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The Methodology of Comparative Law

Edward J. Eberle*

I. INTRODUCTION

In our increasingly globally linked world, comparative law needs to take on an ever more important role. With the rise of important new developments over the last thirty years, like the proliferation of the computer and the internet, global capital markets which begin in Asia and end in the United States, and the mutual trade in commodities, like oil, foodstuffs or metals, we are linked in important common ways. The computer, and especially its generation of the internet, has made us, in effect, a global village. Still, of course, there are differences among areas of the world and countries, notwithstanding the common linkages that connect us. And so, that brings us to the topic at hand: assessing the role and methodology of comparative law so that we can come up with a sound methodological framework to better understand the role of law in different countries. This will serve as a way of promoting insight and knowledge and, maybe, some degree of harmonization over critical issues or, at least, a measure of common understanding. The gathering of knowledge obtained through comparative law can be a vital portal to a foreign culture. The insights gathered can usefully illuminate the inner workings of a foreign legal system. And these insights can be applied to our own legal culture, helping illuminate different perspectives that

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may yield deeper understanding of our legal order.

First, some insight into comparative law. The essence of comparative law is the act of comparing the law of one country to that of another. Most frequently, the basis for comparison is a foreign law juxtaposed against the measure of one's own law. But, of course, the comparison can be broader: more than two laws, more than law, more than written words.

The key act in comparison is looking at one mass of legal data in relationship to another and then assessing how the two lumps of legal data are similar and how they are different. The essence of comparison is then aligning similarities and differences between data points, and then using this exercise as a measure to obtain understanding of the content and range of the data points. Here we need to focus quite carefully on the similarities and differences among the data points derived from the different legal systems.¹ What is the substance of the data point? How does it diverge from the point it was compared to? What are the nature of the divergences? What do the divergences and similarities reveal? On what data are the revelations based?

It is not enough simply to compare words on the page. Law sits within a culture. Law both drives and is influenced by the culture of the home country. So, we must look beneath the law as written formally in text. We need to excavate the underlying structure of law to understand better what the law really is and how it actually functions within a society. To do this, we need to explore the substructural forces that influence law. These can be things like religion, history, geography, morals, custom, philosophy or ideology, among other driving forces. Professor Grossfeld and I have referred to these forces as "invisible powers."² Rodolfo Sacco terms these underlying influences "legal formants," influences that help drive the formation of law.³ The point, simply stated, is that to get a complete understanding of law, we need to look fully at how law operates within a culture.

¹ John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 620 (1998).

² See Bernhard Grossfeld & Edward J. Eberle, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 TEX. INT'L L.J. 291, 291 (2003).

³ See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law II*, 39 AM. J. COMP. L. 343, 384-85 (1991).

To do this, we need to learn to look at the law of a foreign country carefully. Critical here is the need to free ourselves from our own biases derived from our own culture or what Vivian Curran refers to as a “cognitive lock-in.”⁴ This entails, first, immersion in the culture under review. And second, once the culture has been studied and the results gathered, we need to step outside that culture and view the data carefully and objectively. We should learn to apply the skills of a scientist; looking clear-eyed and straightforwardly at the legal data points derived from foreign cultures, and then carefully assessing them, understanding the legal concepts as written and as influenced by the substructural elements. To do this well, we should look to the skills of an anthropologist, learning the techniques of understanding foreign cultures in a neutral, unbiased way. That is one way we can rid ourselves of our cultural biases, whether from our own or the foreign culture under review.

As we reassess the methodology of comparative law, we need also to reassess the purposes and missions served by comparative law. Generally, comparative law has been employed as a discipline to understand foreign law and culture. It has also been used to better understand our own culture through the process of comparison to another culture. In the post-World War II emergence of comparative law, especially in the United States due to the transplantation of the European emigres from the Hitler era,⁵ comparative law has sometimes entailed a search for universal principles of law that transcend culture, primarily in the field of private law,⁶ but with elements transforming public law as

⁴ See Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43 (1998).

⁵ Perhaps the Hitler emigres' quest was based on a pursuit of natural law- principles that would stand over and above human nature as an extrinsic code of conduct to regulate behavior. Perhaps commitment to such universal principles would ward off the demons of base human nature, as experienced in the Hitler and Stalin time of these emigres' history.

⁶ For example, we might also point to the United Nations Commission on International Trade Law (UNCITRAL) sponsored movement toward harmonization of private law, including the highly successful Convention on International Sale of Goods (CISG) that bridges civil and common law contract principles. Unification of private law is also “a task undertaken by the Institute for the Unification of Private Law (UNIDROIT).” Sompong Sucharitkul, *Unification of Private Law and Codification of International Law*, 3 UNIFORM L. REV. 693, 693 (1998).

well.⁷ These are all important missions of comparative law.

