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Critical Comparisons: Re-thinking Comparative Law

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This essay will consider the aims of comparative law and focus on how the de-emphasized theoretical discussions and foundations of comparative work influence the various comparative approaches. It will argue that because of comparative legal scholarship's faith in an objectivity that allows culturally biased perspectives to be represented as "neutral" the practice of comparative law is inconsistent with the discipline's high principles and goals. In response, this essay will suggest a critical approach that recognizes the problems of perspective as a central and determinative element in the discourse of comparative law.

I. DISTANCE AND DIFFERENCE

Comparative Law¹ is somewhat like traveling. The traveler and the comparatist are invited to break away from daily routines, to meet the unexpected and, perhaps, to get to know the unknown. Traveling

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1. Comparatists, so it seems, have identity problems. More often than not, their work begins with a complaint. They reject the term "Comparative Law," calling it a "misnomer." R. SCHLESINGER, *COMPARATIVE LAW* 1 (3d ed. 1970) (an "empty phrase"), H. GUTTERIDGE, *COMPARATIVE LAW* 1-2 (2d ed. 1949) ("une expression peu satisfaisante"), 1 P. ARMINJON, B. NOLDE & N. WOLFF, *TRAITÉ DE DROIT COMPARÉ* 10 (1950). The complaint that the term has little or no meaning usually spurs on search for new terms, such as "Comparative Legal Systems," "Comparative Legal Traditions," "Comparative Legal History," "Comparative Legislation," "Comparative Jurisprudence," the "Comparative Study of Law" or simply the "Comparative Method." See H. GUTTERIDGE, *supra*, at 1-10; M.A. GLENDON, M. GORDON & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 2 (1982) [hereinafter cited as M.A. GLENDON]; A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* (2d ed. 1977); K. ZWIEGERT & H. KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 1-10 (1977). New definitions have always—more or less clearly—indicated which aims the comparatists set out to pursue. See 1 L. CONSTANTINESCO, *RECHTSVERGLEICHUNG* 206-12 (1971). Yet these definitions and redefinitions have not silenced the doubts that there is something basically wrong with comparative law. Instead of providing the ultimate definition, I propose that we do not bother with changes in terminology but deal with the doubts instead.

promises opportunities for learning both about one's own country and culture and about other countries and cultures. Going places and gazing at a strange world do not, however, automatically open up new horizons. More often than not, even exotic trips turn out to be vain attempts to escape from everyday life and to re-invent the traveler's world-view.² Tourism as conspicuous consumption occasionally unearths some raw material upon which learning can take place, and "collecting countries" or "making Europe in a week" at best teaches the tourist how little she knows about herself or others. In travel, one must make a conscious effort to achieve distance from the assumptions and confidences that defend one from the uncertainties brought on by the un-usual. As long as we understand foreign places as like or unlike home, we cannot begin to fully appreciate them, or ourselves. We travel as if blindfolded: visiting only landmarks of our past, that restore confidences and banish fear. Only close attention to detail—variety and heterogeneity—can prevent our leveling others in images taken from our vision of the order of our own world.

Comparative law offers the same opportunities and risks. It can be an opportunity for learning, for organizing and allowing us intimacy with the world. It invites the comparatist to study other peoples' normative practices and ideas, their visions of a well-ordered community and the instruments and institutions they have designed to establish and sustain such order. Comparative Legal Studies might indeed inspire students to learn more about and rethink the biases of their own cultural and legal education.

In fact, most scholars of Comparative Law invite students to participate in an intellectual adventure. They have set as goals for comparative legal study the "deprovincialization" and "cross-fertilization" of the minds of law students and teachers³ and a "meeting of the minds" and easier cooperation between lawyers here and abroad.⁴ The

2. For a vain effort to re-invent one's identity through traveling to distant and exotic places, see S. COHEN & L. TAYLOR, *ESCAPE ATTEMPTS: THE THEORY AND PRACTICE OF RESISTANCE TO EVERYDAY LIFE* (1976).

3. Concerning the educational role and value of comparative legal studies see I P. ARMINJON, B. NOLDE & M. WOLFF, *supra* note 1, at 14-18; K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 15-19; Pound, *The Passing of Mainstreetism*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 3 (A. von Mehren & J. Hazard eds. 1961) [hereinafter cited as XXTH CENTURY]; Yntema, *Comparative Legal Research*, 54 MICH. L. REV. 899 (1956); Rheinstein, *Comparative Law—Its Functions, Methods and Usages*, 22 ARK. L. REV. 415 (1968), reprinted in 1 M. RHEINSTEIN, *GESAMMELTE SCHRIFTEN* 251 (1979). Tunc calls for a cross-fertilization of legal systems and of the minds of students, Tunc, *Foreword* to A. VON MEHREN & J. GORDLEY, *supra* note 1, at viii, while Schlesinger emphasizes de-provincialization, R. SCHLESINGER, *supra* note 1, at xiv.

