

# Two Halves of a Whole: Teaching International and Comparative Employment Law

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*While labour and employment law involves facets of both international and comparative law that are interesting and valuable, the best way to organize an advanced course for US law schools is to study both: Understanding of either is dependent on understanding both. The study of international labour and employment law at the level of the International Labour Organization (ILO) and regional international organizations such as the EU and the North American Free Trade Association (NAFTA) labour side accord take on real meaning and significance by showing their relationship with the national labour and employment laws of the major countries of the world. A unified international and comparative labour law course is an ideal way to develop and deepen the understanding that law students need to practice law in an ethical and professionally responsible way.*

## 1. INTRODUCTION

In the dim mists of the past (the 1960's when I attended law school), international law and comparative law courses played a small role in the elective curriculum at most American law schools. While the pattern at the elite schools might differ somewhat, in general few courses were offered and few students took them. These courses were offered to give the curriculum a slight patina of intellectualism for its own sake. That helped combat the image of law school as strictly a trade school. The course materials were at the most abstract and general level to be consistent with that aura of pure intellectualism. Thus, the international law course looked only at public international law. Comparative law involved study at a high level of abstraction of the differences and similarities of civil law, socialist law and common law systems. Some schools lumped international law and comparative law in with a few other courses, like jurisprudence and law and literature, under some rubric like 'perspective courses' and required students to take at least one of them. That guaranteed that most courses would get sufficient signup to justify their being offered.

Much has changed. Most significantly, the world outside of law schools has changed. 'Globalization,' however you define it,<sup>1</sup> has become ever more significant in ever more aspects of more people's lives. Most law students and even more law professors have now

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<sup>1</sup> P. T. Muchlinski, 'Globalisation and Legal Research,' *Int'l Law* 37 (2003): 221, identifies five ways in which the term 'globalization' is used.

travelled and studied internationally. To an increasing extent, the notion that we are all within 'Six Degrees of Separation'<sup>2</sup> now applies across the world. The group interested in and knowledgeable of things beyond one's national borders is no longer a small, self-defined elite within the law school community. And law follows human activity. With the lowering of economic barriers based on nation state sovereignty, more transnational economic activity has produced more cross-border links across a broad array of legal areas and issues. Labour and employment law is one of them.

The international law and comparative law curriculum of American law schools has expanded to include a wide array of specific subject matter areas that during the earlier time focused only on national law. Thus, there has been a proliferation of courses in the international sector to include, in addition to international public law, international business transactions, international trade finance, international arbitration and others. So too, comparative law has expanded from a core course comparing legal systems at a high level of generality to include such courses as comparative constitutional law, comparative bankruptcy law, comparative family law, comparative tort law and many others. Summer abroad programs for American law students have helped fuel this expansion.

The earlier divide between international law and comparative law in a good number of these areas has narrowed because aspects of both international law and national law are closely related to each other. Understanding either requires understanding both. For example, international trade finance covers such public international law topics as the World Trade Organization (WTO) and the World Bank but is best understood if it also covers private international law such as privatization law and the law concerning letters of credit. International commercial arbitration law includes international conventions but domestic laws also can play an important role. The same is true for courses in international litigation.

## 2. INTERNATIONAL LABOUR AND EMPLOYMENT LAW

Labour and employment law is an area where a full understanding involves looking both at international law and at the laws of many different nation states. To start with, international labour and employment law is integral to understanding how labour and employment law works from a global perspective. At the broadest level, as international human rights law has emerged, international labour rights have developed to suggest a merger of labour and employment rights into the broader structure of fundamental human rights.<sup>3</sup>

The International Labour Organization (ILO) is important to study because it is a unique international organization. It is the only international governmental organization

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<sup>2</sup> A 1993 film starring Kevin Bacon that shows how closely we are connected to each other despite the number of people in any particular country.

