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George P. Fletcher and Steve Sheppard, *American Law in a Global Context: the Basics*. Oxford and New York, Oxford University Press 2005 (Book Review)

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the issue of fees and expenses of arbitrators. Some in the region believe that the cost of arbitral proceedings is prohibitive. It would have been helpful for the author to have addressed this claim.

With this engaging book as guide, a foreign investor today can and should evaluate a wide range of issues before choosing a means of dispute resolution: the quality and reputation of national judiciaries, the manner in which domestic courts in the region sometimes deny parties the principal benefits of arbitration agreements, and the best means of selecting procedures in advance to eliminate the anxiety of litigating under a foreign law before a court far from home.⁸ In targeting a wide audience, the author has included a carefully organized set of useful annexes containing most of the statutes and treaties that a practitioner should have at hand when dealing with arbitration issues in the various MERCOSUR member countries.

GEORGE P. FLETCHER AND STEVE SHEPPARD, *AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS* (Oxford and New York, Oxford University Press 2005)

*Reviewed by Janet E. Stearns**

How does one convey all that is important, unique, and interesting about the American legal system and legal culture to a group of foreign law students in one fifty-hour course? And where to begin when one cannot take for granted fluency in English, knowledge of American history, or familiarity with the federal structure of American government? These questions have become more important recently as the number of foreign students enrolled in American law schools has increased steadily¹ and large numbers of non-Americans study U.S. law in classrooms around the world.

I have been teaching American law to foreign lawyers for ten years, first as a visiting professor at the University of Chile Law

8. For a list of the traditional advantages associated with arbitration, see for example Ramón Mullerat, *Why to Choose Institutional Arbitration for International Commercial Disputes*, 35 A.B.A. INT'L L. NEWS No. 1 (Winter 2006).

* Assistant Dean, International and Foreign Graduate Programs, University of Miami School of Law. The author would like to acknowledge the many lessons that she has learned about comparative law from the students in her Introduction to U.S. Law course at the University of Miami over the past seven years. She appreciates the comments that she received from Professor Keith Rosenn, Professor Paul Dubinsky, and Dr. Carole Stearns.

1. According to the American Bar Association, enrollment of foreign law graduates in post-J.D. programs in U.S. law schools grew by more than 130% in the five years ending in 2004. See Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 CARDOZO J. INT'L & COMP. L. 143, 149 (2006).

School in Santiago² and, since 1999, as director of the Foreign Graduate Law Program at the University of Miami School of Law. I have used a variety of materials and approaches.³ This review will provide a brief overview of the principal texts available and then highlight the important contributions of George Fletcher's and Steve Sheppard's recent book, *American Law in A Global Context: The Basics* (ALGC).⁴

Prior to Fletcher and Sheppard's recent contribution, much of the existing literature in the field grew out of the efforts of U.S. lawyers and legal scholars to teach law abroad. Some of these individuals were comparativists by training (e.g., William Burnham, Peter Hay, Arthur von Mehren), and their works tend to reflect this orientation. Thus a sizeable portion of von Mehren's *Law in the United States: A General and Comparative View* (1987) is devoted to explicating specific aspects of U.S. law, such as the doctrine of consideration in contract law, that are somewhat unique to the U.S. legal system. Burnham's *Introduction to the Law and Legal System of the United States* grew out of the author's "frustrations" in locating good materials to use while teaching at the University of Utrecht.⁵ In 700 pages Burnham identifies fundamental principles of the U.S. legal system, and in some sections, such as in his discussion of juries, he expressly states a "comparative perspective."⁶ On the other hand, some of the texts are anthologies authored by teams of American legal scholars in response to a dearth of appropriate materials to use with their foreign students. *Fundamentals of American Law*, edited by Alan Morrison, is an anthology of short essays written by faculty members of the New York University School of Law who are specialists in particular fields of American law. Morrison conceived of the project after a visit to China, and the materials were part of a "global law school" initiative at NYU.⁷ Although the textbook's audience is clearly the foreign student, the materials are not explicitly comparative in focus.