But now, we must ask, should comparative law step outside its traditional missions and embark on larger pursuits? For example, should comparative law play a larger role in shedding light and, perhaps, helping solve important public policy questions, questions that often transcend national borders? Some important concerns to consider might include informational and data privacy, consumer protection, antitrust law or intellectual property, to mention just a few. Or comparative law could be used to illuminate issues of great importance to the human person. Traditionally, the focus here has been on private law, including subjects like contract, property, and choice of law. But now there is a burgeoning field of comparative constitutional law. A deeper comparative focus on constitutional orders might lead us to question and reexamine core principles of the constitutional order, like freedom of speech, freedom of religion, equality, or structural matters like separation of powers.

Comparative law should also focus more intently on nonwestern legal orders. Especially crucial for consideration are the legal cultures of Asia, most notably China and India, rising superpowers, and Japan, already an important player in the

⁷ Here we might note, for example, the erection of the United Nations and its many missions and treaties, such as the United Nations Convention on Human Rights or the United Nations Convention for the Rights of the Child. Or we might consider the International Bill of Rights that consists of three documents: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Certainly the quest for common, unifying principles has been a goal of post World War II international law.

We can find the notion of human rights in all societies and at all times, in Europe as well as in Asia and Africa, in antique as well as in modern Chinese philosophy, in Hinduism, Buddhism, Christianity, Judaism, and Islam. The idea of human dignity is common to all these concepts, which emphasize different values according to the different conditions and diverse societies in which the human beings happen to be living. Human dignity and tolerance constitute the basic core of human rights.

Sompong Sucharitkul, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 NOTRE DAME L. REV. 305, 306 (1986-87).

For an evaluation of the role of foreign law in the United States, see Timothy K. Kuhner, *The Foreign Source Doctrine: Exploring the Role of Foreign and International Law in Interpreting the Constitution*, 75 U. CIN. L. REV. 1389 (2007).

world. Focus should also turn more intently on indigenous people, which might yield insight into human behavior unencumbered by the complications of the modern world. Evaluation of older cultures in place before the rise of legal systems can yield important information into the basic elements and structure of modern societies. Looking at ourselves in the mirror in these ways can shed useful insight that might reveal important ideas, norms, rules or principles, forcing a reevaluation that may improve the social order or, alternatively, may lead us to confirm the tenets of our own legal system.

In taking on this new mission, comparative law can learn a lot from other disciplines that have arisen in the last thirty years to challenge conventional ways of thinking. Some important disciplines to consider include the wide range of critical legal studies, law and economics, law and sociology, or feminism. Like these disciplines, comparative law must also stand on its own as an independent, scientific discipline.⁸ With a keen focus on comparative law, we can reassess the underlying principles that make up the legal order and determine what, if anything, needs to be done, nationally, regionally or internationally.

To accomplish these goals, Part II will lay out the methodology of comparative law. My proposal for comparative methodology consists of these steps: Rule 1 consists of acquiring the skills of a comparativist. That skill calls for immersion in the culture under review, linguistic knowledge, and the application of neutral, objective, and evaluative skills. Rule 2 will apply comparative skill to evaluate the external law, consisting of the law as written or stated. Here we must do a close assessment of the similarities and differences of the law of different countries under review. Rule 3 will involve applying the same methodology to the internal law, consisting of the law that lies beneath external law yet has important influences on the formation of law. Finally, Rule 4 will involve assembling the results of comparative investigation in order to determine what we can learn from a foreign legal system and how that insight might reflect on our own

⁸ Comparative law must “develop[] into a coherent and intellectually convincing discipline.” Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 673 (2002).

legal system.

II. COMPARATIVE LAW METHODOLOGY

First, it is important to get a sense about comparative law and its methodology. As applied to law, the act of comparison provides insight into the other law, our own law and, as importantly, our own perceptions and intuitions, a self-reflection that often can yield insight into our view of the law.⁹ Do we see law as only rules – commands that channel us along prescribed paths? Do we see law as filtered through the lens of our own law, native predispositions associated with our home territory? Is this a form of cognitive lock-in which colors or even blinds us? This would, of course, be quite natural, as we all reflect our own acculturations. Or do we see law as only illusion? Do we sense a disjunction between law as written versus law as applied or as practiced within a given culture? Is there some operation code or hidden formant we are missing that actually drives the pattern of law?

Perhaps we are not accustomed to asking such questions. Most of us are situated within our own native culture, and within that culture we work with the common clay of material that we have grown up with and are accustomed to. We know our own culture well, have learned to appreciate it and may assume it to be the best. Sometimes we may be right. But we are likely wrong just as often. Inhabiting only our own legal system can be insulating and distorting, which brings us back to comparative law and its purpose. Comparative law offers us avenues by which to access other, foreign patterns of thought and organization different from those we are familiar with. We learn a different language, a different legal culture – what we might call different “patterns of order that shape people, institutions, and the society in a jurisdiction.”¹⁰

Sensing and appreciating the difference of other legal cultures can be enriching. We might sense commonalities in legal systems, such as rules, categories, or patterns of thought or order that resonate across national borders and sit also in our own law. Are

⁹ Parts of this article are based on Edward J. Eberle, *Comparative Law*, 13 ANN. SURV. INT’L & COMP.L. 93 (2007).