<sup>3</sup> See generally, R. J. Flanagan & W. B. Gould IV, *International Labor Standards: Globalization, Trade, and Public Policy*, (2003).

that is tripartite with governmental, employer and worker representation.<sup>4</sup> That system provides interesting insights to the possible development of ‘voice’ at a global level for more than just government speakers. The sole surviving institution from the failed League of Nations, the ILO has struggled and continues to strive to achieve relevance in combating the most significant labour abuses all around the world. As a primary practitioner of ‘soft law’, the ILO has had numerous successes and some failures. Among its successes includes providing significant technical assistance to emerging nations needing help them to enter more fully into the community of nations with healthy labour laws and robust enforcement mechanisms. In enforcing its Conventions, ILO ‘shaming’ has resulted in a good number of countries improving their labour laws but especially upgrading the enforcement of their national laws. With its renewed focus on the four priority areas set forth in its 1998 Declaration,<sup>5</sup> the ILO has become the central institution fighting such fundamental worldwide problems as child labour, particularly in its worst forms. An area where it has yet to achieve much success has been its attempts to rein in the labour abuses of the junta of Myanmar.<sup>6</sup> It is worth noting, however, that the rest of the international community has done no better.

Studying the ILO materials is comfortable for Americans, because all the materials are readily available online and in English. Staying at the Olympian heights is interesting, important and satisfying. But studying only international materials is incomplete, even in trying to understand the operation and potential efficacy of the ILO. To understand how well the ILO is doing, it is necessary to understand how the nations it is dealing with operate as to their labour and employment laws. In other words, the study of the ILO inevitably raises important questions of comparative labour and employment law. Studying the ILO naturally sets up the study of national laws from a comparative perspective. For example, the US is considered a country that ratifies few ILO Conventions but is also considered to be rather high in complying with the ones it does ratify.<sup>7</sup> On the other hand, France has ratified a much larger number of ILO Conventions but its compliance is considered rather low.<sup>8</sup> These facts alone raise important questions about the efficacy of the ILO but that also sets up the comparative discussion of how nation states view labour standards and how these standards can best be implemented at the national as well as the international level.

If the ILO sits atop the international labour and employment law legal pyramid, the step below looks to international labour and employment law through the lens of regional organizations of nation states, especially the European Union, the labour side

<sup>4</sup> See, B. Hepple, *Labour Laws and Global Trade*, (2005), 29-30.

<sup>5</sup> ILO Declaration on Fundamental Principles and Rights at Work, adopted 18 Jun. 1998, I.L.M. 37 (1998): 1233.

<sup>6</sup> On 15 Feb. 2007, the ILO and Myanmar government reached a supplementary agreement that indicates that the junta is willing to take at least small steps in the right direction. See, <[www.ilo.org/public/english/region/asro/yanon/docs/supplementary\\_understanding.pdf](http://www.ilo.org/public/english/region/asro/yanon/docs/supplementary_understanding.pdf)>. But on 11 Jul. 2008, the ILO strongly condemned Myanmar for jailing labour activists. <[www.monstersandcritics.com/news/asiapacific/news/article\\_1416386.php/ILO\\_slams\\_Myanmar\\_for\\_keeping\\_six\\_&quot;labour\\_activists"&quot;\\_in\\_jail](http://www.monstersandcritics.com/news/asiapacific/news/article_1416386.php/ILO_slams_Myanmar_for_keeping_six_&quot;labour_activists)>.

<sup>7</sup> See, R. Blanpain, S. Bisom-Rapp, W. R. Corbett, H. K. Josephs, & M. J. Zimmer, *The Global Workplace: International and Comparative Employment Law – Cases and Materials* (2007), 68.

<sup>8</sup> *Id.*, at 435.

agreement to North American Free Trade Association (NAFTA) and the burgeoning number of multilateral and bilateral trade regimes that include some labour and employment dimension. Understanding the role of the EU, for example, on the development of labour and employment law among its Member States is important but that cannot be understood without understanding the labour and employment laws of those countries. For example, the development of the antidiscrimination laws among European countries simply could not be understood without knowing that the source of the pressure to adopt and enforce such laws has come from the EU.<sup>9</sup> For a situation which works differently, the labour side agreement to NAFTA focuses on the labour and employment laws of the three Member States – Canada, Mexico and the United States – since the underlying commitment of the countries is to enforce their own laws.<sup>10</sup> Thus, assessing the efficacy of the NAFTA labour provisions ends up being a question whether the processes set up in the labour side accord has caused its member countries to better enforce their own laws. Unlike the EU that provides for its laws to trump the national laws of its Member States, NAFTA can influence the development of national laws only indirectly. Yet, that indirect process has resulted in some progress. For example, after being a subject of cases arising under the NAFTA process that led only to consultations among the labour secretaries of the US and Mexico, the Mexican Supreme Court has now stepped forward and recently recognized the right to secret ballot voting in union elections.<sup>11</sup>

