2013

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Recommended Citation

CRIMINAL LAW BULLETIN

Volume 49, Number 3

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Law, Language, Crime, and Culture: The Value and Risks of Comparative Law

Christopher L. Blakesley

INTRODUCTION

Words, language, culture, and literature are so important to us human beings that it should come as little surprise that they are part of our law. Consider Goran Simić’s lovely and terribly sad poem Lament for Vijećnica, written in 1993, citing several of my favorite characters at the destruction and burning of Sarajevo’s town hall (Vijećnica), the National University Library.

Lament for Vijećnica

The National Library burned for three days last August and the city was choked with black snow.

Set free from the stacks, characters wandered streets, Mingling with passers-by and the souls of dead soldiers.

I saw Werther sitting on the ruined graveyard fence; I saw Quasimoto swinging one-handed from a minaret.

Raskolnikov and Mersault whispered together for days in my cellar; Gavroche paraded in camouflage fatigues.

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1Christopher L. Blakesley is a Barrick Distinguished Scholar at the University of Nevada Las Vegas and the Cobeaga Professor of Law at the William S. Boyd Law School, University of Nevada Las Vegas and the J.Y. Sanders Professor of Law Emeritus, Louisiana State University. This Article significantly expands and develops portions of my review-essay of Comparative Law: Its Purposes and Possibilities, 27 Tex. Int’l L.J. 315 (1992) (reviewing Bernhard Grossfeld, The Strength and Weakness of Comparative Law (Tony Weir trans., 1992) and of portions of my chapter in Christopher L. Blakesley, The Impact of a Mixed Jurisdiction on Legal Education, Scholarship and Law (1999). These two works were designed to set up the potential for this current Article. Many thanks to my research assistants: Hilary Heap, Jennifer Shrum, Kathleen Wilde, Keith Berkmeier, Hyungseon Jeong, Darren Rodriguez, Brittnie Watkins, Brad Shipley, and Cheryl Grames.

THE VALUE AND RISKS OF COMPARATIVE LAW

Yossarian was already selling spares to the enemy; for A few dinars young Sawyer would dive off Princip’s bridge.

Each day—more ghosts and fewer people alive; and The terrible suspicion formed that the shells fell just for me.

I locked myself in the house. I leafed through tourist guides I didn’t come out until the radio told me.

How they’d taken ten tons of coals from the deepest cellar of the burned-out National Library.³

This Article considers language and law in general with a focus on issues of criminal justice, both domestic and international. I examine how and why comparative law is valuable in a criminal procedure course, and generally for domestic and international criminal justice. My examination begins by looking back to our common roots in crime, punishment, and expiation, with a special focus on the role of torture and its impact on current criminal justice systems. Comparative law also serves as a springboard from which to ponder law and philosophy in the context of a basic or advanced criminal procedure course. International criminal courts provide a useful example of the value and challenges of comparative law because they are actually experiments in mixing legal systems and procedures as they function in the arena of international law. Although wholesale or simplistic borrowing is wrong and often harmful, carefully comparing how disparate systems resolve similar problems is most helpful. To elucidate this, I use the examples of “verdict” and “to represent.” They look the same on paper, but manifest quite differently in practice in America and in Europe—prime examples of why comparative analysis can be so illuminating. It should not be surprising that comparative analysis is crucial to courses or parts of courses in international or transnational criminal law, as functionally, those are mixed systems—requiring a mixture of international law and domestic law or of international law and that of two or more domestic legal systems. This is especially so in international law, which functions as a mixed jurisdiction essentially comprised of Romano-Germanic and Common Law elements and approaches. Those who understand and can work with both the Romano-Germanic and the Common Law systems will be more able to understand the nuances of international law, its methods, analytical style, and sources. This will help them succeed in practice, scholarship and teaching.

This Article and the benefits of comparative analysis apply to the

³Simic, supra note 2.
study of most subjects in any legal system. My points apply to practitioners, students, policy makers, judges, human rights activists, and many more professions, especially as the world shrinks. Comparative analysis of the sort I suggest herein provides a deeper understanding of the subject, in addition to some understanding of foreign systems.

Law is at least partially a form of language; it arises from the culture and language of the various nations and peoples of the world. Some feel that the study of comparative law, foreign language and culture, or different legal systems may be interesting diversions, but have little practical value or at best are an unaffordable luxury. Reality is to the contrary. Comparative study is more than a leisure activity. It provides insight into law (even one’s own, in its deepest cultural sense) and a more transparent prism through which to understand law, culture, and language, including one’s own law, culture, and language, acting like a perfect prism through which we perceive not merely a white light (a country’s legal system), but all the colors that are essential parts (culture and language) of that white light. Revealing those colors—those essential parts—allows us to analyze and compare them and gain a far deeper understanding of a country’s legal system. Bernhard Grossfeld noted that law and language have common features that are deeply imbedded in our being.\(^4\) Regarding the etymological connections of law and language, Grossfeld wrote:

> It is interesting to note the etymological connections between words such as Recht and Sprache, lex and lingua, law and language, nomos and logos. It is already suggestive that ‘lex’ meaning ‘law’ appears in ‘lexicon’ as meaning ‘word’. Their common root (legein) denotes ‘speak’. A cognate root gives us ‘logos’ which, significantly enough, means both ‘thought’ (as in ‘logic’) and ‘word’.

\(^4\)Grossfeld, supra note 1, at 88–95 (presenting a vision of comparative law through the prism or lens of a formal German and Pandectist tradition); Edward J. Eberle & Bernhard Grossfeld, Law and Poetry, 11 Roger Williams U. L. Rev. 353 (2006).

> The word ‘norm’ leads us through ‘gnosis’ (the process of learning) and ‘gnarus’ (knowledgeable) to ‘narrare’ (to relate).\(^5\)

Law and language have common features that become deeply imbedded in our being. Lewis Carroll writing through Humpty Dumpty made a wonderful point\(^6\) essentially saying something like, words use

\(^5\)Grossfeld, supra note 1, at 94–95.

us as much as we use words. Carroll perfectly illustrated why law is like a language that merits comparative analysis. Understanding Lewis’ point is crucial. This is crucial in the legal setting and even more difficult in the trans-cultural or international setting. Undeniably, no country is truly isolated anymore, either culturally or legally, and every nation is part of an international system of laws. Understanding other legal cultures provides a richer perspective on problems of a philosophical nature.

To be sure, law is more than just language, but its essence has many of the characteristics and fullness, including the cultural imprint, that a language has. Perhaps, too, there is a spiritual or cosmological element to law, language, and scholarship. I use the term “language” not only its usual sense of the words we use to speak and write, but also as a metaphor for law as language which includes all the cultural depth that imbues language with its soul or spirit. Lawrence Rosen wrote:

[One can] see law as contributing to the formation of an entire cosmology; a way of envisioning and creating an orderly sense of the universe, one that arranges humanity, society, and ultimate beliefs into a scheme perceived as palpably real. Edward Levi once wrote that law “has absorbed within itself a view of nature of human beings, and of how their acts and the incidents which overtake them may be classified for favor or penalty.” He could have added that in doing so it reflects and creates a still broader sense of order of all one’s experience. We may, as Clifford Geertz suggests, “conceive of law as a species of social imagination

—I don’t know what you mean by ‘glory.’ ” Alice said.
Humpty Dumpty smiled contemptuously. “Of course you don’t—till I tell you. I meant ‘there’s a nice knock-down argument for you!’ ”

“But ‘glory’ doesn’t mean ‘a nice knock-down argument!’ ” Alice objected.

“When I use a word,” Humpty Dumpty said, in a rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

Alice was too much puzzled to say anything, so after a minute Humpty Dumpty began again.

“They’ve a temper, some of them—particularly verbs, they’re the proudest—adjectives you can do anything with, but not verbs—however, I can manage the whole lot! Impenetrability! That’s what I say!”

7See Laurence J. Peter, Peter’s Quotations: Ideas For Our Time 502 (1977).

8Lawrence Rosen, Law as Culture: An Invitation 11–12 (2006). “Law, like other cultural domains, may not merely contribute to category formation and regularization; a key role of most legal systems, quite apart from addressing disputes, consists precisely in their ability to help maintain the sense of cosmological order.” Rosen, supra note 8, at 170–71.
LAW AS LANGUAGE — PEDAGOGY, SCHOLARSHIP, AND PRACTICE

Although professors are always pressed for time, choosing one or a few topics for comparative analysis actually enhances the quality and depth of understanding, as well as other important values, such as the sense of and appreciation the fascinating differences and similarities of humankind in the struggle for justice, mercy, and other aspects of criminal law or legal systems in general. Ideas inspired by the knowledge of a foreign language, or from a foreign, mixed, or international jurisdiction provide keen insight into how one may approach law, legislation, jurisprudence, doctrine, philosophy, and life. On one hand, perhaps considering law, language, and legal study to have psychological, cosmological, spiritual or perhaps even spiritual qualities seems far-fetched. On the other hand, although the depth of our minds, conscious and subconscious, is not yet plumbed, we nonetheless know that much culture and language influences us to a significant degree. To further develop the idea that a spiritual or psychological aspect exists in law, legislation, jurisprudence, doctrine, philosophy and life, we will ruminate on law as language and culture.

Yes, law is more than language and law school is more than just an analogue to becoming fluent in a foreign language. Like becoming fluent in a foreign language, becoming a compleat lawyer is a matter of becoming a part of another culture. Law, at its essence, has many of the characteristics and fullness of language, including its cultural imprint. Likewise becoming a compleat lawyer requires doing many of the things that are necessary to become fluent in a foreign language—going through many of the stages necessary to becoming fluent in a foreign language and adapting to a foreign culture. There are no shortcuts; students must pay the price of doing what is necessary to become fluent (or a compleat lawyer). Just as one becomes a different being, after becoming fluent in a foreign language and culture, if a student, professor, judge, or practitioner puts in the work necessary to become “fluent” in a foreign legal system, she will notice a difference in her being. Studying good works from continental European, Latin American, Far or Middle-Eastern, or other legal cultures, if dutifully engaged, is fascinating and most beneficial. The same is true, of course, for comparative study by those of the Romano-Germanic or other traditions. The evolution from German Pandectism to modern Germanic system of legal analysis, compared to the evolution of the

8Grossfeld, supra note 1; Vivian Grosswald Curran, Comparative Law: An Introduction (2002); Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law (Tony Weir trans., 1977); Ugo A. Mattei et al., Schlesinger’s Comparative Law (7th ed. 2009); Jaakko Husa, Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing the Pluralistic Mind, 10 German L.J. 913 (2009). The German and the French Civil Codes provide the world with the two great
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French and other Romanesque systems analytical systems is enlightening to the person trained in the evolution in Common Law based systems. The obverse is true, as well and the same thing goes for comparing any variation of legal systems. The more multifaceted one's personal life-culture, the clearer one's vision and the richer one's understanding may be. Comparative law provides a better understanding of our own system, as well as an understanding of a foreign system that one might be comparing.

