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“USING GLOBAL LAW TO TEACH DOMESTIC ADVOCACY”

*John B. Mitchell**

I. GLOBAL LAW AND ADVOCACY TRAINING

Among us academics, exploring the integration of a global perspective into the law school curriculum is considered to be “fashionable” these days.¹ It merited an all-day session at the January, 2006 American Association of Law Schools (AALS) National Conference,² appeared among the roster of programs for AALS 2006 Clinical Conference,³ filled an entire issue of the *Journal of Legal Education*,⁴ and is the subject of a growing body of

* J.D. Stanford Law School, 1970. The author wishes to thank Seattle University School of Law for a grant supporting this work, Beth Lyons for her invaluable suggestions, Madeline Kass, and Ron Slye for their assistance, Kelly Kunsch (Hall of Fame Librarian), and Phyllis Brazier for her word-processing skill.

¹ Catherine Valcke, *Global Law Teaching*, 54 J. LEGAL EDUC. 160, 160 (2004) (“In North American law schools, going global is fashionable these days.”). *See also*, John J. Costonis, *The LSU Law Center-Canada Bijuralism Conference—Introduction: Global Law and the Law School Curriculum*, 52 J. LEGAL EDUC. 1, 1 (2002). (“‘Global Law’ is becoming as influential an organizing principle for law teaching and research as trends associated with critical legal studies, feminist and other forms of outlier jurisprudence, and law and economics and the ‘law and’ movement generally”); Adelle Blackett, *Globalization and its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. TRANSACT’L L. 57, 58 (1998) (globalization is the “big” thing).

² Workshop on Integrating Transnational Legal Perspectives into the First Year Curriculum at the Ass’n of Am. Law Sch. Annual Meeting in Washington, D.C. (Jan. 4, 2006) podcast available at www.aals.org/am2006/program/transnational/index.html.

³ Making International Cooperation a Two-Way Exchange: Learning With Our Partners, Plenary Session I - Collaboration in Teaching at Ass’n of Am. Law Sch. Conference on Clinical Education in New York, N.Y. (Apr. 30, 2006).

⁴ *See, Transnational Articles from the AALS Conference*, 55 J. LEGAL EDUC. 475 et. seq. (2005); This transnational theme continued into the next issue of the *Journal. See, Transnational Articles from the AALS Conference*, 56 J. LEGAL EDUC. 161 et. seq. (2006), where the editors promise that “[i]n our next issue you will see articles suggesting how to teach transactional issues in Civil Procedure, Criminal Law, Property, and Torts.” *Id.* at 159.

pedagogical scholarship, as evidenced by this article. It also offers interesting possibilities for teaching domestic trial advocacy. It is upon one such possibility that this article focuses: Using foreign law as a tool for refining students' strategic and performance advocacy skills.

As yet, there exists no clear, agreed upon definition of what is meant by "globalization"⁵ let alone any definable body of what can be termed "global laws."⁶ Rather, what we have now is a potion, bubbling and boiling: Add eye of newt, sprinkle with bat wings, mix in Yen and Euros, slowly add correct proportion foreign law,⁷ international law,⁸ comparative law,⁹ and an ingredient some say does not yet exist in reality—transnational law (foreign law mixed with international law)¹⁰—and stir. At some point, when the liquid is

⁵Blackett, *supra* note 1, at 60 (discussing the concept of globalization as ambiguous and that it means different things to different people).

⁶See, e.g., Saúl Litvinoff, *Global Law in the Perspectives of the Bijural Curriculum*, 52 J. LEGAL EDUC. 49, 50, 52 (2002) (discussing that there is no global law yet and that if it evolves, it will come out of custom); Valcke, *supra* note 1, at 163 (discussing that there is no such thing as transnational law, yet).

⁷See, e.g., Charles R. Stevens, *Modern Japanese Law as an Instrument of Comparison*, 19 AM. J. COMP. L. 665 (1971); Jerome Alan Cohen, *On Teaching Chinese Law*, 19 AM. J. COMP. L. 655 (1971).

⁸See, e.g., Isaak Dore, *The International Law Program at Saint Louis University*, 46 J. LEGAL EDUC. 336 (1996) (reflecting on their burgeoning movement towards appreciating the significance of bodies of law that stand independent from the domestic law of any particular nation-state). My colleague Ron Slye (with his co-author Beth Van Schaak) have recently contracted with Aspen Publishers for a book on International Criminal Law (e.g., Hague and Geneva Conventions, international tribunals, and such).

⁹See, e.g., Michael P. Waxman, *Teaching Comparative Law in the 21st Century: Beyond the Civil/Common Law Dichotomy*, 51 J. LEGAL EDUC. 305 (2001). But see Basil Markesinis, *Comparative Law: A Subject in Search of an Audience*, 53 MOD. L. REV. 1, 20, 21 (1990) (noting that comparative legal methods came from late 19th Century, where the methods of "legal science" at that time looked at formal rules, procedures, and institutions, and assumed the primacy of private law). "Thus, in a strange sort of way the comparative method may have more of a future by penetrating other subjects than by trying to assert its own continued existence under the unconvincing title of comparative law." *Id.* at 21.

¹⁰See, e.g., Franklin A. Gevurtz et al., *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 PAC. MCGEORGE GLOBAL

sufficiently reduced, global law will emerge in the residue. While global law has been much the topic of discussion in the law-school world, few schools are yet doing more than talking;¹¹ although a few have taken the lead in beginning this alchemy of turning base domestic legal education into something of substance in the glittering world of globalization.¹²

Given the lack of a precise, agreed upon definition of global law, it should not be surprising that a wide variety of approaches for implementing the integration of global law into the law school curriculum have bubbled forth from the cauldron.¹³ Thus, as most are

BUSINESS & DEVEL. J. 1, 11-13 (2005) (Students at University of Michigan Law School must take a "Transnational Law" course – which encompasses any transaction or dispute that crosses national boundaries.). *But see* Vacke, *supra* note 1, at 163 (as yet, there is no such thing as a true body of transnational law; the issues such a body of law would govern currently are resolved by "appeal to a combination of international and internal state law.") *id.* at 163.

¹¹ Nora D. Demleitner, *A Response to Martha Reimann: More, More, More But Real Comparative Law*, 11 TUL. EUR. & CIV. L. F. 73, 74 (1996) ("Despite the rhetoric about globalization of law, only a few law schools in the country offer any international or comparative law training in the first year."). *See generally* Gevurtz, *supra* note 10, at 13-16. Comparatively little has changed since 2005, the McGeorge report lists very few law schools which are aggressively seeking to integrate global perspectives into the curriculum.