¹⁰ Grossfeld & Eberle, *supra* note 2, at 292.

there common archetypes embedded within multiple legal systems? If so, what does this mean? Does this lead to a quest for universal principles of law? The pursuit of common principles might form a bridge between different cultures, facilitating mutual cooperation and understanding, if not, hopefully, a coming together of peoples. But is the quest for universality simply quixotic? Unfortunately, there is often a disjunction between ideals subscribed to and behavior actually undertaken. That is the messy reality of law. Law can only do so much. We are still left with the baseness of the common clay of humanity. Does this mean that a legal system is dependent on its own cultural setting? Or do external influences—perhaps a transplant—drive a national legal order? Or is it both – that is, a legal system consists of both internal and external influences? These are all important questions to ask. And that brings us to the purpose of comparative law: looking to other, foreign legal systems for illumination and insight in the hope that wisdom and understanding are to be gained, either from a foreign legal system or our own.

Turning now to the question of methodology, comparative law must have a sound methodology to operate as a legal science. In this part of the article, my aim is to set out a sound methodology that can be applied carefully, neutrally, and vigorously so that comparative law can fulfill its mission as a critical legal science. Let me describe the methodology. There are four critical parts to comparative methodology. The first part, (Rule 1) is acquiring the skills of a comparativist in order to evaluate law clearly, objectively, and neutrally. The second part, (Rule 2) is evaluation of the law as it is expressed concretely, in words, action, or orality. We can refer to this as the external law. Once we get an understanding of the law as actually stated, we can move on to the third part, (Rule 3) of the methodology an evaluation of how the law actually operates within a culture. We might refer to this as law in action or the internal law. Law in action is quite important, even, to western culture, as often the words in the text take on a different meaning as applied. Law in action is even more critical for nonwestern cultures, as here the law may be more a result of tradition, custom, or orality. To do this, we need to examine the underlying substructural elements within the culture that drive and influence the law. After we have evaluated

the law as stated and the law in action, we can assemble our data, (Rule 4) and conclude with comparative observations that can shed light on both a foreign and our own legal culture. Let us now turn to outlining comparative law methodology.

Rule 1: The Skills of a Comparativist

It is the aim of comparative law to understand the legal rules and patterns of order that drive a given society. To do this, we need to develop critical reasoning skills that are applied in a scientific and neutral manner.¹¹ Here we need to shed our built-in, native bias or “cognitive lock-in” so that we can review the data objectively. This will call upon us to engage in the exotic: exploring and explaining the substructural, underlying forces that influence and form law. For natives of a legal system, this is a question of acculturation. Being a product of a culture, we intuitively sense the hidden forces that play out below the external manifestation of law. But in foreign culture, this is more difficult. Here we must call upon the tools of the anthropologist or archeologist: studying the underlying substrata of data that lie within a culture. By employing these skills, we can better understand a foreign culture.¹²

For the comparativist, this means we must engage in “cultural immersion,” as Vivian Curran advocates. This “requires immersion into the political, historical, economic and linguistic contexts that molded the legal system, and in which the legal system operates. It requires an explanation of various cultural

¹¹ See, e.g., JEROME KIRK & MARC L. MILLER, RELIABILITY AND VALIDITY IN QUALITATIVE RESEARCH 10-19 (1986); COMPARING NATIONS: CONCEPTS, STRATEGIES, SUBSTANCE (Mattei Dogan & Ali Kazancigil eds., 1994); MATTEI DOGAN & DOMINIQUE PELASSY, HOW TO COMPARE NATIONS: STRATEGIES IN COMPARATIVE POLITICS 3-37 (Chatham House 1990) (1984). Accord Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 439, 443 (1985) (we need to undertake a critical self-examination).

¹² Reitz, *supra* note 1, at 631. As Reitz observes, a comparativist must understand the forms of legal reasoning and value judgments that are reflected in the general pattern of legal reasoning. *Id.* at 632. To do this, we need to understand the country's history and “philosophical and religious traditions” and comparativists need “strong linguistic skills and maybe even the skills of anthropological field study in order to collect information about foreign legal systems at first hand.” *Id.* at 631-32. See also KIRK & MILLER, *supra* note 11, at 10-19; Dogan & Kazancigil, eds., *supra* note 11, at 14-27.

mentalities”¹³ We must also consider the underlying concepts, beliefs and reasons that underlie law, what we might call the legal mind or framework of legal philosophy that helps drive and structure law.¹⁴ Law really cannot be understood without understanding the culture on which it sits. And to understand the culture we need to employ the tools of acute observation, linguistic skill and immersion in the milieu and social setting. For example, can we really understand the United States Constitution without an appreciation of the influence of the Enlightenment, natural law or Republican or English Whig theory? Why, after all, do we refer to it as our “higher law?”