A BIT OF HISTORY FOR EMPHASIS: LANGUAGE, LAW, RELIGION, AND IDEOLOGY: CRIME, PUNISHMENT & EXPIATORY VIOLENCE

On 2 March 1757 Damien the Regicide was condemned 'to make the amende honorable before the main door of the Church of Paris', where he was to be 'taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning was weighing two pounds'; then, 'in said cart, to the Place de Grève, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh

"civil law" codal systems. Nations around the world have essentially adopted and adapted either the French or the German paradigm. Christian Wolff (1679-1754) was the founder of the German Pandectist School, which was fruitful especially during the nineteenth century. Although the acceptance and promulgation of a code based system was opposed by Savigny, the "modern" German system, like the French codal tradition, began with the premise that territorial and political unity required a comprehensive, accessible, systematic and coherent body of law. The Pandectists esteemed mathematical precision in legal inquiry. Shael Herman & David Hoskins, Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations, 54 Tul. L. Rev. 987, 1019 (1980). Wolff's approach excluded all inductive and empirical elements through deduction, without gaps, of all natural law rules from axioms, down to the smallest details; every particular rule is derived from the previous more general one, and so on, in the strictest logical sequence. Structure and analysis requires the exactness of geometrical proof, which is achieved by a logical chain of reasoning by exclusion of the opposite. Thus, a closed system is produced, whose validity is based in its freedom from logical contradiction of all its assertions. This tradition was expanded and developed over the years to its culmination as a movement in 1862 in the work of Windscheid. F. Wieacker, Privatechtsge- schichte der Neuzeit 193, cited and translated in Dawson, The Oracles of the Law 237 (1973); Symeon Symeonides, An Introduction to the Louisiana Civil Law System 50-52 (6th ed. 1991). Professor Grossfeld, to be sure, is no mere Pandectist. He is also a scholar who has had extensive training and experience in the Anglo-American schools. He has spent several months in Cambridge, England as Visiting Fellow at Wolfson College. He spent more time as visiting professor at Southern Methodist University. He has used English and American scholars as sounding boards for his thoughts and perceptions. Thus, Professor Grossfeld aims his book at the German legal community, to provide it with some understanding of the importance of comparative law in practice and scholarship. This he does very well. The way he does it provides the American reader with insight into how a sophisticated German comparativist perceives and analyzes law and legal problems.
will be torn away, poured molten lead, boiling oil, burning resin, was and sulfur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes thrown to the winds. 10

... It is said that, though he was always a great swearer, no blasphemy escaped his lips; but the excessive pain made him utter horrible cries, and he often repeated: “My God, have pity on me! Jesus, help me!” The spectators were all edified by the solicitude of the parish priest of St Paul’s who despite his great age did not spare himself in offering consolation to the patient. 11

[At] each moment of torment, he cried out, as the damned in hell are supposed to cry out, “Pardon, my God! Pardon, Lord.” ... Several confessors went up to him and spoke to him at length; he willingly kissed the crucifix that was held out to him; he opened his lips and repeated: “Pardon, Lord.”

The executioners gathered round and Damiens told them not to swear, to carry out their task and that he did not think ill of them; he begged them to pray to God for him, and asked the parish priest of St Paul’s to pray for him at the first mass. 12

Magic, religion, and their symbolism have been part of law and its impact on societies since antiquity. Ancient societies actually merged magic or the religious with law. 13 Many societies still do this to a greater or lesser degree. Magic and religion, begin powerfully “with

10 Michel Foucault, Discipline & Punish: The Birth of the Prison 3 (1979) [hereinafter Foucault, Discipline & Punish]; Michel Foucault, Surveiller et Punir: Naissance de la Prison (1975) [hereinafter Foucault, Surveiller et Punir], referencing 2 Pièces Originals et Procédures Du Procès Fait à Robert-François Damiens 372–74 (1757) [hereinafter Pièces Originals].

11 Foucault, Surveiller et Punir, supra note 10, referencing Pièces Originals, supra note 10.


13 See generally The Roman Twelve Tables, where punishments had to be “blessed” by the priests. See 4 Edward Gibbon, The Decline and Fall of the Roman Empire 483–84 (Everyman’s Library ed., 1994) (1788) [hereinafter 4 Gibbon, Decline and Fall]; also available in 4 Edward Gibbon, The History of the Decline and Fall of the Roman Empire 382 (ccclxxxi) (1788) [hereinafter 4 Gibbon, The History]. This is discussed more fully below, See Grossfeld, supra note 1, at 88–95, 107–09. On the spiritual or religious aspect of “the word,” language, and law, see, e.g., Roscoe Pound, Some Thoughts about Comparative Law, in 1 Festschrift Rabel 7 (1954); Brenda Danet, Language in the Legal Process, 14 Law & Soc’y Rev. 455, 540 (1979–80) (the above cited by Grossfeld); Harold Berman, The Religious Foundations of Western Law, 24 Cath. U. L. Rev. 490 (1975); Harold J. Berman, The Western Legal Tradition
the word.\textsuperscript{14} Thus, law, language, religion, metaphysics, and culture are deeply connected. Separating the socio-legal aspect of humanity from the ethical or spiritual aspects is a relatively recent development. The oldest legal codes represent all the aspects, traditions, manners, myths, and ideas of that particular society. Accordingly, just as language must be viewed within the context of culture and the elements of culture within each culture or linguistic group, so too must those ancient codes be viewed within the context of their language and cultures. Of course, the ancient is part of the present and the current will be part of the future. Grossfeld has written about the possibility of language and law being innate in us—sort of a part of our DNA.\textsuperscript{15}

It is possible that certain core values are innate in us, a bit like Chomsky’s proto human grammar.\textsuperscript{16} This is how I think of jus cogens principles in public international law. There may be certain principles from which there may be no derogation. Hence, to slaughter innocent people is always criminal, which is the law in virtually every society. Even those who try to get away with it try to hide it, lie about it, or to pretend such power as to have impunity. Yet, if such a thing happens to their own innocents, they all consider it to be a horrible crime.\textsuperscript{17} This has always been true and seems to be part of our DNA. This might tell

\textsuperscript{14}See generally supra note 13 (citing various authority).

\textsuperscript{15}Grossfeld, supra note 1, at 103–05.

\textsuperscript{16}Grossfeld, supra note 1, at 103, citing Noam Chomsky, Language and Mind 76 (2d ed. 1972), and David L. Perrot, Has Law a Deep Structure? The Origin of Fundamental Duties, in Fundamental Duties 1, 3 (Dominick Lasok et al. eds., 1980).

\textsuperscript{17}Palliating the deprivations of war has been an important aspect of warfare throughout most of history. See Timothy L.H. McCormack, From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime, in The Law of War

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us something about why certain positive "laws" are actually "illegal" in the larger sense—take, for example, the Nazi "laws" that allowed for conduct amounting to what we now call genocide and for crimes against humanity. 18 Ultimately, the nullity of such "laws" is recognized and occasionally the perpetrators are even punished. Grossfeld notes that Goethe referred to this as "the law innate in us." 19 This angle on our topic is discussed in more detail near the end of this Article.

CRIME, PUNISHMENT, CULTURE, LAW, AND LANGUAGE

Continuing since ancient times, priests and the gods, or ideologues have seemed to have felt the need and obligation to sanction conduct, transactions and punishments. 20 Justice Thurgood Marshall wrote regarding the death penalty: "Its precise origins are difficult to perceive, but there is some evidence that its roots lie in violent retaliat-


19 Johann Wolfgang von Goethe, Faust, Part One, The Student Scene (1806), discussed and quoted in Grossfeld, supra note 1, at 44, 104.

20 See, e.g., The Roman Twelve Tables, where punishments had to be "blessed" by the priests. See 4 Gibbon, Decline and Fall, supra note 13, at 483–84; also available in 4 Gibbon, The History, supra note 13, at 382 (cclxxxi). This is discussed more fully below.
tion by members of a tribe or group, or by the tribe or group itself, against persons committing hostile acts toward group members.\textsuperscript{21}

I will consider the role that notions of expiation and redemption have played and continues to play in justifying violence, including war, punishment, torture, and terrorism.\textsuperscript{22} In virtually all ancient cultures, metaphysics and law merged;\textsuperscript{23} the social cell felt obliged to purge itself of the threat of destruction by the wrath of God or gods.\textsuperscript{24} There was a sense that crime tainted the entire group and when the group was tainted by crime committed by one of its own or by another against the group, the taint had to be removed to make the group whole again. The cleansing or expiating mechanism was the punishment of the wrongdoer, combined with religious ceremony. For example, The Code of Manu provided that rest and happiness for the wrongdoer and society may be obtained only by soul-purging punishment of the perpetrator.\textsuperscript{25} Blood atonement was required by the Israelites for offenses seen as heinous.\textsuperscript{26} The lex talionis, or law of

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\item \textsuperscript{21}Furman v. Georgia, 408 U.S. 238, 333, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Marshall, J., concurring) ("Capital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization."), quoted in Bessler, supra note 13, at 215-216.
\item \textsuperscript{22}Atonement and cleansing has been an important aspect of warfare throughout most of history. See McCormack, supra note 17, at ch. 2 and Simpson, supra note 17, at 32-33. See also Reynolds, supra note 17, at 4-5 n.12. Sun Tzu, in his Art of War, insisted on many humanitarian protections. Sun Tzu, The Art of War, supra note 17; Sun Tzu, The New Translation, supra note 17. In fact, one might even say that, functionally and conceptually, much of the substance of what we call the law prohibiting and punishing war crimes and crimes against humanity, have existed since antiquity. Laws since that time have recognized the counter-productive and criminal nature of atrocity, considering it forbidden in law and conscience. See, e.g., Code of Hammurabi (c. 1728-1686 B.C.); Laws of Eshnunna (c. 2000 B.C.); Code of Ur-Nammu (c. 2100 B.C.).
\item \textsuperscript{23}See discussion below and in Christopher L. Blakesley, Terrorism, Drugs, International Law and the Protection of Human Liberty chs. 1, 4 (1992).
\item \textsuperscript{24}See text below and references. See also Bessler, supra note 13, at 215 passim, citing Gregg Mayer, Poet and Death: Literary Reflections on Capital Punishment Through the Sonnets of William Wordsworth, 21 St. John's J. Legal Comment 727, 723 n.8 (2007), (referencing many variegated means of execution over the centuries).
\item \textsuperscript{25}Indian History Sourcebook, supra note 17, at bk. VII, 12-19, 23-24; bk. VII, 14-19.
\item \textsuperscript{26}See Leviticus 17:11 ("For the life of the flesh is in the blood; and I have given it to you upon the altar to make an atonement for your souls; for it is the blood that maketh atonement for the soul."); see also 1 Kings 2:28-34. Blood atonement appears to be the essence of Christian faith, as the blood of Christ is believed to have been shed for humanity; Martin R. Gardner, Illicit Legislative Motivation as a Sufficient Condition for Unconstitutionality under the Establishment Clause-A Case for Consideration: The Utah Firing Squad, 1979 Wash. U. L.Q. 435, 442 (1979); Martin R.
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exact retaliation, is found in the Jewish Torah or Biblical Pentateuch.\textsuperscript{27} *Lex talionis* “requires” an eye for an eye,\textsuperscript{28} to benefit the punished individual as much as to protect the punishers.\textsuperscript{29} The Hindu Code of Manu\textsuperscript{30} provided that there could be no possibility of happiness for the criminal or for society without punishment—rest and happiness for the sinner and for society had to be obtained through a soul-purging punishment of the wrongdoer.\textsuperscript{31} Punishment was necessary for any crime and had to be appropriate for the given crime and had to be applied to the correct person.\textsuperscript{32}