¹² Although, no doubt even as I write, other law schools are joining the endeavor. *See, e.g.*, John Edward Sexton, *The Global Law School Program at New York University*, 46 J. LEGAL EDUC. 329, 330 (1996) ("[L]aw must be viewed today through a global lens, and . . . the way we think about and teach law must incorporate this perspective."); Dore, *supra* note 8, at 336 (discussing the Global Law Program at Saint Louis University); Gevurtz, *supra* note 10, at 13-16 (discussing global law approaches at McGeorge, Michigan and Georgetown). *See also* Costonis, *supra* note 1, at 1, 3 (since LSU and McGill of Canada teach in bijural jurisdictions, i.e., both civil- and common-law traditions, they use a "trans-systematic method" in which, e.g., a contracts class looks at a problem such as enforcement of promises from both civil- and common-law approaches). In fact, Harvard Law School, as part of "the broadest overhaul [of its first year curriculum] in more than 100 years," will now require students to take "one of three new courses dealing with International Law." *See*, Jonathan D. Glater, *Harvard Law Decides to Steep Students in 21st Century Issues*, THE NEW YORK TIMES, Oct. 7, 2006, at A8.

¹³ This wide array of approaches is in part a reflection of the equally wide range of rationales supporting this movement. For example, introducing global law into the

aware, some schools offer comparative law courses,¹⁴ some bring in foreign scholars¹⁵ to teach or co-teach classes on foreign law or bring comparative perspectives into domestic doctrinal courses. Some schools have conjured International Law¹⁶ and Comparative Legal Culture¹⁷ courses, while others see in the rising steam from the cauldron a unifying Institute on Globalization,¹⁸ or a mandate to send

curriculum: prepares students to work with foreign attorneys and foreign clients, *see, e.g.*, Cohen, *supra* note 7, at 655; Gevurtz, *supra* note 10, at 9, prepares students to face increasingly convergent legal systems, and to become aware that many of their transactions will involve multiple bodies of domestic, foreign, and international law, *see, e.g.*, Peter Goldsmith, *Globalization: The European Experience*, 46 J. LEGAL EDUC. 317, 318-20 (1996); Roberta Cooper Ramo, *A Practitioner Looks at Globalization: I*, 46 J. LEGAL EDUC. 313, 314 (1996), instills the ability to “think like” a global lawyer, *see, e.g.*, Valcke, *supra* note 1, at 161, provides a perspective from which to teach our own law, revealing avenues of possible reform, *see, e.g.*, John Edward Sexton, *supra* note 12, at 330; *see, e.g.*, Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*, 46 AM. J. COMP. L., 637, 645 (1998), and increases our capacity of tolerance of others while, at the same time, forcing us to respect the other’s “difference,” Vivian Grosswald Curran, *Dealing in Difference: Comparative Law’s Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657, 657 (1998).

¹⁴Sexton, *supra* note 13, at 334 (articulating the need for comparative law courses); Dore, *supra* note 8, at 338 (explaining that Saint Louis program has curriculum composed of comparative and international law courses). In fact, my colleague, Russell Powell, has just created a course entitled “Comparative Law: Middle East” (syllabus on file with author).

¹⁵*See, e.g.*, Sexton, *supra* note 13, at 333; Norman Dorsen, *Achieving International Cooperation: NYU’s Global Law School Program*, 51 J. LEGAL EDUC. 332, 333 (2000) (explaining that every year NYU invites eighteen foreign law teachers to teach courses and seminars).

¹⁶For example, my colleague Ron Slye has developed an International Criminal Law course (soon to be a book *see* Slye, *supra* note 8. *See also*, JORDAN PAUST ET AL., *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* (Carolina Academic Press 2000); Dore, *supra* note 8, at 338. (noting that Saint Louis law school has several International Law courses as part of their program).

¹⁷Waxman, *supra* note 9, at 306 (Law in Comparative culture takes problems and studies the approaches of select legal systems traditions), and considers law as written, law as implemented, and law within the particular cultural context, *see* Waxman, *supra* note 9, at 308-10.

¹⁸*See, e.g.*, Seattle University School of Law recently established an International

their students to law clinics in foreign countries.¹⁹ More visionary still, others propose a pervasive global curriculum, where global perspectives are integrated into existing domestic doctrinal courses rather than confined to discrete doctrinal offerings.²⁰

While there have been whispers in this global law dialogue hinting at the possibility of refining our clinical perspective through a global awareness,²¹ virtually all of the curricular discussion (and

and Comparative Law Center. The Center brings in speakers and panels, organizes overseas programs, encourages and supports International Law scholarship, and assists faculty who wish to bring a global legal perspective into their traditional courses. (available at <http://www.law.seattleu.edu/international?mode=standard>).

¹⁹ See generally, J. P. Ogilvy and Karen Czapansky, *Clinical Legal Education: An Annotated Bibliography* (3d ed.), 11 CLIN. L. REV. (Special Issue 2.) 111-411 (2005), detailing the experiences of American students in foreign clinics.

²⁰ See, e.g., Michael P. Waxman, *The Comparative Legal Process Throughout the Law School Curriculum: A Model Proposal for Culture and Competence in a Pluralistic Society*, 74 MARQ. L. REV. 391 (1991) (proposing integrating comparative law into first-year subjects, and the rest of the curriculum); Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L. F. 49, 50 (1996) (authors proposing integrating comparative law into other courses) [Hereinafter Comparative Legal Process]; Such an approach has been apparently successful both in the individual course context. M.C. Mirow, *Globalizing Property: Incorporating Comparative and International Law into First Year Property Class*, 54 J. LEGAL EDUC. 183 (2004), and at the full institutional level, Gevurtz, *supra* note 10, at 2 (McGeorge professors integrate international, transnational, and comparative law issues into traditional courses; Georgetown students select from mini-courses with global law perspectives paralleling traditional first year courses). Cf. Costonis, *supra* note 1, at 5 (describing bijural education at LSU); On the other hand, there certainly have been critics of such a "pervasive" approach to integrating global law into the curriculum: See, e.g., Rudolph B. Schlesinger, *The Role of the 'Basic Course' in Teaching of Foreign and Comparative Law* 19 AM. J. COM. L. 616, 616-17 (1971) (stating that it is unrealistic, and likely misleading, to try to integrate comparative law into traditional courses).

²¹ See, e.g., Ruther Buchanan and Sudya Pahuja, *Using the Web to Facilitate Active Learning: A Trans-Pacific Seminar on Globalization and the Law*, 53 J. LEGAL EDUC. 578, 580, 590 (2003) (using "case studies where multiple bodies of law intersect" students do a role-play exercise where they take the position of one of five international organizations); Sexton, *supra* note 14, at 333-34 (author posits that students should work in clinics such as those dealing with the U.N. or transnational commercial issues); Reimann, "Comparative Law", *supra* note 20, at

implementation to date) has focused upon doctrinal and jurisprudential infusions.²² In fact, other than foreign externship placements,²³ setting up or working in foreign law clinics,²⁴ offering Human Rights²⁵ or Immigration Law clinics,²⁶ or transactional

58 (author discusses an “international legal practice” or “international litigations” course; courses would not be true comparative law courses, but would necessarily contain comparative “elements”); Valcke, *supra* note 1, at 177 (suggests that there should be clinical aspects to a “global curriculum”); John C. Reitz, *How To Do Comparative Law*, 46 AM J. COMP. L. 617, 628-29 (1998) (suggests developing a course where students see how attorneys “from inside” different systems use and argue law).