Once we have uncovered the cultural context of law, then we can set out the data we have gathered. Here we need to take two approaches to the culture under study. First, we must assess the data within its cultural context through the knowledge we have gathered through cultural immersion. After we have completed a careful consideration of law situated in culture, we must step back and distance ourselves from the legal order under review, decanting it like a fine wine, and then turn to a careful assessment of the data.¹⁵ To do this, we must strive for neutrality and a healthy skepticism so that we can view a foreign culture objectively, in an honest and clear way.¹⁶ Here it is important to

¹³ Curran, *Cultural Immersion*, *supra* note 4, at 51; *see also* Vivian Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657, 659, 661 (1998).

¹⁴ William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats,"* 46 AM. J. COMP. L. 701, 704-05 (1998); William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1973-74 (1994-1995) (observing that we need to compare law from the interior point of view so that we can see how lawyers think in their own legal system). *See* Nicholas H.D. Foster, *Company Law Theory in Comparative Perspective: England and France*, 48 AM. J. COMP. L. 573, 616 (2000) (quoting Pierre Legrand who calls this the *mentalité* of lawyers). *See also* Nora V. Demleitner, *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, 46 AM. J. COMP. L. 647, 652 (1998) (“Like the study of other religions, comparative law will help us understand how another person conceives of the world and how law contributes to and reflects the culture of a country.”).

¹⁵ DOGAN & PELASSY, *supra* note 11, at 169; Demleitner, *supra* note 14, at 647 (observing that we need to be careful that we do not misinterpret legal phenomena). *See also* Frankenberg, *supra* note 11, at 412 (observing that we need to make conscious effort to achieve distance from our assumptions).

¹⁶ Reitz, *supra* note 1, at 622.

free ourselves, as best as we can, of cultural bias, both with respect to our own culture and the one under review.¹⁷ A complete cultural immersion or objective evaluation may not be possible, but we must do the best we can.

After we have completed this investigation, we must then employ skills of translation; translating one world view into another. Employing the skills of translation is not easy. We need to be extremely careful and not assume that an idea or word will translate perfectly from one culture to another. We must recognize the meaning of the idea or word in its own culture, explain its underlying cultural context, and then translate that meaning as best we can to another legal culture, whether our own or a different foreign culture. Translation will call upon us to explain the underlying context of the culture the idea or word is situated in. Translation calls for understanding the multiple semiotic systems and linguistic contexts that situate ideas, and then determining how to adjust and transfer over that particular world view into that of another. If we do this well, translation can be a bridge to connect cultures.¹⁸ Or translation can illuminate disjunction between legal orders. Illuminating either connection or disjunction among cultures can yield valuable insights.

These tools will help us to learn and appreciate that law is not just the words on the page or the chant by the sage. Employing these skills can lead us to new insight and new perspectives on foreign law. By gaining a greater understanding of the underlying socio-philosophic context that both reflects and helps mold law, we can obtain a fuller understanding of law. This more wide-eyed view of law will lead to new perceptions of traditional views of law—law as rules, as categories, as legally enacted measures. In fact, we can truly only understand law by examining the visible stated law and the substructural, underlying phenomena that form the invisible pattern of law. We can thereby gain a fuller appreciation of law; not just law, but law as it sits within culture. This more comprehensive use of comparative law can offer fuller

¹⁷ Demleitner, *supra* note 14, at 653 (observing that we need to be careful not to be trapped by our own stereotypes and “built-in assumptions about other systems”). See also Frankenberg, *supra* note 11, at 412-14 (observing we need to rethink our own biases and de-center our point of view).

¹⁸ See Curran, *Dealing in Difference*, *supra* note 13, at 661.

access to different and alternative patterns of thought.

Rule 2: Evaluating External Law, as Written or Stated

The essence of comparative law is comparing the law of one country against that of another country. The act of comparison requires a careful consideration of the similarities and differences between multiple legal data points, and then using these measurements to understand the content and range of the legal material under observation.¹⁹ To do this, we must look quite carefully at the legal data points under review, assess and understand their content, meaning, and application. Here our focus will be on external law: law as written, stated or otherwise made concrete. Words as written are important, but not enough. We must also understand what meaning the words have within the context of the case, statute, or other legal norm. That is, how does the legal rule fit within the broader framework of the legal system? After we have undertaken the careful evaluation of the legal data points, we must proceed to the next step of comparative methodology: comparing and contrasting the similarities and differences between the legal points under review in the different legal systems. First, we can focus on similarities. How are the multiple data points similar? Is it by word, rule, meaning, application, impact or some other underlying basis? Or is it because of the context of the legal norm, a functional meaning or something else? We need to understand the similarities between the legal data points under review. The meaning of words and norms can vary with their setting. What provides the basis for the similarity? What is the meaning of the similarity? How does the similarity translate across legal cultures? These are just some of the questions to pose.

In the next step of Rule 2, we must apply the same technique to assessing differences among legal data points. How and in what way are the legal data points different? Is the difference based on words, on context, on functionality or something else? What is the concrete meaning of the differences? What do the differences reveal? How do you translate the differences across

¹⁹ As Günter Frankenberg observes, we need to employ a “close attention to detail.” Frankenberg, *supra* note 11, at 412. See also Reimann, *supra* note 8, at 686.

legal cultures? Only a close assessment of the legal data points will reveal the underlying differences among legal systems.