The relationship between the authority to punish and promoting the sense of need for expiation is evident. This relationship has been well understood and exploited by leaders who use the idea that the good of the group and the individual are promoted by punishment of the

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\textsuperscript{27}See Deuteronomy 19:21. “Do not look on such a man with pity. Life for life, eye for eye, tooth for tooth, hand for hand, and foot for foot!” Leviticus, 24:17-20: “When a man causes a disfigurement in his neighbor, as he has done it shall be done to him, fracture for fracture, eye for eye, tooth for tooth; as he has disfigured a man, he shall be disfigured.” See also Exodus, 22:32; 22:1, 22:6; J. M. Powis Smith, Origin and History of Hebrew Law (1960). In addition, see The Ancient Code of Hammurabi, in The Babylonian Laws 154 (G. R. Driver & J. Miles eds., 1952), which applied some 4,000 or so years ago, that applies both the lex talionis and compensation. Rule 196, for example, decrees that “If one destroys the eye of a free-born man, his eye shall one destroy,” but Rule 198 requires, “If the eye of a nobleman he has destroyed or the limb of a nobleman he has broken, one mine of silver he shall pay.” Cf. William Shakespeare, The Merchant of Venice, act 1, sc. 3, ll. 157-67. Nor that the exacting of a mutilating fine is contrary to Jewish law. Compare Rabbi Hertz’s comment on the lex talionis (“eye for eye etc.”): “In the Torah . . . this law of ‘measure for measure’ is carried out literally only in the case of murder . . . [O]ther physical injuries which are not fatal are a matter of monetary compensation for the injured party. Such monetary compensation, however, had to be equitable, and as far as possible equivalent. This is the significance of the legal technical terms, “life for life, eye for eye, and tooth for tooth.” J.H. Hertz, The Pentateuch and Haftorahs 309 (2d ed. 1981). See also Jules Gleicher, Three Biblical Studies on Politics and Law, 23 Okla. City U. L. Rev. 869, 890-99 (1998). Could it not be said that Shylock’s troubles begin with his deviation from Jewish law? Compare Shakespeare, supra, at act 1, sc. 3, ll. 31-35, with id. at act 2, sc. 5, ll. 11-16; Dan Markel, Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate, 54 Vand. L. Rev. 2157 (2001).

\textsuperscript{28}Exodus 21:24; Dinstein, supra note 13, at 11.

\textsuperscript{29}See, e.g., 1 Kings 2:28-34 (blood atonement) and other authority in supra notes 27 and 28.

\textsuperscript{30}Code of Manu, supra note 17, at bk. VII, 18, 23-24; bk. VIII, 17.

\textsuperscript{31}Code of Manu, supra note 17, at bk. VII, 18, 23-24; bk. VIII, 17.

\textsuperscript{32}Code of Manu, supra note 17, at bk. VII, 18, 23-24; bk. VIII, 17.
wrongdoer. If the wrongdoer is a “foreigner” or “outsider” and has taken refuge abroad, it is necessary to capture him to accomplish this expiation. Sometimes this has required going to war.

Cleansing the Taint: Attempts to “Expiate” the Taint in the Wrongdoer and Society through Punishment of “Evil-doers” Took Many Forms

Comparative analysis knows no time or space limitations. It allows for temporal, geographical, linguistic, cultural, and legal comparisons—even between ancient societies and their forms of punishment and our own. Such study both aids us to understand the nature of punishment and to see why law is comparable to language and culture. It all may well have some mystical qualities, whether we wish to admit it or not. Early societies used punishment or war as means to propitiate their God or gods after having been “attacked” and tainted by an enemy or by crime. When murder, theft, or assault were committed, it was necessary that both society and the perpetrator purge the “taint.”

Punishment, including war, was the vehicle. The Cheyenne banished the one who tainted the food or water supply. They required purging and cleansing the group through punishment for various crimes, including the crime of tainting the food or water supply and intra-tribal murder, by banishing the wrongdoer combined with the “breaking of the arrows” ceremony. For the worst of crimes, intra-tribal murder and tainting of the food or water supply “required the keeper of the arrows to cleanse the tribe of the specter of death.” through punishment of the perpetrator. The perpetrator had to be banished from the society and sent into the wilderness. This often meant actual death. It certainly meant that the person was banished from the kingdom, so to speak, was made a non-being from the group’s perspective. The cleansing qualities of fire prompted many societies and groups to

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34See, e.g., 1 Kings 2:28-34.
351 Kings 2:28-34.
37M. Fouest de Coulanges, La Cité Antique, bk. III, ch. XIII (1864); Llewellyn & Hoebel, supra note 36.
make it a favored method of capital punishment. Nero used burning at the stake to propitiate Vulcan, the god of fire.\textsuperscript{38}

Thus, a mystical relationship between punishment, war, and expiation has obtained (often still obtains) in the domestic systems of punishment and in warfare, as individuals, groups, nations, or states seek to obtain retribution for wrongs done to them, which they seem to believe will provide them some form of expiation. Somehow, it will make them whole—some say it will give them closure. War tends to play the same role for groups who feel that they were deeply wronged and tainted, even long for wrongs done long ago. Nations or groups go to war to gain retribution and an expiation for having been tainted. Language, rhetoric, ideology, and religion have fueled this idea. It has proved useful to leaders who want either to establish or maintain their own sovereign power.\textsuperscript{39} Even after execution, corpses “were sometimes publicly dissected, desecrated, or gibbeted,”\textsuperscript{40} exemplifying symbolic, even mystical, messaging, along with the need for retribution and deterrence. I will consider and show examples of that connection. In each of these, the synergy of law, language, culture, and myth are evident. The Code of Hammurabi called for the death penalty for adultery, perjury, faulty home construction, theft, and harboring


\textsuperscript{39}Foucault, Discipline & Punish, supra note 10, at 1-69; Foucault, Surveiller et Punir, supra note 10; Silverman, supra note 33. John W. Ragsdale, Jr., Some Philosophical, Political and Legal Implications of American Archaeological and Anthropological Theory, 70 UMKC L. Rev. 1, 35–36 (2001), referencing Christy G. Turner II & Jacqueline A. Turner, Man Corn: Cannibalism and Violence in the Prehistoric American Southwest 459–84 (1999), discusses the recent work of

the iconoclastic physical anthropologist Christy Turner, noting that she dealt a shuddering broadside to the paradigm of an integrated, egalitarian harmony among the prehistoric and contemporary Pueblo, when she proposed, in part, that the external facade of Pueblo pacifism and equanimity hides internal episodes of raw and loathsome terrorism—including violence, mutilation, and cannibalism practiced within the group. Beyond this, her work suggests that the apparent cooperation and common vision of the prehistoric Chacoan nirvana was produced by force and fear, rather than the internalized precepts of balance and harmony.

\textsuperscript{40}Bessler, supra note 13, at 217.
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runaway slaves.\textsuperscript{41} Egyptian Pharaohs had criminals embalmed alive for giving false testimony.\textsuperscript{42}

Society was required to purge the taint of crime to avoid the wrath of the God or gods. Societies and individuals have exhibited, for good or for ill, a deep need to find expiation and redemption when crime has been committed in their midst or against them. Punishment has been perceived as the mechanism to rid society of crime’s destructive plague.\textsuperscript{43} Thus, in virtually all ancient cultures, metaphysics or religion and law were merged; the social cell felt obliged to purge itself of the threat of destruction. When the group was tainted by crime committed by one of its own or by another against the group, the taint had to be removed to cleanse the group and make it whole again. Punishment of the wrongdoer, combined with religious ceremony, was the cleansing or expiating mechanism.

The individual, family, social cell, clan, tribe, or group would require vengeance against those who were found to have committed a crime, caused certain harm or perceived harm against the social cell or its leader. When a person escaped who had committed an act putting the group at this spiritual risk, the group had to seek that person’s return. If the person’s return was impossible, the group had to purge the taint by proxy, often through the attack and often wholesale slaughter of those who represent the fugitive.\textsuperscript{44} Thus, when the crime was committed by an external source, war usually was the expiatory means of choice.\textsuperscript{45}

In ancient Rome, punishment for treason, which included parricide and attempted parricide, called for the perpetrator being placed in a sack with a rooster, ape, fox, and viper (all considered to be unclean animals), then thrown into the Tiber or the sea.\textsuperscript{46} If the perpetrator became a fugitive, it was necessary to obtain his person or a proxy to


\textsuperscript{42}Bessler, supra note 13, at 216.

\textsuperscript{43}See 4 Gibbon, The Decline and Fall, supra note 13, at 483–84; Fredrik Strom, On the Sacral Origin of the Germanic Death Penalties 14, 208 (1942); see also Hans von Hentig, Punishment, Its Origin, Purposes & Psychology 83, 84 (1973).

\textsuperscript{44}See, e.g., 1 Kings 2:28–34. Also, when Jericho fell to Israel, “they utterly destroyed all that was in the city, both man and woman, young and old, and ox, and sheep, and ass, with the edge of the sword.” Joshua 6:21.

\textsuperscript{45}See, e.g., Joshua 6:21; 1 Kings 2: 28–34.

\textsuperscript{46}See 4 Gibbon, Decline and Fall, supra note 13, at 483–84; also available in 4 Gibbon, The History, supra note 13, at 382.
purge the taint. The death penalty was imposed in England for crimes ranging from treason, parricide and murder to killing or maiming cattle, disturbing a fish pond, cutting down trees, setting a cornfield on fire, or shooting rabbits.

Some spiritual dangers were seen as only being avoidable through "blood atonement," spilling the blood of the perpetrator or his proxy. In England, people were boiled, disemboweled, hanged and drawn and quartered. Despite the fact that some of the forms of ancient,

Any act of treason against the state, or of correspondence with the public enemy. The mode of execution was painful and ignominious; the head of the degenerate Roman was shrouded in a veil, his hands were tied behind his back, and after he had been scourged by the lictor, he was suspended in the midst of the forum on a cross, or insauspicious tree. 2. Nocturnal meetings in the city; whatever might be the pretense, of pleasure, or religion, or the public good. 3. The murder of a citizen; for which the common feelings of mankind demand the blood of the murderer. Poison is still more odious than the sword or dagger; and we are surprised to discover, in two flagitious events, how early such subtle wickedness had infected the simplicity of the republic, and the chaste virtues of the Roman matrons. 174 The parricide, who violated the duties of nature and gratitude, was cast into the river or the sea, enclosed in a sack; and a cock, a viper, a dog, and a monkey, were successively added, as the most suitable companions. 175 Italy produces no monkeys; but the want could never be felt, till the middle of the sixth century first revealed the guilt of a parricide. 176 The malice of an incendiary. After the previous ceremony of whipping, he himself was delivered to the flames; and in this example alone our reason is tempted to applaud the justice of retaliation. 5. Judicial perjury. The corrupt or malicious witness was thrown headlong from the Tarpeian rock, to expiate his falsehood, which was rendered still more fatal by the severity of the penal laws, and the deficiency of written evidence. 6. The corruption of a judge, who accepted bribes to pronounce an iniquitous sentence. 7. Libels and satires, whose rude strains sometimes disturbed the peace of an illiterate city. XII Tables, punishment for treason.

See also Ester Cohen, The Crossroads of Justice — Law and Culture in Late Medieval France 171 (1993).

