of the institutional norms of nations in the Western Hemisphere. Educators across the Americas have an important, perhaps critical, role to play in the internalization of universal individual human rights norms within the legal systems of the nations of the Americas. Law schools best serve this role by

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incorporating human rights education into the core curriculum in every law school in the region. But, the human rights mission of legal institutions in the Americas faces serious challenges, which are explored in this paper. In the United States, individual rights is still assumed to be a wholly endogenous product, the source of which is limited to federal and state constitutions. Human rights education is marginalized, confined to the ghetto of specialization within the fields of international and comparative law. In Latin America, the opposite is true. Human rights is taught, but as the universalizing product of exogenous origin and control. The rich human rights traditions of Latin American nations are marginalized. The result is the construction of a rights edifice that is foreign, a hollow internationalism. Nevertheless, the problem of legal parochialism and hollow universalism can be overcome and the paper concludes by offering some examples and suggestions of methods by which this process can be started.

Since 1999, the Section on Graduate Programs for Foreign Lawyers of the American Association of Law Schools has sponsored an annual dialogue between academics in the Americas.<sup>1</sup> Over the years, this dialogue has been fruitful in a number of respects.<sup>2</sup> The topic for 2002 – Human Rights and Legal Education – was particularly appropriate as the world nears the end of the United Nation's Decade for Human Rights Education.<sup>3</sup> It was also particularly well suited to the moderator of this dialogue, Dean Claudio Grossman, whose law school has been at the forefront of bringing human rights education to the Americas through Washington College of Law's Center for Human Rights and Humanitarian Law.<sup>4</sup>

This conversation is meant to provide an opportunity to share views "on the important issues facing human rights as a part of standard legal

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1. Claudio Grossman, *Human Rights and Legal Education in the Western Hemisphere*, Graduate Programs for Foreign Lawyers, AALS Section Newsletter, Fall 2001 at 4 (copy on file with author).

2. See American Association of Law Schools, Section on Graduate Programs for Foreign Lawyers, Annual Meeting (2000) (seminars included Emerging Worldwide Strategies in Internationalizing Legal Education, The Quest for Consensus on LL.M. Standards, and Transnational Legal Practice: Regulatory Hurdles), available at <http://www.aals.org/am2000/schedule.html>.

3. United Nations Decade for Human Rights Education, U.N. GAOR, 49<sup>th</sup> Sess., Agenda Item 100(b), U.N. Doc. A/RES/49/184 (1995). The decade for human rights education ends in 2005. The resolution declaring the commencement of this decade urged states to use education as a means by which people "learn respect for the dignity of others and the means and methods of ensuring that respect in all societies." *Id.*

4. For a hint of the activities of the Center for Human Rights and Humanitarian Law, see, e.g., Natasha Concepción, *Center News: Promoting Human Rights Education in the Americas*, 7 HUM. RTS. BR. 30 (1999) (describing a training seminar for human rights law professors in 1999).

education”<sup>5</sup> within the Americas. This sharing presupposes a number of understandings and assumptions. First, human rights is directly related to positive law.<sup>6</sup> Second, among those actors within a nation with power to affect positive law, law schools must serve “as institutions promoting fairness and justice in society.”<sup>7</sup> Third, as a consequence of this mission, “human rights education should be part of the core curriculum in every law school in the region.”<sup>8</sup> Lastly, the human rights mission of legal institutions in the Americas faces serious challenges, particularly the battle from the predilection among even the most well-meaning governments in the Americas to ignore or apply human rights to suit their

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5. *Id.* For my purposes here, I will understand human rights to include all “rights held equally by every individual by virtue of his or her humanity, and for no other reason. Human rights are non-derogable claims against both society and the state that are not contingent upon performance of specific duties.” Rhonda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 HUM. RTS. Q. 315 (1993).

6. *Id.* (“While human rights is obviously an important issue, the teaching of human rights law lags.”). However, one should keep in mind what Alfred Rubin noted: “The bottom line of positive law is not justice but authority. The issue with regard to the positive law is always *who* . . . has the authority to define the offense, to determine if it has occurred, and to demand. . . a ‘legal’ result of that determination.” Alfred P. Rubin, *Enforcing the Rules of International Law*, 34 HARV. INT’L L.J. 149, 157 (1993).

There is a rich and complicated discourse respecting this assumption. For a discussion in the context of human rights, see, e.g., Rubin, *supra*, Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOKLYN J. INT’L L. 417 (2000), Joy Gordon, *The Concept of Human Rights: The History and Meaning of its Politicization*, 23 BROOKLYN J. INT’L L. 689 (1998). The discussion is not unknown within the context of American constitutional law. See, e.g., Charles R. Kesler, *Natural Law and a Limited Constitution*, 4 S. CAL. INTERDIS. L.J. 549 (1995). The original debate on the need for a federal Bill of Rights touches on this assumption. See, e.g., IRA GLASSER, *VISIONS OF LIBERTY: THE BILL OF RIGHTS FOR ALL AMERICANS* (Arcade Pub., 1991). The modern discussion on the nature of ‘rights’ within modern constitutional interpretation is one of the more important modern expressions of the difficulties inherent in this assumption. For judicial discourse, compare *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) and *Bowers v. Hardwick*, 478 U.S. 186 (1986). For academic discourse, see, e.g., DEBORAH RHODE, *IN THE INTEREST OF JUSTICE* (Oxford 2000).

7. Claudio Grossman, *Human Rights and Legal Education in the Western Hemisphere*, Graduate Programs for Foreign Lawyers, AALS Section Newsletter, Fall 2001 at 4 (copy on file with author).

There are a number of international instruments that seek to secure a privileged place for education. For example, Section 5(1)(a) of the Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93 provides that:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

For a brief discussion of education rights in international instruments, see Lynda Frost, *Human Rights Education Programs for Indigenous Peoples: Teaching Whose Human Rights?*, 7 ST. THOMAS L. REV. 699, 703-706 (1995).

8. *Id.*

own purposes.<sup>9</sup>

Law schools in the Americas are particularly well suited to the task of internalizing a universal human rights normative structure within the cultures of the civil and common law and among lawyers, judges, bureaucrats, legislatures, and political executives, many of whom are lawyers.<sup>10</sup> But law schools across the Americas are hardly ready to participate effectively in the process of human rights convergence. On the one hand, law schools continue to support systems of parochialism which resist the introduction of any universalist notions into national rights discourse. On the other hand, law schools teach a human rights universalism in a form which is alien to the local legal culture and which provides little effective means for bridging the distance between the local legal culture and an intrusive alien universalism.

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9. *Id.* Thus, Dean Grossman notes, among the serious issues of human rights in the Americas, the imposition of death sentences on minors, the murder of journalists, domestic violence against women, and incarceration without sentence. *Id.* Indeed, there are international agreements, some aspirational and some with at least limited binding effect but in various stages of approval, that touch on these topics. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217, UN GAOR, 3<sup>rd</sup> Sess., U.N. Doc. A/810 (1948); International Convention on Civil and Political Rights, G.A. Res. 2200A (XXI), 21<sup>st</sup> Sess., U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21<sup>st</sup> Sess., U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966); Convention on the Political Rights of Women of 1952, 193 U.N.T.S. 135; Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 14 (1981); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39<sup>th</sup> Sess., Supp. No. 51, U.N. Doc. E/CN.4/1984/72 (1984); Convention on the Rights of the Child of 1989, G.A. Res. 44/25, U.N. GAOR, 61<sup>st</sup> plen. Mtg., at 166, U.N. Doc. A/44/736 (1989).

10. There is a strong tradition of politically charged education within the Americas. In the United States, the political thrust of that education has been to serve the social, economic and political elites. *See, e.g.*, JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976). Traditionally, in Latin America, the political thrust of that education has been conservative and sometimes religiously oriented to the benefit of the Roman Catholic Church. *See, e.g.*, Laura M. Padilla, *Latinas and Religion: Subordination or State of Grace?*, 33 U.C. DAVIS L. REV. 973 (2000) (assimilation to European standards was attempted through education in Latin America); Paul E. Sigmund, *Religious Human Rights in Latin America*, 10 EMORY INT'L L. REV. 173 (1996) (Catholic Church had a religious and educational near monopoly in Latin America until the late 20<sup>th</sup> century). Since the Second World War, the great advances in education as a political project have come from the left. *See, e.g.*, PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Myra Bergman Ramos, trans., 20<sup>th</sup> Anniversary ed., The Continuum Pub. Co., 1993) (1970). *See generally*, Philippa Bobbett, *Human Rights Education and Non-Governmental Organizations: A Variety of Approaches*, in *THE CHALLENGE OF HUMAN RIGHTS EDUCATION* 219 (Hugh Starkey, ed., 1991); UNITED NATIONS, *TEACHING HUMAN RIGHTS: PRACTICAL ACTIVITIES FOR PRIMARY AND SECONDARY SCHOOLS* (1989). In the United States there has also been considerable discussion of the civic mission of educational establishments generally. *See, e.g.*, R. FREEMAN BUTTS, *THE CIVIC MISSION IN EDUCATION REFORM: PERSPECTIVES FOR THE PUBLIC AND THE PROFESSION* (1989).

This essay examines the reality of human rights education within the Americas based on an acceptance of the assumptions about the teaching mission of law schools with respect to human rights and the relationship of that teaching mission to an assumed obligation of law schools to participate in the development of positive law. Section I introduces the problem of legal parochialism and hollow universalism as impediments to the internalization of universal individual human rights norms in the Americas. Section II provides the detail, setting out the way in which curricular choices and categorizations within the United States, and course methodologies within Latin America, impede advancement of human rights education. Section III offers suggestions for remediation. These suggestions point only toward first steps in a long process of changing natural cultural conceptions of human rights as something arcane, apart, and alien into an accepted reality among all peoples of the Americas.

#### I. The Structural Problem: Legal Parochialism and Hollow Internationalism

The world has been moving slowly toward a grudging acceptance of globalism in a variety of fields. If globalization is the great postulate of the twenty-first century socio-economic organization, its great corollary is legal convergence.<sup>11</sup> The imperatives of modern commerce have been a great engine of globalism, extending even into 'non-capitalist' strongholds like the People's Republic of China.<sup>12</sup> Legal education, as well, has seen the beginnings of attempts to respond positively to the forces of convergence and globalization.<sup>13</sup> Convergence has come slowly in other areas as well. Starting with the United Nation's Universal Declaration of Human Rights,<sup>14</sup> there has been an accelerating

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11. For an excellent short discussion, see Michael Mussa, *Factors Driving Global Economic Integration*, presented in Jackson Hole, Wyoming at a symposium sponsored by the Federal Reserve Bank of Kansas City on "Global Opportunities and Challenges," August 25, 2000, available at <<http://www.imf.org/external/np/speeches/2000/082500.htm>>

12. China's entry into the World Trade Organization system, and its adoption of corporations codes, are strong indicators of the power of globalist trade to compel compliance with emerging worldwide standards of economic conduct. For a general discussion, see, e.g., Robert C. Art and Minkang Gu, *China Incorporated: the First Corporation Law of the People's Republic of China*, 20 YALE J. INT'L L. 273 (1995).

13. For example, in 2000, the Association of American Law Schools convened a "watershed conference, believed to be the first of its kind ever held, [to highlight] the world's diverse systems of law and legal education and explore the desirability and feasibility of greater global cooperation among legal educators." John Sexton and Carl C. Monk, *Introduction: Papers From the La Pietra Conference of International Legal Educators*, 51 J. LEGAL EDUC. 313 (2001).

14. Universal Declaration of Human Rights, G.A. Res. 217, UN GAOR, 3<sup>rd</sup> Sess.,

trend, especially within the Americas, to embrace a universal normative structure for defining the rights of individuals.<sup>15</sup> Convergence of notions of individual human rights has not had the sort of successes that have marked worldwide international economic integration,<sup>16</sup> but there is a noticeable inclination of governmental institutions across the Americas to at least acknowledge *de jure* the importance of protecting individual human rights.<sup>17</sup>

Underlying the discussion of human rights, at least within the Americas, is the view expressed by Jerome Shestack that: fundamental human rights principles have become universal by virtue of their entry into international law as *jus cogens*, customary law, or by convention. In other words, the relativist argument has been overtaken by the fact that human rights have become hegemonic and therefore essentially global by

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U.N. Doc. A/810 (1948).

15. The Universal Declaration of Human Rights is the most well known of the human rights instruments proceeding from the United Nations. Less well known is the increasing number of human rights related conventions which have been created through the United Nations from around the time of the adoption of the Universal Declaration. These conventions, unlike the Universal Declaration, have been meant to have a direct effect on the legal obligations of nations toward each other and toward the individuals that inhabit the lands these states rule. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide U.N. GAOR, 3<sup>rd</sup> Sess., U.N. Doc. A/810 (1948). For a complete list of United Nations Declarations and Conventions regarding human rights, see, United Nations International Human Rights Instruments, available at <http://www.unhchr.ch/html/intlinst.htm>.

16. Domestic application of universal principles of individual human rights has been attacked on a number of grounds. They include the arguments that human rights cannot be universal because there is no evidence of a base of human rights protections within all of the indigenous cultures of the globe either in principle or in fact and that, as a result, the only universal characteristic of human rights norms must be that transcendent human rights norms cannot exist – and thus that it is infeasible to devise a single set of universal human rights norms. For a critical discussion with an extended description of these arguments, see Rhonda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 HUM. RTS. Q. 315 (1993). The problems are especially acute with respect to the rights of minorities. See, e.g., David Wippman, *The Evolution and Implementation of Minority Rights*, 66 FORDHAM L. REV. 597 (1997) (arguing that minority rights issues are too context sensitive for anything but application of a limited set of general principles, like non-discrimination, to majority-minority disputes within a nation-state).