²² See, e.g., Yves-Marie Morissette, *McGill's Integrated Civil and Common-Law Program*, 52 J. LEGAL EDUC. 12, 20-21 (2002) (lists courses in program, all of which are doctrinal); See also, International/Global course offerings and summer abroad programs listed: Georgetown University Law Center, available at <http://www.law.georgetown.edu/oitp/semesterabroad.htm> (last visited Feb. 9, 2007); New York University School of Law, <http://www.law.nyu.edu/depts/acservices/registration/studyabroad.html> (last visited Feb. 9, 2007); Pacific McGeorge School of Law, http://www.mcgeorge.edu/academics/summer_school/index.htm (last visited Feb. 6, 2007); University of Michigan School of Law, <http://www.law.umich.edu/CentersAndPrograms/cicl/programs.htm> (last visited Feb. 9, 2007); Washington College of Law American University, <http://www.wcl.american.edu/studyabroad.cfm> (last visited Feb. 9, 2007).

²³ See, e.g., University of Michigan School of Law, available at <http://www.law.umich.edu/CentersAndPrograms/cicl/programs.htm> (last visited Feb. 9, 2007).

²⁴ Ogilvy & Czapsky, *supra* note 19. For example, four Villanova Law students spent two weeks in the University of Malta refugee clinic, while another student worked under the supervision of the University of Puerto Rico's Environmental Law Clinical director last summer. E-mail from Professor Beth Lyon, Villanova Law School, June 23, 2006 (on file with author).

²⁵ E.g., Seattle University School of Law offers a Human Rights Clinic. For a detail survey by the AALS International Human Rights Section reflecting many of the Human Rights Programs and Clinics throughout the country's law schools, available at <http://vls.law.vill.edu/clinics/aals/humanrightssurvey.htm> See also Deena Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505 (2003) and also Arturo Carrillo, *Bringing International Law Home: The Innovative Role Of Human Rights Clinics into the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527 (2004).

²⁶ See, e.g., Washington College of Law Professor Richard J. Wilson's International Human Rights Law Clinics (Political Asylum Cases), available at <http://www.aals.org/profdev/humanrights/wilson.html>.

simulations (which I assume someone, somewhere is conducting) in a discrete set of courses in which multiple bodies of domestic, foreign and international law play a part,²⁷ there does not appear to be real hands-on transnational clinical experiences in American classrooms,²⁸ though, that may be about to change.²⁹

The ultimate focus of this article is basic litigation skills training and with that in mind the creative possibilities are extensive. Students could argue within the context of other legal systems:³⁰ Taking simulation courses in civil law litigation; playing the role of a defense attorney in a so-called inquisitorial system,³¹ where the students try to affect the final outcome of the investigating

²⁷ Such simulation exercises, however, do appear to exist in certain Australian classrooms, Duncan Bentley & John Wade, *Special Methods and Tools for Educating the Transnational Lawyer*, 55 J. LEGAL EDUC. 479 (2005), and New Zealand classrooms, Catherine J. Iorns Magallanes, *Teaching for Transnational Lawyering*, 55 J. LEGAL EDUC. 519 (2005).

²⁸ While courses on transactional litigation are appearing in law school catalogues, to date, these are doctrinal courses, which are basically "Global Civil Procedure" or preparation for international law moot court competitions. *See, e.g.*, International Civil Litigation at Georgetown University Law Center, *available at* http://www.law.georgetown.edu/curriculum/tab_courses.cfm?Status=course&detail=1215, and international advocacy at University of Pacific, McGeorge School of Law, *available at* <http://www.mcgeorge.edu/catalog/media/Course%20Descriptions%20501.pdf>.

²⁹ The Law and Society Association hosted a roundtable on "The Rise of Transnational Advocacy Arenas" at its May Conference. The 2007 Clinical Program at the Association of American Law Schools Annual Meeting was entitled "Introducing International Law, Treaty-Law and other International Law Concepts in Domestic Cases or Projects—A Teaching Demonstration," *available at* <http://www.aals.org/am2007/brochure.pdf>.

³⁰ *See, e.g.*, Dore, *supra* note 8, at 337 (author proposes "learning advocacy techniques under a different but related system.").

³¹ *See, e.g.*, Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models and Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973) (discussing adversarial and so-called inquisitorial systems.). It has been suggested that terming the civil law system's criminal procedure as "Inquisitorial" is misleading, noting that is might be better term "non adversarial." MARY ANN GLENDON, MICHEAL WALLACE GORDON, CHRISTOPHER OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 179 (2d. 1994).

magistrate's file³² or trying to advocate in a religious³³ or customary law system.³⁴

It certainly could be interesting. But at this point, my thoughts about teaching trial skills within the influence of global law are far less ambitious. I propose taking unique aspects of some foreign legal system and using these unique aspects (as compared with our system) as a tool to help the students' domestic advocacy skills. You could use any foreign legal system, though choosing a fellow common-law system would probably be easiest given the students' familiarity with the structure of that system.

In order to fully demonstrate this idea, concreteness seems the best approach. I have thus created an imaginary class³⁵ for this article, replete with exercises and accompanying teaching notes. For this class, I have chosen the Scottish criminal procedure system due to a variety of interesting systematic differences from our own, including the "Scotch Verdict,"³⁶ which I feel are pedagogically useful.

³² See GLENDON ET AL., *supra* note 32, at 179, 181 (explaining that this file is an extensive dossier compiled through investigation and witness interviewing by a prosecutor or judge. The result of this investigation generally will determine if the defendant will be charged. "Under modern codes of criminal procedure, the accused has a right to be represented by counsel during interrogation [and the investigation] and to remain silent."

³³ See, e.g., RUDOLPH B. SCHLESINGER, HANS ET AL., *COMPARATIVE LAW*, 297, 302 (6th ed., 1998) (For Example, in Israel, marriage and divorce are left to the jurisdiction of Jewish, Moslem, and Christian Religious courts. In Saudi Arabia and Oman the law's largely based one religious source).

³⁴ See, e.g., SCHLESINGER ET AL., *supra* note 33, at 303 ("In Indonesia . . . the Dutch introduced the so-called 'dualist' system; the majority of the indigenous population lived under their own customary law (adat) law, varying from region to region.").

³⁵ I have never actually taught this class, and now teach other courses than trial advocacy. But I fully believe it would "work."

³⁶ Criminal juries in Scotland have a choice of three-verdicts; Guilty, Not Guilty, "Not Proven." See Sam Bray, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299, 1299 (2005); Joseph M. Barbato, *Scotland's Bastard Verdict: Intermediacy and the Unique Three Verdict System*, 15 IND. INT'L & COMP. L. REV. 543 (2005). Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, 62 LAW & CONTEMP. PROBS. 173, 193 (Spring 1999).