### 3. COMPARATIVE LABOUR AND EMPLOYMENT LAW

There are, of course, special challenges to studying comparative law but there are also special opportunities to broaden and deepen the understanding of law students about law in general and labour and employment law in particular. Given the federal system of the United States, an important dimension to understanding the law of other states within the union has always been a need for healthy skepticism about what the words of the law on the books mean in the real world of law in action. That is easy to say but studying comparative law among nation states drives the point home very powerfully. Students, who might not recognize much difference between living in different states in the US, are much more likely to grasp that life in the US is quite different from life in Mexico. And that may make them ready to see important differences but also similarities that exist in the legal cultures of these two countries. For example, the US, through national and state laws, has set minimum labour standards to provide a floor of protection for all covered workers. But some workers who are covered by the law as written nevertheless do not in fact receive any protection. They fall between the cracks of the enforcement efforts of the government and they lack the ability to assert their own

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<sup>9</sup> *Id.*, at 313–324.

<sup>10</sup> *Id.*, at 249–275.

<sup>11</sup> On 11 Sep. 2008, the Mexican Supreme Court rendered a decision in an ‘amparo’ suit requiring secret ballots for labour elections under the Federal Labor Law. See, <[www.ueinternational.org/Mexico\\_info/mlna\\_articles.php?id=138#913](http://www.ueinternational.org/Mexico_info/mlna_articles.php?id=138#913)>.

rights. Students know that at some level law is not fully efficacious. But when students learn about the broadly protective labour laws of a country like Mexico, which is at odds with the stereotype many have about Mexico and Mexican law,<sup>12</sup> then the question of how many workers are left out of the system becomes meaningful. That up to two-thirds of Mexican workers fall outside of the protections of the labour law drives home the point that law in action can be very different than law on the books.<sup>13</sup> Discussions that follow about the existence and extent of the informal economy become more focused. In that context, the problem of developing laws that can be effectively enforced becomes a lively topic for discussion.

One of the main benefits to comparative study is that it helps us explore more deeply the law of our own country. While it is easy to simply announce that American labour and employment law is ‘exceptional’, the how and why of that requires a deeper look at the law of other countries: What is different about US law from the law of other countries? Students too easily assume that the law of their own country is ‘natural’ – that there are no real alternatives worth considering except as to details, strategies and tactics to enhance the existing policy objectives. The study of comparative labour and employment law challenges those assumptions and makes one think more deeply. Comparative legal studies can drive a rich normative discussion about the goals of law and how these goals may best be achieved.

At the present time, the prestigious American Law Institute (ALI)<sup>14</sup> is working to develop a Restatement of Employment Law to add to its impressive list of Restatements of such important common law topics as Contracts and Torts. Many of these earlier Restatements have had profound influence on the development of American common law. The Employment Restatement is an attempt to capture the common law of employment relations, including the contract law of employment. It is a goal of the ALI to have this Restatement have a significant impact on the future of employment law in the US. Because the at-will presumption for the termination of employment is almost universally accepted in the US, the initial draft of the Restatement presented by its Reporters simply set forth the at-will rule as black letter law. Beyond the fact that it is generally adopted in the US, the black letter rule was not supported by much in the way of justifications of any kind.<sup>15</sup> Perhaps because the Restatements drafted in earlier periods did not include much in the way of comparative law analysis when they were drafted, the Reporters of the Employment Restatement did not include anything to support the at-will rule. Seemingly, they failed to understand that the world had changed since those

<sup>12</sup> The stereotype is that a comparatively poor country is likely to have weak labour laws.

<sup>13</sup> R. Blanpain, S. Bisom-Rapp, W. R. Corbett, H. K. Josephs, & M. J. Zimmer, *The Global Workplace: International and Comparative Employment Law – Cases and Materials*, (2007), 209.