4. The discourse emphasizes quite regularly the practical importance and the desirable goals of comparative law. See I P. ARMINJON, B. NOLDE & M. WOLFF, *supra* note 1; Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung*, in RECHTSVERGLEICHUNG 85 (K. Zweigert & H. Puttfarcken eds. 1978); Lawson, *The Field of Comparative Law*, 61 JURID. REV. 16 (1949); Pound, *supra* note 3; Wolff, *The Utility of Foreign Law to the Practicing Lawyer*, 27 A.B.A.J. 253 (1941);

ultimate aims of comparative law—to reform and improve the laws, to further justice and to better the lot of humankind⁵—require the comparatist to expose existing legal systems, cultures and traditions to a thorough review. Such goals presuppose an increased and deepened understanding of foreign and domestic laws and suggest reform of legal education towards a genuine learning experience—in which the new is respected and appreciated and brought into dialogue with the assumptions that stabilize confidence in the old. It is therefore not extravagant to conclude that comparative legal studies requires what I call a learning experience.⁶

Learning itself demands a change in a person's cognitive status quo. Basic prerequisites for a cognitive transformation are that one (1) become aware of her assumptions, (2) no longer project characteristics of her own way onto the objects of her scholarly attention, and (3) decenter the personal point of view so that through the vantage the new allows her she can consider not only the new, but the truthfulness of her own assumptions. In other words, it is crucial how we select the information we are exposed to and how we relate new knowledge to settled knowledge. Unless we assimilate what we get to know to what we know already and accomodate what we know to what we get to know, we merely accumulate information. The new information has to be processed, that is, to be integrated and contextualized with the known to make sense to us. And what we already know has to be connected with what we get to know in order for the latter to make a difference. The risks are that in integrating knowledges we will level the new in the hard-worn categories of the old or that in looking too hard for the new we will abandon the stability and prudence embodied in the old's normative vision or keep the new and old separate and not allow ourselves to learn the lessons of each. Metaphorically speaking, new and old knowledge enter into a dialogue with each other, in which their respective claims to completeness, authenticity and truth are mutually questioned and tested. Learning does not require us to sell out what we know to any novelty or just

R. SCHLESINGER, *supra* note 1 *passim*. Yet, outside conflicts and international law, it is difficult to imagine where lawyering and judging require substantial comparative knowledge. For a skeptical view, see H. GUTTERIDGE, *supra* note 1, at 23–25.

5. See K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 12–14, 19–23; Tunc, *La contribution possible des études juridiques comparatives à une meilleure compréhension entre nations*, 16 *RÉVUE INTERNATIONALE DE DROIT COMPARÉ* [R.I.D.C.] 47 (1964); Tunc, *Comparative Law, Peace and Justice*, in *XXTH CENTURY*, *supra* note 3, at 80; Stone, *The End to be Served by Comparative Law*, 25 *TUL. L. REV.* 325 (1951); David, *The Study of Foreign Law as a Contribution towards International Understanding*, 2 *INT'L SOC. SCI. BULL.* 5 (1950); Yntema, *Comparative Law and Humanism*, 7 *AM. J. COMP. L.* 493 (1958).

6. See Piaget, *The Psychogenesis of Knowledge and Its Epistemological Significance*, in *LANGUAGE AND LEARNING: THE DEBATE BETWEEN JEAN PIAGET AND NOAM CHOMSKY*, 23 (M. Piarelli-Palmarini ed. 1980).

to enlarge the quantity of the knowledge we store, but to review and transcend both.

A dialogue between the settled and the new knowledge or, for that matter, a dialectical exchange between the self and the other may sound right in theory. Yet, how does it work in practice? I suggest that the dialectic of learning requires at least two operations that prevent the old categories and way from being merely projected onto the world and that allow the new to speak for itself. These operations I call "distancing" and "differencing." Distance is needed to gain a vantage on who we are and what we are doing and thinking. Distancing can be described as an attempt to break away from firmly held beliefs and settled knowledge and as an attempt to resist the power of prejudice and ignorance. From a distance old knowledge can be reviewed and new knowledge can be distinguished as it is in its own right. Distance de-centers our world-view and thus establishes what might be called objectivity.