Once we have undertaken the systematic study of the similarities and differences between legal data points, we can move onto the next step: closely evaluating what is similar and what is different among the data points and why. Here we need to investigate and explore the reasons for the similarities and differences and then evaluate their significance within their legal culture.²⁰ We need to compare and contrast the points so that we can arrive at a fully considered and understood conception of the object under study. We need, then, to record the data we have considered, outlining the substantive content of the data, and then pointing out how the data compares and contrasts. Once we have recorded the results of our investigation, we can begin to pose questions.

For example, why are the legal rules or data points similar or different? What does that reflect—a rule, law, application or context? How do they apply? What are the reasons for the substance of the data point? What does the information tell us about the legal culture? Can we learn something from this? Have we looked only at the law in the books? Is there a difference between the law in the books and the law in action? How do we study the law in action? And by that study can we help fill in the gaps between law in the books and law in action so that we get a fuller study of the law as it actually operates within its legal culture. These are just some of the questions that need to be addressed. I am sure there are others. The end result of our systematic application of Rule 2 is that we will uncover the concrete meaning of the legal data point under review. We can then turn to the next step of comparative law methodology.

Rule 3: Evaluating Internal Law

Turning to the third part of comparative law methodology, we must understand that not all law is external or overt or readily identifiable on the surface. A comparativist is like an archaeologist: mining the mass of data of a foreign source in search of uncovering patterns of thought and order that undergird

²⁰ John Reitz makes a similar point in his outstanding article, *How to Do Comparative Law*. See Reitz, *supra* note 1, at 626-27.

and form a legal culture. The work of the comparativist is, by definition, exotic: studying the legal culture to see by what rules it is run, how they function, how effective they are, how they influence and form the culture. We thereby learn much about rules, but as importantly, about the culture. Why are the rules formed this way? Do the rules reflect cultural predispositions? Do the rules influence the culture? What does the culture consist of? How do the elements of the culture influence the law?

To get to the bottom of these questions, we must understand what law is. Many of us think of law as rules, and this is surely part of law. We can look to constitutions, statutes, codes, regulations, cases or other sources to find concrete statements of rules. We might think of this part of law as law in its external manifestation. External law is that which is the readily identifiable form of law. In the western tradition, most of external law is written; the power of the written word—*sola scripta*: written words convey authority and respect, or so they have come to be within the western cultural tradition. And westerners are accustomed to thinking of law as written; the words on the page convey most of the meaning one seeks. We only need to deal with words and then translate their meaning. That is, again, the object of our evaluation in Rule 2.

But not all external law is written. A second, deeper part of law lies beneath the surface and is less visible. These are the underlying forces that operate within a society to help form and influence law and give it substance. We might call this the “invisible” dimension of law. Not that this dimension is wholly unknown or unrecognizable, but more that this dimension of law is one we tend to assume, take for granted, or perceive just dimly.²¹ Or we might think of these invisible patterns as underlying cryptotypes—“the pattern to be revealed” — or legal formants—“non-verbalized rule[s]” — or “implicit patterns.”²² Or we might think of this dimension as “substructural, often unarticulated, categorizations. . . .”²³ We might refer to this dimension of law as internal: forces that operate beneath the surface of external law, but which infuse the law with meaningful

²¹ Grossfeld & Eberle, *supra* note 2, at 294.

²² Sacco, *supra* note 3, at 385.

²³ Curran, *Cultural Immersion*, *supra* note 4, at 51.

content. Examples of internal forces might be custom, history, religion,²⁴ ethics, geography,²⁵ language, philosophy,²⁶ interpretation or translation. There is a deeper dimension to law than that which manifests itself overtly. We must pay close attention to law in all of its manifestations.

We all have a tendency to seize upon the readily identifiable and ascribe meaning to it. But that is a mistake. The internal dimension of law can exert powerful meaning on legal culture. We need to look at law fully, considering all aspects so that we can reach a better understanding of how law actually functions within a society. Law, of course, is like a language; in reality, it is a legal language. But as with a foreign language, in order truly to understand language, we must understand the cultural context on which it sits and which helped form it. Only then can we translate accurately true meaning from one legal system to

²⁴ See, e.g., Joachim J. Savelsberg, *Religion, Historical Contingencies, and Institutional Conditions of Criminal Punishment: The German Case and Beyond*, 29 LAW & SOC. INQUIRY 373 (2004).

²⁵ For example, England is an island country, now long united as the United Kingdom. Due to English isolation, English law formed much of its core on its own, reflecting its traditions. By contrast, France is part of continental Europe. Thus, France looked more frequently to its fellow Europeans for borrowings. For example, “the *société à responsabilité limitée* . . . was imported almost wholesale from Germany, partly in response to the wishes of the business community to have an equivalent to the English private company.” Foster, *supra* note 14, at 613-14. See also Ewald, *Jurisprudential Approach*, *supra* note 14, at 702 (“the relevant ‘context’ [might include] the economics of the society, or its political structure, or social arrangements, or even (as in Montesquieu) its geography and climate.”).