<sup>14</sup> The American Law Institute is a private organization of about 3,000 judges, practitioners and legal academics. Organized in 1923, it is ‘a perpetual society ... formed to improve the law and the administration of justice in a scholarly and scientific manner. Thus was established our unique organization dedicated to legal research and reform.’ See, <[www.ali.org/index.cfm?fuseaction=about.creationinstitute](http://www.ali.org/index.cfm?fuseaction=about.creationinstitute)>.

<sup>15</sup> The present draft sets forth the black letter rule for employment termination in §2.01: ‘Unless an agreement, statute, or other law or public policy limits the right to terminate, either party may terminate an employment relationship with or without cause.’ See <<http://extranet.ali.org/docs/Employment%20Law-C2-redline.pdf>>.

earlier Restatements had been adopted. In the absence of any articulated justification, it may be that they thought that the at-will presumption was the 'natural law' of employment termination or that the rule's justifications were self-evident. In any challenge to the at-will rule brought before a US court, the challengers will support their efforts to overthrow it or to narrow its scope of application with the best arguments that they can muster. Those arguments will be based on comparative employment law. In the present more globalized era, it is hard to imagine that the Restatement's position will have the significant impact that some of its predecessors have had unless the Restatement's black letter rule is bolstered with justifications that show either that the rest of the world is wrong or that, somehow, the labour and employment law environment in the US differs so substantially that its unique approach is justified. Presenting a well based defense of the rule in face of the alternative approaches that generally apply would make the Restatement more powerful and effective than does a simple *ipse dixit*.<sup>16</sup>

#### 4. PREPARING STUDENTS FOR THE PRACTICE OF LAW

Given that transnational law has become an increasingly important aspect of the practice of law generally and the practice of business-related law in particular, the study of comparative law is especially important to prepare law students for law they will practice in their future careers. What the development of comparative law studies aimed at various areas of law has provided is a means by which a much fuller understanding of the operation of the legal system of any particular country can be understood. As more and more law students foresee that their professional lives likely will include some transnational aspects, the need to understand law in the transnational context becomes ever more fundamental. Some years back, mentioning to practitioners that one was interested in international and comparative employment law inevitably elicited a response that the topic sounded interesting but was not relevant to their practice. More recently, these same practitioners want to talk about issues of transnational law that have arisen in their practice.<sup>17</sup> Many experienced practitioners have come to recognize that they need to know about the emerging areas of labour and employment law but that they lack any expertise in it. Law students today can start practice at the cutting edge and use what they know about international and comparative labour and employment law as an asset to give them a quick start practicing law.

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<sup>16</sup> In response to criticism, the reporters, without addressing the fact that US law is unique, have bolstered the justifications for the rule in the comments to it. *Id.* Basically, the two justifications articulated are, first, that the rule reflects the background assumptions of workers and employers that freedom of contract allows the at-will rule to be altered through bargaining and, second, that the rule protects the property interests of the employer. In essence, these reasons seem to be another way of saying that capital is favoured over labour but without explaining why workers are only worth what the free market is willing to pay them for their labour.

<sup>17</sup> Several years ago, I was asked to speak to a group of labour and employment lawyers who represented employers, unions, individual employees and government enforcement agencies. Since I teach a broad range of labour and employment law courses, they could have picked any of a broad array of topics. The topic they wanted to know about was how works councils were constructed and how they operated.