Mere distance, however, neither opens our eyes nor makes us see clearly. As long as foreign places only look like or unlike home, as long as foreign legal cultures only appear to be un-common or uncivil, and as long as they are treated as same or other, they do not speak for themselves. In order to break the unconscious spell that holds us to see others by the measure of ourselves without abandoning the benefits of criticism, traveling as well as comparison has to be an exercise in difference.⁷ By differencing we not only develop and practice a sharp sense for diversity and heterogeneity but, more importantly, we make a conscious effort to establish subjectivity, that is, the impact of the self, the observer's perspective and experience, is scrupulously taken into account. Differencing calls into question the neutrality and universality of all criteria; it rejects the notion (entertained by many comparatists and travelers alike) that the categories and concepts with which new experiences are grasped, classified, and compared have nothing whatsoever to do with the socio-cultural context of those who see in terms of them. Differencing is necessary to prevent the observer-comparatist from confusing the present content of (Western) ideas and concepts with the criteria of a universal truth and logic. By the same token, however, recognition of subjectivity threatens the objectivity of any observation, analysis or comparison. Differencing can thereby prevent the traveler-comparatist from regarding the world only in terms of the language of security and self-

7. The concept of "difference" is inspired by but only rather loosely related to feminist critiques and literary theory. It will be quite obvious that I have taken the liberty to differ with Derrida's "différance." See *THE FUTURE OF DIFFERENCE* (H. Eisenstein & A. Jardine eds. 1983), J. DERRIDA, *L'ÉCRITURE ET LA DIFFÉRENCE* (1967); J. CULLER, *ON DECONSTRUCTION. THEORY AND CRITICISM AFTER STRUCTURALISM* 89-110 (1982).

understanding and from leveling others with old concepts, imagery, and experience.

Distancing and differencing oblige the comparatist to embark upon an intellectual enterprise which appears to be (yet is not) paradoxical. This enterprise begins with a critique of the rationalist assumption that comparison along the lines drawn by the cognitive patterns of "our" Western (or, for the matter, "their" Eastern) culture is objective if only guided by a neutral referent, such as the idea, development or function of law. The enterprise moves on to a critique of the skeptical assumption that objective comparison is impossible because the comparatist's vision is totally determined by her specific historical and social experience and perspective. Comparative Legal Studies that are critical in this double sense may not solve the perennial problem of how to understand other peoples' ideas and activities truly or rationally. Yet, critical comparisons claim to elucidate the path of a dialectical learning experience involving the self and the other.

In this essay I attempt to illustrate and practice the theory and method implied by a critical approach to Comparative Legal Studies. I start from the premise that comparison is itself a social activity and that it tries to understand social activity and therefore has to be separate from the social background and scientific culture by which it has been produced. The dilemma of understanding foreign (legal) cultures and of transcending the domestic (legal) culture can neither be resolved by "going rational" nor by "going native." The rigorous rationalist who relies on conceptual or evolutionary functional universals is prone to give her world-view and norms, her language and biases only a different label. In the end, she may bring home from her comparative enterprise nothing but dead facts and living errors, the progeny of ethnocentrism. The rigorous relativist who naively deludes herself into believing that cultural baggage and identities can be dropped at will, is prone to oscillate between ventriloquism and mystification. As a cultural ventriloquist she would reproduce ethnocentrism under the guise of a pseudo-authentic understanding. As a cultural immigrant she might over-identify with the mystified new way and thereby be unable or unwilling to relate anything her sympathetic eye happens upon in travel to what she learns at home.

Both universalism and relativism tend to reproduce the dichotomy between the self and other; they are non-dialectical in the sense that they either come up with "bad" abstractions or with no abstractions at all. Comparison however presupposes that one abstract from a given context. This necessity is conveyed by the otherwise misleading idea of neutral referent or *tertium comparationis*. The problem then is how to produce "good," that is, non-ethnocentric abstractions. For that purpose I suggest we abandon the notion of cultures or laws as objects

whose reality can be grasped, represented wholly and classified systematically, for what appears to be "objective reality" is an intricate tangle in which the comparatist's cultural, historical, and personal preconceptions inevitably shape the way she perceives and compares. Therefore critical comparisons, instead of dichotomizing new against old knowledge, would have to recognize that new always and inescapably reveals old. To transcend old orders and to understand new ones as different and same the comparatist has to become aware, first and foremost, of the limitations the domestic legal regime imposes on any comparative approach. That is why I focus in this article on a critique of the discourse on comparative law rather than presenting a whole new theory of legal comparison.

II. CINDERELLA IN COGNITIVE CONTROL

Three features of comparative legal discourse reveal to what degree comparatists' have projected onto what they have studied their own society's vision of law and social life: (1) the marginal role of theory and method in comparative law, (2) the comparatists' ambivalence towards being marginalized from mainstream legal study, and (3) the dominant mode of comparison, "cognitive control."