²⁶ French legal thought, for example, often reflects the Cartesian method of breaking an argument into two segments. Foster, *supra* note 14, at 604. There is a “greater [emphasis] of theory and categorization in French legal thinking and the construction of a typical Cartesian, dualist [framework] . . . as opposed to the lack of importance accorded to theory in English law.” *Id.* at 616. Of course, this would make sense, as Rene Descartes is French and English common law is based on practical solutions given the exigencies of the case, the origin of what became the common law.

Law and economics has had a major influence on contract and antitrust law in the United States. Given some strong similarities of the United Kingdom to the United States, law and economics has influenced English law as well. *Id.* at 619. However, law and economics does not have much of an impact in continental European countries, reflecting deep underlying structural differences in culture. See, e.g., Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT’L & COMP. L. REV. 295 (2008).

another.²⁷

A range of forces lie beneath the external law, and a main mission of comparative law is to offer the tools by which to examine the full range of forces that comprise the internal dimension of law so that we can understand how law actually functions within a society. Law sits on the surface of culture, is vested with meaning by the culture and, in turn, vests the culture with meaning. Accordingly, we must look at law in a more complete way as: 1) external law; 2) internal law; and 3) the culture on which law sits. We are not studying just law, but legal culture as well. The study of law is as important as the study of culture. Only this way can we obtain a more complete view of law, allowing us to impart truer understanding.

Rule 4: Determining Comparative Observations

The final step in comparative law methodology is assembling

²⁷ Translation of legal concepts from one country to another can be difficult. For example, consider the observations made by Nicholas H. D. Foster in his article, *Company Law Theory in Comparative Perspective: England and France*. Consider the term for corporations. Older English usage used the term corporation, which is the common usage in North America. Foster, *supra* note 14, at 578. But more modern terminology uses the term "company" as the general term for business organizations. *Id.* In France, the usage is *société*, although in old French law, the term was *compagnies*. *Id.* Likewise, the English term of contract "is far from coterminous with French '*contrat*.'" *Id.* at 596. As Professor Foster observes, it is hard to find an exact equivalence between legal ideas. *Id.* at 578. For example, comparing England and the United States – two countries with much shared traditions – concerning corporate governance, there can be significant differences, "principally residing in the lack of a United Kingdom counterpart to the United States tension between notions of centralizing, bureaucratic, control and democratic freedom." *Id.* at 617.

As John Reitz observes:

Here the comparatist comes face to face with the enigma of translation. In one sense every term can be translated because there are things in each legal system that are roughly the functional equivalent of things in the other legal system. In another sense nothing can be translated because the equivalents are different in ways that matter at least for some purposes. At a minimum, generally equivalent terms in each language often have different associated meanings, like, for example, "fairness" and *loyaute*.

Reitz, *supra* note 1, at 620-21; see also ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 10-11 (2d ed. University of Georgia Press 1993) (1974); Reimann, *supra* note 8, at 678 (noting that legal transplants assume new meaning in a different culture).

the results of our investigation. Here we must focus on the legal data points under review. What is the significance of the data? What have we learned? Has our investigation of a foreign legal system shed light into the operation and meaning of the foreign legal system? Can we now understand the foreign legal system better? What has the foreign system taught us? These are probably some of the most important questions to ask.

The results of comparative observation are likely to be our window into the world of the foreign culture. Just as importantly, a look at a foreign culture is just as likely to shed light on our own legal culture. In effect, we are holding ourselves up to a mirror. How do the rules of our culture operate? How do our rules compare to those of a foreign system? Is there something in the foreign culture that can benefit or lead to improvement of our own system?²⁸ Or, upon reassessment, do we conclude that our system operates effectively?

These will not be easy questions to answer. Much will depend on the similarities and differences in the legal systems under review. For example, let us draw upon constitutional law as an example. Start with structural governmental issues like separation of powers. In the United States, separation of powers at the federal level consists of dividing government into three separate but equal branches of government (legislative, executive and judicial). In European countries, separation of powers is quite different. As in the United States, power is divided between legislative, executive and judicial branches. However, the common European form consists of Parliamentary democracy, with the Prime Minister or Chancellor being both a member of Parliament and the leader of the government. That is, the Prime Minister is both part of the legislature and of the executive branch. This would be the case, for example, in the United Kingdom, France, and Germany. In the United Kingdom, the King or Queen is the titular head of all three branches of government—legislative, executive and judicial—reflecting English tradition. Further, the judiciary is not always truly independent in the sense of being able to rule whether acts of governmental

²⁸ MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 9 (West 2d ed. 1994)(1985) (comparative law can lead to “promoting an improved understanding of one’s own legal system or searching for principles common to a number of legal systems.”).

bodies are constitutional. This would be the case in the United Kingdom and France, although the French *Conseil Constitutionnel*, since 1971, is now moving toward a role of independent judicial review.²⁹ And, finally, most European countries are subject to the supranational law of the European Union and the European Convention on Human Rights. Thus, in comparison to the United States, most European countries are subject to two legal orders, national and supranational. Thus, the European form is not an easy fit with that of the United States. There are significant differences that need to be examined and considered carefully and then explained to see whether understanding or transplanting a rule will actually work.³⁰ This is not to say that important insights could not be gained through comparison. But the translation of law from somewhat different legal structures can be a challenge, requiring deep investigation and explanation.