17. In Costa Rica, “international agreements have become as important a source of human rights guarantees in Costa Rica as is the Constitution of 1949 and, indeed, that international human rights law, as a practical and juridical matter, has become part of Costa Rican constitutional law.” Robert S. Barker, *Judicial Review in Costa Rica: Evolution and Recent Developments*, 7 SW. J.L. & TRADE AM. 267, 286 (2000). Moreover, since the overthrow of the dictatorships in Argentina and Chile in the 1980s, there has been a greater institutional embrace of human rights within the Americas. See, e.g. Jonathan M. Miller, *Evaluating the Argentine Supreme Court Under Presidents Alfonsín And Menem, (1983-1999)*, 7 SW. J. L. & TRADE AM. 369 (2000); Katherine M. Culliton, *Legal Remedies for Domestic Violence in Chile and the United States: Cultural Relativism, Myths, and Realities*, 26 CASE W. RES. J. INT’L L. 183 (1994).

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This hegemony of human rights finds particular expression within the Americas through a cluster of human rights instruments binding on the members of the Organization of American States.<sup>19</sup> Thus, for example, the signatories of the OAS Charter – including the United States – have pledged to achieve what is described in general terms as the “equitable distribution of national income,” “proper nutrition,” and “adequate housing for all sectors of the population.”<sup>20</sup> All OAS

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18. Jerome J. Shestack, *The Legal Profession and Human Rights: Globalization of Human Rights Law*, 21 *FORDHAM INT'L L.J.* 558, 568 (1997). At the time the remarks were delivered, Mr. Shestack was the President of the American Bar Association, a former U.S. Ambassador to the United Nations Commission on Human Rights, and past chair of the IBA Standing Committee on Human Rights. For the historical context in which declarations such as these seem unproblematic, see B.G. RAMCHARAN, *THE CONCEPT AND PRESENT STATUS OF INTERNATIONAL PROTECTION OF HUMAN RIGHTS: FORTY YEARS AFTER THE UNIVERSAL DECLARATION* (1988); LOUIS SOHN, *THE HUMAN RIGHTS MOVEMENT: FROM ROOSEVELT'S FOUR FREEDOMS TO THE INTERDEPENDENCE OF PEACE, DEVELOPMENT AND HUMAN RIGHTS* (1995).

This idea of human rights hegemony has been attacked on a variety of grounds: religious, see, e.g., Thomas M. Franck, *Is Personal Freedom a Western Value*, 91 *A.J.I.L.* 593 (1997) (discussing post WWII politics in Islamic countries as they confronted and struggled with “Western ideals”); Surya P. Subedi, *Are the Principles of Human Rights ‘Western’ Ideas? An Analysis of the Claim of the ‘Asian’ Concept of Human Rights From the Perspective of Hinduism*, 30 *CAL. W. INT'L L.J.* 45 (1999) (the universality of human rights can be found in the universal values of the Hindu faith); ethno-cultural, see, e.g., Bilahari Kausikan, *Asian versus ‘Universal’ Human Rights*, 7 *RESPONSIVE COMMUNITY* 9 (1997); MAHATHIR MOHAMMAD & SHINTARO ISHIHARA, *THE VOICE OF ASIA: TWO LEADERS DISCUSS THE COMING CENTURY* (Frank Baldwin, trans. 1995) (“Western societies are riddled with single-parent families, which foster incest, with homosexuality, with cohabitation, with unrestrained avarice, with disrespect for others and, of course, with rejection religious teachings and values.” *Id.*, at 80); political, see, e.g., Paul W. Kahn, *American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 *CHI. J. INT'L L.* 1 (2000) (suggesting the need for equality among states in constructing international normative orders).

19. These include the Charter of the Organization of American States, signed April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 48 (1952) (entered into force for the United States December 13, 1951) (hereafter the OAS Charter), as amended by the Protocol of Amendment to the Charter of the Organization of American States, signed February 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 (hereafter the “Buenos Aires Protocol”), the American Declaration of Rights and Duties of Man, signed May 2, 1948, O.A.S. Off. Rec. OEA/ser. L./V/II. 23. Doc. 21, rev. 6 (English 1979) (hereafter the “Rights and Duties Declaration”), and the American Convention on Human Rights, signed November 22, 1969, entered into force July 18, 1978, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/ser. L./V/II. 23 doc. 21, rev. 2 (English 1979) (hereafter “American Convention”). OAS documents can be accessed at <http://www.oas.org>. For excellent materials on this system, geared to students, see THOMAS BUERGENTHAL AND DINAH SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS* (4<sup>th</sup> ed. 1995). The United States has signed and ratified the OAS Charter, and has approved the Rights and Duties Declaration, but has neither signed nor ratified the American Convention.

20. OAS Charter, *supra* note 18, art. 31 1(b), (j), (k).



signatory nations also acknowledge that their nationals are entitled to "material well being . . . under circumstances of liberty, dignity, equality of opportunity, and economic security."<sup>21</sup> The civil and political rights accorded to individuals under the American Convention on Human Rights are meant to be incorporated within the constitutional traditions of the signatory states.<sup>22</sup> These rights are generally enforceable through a system of quasi-judicial proceedings before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights and in the national courts of the signatory states.<sup>23</sup>

Indeed, supra-national entities have appeared at the forefront of movements to articulate and enforce systems of human rights since the Second World War. It is commonly accepted, at least among the Western intellectual elite in Europe and the Americas, that the "ideal of human rights requires a world which transcends nationalism and state sovereignty in favor of a more universalist outlook, a more cosmopolitan approach which perceives the individual person as enjoying certain rights and privileges apart from the confines of his citizenship."<sup>24</sup> Thus, regional systems of human rights, along with the rights-convention system of the United Nations, have provided the bulk of the articulation of 'universally' cognizable rights. The most progressive states now appear to have imposed on themselves constitutional mandates that require national institutions to look outside of themselves for a standard of fundamental human rights enforceable within their territories.<sup>25</sup> Other

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21. *Id.*, art 43(a).

22. American Convention, art. 2, provides:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

23. American Convention, arts. 34-40 (Commission); arts. 52-69 (Court). See Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INT-AM. L. REV. 297 (1995); Holly Dawn Jarmul, Note *The effects of decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 311 (1995-96). The system is similar to that used to enforce the European Convention on Human Rights. For a discussion, see, e.g., Martin A. Olz, *Non-Governmental Organizations in Regional Human Rights Systems*, 28 COLUM. HUMAN RIGHTS L. REV. 307 (1997); Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285 (1999); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 11 YALE L.J. 1935 (2002).

24. Rane K.L. Panjabi, *Review Essay*, 28 CORNELL INT'L L. J. 229, 230 (1995) (reviewing JACK DONNELLY, *HUMAN RIGHTS IN THE 1990S: PROMISE OR PERIL? INTERNATIONAL HUMAN RIGHTS*).

25. The Republic of South Africa and the Argentine Republic are two cases in point. For a discussion of the constitutionalization of a comparative/supra-national approach to basic rights within domestic law in Argentina, see, e.g., Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J.

political entities, such as the European Union, have incorporated human rights norms within their constitutional framework from the constitutional traditions of their member states and the articulation of rights in regional human rights systems.<sup>26</sup>

But there may be no hegemony of supra-nationally derived and maintained rights *in fact* within the Americas. There may be no unity of purpose, no singular vision, shared among legal academic institutions in the Americas. There may be no push to include a singular set of universally accepted and uniformly interpreted human rights *in fact* within the academic curriculum of many law schools. Convergence of a unified and universalistic set of human rights norms requires more than the declarations of the political branches of government and the adoption of treaties or conventions at the state-to-state level. Convergence of the sort described at the beginning of this essay require that individuals and state institutions together internalize the same normative structure of individual human rights, at least at some level of meaningful generality.<sup>27</sup>

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Transnat'l L. 281 (1999); Jonathon M. Miller, *the Authority of a Foreign Talisman: a Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith* 46 Am. U.L. Rev. 1483 (1997). For South Africa, see, e.g., S. Afr. Const. ch. 2 § 36(1) (1996); *Du Plessis v. De Klerk*, 1996 (5) BCLR 658 (CC); *Ferreira v. Levin*, 1995 (4) BCLR 437 (W). For commentary, see, e.g., Jeremy Sarkin, *the Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions* 1 U. PA. J. CONST. L. 176 (1998); Hoyt Webb, *the Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205 (1998); Johan D. van der Vyver, *Comparative Constitutionalism: Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L.J. 745, 823 (1991).

26. The European Court of Justice has long held to that view. The ECJ interprets Member State obligations under the treaties establishing the European Union in the basis of general principles of law of which fundamental rights form a significant part. For that purpose, the ECJ "is bound to draw inspiration from constitutional traditions common to Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines. . . ." *Nold v. Commission*, Case 4/73 [1974] ECR 491, [1974] 2 CMLR 338. Since the 1970s, the European Union has moved to incorporate fundamental rights into black letter law, albeit still indirectly. See, e.g., Gráinne de Búrca, *The Language of Rights and European Integration*, in *NEW LEGAL DYNAMICS OF THE EUROPEAN UNION*, (G. More and Jo Shaw, eds., Clarendon Press, 1995).

27. This, of course, is the conventional stance in the legal academic literature. On the importance of internalization see, e.g., Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 642 (1998) (describing internalization of international norms within nation states); see also Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (discussing the usual American course of dealing with customary international law); Edward M. Morgan, *Internalization of Customary International Law: An Historical Perspective*, 12 YALE J. INT'L L. 63 (1987). Internalization requires more than a change in cultural understanding and practice. In many nations, internalization requires implementation through national legislation and

This sort of necessary converging internalization is little in evidence in the Americas. Although the Charter of the OAS proclaims that "the education of peoples should be directed toward justice, freedom and peace,"<sup>28</sup> there are no specific obligations respecting education within the great treaty systems of the Americas, especially those of the Organization of American States.<sup>29</sup> Moreover, even the basic legal impediments to convergence remain significant. Thus, for example, the United States has not signed nor ratified the American Convention, and has taken the position that it is not subject to the jurisdiction of either body. In addition, the institutions of the OAS cannot appropriate for themselves the right to interpret the hortatory provisions of the Rights and Duties Declaration.<sup>30</sup>

The United States Supreme Court has expressed the view that law or conceptions of rights not domestically produced, have no place within constitutional or other 'rights' discourse.<sup>31</sup> That U.S. courts might

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enforcement through national courts and administrative agencies. Most international obligations of the United States are not given direct effect. See Stefan Riesenfeld, *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT'L L. 548 (1971) (suggesting an approach to determination if provisions of international agreements are self-executing; *id.*, at 550).

28. OAS Charter, *supra* note 18, at art. 5, ¶ 1, 119 U.N.T.S. 3.

29. The American Convention on Human Rights does not include specific requirements respecting either education in general or human rights education specifically. However, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S. Treaty ser. 69, reprinted in I/L.M. 156 (1989), requires that education "should strengthen respect for human right, ideological pluralism, fundamental freedoms, justice and peace . . . and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups." *Id.*, at art. 13.

30. WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 512-516 (2<sup>nd</sup> ed. 1995). For a list of states that have signed, ratified, and as ratified deposited with the OAS General Secretariat the American Convention, see OAS, Secretariat for Legal Affairs, Department of Legal Cooperation & Information, American Convention on Human Rights, Signatures and Ratifications, available at <http://www.oas.org/juridico/english/Sigs/b-32.html> (last visited Jan. 1, 2002). The United States is not alone. There are a number of other OAS members that have not signed or ratified the American Convention. Even among those OAS states that have signed and ratified, such ratifications have been limited, to a certain extent, by reservations made by the ratifying party. See OAS, Secretariat for Legal Affairs, Department of Legal Cooperation & Information, American Convention on Human Rights, Signatures and Ratifications, available at <http://www.oas.org/juridico/english/Sigs/b-32.html> (last visited Jan. 1, 2002).

31. American courts remain fiercely dualist. For a recent case illustrating this view of the majority of the current Court, see *Breard v. Greene*, 118 S. Ct. 1352 (1998) (even though Vienna Convention on Consular Relations was violated, the conviction and execution were upheld because the petitioner did not raise the consular visitation issue in state court). For a discussion of dualism and monism in international law, see, e.g., LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 64-67 (1995). At least one commentator has argued that while the federal courts, at least, continue to apply traditional dualist principles where international norms and constitutional principles are

appear increasingly aberrational in this respect<sup>32</sup> does not make the distinction between endogenous 'law' and exogenous 'rights' any less significant in U.S. rights jurisprudence. Moreover, the United States Supreme Court has developed a series of legal doctrines, sometimes commonly known as the plenary power doctrine,<sup>33</sup> that has had the effect of creating a virtually impenetrable wall that effectively divides the domestic human rights regime available only to US citizens and residents within these walls, from other regimes of rights to which others may seek such comfort as may be available to them.<sup>34</sup> And, of course, within the territory of the United States, this is cold comfort indeed, since international rights regimes are not applicable to outsiders, but outsiders are not generally accorded the rights available to citizens and residents in some circumstances.<sup>35</sup>

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implicated in a case, many legal academics have abandoned dualism in favor of something approaching monism. See Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999). Dualist principles may be reflected in our federalism jurisprudence as well. See *Printz v. U.S.*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring); *Knight v. Florida and Moore v. Nebraska*, 120 S. Ct. 459 (1999) (denial of cert.). See generally, Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J. L. & PUB. POL'Y 807, 816-820 (2000). For monism in approaching U.S. law, see, e.g., JORDAN J. PAUST, *INTERNATIONAL LAW AS THE LAW OF THE UNITED STATES* (1996). For the view that the old dualism versus monism debate is increasingly irrelevant in a globalizing world of supranational entities, see Rett R. Ludwikowski, *Supreme Law or Basic Law? The Decline of Constitutional Supremacy*, 9 CARDOZO J. INT'L & COMP. L. 253 (2001).