(1) The marginal role of theory and method in comparative legal studies has to be taken quite literally. Although there are some theoretical and methodological treatises and monographs on comparative law,⁸ most of what we learn about actual and possible motives for undertaking comparison and about some of the difficulties is found in forewords, prefaces, acknowledgements, and introductions to textbooks.⁹ It is assumed that for comparative law proper theoretical guidance is either not needed or not heeded. Comparatists rarely devote much attention to such questions as: Why should anyone undertake the difficult and complex task of studying the law comparatively? How should a comparative study proceed if it is meant to educate students

8. Notably I. L. CONSTANTINESO, *supra* note 1; K. ZWIGERT & H. KÖTZ, *supra* note 1; P. ARMINJON, B. NOLDE & M. WOLFF, *supra* note 1; J. HALL, *COMPARATIVE LAW AND SOCIAL THEORY* (1963); Kamba, *Comparative Law: A Theoretical Framework*, 23 INT'L & COMP. L.Q. 485 (1974); Pound, *Comparative Law in Space and Time*, 4 AM. J. COMP. L. 70 (1955); the essays in RECHTSSTATTISCHES UND RECHTSVERGLEICHUNG (Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung Band 38 (U. Drobnig & M. Rehbinder eds. 1977)).

9. See, e.g., Pound, *Foreword* to A. VON MEHREN, *THE CIVIL LAW SYSTEM: CASES AND MATERIALS FOR THE COMPARATIVE STUDY OF LAW* vii (1957); A. VON MEHREN, *supra*, at xi; J. MERRYMAN & D. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* ix-xii (1978); M. CAPPELLETTI & W. COHEN, *COMPARATIVE CONSTITUTIONAL LAW* vii-x (1979). For exceptions to the rule of implicit theorizing, see R. SCHLESINGER, *COMPARATIVE LAW* ix-xvi (1st ed. 1950); H. VAN MAARSVEEN & G. VAN DER TANG, *WRITTEN CONSTITUTIONS, A COMPUTERIZED STUDY* 2-22 (1978); K. KARST & K. ROSEN, *LAW AND DEVELOPMENT IN LATIN AMERICA* vii (1975).

and lawyers? What can be (or is, in a given case,) the subject of comparative legal analysis? What is achieved by comparing the law of different societies? What is the "law" and how can we know it when we see it? In general, a spirit of straight-forward comparison (and so a practice of inexplicit theorizing that relies on common-sense and so probably cultural prejudice) prevails.¹⁰

Comparatists often imply or suggest that there is no reason not to compare; that in the field of comparative law almost any approach and method may enhance a better or at least a more learned understanding; that anything is comparable—law in the books, law in action, and the environment of law, or texts, systems, cultures, behaviors, mental habits, historical origins, practical solutions, general functions, and developments. To avoid, limit or replace a rigorous discussion of theory and method, comparatists often rely on common-sense, and assert (in the awkwardly threatening posture of their own humility) that one should not argue about the evident. Whoever questions the value of comparison is directed to its evident purpose and unquestionable necessity, to its versatility and universality. This technique both appeals to the birth-rite of comparison, comparison and its goals are said to have been part of legal studies from their very beginning,¹¹ and disregards the dignity of birth-rite and any history but of the present by appealing to comparison's natural and necessary function in today's world.¹²

The interest in comparative studies in American law schools is a response to the increasing relevance of foreign law to the concerns of lawyers and their clients on a shrunken, interdependent globe. Both as professionals and as leaders in the public and private sectors, lawyers in the West participate in a continual institutional reconstruction of the relevant world. Now that their relevant world embraces both the Common Law and the Civil Law . . . a familiarity with other people's law is indispensable to an adequate legal education.¹³

10. For a systematic and thorough discussion of the methodological uncertainties of comparative law, see 1 L. CONSTANTINESCO, *supra* note 1, at 203–62.

11. See R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 1–29 (2d ed. 1978); K. ZWIGERT & H. KÖTZ, *supra* note 1; H. GUTTERIDGE, *supra* note 1, at 11 (stresses discontinuity and claims that comparative law "is essentially modern in character"). See also C. STRONG, *MODERN POLITICAL CONSTITUTIONS: AN INTRODUCTION TO THE COMPARATIVE STUDY OF THEIR HISTORY AND EXISTING FORM* 98–99 (3d rev. enl. ed. 1949); Longo, *The Cornell Project on the Common Core of Legal Systems: Views of a Civilian*, 4 COLUM. J. TRANSNAT'L L. 1, 1 (1965) ("Since medieval times far-sighted scholars have called for unification of law.").

12. POUND, *supra* note 9, at viii. See also Pound, *supra* note 8, at 78–80, 83–84; 1 A. SCHNITZER, *VERGLEICHENDE RECHTSLEHRE* 2–3 (2d exp. and rev. ed. 1961).