Contrast this example now with issues of fundamental rights. Take freedom of speech for example. In the United States, free speech is textually protected without limitation, leading to a more absolutist approach.³¹ Yet, of course, the Supreme Court does limit free speech if, under standard methodology, a clear and present danger is present, now transformed into imminent harm.³² By contrast, in most European countries, freedom of speech is protected, but with explicit textual limitations.³³

²⁹ JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 147-56 (1998).

³⁰ Sometimes a transplant does not work. One example is the attempt by Italy to transplant the United States adversary model in matters of criminal justice, as documented by Elisabetta Grande in *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 228, 232 (2000).

³¹ The First Amendment Free Speech provision provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

³² For example, advocacy of violence can be regulated, under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

³³ For example, under Article 10 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, of which most European countries are members, freedom of expression is guaranteed as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from

Germany lists express limitations on freedom of expression,³⁴ as does Canada,³⁵ which tends to follow more the European approach.

Let us focus on obscenity as a form of expression. What is interesting is that despite the difference in textual constitutional provisions, the United States' treatment of obscenity contrasts

requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention for the Protection of Human Rights and Fundamental Freedoms, EUR. CT. H.R. (1950), Art. 10 (Nov. 4, 1950).

³⁴ The full text of the Basic Law for the Federal Republic of Germany, article 5, provides as follows:

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.

(3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

³⁵ Under the Canadian Charter of Rights and Freedoms, freedom of expression is guaranteed as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

....

2. Everyone has the following fundamental freedoms:

....

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 § 2 (U.K.).

with that of Germany and Canada. In the United States, obscenity is unprotected speech under the definition set forth in *Miller v. California*.³⁶ By contrast, obscenity is generally protected speech in Germany in so far as it does not violate the core norm of dignity or threaten youth.³⁷ Likewise, obscenity is mainly protected in Canada unless it demeans women or portrays violence.³⁸ Comparatively, we can learn a lot from this example. Despite textually different treatment of freedom of expression – no textual limitation in the United States in contrast to textual limitations in Germany and Canada – obscenity is unprotected speech in the United States whereas it is largely protected speech in Germany and Canada. Why is this the case?

In the United States, is it because something lies beneath the written law that helps drive its formation? Is it morality, religion or a sense of ethics? We would need a deep investigation of these underlying cultural aspects to reach a solid conclusion.

³⁶ 413 U.S. 15 (1973). Under *Miller*, obscenity must meet these standards to be considered unprotected speech:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

³⁷ See, e.g., 83 BVerfGE 130 (1990).

³⁸ See, e.g., *Regina v. Butler*, [1962] 1 S.C.R. 452, 484 (Can.) (unprotected obscene speech is that with "(1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing"; however, "explicit sex without violence that is neither degrading nor dehumanizing" is protected speech).

[T]he portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.

Id. at 471. For consideration of Canadian obscenity law, see Grant Huscroft, *The Constitutional and Cultural Underpinnings of Freedom of Expression: Lessons from the United States and Canada*, 25 U. QUEENSLAND L. J. 181 (2006); Kathleen E. Mahoney, *Obscenity and Public Policy: Conflicting Values—Conflicting Statutes*, 50 SASK. L. REV. 75 (1985-86); Kathleen E. Mahoney, *The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography*, 55 LAW & CONTEMP. PROBS. 77 (1982).

Summarily stated, religion and its influence on moral standards is the most plausible explanation for the regulation of obscenity in the United States.³⁹

In Germany, the constitutionally protected status of obscenity would seem to reflect the supreme valuation of a human being as *qua a human being*; that is, each person should be free to express themselves as a constituent element of their personality, itself a reflection of human dignity, the core animating value of the Basic Law. Limitations can, most likely, only curtail obscenity if it violates the core underlying philosophic ideal of the German constitutional order, human dignity, or the textual limitation of article 5(2) for “the protection of young people.” For example, human dignity could be violated if the expression depicts violence or demeans a human being. Treating a person as an object and not a human violates human dignity. Otherwise, access to obscenity is left to the choice of people on the idea that sex is a natural part of human life and, therefore, an integral aspect of human autonomy and personality.⁴⁰

³⁹ Christianity is most likely the driving influence on regulation of obscenity. In the pre-Christian era, Greece and Rome tolerated rampant obscenity, a natural aspect of that era of western culture. The Roman led movement toward Christianity led to regulation of obscenity. Under Christian values, sex should only occur as a means of propagation. Otherwise to engage in sex was considered sinful. See, e.g., Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 304-06 (2008); Kevin W. Saunders, *The United States and Canadian Responses to the Feminist Attack on Pornography: A Perspective From the History of Obscenity*, 9 IND. INT'L & COMP. L. REV. 1, 18, 19, 21-22, 25 (1998-99).