32. For a discussion of what other courts are doing, see, e.g., *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation* 114 Harv. L. Rev. 2049 (2001); Rett R. Ludwikowski, *Supreme Law or Basic Law? The Decline of Constitutional Supremacy*, 9 CARDOZO J. INT'L & COMP. L. 253, 276 et seq. (2001).

33. *Ping v. U.S.*, 130 U.S. 581 (1889) (affirming governmental authority to exclude certain classes of people from entry into the territory of the U.S., even the excluded shared those characteristics with U.S. citizens who could not be excluded); *Wo v. Hopkins*, 118 U.S. 356 (1886); *Wing v. U.S.* 163 U.S. 228 (1896) (aliens entitled to trial before punishment). See, e.g., Natsu Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness", and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997) (discussing the treatment of foreigners and aliens in the U.S. with particular emphasis on persons of Asian descent).

34. Of course, the United States is not unique in this respect. The recently passed anti-terrorism legislation adopted by the United Kingdom Parliament was recently struck down for discrimination in application between citizens and non-citizens. See, e.g., Audrey Gillian, *Detention of 11 Suspects Unlawful, Judges Rule*, THE GUARDIAN (London), July 31, 2002, at 1.

35. See, e.g., *Breard v. Greene*, 523 U.S. 371 (1998). For an interesting interpretation of that case in light of the possibility of incremental movement by the Supreme Court, see Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 WAYNE L. REV. 841 (2001). A recent example that demonstrates the substantial reach of this human rights scheme was the attempt in the 1996 reform of welfare, to exclude from the provision of benefits not only undocumented

The political branches of the United States government follow a similar path. For example, having withdrawn from the attempt to harmonize and globalize the criminal law of human rights through the establishment of an elaborate system of prosecuting and trying various forms of individual criminal behavior,<sup>36</sup> the United States is currently seeking agreements from other states that would protect American nationals from the jurisdiction of the new International Criminal Court.<sup>37</sup>

U.S. law schools serve a pivotal role in perpetuating the American Supreme Court's current division of rights discourse as a natural division of law.<sup>38</sup> Our curricula normalizes the great division between, on the one hand, domestic law and the rights of citizens and permanent residents of the United States and, on the other hand, rights available to outsiders.<sup>39</sup> The foundation of fundamental rights in the United States is presumed to be the Federal Constitution — a product of domestic development.<sup>40</sup> The

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immigrants but also certain otherwise lawful residents of the United States. For a discussion, see, e.g., Larry Catá Backer, *Welfare Reform at the Limit: An Essay on the Futility of "Ending Welfare as We Know It,"* 30 HARV. C.R.-C.L. L. REV. 339 (1995). For a discussion of the problem in the context of the application of U.S. law to events taking place outside the United States, see, e.g., Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?*, 39 HOUS. L. REV. 307 (2002).

36. See The Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (1998) 37 I.L.M. 999 (the "Rome Statute"). The Rome Statute is reproduced in M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (1998). For general discussion of the Rome Statute, see, e.g., the collected works in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (Mauro Politi and Giuseppe Nesi, eds., Ashgate Pubs. 2001).

37. For accounts in the popular press about this activity, see, e.g., Christopher Marquis, *U.S. Seeking Pacts in a Bid to Shield Its Peacekeepers: Response to New Court, Romania and Israel Are First to Agree Not to Extradite Americans for Trials*, N.Y. TIMES, Aug. 7, 2002, at A-1.

38. This is among the most important and basic roles of law schools within the field of legal production in the United States. For a discussion see, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976). In a very general sense, law schools are an important mechanism for the institutionalization, the perpetuation, and the replication, through thousands of interactions between counsel and their clients (without the necessity of judicial intervention), of "the Norm." MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 184 (Alan Sheridan, trans., 1977; Vintage Books 1995) (1975).

39. As the actions of the Justice Department under John Ashcroft have amply demonstrated since the terrorist actions of September 11, 2001, the fundamental rights of the citizens and lawful residents of the United States are, for the moment, different from those accorded to others. See, e.g., Timothy Roche, *A Short Course in Miracles*, TIME, July 29, 2002, at 34 (the American Taliban, John Walker Lindh, and the Justice Department entered into a plea agreement where Lindh would serve no more than 20 years.), Roy Gutman, *Guantanamo Justice?*, NEWSWEEK, July 8, 2002, at 34 (the suspected members of Al Qaeda held by the United States at Guantanamo Bay do not have a right to a trial or a lawyer, and the Geneva Convention and the U.S. Constitution do not apply).

40. As the discussion that follows in Part II, *infra*, suggests in more detail, elite law

foundation of fundamental human rights in other nations, on the other hand, is made up of the charters of rights recognized as fundamental and universal by supra-national organizations – products of exogenous ‘civilization’<sup>41</sup> which has had to be pressed onto the parochial political traditions of these states.<sup>42</sup> Human rights education is necessary – but it is a subject of study of others. The academics of the United States of America have no need of any sort of personal relationship with human rights – we have our constitution to protect us. Internationally based human rights are for foreigners; fundamental rights are a creature of necessity devised to protect *other* societies against their own excesses. All societies must adhere to a regime of fundamental human rights. In the United States, those rights have their sources in the domestic sphere –

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schools in the United States pride themselves on the number of courses offered on the fundamental rights of citizens and residents of the United States – all of these courses are based on the federal, or state constitutions. These courses are identified by a number of titles – ‘constitutional rights,’ ‘religion,’ ‘civil rights,’ ‘First Amendment law,’ and the like. None of them are identified as courses on ‘human’ rights.

41. The reference here is to the distinction between communal folk ways (*Gemeinschaft*) and society or social ordering at the greatest level of organizational generality (*Gesellschaft*), made a century ago by Ferdinand Tönnies. See FERDINAND TÖNNIES, *COMMUNITY AND SOCIETY* 223-235 (Charles P. Loomis, ed. & trans., Harper Torchbooks, 1963) (*GEMEINSCHAFT UND GESELLSCHAFT* (1887)).

42. For those academics in the Americas who toady to the increasingly anachronistic icons of third world rhetoric of a bygone age or who echo the emerging racist or religionist jingoism of Asia, Africa or the worlds of Islam, all of which are uncomfortable with universals, the human rights of other states must proceed from the social, ethnic or religious ‘constitutions’ of those states or their constituent communities. Here, ironically, is fertile ground for the crafting of apologia for the ‘human rights’ regimes of Fidel Castro and the rulers of the Islamic Republic of Iran. This discourse, of course, reflects the criticisms of the great advances in articulations of fundamental human rights within the international community. These criticisms have their greatest champions in people purporting to speak for religious, ethnic, or racial communities outside of the Europeanized Western Hemisphere, Christian Europe proper, and Israel. The current prime minister of Malaysia along with a long time member of the Japanese Parliament wrote a widely circulated work in this vein. See MAHATHIR MOHAMMAD & SHINTARO ISHIHARA, *THE VOICE OF ASIA: TWO LEADERS DISCUSS THE COMING CENTURY* (Frank Baldwin, trans. 1995). Clifford Geertz long ago suggested the fallacies of the approaches of the ‘relativists’ within the context of the search for human universals when he observed that the point should not be that:

there are no generalizations that can be made about man as man, save that he is a most various animal, or that the study of culture has nothing to contribute toward the uncovering of such generalizations. My point is that such generalizations are not to be discovered through a Baconian search for cultural universals, a kind of public-opinion polling of the world’s peoples in search of a *consensus gentium* that does not in fact exist, and, further, that the attempt to do so leads to precisely the sort of relativism the whole approach was expressly designed to avoid.

CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 40 (Basic Books, 2000) (1973). For a different view, see, e.g., DONALD BROWN, *HUMAN UNIVERSALISTS* (1991) (some base concepts are universal to all cultures and these universals form a diverse set best understood through the lens of human biology and evolutionary psychology).

human rights are wholly endogenous.<sup>43</sup>

Within the rest of the Americas, or at least that part of the Americas south of the Rio Grande, those rights are exogenous. Courts and law schools begin with the premise that individual human rights are received from outside the nation-state, much like Moses received the law of Israel from God.<sup>44</sup> Outside imposition is necessary for those nation-states whose normative structures were deemed devoid of any strong continuing tradition of such rights. Moreover, the perceived lack of a sufficiently robust indigenous human rights tradition also suggested that such states were incapable of sustaining regimes of individual human rights on their own.<sup>45</sup> As a consequence, such human rights regimes are

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43. There are some interesting consequences, not the least important of which are the imperviousness of U.S. courts to arguments based on emerging international norms, or even the common approaches adopted by other states. This resistance has been particularly acute in the area of the law applicable to indigenous peoples, and those applicable to sexual non-conformists and people condemned to death. In these cases, at least, it has been common to reject the idea that international norms have any applicability to decisions in the U.S. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361 (1989) (capital punishment for sixteen and seventeen year olds is not a violation of the 8<sup>th</sup> Amendment; "It is American conceptions of decency that are dispositive, in reviewing Eighth Amendment claims of cruel and unusual punishment." *Id.*; *Rowland v. Mad River Local School Dist.*, *cert. denied*, 470 U.S. 1009 (1985) (high school guidance counselor fired because she was a homosexual who revealed her sexual preference); *Knight v. Florida*, *cert. denied*, 528 U.S. 990 (1999) (the court declined to consider the many foreign courts who have found that a lengthy delay in administering a lawful death penalty rendered ultimate execution inhumane, degrading, or unusually cruel). For a critique of American judicial reluctance to avail itself of 'comparative jurisprudence,' see Rebecca Lefler, Note: *A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority By the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia*, 11 S. CAL. INTERDISC. L.J. 165 (2002).

44. Exodus 20:1-17 (10 Commandments). This is an important normative statement. For many cultures, including some significant elements of U.S. culture, the reception of law from an outside, authoritative force, is the ultimate expression of legitimacy. For a discussion in a variety of contexts, see, e.g., James W. Gordon, 84 MARQ. L. REV. 317 (2001) ("Harlan believed in the collective wisdom of ordinary people not because they were good, but because the United States, with its divinely inspired Constitution, was God's instrument. Harlan's faith in Providence and his conviction that the United States was God's chosen vehicle for the liberation of mankind complemented his direct political experience." *Id.*, at 369); David Ray Papke, *The American Legal Faith: Traditions, Contradictions and Possibilities*, 30 IND. L. REV. 645 (1997) ("Between 1800 and 1850 schoolbooks routinely spoke of the Constitution as divinely inspired and glorious." *Id.*, at 650). In the West, moral and principles of positive law have replaced the commanding power of divine law, at least within the official organs of state organization. For a discussion of the Western World at the cusp of this change, see, e.g., Alfred P. Rubin, *International Law in the Age of Columbus*, 39 NETH. INT'L L. REV. 5 (1992).

45. With respect to the right of free expression, see, e.g., Claudio Grossman, *Libertad de expresion en el sistema interamericano de proteccion de los derechos humanos*, 7 I.L.S.A. J. INT'L & COMP. L. 755 (2000) (La proteccion de los derechos humanos se ha desarrollado desde la Segunda Guerra Mundial como consecuencia del fracaso tragico de un orden internacional basado en la soberania absoluta. Mientras se desarrolla la proteccion internacional de los derechos humanos, se han adoptado normas

not only imposed from outside, but must remain controlled by elements outside the nation-state. To this extent, then, the necessary pre-condition to the adoption of individual human rights outside of the United States is a loss, by the state, of sovereign authority over the individual and the compulsory assimilation of normative structures alien to the traditional political and social organization of the nation. Universal individual human rights, then, is something foreign, received from a superior force,<sup>46</sup> to be absorbed by local elements in power who are kindly disposed to these normative structures.<sup>47</sup> It is not necessarily initially natural to the nation on which it is imposed.<sup>48</sup>

The other-worldliness of this imposition also serves as a source of resistance by local elements. Moses may have brought down the Law as received from God, but the people of Israel appeared content at the time to worship a golden calf of its own creation.<sup>49</sup> Likewise, reception of an alien, and unalterable regime of universal individual human rights can be resisted overtly on local, national, ethnic, and religious grounds – as neo-colonialism in the form of cultural imperialism.<sup>50</sup> But resistance can be

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y creado instituciones a nivel internacional para vigilar el proceso. *Id.*, at 758).

46. In the case of the Americas, this superior force is the Organization of American States and its treaty and convention system. To some extent, it is also enforced by other superior bodies – the International Monetary Fund, the World Bank, and the Import-Export Bank, may also compel, on a state by state basis, the adoption of certain normative structures as part of their loan agreements. These function much like negative and positive covenants in a standard bank loan in the United States. For a discussion of the ways in which these lending bodies introduce and enforce normative conduct rules on client states, see, e.g., Daniel D. Bradlow, *Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?*, 50 U. KAN. L. REV. 695 (2002); Daniel D. Bradlow & Claudio Grossman, *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*, 17 HUM. RTS. Q. 411 (1995). For a discussion of the economic value of human rights, see, Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83 (2002).