13. Cappelletti, *Preface* to J. MERRYMAN & D. CLARK, *supra* note 9, at vii.

Comparative legal study is the logical reaction to global development and interdependence, to the transnational structure of law, or to the intensified economic, social, and military relationships.¹⁴ Its usefulness is beyond question:

Just as no individual can claim to be wise by himself, no legal system can be regarded as so advanced that it has little to gain from the study of foreign schools of thought.¹⁵

The present utility of comparative law can be analysed under three heads: it is useful in historical and philosophical legal research; it is important in order to understand better, and to improve, one's national law; and it assists in the promotion of the understanding of foreign peoples, and thereby contributes to the creation of a context favourable to the development of international relations.¹⁶

The strain on a practice that must justify itself by appeal to these contradictory explanations is evidenced by the fact that comparative legal training is still not considered of prime importance in legal education and practice. At the margin of the discourse, comparatists admit that deficiencies in theory and method account for the discipline's marginal role and rather blatant defects.¹⁷ Within the discourse however, the obvious utility of comparison remains aggressively asserted.

(2) Scholars often complain of feeling marginalized from the main currents of legal scholarship. Such complaints suggest that the stories of self-evident necessity and utility are wishful thinking and suppress but cannot cure the misery of exclusion from the privileges of involvement in vital areas of scholarship. Perhaps it is the wishful nature of this self-characterization that leads comparatists to characterize their discipline as the "Cinderella of the legal sciences."¹⁸ This characterization at once recognizes the reality of marginalization and, in sug-

14. See H. LIEBESNY, *FOREIGN LEGAL SYSTEMS: A COMPARATIVE ANALYSIS* 1-2 (4th rev. ed. 1981); J. BARTON, J. GIBBS, V.H. LI & J. MERRYMAN, *LAW IN RADICALLY DIFFERENT CULTURES* xiv (1983) [hereinafter cited as J. BARTON & J. GIBBS]; R. DAVID & J. BRIERLEY, *supra* note 11, at 10; K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 3.

15. TUNG, *supra* note 3, at ix.

16. R. DAVID & J. BRIERLEY, *supra* note 11, at 4. See K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 11-23.

17. See McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 *YALE L.J.* 915, 918-20 (1952); VON MEHREN, *An Academic Tradition for Comparative Law?*, 19 *AM. J. COMP. L.* 624 (1971). For a thorough immanent critique of the deficient methodology of comparative law, see 2 L. CONSTANTINESCO, *supra* note 1.

18. See H. GUTTERIDGE, *supra* note 1, at 23.

gesting the disciplines true "beauty" and promising that one day a prince will rescue it from its jealous and nasty step-mother and sisters, endows it with dignity. In a sense, the comparatist confesses other people's lack of interest in her only to affirm her own worth.

Such a description suggests that comparative scholars have developed what can be called a Cinderella Complex. The scholar under the influence of this complex feels isolated, underrated, not adequately appreciated by her colleagues and students. She even senses hostility, contempt, and prejudice in the academic community and a widespread lack of interest and support for comparative work. Consequently, she is led to assume that the inferior status and relevance of her discipline place her at the bottom of the professional hierarchy:

It has gained a foothold in the domain of the law, but its position is by no means secure, and comparative studies must often be carried on in an atmosphere of hostility or, at best, in a chilly environment of indifference [M]ost practitioners in England, as elsewhere, view comparative law with doubt and suspicion, and their attitude towards comparative lawyers is summed up in Lord Bowen's famous pleasantry that 'a jurist is a man who knows a little about the law of every country except his own'.¹⁹

Most see in it nothing more than an amusing puzzle, the chance to satisfy an idle curiosity. Nearly all the books and courses which have dealt with the subject amply confirm this estimate.²⁰

The Cinderella Complex cannot be dismissed as a mere expression of professional paranoia or, for that matter, pariah-noia. The lack of interest among law teachers and students is real. What little comparative law there has been has "tended to be squeezed out of the law school." Serious legal comparison has never seemed to be rewarding and is still not *en vogue*.²¹ In fact, it appears to have been and to be quite unattractive and unrewarding:

A busy practising lawyer cannot, as a rule, be expected to pay much heed to other systems of law. His main concern is to make himself master of the rules of law which are the subject-matter

19. *Id.* See also B. GROSSFELD, *MACHT UND OHNMACHT DER RECHTSVERGLEICHUNG* 13-22 (1984).

20. Lepaulle, *The Function of Comparative Law*, 35 HARV. L. REV. 838 (1922). Escarra, *The Aims of Comparative Law*, 7 TEMP. L.Q. 296, 297-98 (1933), states that foreign laws and habits were up to a rather recent period treated "more like objects of simple curiosity than of real science. The neglect was often even mixed with a certain contempt."

21. K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 3, mention the "rather modest position in academic curricula" of comparative law. See also RECHTSVERGLEICHUNG, *supra* note 4, at 1; Hug & Ireland, *The Progress of Comparative Law*, 6 TUL. L. REV. 68 (1931).

of his vocation; he will, for the most part, have neither the leisure nor the inclination to embark on a course of study which is more than usually exacting, and unlikely to prove profitable in the professional sense.²²

Interesting as it may be to learn more, to transgress the boundaries of one's legal education and experience, and to view new horizons, students seem to find such ventures burdensome; and law teachers, though sensing that on balance a comparative perspective might be useful, do not pursue it. Instead, they stress the constraints: the overloaded curriculum, language difficulties, logistic problems, cultural barriers, parochialism, and a tradition of "consecrated ignorance" of foreign laws that is difficult to overcome.²³ In a sense, they assert the comparatist's justifications as grounds for dismissing comparison.