2. See Janet E. Stearns, *Reflections on Teaching in Chile*, 48 J. LEG. EDUC. 110 (1998).

3. In addition to readings, I have assigned films, such as *To Kill A Mockingbird* (1962), *Unprecedented* (2002) (discussing the 2000 presidential election) or *In the Jury Room* (CBS television broadcast, Apr. 16, 1997) (providing an inside view of the operation of the American jury).

4. Because this book review is focused on materials for teaching introductory courses on substantive American law, I have not made reference to the numerous excellent textbooks that teach legal research and writing or related skills to foreign lawyers. This review addresses those books that are currently generally available to students and teachers but does not examine introductory texts written prior to 1987. As this review went to press, an additional casebook was published that also targets the foreign-student market. See CHARLES F. ABERNATHY, *LAW IN THE UNITED STATES* (2006).

5. See WILLIAM BURNHAM, *INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES* (3d ed. 2002) at xxvii. Burnham's treatise has been translated into Chinese, Russian, and Ukrainian. Spanish and Georgian editions are planned.

6. *Id.* at 86.

7. See generally, Norman Dorsen, *Foreward: The Global Law School Program*, in ALAN MORRISON, *FUNDAMENTALS OF AMERICAN LAW* (1996) at xxvii. Two recent additional books providing brief overviews of the subject are PETER HAY, *LAW OF THE*

I used the Morrison text when I taught in Chile, and I later adopted the Burnham text in my second year at the University of Miami. Those two books, along with the older one by von Mehren, are useful in providing clear overviews to the foreign student. They simplify and generalize critical differences among legal systems. My foreign students appreciated the brevity and clarity of these materials. For example, after reading 30 pages about the First Amendment in Burnham's text, the students felt somewhat comfortable with the basic constitutional framework.⁸ But, after a number of years of teaching in this area, I question whether creating this kind of comfort zone is the best approach.

Foreign law students come to the classroom with different backgrounds, experiences, and skills than do U.S. law students. If American students struggle to appreciate the nuances and complexities of the subjects they are reading, the difficulties can be considerably greater for non-American students, who are accustomed to working with codes more than cases and who have been educated by lecture rather than Socratic questioning. Foreign law students also may be less prepared than their American counterparts to tackle a traditional "issue-spotting" exam. This is not to say that the traditional Socratic method is the only or best method of teaching law—American or foreign. But a weakness, in my view, of the texts available until now has been that their mode of presentation is actually similar to the civilian approach,⁹ thus failing to convey in their mode of presentation what is distinctive about American legal education. Consequently, when I used the Morrison and Burnham books, I provided the students with a large supplement containing cases of historical significance together with recent Supreme Court decisions of particular relevance to the themes discussed in class.

In the past year, this weakness in the existing texts was addressed by the publication of three new books. Gerald Paul McAlinn, Dan Rosen and John P. Stern's *An Introduction to American Law* ("McAlinn") presents a wide spectrum of legal topics in 400 pages of heavily edited cases. In a text that is divided into 13 chapters, the authors first cover some of the distinctive aspects of the American legal system, including aspects of separation of powers and federalism, civil liberties, and the jury system. The text also includes chapters dedicated to other substantive areas of law, such as administrative law and intellectual property. The authors draw upon recent Supreme Court cases in such areas as presidential elections, affirmative action, intellectual property, and same-sex marriage.

UNITED STATES (2002), and LLOYD BONFIELD, *AMERICAN LAW AND THE AMERICAN LEGAL SYSTEM* (2006).

8. See Burnham, *supra* note 5, at 355-81. When I used the Burnham text, I heavily supplemented the course materials with recent Supreme Court decisions in their entirety to provide a greater flavor for the current constitutional debate.

9. See generally Keith S. Rosenn, *Law and Development in Latin America: A Case Book* (tent. 2d ed. 2000) (unpublished manuscript on file with *American Journal of Comparative Law*) at 96.