47. The Argentine example is telling. See, e.g., CARLOS NINO, *THE ETHICS OF HUMAN RIGHTS* (1991).

48. The notion of naturalization of rights or norms is well established in European theory. See, e.g. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 184 (Alan Sheridan, trans., 1977; Vintage Books 1995) (1975). It has made inroads even within conventional American legal writing, at least with respect to writings in ‘international law.’ See, e.g., Koh, *Bringing International Law Home*, *supra* note 26.

49. Exodus 32:1-35.

50. See, e.g., MAHATHIR MOHAMMAD & SHINTARO ISHIHARA, *THE VOICE OF ASIA: TWO LEADERS DISCUSS THE COMING CENTURY* (Frank Baldwin, trans. 1995). Mr. Mahathir, the current Prime Minister of Malaysia, and Mr. Ishihara, a Japanese politician, defend what they describe as an Eastern approach to prosperity as against the West’s “moral degeneration”:

The community has given way to the individual and his desires. The inevitable consequence has been the breakdown of established institutions and diminished respect for marriage, family values, elders, and important customs, conventions and traditions. . . . Hence Western societies are riddled with single-parent families, which foster incest, with homosexuality, with cohabitation, with



subtle as well; it is not uncommon for nation-states forced to adopt alien standards to turn them into hollow norms.<sup>51</sup> Some Latin American courts appear ready to follow this example – a ready willingness to ignore this alien law of the land.<sup>52</sup>

Outside of gatherings like ours, then, it appears that universal human rights as theory or practice is far from forming an integral part of behavior norms of the peoples of the Americas. Legal parochialism and a hollow internationalism seem to be the norm, each providing a substantial basis for resisting any regime of universal individual human rights. Yet, both the parochialism of the United States and the formal internationalism of Latin America and Canada contain within them powerful positive insights that can serve as the basis of a successful program of social construction based on human rights. A blending of both is required. Combining the universalizing project of the individual

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unrestrained avarice, with disrespect for others and, of course, with rejection religious teachings and values.

*Id.*, at 80. Scholars in South and East Asia tend to share these views to an extent. For a description, see, e.g., Joseph W. Dellapenna, Forward: *Symposium on East Asian Approaches to Human Rights*, 2 *BUFF. J. INT'L L.* 193 (1995-96). For a response to the claims of human rights imperialism and neo-colonialism, see, e.g., Dianne Otto, *Rethinking the Universality of Human Rights Law*, 29 *COLUM. HUM. RTS. L. REV.* 1 (1997).

51. The example of Japan during the Allied Occupation is a case in point. While the Allied powers forced the Japanese to adopt a series of Western styles laws, many of these were honored only in the breach or reinterpreted in a way that substantially gutted the law. In many other cases, the laws remained honored only in the breach – when it was necessary to demonstrate to the outside powers the good faith of the conquered. For a discussion, see, e.g., Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 *CASE W. RES. J. INT'L L.* 3 (1996) (describing central problem in post-War Japanese constitutional law as dilemma of mediating between the communal norms traditional to Japanese society with the regime of individual rights of the Japanese post-War constitution); Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins*, 8 *EMORY INT'L L. REV.* 127 (1994) (Japanese institutions harmonized the provisions of the Showa Constitution with traditional norms and customs).

52. A recent example of this tendency in the courts of Latin America involves the Chilean Supreme Court, affirming the determination of the Chilean administrative body banning the exhibition of the motion picture, *The Last Temptation of Christ*. See *Olmedo Bustos y Otros vs. Chile*, Series C No. 73 (February 5, 2001) available at [http://www.corteidh.or.cr/SERIE\\_C/C\\_73\\_ESP.html](http://www.corteidh.or.cr/SERIE_C/C_73_ESP.html) (last visited Dec. 28, 2001) (determining that the right to exhibit this motion picture was protected under international concepts of human rights). For a discussion of the background of the this case, see *Derechos Humanos, La Última Tentación de Cristo, El paradigma de una sociedad por el conservadurismo?*, available at <http://www.derechoshumanos.cl/ultima/index.html> (last visited Dec. 28, 2001). For a discussion of the difficulty of Argentine courts with the post-Dictatorship regime of international human rights, see Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 *Colum. J. Transnat'l L.* 281 (1999) (the Supreme Court of Argentina has either declined to interpret human rights treaties or has twisted international law against individuals who seek compliance).

human rights movement with the endogenous human dignity traditions of nation states is a necessary prerequisite to the success of any attempt to naturalize human rights through legal education in the Americas.

To a large extent, then, for those academics sharing the understandings and assumptions with which I started this analysis,<sup>53</sup> it would appear clear that in order to be effective, education must be a tool for the assimilation of universal principles of individual human rights.<sup>54</sup> The universities must consciously engage in a sort of missionary activity; to work as the vanguard of changing cultural norms and expectations. This missionary activity must cultivate fundamental changes in communities at the national and sub-national levels, and among all religious, ethnic, and indigenous communities inhabiting the Americas. This is difficult work for academics; as the tools of a universalizing creed, academics will have to overcome the tension between one of the core norms of universal individual human rights—respect for cultural differences—and the purpose of the universal individual human rights project itself: requiring conformity within all cultural communities of a

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53. See discussion at notes 6-10, *supra*.

54. Assimilation of universal norms is a prerequisite to an effective naturalization of human rights norms within any society.

[A]ssimilation functions as the consequence of the significance of socio-cultural taboos to the dominant culture. As a culture assigns a higher value to a particular taboo, that culture becomes willing to expend greater effort to ensure conformance with that command or prohibition, and to extract greater penalties for its violation. That effort is the species of assimilation with which I concern myself here. Like taboos, assimilation or conformance is selectively blind. That is what we commonly understand as toleration, what we might more profitably describe as indifference. For example a significant cultural taboo may forbid idleness. A group that forbids its members to practice certain professions (money lending) may be tolerated as long as the dominant taboo is not violated. The dominant culture insists only that all who reside within its influence be productive—it is indifferent to the forms of productivity, or, for that matter, to any individual or sub-group restrictions on the range of productive choice. On the other hand, there does exist discrimination in the nature of a dominant group's tolerance of deviance. A group that insists that it will not work unless it can be paid a certain minimum for its services (perhaps a decent or "living" wage) will not find the dominant group indifferent. Unlike the belief structure of the first group, the application of the latter group's beliefs results in a violation of the dominant group's core taboo. That latter group will be compelled to comply. In this sense it may not be so surprising that society could characterize the non-conforming sexual and reductive habits of some in the society in apocalyptic terms. . . . Assimilative forces pervade systems built to guard culture rules. Equality of opportunity is assimilationist; equality of result is paradigm exploding.

Larry Catá Backer, *Poor Relief, Welfare Paralysis and Assimilation*, 1996 UTAH L. REV. 1 ("The *tune* to which we dance is set by our socio-cultural taboos. Taboos compel assimilation. Assimilation assures avoidance of taboos. It is a significant social good in the eyes of any dominant group. " *Id.*, at 4-5).

set of basic transcendent conduct norms.<sup>55</sup> Academics, in their role as teachers, must be prepared to further a set of meta-norms which cannot be disputed, and which must be protected against incursion in the name of national tradition or culture or religion or ethnicity or indigenous status.<sup>56</sup> This assimilative project requires a continual stripping of the sovereignty of states.<sup>57</sup> It requires an acceptance of a system of political organization in which sovereignty is divided, and the state assumes a subordinate position with respect to the fundamental rights of the individual.<sup>58</sup> It is ironic that legal education in the western hemisphere, if it is to be truly effective in accordance with the assumptions earlier made, would have to be based on a commitment to a fundamental normative understanding that would strip core norm-making authority

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55. The transcendence of the universalizing principles of individual human rights does not suggest that all sub-universal communities would be stripped of all of their normative powers. There is room for the parochial within systems of universal norms – to the extent at least that the local does not adversely affect the universal. See Larry Catá Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union*, 12 EMORY INT’L L. REV. 1331 (1998) (“Today, Europe keeps potentially incompatible systems of culture norms firmly in check. The non-political and non-normative expression of culture is protected. Everything else is suppressed.” *Id.*).

56. Clifford Geertz correctly describes the cultural dimension of teaching and enforcing the new regime of universal individual human rights when he reminds us that:  
[C]ulture is best seen not as complexes or concrete behavior patterns – customs, usages, traditions, habit clusters – as has, by and large, been the case up to now, but as a set of control mechanisms – plans, recipes, rules, instructions (what computer engineers call ‘programs’) – for the governing of behavior.

CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 44 (Basic Books, 2000) (1973). This notion has found recent echoes in the legal literature. See, e.g., Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643 (2001); Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640 (2001). Cf. JACK M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1998) (relating culture, personhood, and historical existence to the controlling mechanisms of information as “cultural software”).

57. Isaiah Berlin reminds us of the ideological dangers of nationalism for any universalist project. In particular, nationalism, when fused with statism, exhibits four characteristics dangerous for any universalizing normative project:

the belief in the overriding need to belong to a nation; in the organized relationships of all the elements that constitute a nation; in the value of our own simply because it is ours; and, finally, faced by rival contenders for authority or loyalty, in the supremacy of its claims.

Isaiah Berlin, *Nationalism: Past Neglect and Present Power*, in ISIAH BERLIN, *AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS* 333, 345 (Henry Hardy, ed., Random House 1997) (1979). Elizabeth Kiss has argued that nationalism and human rights are not necessarily related. See Elizabeth Kiss, *Is Nationalism Compatible With Human Rights? Reflections on East-Central Europe*, in IDENTITIES, POLITICS, AND RIGHTS 367 (Austin Sarat & Thomas R. Kearns, eds., 1997).

58. The Europeans have made a great advance toward this sort of system within the evolving European Union. See Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173 (2001).

from independent communities and transfer this authority to a much larger global or regional community made up of a number of member states. The European Union has shown us the way: it has commenced this very project at the political,<sup>59</sup> as well as at the educational level.<sup>60</sup> Within this normative ordering, the rights system as well as the teaching of the rights system of the United States, at least, would appear aberrational.

Incorporating universal individual human rights as part of the basis for the teaching of the social and political organization in the United States requires a substantial reorientation by U.S. law teachers. Such an incorporation entails liberation from the deeply ingrained provincialism that has characterized the teaching of human rights in the United States as one thing for United States and another thing entirely for everyone else. There can no longer be one set of indigenous 'constitutional' rights for U.S. citizens and residents, and another set of externally imposed 'international human rights' for everyone else in the Americas. Law, perhaps starting with Constitutional law, must become an integral and integrated part of the curriculum of universal human rights laws applicable consistently throughout the Americas. To do less could easily be characterized as affirming a hypocrisy, a racism, and an ethnocentrism at odds with much of the rhetoric of the current liberal establishment of rights discourse within the United States.

In the rest of the Americas, the embrace of universal individual human rights requires a greater domestication within the rich human rights traditions of Latin American states. No longer ought these norms be taught as the imposition of outsiders. Instead, the universal can be naturalized or reconceived within a revised pedagogy as a generalized expression of basic and unalterable principles with specific connection to specific local social and political traditions, behavior, and organization. It requires the naturalization of the universal *within* the national legal cultures of the various states. The universal must be accepted as an

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59. See Larry Catá Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union*, 12 EMORY INT'L L. REV. 1331 (1998).

60. The Erasmus and Socrates programs have gone a long way in that direction. Commentators have noted that "[t]he Erasmus-Socrates Program is a massive program for educational exchange at university level in all disciplines of science including law. It was initiated by the European commission in 1989 and has spawned ever since dozens of university networks for educational exchange in Europe." Frans J. Vanistendael, *Blitz Survey of the Challenges for Legal Education in Europe*, 18 DICK. J. INT'L L. 457 (2000) (discussing efforts since the 1999 Sorbonne-Bologna Declaration to harmonize university education within Europe through "(a) comparability in academic degrees, (b) a uniform structure of the university curriculum in all disciplines and (c) a common system of transfers for course credits." *Id.*, at 460). See also, Jo Shaw, *From the Margins to the Centre: Education and Training Law and Policy*, in THE EVOLUTION OF EU LAW 555 (Paul Craig and Gráinne de Búrca, eds., Oxford, 1999).

elaboration of the domestic.

At the same time, legal education must be far more sensitive to national parochialisms. The universalizing doctrines of fundamental individual human rights are much like the universalizing doctrines of the Catholic Church during the Late Antique.<sup>61</sup> The Catholic Church, hungry for converts, faced significant resistance, from traditionalists within the leadership of invading barbarian tribes as well as within the old pagan elite. Similarly, modern proponents of a universalizing human rights regime face significant resistance from the modern traditionalists—nationalists, sub-national communities, and socio-religious ideologues. The early Church was aware that universalism without converts was dead letter. The Church was willing to bend to parochialism in the ultimate service of the universal.

Gregory the Great's famous letter to the Abbot Mellitus, advising that pagan temples in England be used for the worship of the Christian God that people *ad loca quae consuevit, familiarius concurrat*, and that the sacrificial animals of heathenism be now devoted to Christian festivals, agrees with the *responsa* of the same pope to Augustine concerning the choosing of local customs best suited to the conditions of the converted.<sup>62</sup>

That principle should be taken to heart by human rights educators across the Americas.