Some comparatists simply reverse the Cinderella Complex. While the source of insecurity has remained the same, it now produces the opposite manifestation. They avoid the tone of disappointment, and switch from a feeling of inferiority to one of superiority. Cinderella re-appears as the Princess or Fairy Godmother herself. No longer pitiful and humble but quite forthright, the comparatist comes across as the owner of truth and as the representative of a higher professional ethic. They describe comparison as the royal road to the study of law. Freud would call this response "reaction formation":²⁴ in this instance, the claim that there is no alternative to comparison.

In fact all methods of jurisprudence must be comparative

Experience, which is no longer merely local, must be subjected to the scrutiny of reason and developed by reason, and reason, which in its very nature transcends locality, must be tested by experience. The wider the experience, the better is the test. Thus the science of law must increasingly be comparative. Whether we are dreaming of a world law or thinking of the further development of our own law, to suit it to the worldwide problem of the general security in the present and immediate future, the methods of the jurist must have a basis in comparison.²⁵

The comparative study of law, so we read or may infer, is a must or, at least, an ought.²⁶ In the kingdom of ought, and of the categorical

22. H. GUTTERIDGE, *supra* note 1, at 23. See 1 W. BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS xix (new ed. London 1907).

23. See Pound, *supra* note 3; Yntema, *supra* note 3.

24. See S. FREUD, VORLESUNGEN ZUR EINFÜHRUNG IN DIE PSYCHOANALYSE (1916-1917), 11 GESAMMELTE WERKE (1944).

25. Pound, *supra* note 9, at vii-viii.

26. See Tunc, *supra* note 3, at viii *passim*; R. DAVID & J. BRIERLEY, *supra* note 11, at 11.

imperative of comparison, many if not all problems vanish. The "sensible, though invisible and impalpable barrier that separates the jurists of different countries"²⁷ is magically transformed into "a fundamental kinship between our beliefs and those of most lawyers in civil law countries, a kinship based on a common devotion to the rule of law and the dignity of the individual."²⁸ Language problems, hermeneutic barriers and different assumptions, biases and political visions cease to exist or seem hardly relevant. Warnings concerning the "uncritical transfer to a foreign legal system [of] the assumptions made about the underlying foundations of our own systems"²⁹ are likely to fall on deaf ears. Comparison is so fundamental that everyone does it; we are left, peculiarly, with a sense that as a separate discipline it is superfluous, and any particular discussion is partial if not redundant.

(3) The overall lack of explicit discussion of theory and method and the moralizing attitude that comes with the reversal of the Cinderella Complex would be peculiar but irrelevant features of the comparatists' discourse if they had little or no influence at all on how one compares. I want to argue, however, that the Cinderella Complex (straight and reversed) and its causes, for example, the lack of self-critical theoretical and methodological guidance, inspire a mode of comparison that leads not to learning, but rather to cognitive control. Cognitive control is characterized by the formalist ordering and labeling and the ethnocentric interpretation of information, often randomly gleaned from limited data. These operations are based on a specific (formalist) model of law, mechanisms of strategic comparison and the comparatist's claim to objectivity.

Different approaches to comparison have in common a core concept of law in which law is understood as a set of institutions, techniques, and regulations designed and deployed to guarantee and vindicate individual rights in a neutral and rational manner.³⁰ The various rules and standards, principles and precepts, decisions and doctrines are regarded as constituting a coherent body of law. The basic structure of this body of law is discussed in terms of "rights" and "obligations." By tracing reasoned arguments the comparatist expects to elaborate this basic structure into a "system,"³¹ thus inferring from the contractualist cell the most rational of all possible legal worlds. Formalism³²

27. H. MAINE, *VILLAGE-COMMUNITIES IN THE EAST AND WEST* 341 (author's ed. 1889).

28. R. SCHLESINGER (1st ed.), *supra* note 9, at ix.

29. Berman, *The Comparison of Soviet and American Law*, 34 *IND. L.J.* 559, 559 (1959).

30. See K. ZWIEGERT & H. KÖTZ, *supra* note 1, *passim*.

31. See J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (2d ed. 1980).

32. For a critique of formalism, see Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561, 567-76 (1983).

prompts a narrow conception of law that, in a comparative perspective, is informed by the domestic legal culture and then projected onto what in other historical or social contexts is, looks like or may be taken as law. While analogies and some degree of generalization may promote learning, I am not convinced that forcing data into controllable cognitive categories such as one does in dichotomizing legal cultures, situating the law vis-à-vis reality, and positioning the comparatist as objective observer guarantees or promises real learning.