Though inevitably the students would obtain some of the benefits said to reside in the integration of global law in the curriculum (e.g., gaining a perspective from which to critique our own system, offering an antidote to American-centered provincialism), that is not my primary goal. Nor do I intend that the students imagine themselves to be Scottish lawyers; after all, we all recognize that in order to have the context needed to carry out such a task, the students would need to fathom the Scottish culture and character, and the social and political history of Scotland, as well as the interrelationship between Scottish law and the culture.³⁷

Again, my incorporation of Scottish criminal procedure into exercises in an American trial advocacy course is an exercise in instrumentality. It is intended as a device to enhance the students domestic advocacy skills by literally changing the rules on them, thereby forcing them to rethink their strategic litigation approaches when the range of procedural assumptions underlying their strategies (e.g., that they will be allowed *voir dire*, that the verdict must be unanimous, that they may give an opening statement) abruptly change.

What follows is a full demonstration of my concept. It includes an oral “assignment” to the students in a trial advocacy class, and then “teaching notes” for the exercises that will be the focal point of that assignment. As you will see when reviewing the teaching notes, in Part 1, students quickly catalogue the various aspects of the Scotch criminal procedure system in which that common-law system differs from our own. In Part 2, going back to the American procedural system, I put forth a simple robbery case hypothetical, and then set up a series of questions for a simulation class in which the hypothetical

³⁷ See, e.g., Barbato, *supra* note 36, at 544 (explaining Scotch law is inextricably tied to the Scotch heritage and culture); Duff, *supra* note 36, at 173 (“One of the benefits of the comparative study of legal institutions is that it exposes the extent to which they are shaped by contingency as well as by logic or principle.”). See also, Barbato, *supra* note 36, at 546, (stating that the three verdicts in the Scotch system are a “product of historical accident.”) Cf. Waxman, *supra* note 21, at 391 (describing that comparative law curriculums include an appreciation of cultural context).

is used to help develop the students' strategic and performance litigation skills.

Finally, Parts 3 and 4 contain mock teaching notes for using the Scotch criminal justice system within the same hypothetical as in Part 1, again, in order to refine the students' strategic and performance trial skills.

II. ASSIGNMENT TO CLASS

We're going to be doing a series of exercises in class that are intended to help you see the relationship between your Case Theory, the strategic tactics available to successfully present your theory, and the existing procedural rules. All this will be based on the robbery hypo³⁸ in your text. Please, know it inside-out. When thinking about the hypo, imagine that you are representing the defendant. Now, in our next class, I'm going to ask you to articulate your strategic, practical, and legal reasons for your choice of Case Theory. So, again, be prepared. We're then going to look at how you would approach opening statement, voir dire, and choice of witness(es) given your Case Theory. All pretty standard stuff; but then we're going to do something a bit more unusual. We're going to change the procedural rules, and then have you rethink how you'd carry out or modify your Case Theory.

What do I mean "change the rules?" We're going to stay in our basic American legal system, but we're going to borrow a few rules from a fellow common-law nation: Scotland. Read the Peter Duff article in your materials. You'll see that even countries with a common-law system can make different procedural choices than we've made. For example, there's no *voir dire* or preemptory challenges to jurors in the Scottish system. Will that affect your strategy for persuasively presenting your Case Theory? How? What will you do?

Now, why are we doing this? Simply to change from the routine is one possibility, and not necessarily a bad one at that. Admittedly, this has a certain game-like quality, but in some profound sense, that

³⁸ See *infra* p. 13 and accompanying text.

is the essence of all advocacy. Also, there is something to be said for learning about other cultures, whether it be art, politics, history or, as in this case, law. But, I have something more in mind. The procedural rules (in conjunction with Rules of Evidence) set the boundaries on plausible strategic options for effectuating your Case Theory. By changing the rules on you, I'm forcing you to be flexible, adaptive, and creative in your understanding of trial strategy. This is going to be a real challenge.

We'll start next class with assessing the similarities and differences between the Scotch criminal procedure rules and our own. We'll then put that information aside for the moment, and analyze the robbery hypo within our American system. Then we'll analyze the exact same hypo, this time by adopting some of the Scotch procedural rules. Are there strategies we will have to abandon altogether, or must we merely look for an alternative strategic paths? On the other hand, do our new procedural rules provide us with opportunities we did not have under the American rules? This will be fun. It will also be difficult, and require sophisticated strategic fluidness.

III. TRIAL ADVOCACY EXERCISES—TEACHING NOTES & LESSON: PLAN FOR CENTERING ON STRATEGIC DECISION-MAKING WITH A “GLOBAL” FLAVOR

Description: This exercise has four (4) parts if you choose to do the full exercise. The instructor may, however, shorten the exercise by choosing parts 1, 2, and 3 or 4. Part 1 is a quick introduction to unique features of the Scottish legal system. Part 2 asks students to consider alternative case theories to a robbery defense, within the current American system, and to make strategic decisions including the content of specific skills performances (e.g., voir dire, opening statement), based on their case theory decisions. In parts 3 and 4, the students replace familiar aspects of the American criminal procedure system with those of the Scottish system (e.g., in Scotland, there is no jury voir dire), and repeat the strategic analysis from Part 1.

Purpose: To force the students to refine their trial strategies and skills performances in light of different (i.e., Scottish) criminal

procedure rules, thereby sharpening their strategic skills and making explicit the relationship between legal procedure and the available range of trial strategies. Secondly, the exercises show the students that other approaches to conducting a criminal trial than our own are possible.

Readings: A good summary of Scottish Criminal Procedure is offered in Peter Duff's, "The Scottish Criminal Jury: A Very Peculiar Institution."³⁹ If the instructor is uncomfortable with a summary, they can have their library borrow a copy of Robert Wemyss Renton and Henry Hilton Brown's, CRIMINAL PROCEDURE ACCORDING TO THE LAW OF SCOTLAND.⁴⁰

PART 1: INTRODUCING THE SCOTTISH CRIMINAL PROCEDURE SYSTEM

While a common-law system, the Scotch criminal procedure system differs from our own in a number of significant respects (e.g., no voir dire or peremptory challenges, no opening statement). Depending on the time the instructor chooses to commit to this portion of the exercise, the instructor can; (1) provide the students with a list or chart noting the differences from our system, or (2) have the students bring forth and discuss the differences.

A. Summary of unique aspects of Scottish Criminal Procedure:

Both the United States and Scotland are common-law systems in which the criminal defendant is presumed innocent,⁴¹ the prosecution must prove guilt beyond a reasonable doubt,⁴² and the defendant has a privilege against self-incrimination,⁴³ a right to cross-examination,⁴⁴

³⁹ See Duff *supra* note 36.