Universal individual human rights is always in danger of treatment as hollow rights when it has failed to become rooted within the normative structure of nation-states.<sup>63</sup> Teaching universal individual human rights law as something 'outside,' as something to be used against national law becomes something invasive. This amounts to the use of

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61. For background, *see, e.g.*, BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE 1050-1300* (1964); RICHARD W. SOUTHERN, *WESTERN SOCIETY AND THE CHURCH IN THE MIDDLE AGES* (1970).

62. William A. Chaney, *Paganism to Christianity in Anglo-Saxon England*, in *EARLY MEDIEVAL SOCIETY* 67 (Sylvia L. Thrupp, ed., 1967).

63. "When countries are rewarded for positions rather than effects— as they are when monitoring and enforcement of treaties are minimal and external pressure to conform to treaty norms is high—governments can take positions that they do not honor, and benefit from doing so." Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935 (2002). I here suggest turning on its head the classic argument of cultural relativists who suggest that a universal human rights is subject to the vagaries of cultural difference. I am suggesting that universalism that fails to become translated into the rights language of the receiving state will always be subject to treatment as foreign and on that basis, temporary. For an example of the classic form of the culture matters in human rights discourse, *see, e.g.*, Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 *HARV. HUM. RTS. J.* 13 (1990); R.P. Peerenboom, *What's Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 *HARV. HUM. RTS. J.* 29 (1993).

law as a colonizing power.<sup>64</sup> The result is likely to be resistance and failure.<sup>65</sup> There is some evidence of this dysfunctional consequence of teaching universal individual human rights as an imposition from above.<sup>66</sup> To succeed, the enterprise of universal individual human rights must be willing to use the temples of national law for the worship of the new god of human rights, to use the sacrificial animals of community norms for the celebration of the rights of individuals. We in the 21<sup>st</sup> century Americas are still very much like the 6<sup>th</sup> century pagans of England – the way to the salvation of the people of the Americas may well also be similar. That task will require that universal principles find parochial expression. It may require that the language of individual human rights speaks through the federal constitution in the United States, and in the language of each of the several local communities that comprise the rest of the Americas.

My contribution, then, is based on balance. Universal individual human rights will neither be universal nor rights unless it is taught as such in all of the Americas, and taught in such a manner that similar situations produce similar results throughout the Americas. This requires a significant adjustment in the curriculum of American law schools based on an acceptance of the supra-constitutional basis for the rights of the citizens and residents of the United States.<sup>67</sup> At the same time, universal

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64. On the colonizing power of law in the context of the regulation of Native American governance in the United States, *see, e.g.*, law as a colonizer, *see, e.g.*, Philip R. Frickey, *A Common Law For Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1 (1999). *See generally*, JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION, VOL.2: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* 355, 392 (Thomas McCarthy trans., 1987). *Cf.* George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467 (1994) (“The use of law by colonizers to execute and rationalize oppressive policies, notably the acquisition of native lands for European settlement, is poorly explained as an effort to gain the consent of thoroughly dominated indigenous populations. Rather, it is argued here, the use of law under such circumstances reflects the needs of dominant colonial groups to maintain internal cohesion and morale, and, to a lesser extent, to gain international approval for their policies.” *Id.*, at 470-471).

65. Thus, some have argued that “a pivotal states human rights policy must be sensitive to cultural variation and not insist on standards to which only advanced industrial societies can be held” if these states are to develop sustained and naturalized cultures of human rights. Charles H. Norchi, *A Pivotal States Human Rights Strategy*, in *THE PIVOTAL STATES* 315, 332, 333 (Robert Chase et. al. eds., 1999).

66. *See, e.g.*, *Olmedo Bustos y Otros vs. Chile*, Series C No. 73 (Feb. 5, 2001) available at [http://www.corteidh.or.cr/SERIE\\_C/C\\_73\\_ESP.html](http://www.corteidh.or.cr/SERIE_C/C_73_ESP.html) (last visited Dec. 28, 2001).

67. While I readily concede that this is not the case today—recall the United States continues to go its own way on human rights—it may be the inevitable conclusion to the globalism and convergence that the United States, among others, has been pressing on the world since 1945. Even if the United States never concedes the primacy of international human rights norms, it will be confronted by a world that increasingly seems inclined to

individual human rights remains an empty letter to the extent it remains an 'outsider' to the normative structure of a political community. Such a regime of norms must be naturalized – made parochial as well as universal. This naturalization may require the greatest adjustments in the curriculum of the law schools of the Americas outside of the United States.

## II. Some Evidence of Legal Parochialism and Hollow Universalism as Fatal Methodology

Merely offering a course for students neither suggests the relative importance of the course for student development nor does it suggest its content. As law faculties have been aware for a long time – curriculum matters.<sup>68</sup> The perceived importance of a course, the nature of the way it is taught, and its connection to other courses in an integrated curriculum are all matters that significantly affect the power of a course. Law schools in both the United States and Latin America have made methodological determinations that substantially affect the impact of human rights courses in the curriculum. In the United States, human rights is a marginalized field of study, consigned to the field of foreign or international law. In Latin America, human rights forms a more central part of the curriculum but becomes marginalized to the extent it is taught as foreign law. It is true enough that part of the reason for the present state of human rights education in the curriculum is historical. International human rights, as law affecting individuals, and as a group of somewhat enforceable legal obligations imposed on states, is a recent phenomenon, postdating by many decades—and in the case of many Latin American civil law states, centuries—the setting of the form and

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move in that direction, and who will seek to arrange their relationships with the United States on that basis. *But see* Justice O'Connor's comments, *infra* note 117.

68. Indeed, the great battles over the nature of legal education have focused on both what is taught to whom and how. For a discussion of the early battles leading to the adoption of the case method of study, the Socratic method of teaching, and the implementation of a curriculum heavily weighted toward the teaching of courses on the common law of property, contracts and torts, *see* WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994); ROBERT BOCKING STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (Chapel Hill: University of North Carolina Press 1983); Anthony Chase, *The Birth of the Modern Law School*, 23 *AM. J. LEGAL HIST.* 329 (1979). For a discussion of the battles over curriculum in U.S. law schools in the 20<sup>th</sup> century, *see, e.g.*, Frank J. Macchiarola, *Teaching in Law School: What Are We Doing and What More Has to Be Done?*, 71 *U. DET. MERCY L. REV.* 531 (1994); Richard B. Lillich, *The Teaching of International Human Rights Law in U.S. Schools*, 77 *AM. J. INT'L L.* 855 (1993) (discussing the exclusion of international human rights courses from law school curricula).

basic content of the legal education curriculum.<sup>69</sup> Its late arrival on the legal scene might help explain the reason that the curriculum seems to 'make room' for this set of legal upstarts only begrudgingly. Yet enough time has passed to make the excuse of the youthfulness of international individual human rights less than satisfying. Are there more principled bases on which the continued state of curricular affairs can comfortably rest?

#### A. *U.S. Legal Parochialism*

The current state of curricular parochialism in U.S. law schools is well known.

Most American law schools have not made significant progress in integrating international perspectives with their domestic law courses. The more common strategy has been to add a select number of courses in international and comparative law. A recent ABA survey showed that 90 percent of the schools responding offered five or more international courses, and 84 percent offered comparative law courses.<sup>70</sup>

This sort of parochialism is also easy enough to illustrate. One example will suffice. Consider the following course placement and descriptions of a law school ranked within the 'top 50' in a popular press ranking for 2001.<sup>71</sup> The basic course in Constitutional law is grounded on basic governmental ordering and the consideration of a few of the more significant fundamental rights as constructed from out of the U.S. Constitution.<sup>72</sup> Advanced courses in fundamental rights within the United States also key in closely to the federal Constitution.<sup>73</sup> In

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69. For an interesting history of the emergence of human rights as objects of legal regulation, see, e.g., Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM RTS. Q. 447 (1992).

70. Margaret Y. K. Woo, *Reflections on International Legal Education and Exchanges*, 51 J. LEGAL EDUC. 449 (2001).

71. *Best Graduate Schools 2001; Law Schools*, U.S. News and World Report, April 10, 2000, at 73.

72. The course description for the basic Constitutional Law course reads as follows: This course is a study of basic principles of constitutional law. The primary focus will be on the Due Process Clause, the Equal Protection Clause, the First Amendment, the guarantees of federalism and the separation of powers. Harvard Law School, Course Catalog, 2001/2002, Constitutional Law, available at <http://www.law.harvard.edu/students/catalog/catalog.php?op=show&id=347> (last visited Aug. 18, 2002).

73. Thus, for example, the course description for Civil Rights Litigation provides: This course will provide an introduction to the procedural and remedial aspects of enforcing civil rights—both constitutional and statutory—in the federal courts. Much of the course will be devoted to study of the basic federal civil rights statute, 42 U.S.C. 1983, and the parallel Bivens cause of action. Topics may include: the rules of individual and official liability and, conversely, of official and sovereign immunity under Section 1983 and Bivens; standing and



contrast, the courses on international human rights appear to stop at national border.<sup>74</sup> The clinical component of the course, an exceptional course offering outside of elite institutions, also tends to an outward gaze.<sup>75</sup>

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justiciability doctrines that frequently arise in civil rights litigation; the availability of damages and other remedies in constitutional tort cases; and the rules governing the award of attorney's fees. The class will then consider problems arising under other federal civil rights statutes, both of Reconstruction-Era and of modern vintage. We will place special emphasis on the increasingly important question of the scope of Congress's constitutional authority to enact civil rights legislation.

Harvard Law School, Course Catalog 2001/2002, Civil Rights Litigation, *available at* <http://www.law.harvard.edu/students/catalog/catalog.php?op=show&id=355> (last visited Aug. 18, 2002). The description of the advanced course in Church State Law provides a similar inward looking focus:

This course will explore issues arising under the Establishment and Free Exercise Clauses of the First Amendment. Attention will be given to Supreme Court decisions concerning government aid to education, tax exemption of religious institutions, conscientious objection, disputes over church property, and similar topics. The aim of the course is through the exploration of particular problems to develop a general theory of the religion clauses of the First Amendment and of the constitutional ideology that underlies these clauses. As groundwork for this effort, the course will explore the historical background of the religion clauses with particular emphasis on church-state systems in colonial Massachusetts and Virginia and the circumstances surrounding the adoption of the First Amendment.

*Id.*, Church and State, *available at* <http://www.law.harvard.edu/students/catalog/catalog.php?op=show&id=445> (last visited Aug. 11, 2002).

74. The course description for International Human Rights provides that:

This course describes and critically examines the underpinnings, norms, institutions, and processes of the human rights movement as it has developed over a half century. It instructs in those aspects of public international law that are vital to understanding human rights. Its topics and continuing themes include: ancestry and character of the treaty and customary law of human rights; the relation between human rights and the humanitarian laws of war; the universal or culturally particular nature of human rights; rights-oriented and duty-oriented approaches; the significance of the public-private divide for human rights law; the relation between civil-political and economic-social rights; the functions and evolution of intergovernmental institutions of the universal (UN) and regional (African, European, Inter-American) human rights regimes; dilemmas of implementation and enforcement of human rights norms in relation to sovereignty and political fragmentation; the vital role of non-governmental human rights organizations; and internal application of human rights norms by states. Illustrations drawn from the human rights movement inform these topics, from gender discrimination and the right to health to prosecution of war criminals and problems of religion and state.

Harvard Law School, Course Catalog, Human Rights and International Law, *available at* <http://www.law.harvard.edu/students/catalog/catalog.php?op=show&id=461> (last visited Aug. 18, 2002).

75. The course description provides that:

This seminar introduces students to human rights advocacy through readings and class discussion of critical issues in the human rights movement and participation in supervised projects. The clinical projects will involve work

There are a number of things that these descriptions reveal. First, there is a curricular division between individual rights affecting citizens and residents of the United States, usually the subject of a basic or advanced "Constitutional Law" course, and the general human rights of foreigners, usually the subject of a course in "International Human Rights."<sup>76</sup> While the occasional human rights casebook written for American law schools makes a reference to its utility within the United

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individually or in small groups in collaboration with human rights non-governmental organizations (NGOs) and multilateral agencies. Class sessions will be divided between case studies of advocacy from the recent history of the human rights movement and student-led discussions of their clinical projects.

The case studies will explore issues faced by human rights advocates including priorities, strategies, and understandings of what constitutes a human rights problem. In particular, the studies will explore the human rights response to problems like apartheid, human rights violations in strategic states (e.g., Israel), violations of women's human rights (including female genital mutilation and trafficking in women), and the increasingly important role of international business and globalization.

All students will work on a clinical project involving: (1) a significant research component; (2) close collaboration with a human rights organization; and (3) participation in some ongoing process such as a UN session or NGO investigation or court proceeding. In recent years, these projects have involved a range of topics including corporate responsibility, trafficking in women, and the growth of national human rights commissions. Unlike domestic clinical work, the projects will only rarely be based on judicial proceedings

Harvard Law School, Course Catalog, Seminar: Human Rights Advocacy: Clinical, available at <http://www.law.harvard.edu/students/catalog/catalog.php?op=show&id=518> (last visited Aug. 11, 2002).