Dichotomies measure the object in terms of inclusion in the category of one or the other extreme of two opposed terms, such as the civil law/common law dichotomy constituting the "relevant" legal world.³³ This dichotomy implies the existence of less relevant or even irrelevant as well as legal or non-legal worlds. This dichotomy can be related to the dichotomy between the law in cultures sharing a "common core"³⁴ and the law "in radically different cultures."³⁵ This second dichotomy overlaps somewhat with the Western/Eastern dichotomy and the mature/immature, developed/developing, modern/primitive, parent/derivative dichotomies.³⁶ Such dichotomies over-simplify complexity and almost invariably put the Western legal culture at the top of some implicit normative scale. Such self-confirming hierarchies threaten the comparatist's claim to non-ethnocentric, impartial research. Perhaps it is from fear of obvious prejudice that comparatists have introduced systematizations that do not look quite so hegemonic. They talk of "groups" and "legal families," such as the Romano-Germanic and Common and Socialist law families, of "great cultural families" and *Rechtskreise*.³⁷ Interestingly enough, the systematic ordering of the world invariably makes room for other systems,³⁸ which reject the Western idea of law or do not have a common origin, tradition, ideology or style. Insofar as these systems do not fit the comparatist's artificial order, they are banished to a residual category.

33. See R. SCHLESINGER (1st ed.), *supra* note 9, *passim*; A. VON MEHREN & J. GORDLEY, *supra* note 1, at 3; H. LIEBESNY, *supra* note 14, at 1-3. See also K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 18, 33-34.

34. See R. SCHLESINGER, *FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* (1968); Longo, *supra* note 11.

35. See J. BARTON & J. GIBBS, *supra* note 14.

36. See R. DAVID & J. BRIERLEY, *supra* note 11, *passim*; J. MERRYMAN, *THE CIVIL LAW TRADITION* 1-6 (1969); J. WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* 1119-25 (Library ed. 1936).

37. See 1 P. ARMINJON, B. NOLDE & M. WOLFF, *supra* note 1, at 42-53; R. DAVID & J. BRIERLEY, *supra* note 11, at 21-30; K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 57-67 *passim*. 1 A. SCHNITZER, *supra* note 12, at 133-64 (1961).

38. See R. DAVID & J. BRIERLEY, *supra* note 11, at 26; see also G. GLOS, *COMPARATIVE LAW* (1979) ("additional countries"). K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 67 (recognizing "hybrid" systems). For a critique of systems-construction, see Malmström, *The System of Legal Systems*, 13 SCAND. STUD. L. 128-49 (1969); Eörsi, *On the Problem of the Division of Legal Systems*, in INCHIESTE DI DIRITTO COMPARATO 179 (M. Rotondi ed. 1973).

The similarities that surface in the course of such comparisons are mirror images of the categories of the conception of law in the comparatist's own culture. Ambiguities are defined away or adjusted to fit the model; thus the "home" law is positioned as natural, normal, standard, and critically understood by those within it. The authority and omnipresence of the comparatist's conception allow only strategic comparison. The comparatist always returns to the original and prior conception, which is never exposed to criticism from the vantage the new conception allows. The foreign law is conceived of as like or unlike, derivative or opposite.³⁹ Strategic comparison confirms the antagonism between "capitalist" and "socialist" law; it idealizes modern law, for example, common law, as mature and rationally superior, and then levels in its own system and structure what is found in scholarly travel, the "primitive" or "foreign" law. It thus affirms differences already in place, and does not experience and appreciate ambiguity and heterogeneity.

Gaining cognitive control often involves more than formalist modeling of law and systematic ordering of the world of laws; another crucial element is situating law against and outside reality. Legal formalism, now supported by sociological positivism,⁴⁰ produces and informs distinctions that function as borderlines and cornerstones. These distinctions limit the law externally and structure it internally. They cast it in the exchangeable forms of understanding that allow comparison. The first set of distinctions organize law into: law in the books and law in action; dead and living law; and the normativity and facticity of law.⁴¹

Underlying these distinctions is the notion that law exists first and foremost as written text: statutes, court decisions and scholarly opinions. The texts and their normative commands have or do not have operative effects. In order to find, compare and evaluate these effects, the comparatist has to move back and forth between texts and their application. Although this procedure is certainly more complex than mere legal philology, especially within the comparative dimension, the law is located "out there." It can be grasped quite positively as text—written and practiced by legal officials and subjects. Hence law as a series of discrete legal events is given a life of its own. It can be distinguished from its socio-economic and politico-cultural "environ-

39. See J. DERRIDA, *Limited Inc.* 66 (1977).

40. Sociological positivism is earmarked by its claims to objectivity based on strictly scientific methods and data. Accordingly, social phenomena are interpreted within the framework of "objective" classificatory patterns. See T. ADORNO, *DER POSITIVISMUSTREIT IN DER DEUTSCHEN SOZIOLOGIE* (1969).