47 See, e.g., Judges chs. 15; 19–20. When the perpetrator was not obtainable, sometimes the village where the perpetrator was believed to be hiding or at least hailed from or in which he was believed to live, had to be utterly destroyed. Judges chs. 15; 19–20. This caused many blood feuds.


49 See Leviticus 17:11 ("For the life of the flesh is in the blood; and I have given it to you upon the altar to make an atonement for your souls; for it is the blood that maketh atonement for the soul."); see also 1 Kings 2:28-34. Blood atonement appears to be the essence of Christian faith, as the blood of Christ is believed to have been shed for humanity; Martin, Illicit Legislative Motivation as a Sufficient Condition for Unconstitutionality under the Establishment Clause—A Case for Consideration; The Utah Firing Squad, 1979 Wash. U. L.Q. 435, 442 (1979); Gardner, supra note 27, at 10.

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medieval, and current punishment are repugnant to us today, the mystical need to seek retribution, to make society whole again after it has been tainted, continues. John Bessler wrote:

As in Europe, offenders in the American colonies were hanged, disemboweled, or drawn and quartered, and many offenses were punishable by death. In an era rife with superstition—American executions have frequently taken place on Fridays—executions of many different types of offenders took place . . . [I]n Massachusetts, four Quakers were executed in the seventeenth century for returning to the colony after being banished, while in 1643 James Britton and Mary Latham were hanged there for adultery.  

Oppression of a group is criminal and certainly perceived as being criminal to those oppressed. Thus, oppression or perceived oppression by a state against a group or by one group against another is the impetus for retaliation by the oppressed against the oppressors and then counter-retaliation by the original oppressors. Any member of the opposing group (call it the family, clan, tribe, people, or nation-state) is considered fairly subject to retaliation. The retaliator is not viewed by his or her own group as a criminal or a terrorist, because he or she is an instrument of the group’s need to avenge or expiate itself. Once this occurs, the other group feels justified in a counter-reprisal and the vendetta rages. Rhetoric, language, culture, religion, and myth, all provide grist for a “national” or group story, propaganda, law, and legal system—the propaganda story that motivates adherents to kill and be killed or to torture (or accept torture) so as to maintain the story or vision of well-being along with those in power. Violence may be justified or excused under some circumstances, but never when intentionally, wantonly, or recklessly applied to non-combatants or innocent civilians. Rape and murder remain criminal in wartime.


52 See almost any armed conflict. For example, the conduct of the Ancièn Régime, the French Revolution, the U.S. Civil War, and more recently Chile, Argentina, Uruguay, Peru, El Salvador, conflicts in the former Yugoslavia, Rwanda, Sudan, the Democratic Republic of the Congo, Libya, Syria, Israel, Iraq, Afghanistan, and sadly on and on.

53 Hugo Grotius, for example, argues in his Book III, the whole of which is devoted to what is permissible and impermissible in war, that “the death of innocent persons must be prevented ‘so far as is possible.’ ” Hugo Grotius, de Jure Belli ac Pacis, at bk. III (Francis W. Kelsey et al. trans., 1925) (1646).

54 Larry May, Crimes Against Humanity: A Normative Account 99 (2005).
TORTURE — FINDING “THE TRUTH”

Of course, it was important to “find the truth” regarding the perpetrator’s commission of the crime. Torture has been commonplace as a means of punishment, but also as a means of “finding the truth” and providing propaganda to bolster the power of the leader, who was also threatened by crime. Of course, “the truth” is in the eye of the beholder. Thus, before punishment could be inflicted, it was necessary to “establish guilt.” This was done by formulary torture, which was intended to find what was called “the objective truth.” The only way truth could be obtained ultimately was out of the accused’s mouth, so the inquisitor applied torture to obtain this “truth.” Thus, formularies for torture and how to torture “legalized” that atrocity and are available for us to read.

Great authors picked up on this apparent need for society and the individual to purge the taint. Many of Dostoyevsky’s latter novels—after his epiphany in Siberia—made the point, among others, of the need of society and criminals for redemption or expiation through punishment. This is a major theme in Dostoyevsky’s Crime and Punishment, of course. He made the point that society needs it through Porifiri, the procurator, and that perpetrators need it through Raskolnikov, the perpetrator. The mystical need felt by many societies for the individuals to purge the taint of crime through punishment continued through the Middle Ages, the Enlightenment, and continues for many to this day.

MEDIEVAL ABUSE: CRIME AND PUNISHMENT — IDEOLOGY AND TERROR IN THE FRENCH MIDDLE AGES AND THE FRENCH REVOLUTION

The theoreticians and technicians of punishment in the French Middle Ages used the symbol of le bourreau (the executioner, the man of a thousand deaths) to represent the king’s power. Contemplate the playing-card king. A person condemned to be “expiated” for at-

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55 See Christopher L. Blakesley, Terrorism and Anti-Terrorism: A Normative and Practical Assessment chs. 11-12, Conclusion (2007).


58 Foucault, Discipline and Punish, supra note 10, at 28-30 (analyzing Ernest H. Kantorowitz, The King’s Two Bodies (1959)); Silverman, supra note 33. Of course, before punishment could be inflicted, it was necessary to “establish guilt.” Formulary torture, was used to find the so-called “objective truth.” Objective or “Legal” truth
tempted regicide, which included parricide, was the bottom half: the inverted figure of the king. This perfect opposite of the king simultaneously represented the powerlessness of the people, represented by the condemned. The alleged perpetrator was the perfect reflection, the exact opposite of the king. According to the history, the perpetrator represented the people. One who would challenge that power, the traitor who had attempted regicide or its analogue, parricide or attempted parricide, must be shown to be absolutely without power or hope. He must be symbolized to the people, in the most powerful way, as the opposite of the sovereign. The sovereign must be seen as omnipotent; the régicide utterly powerless. Indeed, he must be shown not even to have the power to die. The king had power over that person’s very soul, indeed, over the very soul of the people. In fact, the people’s soul had to be seen as being born of the punishment available to them. So the king, representative of God on earth, was omnipotent; the people had no power. Naturally, the omnipotent king had control of life and death over his subjects. Indeed, he had power over their very souls. Terror and power interrelated in a very significant and horrifically symbolic way. Thus, it followed that symbolism required the traitor’s death, and more. He must die a thousand deaths, before being allowed to die. It would not do simply to execute him. The executioner, therefore, was to take that person up to the very edge of death by torture, but bring her or him back again. Then up to death and back again-up and back, up and back, a thousand times. Finally, the individual was “allowed” to die when it suited the king.

In reaction to this and to the general oppression by the Ancien Régime, it seems natural and right that people should revolt against such power, even if that power represented “law.” Revolution eventually ensued. The problem is that fear and hatred beget more hatred and violence. The French Révolutionnaires applied tactics of terror learned from their former masters in the Ancien Régime. The people turned on their former masters with a vengeance, so to speak, and the Reign of Terror followed. Violence is certainly justified in some circumstances—in rebellion and revolution to escape oppression. In his work, On Liberty, John Stuart Mill wrote: “Political liberties or rights which it was to be regarded as a breach of duty in the ruler to infringe,

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Footnotes:
59 Foucault, Discipline and Punish, supra note 10; Kantorowitz, supra note 58.
60 Foucault, Discipline and Punish, supra note 10, at 11–13, 28–30, analyzing Kantorowitz, supra note 58.
61 Foucault, Discipline and Punish, supra note 10.
specified resistance, or general rebellion, was held to be justifiable.\textsuperscript{62} The French Revolution and related violence might be seen as culmina-
tions of the Enlightenment philosophy and have been considered justi-
fied, even noble. Violence and terror against innocents, however, are
neither noble nor justified—no matter what the claimed “justification”
or “excuse.” When revolution takes that turn, it descends to a self-
destructive reign of terror.

Murder was murder and terror was terror under the Anciên Régime
and under the Reign of Terror, no matter how it was rhetorically glori-
fied at the time or afterward. In Dickens’ Tale of Two Cities,\textsuperscript{63} Madame
DeFarge is an interesting literary symbol of this truth. She certainly
had good reason to wish to avenge herself and the French people.
She knitted, and registered all who would be executed to avenge and
“free” her people. Once the wave of violence and concomitant power
takes hold, they consumed her as she embodied them. Similarly, Èvariste
Gamelin (in Anatole France’s Les Dieux Ont Soif),\textsuperscript{64} a sensi-
tive artist interested in rectifying injustice, becomes a paranoid monster
as he is consumed with the need and desire to execute all who might
have been connected with the Anciên Régime. Violence against
innocents for whatever end, however glorified, is immoral and criminal.
Revolution overcame the oppression and terror of the Anciên Régime.
This led to the Directorate, a regime that was as bad or worse than the
one it replaced. A balance and relative end to the violence eventually
developed, as a result of the rule of law. Today, the rules of life are no
different. Violence is immoral and criminal when perpetrated against
innocents. The excuse given is meaningless.

When violence explodes with its ferocious and relentless intensity
against those who represent or symbolize the enemy, it consumes
those who wield it as well. Righting wrongs, in Mme. DeFarge and
Gamelin’s cases, destroyed not only the original oppressors (who had
wielded it first), but also those who use it second to avenge the former
evil. Violence, thus, consumes the good, even that which prompted it.
It consumes even its own. Gamelin, who was finally decapitated by his
beloved Guillotine, makes the point:

Until recently it was necessary to seek out the guilty to try to uncover
them in their retreats and to wrench confessions from them. Today it is
no longer a hunt with packs of hounds, no longer the pursuit of a timid


\textsuperscript{63} Charles Dickens, A Tale of Two Cities (1886) (1859).

\textsuperscript{64} Anatole France, Les Dieux Ont Soif (The Gods are Athirst) 198 (1978),
discussed in section D. See also Giovanna Borradori, Philosophy in a Time of Terror:
Dialogues with Jürgen Habermas and Jacques Derrida 152 (2003) (on Robespierre’s
reign of terror). See generally Ruth Scurr, Fatal Purity: Robespierre and the French
prey. From all sides the victims surrender themselves. Nobles, virgins, soldiers, prostitutes flock to the Tribunal to extract their delayed condemnations from the judges, claiming death as a right, which they are eager to savor.\textsuperscript{65}

Today, we seem no different. We seem always to be involved in some sort of blood-feud.

\textbf{Very Early \textit{“Modern Era”} and \textit{“Post Modern”} Views}

Jean Bodin, Hugo Grotius, and Emerich de Vattel all called for the rule that punishment was necessary for those who commit serious offenses, in their requirement that there be no sanctuary for the criminal.\textsuperscript{66} and every government has an obligation to “prosecute or extradite.”\textsuperscript{67} The ascendency of positivism in the nineteenth century created the perception that international law was binding only on states and could not impose obligations or punishment directly on individuals.\textsuperscript{68}

Revenge killing, hate-based slaughter and associated horrors, sadly are commonplace throughout history. Terrorism, torture, and other aspects of our own \textit{maux des siècles} continue to accelerate in the new millennium. Crimes against humanity form part of a nauseating modern equivalent of the ancient blood feud. There are so many; it is nearly impossible to keep track, and it has occurred on U.S. territory, the most vivid and recent being the September 11\textsuperscript{th} attacks. The problem is that we are facing a vicious threat from a group that has moved beyond the pale to use terrorism against us, and that feels a moral religious right to kill innocent people in order to obtain vengeance, to throw off oppression, and, as they see it, to make the world safe for their God. Makes you wonder!