76. This division is apparent in the treatment of immigration law, which in the United States has come to be almost exclusively focused on the practicalities of immigrant status within the United States. The course description provides:

This course examines the constitutional and civil rights of immigrants in the United States. The course extends the treatment of non-citizens' rights found in the Immigration Law and Constitutional Law courses, and analyzes a broad set of problems involving anti-immigrant discrimination. The course explores the rights of immigrants and refugees in immigration proceedings, including removal hearings and detention, as well as in areas such as criminal justice, education, employment, the political process, and access to government benefits. The course also analyzes and critiques civil rights laws that address discrimination based on national origin, immigration status, and U.S. citizenship. In addition to covering discrimination based on formal citizenship, the course examines the intersection of citizenship and race; in particular, the course analyzes problems arising when racial and ethnic minorities encounter discrimination because they are perceived to be foreigners, regardless of actual citizenship status. The course also devotes attention to language rights and problems of language discrimination, including English-only policies in government and in the workplace.

Harvard Law School, Course Catalog, Civil Rights of Immigrants, available at <http://www.law.harvard.edu/students/catalog/catalog.php?op=show&id=446> (last visited Aug. 8, 2002).

States, it is more often clear that the two categories of courses are not meant to provide different perspectives on governance or legal issues affecting the same set of people. There are a very small number of exceptions. One of the most interesting involves the law of indigenous people.<sup>77</sup> Perhaps another are courses in Comparative law.<sup>78</sup> But courses in comparison are focused on a different object: these courses study self-contained systems for a number of reasons other than because the laws might or ought to be binding within the home jurisdiction.<sup>79</sup>

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77. A course offered by two visiting professors with significant experience in both domestic and international law aspects of the legal position of indigenous people provides that:

This course examines the contemporary international human rights framework for understanding the unique problems raised by indigenous peoples' legal claims to lands, cultural autonomy, and treaty-based rights. Emphasis will be given to the developing international and domestic law and legal standards respecting indigenous peoples' rights, particularly in the United States, but also in Canada, Australia, New Zealand, Latin America, and Asia. The problematic structural influences and weight of colonial era rules and principles on indigenous peoples rights developed under the European law of nations and the increasing receptivity of the international human rights process towards the active monitoring and investigation of abuses of indigenous peoples human rights occurring under domestic law regimes will be explored in depth in the course. Special attention will be devoted to major topics in United States Federal Indian Law, including tribal sovereignty and jurisdiction, the trust doctrine, and treaty rights, utilizing the human rights framework and comparative indigenous rights perspectives from other countries developed during the course.

Harvard Law School, Course Catalog 2001/2002, Indigenous Peoples' Rights, *available at* <http://www.law.harvard.edu/students/catalog/catalog.php?op=show&id=419> (last visited Aug. 11, 2002).

78. Consider, for example, the description of a comparative U.S. South African Constitutional law course:

This course will examine American and South African constitutional-legal materials primarily from the standpoint of the American constitutional lawyer making the acquaintance of South African constitutionalism. We shall look constantly to see how the light shed by South African constitutional choices and developments might sharpen our descriptions, deepen our understandings, and enrich our evaluations of American choices and developments. In addition, we shall try to consider how differences in national history and situation may or may not be aptly reflected in both differences and likenesses in constitutional choices and developments.

Harvard Law School, Course Catalog, Comparative Constitutionalism: South Africa and the U.S.—Equality, *available at* <http://www.law.harvard.edu/students/catalog/catalog.php?op=show&id=447> (last visited Aug. 8, 2002).

79. Professor Donald Kommers has described four principle benefits of the comparative study of constitutional law: (1) it can provide valuable insights into the experiences of other constitutional democracies; (2) it can be helpful in working through issues of what the 'perfect' constitutional order would look like, and in this matter inform local constitutional thinking; (3) it can enrich the study of comparative politics; and (4) it enriches the study of American constitutional law by providing a richer critical perspective for understanding US constitutional jurisprudence. Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J., OF PRAC. & PROC. 685

Second, rights related courses are almost universally inward looking in scope. The outer walls of nearly every rights related course within the U.S. curriculum starts and ends with the U.S. Constitution.<sup>80</sup> There is perhaps in some a somewhat wistful look at other instruments, but even with respect to this, academics have preferred to carve out a new area of endeavor – comparative constitutional law – rather than incorporate international, transnational or comparative materials within the standard constitutional or constitutional rights law course.<sup>81</sup> But generally, any such look is consigned to the ‘if there is time’ pile – interesting but not critically relevant material for students to learn. The effect is reinforcement of the tendency to avoid naturalization of the idea that the emerging normative structure of international human rights, expressed as formal law, has a place within U.S. jurisprudence.<sup>82</sup> Conversely, human

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(1976). See also VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* v (Foundation Press, 1999) (“Being able to think systematically about different structures for organizing a government, and different approaches to establishing just, effective, and stable forms of government while providing the flexibility for the future that is required to meet changing needs and ensure continued stability are general benefits of studying these materials.”).

80. Thus, for example, Professors Newman and Weissbrodt argue that international human rights is worth studying because (i) “the subject deals with many concerns that are also the focus of civil liberties and civil rights law.” DAVID WEISSBRODT, JOAN FITZPATRICK AND FRANK NEWMAN, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS* xxxii (3<sup>rd</sup> ed., 2001); and that (ii) even if a litigant exhausts remedies under U.S. national law, “there may be international tribunals or other bodies to which they can take their case.” *Id.*

Advocates should also be aware that there are arguments based on international law that clearly should be raised in U.S. federal and state courts, as well as in legislatures and administrative agencies. For lawyers in many other countries there are even more opportunities to raise issues based on international human rights law. Civil liberties and civil rights attorneys arguably breach their professional responsibilities if they represent clients and stay ignorant of international laws and procedures.

*Id.*

81. For an example of the new genre casebook, see VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (NEW YORK: FOUNDATION PRESS, 1999).

82. The strength of this unconscious divide can be seen in the description of an advanced course in Discrimination:

The goal of this course will be to learn about selected elements of our current antidiscrimination regime that are currently under particularly interesting academic scrutiny, both to study parts of the regime that are now thought to be particularly problematic or inchoate, and to develop some idea of the analytic approaches being developed to assess them. Thus, we will not undertake a systematic detailed overview of all antidiscrimination law; rather, we will select for particular scrutiny distinct elements of it, such as intent, the tension between status-based and efficiency-based theories of discrimination, hostile environment and other novel theories of harm, and accommodation mandates. This course will combine two approaches. Half the meetings will be devoted to the study of legal rules and doctrines currently in place in constitutional and statutory antidiscrimination law.

rights courses look outward, to courts and venues outside the United States, and deal with issues and problems and legal frameworks with little formal or practical connection to American law.<sup>83</sup>

This division is reinforced by the structure and content of course books produced for the teaching of these courses.<sup>84</sup> Even if one were inclined to consider rights regimes other than our own, at least as currently formulated, one would have a difficult time finding instructional materials – casebooks in particular – to make such an approach easy. Casebooks reinforce and help naturalize the idea that the study of American rights regime and the rights regimes of other parts of the world remain separate fields entirely. In the usual case, “constitutional law” casebooks obsess about the legitimacy and extent of judicial review of the actions of individuals and the institutions of the various levels of our government. The books then proceed to discuss the substantive results of judicial consideration of the division of powers between the state and general governments and among the components of each,<sup>85</sup> and the extent to which the constitution serves as a basis for the limitation of the powers of government to do or not do certain things

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Harvard Law School, Course Catalog, 2001/2002, Discrimination, *available at* <http://www.law.harvard.edu/students/catalog/catalog.php?op=show&id=452> (last visited Aug. 10, 2002).

83. This tendency occurs even in courses with potentially significant relation to issues affecting segments of the American population. Consider in this respect the course description for a course on Sex Gender and Human Rights:

This course will examine issues of sex and gender in the law of human rights. It will begin with a discussion of the concepts of sex and gender and the scholarly and political debates about their meanings. It will then turn to the ways in which sex and gender are constructed, particularly in the international arena. It will analyze the way that sex and gender are represented in the human rights canon, and discuss the value of the women-specific human rights treaties and institutions. The course will also examine the way in which ideas of sex and gender have influenced the ‘mainstream’ human rights bodies and focus in particular on the strategy of ‘gender mainstreaming’ developed in the UN and European Union.

Harvard Law School, Course Catalog 2001/2002, Sex, Gender and Human Rights, *available at* <http://www.law.harvard.edu/students/catalog/catalog.php?op=show&id=402> (last visited Aug. 8, 2002).

84. Indeed, the exceptional course, Indigenous Peoples’ Rights, was based on “Readings [taken] from multilithed materials.” Harvard Law School, Course Catalog, Indigenous Peoples’ Rights, *available at* <http://www.law.harvard.edu/students/catalog/catalog.php?op=show&id=419> (last visited Aug. 8, 2002).

85. All of this together usually comprises the core of a typical 3 hour credit one semester course in American Constitutional Law. In four credit semester courses, an introduction to the constitutional law of individual rights is also included. Within these confines, casebook organization is increasingly flexible enough to “allow[] users to ‘structure their own courses in their own ways.’” WILLIAM COHEN AND JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS v (2001).

(the "individual rights" portion of the course).<sup>86</sup> The teaching goals of such materials typically includes:

the following: (1) the types of accepted justifications for the exercise of the power of judicial review; (2) the influence of different eras of American legal thought on constitutional decision making; and (3) how to name (and then utilize) regularly recurring forms of legal argument."<sup>87</sup>

Inward looking, the typical casebook materials make difficult even limited efforts to include discussion of the approaches of other regimes to similar issues.

The teaching materials for the basic human rights course respect this division as well. The primary emphasis is on the history and development of a law of state-to-state obligations centering on the creation of norms meant to protect individuals and communities, a study of various international and supra-national frameworks developed or in development with respect to the construction, enforcement of these supra-national human rights norms, and an introduction to some of the more important substantive norms of this international system. However, international human rights casebooks do attempt some coverage of international norms in a domestic context. In the case of textbooks prepared for the American market, there is some sometimes significant coverage of domestic remedies for human rights violations within the U.S. and U.S. judicial remedies for violations occurring outside the U.S.<sup>88</sup> For casebooks devoted to the availability of international law in U.S. litigation, the focus tends to be on process

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86. For a nice summary of this basic characterization, *see, e.g.*, CHARLES A. SHANOR, *TEACHER'S MANUAL TO ACCOMPANY AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION* 1-7 (2001). Some casebook authors attempt a nod at an exploration of "the role that legislatures, the executive, and other political institutions (for example political parties and social movements) played in constitutional decisionmaking." PAUL BREST, SANFORD LEVINSON, J.M. BALKIN, AKHIL REED AMAR, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* xxix (2000).

87. MICHAEL ARIENS, *TEACHER'S MANUAL: GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, AND MARK TUSHNET, CONSTITUTIONAL LAW* (3<sup>RD</sup> ED. 1996) at xxiii. *See also* DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* vii-viii (1998) (two major purposes of introductory course, the first is to provide a grasp of judicial doctrine and the second is to understand how judges wrestle with basic questions about the nature of American society).

88. Chapters 13 and 14 of the casebook, DAVID WEISSBRODT, JOAN FITZPATRICK AND FRANK NEWMAN, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* (3d ed., 2001) are devoted to a consideration of these issues. *See also* LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHER AND DAVID W. LEEBRON, *HUMAN RIGHTS* (1999) (covering international and domestic contexts).

rather than any substantive area.<sup>89</sup> The problem in this case, of course, is practical rather than formal. In a two or three credit hour semester class in international human rights it is more likely than not that the materials on domestic application will be given shorter shrift. The substantive division reflects the determination by the larger law book publishers in the U.S. that international human rights constitutes a specialty category, rather than something more basic to the law school curriculum.<sup>90</sup> To ameliorate the problem, some authors have attempted the creation of a 'human rights module,' a short course within a larger course, focusing on international human rights issues *in situ*.<sup>91</sup> However, the legal academy has thus effectively constructed a legal pedagogy within the United States in which the amalgamation of instruction in rights regimes is deemed aberrational in fact in courses devoted to individual rights within the United States, notwithstanding the gesture of inclusion as a separable item of specialty study within the curriculum of some law schools.

To a large degree, then, instruction in individual human rights is relegated to a curricular Never-Never Land in the United States. The important courses in individual rights, with pride of place in the curriculum, are all essentially courses in insular law. Human rights is catalogued with those other curiosities making up the curriculum in the specialized area of international and comparative law. We start by taking for granted the walls separating national from international rights regimes, and base a curriculum on that notion. The ironies of this are great indeed. U.S. law schools effectively build a curriculum *solely* on the basis of current and parochial rights doctrines generated by the Supreme Court.<sup>92</sup> This suggests that such doctrine is either as permanent

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89. See, for example, JORDAN J. PAUST AND JOAN M. FITZPATRICK AND JON M. VAN DYKE, *INTERNATIONAL LAW AND LITIGATION IN THE UNITED STATES* (2000) (focusing on procedural issues in connection with cases touching on international law).

90. Thus, for example, in advertising *INTERNATIONAL LAW AND LITIGATION IN THE UNITED STATES*, *supra*, note 89, West Publishing Company suggests that the casebook might be "[u]seful in other specialty courses, especially human rights courses or seminars." Thompson/West, Paust, Fitzpatrick, and Van Dyke's *International Law and Litigation in the United States* (American Casebook Series®), Features and Benefits, available

at [http://www.westgroup.com/store/product.asp?product\\_id=18257965&catalog\\_name=wgstore](http://www.westgroup.com/store/product.asp?product_id=18257965&catalog_name=wgstore) (last accessed August 11, 2002).