From the viewpoint of those who represent employers, it has become increasingly necessary to understand at least the general outlines of the labour and employment laws of other countries. That is because American business increasingly operates across national borders, frequently setting up operations in a fairly significant number of countries and, at least in part, making business siting decisions based on difference in the labour and employment laws of different countries. Correspondingly, many transnational enterprises that are headquartered in countries other than the US have set up operations in the US. Both of these groups need experienced and knowledgeable lawyers to act as counsellors as they proceed. On the workers side, US unions are coming to see the necessity that to be effective they have to rise above and beyond their historic national focus.<sup>18</sup> They need to look to engage with labour organizations in other countries as potential allies to work together to overcome the tremendous advantage that employers have achieved by the expanding globalization of business. Years ago in the US, an important issue was moving work from unionized northern states to right-to-work southern states. Now the issue is moving work from the worldwide North to the South and the movement has extended far beyond manufacturing. Indeed, legal work is now being outsourced.<sup>19</sup> Coalition building of workers' groups across national lines is just getting under way.<sup>20</sup> But that is important to the future of unions all around the world, if that future is to be other than bleak. Workers organizations need to be able to follow businesses as they do business around the globe.<sup>21</sup> Lawyers representing unions need to understand how labour organizations around the world are organized, how they work and the legal structures in which they operate.<sup>22</sup> Even lawyers representing individual employees need to know how to approach comparative labour law questions. As of now most of the clients who are individually represented are highly educated, top level workers whose career ladders and paths take them outside the US as they advance in their careers. Lawyers representing them need to know enough about the labour and employment laws of the countries to which they are posted to advise them as to their rights and obligations in a different legal environment. Finally, NGOs are working to protect lower level workers, including migrant workers, whose work lives are dramatically impacted by the

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<sup>18</sup> It is no surprise that unions originally organized along national lines relying on national laws within the framework of economies defined along national boundaries. As more economic activity crosses national borders, the independence of national economies from each other has lessened. Therefore, union activity within any particular nation has also lost some significance as employers have increased alternative ways to operate to lessen the impact of unions in any particular jurisdiction.

<sup>19</sup> The ABA Standing Committee on Ethics and Professional Responsibility recently issued Formal Opinion 08-45, *Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services*. It deals with the ethical dimensions, including supervision and notice to clients when a US lawyer outsources legal work of a client to a foreign country.

<sup>20</sup> It is interesting that one of the consequences of the NAFTA side agreement is that unions in the three countries have come to establish new kinds of relationships to begin to work together to represent workers. Before NAFTA, the connections were limited to meet and greet opportunities at the annual Convention of the ILO in Geneva, Switzerland. See, C. de Buen Unna, 'Mexican Trade Unionism in a Time of Transition,' in *Labour Law in an Era of Globalization*, eds J. Conaghan, R. M. Fischl & K. Klare, (2002), 401, for a description of the emergence of independent unions in Mexico.

<sup>21</sup> See, M. J. Zimmer, 'Decent Work with a Living Wage,' in *The Global Labour Market: From Globalization to Flexicurity*, Bull. Comp. Labour Relations eds R. Blanpain & M. Tiraboschi, (2008), 61, 65.

<sup>22</sup> For a vivid description of how transnational cooperation among labour organizations in a number of countries worked in those different countries, see J. Atleson, 'The Voyage of the Neptune Jade: The Perils and Promise of Transnational Labor Solidarity,' *Buffalo L. Rev.*, 52, (2004): 85.

globalization of business and of employment. These organizations also need knowledgeable legal representation.

It must be recognized that the study of comparative law, including comparative labour and employment law, adds some special challenges to the study of law. First and foremost, the study of the labour and employment laws of a country other than one's own raises issues of how that law works in the larger culture, including the legal culture, of that country. Those students who have the opportunity to take a general comparative law course, where the different legal cultures are studied at a more general level, have a clear advantage over those who do not. But, it is possible to learn about the general legal cultures at least in the countries that are most engaged in global business. Second, though this may be a shock to many Americans, the language of law in many other countries is not English.<sup>23</sup> Yet, for English speakers, there are increasing amounts of materials in English about the labour and employment laws of all countries without regard to the language in which the law is written.<sup>24</sup> Also the internet has proven to be a boon to expanding the availability of foreign legal materials.

The role of a lawyer in a transnational setting raises special ethical questions. Recently, the Carnegie Foundation for the Advancement of Teaching issued a report criticizing American legal education for failing to develop sufficiently the ethical and social skills necessary to practice law,<sup>25</sup> even though all American law students take a course in professional responsibility.<sup>26</sup> These courses are supposed to be relatively comprehensive, but the amount of coverage given to multistate, much less transnational, practice issues is extremely limited.<sup>27</sup> Courses like international and comparative employment law present very concrete professional responsibility problems that expose students to understand the challenges of engaging in the representation of clients with crossnational or transnational legal issues.<sup>28</sup> In 2002, the American Bar Association amended its Model Rules of Professional Conduct to address multistate and transnational ethical questions

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<sup>23</sup> A joke demonstrates the point: You are trilingual if you speak three languages, bilingual if you speak two. What are you if you speak just one? American.