Another text of similar length is Professor Alberto Manuel Benitez's *An Introduction to the United States Legal System: Cases and Comments*. Benitez covers a comparable range of topics to McAlinn but with more narrative, including some large excerpts from the Morrison anthology. Although Benitez covers fewer cases than McAlinn, those included are given fuller coverage.

And now there is ALGC, by Fletcher and Sheppard, which I am now using a second time. ALGC incorporates materials the authors used for a 26-hour intensive course for incoming foreign students at Columbia. The book adopts a case-based approach and is divided into four major sections. Part 1, entitled "Common Law and Civil Law," tackles differences in language and legal reasoning between common law and civil law legal systems. Part II, "The Constitutional Identity," includes ten chapters on such important topics as the U.S. Constitution, judicial review, federalism, equality (and the Equal Protection Clause), freedom (and the First Amendment). Part III, "The Theory of the Common Law: Liberalism and Its Alternatives," is comprised of 12 chapters that highlight jurisprudential debates in property, contracts, torts and an overview of the American civil trial. Finally, Part IV, "Criminal Law: the Adversary System and its Alternatives," covers the differences between adversarial and inquisitorial criminal justice, the scope and proof of self-defense, and U.S. approaches to crimes in both the domestic and international contexts, including the war on terrorism. This last part also discusses the trial of Bernhard Goetz, on which Professor Fletcher authored a separate book in 1988.¹⁰ ALGC includes three appendices on how to (1) brief a case, (2) use cases as precedent, and (3) interpret statutes.¹¹

Fletcher and Sheppard's introductory chapters clearly benefit from their experience as comparativists. The introduction highlights some "simple" facts about American law that are a response to common misconceptions held by foreign students. Part I of the text delves into some of the major analytic and linguistic differences, between the common law and civil law approach. Here the authors comparative approach to the subject comes through most forcefully. Chapter 2 includes a 1927 case of the German Supreme Court to contrast legal reasoning and interpretation in civilian systems from those in common law countries. Chapter 3, entitled "The Language of Law," makes some specific comparisons between American and European vocabulary and philosophy. This comparative foundation then leads neatly to Chapter 4—an analysis of the challenges of legal reasoning in our common law system through a skillful dissection of the Supreme Court's opinion in *Rogers v. Tennessee*.¹²

10. See GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1988) (analyzing *People v. Bernhard Goetz*, 68 N.Y. 2d 96 (1987)).

11. The authors have prepared a very thorough guide for teachers and a companion web site where the teacher's manual can be downloaded, and which includes some online references that may be useful to students. See <http://www.oup.com/us/companion.websites/0195167236/?view=usa>.

12. 532 U.S. 451 (2001).

I particularly enjoy the beginning of Part II, which provides some historical perspective on the Constitution and judicial review, major topics that always interest my students. This semester was the first time that I had foreign students actually read *Marbury v. Madison* (rather than just read about it). The classroom response was excellent; students saw the historical and political tensions surrounding the case. As a result I believe they achieved a deeper understanding of the role of judicial review in the U.S. than students did in previous years, when I used books that just summarized the case. But then again, during the very same semester that I was covering these topics, the Senate furnished an extraordinary electronic supplement—the Roberts and Alito confirmation hearings.

Other especially helpful chapters that generated interesting class discussion were one on federalism, one on the jury system, and one entitled “The Alternative Constitution,” which sets out historical and legal developments connected with the Civil War and Reconstruction. The authors also provide an excellent conclusion entitled “The Right and the Reasonable.” Unlike the authors and editors of the other books discussed above, Professors Fletcher and Sheppard step back and put their preceding chapters on American law in perspective, with an eloquent summary of the legal, historical and jurisprudential points covered in the book.