At the founding of the United States, obscenity was treated as the religious offence of blasphemy. Boyce, *supra*, at 312. Victorian prudery was a major influence in the United States and Canada. *Id.* at 302. After the Civil War, starting in the 1870s, Andrew Comstock led the movement for passage of federal obscenity legislation that led to the suppression of sex speech. Boyce, *supra* note 39, at 313. While some of the religious fervor leading to regulation of obscenity has waned, still one of the essences of obscenity regulation is the “appeal to the prurient interest;” that is, the triggering of a sexual response. *Miller*, 413 U.S. at 24. The sex act is still the core of obscenity regulation.

⁴⁰ Mathias Reimann, *Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States*, 21 U. MICH. J.L. REFORM 201, 229 (1987-88). Since the 1974 law liberalizing obscenity, graphic sex material is widely available unless it depicts extreme violence or endangers youth. *Id.* at 212. The law prohibits “extreme hard-core pornography . . . sex-related violence, sexual acts by or on children, and sexual acts of humans with animals.” *Id.* at 216. “[N]otions of sexual

Canada seems to follow the European model: freedom of expression is a core element of the underlying dignity of human beings. Limitations on obscenity are allowed when the expression depicts violence, or when expression demeans people, no matter what gender, on the idea that people are to be treated as of equal worth. Canada has also moved away from the community standards norm, still present in the United States,⁴¹ and, like Germany, has jettisoned morality as a basis for regulation.⁴² Instead, it has moved to a standard based on harm, mainly relating to the demeaning of women.⁴³

In sum, we seem to see different underlying bases for the treatment of obscenity: in the United States it is most likely morals and religion; in Germany it is most likely the underlying philosophic ideal of human dignity; in Canada, it is most likely a concern for dignity and equality,⁴⁴ a competing constitutional norm with freedom of expression. Accordingly, the United States stands apart from its western brethren, Canada and Germany, which are more closely aligned. Interestingly, Canada and the

morality or decency [are not] a sufficient ground for regulation." *Id.* at 217.

⁴¹ *Miller*, 413 U.S. at 24. Under Canadian law, the community standard was applied on a national level, as was done in *Roth v. United States*, 354 U.S. 476, 490 (1957), in contrast to the local community standard norm set forth in *Miller*, *Butler* rejected the community standard. Boyce, *supra* note 39, at 301, 335-36.

⁴² Boyce, *supra* note 39, at 331.

⁴³ *Id.* at 335-36, 338. Under *Butler*, harm is mainly viewed as the degradation of women. *Id.* at 338. According to *R. v. Labaye*, [2005] 3 S.C.R. 728, 753-54 (Can.), the harm must be "objectively shown beyond a reasonable doubt" and be so great as "to interfere with the proper functioning of society." *Id.* at 750. Specifically, "[t]he causal link between images of sexuality and anti-social behaviour cannot be assumed," it "must be proved." *Id.* at 751-52. No study has yet shown that correlation. Boyce, *supra* note 39, at 363.

⁴⁴ As stated by the Court in *Butler*:

The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.

Id. at 477.

United States are linked closely by geography and strong elements of culture. Yet, constitutionally, they differ in important respects, including over obscenity. By contrast, Germany shares more common geographic and legal ties to its common members in the European Union, including over obscenity.

III. CONCLUSION

What is clear is that comparative law is in need of an overhaul if it is to take its rightful place as an important legal science, along the lines of the new movements that have developed over the last thirty years, such as law and economics and critical legal studies. First, we need to focus on developing and applying a sound methodology, as employed in law and economics. I have set forth a four step process: Rule 1 (comparative skill); Rule 2 (evaluation of external law); Rule 3 (evaluation of internal law); and Rule 4 (comparative observations). There may be better ways of developing and outlining a sound comparative law methodology. It would be welcoming if others come up with alternative, if not, better strategies. We certainly need to assess and reassess the proper approach.

Comparative law must also take on broader missions. We need to explore more deeply nonwestern and nontraditional cultures. We need to step outside of our own native predispositions to see if we can learn more from those influenced by different cultural patterns. Looking outside the west might have a major influence on personal behavior, communal ties and support, stewardship of the earth's resources and trading practices, among other subjects. And comparative law needs to be employed to help shed insight on major public policy issues, such as antitrust, consumerism, data privacy, accounting, formation of corporations and criminal law.

Comparative law should now be set up to serve a new and important role in the 21st century. Through comparative law we can embark on a new course as we try to figure out what to do in our modern, increasingly globally linked world. Comparative law has a large role to play here. We need to take on these new tasks as a way to improve human welfare and our legal order, whether national, regional or international. Understanding law and culture is key to understanding people.