Other times, it is simply the wronged person or group looking to right wrongs or to obtain retribution. For example, an unfair trial and a lack of evidence did not stop the public from vilifying then Gov. Altgeld because he (apparently) rightly pardoned the men convicted of the Haymarket Square bombings of 1886:

After reviewing a tremendous stack of affidavits and court records, Governor John Peter Altgeld of Illinois was convinced that an unfair trial and insufficient evidence had convicted the three defendants, not yet

\textsuperscript{65}France, supra note 64, at 198.
\textsuperscript{67}Grotius, supra note 53; Bodin, supra note 66; de Vattel, supra note 66.
hanged, of murder in Chicago's famous Haymarket Square of 1886. Warned by Democratic leaders that he must forget these convicts if he still looked toward the Senate, Altgeld replied, "No man's ambition has a right to stand in the way of performing a simple act of justice"; and when asked by the Democratic State Chairman if his eighteen-thousand word pardon document was "good policy," he thundered, "It is right."

For his action, the Governor was burned in effigy, excluded from customary ceremonies such as parades and commencements, and assaulted daily in the press with such epithets as "anarchist," "socialist," apologist for murder" and "fomenter of lawlessness." Defeated for re-election in 1896, denied even the customary right to make a farewell address at his successor's inaugural ("Illinois has had enough of that anarchist," the new Governor snorted), John Peter Altgeld returned to private life . . . 69

Sometimes, it is the nihilist simply looking to destroy the status quo with terror. Even the nihilist seems to have an almost spiritual vision of the need to destroy. Perhaps many of these are pretend nihilists, using crimes against humanity simply as his or her way of gaining power and becoming a statist functionary, then using terror to maintain his or her power.

PRE-ENLIGHTENMENT, ENLIGHTENMENT, AND "NATURAL LAW"

The Pre-Enlightenment, Enlightenment, and "Natural Law" gave rise to modern Western law and legal systems. Great Western religious scholars, and others, considered natural law to be "revealed law," meaning scripture, then Saurez, Gentili, and other great Western Christian legal scholars began to expand natural law beyond scripture.70 After the reign of Natural Law as revealed law (scripture), Hugo Grotius established a more secular Natural Law, wherein law was seen as a reflection of right reason.71 Although his work was limited and problematic in many ways, Savigny, at least, partially understood this and developed his "historical school" of law to a large degree on this basis.72


71 Grotius, supra note 53, at bk. III.

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NOW CONSIDER THE "LANGUAGE" PART OF CRIMES, PUNISHMENT, CULTURE, AND LANGUAGE

It is a truism that every nation, state or group perceives its law's strengths and weaknesses through its own prism, which refracts the law according to its own linguistic, cultural and formal training. Language, culture, and training are also infused into perceptions developed during formal training. The essence of law as language derives not simply from the text of laws and our judicial opinions, but also from how that text is infused and interacts with the culture and the people and everyday life. Works of comparativists and others from diverse systems may reshape our prism, providing a chance to see different refractions, a fuller spectrum of possibilities, producing a deeper appreciation of one's own law and that of other systems. The heightened refraction is magical and, frankly, ought to be extremely helpful in solving legal problems facing students, scholars, judges, and practitioners in "unitary" common law, "inquisitorial," or other systems,

73 See generally Rosen, supra note 8.
74 Please forgive my mixing of metaphors. For a vision of comparative law through the prism or lens of a formal German and Pandectist tradition, see Grossfeld, supra note 1. The German and the French Civil Codes provide the world with the two great civilian codal systems. Nations around the world have essentially adopted and adapted either the French or the German paradigm. Christian Wolff (1679-1754) was the founder of the German Pandectist School, which was fruitful especially during the nineteenth century. It like the French tradition began with the premise that territorial and political unity required a comprehensive, accessible, systematic and coherent body of law. The Pandectist school esteemed mathematical precision in legal inquiry. Herman & Hoskins, supra note 9, at 1019. Wolf's approach excluded all inductive and empirical elements through deduction, without gaps, of all natural law rules from axioms, down to the smallest details; every particular rule is derived from the previous more general one, and so on, in the strictest logical sequence. Structure and analysis requires the exactness of geometrical proof, which is achieved by a logical chain of reasoning by exclusion of the opposite. Thus, a closed system is produced, whose validity is based in its freedom from logical contradiction of all its assertions. This tradition was expanded and developed over the years to its culmination as a movement in 1862 in the work of Windscheid. Herman & Hoskins, Perspectives in Code Structure, supra this note, at 1019, quoting Wieacker, supra note 9, at 193; see also Symeonides, supra note 9, at 50-52. Professor Grossfeld, to be sure, is no mere Pandectist. He is also a scholar who has had extensive training and experience in the Anglo-American schools. He has spent several months in Cambridge, England as Visiting Fellow at Wolfson College. He spent more time as visiting professor at Southern Methodist University. He has used English and American scholars as sounding boards for his thoughts and perceptions. Thus, Professor Grossfeld aims his book at the German legal community, to provide it with some understanding of the importance of comparative law in practice and scholarship. This he does very well. The way he does it also provides the American reader with insight into how a sophisticated German comparativist perceives and analyzes law and legal problems.
no matter what the discipline or subject. Unfortunately, and as noted by Vivian Griswold Curran, some comparativists—even some of the most influential in the past several decades, blind themselves by refusing to consider differences among legal systems, or just wishing to “harmonize” by focusing only on similarities. Comparativists who focus solely on similarities also claim that when outcomes are the same or similar, the systems are the same or similar. The problem with all of this, of course, is that refusing to consider the differences creates a tautology and a self-fulfilling prophesy, at least for those who do not wish to penetrate the depths of actual difference for what they can learn from them.

Comparative law or comparative analysis, for our purposes, does not merely mean examining similarities or even exotic differences between legal systems. Comparative law does much more than contrast laws or systems. Nor is it a mere “matching” of laws, or even necessarily a discrete discipline that exists on its own terms and for its own sake. Comparative analysis should occur naturally within any rigorous study of well-chosen basic, elements of a topic. Studying another system’s approach to a subject enhances teaching and learning in addition to fostering an understanding of the nature and spirit of disparate systems. In a basic domestic course, it does not have to be applied throughout, but one can always find segments that can be addressed and enhanced through comparative analysis. Used well, it can clarify and elucidate domestic concepts. Considering more than one analytical approach to solving similar legal problems occasionally


76 Curran, supra note 9, at 8-9. Professor Curran references the famous and valuable work by Zweigert & Kötz, whose explicit aim “is to avoid finding differences.” Curran, supra note 9, at 8-9, citing Zweigert & Kötz, supra note 9, at 39.

77 Curran, supra note 9, at 8.

78 See Grossfeld, supra note 1, at 73.
takes place within unified systems—systems which are not mixed-jurisdictions.79

THE LAW SCHOOL EXPERIENCE

The law school experience, in general, is actually quite analogous to becoming fluent in a new language. Learning and eventually becoming fluent in a new language, enhances one’s spirit. Learning and eventually becoming fluent in a new language transforms us and enhances one’s spirit. Gaining fluency prompts a better and deeper understanding of one’s original language, and imbues one with a new personality and perspective. One gains a new capacity to see shades, tints, and colors not noticed before. Law students are better equipped to become good lawyers when they gain the ability to analyze legal problems through different perspectives and with a new language in its full sense. Comparative analysis, thus, is a valuable tool for developing a clearer understanding of one’s own law and legal system as well as that of others. Students from common law jurisdictions become better common law lawyers through comparative study. The ambiance of comparative law inspires anyone who lets it.

INTERNATIONAL LAW AS A “LEGAL SYSTEM”

International law, including international criminal law and procedure, may be seen as forming a conceptual “mixed-jurisdiction” generally based on Romano-Germanic or “inquisitorial” systems, buffeted and now significantly influenced by aspects of the Common Law and increasingly by the influence of various custom and religion-based systems. Thus, one who understands both the Common Law and Romano-Germanic models can better understand the methods, analytical approaches, sources, and problems of international law. In addition to the difficulty understanding and applying concepts from Common Law and Romano-Germanic legal systems, one faces differences among states within each of those types or systems. To understand the nuances of any relevant legal system, it is excruciatingly important to study the context and culture of that system.

International law, being a functionally mixed-system, requires extreme care and comparative understanding. Study and understanding, for example, international criminal tribunals requires significant cross-cultural understanding. International tribunals are neither fully

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79For an analysis of international criminal law through different prisms, see, e.g., Christopher L. Blakesley, Conditional Liberation (Parole) in France, 39 Louisiana Law Rev. 1 (1978); Linda E. Carter et al., Global Issues in Criminal Procedure (2011); Linda E. Carter et al., Global Issues in Criminal Law (2007). Lawrence Rosen provides good examples, such as the idea of “unconscionability” in contracts or agreements in disparate systems. See Rosen, supra note 8, at 30 passim.
common law nor fully civil law based. They mix aspects of and permute these two models. In addition, some aspects are *sui generis*. The International Criminal Court (ICC), the International Tribunal for the former Yugoslavia (ICTY) and that for Rwanda (ICTR), for example, combine elements or aspects of Romano-Germanic and Common Law in addition to substantive international humanitarian law and the unique culture of the given tribunal. Criminal procedure in international criminal tribunals has been in continuous development and poses problems that are difficult to resolve. Comparative law and culture is also valuable for mixed international criminal tribunals, which also require understanding of legal culture and language from systems beyond the Common Law or Romano-Germanic.

**Borrowing is Hard to Do**

It is difficult to borrow from any type of domestic legal system, as every system functions in its own domestic context, and there exist manifold versions of each type of system throughout the world. Moreover, providing an equitable and fair procedure to protect the rights and interests of those accused is an extremely difficult requirement. Domestic criminal justice systems have developed such protections as fit their own legal context over their history. The *sui generis* nature of international prosecution renders development of effective protections very difficult. Despite the great variety among national systems based on either the Romano-Germanic or the Common Law based “adversarial” model (also called the “party” model), there are several fundamental principles of the adversarial or Romano-Germanic systems which differ significantly. For example, in an adversarial system, the parties present the elements of proof, whereas these elements are principally introduced under the direction of the judge in Romano-Germanic systems. Common law systems have extremely complex and numerous rules relating to evidence production and presentation, but Romano-Germanic systems have very few and simpler such rules. Just these two seemingly straightforward differences present enormous challenges when trying to establish an international criminal court, make it function in a coherent way, and in a manner which is understandable and functional by all parties. Cross-examination of principals and witnesses can also be a troublesome element. Thus, individuals who gain a deep understanding of the fundamental, principle differences can be effective—others cannot. Attaining this understanding is also extremely important because we live in a world of mixed-jurisdictions. It is also crucial for transnational practice, for example in matters of extradition, Status of forces agreements and situations and mutual cooperation in criminal matters.
THE VALUE AND RISKS OF COMPARATIVE LAW

LAW AS A TYPE OF LANGUAGE — THE LEGAL PROFESSION AS A TYPE OF CULTURE

Law and language are creative forces, greatly affecting life, society, and culture, even as life, society and culture affect them. Grossfeld wrote: "we should recall the close historical connection between law and rhetoric in the Glossators, between scholasticism and jurisprudence, and again between law and poetry. The links occur through the medium of language: 'Rhetoric is in turn the child of the myths and poetry . . . . The poetry and myths are the response of a prehistoric people to the universe around them.'"80 Samuel Johnson recognized this when he wrote: "I am always sorry when any language is lost, because languages are the pedigree of nations."81 This captures what I am suggesting: I am not advocating an erasure of any legal system, but rather encouraging development and understanding through the study of other legal systems. Language gives form to our thoughts and perceptions, as Grossfeld notes, quoting Karl Kraus as saying, "language is the mother of thought."82 The same is true of legal systems or cultures. Becoming a lawyer mimics becoming fluent in a new language. Grossfeld correctly noted that law and language have common features deeply imbedded in our being.83 Learning the law, like any real learning, is made keener as one broadens her "linguistic" perspective. Thus, I use the term "language" or "the word" in not only their usual sense of the language or words we use to perceive, think, speak and write, but also as metaphors for law as language.