91. See, e.g., JORDAN J. PAUST, M. CHERIF BASSIOUNI, MICHAEL P. SCHARF, JIMMY GURULÉ, LEILA SADAT BRUCE ZAGARIS AND SHARON A. WILLIAMS, *HUMAN RIGHTS MODULE: ON CRIMES AGAINST HUMANITY, GENOCIDE, OTHER CRIMES AGAINST HUMAN RIGHTS, AND WAR CRIMES* (2001) (providing a self-contained set of materials focusing on crimes against humanity, genocide, and other war crimes for use in seminars or other courses in international human rights or in general international law courses. *Id.*, at ix (Preface)).

92. Again, at this point I should emphasize that I am not arguing against the teaching of law as it is currently formulated by the courts. Rather, I argue here, with particular

and absolute as the word of the Divine – which most law professors would concede is not the case – or that law professors themselves are proponents of this division – which most faculties would deny. Parochialism, pedagogical inertia, and institutional impediments, rather than tradition, conviction, or principle, appear to account for the perpetuation of this division in the teaching of individual human rights in the United States.<sup>93</sup>

### B. *Latin American Hollow Universalism*

Latin American education in international individual human rights plays a more central role within the curricula of prominent law schools. Yet there remains a great disconnect between the curriculum and the practice within Latin American states. The problem here is essentially methodological. But methodology in this case has great substantive

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focus on the approach to teaching about ‘human rights,’ that such a narrow and particularized approach does a great disservice to our students. The American courts have always shown a willingness from time to time to reconsider fundamental positions, and change them. *See* *Lochner v. New York*, 198 U.S. 45 (1905); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Miranda v. Arizona*, 384 U.S. 436 (1966). Teaching to the past without an eye on possible avenues of change for the future, while it requires a substantial amount more work on the part of faculty, ought to form an important component of our teaching mission. This argument should not be read to imply any necessary agreement with what one teaches – but it does suggest an obligation to prepare our students for the world they will face by equipping them with what they will need to do their jobs well. Ironically, the most useful analogy might be best suggested the person with a strong personal belief in the error of *Roe v. Wade*, 410 U.S. 113 (1973), or of *Bowers v. Hardwick*, 478 U.S. 186 (1986), each of whom must teach the law as it exists within existing jurisprudential confines, but also may suggest the context in which those confines exist today and the possible alternatives future courts or legislatures might be free to follow.

93. The United States, among common law countries, does not have a monopoly on legal parochialism in the field of human rights. The National Law School of India, a relatively young school in Bangalore, has devised a program of undergraduate legal studies that mimics both English and U.S. approaches to the study of fundamental rights. Fundamental rights is taught as the second part of a two part comprehensive study of the Indian Constitution. The course description for Constitutional Law II is similar to the similarly named class in many U.S. law schools. CONSTITUTIONAL LAW - II

The course is exclusively devoted to a detailed analysis of fundamental freedoms guaranteed by Part III and complemented by fundamental state policy adumbrated in Part IV and both these reinforced by the provisions in Part IV-A of the Indian Constitution. Through incisive and comparative analysis of case law, the students are enabled to realise the status and importance of Fundamental Rights and Directive Principles and to examine the problems involved in their judicial enforcement. The chapter on Fundamental Duties will also be studied in the course and an effort will be made to articulate the basic values which the Indian Constitution has identified and is attempting to actualise for justice and governance.

The National Law School of India, Bangalore, India, Undergraduate Courses, *available* at <http://www.nls.ac.in/> (last visited Jan. 1, 2002).



effect. The disconnect is understandable given the thrust of the human rights project since the end of the Second World War. Richard Falk, in considering the effect of human rights on the erosion of state power, explains that:

The cumulative influence of human rights as legal norms gave the notion of external accountability an increasing credibility, at least in Western Europe, especially after the creation and operation of the Strasbourg human rights mechanisms within the framework of the European Community, which took the radical step of allowing citizens in the participating countries to challenge alleged infringements of human rights in external administrative and judicial arenas.<sup>94</sup>

The analogous organs of the OAS were meant to extend that model to the Americas. External accountability and citizen standing before supra-national bodies effectively limits the power of a state to thwart or mold a human rights regime to suit itself. However, at its extreme, external accountability and norm setting can obliterate the indigenous traditions of human dignity that have, to some extent, shaped the global approach to human rights. In an effort to limit the power of rogue governments in the future to trample on human rights, human rights has been made essentially exogenous. But exogenous law, with no foundation in indigenous traditions, can also be treated as irrelevant, and foreign, by both the people it is supposed to protect, and the national institutions charged with its implementation or against whom the exogenous protections have been instituted.

The traditional civil law methodologies of instruction, so ingrained in Latin America, make the teaching of a treaty and convention based supra-constitutional law of human rights neither natural nor, within the traditional curriculum, easy. Virtually all Latin American Countries adhere to the civil law tradition.<sup>95</sup> Law is substantially limited to legislative or administrative enactments in written form. The answer to all questions can be found in the Codes. The judiciary, like the legal profession, is meant to apply rather than interpret that statutory law. Legal education mirrors this approach to law. Much instruction is based on a familiarization with the national and local law Codes and other pertinent legislation. The core indigenous codes usually include a civil,

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94. RICHARD FALK, *PREDATORY GLOBALIZATION: A CRITIQUE* 96 (Polity Press, 1999).

95. Virtually all Latin American states "are solidly within the civil law tradition and have contributed their own characteristic Latin American variation to it." JOHN MERRYMEN ET AL., *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* ix (1990).

criminal, commercial and civil procedure code. Other codes may include labor, corporation, and public law codes.<sup>96</sup>

This form of traditional instruction, deeply ingrained in Europe and Latin America, has found some critics within Latin America. For example, Martín Bohmer, the dean of the law school at one of the private universities in Argentina, has made an argument for a move to a mode of instruction that emphasizes the patterns of thinking encouraged through use of the Socratic method.<sup>97</sup> Consistent with the normative basis of the European civil law tradition from which it derived, Argentine law is principally based on written codes in which judges apply, but do not interpret, the law.<sup>98</sup> That relationship between judge and law replicates itself in the relationship between student and teacher within law schools. Instruction in law often reduces itself to little more than a memorization of the Codes, with no emphasis on critical thinking.<sup>99</sup>

As a result of the heavy emphasis on the traditional codes, international law tends, on the one hand, to be relegated to the periphery of the core of study, and, on the other, presented as foreign, rather than domestic, law. The applicable national effects of international human rights law is sometimes a part of a course in national constitutional law, or is included in the mandatory international law course. At the Pontifical Catholic University of Chile, the mandatory Constitutional Rights course contains a section discussing the sources of constitutional law, which includes, among others, international treaties.<sup>100</sup> In Brazil,

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96. For a general introduction to the general forms of legal education in a civil law context (with emphasis on French and German models), see, RUDOLF B. SCHLESINGER, HANS BAADE, PETER HERZOG AND EDWARD M. WISE, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 340-374 (1998).

97. Martín F. Bohmer, *Algunas sugerencias para escapar del silencio del aula* (paper on file with the author) at 8.

98. Martín F. Bohmer, *Algunas sugerencias para escapar del silencio del aula* (paper on file with the author) at 8. The French Civil Code still provides – “Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.” C. CIV. Art. 5. Indeed, Dean Bohmer refers to the general conception of law in Argentina as Napoleonic. *Id.*, at 8, citing among others CARLOS NINO, *ALGUNOS MODELOS METODOLÓGICOS DE ‘CIENCIA’ JURÍDICA* (Valencia, Spain, 1980); CALOS NINO, *LA DOGMÁTICA JURÍDICA* (Mexico, 1974).

99. Martín F. Bohmer, *Algunas sugerencias para escapar del silencio del aula* (paper on file with the author), at 9 (“La habilidad que se califica es la mera memoria. La cuestión es, en general, demostrar que se puede repetir lo que dijo el docente en clase que es a su vez la repetición de lo que dice el manual, que repite lo que dice de Código.”). Dean Bohmer suggests that while this traditional mode of instruction might at one time have been useful in building a unified state, it does little service for a nation attempting to create democratic, free market state. *Id.*, at 9. As a result, the role of law faculty “no es otro que hacer conocer a los alumnos el contenido de esos códigos.” Martín F. Bohmer, *Sobre la inexistencia del derecho de interés público en Argentina*, 3 *REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO* 131, 139 (April, 1998) (Argentina).

100. Pontificia Universidad Católica de Chile, *Derecho Constitucional*, DEL101A-

after reforms in the 1990s, that curriculum now includes mandatory courses in Roman Law, International Law, Jurisprudence, Civil Law, Procedural Law, Criminal Law and Constitutional Law.<sup>101</sup> At the University of Sao Paulo Law School, international human rights is incorporated, to some extent, in a mandatory fourth semester course on fundamental rights – *Direitos Fundamentais*.<sup>102</sup> The course is divided into two parts. The first examines generally the concepts and classifications underlying international notions of fundamental rights.<sup>103</sup> The second part of the course concentrates on the regime of fundamental rights within Brazil.<sup>104</sup> This section of the course is limited to the substantive rights available under the Brazilian constitution and the procedures available for their vindication.<sup>105</sup>

### III. First Steps Towards Solution – An Example in that Direction?

It is an easy matter to argue, as I have, for a blending of the parochial and the universal when teaching – and practicing – human rights within a nation-state. It is, likewise, simple to demonstrate that the methodology of the current pedagogy is imperfect. It is quite another matter, however, to convince law teachers that this methodological problem is one worth correcting, and harder still to illustrate how this correction might be accomplished in fact.

Fortunately for those of us in the Americas, academics elsewhere have taken some very interesting and potentially useful steps in that

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DEL101B, available at <http://cursos.puc.cl/catalogo/programas/de101a-de101b.pdf> (last visited Aug. 12, 2002). Among the books used in the constitutional law class, see, JOSÉ LUIS CEA EGAÑA, CURSO DE DERECHO CONSTITUCIONAL (4 vols., Santiago, Chile, 1994-95); HARNÁN MOLINA, DERECHO CONSTITUCIONAL (Concepción, Chile, 1992); JORGE MARIO QUINZIO, I Y II TRATADO DE DERECHO CONSTITUCIONAL (Santiago, Chile, 1993-94); M. VERDUGO, E. PEIFFER AND R. VÍO, I Y II DERECHO CONSTITUCIONAL (Santiago, Chile, 1994).

101. Nadia de Araujo, *The Status of Brazilian Legal Education*, 51 J. LEGAL EDUC. 325, 327 (2001). In Brazil, unlike other Latin American states, the Ministry of Education regulates the curriculum. *Id.*

102. See Faculdade de Direito da Universidade de São Paulo, Curso de Graduação 2001, at 9 (*Ciclo Básico*), available at <http://www.usp.br/fd/catalogograduacao/2001/index.html> (last visited Aug. 12, 2002). The catalogue for 2002 is substantially the same. See Faculdade de Direito da Universidade de São Paulo, Curso de Graduação 2002, at 9 (*Ciclo Básico*) available at <http://www.usp.br/fd/catalogograduacao/2002/index.html> (last visited Aug. 12, 2002).

103. See *id.*, at 112. This section includes a study of the initial universal declaration of rights, the rise of social and economic rights, and third generation human or basic rights. It also includes a discussion of modern public rights and international systems for the protection of those rights. *Id.*

104. *Id.*

105. *Id.* The substantive rights include the right to life, liberty, equality, and property. In addition, the course includes consideration of remedies for breaches of constitutional rights. *Id.*

direction. Consider for example the way in which courses on 'civil rights' are taught at the University of Canterbury, New Zealand. That course contextualizes New Zealand's civil rights regime within that of 'modern liberal democracies' including the United States, Canada and the United Kingdom, and then examines this legal order in light of international human rights instruments.<sup>106</sup> Here is an attempt to contextualize universal human rights within the particular legal context of New Zealand. The universal and the parochial work together to advance the universalizing project of a single standard of individual fundamental human rights.

The benefits of such an approach are fairly easy to understand. First, such an approach can significantly enrich an understanding of indigenous approaches to the protection of individual rights within the structuring of the parochial legal system being studied. Second, this contextualizing approach can accomplish the 'enrichment' function while remaining true to law as actually being practiced. Third, this approach can offer a faculty member the opportunity to provide students with insights not only with respect to current regimes of constitutional interpretation, but also to potential alternatives, which whether the students or their instructor like them or not, will likely confront the practitioner, as well as the theoretician, more often as the century wears on.

Moreover, international human rights teaching need not be confined to the constitutional law or human rights course ghetto. There are alternatives available for spreading the introduction to principles of

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106. The course description published by the University sets forth the content of the course as follows:

The course objective is to examine the role of civil liberties in the context of modern liberal democracies and particularly the New Zealand experience. The general theory will include a critical review of individual rights and responsibilities under different notions of liberalism and in competing notions of communitarianism. The Canadian, American and English 'Bill of Rights' will be briefly considered before an analysis of the New Zealand legislative and common law regimes. The New Zealand Bill of Rights Act 1990 and Human Rights Act 1993 will be examined in some detail, along with threshold questions of constitutional entrenchment and the peculiar political context of New Zealand democracy. The impact of international human rights instruments on New Zealand law will also be considered, with particular reference to issues of statutory interpretation, discretionary decision-making by the Executive and judicial review of such Executive action. The right of individual communication under the Optional Protocols to the International Covenant on Civil and Political Rights and the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) will also be analysed.