It should not be surprising, particularly to anyone who has worked with foreign students, that many of the great strengths of ALGC were in fact perceived as great weaknesses by the students. A survey of the students in my class indicated that some found the book’s approach “confusing.”¹³ Some were concerned that the chapters included questions but not clear answers. Whereas the text by Professor Burnham contains a clarifying and simplifying thirty-page discussion of the First Amendment, Chapter 10 of ALGC (“Freedom Fights Back”) tackles the subject with a one-page historical introduction, an edited version of *New York Times Co. v. Sullivan*,¹⁴ and two pages of queries and comments. Of course some students will go beyond the Introduction to U.S. Law course to take electives on constitutional law and the First Amendment. But not all foreign law students, many of whom are enrolled in a one-year masters program, can do so. Some may rightly feel that ALGC’s coverage of this crucial area of American law is not sufficiently thorough or clear.

My own experience is that the shift from exposition in the 1980s and 1990s to the case method employed in more recent books like ALGC is an important pedagogical step forward. Some of the dissatisfaction expressed by my students was, in my opinion, more a discomfort with the way that law is taught in the United States than with one particular book. However, I would agree with these students that some sections of the Fletcher and Sheppard book might have chosen cases that were not only historically or analytically interesting, but which provided some insight into current Supreme

13. Comments on file with the author.

14. 376 U.S. 254 (1964).

Court jurisprudence. In the alternative, some additional commentary might have helped to guide the students on these points. Imagine foreign students with little historical or cultural context trying to make sense of equality in the American legal system. They know little about the history of slavery in the U.S., the Civil War, or Reconstruction. When we come to the text of the Fourteenth Amendment, they question why we Americans have not amended our constitution more clearly. Why do we entrust constitutional meaning on such important matters to judicial interpretation? It may not help matters that the principal case included in this area is *In Re Griffiths*,¹⁵ an interesting case from 1973 with a dissent by Justice Rehnquist that brings in historical drama. The problem, however, is that the students have not read *Plessy v. Ferguson*¹⁶ or *Brown v. Board of Education*¹⁷ (the text briefly discusses them), nor have they read the more recent Supreme Court cases on affirmative action, such as *Grutter v. Bollinger*.¹⁸ For this reason, I would recommend readings and cases to supplement some of the chapters in the Fletcher and Sheppard text.

I would encourage the authors to take a closer look at their chapter on self-defense in criminal law. They raise some issues about the so-called war on terror and the extent to which the principles of self-defense apply in that context. These questions are enormously interesting to the students at this moment in time. The authors relate these questions to the trial of Bernard Goetz¹⁹ and to the principles of self-defense as articulated in New York criminal law. The connection between the *Goetz* case and the war on terror was a difficult leap for the class and proved to be a distraction to the discussion that the students wanted to have on the recent Supreme Court jurisprudence in this field.

All of the major textbooks discussed here (Burnham, Morrison, McAlinn, Benitez and ALGC) were written in response to their authors' teaching experiences with foreign students. They provide a general overview of American legal concepts without specific reference to any particular region of the world. In my teaching I see that a student from Israel or Japan or Germany or Venezuela or Iraq may relate differently to concepts of freedom of speech, women's rights, or the death penalty. As the foreign student market continues to grow, the demand will increase for additional texts that focus on comparisons with specific legal systems or regions of the world.

American Law in a Global Context is a challenging case book for foreign lawyers. The case method, while frustrating at first to foreign students, will ultimately help them to build their skills in the common law method. For those foreign lawyers with more than a passing interest in the subject, the new generation of course materials will be well worth the effort. Exposure to actual cases provides these stu-

15. 413 U.S. 717 (1973).

16. 163 U.S. 537 (1896).

17. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

18. 539 U.S. 306 (2003).

19. See note 10, *supra*.

dents with a deeper understanding of how Americans approach law and also confers the benefit of enabling them to be more successful on law school exams, including the bar examination. Fletcher and Shepard's work is an important contribution to pedagogy and to the resources available to those of us who teach U.S. law to students from abroad.