Like learning to become fluent in a foreign language, learning to become a compleat lawyer is a matter of becoming a part of another culture. One becomes a French speaking person by going through an arduous process. One becomes a person who can solve legal problems (who can "think like a lawyer"), by going through an arduous process, too, analogous to learning a foreign language. There is no shortcut. The first-year curriculum, certainly, is generally designed as a process of creating a person who is fluent in the "language" of the law (writ large). This being so, becoming a cross-cultural—and legal bi-lingual—attorney or scholar is better than being limited to one perspective, in the same broadening way that becoming fluent in a second language make one different and broader than before. Thomas Kuhn explains it this way:

81 Samuel Johnson, quoted in Boswell, Tour to the Hebrides, in 5 Life of Johnson 175 (1773).
82 Grossfeld, supra note 1, at 86.
83 Grossfeld, supra note 1, at 88–95.
Looking at a contour map, the student sees lines on paper, the cartographer a picture of a terrain. Looking at a bubble-chamber photograph, the student sees confused and broken lines, the physicist a record of familiar subnuclear events. Only after a number of such transformations of vision does the student become an inhabitant of the scientist’s world, seeing what the scientist sees and responding as the scientist does . . .

**LAW AS LANGUAGE AND DEVELOPING LEGAL “MULTI-LINGUALS”**

Bernhard Grossfeld notes Rudyard Kipling’s aphorism that words (language, writ large) are the “mightiest drug.” Nobody should doubt the powerful creative force of language. In some ways it is what creates, certainly in a deep, cultural, perhaps even spiritual, way. Religious canon is often called “the Word.” *Chefs d’Oeuvres* (master works) move us profoundly. To name only a few, reading works like the *Odyssey*, Shakespeare’s work, Hugo’s *Les Misérables*, Garcia-Marquez’s work, Goethe’s *Faust*, Dostoyevsky’s work, and the poetry of the thirteenth century poet, Rumi, reflect the primal creative force of language and love, as well as other powerful forces. All of these works use words to move us toward becoming new, better beings. Creation in many cultures actually occurs with the “word.” Language gives our perceptions form—and more. In this way, learning a foreign language makes a “new person” out of us. It gives one a new personality, a new dimension to thought, perception, and understanding—a new being. It is through language, our own and any others that we truly learn, that we become. Schiller wrote: “[a] developed language that composes and thinks for you.” Language certainly creates a world picture given form. Gottfried Benn wrote, Worte: “Alone: really alone—just you and words.” Similarly, Burckhardt wrote: “Man has as many hearts as he has languages.” Victor Hugo wrote: “The man who does not know other languages, unless he is a man of genius, necessarily has

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84 Thomas Kuhn, The Structure of Scientific Revolutions 111 (1962).


86 Johann Christoph Friedrich von Schiller, Dilettant in Tabulae Votivae, I Werke 319 (1952), quoted and discussed in Grossfeld, supra note 1, at 96.


deficiencies in his ideas." 89 Yes, learning a new language gives us a new, fresh personality, and not becoming fluent limits us. Grossfeld discusses Wittgenstein’s aphorism that “the limits of language (the language I understand) mean the limits of my world.” 90 Referring to language’s capacity to shape a people’s cultural (hence, legal) history, Grossfeld wrote, “[W]hen we learn another language we unconsciously incorporate its speakers’ world of thought: ‘[L]anguage thinks in us.’ “ 91 Certainly, words and language have legal side effects. Law or the ideological appropriation, avoidance, or perversion of law sometimes creates new legal terms, for example the invention of “illegal enemy combatants” to avoid the application of law. If law is language in this sense, and it is in many important ways, studying law from more than one system gives us more depth or vision. It is undeniable that no country is truly isolated anymore, either culturally or legally. Every nation is part of an international system of laws.

Thus, being legally multilingual is extremely valuable. Part of learning is cognitive, of course, but simply to memorize legal maxims or “buzz-words” will not suffice, just as memorizing common phrases or grammatical rules will not make one fluent in a foreign language. Learning facts and information—a deep sense of the culture presented by the language—are required, but this is only the beginning of the process. Learning is an ongoing process, not an event. As one practices the language with the actual culture, one interacts with and absorbs that culture, thus becoming more fluent. Some may expect that becoming a lawyer or a scholar is an event like suddenly being “born again,” as anticipating that by passing a bar examination or receiving her J.D. or Ph.D., she will instantly change. This is not true. To change oneself, one must go through the process of becoming fluent. This is what professors mean when they say that law school allows one to become a person who “thinks like a lawyer.”

THE PRACTICAL IN COMPARATIVE ANALYSIS

Skeptical practitioners, judges, legislators, or academics from systems, which are not mixed-jurisdictions, such as Canada, Puerto Rico, Louisiana, South Africa, and even Scotland, sometimes claim that comparative law or study of foreign legal systems is arcane,
exotic, or perhaps even useless fluff—an unnecessary luxury for the so-called "practical" jurist. I have even heard it charged, in an exhibition of ignorance, that studying civil law systems is meaningless, because there is no real difference in the results obtained in various legal systems.\textsuperscript{92} Even some excellent comparative law scholars believe that for the sake of harmonization, difference should be ignored. No doubt, virtually all legal systems face similar legal problems and usually arrive at similar results. Nevertheless, the analytical approach used in various legal systems can be quite different, and understanding more than one way to think through a problem is a useful skill. One continental scholar suggested that common law lawyers and legislators are nothing more than mere casuistic thinkers—"mere plumbers."\textsuperscript{93} I doubt that the continental scholar meant to suggest that plumbers are not good or important, but that the common law practice and mode of analysis is so extremely fact dependent and casuistic that it is not worth an intellectual candle. The non-sequitur is evident. The truth is that, whatever their legal culture, legislators who fail to realize the value of comparative law may promulgate inferior legislation. Judges may render inferior decisions. Scholars may not write as well, practitioners may commit malpractice. Comparison helps one see how one's foreign counterparts litigate, negotiate, adjudicate, envision, and draft their law. Comparative understanding helps one become more incisive, more innovative, and enables a person to work more efficiently and clearly with his or her foreign counterparts. Thus, even though it is true that wholesale borrowing is harmful, it seems shortsighted and ill-thought to claim that comparative study is useless because similar outcomes result regardless of the system.\textsuperscript{94}

Criminal procedure for resolving basic criminal law problems and the method of analysis for recognizing them and arriving at solutions vary quite significantly among legal systems. Studying some of the differences and similarities in various approaches elucidates the law and the legal process in other systems, in one's own domestic system, and international criminal procedure. Students can become better at case analysis and synthesis, better conceptual thinkers, statutory analysts, drafters, and interpreters than without it. Teachers will see nuance that had eluded them before. They will find questions to pose from angles they and students will not have considered. Judges, legislators and students will find similar inspiration. "\textsuperscript{92}A colleague at Louisiana State University actually stated this to me.
\textsuperscript{93}Statement made to me personally by a European scholar and friend. I will not mention his name.
\textsuperscript{94}See, e.g., discussion, herein, on the Willy Holder case and how failure of comparative legal and cultural understanding may cause total misunderstanding of proceedings and rules of law or practice.
of a variety of legal cultures will recognize what is accidental rather than necessary, what is permanent rather than changeable in legal norms and legal agencies, and what characterizes the beliefs underlying both. The law of a single culture will take for granted the ethical theory on which it is grounded.\textsuperscript{95}

Skeptics, to whom I alluded above, would do well to take a deep breath and dive deeply into the waters of comparative law, rather than merely skimming rocks off the surface. As those who have lived in Louisiana, Florida, or other swampy places know very well, the water of a swamp may appear to the uninitiated to be murky and foul, but in truth, if left unpolluted, it is pristine and clear. Once immersed, one will feel the fresh illuminating effect of a clear, new perspective and approach—the dark prism brightens. The unitary white light is revealed to be dazzlingly multivarious.\textsuperscript{96} Practical problems may be resolved more incisively, inventively, and artfully, with new perspective. Classroom discussion may be more lively, interesting and fun. Even the skeptic may begin to see the practicality and value of considering different approaches.

Thus, by using comparative analysis, students have the opportunity to become better common law lawyers. They will become better international lawyers. They gain unique perspective from which to solve legal problems in either system. Comparative analysis is not arcane fluff. It assists one in becoming more incisive, more innovative—a better teacher or attorney in one’s own system. It also provides one with the understanding necessary to work well with one’s foreign counterparts or in the international arena. One can actually comprehend the essence of the words and phrases used. This is as practical as it gets when one has a transnational or international legal problem. In addition, on a broader level, understanding breeds innovation and cooperation—ignorance breeds contempt.

\section*{The Impact and Value of Comparative Criminal Law and Procedure in the Domestic and International Criminal Arenas — Avoiding Superficial, Erroneous, or Ideological Assumptions}

Yes, in many ways law is language in the deepest sense, which, as Grossfeld wrote, the “constitutive and cognitive power of language is especially significant for law, for only in language do the concepts of

\textsuperscript{95}Henry W. Ehrmann, Comparative Legal Cultures 11 (1976).

\textsuperscript{96}Thanks to my research assistant Cheryl Grames for providing this turn of phrase.
positive law have any being at all."97 Different languages and different legal systems may represent different world-views.98 Thus, comparative law, language, and etymology may tell us a great deal of each other's and our own legal cultures, thus allowing us to understand how we in different legal systems may think. Good comparative law allows us to understand. Most people, including lawyers, take their own world-view for granted as the product of natural common sense. As Peter De Cruz notes: "[T]he comparative method encourages the student to be more critical about the functions and purposes of the rules he or she is studying and to learn not to accept their validity purely because they belong to his or her own system of law."99 In reality, it is provided by our mother tongue, writ large—Vox populi, vox dei (the voice of the people is the voice of God). This belief may be more weakness than strength, if one becomes blinded by a belief that one's own system is so superior that consideration of another system is just a waste. It is often a weakness when applied by many judges, attorneys, and scholars in the United States, as well as other legal systems. Assuming that the cultural vision of a term is universal, and thus means the same thing everywhere, is usually both wrong and problematic. Similarly, simplistic or wholesale borrowing is a weakness and often proves to be harmful. It may be overcome by comparative law, exercised properly. This can allow not only better understanding in legal study, but even provides a way for various legal systems to incorporate sensible, interesting, and valuable ideas from other systems. In the international arena, it allows for sensible drafting of treaties or other instruments, which both or all sides can understand.