⁴⁰ ROBERT WEMYSS RENTON AND HENRY HILTON BROWN, CRIMINAL PROCEDURE ACCORDING TO THE LAW OF SCOTLAND, § 24-01 at 423 (Gerald H. Gordon ed., Green & Son 1996) (6th ed. 1996).

⁴¹ See *id.*

⁴² *Id.*

⁴³ *Id.* §12-27 at 175 (explaining that accused is not required to answer questions or make statement during procedure to determine if there is a prima facie case to hold

and a right to counsel.⁴⁵ Nevertheless, there are significant procedural differences between the two systems. In contrast to the United States, the defendant has no right to a jury trial in Scotland.⁴⁶ In cases tried by jury, jurors are chosen by lots;⁴⁷ there is no voir dire,⁴⁸ no peremptory challenges,⁴⁹ and challenges for cause are so rare that there is no formal procedure for making such a challenge.⁵⁰ The Court keeps stringent control over the media regarding providing information potentially affecting the jury panel,⁵¹ without any countervailing American-like constitutional right to speech or information.⁵² There are no opening statements,⁵³ the jury is read the indictment, which contains a narrative of the prosecutors' cases⁵⁴ and, at the end of evidence, the jury only hears brief comments⁵⁵ by the

accused for trial). *See also, id.* § 24-10 at 427 (explaining that the accused is "a competent witness for defense", but may only be called for the defense "on his own application."); *id.* § 24-12 at 428 (explaining that defendant does not have to testify; but judge can comment on failure "to give evidence").

⁴⁴ *Id.* § 18-48 at 244.

⁴⁵ *Id.* § 12-11 at 170, § 12-41 at 180.

⁴⁶ *See Duff, supra* note 36, at 177 (explaining that when a case may be tried under law by either a judge or jury, as in the case with robbery, it is the *prosecutor* who chooses the form of fact finders).

⁴⁷ *Id.* at 180.

⁴⁸ *Id.*

⁴⁹ *Id.* at 182-85. ("In Scotland, the right of peremptory challenge has gradually disappeared. The position was formalized in the early nineteenth century when the accused was granted five peremptory challenges, but the number was reduced to three in 1980, and abolished altogether in 1995.").

⁵⁰ *Id.* at 181.

⁵¹ *Id.* at 185-6 (illustrating the scope with which this power is utilized by a case in which the trial court barred airing of a documentary television program, in part about a doctor who was also to be a witness at the trial. While the program had absolutely nothing to do with the subject of the trial, because it gave the impression that the doctor was a person of great character, the court felt it could unfairly influence the jury).

⁵² *Id.* at 187 ("It should be remembered that, unlike in the United States, in Scotland there is no constitutional right to freedom of expression or freedom of information to counter-balance the strict laws of contempt.").

⁵³ *Id.* at 189.

⁵⁴ *Id.*

⁵⁵ *Id.* at 190.

prosecution and defense. Since medieval times, the jury has consisted of fifteen persons,⁵⁶ with a bare eight-to-seven majority⁵⁷ to reach a verdict. There are no alternates,⁵⁸ and no hung juries.⁵⁹ Trial rarely takes more than a few days.⁶⁰ One pro-defense feature not found in United States criminal jurisprudence is that in Scotland, prosecution eye-witnesses must have corroboration.⁶¹ That means that a defendant may not be convicted solely on the testimony of even a completely credible eye-witness.⁶² And then there is the so-called "Scotch verdict;" guilty, not guilty, "not proven." Actually, in America, we effectively have "guilty" and "not proven,"⁶³ because our "not guilty" verdict is not an affirmative statement of the defendant's innocence,⁶⁴ but rather, that the prosecution has failed to carry its constitutionally mandated burden of proving every element of the crime "beyond a reasonable doubt."⁶⁵ In fact, there has been some suggestion by American academics to add a third verdict of "innocence" to our own system,⁶⁶ both to avoid the stigma⁶⁷ that that

⁵⁶ *Id.* at 187.

⁵⁷ *Id.* at 188.

⁵⁸ *Id.* at 188-89.

⁵⁹ *Id.* (explaining that if jurors get ill, the case still goes on. The system can accept losing up to three jurors. A majority vote of eight is then needed for a conviction, with anything less constituting an acquittal).

⁶⁰ *Id.* at 189.

⁶¹ *Id.* at 192-94.

⁶² On its face, the law of Scotland requires "at least two witnesses implicating the accused . . ." Renton and Brown, *supra* note, at §24-69 at 461. But, in fact, the rule "does not require every circumstance be proved by two witnesses." *Id.* Rather the prosecution must present "at least two sources" of evidence for the essential elements. *Id.* Of course, two consistent eye-witnesses would satisfy this rule. *Id.*

⁶³ See Bray, *supra* note 36.

⁶⁴ See Bray, *supra* note 36, at 1308 ("acquittal covers some who are [factually] guilty and some who are [factually] innocent . . .").

⁶⁵ Jackson v. Virginia, 443 U.S. 307, 314-20 (1979).

⁶⁶ See, e.g., Barbato, *supra* note 36, at 543-47; Andrew D. Liepold, *The Problem of the Innocent, Acquitted Defendant*, 94 Nw. U. L. REV. 1297, 1300 (2000); Samuel Bray, *supra* note 36, at 1303, n. 29. (Cal. Penal Code § 851.8 (West 1985 & Supp. 2005)). This finding is available to any defendant whose charges have been dropped or who has been acquitted at trial. The finding may be made by the judge upon a determination "that no reasonable cause exists to believe that the arrestee committed

remains over the defendant even after an acquittal, and to provide future employers more accurate “market information.”⁶⁸ Interestingly, there have been fairly recent movements in Scotland to eliminate the “not proven” verdict⁶⁹ because “[i]t simply creates the odd phenomenon of qualified innocence, which carries a stigma . . . or qualified guilt, which carries no penalty.”⁷⁰

PART 2: CASE STRATEGY IN THE AMERICAN SYSTEM—ALIBI VS. “REASONABLE DOUBT” DEFENSE

In this exercise, the students are defense attorneys strategically approaching the defense of a robbery charge. As an option, skills exercises tying strategic decisions to voir dire and opening statement are included.

The robbery hypothetical Ed Sam has been charged with robbing at gunpoint the attendant at Day ‘n Night Cleaners. The sole eye-witness, an employee and victim, while “very shaken” when talking

the offense for which the arrest was made.”); *See also* Liepold, *supra* note 64, at 1324-1325. Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 766-67 (1990). Other suggestions for “third verdicts” include “no blame” acquittal (jury disapproved of conduct) with “no violation” (did nothing legally wrong). Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 290 (1982) and “guilty, but not punishable” (acquitted for no exculpatory public policy defense, such as police overreaching).⁶⁷ *See e.g.*, Bray *supra* note 36, at 1300 (“With a high standard of proof, such as beyond a reasonable doubt, the public will know that some defendants are being acquitted because of insufficient evidence, not factual innocence”). *See also* Bray *supra* note 36, at 1320.