<sup>24</sup> Look to the website for The Global Workplace, <[www.luc.edu/law/faculty/globalwork/index.html](http://www.luc.edu/law/faculty/globalwork/index.html)>, for references to a wide array of legal research materials for the study of international and comparative labour and employment law.

<sup>25</sup> The Report describes the problem as follows:

Law schools fail to complement the focus on skill in legal analyses with effective support for developing ethical and social skills. Students need opportunities to learn about, reflect on and practice the responsibilities of legal professionals. Despite progress in making legal ethics a part of the curriculum, law schools rarely pay consistent attention to the social and cultural contexts of legal institutions and the varied forms of legal practice.

'Educating Lawyers: Preparation for the Profession of Law,' Summary, Report of the Carnegie Foundation (2007), 6.

<sup>26</sup> The American Bar Association Standards for Approval of Law Schools, § 302 (a)(5) requires that law students take a legal ethics course, described as one teaching 'the history, goals, structure, values, rules and responsibilities of the legal profession and its members.'

<sup>27</sup> For example, one prominent casebook devotes about four pages to 'Interstate law practice.' See, L. G. Lerman & P. G. Schrag, *Ethical Problems in the Practice of Law*, (2005), 646-650.

<sup>28</sup> For a general description of the professional responsibility requirements for transnational practice, see R. A. Brand, 'Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law,' *Vand. J. Transnatl. L.*, 34 (2001), 1135.

more completely.<sup>29</sup> Based on an assumption of reciprocity across most jurisdictions across the world, Rule 5.5 now permits a lawyer admitted to practice in one US jurisdiction where it has been adopted to perform legal services temporarily in another, host jurisdiction where (1) she is affiliated with another lawyer admitted in the host jurisdiction who actively participates in the representation, (2) is preparing for a lawsuit in which she is admitted to appear, (3) is working on an ADR proceeding, such as an arbitration, that is reasonably related to the lawyer's home jurisdiction, or (4) is working on a matter involving a jurisdiction in which the lawyer is licensed. A matter involves a jurisdiction in which the lawyer is licensed includes when a lawyer works for a home-state client, works on a matter with a significant connection to the home state, or works in an area of the lawyer's specialty.<sup>30</sup>

Since it is not the unauthorized practice of law to engage in multijurisdictional practice within the circumstances described by Rule 5.5, the next requirement, necessary for the practice of law generally, is that the lawyer must 'provide competent representation to a client'.<sup>31</sup> The first step of competent practice is that the lawyer working on a transnational matter needs to undertake that action in conformity with the regulations concerning the practice of law in the host jurisdiction.<sup>32</sup> Since the amendment of ABA Rule 5.5, the multijurisdictional practice rules of US states following it appear to be close to the rules that apply to lawyers admitted in one EU Member State who are practicing temporarily in another Member State.<sup>33</sup> Inquiry is necessary as to the rules about the unauthorized practice of law in all host jurisdictions, whether or not the host country is a member of the EU. Assuming the transnational work is not the unauthorized

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<sup>29</sup> Since the individual states determine their own ethical rules for lawyers, not all US jurisdictions have adopted the ABA Model Rules or its amendments to Rule 5.5. As of 6 November 2008, 12 states have adopted Rule 5.5 as amended and 25 states have adopted it in modified form. Most of the other remaining states are considering the question. See, State Implementation of ABA Model Rule 5.5 (Multijurisdictional Practice of Law), see <[www.abanet.org/cpr/mjp/quick-guide\\_5.5.pdf](http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf)>.

The notion of reciprocity for Rule 5.5 can be seen by action taken by the ABA at the same time it adopted that rule. When the ABA amended Rule 5.5, it adopted a Model Rule for Temporary Practice by Foreign Lawyers which provides the opportunity for lawyers admitted in non-United States jurisdictions to provide legal services on a temporary basis within the United States on the same basis that Rule 5.5 provides for US lawyers to do the same in foreign jurisdictions.