THE TERM "VERDICT"

A brief comment on the confusion relating to the term "verdict" may be enlightening, to illustrate the reality that, while there are serious cultural and historical differences in how it is done, all or most cultures, groups, and states are interested in finding a way to determine the truth in a criminal trial, without damaging either justice or liberty. Different systems do this in different ways. One trap to avoid is the tendency to assume that commonality exists where there is actually difference. This has obvious practical and theoretical import. Take, for example, the term verdict, which derived from the Latin term verum dicere, which means "telling the truth." Both Common Law and Civil Law systems use the term "verdict." Comparing the philology and focus of this term in the continental, modernized inquisitorial, systems

97 Grossfeld, supra note 1, at 92.
98 See Grossfeld, supra note 1, at 94–97.
99 Peter De Cruz, Comparative Law in a Changing World 19 (2007).
of criminal justice with that in the Anglo-American adversarial systems is eye-opening. I have discussed elsewhere the implications of evolution in these two systems or paradigms, which currently seem to be attempting to converge in some respects and to diverge in others, raising problems as well as benefits. 100 Sadly, legal systems in Europe, in the United States and in England seem to adopt parts of each other's systems based on caricature, not sophisticated understanding of the comparative reality or to reject elements based on similar superficiality. 101

Bernhard Grossfeld's discussion of language and the value he puts on his perception of the term verdict provides insight into both some of the promise and some of the dangers of comparative law. His discussion of "verdict" shows how even a brilliant and learned comparativist may have an incomplete understanding of a term, at least as to its conceptualization in the United States. This may have been based on his cultural predisposition, perspective, assumption, or predilection. No one can fully escape the tendency to perceive the world through one's own cultural and linguistic prism. Grossfeld's prism caused him to assume that the United States concept of verdict


101 Examples, such as the perception that the "adversarial system" is really a modified jousting or battle, or that the inquisitorial system is still similar to the Inquisition or the Star Chamber.
was the same as his own, because both used the very same term and referenced the result of a criminal trial.

The “inquisitorial system” has been the basis of “continental” European criminal justice for ages and still is. Much of what resides in all of Europe’s various legal systems has been informed and rests in the inquisitorial model, still. The past is part of the present, just as current language, culture, and law are loaded with concepts, practices, and terminology that evolved through the ages, yet still maintain part of the essence of those concepts, practices, and terminology in the past. The stated goal of modern European criminal investigations and trials, for example, was [and still is] to “find the objective truth.” “Verdict,” a simple term, nonetheless has a profoundly different meaning in a modern continental criminal trial (which uses an inquisitorial model), than in a criminal trial in the United States (which uses an adversarial model). The inquisitorial model traces its roots to ancient and medieval authorities who promulgated torture formularies to “find the truth.” Torture enabled the inquisitor virtually always to find the so-called “objective truth.” A verdict in the United States, however, is the result of a jury’s attempt to find the “truth,” but only means that the jury decided the prosecution met or failed to meet its burden to prove each fact and element of the crime beyond a reasonable doubt. Of course, one hopes every trial results in finding the truth, but this does not always occur.

Criminal justice in the United States is “adversarial” for important historical, cultural and political reasons, but primarily because early leaders knew too well on the heels of the American Revolution that a government generally has an overwhelming advantage over an accused criminal. Procedural protections are necessary to give the accused a fair trial and to thwart the potential for manufacturing “truth.” Herbert Packer based his due process model on ideas of confrontation and irreconcilable differences between the individual defendant and the state prosecuting him. For these reasons, criminal procedure in the United States is largely constitutional, including many of the amendments in Bill of Rights. Limitations on evidence gathering are rigorous. The Constitution sets forth rules relating to pre-trial and trial procedure to protect the accused from abuse, to avoid the innocent being wrongly convicted, and, significantly, to protect the Republic from government using criminal procedure to arrogate undue or authoritarian power. Hence, there are limitations on state power to

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102 See, e.g., Guidonis, supra note 56.

"find the truth" in criminal matters, which do not just protect the defendant, but protect everyone, even the Republic itself.

In contrast to the United States, in Europe, the judiciary and judicial police develop and produce the evidence in court. Also, the administrative court system protects against evidentiary abuse (e.g., the Conseil d'Etat, in France, which is the highest administrative court in France, charged to protect the rights of citizens).\textsuperscript{104} Purposes of the limitations on prosecutorial power in the United States include ensuring fairness in finding the truth, protecting the innocent, as well as preventing the abuse of criminal justice to promote authoritarianism.

"Verdict," then, is a part of the American legal language and culture, best understood against the backdrop of its broader relationship with the nature of the Republic. The tension between the people and their government was articulated by revolutionary Founders such as Thomas Paine and Patrick Henry.\textsuperscript{105} The recognition of, need for, and motivation to promote the protection of the accused in the face of state power was fortified after World War II. Judges and scholars in the United States viewed with horror the facilitation by the criminal "justice" systems of depredations wrought by the totalitarian states of Europe prior to, during, and after World War II.\textsuperscript{106} Once installed, the totalitarian regimes in Europe prior to the War, including the Soviet Union, taught graphic lessons about the potential of abusing criminal law and procedure as instrumentalities for systematic destruction of values upon which free society rests.\textsuperscript{107} American judges and scholars saw the need to prevent this from happening in the United States. These barriers may make prosecution more difficult, but are necessary nonetheless. Limitations in the Bill of Rights often frustrate many in the public because of the misunderstanding caused when basic rights are characterized as "mere technicalities." One trusts that the United States is strong enough to avoid going down a path anywhere close to that in the former Soviet Union or the National Socialist

\textsuperscript{104}For a discussion of the nature of the systems and barriers, see generally Mirjan Damaska, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure, 121 U. Pa. L. Rev. 506, 575-76 (1973).

\textsuperscript{105}See, e.g., Jack Fruchtman, Thomas Paine: Apostle of Freedom (1996) (showing that superficial reading and propagandistic appropriation of Thomas Paine by certain "movements" in our current era do damage to Paine's vision and to the country).


\textsuperscript{107}Allen, supra note 106, at 521-25.
criminal systems. Considering why this is important and how to avoid it seems crucial.\textsuperscript{108}

Thus, obstacles to gathering and admitting evidence to trial were established as a matter of fairness and due process, but also to prevent tyranny of the state and tyranny of the majority. The protections established in the realm of criminal justice are crucial to ensuring general human and civil rights and preventing the arrogation of governmental power. Not to limit that power, it was feared, could endanger the rights of the people and the nature of the Republic. Barriers, therefore, were set to prevent government from having so much power to "find the truth" that it could invent it. If left unchecked, the Founders feared that the government's power could endanger the rights of the people and the nature of the Republic.

In 1968, when Herbert Packer wrote his significant work on the United States criminal justice system, American society was in turmoil due to social change and the Vietnam War. Largely in reaction to police and prosecutorial abuses, the Warren Court attempted to reform the criminal justice system to promote civil liberty and to protect against abuse. The Court tried to promote basic human rights values and to ensure that the liberties guaranteed in the Constitution received sufficient judicial protection to be functional. In Packer's somewhat oversimplified terms, the Court attempted to move the system toward

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a more vigorous or wide-sweeping “adversarial” or “due process” model.109

Obstacles to evidence gathering and production also developed in the United States to protect against arrogation of power in the executive and legislative branches. The judiciary is obligated to protect against government abuse by applying the Bill of Rights with vigor. As a result, burdens of evidence production and proof were imposed on the prosecutor and police. Subsequent Supreme Court decisions have promoted this protection to some degree, but not consistently.

Recently, during the so-called “War on Terror,” some members of the government have expressed fear of the protections of the Bill of Rights or have argued that their protections ought to be toned down in relation to the so-called “new kind of war.” Some even have sought to eliminate our most valued, especially when they apply to individuals alleged to be terrorists, including U.S. citizens.110

The purposes of the limitations on prosecutorial power include ensuring fairness in finding the truth, protecting the innocent, as well as preventing the abuse of criminal justice to create a police state. Over the past few years, especially in relation to the so-called wars on drugs and on terror, these values have been eroded. Insecurity and fear generated by the terroristic attack on September 11, 2001, may have been manipulated by government and some in the press to create a perception that we citizens are facing tyranny by crime, criminals, and terrorists—that public order is collapsing.111 Sensationalist news media promoted the misconception that the Bill of Rights and human rights allow criminals and terrorists to go free.112 This is exactly why the limitations are crucial, however. If we allow the government to bypass the barriers created by the Bill of Rights in order to prosecute individuals accused of terrorism, torture, murder, child murder or

109 See Blakesley, supra note 23, at chs. 1–2.
110 See supra note 108 (citing authority).
111 See Richard H. Sayler et al., The Warren Court: A Critical Analysis (1968); Blakesley, supra note 23, at chs. 1–2, 4; Blakesley, supra note 55, at chs. 1–3, 8, 11, 12; Christopher L. Blakesley, Ruminations on Terrorism: Expiation and Exposition, 10 New Crim. L. Rev. 554 (2007).
abuse, and other crimes that prompt a strong public visceral reaction, we then risk eroding our entire legal system and arrogating power to the executive branch. Authoritarian sometimes attempt to erode civil liberty by manipulating, perverting, or excepting the government from legal limitations of the criminal arena. An example might be the Military Commissions for Guantánamo, and actions against United States citizens deemed terrorists.\(^{113}\)

Importantly, much of the impact of the Fourth, Fifth, and Sixth Amendments relate to pre-trial and at trial evidence production. In practice, evidence production and limitations on its production are crucial to the U.S. approach to criminal procedure, which is constitutional at its core (the Bill of Rights). Evidence production in the United States is not part of the judicial function as it is in Europe, although limitations on it are protected by the judiciary in the U.S. system.

Comparative study can help to highlight such problems and to help resolve them sensibly by bringing them into clearer focus and providing more opportunity to see the need to protect basic rights. Well-developed comparative analysis may help clarify why other values, in addition to “finding the truth” play a significant role in criminal procedure. Comparative law can show how simplistic adoption or rejection of foreign approaches can prove harmful, even dangerous. Some lessons a comparativist can glean include simply being careful with assumptions of similarity or difference; to be careful of “harmonization” and adoptions of “foreign solutions” and recognition of the need to penetrate more deeply to find the actual similarities—the core element that we have in common—rather than a caricature.

**TO REPRESENT (REPRÉSENTER)**

International extradition, a matter of transnational criminal law, provides another example of conceptual confusion and damage caused by misunderstanding of other systems. The term “to represent” in English is the same in French (représenter). Yet the conceptual meaning and mental picture created by the word in the mind of an attorney from the United States and her French counterpart differs considerably. For example, perhaps startlingly, some of my superiors in the U.S. Department of State did not seem to understand this difference, in a case in which the United States sought to extradite alleged airline hijacker, Willie Holder, from France.\(^{114}\) Under the terms of the U.S.-France Extradition Treaty, the French Avocat Général (the prosecutor who presents extradition cases) was charged with “representing” the U.S. before the Cour d’Assise (the French trial level court)

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\(^{113}\)See, e.g., supra note 108 (citing authority).

\(^{114}\)See In re Holder, Dig. U.S. Prac. Int’l L. 168 (reprinted in 1975).
in extradition hearings. The *Avocat Général* presented the United States' evidence against Holder to the French Court. He then proceeded to argue that Holder should not be extradited because his crime was of a political character, and that the extradition request should be refused because the Extradition Treaty exempted political offenses. The United States Government was outraged that the person responsible for "representing" the United States in France would simply present the evidence, and then would argue against the United States interest.