⁶⁸ Bray, *supra* note 37, at 1307-08.

⁶⁹ *See* Barbato, *supra* note 37, at 557-58.

⁷⁰ Barbato, *supra* note 36, at 563 (quoting John Home Robertson, Member of Parliament for East Lothian). Unlike Americans, the Scotch, therefore, do not seem to perceive the “not proven” or “reasonable doubt” acquittal as a mechanism that provides part of a screening system which serves to protect us from overreaching executive power. Compare, John Mitchell, *The Ethics of the Criminal Defense Attorney – New Answers for Old Questions* 32 STAN. L. REV. 295, 296 at seq. (1980), with Duff, *supra* note 36, at 195 (explaining that there is some anecdotal evidence that the “not proven” verdict has been employed by Scotch juries as a means for “jury nullification” (i.e., conscious rejection of the law)).

to police that night, was able to give the police a description of the robber (5'11," 185 lbs., early twenties Caucasian, male, short brown hair, red jacket). Defendant was selected by the victim in a lineup in which the eyewitness told police, "#3 [the defendant] looks like the guy who robbed me." Ed Sam is twenty-seven years old, Caucasian, 5'11", 185 lbs., short brown hair, a small "soul patch" goatee and, when arrested was wearing a red jacket with a thin white stripe along each sleeve. Other than the jacket, the government does not have any physical or forensic evidence.

Ed has told his attorney the following: As a kid, he grew up in a rough neighborhood and was always getting in trouble. He dropped out of school at sixteen, amassing a juvenile record including petty thefts, fights, and a car theft, for which he spent a year in juvenile detention. A drunken fight on his twenty-first birthday led to a month in county jail, and to a decision to get his life on track. Ed first got his general education degree (GED), went on to community college where he graduated with honors, and is currently the manager of a very successful grocery shopping service. He is engaged to a woman he met in community college (who is the administrative assistant to the head of a small software company), and plans to be married in the fall.

At the time of the robbery, Ed was playing cards with four friends. All claim that, but for "about fifteen minutes" when Ed went to get beer, he was with them all night. Two of Ed's friends have criminal convictions for theft crimes which would be admissible in the jurisdiction for impeachment. Also, the Day 'n Night Cleaners is a five to seven minute drive from the house where Ed was playing cards.

Class Questions

(1) What is your Case Theory?⁷¹

The legal theory is a reasonable doubt concerning the element of identity. The factual theory is misidentification (witness was "very

⁷¹ MARILYN J. BERGER, ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY 16-17 (1989) ("Case Theory" is a term denoting the advocates basic trial strategy).

shaken,” does not mention facial hair, defendant is twenty-seven-years-old, not early 20s. The Witness does not mention “thin white strip” on jacket sleeve and did not say at line up “that’s the man” instead said it “looks like the man”). While an alibi defense would include attacking the reliability of the ID, one could focus solely on misidentification without raising alibi.

- (2) If you’re going to attack the ID anyway, what’s the harm in throwing in the alibi?

A misidentification defense lets you raise a pure “reasonable doubt defense”;⁷² so, attack the prosecution case on cross-examination, do not call on any defense witnesses, force the prosecution to explain its own case rather than shift to the credibility of the defense witness, and focus the jury on weaknesses of the prosecution case. Of course, technically an alibi is not a true affirmative defense, i.e., the burden on ID remains on the prosecution. So, in theory a juror could think, “I don’t have a great deal of confidence in the alibi, but it’s enough to raise a reasonable doubt in my mind.” But as a practical matter, it would seem that if you put an alibi on, and the jury does not buy it, conviction is likely to follow. Additionally, in this case there appears to be some problems with the alibi: (1) Two of the witnesses have criminal records, and (2) there might have been time for Ed to leave the card game, and rob the cleaners, and return within “about fifteen minutes” (which could be twenty to twenty-five minutes when you’re playing cards with friends and drinking). Whether these problems will turn out to be serious will depend. If either or both of the other two friends, who do not have convictions, make good witnesses, the convictions are a non-issue. As to the time, to the extent the need for Ed to go out to get beer mid-game was not easily anticipated, so he would not have thought to have some stashed

⁷² The Case Theory in turn is composed of two interrelated components—a “Legal Theory” (generally the elements of a cause of action or defense, Berger *supra* note 69, at 17-22), and a “Factual Theory” (the party’s basic “story”). Berger *supra* note 69, at 22-23. Under this conception, opening, cross-x, voir dire, and such are not fragmented, atomized performances; but rather all opportunities to carry forth the “Case Theory.” Berger *supra* note 69, at 26-27.

in his car for his alibi and the beer he brought back was cold and he had no obvious means to have kept it chilled in his car, the timing becomes less of a problem.

(3) How should you advise Ed about taking or not taking the stand?

Initially, there is the concern that by taking the stand, for practical purposes, the defendant has diminished the power of a reasonable doubt defense in which the burden is totally on the prosecution. Once the defendant takes the stand, however, the case is likely to rise and fall on whether the jury believes the defendant, with the prosecution's closing focusing heavily on her cross of the defendant. Further, in this case, if the defendant takes the stand, he will also have to put on alibi witnesses, since it is difficult conceiving the jury accepting the defendant's story that he was with four friends if none of those friends are called to the stand to confirm his story. On the other hand, at least initially, it seems that the defendant has a powerful story to tell of a "life redeemed" which will likely make the potential tragedy of a wrongful conviction weigh very heavily on the jurors in deciding the case. Also, his story is in effect a legitimate form of character evidence "Look who he is. Look at what he's overcome. Look at the life he has now, the person he has become. How can you imagine the person he is today picking up a gun, pointing the gun in the face of a teenaged attendant and grabbing \$197.00?"

(4) How will your strategic choices affect your voir dire?

This portion of the exercise can be limited to class strategizing, or include an actual performance component where students conduct portions of the voir dire. Whatever overall strategy the defense chooses (alibi, with or without defendant's testimony; pure reasonable doubt case; etc.), a core portion of the defense will be misidentification.

The juror's view toward eye-witness identifications therefore must be explored. Do you believe people ever make mistakes identifying someone in court? Has anyone come up to you in the past

few months thinking they knew you when, in fact, they were a complete stranger? Tell me about that. Have you ever thought you knew someone, but it turned out that you were wrong? Tell me about that. Why do you think that happened?

Whether you put on a pure reasonable doubt defense or the alibi without defendant, you also have to voir dire on the defendant not taking the stand. If you were accused of doing something wrong and you were innocent, wouldn't you want to tell your side of the story? How will you feel then if my client does not take the stand? You know that under our Constitution a defendant does not have to take the stand in a criminal case? Do you agree with that? Why? Can you think why an innocent defendant would not take the stand?

If you are going to put on an alibi, you probably want to voir dire about alibi, too. If I said a defendant has an "alibi" what image comes to mind? Some people might say that if the alibi isn't "perfect", they'll ignore it. How do you feel about that? What kind of witnesses would you expect in an alibi? Would you be surprised if the witnesses were friends of the defendant?