University of Canterbury, Undergraduate Courses 2001, LAWS 344 CIVIL LIBERTIES (1st half of the year) Half Course, Course Supervisor: Mr. G Leane, *available at* <http://www.laws.canterbury.ac.nz/> (last visited Dec. 30, 2001).

international individual human rights across the curriculum. In a way analogous to what critical race theorists have demonstrated to us with respect to race,<sup>107</sup> human rights issues touch virtually every traditional course in the curriculum.<sup>108</sup> Damages for torture, for example, can be as much the topic of basic tort law as it is a subject of a course in 'human rights.'<sup>109</sup> Sex crimes are as much a matter of human liberty and dignity, at the core of national and international human rights norms, as they might be just another topic in a course on criminal law.<sup>110</sup> Forced

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107. See, e.g., Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39; Alex M. Johnson, Jr., *Scholarly Paradigms: A New Tradition Based on Context and Color*, 16 VT. L. REV. 913 (1992); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991); citing Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431.

108. As Dean Claudio Grossman has suggested:

We need to create such linkages because in our new global reality even 'domestic' lawyers will at some point in their careers have to address issues of international law. At WCL we have made revisions to the first year curriculum to incorporate international issues into traditional first year 'domestic' law courses. For example, a first year torts class studies the *Paquete Habana* case, a case decided by the U.S. Supreme Court in 1900 on the basis of customary international law. The students also study cases brought by foreign nationals in U.S. Courts under the Alien Tort Claims Act. These cases help students understand the outer limits of the application of U.S. laws abroad as well as the application of treaty law and customary international law within the U.S. First year students are also exposed to international legal research in their Legal Methods course.

Claudio Grossman, *Building the World Community: Challenges for Legal Education*, 18 PENN STATE INT'L L. REV. 441, 446-47 (2000).

109. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 877-78 (2d Cir. 1980) (The court awarded Paraguayan citizens compensatory damages, including attorney fees, and substantial punitive damages against Paraguayan official for the torture and death of their brother and son); see also *Kadic v. Karadzic*, 74 F.3d 377 (2<sup>nd</sup> Cir. 1995).

110. This certainly has been the case within Europe with respect to sodomy legislation. Compare *Norris v. Ireland*, 13 Eur. Ct. H.R. 186 (Ser. A No. 142)(1988) (Irish buggery and gross indecency laws applied to adult private consensual activities violated Art. 8(s) of the Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222) with *Bowers v. Hardwick*, 478 U.S. 186 (1986) (finding no constitutionally protected right against state legislation criminalizing sodomy between people of the same sex). It has not been uncommon to use the criminal laws of sexual conduct as a means of political coercion. There is a long history of this in the Western world. For an example from Stuart England, see, e.g., CYNTHIA B. HERRUP, *A HOUSE IN GROSS DISORDER: SEX, LAW AND THE 2<sup>ND</sup> EARL OF CASTLEHAVEN* (1999) (analysis of trial and execution of the second Earl of Castlehaven for assisting the rape of his wife and committing sodomy with his servants). For a modern version of the story of the 2<sup>nd</sup> Earl of Castlehaven, one need only turn to late twentieth century Malaysia where the ruler sought to use the sodomy laws to eliminate a strong political opponent. See Rajiv Chandrasekaran, *Malaysian Ex-Official Convicted of Sodomy; Defense Argued That Charge Was Part of Plot by Premier*, Wash. Post, Aug. 8, 2000, at A17, LEXIS-NEXIS Academic Universe; John Gittings, *Sex claims in Anwar trial fuel gay fears*, Guardian, Nov. 4, 1998, LEXIS-NEXIS Academic Universe. Robert Mugabe, 21<sup>st</sup> century Zimbabwe's dictator has been using a manufactured set of

eviction is more than a section of a course on property; it is tinged with issues of human rights and personal freedom. As an alternative, some schools have instituted a short 'bridge' course, usually in the week before a student's second year studies commence, in which students receive an introduction to the relevance of international and comparative law issues in traditional areas of practice.<sup>111</sup> Thus, the New Zealand approach, in some form, may provide a clue to the construction of an international individual human rights tinged course for U.S. law schools which remains true to the reality of current law within which the global legal positivist discourse of legal rights can be contextualized for local consumption.

There exist several significant impediments to any movement in this direction. The addition of international and comparative themes to existing courses, and especially existing first year courses, may present fatal obstacles. Traditional courses are already crowded with information, requiring abbreviated presentation of important domestic substantive issues. Also many instructors might be uncomfortable with unfamiliar materials. The result might be faculty resistance to this sort of innovation. If international and comparative human rights issues are woven into advanced courses, there is no guarantee that students may take the course in sufficient numbers to be effective.<sup>112</sup> Moreover, the lack of readily available teaching materials may pose another significant obstacle. It is difficult enough to teach a traditional course when materials are readily available. For many faculties, the additional burden of creating one's own materials, especially with respect to subjects that may be less familiar, may create an insurmountable barrier to any movement.<sup>113</sup> Moreover, busy faculties tend to prefer to follow the

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'customary' law to promote the primacy of heterosexual African males within the social and political organization of the state. See, e.g., David M. Bigge and Amelie von Briesen, *Conflict in Zimbabwean Courts: Women's Rights and Indigenous Self Determination in Magaya v. Magaya*, 13 HARV. HUM. RTS. J. 289 (2000) (examination of case of *Magaya v. Magaya* to show how women are accorded an inferior status to men in Zimbabwean courts in light of colonial influenced customary laws). For popular press accounts, see, e.g., Andrew Meldrum, *Mugabe Steps Up Attack on Gays*, GUARDIAN (London), Aug. 19, 1995, at Pg. 13, LEXIS-NEXIS Academic Universe; Alec Russell, *Attacks on Gays by Mugabe Seen as Political Smokescreen*, DAILY TELEGRAPH, Aug. 25, 1995, at pg. 14, LEXIS-NEXIS Academic Universe.

111. Mark A. Drumbl, *Attainable Globalization: International and Comparative Law 'Bridge Course,'* in Workshop on Shifting Boundaries: Globalization and Its Discontents, Association of American Law Schools Annual Meeting, January 4, 2001, San Francisco, California at 7, 9-13 (copy on file with author).

112. Mark A. Drumbl, *Attainable Globalization: International and Comparative Law 'Bridge Course,'* in Workshop on Shifting Boundaries: Globalization and Its Discontents, Association of American Law Schools Annual Meeting, January 4, 2001, San Francisco, California at 7 (copy on file with author).

113. This barrier, however, may be becoming less formidable. Faculty are

strong incentive structure provided by conventional professional expectations. The pull to follow the currently conventional thinking of the judiciary, and the inertia exerted by the traditional division of subjects within a law school curriculum, all tend to create barriers to any change in current approach.

Balanced against these obstacles are the emergence of additional and newer pedagogies for naturalizing international individual human rights within the law schools. Among them, clinical education has great potential both as a means of teaching individual human rights in context and as providing an essential bridge between theory in the classroom and practice in the everyday life of the legal community. Clinic and clinical faculties are in the optimum position not only to weave international human rights themes into their courses, but also to formulate and put forward in court those arguments that might have an effect on the ways in which American courts approach human rights norm making the origins and character of which is not exclusively within the control of national governmental institutions.<sup>114</sup>

#### IV. Conclusion

Human rights as an international normative project with positive law effects must find its way into the core of U.S. individual rights instruction. The fact that the current Supreme Court, and the current legislative and executive branches, have not yet conceded the application, is hardly an excuse for ignoring the applicability of these regimes within the United States. It would hardly have struck law professors as odd to teach the possibility of error in the reasoning, approach, or result of *Plessey*,<sup>115</sup> even prior to *Brown*.<sup>116</sup> Yet, by effectively failing to incorporate international human rights norms within

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increasingly encouraged, even by textbook publishers, to create their own sets of materials from out of those currently published. For example, both West and Lexis publishing have established programs for the preparation of individualized course materials for a variety of materials they each publish. In the near future, it may be easier to combine materials from multiple texts (for example from traditional constitutional law and human rights texts) published by the same entity in the creation of materials for a course.

114. Clinic programs have undertaken this role to some extent already. This is especially the case in connection with immigration issues. For a discussion and example, see, e.g., American University International Human Rights Law Clinic (explaining that students also work on projects that influence or create U.S. policy on international human rights), available at <http://www.wcl.american.edu/clinical/inter.html> (last visited July 10, 2002).

115. *Plessey v. Ferguson*, 163 U.S. 537 (1896) (arguing against the affirmation of the racial separate but equal doctrine).

116. *Brown v. Board of Education*, 347 U.S. 483 (1954) (rejecting constitutional protection for doctrine of separate but equal treatment of races).

domestic discussions of legal rights, law faculty effectively engage in a very similar practice with respect to the foundation and approach to human rights in the United States. Indeed, Members of the American Supreme Court have begun to warn legal academics, among others, of the coming turn in law. In May 2002, Justice O'Connor "suggested that the Court will increasingly come to rely on 'international and foreign law in resolving what now appear to be domestic disputes.'"<sup>117</sup> She predicted that since "international and foreign law are being raised in our courts more often and in more areas than our courts have the knowledge and experience to address... expanded knowledge in this field" is important.<sup>118</sup>

Moreover, the result should be the same if the institutions of our government, with the approval of the people of our nation, were to continue to reaffirm, over and over again, the fundamental principle of a necessary division between domestic and international rights regimes. Even in such circumstances, the international foundation of human rights would intrude on American law whenever it would be necessary to deal with nation states that have acceded to those principles.<sup>119</sup> Moreover, as Calvin Massey has suggested in another context, to study American Constitutional law, "[o]ne needs to ask why the doctrine is the way it is, to determine whether it is justifiable in terms of the fundamental premises of constitutional law, and to propose alternative ways of expressing our constitutional principles."<sup>120</sup> And those principles may creep into American jurisprudence through their adoption in treaty instruments involving the United States. Again, the Rome Statute provides a case in point, creating an international criminal law regime based on interpretations of human rights norms that might be rejected under American law.<sup>121</sup> The North American Free Trade Agreement

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117. *Justice O'Connor Predicts Greater Domestic Reliance on Norms of International Law and Praises Institute's Increasing Transnational Focus*, 24(4) THE ALI REPORTER 3 (Summer 2002) (quoting in part, Justice O'Connor). Justice O'Connor was also quoted as observing that while "inter-nation law and the law of nations are rarely binding on our decisions, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts - what is sometimes called 'transjudicialism.'" *Id.*, at 3, 6.

118. *Id.*

119. Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 B.Y.U. L. Rev. 1139, 1198 (The evolution of CIL raises concerns of whether this internationalization of domestic law undermines the executive sovereignty and whether a judicially internationalized law of nations threatens the normative structure within which the interaction among sovereigns takes place. *Id.*).

120. CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* xxvii (2001).

121. Senator Chris Dodd (D. Conn.) Perhaps expressed this well when, through his spokesperson Tom Lenard, he suggested that "The court is going to be making international law in the future, and it would be better for the United States to be a leader



provides another.<sup>122</sup> For all these reasons, human rights ought to be freed from the bonds of its institutional ghetto within legal education.

Yet, it should be lost that the aim in this endeavor, as in most worthy endeavors, is to effect a change in fundamental cultural norms. Integrating universal individual human rights into the curriculum of parochial rights courses (that is, making it natural to treat local issues of constitutional fundamental rights as part of the larger fabric of universal and international individual human rights) will make it easier to incorporate such universal individual rights into the social reality of the nation-states of the Americas. In a related study of the production of culture, Pierre Bourdieu has noted that

Cultural legitimacy appears to be the 'fundamental norm', to employ the language of Kelsen, of the field of restricted production. But this 'fundamental norm', as Jean Piaget has noted, 'is nothing other than the abstract expression of the fact that society 'recognizes' the normative value of this order' in such a way that it 'corresponds to the social reality of the exercise of some power and of the 'recognition' of this power or of the system of rules emanating from it.'<sup>123</sup>

Universal human rights will become a reality in the Americas only to the extent it becomes a lived reality. That requires an investment in its reality by law teachers, as well as the institutions of the nation-state – the courts, the legislatures, the military. As law teachers we can do little directly with respect to the institutions of government. However, we can assert our power, as the teachers of the coming generations of lawyers, judges, and those other actors within the formal institutions of the state, to begin to adjust that which is accepted as 'normal.' As the parents of

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and a participant, rather than an idle observer." *Quoted in Christopher Marquis, U.S. Seeking Pacts in a Bid to Shield Its Peacekeepers: Response to New Court, Romania and Israel Are First to Agree Not to Extradite Americans for Trials*, N.Y. TIMES, Aug. 7, 2002, at A-1, A-8. Indeed, some argue that Americans are beginning to feel efforts to marginalize the United States as a significant contributing voice in the international construction of human rights. *Cf.* Stephen G. Wood and Brett G. Scharfs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 533-538 (2002).

122. For an argument that the dispute resolution mechanism of the North American Free Trade Agreement violate Article II of the Federal Constitution, see Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L L.J. 141 (1994). See generally, A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877 (2000).

123. PIERRE BOURDIEU, *THE FIELD OF CULTURAL PRODUCTION* 141 (Randal Johnson ed. Columbia University Press, 1993) (originally *Le marché des biens symboliques*, in *L'ANÉE SOCIOLOGIQUE* 22 (1971), trans. R. Sawyer 14/1-2 *POETICS* (Amsterdam) 13-44 (April 1985) (*citing* J. Piaget, 3 *Introduction à l'épistémologie génétique* 239 (Paris: Universitaires de France, 1950)).

future generations of those in control of the field of legal production, those who believe in the necessity of a universal system of individual human rights have a duty to do no less.