<sup>30</sup> See, S. Gillers, *It's an MJP World: Model Rules Revisions Open the Door for Lawyers to Work Outside Their Home Jurisdictions*, A.B.A.J., Dec. 2002, at 51.

<sup>31</sup> ABA Model Rules of Professional Conduct Rule 1.1.

<sup>32</sup> For example, the Code of Conduct for European Lawyers, which applies to practice within the European Union, appears to adopt an approach similar to the ABA's Rule 5.5. Art. 2.4 of the Code provides:

When practising cross-border, a lawyer from another Member State may be bound to comply with the professional rules of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity.

The Commentary to Article 1.5 makes clear that this Code does not apply to actions by a lawyer within her own jurisdiction, even though the matter involves another state.

The definition of crossborder activities would, for example, include contacts in state A even on a matter of law internal to state A between a lawyer of state A and a lawyer of state B; it would exclude contacts between lawyers of state A in state A of a matter arising in state B, provided that none of their professional activities takes place in state B; it would include any activities of lawyers of state A in state B, even if only in the form of communications sent from state A to state B.

<sup>33</sup> For a description of the EU rules that apply to transnational legal representation at least across national borders of member states at a time before the ABA amended Rule 5.5, see R. J. Goebel, 'The Liberalization of Interstate Practice in the European Union: Lessons for the United States?', *Int'l. Law.*, 34 (2001): 307.

practice of law in the host jurisdiction, the second step is to give competent advice concerning the law of the foreign jurisdiction.<sup>34</sup>

Exploring these two issues with students helps them to develop an understanding of the judgment necessary to the successful practice of law. The inquiry as to both involves the development of professional judgment. Where the law of the host country requires that lawyers admitted in that jurisdiction be involved in the representation, then the issue is to find a lawyer in the host country.<sup>35</sup> Generally, if the issue involves litigation in the courts of a host country, local counsel in that country will be necessary. When, however, the issue involves matters other than litigation, then the question is whether the importance of the matter still justifies engaging someone admitted to practice in the host country.<sup>36</sup> If the matter at hand involves providing only general information about the law of another country, a lawyer can research that law and provide the resulting information to the client without the need to engage a lawyer admitted to practice in that country. If, however, the matter is likely to lead to litigation or even if no litigation is anticipated but the matter involves a transaction with significant financial impact for the client, then engaging a lawyer admitted in that other country is advisable.

## 5. CONCLUSION

In sum, the study of international and comparative employment law in US law schools is interesting and valuable in its own right. Learning about the law as it is situated in the culture of different countries prepares students for the likely future of the practice of law in general and of labour and employment law in particular. At the present time, the study of international and comparative law gives current students a leg up on practitioners who have not studied that area of law but who have the need to know about it given the growing transnational character of the practice of law. The study of international and comparative law, including labour and employment law, also gives students a strong basis to develop a normative perspective of US law, which is free of the unexamined assumption that US law is the only way that the labour and employment law could possibly be constructed. Finally, the study of international and comparative law, including labour and employment law, expands and deepens the understanding of students to prepare them for the practice of law in an ethical and professionally responsible way.

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<sup>34</sup> *Id.*

<sup>35</sup> One of the ways to find lawyers in another country is to participate in one of the international referral institutions such as Interlex or Terralex. See, Bill Myers, 'International Legal Referral Raises Questions of Standards', *Chic. Daily L. Bull.*, 150 (25 Aug. 2004): 1.

<sup>36</sup> While it is natural to look to lawyers located in the other jurisdiction, the ABA adopted in 1993 a Model Rule for the Licensing of Legal Consultants which provides for the licensing of a foreign lawyer by a US jurisdiction for the limited purpose of providing advice to clients on the law of the jurisdiction in which he or she is admitted to practice law. See, <[www.abanet.org/cpr/mjp/FLC.pdf](http://www.abanet.org/cpr/mjp/FLC.pdf)>. For a description of how this rule operates, see generally, Pamela Stiebs Hollenhorst, 'Options for Foreign-Trained Attorneys: FLC Licensing or Bar Admission,' *The Bar Examiner*, (Aug. 1999): 7.