Finally, as an overall strategy, you may decide that you are going to try to hang the jury, rather than try for an acquittal.⁷³ Therefore, e.g., you may decide to try a pure reasonable doubt case, thereby providing no record of a defense case for subsequent prosecutors if the jury hangs and the case is retried (though, under this strategy, the hope is to sufficiently hang the jury (seven-to-five; eight to-four) that the prosecution will not seek a retrial), and in jury selection chose strong individuals who you believe will disagree and hold to their positions.

(5) How will your strategic choices affect your opening statement?

The defense always has the option of waiving or reserving the opening statement (until the defense case). There are a number of reasons why the defense might choose not to give an opening statement.⁷⁴ The defense may not want to tell the prosecution

⁷³ BERGER ET AL., *supra* note 69, at 168.

⁷⁴ BERGER ET AL., *supra* note 69, at 208.

whether or not the defendant will testify, may not want to pin itself down to putting on the defendant (or even a case) before hearing the prosecution's case, and/or may not want to set the jury up for expectations which might not be met. (On the other hand, there is a risk that if the defense does not give an opening, the jurors will prematurely resolve the case into a narrative antithetical to the defense.)⁷⁵ Reserving the opening can serve several functions. It

⁷⁵ See LANCE BENNE & MARTHA FELDMAN, RECONSTRUCTION REALITY IN THE COURTROOM (1981) (While a good voir dire and cross examination may go some way towards exposing the jury to the defense case theory, nevertheless, there are risks if you do not get your story in front of the jury before their own "story" of the case hardens during the prosecution case. Placing presented evidence into stories (i.e., narratives) is at the core of the juror's decision-making process). Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520 (1991) (As Bennett and Feldman found, narrative allows jurors to make sense of the trial. Opening statements aside, trials are often fragmented affairs in which evidence comes in a piece at a time, often without any deference to logical order, and at times consisting of extensive evidentiary foundations which are unrelated to the substance of the case. Jurors make sense of this by constantly trying to fit the information they are hearing into a story. Narrative also guides the jurors to their ultimate decision, as they look at the stories being presented and assess whether the stories "made sense" in terms of logic, common sense, their own experiences, their cultural biases and beliefs, and their own stories about how people do or do not behave in the situations raised in the trial. The recent study by Penning and Hastie confirms that Bennett and Feldman thesis). *Id.* at 519-20 (according to this later study, jurors do not make their decisions using mathematical models, Bayesian or otherwise). *Id.* at 520 (explaining that they decide by what Penning and Hastie call the "story model." Like Bennett and Feldman, these researchers conclude that jurors order the information at trial into story representations and then compare their own stories to those offered by the parties in deciding the case outcome). *Id.* at 521 (explaining their central finding was that the story, which the individual juror constructs, will determine the decision that a particular juror reaches). *See also Id.* at 525. (and again, these stories will be constructed from case specific information mixed in with the juror's unique knowledge and beliefs about the world and those in it. In other words, the juror's socially constructed reality. "Because all jurors hear the same evidence and have the same general knowledge about expected structures of stories, differences in story construction must arise from differences in world knowledge; that is, differences in experiences and beliefs about the social world.") *Id.* at 525 (emphasis added).

gives the defense the choice of waiting until after the prosecution's case to decide whether to put on a case, can serve as a bluff in cases when the defense never intends to put on a case, and in those cases when the defense does put on witnesses, the reserved opening can focus the jurors on the upcoming defense witnesses.

In our case, the decision whether and when to give an opening, and the content if you do, is driven by the results of the previous strategic choices. If you are doing the pure reasonable doubt case, you might decide to reserve the opening and then rest when it comes time for your case. Or, you might decide to give an opening highlighting some of the major problems with the ID, pointing out that "the government will not offer any real physical (other than the jacket) or forensic evidence," and conclude with a statement that at the end of the testimony you will come back on closing and ask for an acquittal because "the government has not proven beyond a reasonable doubt that they have the right person."

If, on the other hand, the defendant is going to testify, you can frame your opening around who the defendant is (i.e., tell his story), where he was that night, about his being arrested and placed in a lineup, and then discuss problems with the ID. If defendant is not going to testify but still raise an alibi, you will not be able to tell his full personal story (although some of it may come in through one of his alibi witnesses), and will likely try in your opening to connect the alibi with the overall problem of misidentification.

PART 3: SAME HYPOTHETICAL; DIFFERENT SYSTEM OF CRIMINAL PROCEDURE

In this portion of the exercise, we take a second look at our hypothetical, but, for this round we imagine that we are working in American courts, but have incorporated all the variants of Scottish criminal procedure listed in Part 1, except for the "Scotch verdict". We'll use that unique feature of the Scottish system in Part 4.

(1) Which strategies we've discussed in Part 2 are either unavailable, or significantly curtailed under the Scottish criminal procedural rules?⁷⁶

Looking back at our strategic choices in Part 2, under the Scottish rules: (1) it is impossible to hang a jury,⁷⁷ therefore, that basic defense strategy in our own system is null and void under the Scotch rules; (2) we will not have either an opening or voir dire,⁷⁸ therefore, we will not have either of those avenues for educating the jury about our chosen theory, while the prosecution's "narrative" will be contained in the indictment and read to the jury at the beginning of trial.

(2) Can you compensate for any of these limitations on the strategies from Part 2? How?

You don't have either an opening or voir dire to get across your theory; but you do have some strategic options: (1) If possible, explicitly structure your cross-examination to give the jury a good sense of your theory; (2) ask the court to give you an instruction at the beginning of trial (and perhaps sometime in the prosecution's case) to the effect that the defense has not had an opportunity to explain its version of the case to the jury, that the burden of proof is completely on the government, and that for the system to function the jurors must wait until all evidence and arguments before they form an initial view

⁷⁶Given the garden variety nature of this case, the strict control the Scottish Courts exercise over the media (*see supra* note 68) is not significant; although, I have strong personal reservations about "trying cases in the media" under any circumstances. Once my good friend J. Gerald Schwartzbach commenced his representation of the actor Robert Blake (who was accused of murdering his wife), the story dropped from the media-until the acquittal. *See*, Andrew Blankstein & Jean Guccione, *Actor Robert Blake Acquitted in Shooting Death of His Wife*, LOS ANGELES TIMES, Mar. 17, 2005, at A3. *But see* Robert S. Bennet, *Press Advocacy and the High Profile Client*, 30 LOY. L.A. L. REV. 13, 13 (1996) (getting favorable media is particularly important for a business or political leader who has built a strong reputation for integrity and honesty).

⁷⁷*See* Duff *supra* note 36, at 190.

⁷⁸*See id.* at 180, 189.

of the case,⁷⁹ (3) if, similar to most trials in Scotland,⁸⁰ it is a bench trial, a well-crafted trial brief can effectively lay out the defense for the fact finder.