The American conceptualization of "represent" naturally conjured up the aggressive adversarial paradigm. On the other hand, the French *Avocat Général* simply functioned as required under the French law and concept of the term "représenter." French law demands that he present all the papers in evidence, but also requires him to speak as his perception of justice would require *la parole est libre, mais la plume est servie* (the spoken word is free, but the written word—evidence—must be served). The *Avocat Général* must present exculpatory evidence and arguments, if he feels compelled by his notion of fairness, justice and the truth. Thus, paradoxically, both sides in this controversy were right, from their own frame of reference, on the meaning of "represent" and "représenté" in a criminal proceeding. Notwithstanding the use of the same word, misunderstanding arose due to different visions of criminal justice and different means of protecting liberty and the accused. Counsel must become familiar with the legal culture behind the legal language. An important part of the cultural language of legal systems is in their methodology and procedure.

**Risk in Facile, Superficial Comparison to Justify Transplantation or Rejection of Foreign Models**

As Vivian Curran notes, any "valid examination of another legal culture requires immersion into the political, historical, economic and linguistic contexts that molded the legal system, and in which the legal system operates."\(^{115}\) The American adversarial system and the Bill of Rights are venerable, crucially important, and imbued with deep-set

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historical and cultural values—language in its deepest sense. European civil law systems have their own set of ways to protect liberty and to prosecute crime, also imbued with cultural language in its deepest sense. Careful analysis of European Codes of Criminal Procedure and methods of protecting civil liberty (say in the French Administrative Law and interpretation by the Conseil d’État) make this clear. Both systems, however, have problematic tendencies when they try to incorporate elements of other systems or laws. Legislators and courts tend to adopt caricatures of other systems. Some decisions by the United States Supreme Court have accepted as valid some legislative adoption of elements or aspects of the inquisitorial systems, sometimes in mere caricature. Other opinions have rejected even the consideration of foreign conceptualizations. Whether accepting or rejecting, they have often used caricature rather than in-depth
design of other legal institutions and the facts of political sociology.”). Of course, “language barriers . . . [and differing] legal cultures” cause significant interpretive or incorporation difficulties, when courts interpret foreign laws or legislatures try to incorporate foreign legal ideas. Tushnet, supra note 115, at 4–5. See also John C. Reitz, How to Do Comparative Law, 46 Am. J. Comp. L. 617, 620 (1998).

111Vivian Curran notes: “For an example of an apparently identical legal question which masks fundamental underlying differences in different legal systems, one might posit two nations working on replacing welfare payments to single parents with obligatory, government-created jobs. If each nation enacted the same provision on its face, the law nevertheless would be very different in significance if in one country the government also provided free day care for children, while in the other no provisions were made for child care and day care centers were nonexistent because the second country viewed child rearing as the exclusive responsibility of mothers.” Supra, at 71 n.93. Professor Curran also notes that sometimes “practical results that seem the same in fact are not, because of profound differences in the respective legal systems that amount to highly different results, despite superficial appearances to the contrary. Curran, supra, at 83.

112See discussion in Adam Liptak, U.S. Court is Now Guiding Fewer Nations, N.Y. Times, Sept. 18, 2008, at A1; Annelise Riles, Wigmore’s Treasure Box: Comparative Law in the Era of Information, 40 Harv. Int’l L.J. 221, 228, 240 (1999) ("Any amount of contextual detail that the comparativist might provide seems insufficient, and yet every amount of detail threatens the possibility of comparing across different systems"), referenced and quoted in Jacco Bomhoff, Balancing the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law, 31 Hastings Int’l & Comp L. Rev. 555, 561 n.25 (2008). “The pragmatically motivated functional method has been a useful guide for establishing comparative law as a discipline. It still has its virtues and valuable applications today. As a model for all comparative studies, however, functionalism is no longer a good fit because it is too limited in its application by its premises and operational problems. Merely abandoning the praeceptum similitudinis, as arguably its most controversial presumption, cannot save the method. The objections to the remaining presuppositions are too serious.” Oliver Brand, Conceptual Comparisons Towards a Coherent Methodology of Comparative Legal Studies, 32 Brook. J. Int’l L. 405, 420–21 (2007), citing Jaakko Husa, Farewell to Functionalism or Methodological Tolerance?, 67 RabelsZ 419, 424 (2003).
understanding for their decisions or arguments. When aspects are adopted, it appears to be with a pretense of comparison and sophistication, but in reality it often is not. In the U.S., this has tended to enhance the powers of the executive branch, including police and prosecution, by incorporating bald, misunderstood, terms of European systems, such as the belief that they are still like the Spanish Inquisition. None of the protections that Europeans have built onto their systems seem even to have been considered. The decisions and laws sometimes articulate the age-old inquisitorial aphorism that the sole purpose of the criminal trial is to find the “objective truth.” European nations often do similarly with parts of the adversarial paradigm. Adoption and adaptation may be valuable, but only if done with care, caution, and a deep understanding of the legal culture. Adopters need to understand the subtleties of the foreign system they are attempting to emulate. It is crucial to build into any transplantation or adaptation the essences and important basic features of the traditional legal culture.

This problem of superficiality is utilized by ideologues who appropriate comparative law for their narrow purposes. Some jurists, legislators, judges and policy makers pretend to be comparativists, mouthing platitudes based on caricature. Others do the same in rejecting any consideration of foreign approaches. Sometimes in the name of fighting crime or fighting terrorists, we erode our democratic and constitutional institutions, often using “comparison” and “harmonization” as justification, or rejecting sensible and useful comparative analysis. Thus, pro-prosecution procedural elements of one system may be blindly adopted by the other. Analysis of Mutual Assistance Treaties and aspects of counter-terrorism legislation are examples. This has international impact through adoption of Mutual Assistance Treaties in Criminal Matters (MLATS), which may include potential for abuse of liberty to “fight crime.” Such treaties and their relatives include much of the legislation to fight terrorists and the exemption of the rule of law to situations relating to the executive claim of fighting terrorists. Examples include the so-called torture memoranda out of the Office of Legal Counsel, the laws and orders relating to Military Commissions for Guantanamo and elsewhere, among others. Many United States tactics and strategies in “crime fighting” are exported vigorously. The United States has been isolationist in relation to incorporation of pro-human rights initiatives, but expansionist in importing and exporting “crime fighting” techniques that diminish human rights and civil liberty. Occasionally this is due to ignorance. Other times it is purposeful or deliberate. Sometimes, especially in relation to our “wars” on drugs and terrorism, hysteria and ignorance can cause us to accept perversion of the rule of law, arrogation of executive power, and erosion of constitutional values. Our simplifica-
tion of conceptual language and vocabulary (for example, so-called "Muslim looking," hence "bad," people risk being terrorists and enemies) presents a fairy-tale quality where simplistic, superficial and manipulated views of right and wrong, good and bad are presented as qualities easily, but mostly incorrectly, seen and easily sold by propagandists. Although the legislative process is sometimes cumbersome, and although the judiciary may make mistakes, they are set in the Constitution as checks and balances to protect against executive abuse and authoritarianism. Sometimes they have not lived up to their obligations.

Applying knowledge, understanding, or analytical styles from foreign jurisdictions can be beneficial. What is called law may function for good or evil—may be helpful or harmful. Some counterfeit "law," like music in the Pied Piper of Hamelin that actually tricks people and pulls them along to participate in, acquiesce to evil, to slip into danger, or what is actual illegality. One can argue, against Goethe that, while "law innate in us" is always good, even Goethe, through Mephistophiles, shows us how counterfeit law is bad:

Laws are transmitted, like some dread disease,
Father to son, and spread from place to place.
Reason turns to folly, boon becomes a bane
To later generations. Yet the law
Innate in us is meanwhile quite ignored.

I would argue that the negative side of "law innate in us," the tendency of people to be manipulated by counterfeit law and their "tradition," is neither good nor innate in us. The classic example is presented by the German "laws" that allowed the Nazi depredations during World War II. It was "legal" under Hitler's counterfeit domestic "law" to slaughter "enemies" of the Reich. "Rules," that lead or force people to do evil things are not law—they are illegal. They are inconsistent with our

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118 See Grossfeld, supra note 1, at 104.
119 Goethe, supra note 19, discussed and quoted in Grossfeld, supra note 1, at 4.
120 See Judgment of the International Military Tribunal, Nuremberg, Germany, 1946 (The Nuremberg Judgment), 22 I.M.T., Trial of the Major War Criminals 411, 427 (1948).
inner harmony. Rules may be established which abuse our desire or need to conform, to be in rhythm with authority, but they lead us to illegality. More recently, we have seen this in the “dirty wars” in Latin America, in Rwanda, in the Democratic Republic of the Congo, in the former Yugoslavia, and Cambodia. We have seen this, by all sides in the so-called “war on terror,” including eviscerations of constitutional and moral principles, such as torture, to mention only a few of the too-frequent atrocities committed in the name of culture, ethnicity, religion, ideology, fear, hatred, and pursuant to counterfeilt law. We need to be able to transcend that tendency and nurture our sense of the law innate in us.

Perhaps a reality of life and law is that “our basic feeling for play, rhythm, and proportion is inborn.”122 Could it be that even our sense of right and wrong, are inborn? Grossfeld writes, “[W]e obey the law [‘that law innate in us’] from a consensual, inner impulse which we experience as moral duty, even as joy.”123 This is consistent with “moral law,” “moral duty” or “moral necessity” as opposed to “physical law, duty and necessity,” that Joseph Conrad makes us feel and struggle with in Lord Jim and Heart of Darkness. The point that I would take from this and from Goethe is that there is a moral compass or core set of values—a type of morality, from which we may be tempted or tricked to leave behind, but which may represent or develop into law. Perhaps they are manifest in our sense of self, our language and law.124 What is important is that we provide an opportunity to study what others might perceive as “universal law.” On the other hand, but this is beyond the scope of this Article, there may be certain immutable principles that really are universal (e.g., that innocent people will find it offensive, if some of their own—say, their family—are raped, tortured, or assassinated to promote a political, ideological, “religious,” or other interest). Law, if it really is law and not some pathological analogue or pretender, should be consistent with human beings’ instinctive and deepest moral values. This is what Goethe called “the law innate in us.” It should cause, not erode, an

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122 Some of these thoughts were prompted by Grossfeld, supra note 1, at 104.
123 See Grossfeld, supra note 1, at 104.
124 See Grossfeld, supra note 1, at 104.
appropriate response in our "moral wave-length."

"[L]anguage [and law] uses cultural sensibility we have inherited with our genes; we obey the law from a consensual, inner impulse which we experience as moral duty, even as joy. Law resonates within us, is our own; we now want to do what we should do because we are in harmony with it."\textsuperscript{126}

CONCLUSION

Comparative law, comparative study in general, including comparative literature and languages may all help us to address these issues in their various manifestations. Because I frequently use metaphors to explain things, please indulge me to come full-circle. We owe it to ourselves to develop the prism through which we see the world, law, culture, and language to allow us to see less darkly. This will help us to break down the barriers to understanding in our own minds.

\textsuperscript{125} Grossfeld, supra note 1, at 104.
\textsuperscript{126} Grossfeld, supra note 1, at 104.