(3) Are any strategic options available under the Scotch criminal justice system that were not available under the American system? How will that option effect your cross-examination?

Even with an unimpeachable eye-witness (which the witness in this case certainly is not), Scottish rules require acquittal if the testimony lacks corroboration.⁸¹ Here, the fact that the robber and the defendant both owned red jackets is the only corroboration for the eye-witness. While even when raising a misidentification theory in the American system, defense counsel would raise the lack of the white stripe in the victim's description of the robber's jacket in cross examination ("You described the jacket as red, didn't you? You never mentioned seeing any other color on the jacket, did you?"); under the Scotch system that attack on the only corroboration would be a major part of the defense theory—no corroboration, no conviction:

- Cross examination of investigating officer
 - Officer, you interviewed the victim right after the robbery?
 - And he gave you a description of the robber?
 - You asked him what the robber was wearing?
- Cross examination of victim
 - Now you were only a few feet from the robber, weren't you?
 - And he was holding a gun with his arm stretched out?
 - So you could see his arm?
 - Now when you talked to the police, you gave them a description?
 - And you tried to give the most complete description you could?

⁷⁹ While this will not be completely effective given how jurors create stories, it may serve as a reminder, particularly if given more than once.

⁸⁰ Duff, *supra* note 36, at 175-76.

⁸¹ See *id.* at 194.

- Because you wanted to help the police catch this guy?
- And you knew that the more detailed and accurate your description, the better chance the police would have of catching him?
- So you described the robber's age? His weight and height? His hair color and hair style?
- And you described his clothing?
- You told the police that he was wearing a red jacket, didn't you?
- Just red, right?
- You didn't see any other color on the jacket, did you?
- If you had, you'd have told the police?
- You didn't see any white coloring against the red, did you?
- You didn't see any white stripes down the sleeves when the robber extended his arm?
- You didn't see any white stripes at any time, did you?

Cross examination of arresting officer

- Now officer, when you arrested my client he was wearing the jacket you've just introduced into evidence?
- And that jacket is red?
- But it has white stripes down both of the sleeves, doesn't it?
- And each of these stripes is at least 1/4" wide?
- So, you had no trouble seeing them when you arrested the defendant, did you?

[This is a slightly risky question which should probably not be asked unless (a) you've interviewed the officer or (b) the stripes are so obvious that any answer except *no* would appear disingenuous.]

PART 4: INCORPORATING ONLY THE "SCOTCH VERDICT"

In this portion of the exercise, all aspects of the American system remain as they are except we replace the guilty/not guilty verdict form

with the three part (Scotch) verdict—guilty, not guilty (i.e., innocent), not proven (i.e., reasonable no doubt).⁸²

(1) How would this form of verdict affect your voir dire?

Here, the first guilty verdict is the result of the prosecution carrying its burden. The third not proven verdict is the result of the prosecution failing to carry its burden. The second not guilty verdict, however, would be a burden the defense would have to carry. Part of voir dire will be making certain that the jury appreciates that as to “not proven,” the defense has no burden. If I argue that my client is innocent, and you are not convinced, will you automatically find him guilty? Do you think you could say that I’m not convinced the defendant is innocent, but I still have a doubt as to his guilt? Does it make sense to you to not find him innocent and not find him guilty?

Also, if you don’t plan to argue for not guilty/innocent (for reasons discussed below), analogous to the possible juror belief that an innocent defendant would take the stand, some jurors may believe that an innocent person would seek a not guilty/innocent verdict. If you were charged with a crime of which you were innocent, would you seek a verdict of innocent? If my client seeks only “not proven”, what will you think? Will you tend to think that he is probably guilty? Can you think of any reason that an innocent defendant would only seek a “not proven” verdict?

⁸² See Liepold *supra* note 64, at 1315. The proposals for bringing a “third verdict” into American jurisprudence did not envision that all three be considered at once; rather, the not guilty/innocent determination would be made by the jury only after an acquittal; see also Bray, *supra* note 36, at 1305. Interestingly, even in Scotland the judges tend not to instruct the jury how to apply the three verdicts. See Duff, *supra* note 37, at 193. (“[T]he [Scottish] Court of Appeal has discouraged judges from attempting to direct jurors as to the difference between not proven and not guilty, although they must be informed of three verdicts available to them.”).

(2) How would this form of verdict affect your decision about whether to put the defendant or the alibi witnesses on the stand?

While in theory it may be possible to imagine such an overwhelming amalgam of reasonable doubt that it transposes into innocence, as a realistic matter, the jury in this case would have to hear at least the alibi witnesses to come to a verdict of not guilty/innocent. Plainly, defendant's compelling story (i.e., why would he do this given his life?) would be a powerful addition to the mix. (Note: An interesting counseling exercise could be built around a client who initially insists on seeking a verdict of not guilty/innocent when his testimony and/or that of his witnesses carry serious risks if presented; while, at the same time, the defense has a very strong reasonable doubt (i.e., "not proven" case if no defense witnesses are offered.)

(3) How would this form of verdict affect your opening and closing?

If you are seeking a "not proven" verdict, your decisions concerning your opening do not differ from the strategic choices in Part 2 (although, you may wish to make clear from the outset that you are not seeking not guilty/innocent). If you are seeking a not guilty/innocent verdict (with "not proven" as a safety net), the matter is otherwise. First, you probably have to give an opening. Second, while the theme of misidentification will appear, your emphasis will be an affirmative innocence (i.e., your client's personal story of "overcoming and succeeding", and the alibi).

While from my experience, some defense attorneys feel that they must argue in closing that their client is innocent, they do so at the price of taking on a burden in a system where all burdens are on the prosecution. Claiming not guilty/innocent, however, is a form of affirmative defense where the burden (at least realistically) rests on the defense. How do you do that while maintaining the "not proven" option? Perhaps, defense counsel could begin closing, e.g., "Not only does the evidence mandate a verdict of 'not proven', under the evidence before you, you should find my client 'not guilty/innocent'.

Let me first list all the reasons the prosecution has failed to meet its extremely high burden of proof; then I will focus on the evidence from which my client's innocence of this robbery is clear. . . .".

IV. CONCLUSION

Awareness of law beyond the borders of our nation is one "fashionable" topic which is destined to remain with us. My expressed goal in this article was to use the criminal procedure of a foreign nation as a pedagogical tool for creating some very challenging exercises to improve strategic aspects of the students' domestic advocacy skills. At the same time, it is plain that such a use of foreign law carries other, secondary benefits. If nothing else, it can spice up the pedagogy, and that is hardly something to be taken lightly. Also, in the manner of a liberal arts education, exercises such as these add to the students' general knowledge of the world. These types of exercises also offer an antidote to our tendency towards American-centered provincialism. Beyond being told about another version of our common-law system, you get an additional level of appreciation when you actually attempt to use the aspects of that system that differ from our own. Come to think of it, as fashions go this may not prove to be a bad one.