41. See Rehinder, *Erkenntnistheoretisches zum Verhältnis von Rechtssoziologie und Rechtsvergleichung*, in *RECHTSOZIOLOGIE UND RECHTSVERGLEICHUNG*, *supra* note 8, at 56–71.

ment," with which it is said to interact causally. Though considered interdependent with other spheres of social life, the legal is analytically isolated from, and later added to, the non-legal reality of society and its sub-systems. This apartheid of law allows for situating it in a social vacuum and for stylizing it as a prism, allegedly enabling the legal scholar to look through it at reality and to detect and normatively criticize political ideologies.

Defining law as an additive to and not (as I shall later propose) as a constitutive element of social reality confirms the domination of the text (dead or alive) over social experience and makes it difficult if not impossible to analyze legal ideologies and the rituals pervading social life. One might contend that in situating the law in opposition to social life the comparatist achieves the distance required for learning. However, the formalist-positivist perspective marks passive space and not distance required for critical review. This passive space is in fact "filled" with "society" and "law" and their separateness as givens. They are "objective facts" and as such the prerequisites that in comparison cannot be questioned, elucidated or revised.

Positioning the comparatist as pure spectator, objective analyst, and disinterested evaluator is the final mechanism of cognitive control. We can identify several postures and strategies that exempt the comparatist from subjective reactions and neutralize the adverse effects of ethnocentric biases and assumptions, of political interests and visions. Most implicit is the denial that the comparatist's interestedness might have anything to do with her work and might even taint the results of her research. The comparatist approaches her field of research purely as philosopher, historian, sociologist or legal scholar; her task is merely to collect interesting items, to systematize, to develop or unify the law and/or to bring about rational change. Searching for the universal history and development of law, for its general principles or universal function, for a universal language or a common origin, style and core places the comparatist, so we may infer or read, in the imaginary realm of value-freedom.⁴² The claim to universality forbids question of the purity of her motives, the objectivity of her methods, or the correctness of her results.

To conclude that the comparatists' discourse reveals no awareness whatsoever of the problems of bias and ethnocentrism would be rash. Subjective interestedness is indeed recognized. Comparatists have however devised several ways to objectify it. They distinguish pure com-

42. See the discussion of the dominant paradigms of comparative law, *infra* Part III. See also 2 L. CONSTANTINESCO, RECHTSVERGLEICHUNG 37 (1972) ("Comparison has to be value-neutral.").

parison from evaluation,⁴³ invoking the right professional ethic.⁴⁴ They call for an objectifying methodological approach⁴⁵ or trust that international collaboration will correct national biases.⁴⁶ They modestly propose rules of comparative reason, that if every comparatist follows will control subjectivity.⁴⁷

These postulates and attitudes seem to be quite commonsensical and even basic for comparative work. Indeed, it seems somewhat of a joust at windmills to question the importance in comparison of a dispassionate attitude and sober self-restraint⁴⁸ or to argue against the philosopher's claim to reasoned speculation, against detached empirical research or an objective analysis.⁴⁹ Their importance however conceals the risk presented by their all too easy invocation. Under the guise of good intentions and the will to objectivity, such modest suggestions naively suggest that interests and biases can be transcended without much theoretical ado. Suppressing emotions and striving to avoid value-judgments do not however make the comparatist a resident of a non-ethnocentric neutral territory, for such a land simply does not exist. On the contrary, the fictitious neutrality stabilizes the influence and authority of the comparatist's own perspective, and nurtures the good conscience with which comparatists deploy their self-imposed dichotomies, distinctions and systemizations. The objective posture allows the comparatist to present and represent her own assumptions and what she observes in a scientific logic, with the balances and measures that project neutrality and conceal the weigher's complicity with both selection of the units on the scale and the objects to be measured. This ethos of value freedom suppresses how language, interests and experiences, which even the comparatists concede are culture-based, contribute to the comparison.

Consequently, comparison is not open-textured and infinite, self-critical and self-reflective, but a way of getting it straight—"it" being

43. K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 40-41; Zweigert, *Die kritische Wertung in der Rechtsvergleichung*, in *LAW AND INTERNATIONAL TRADE—RECHT UND INTERNATIONALER HANDEL: FESTSCHRIFT FÜR C.M. SCHMITTHOFF*, 403-20 (F. Fabricius ed. 1973); H. BARTELS, *METHODE UND GEGENSTAND INTERSYSTEMARER RECHTSVERGLEICHUNG* 147-206 (1982).

44. H. SCHWARZ-LIEBERMANN VON WAHLENDORF, *DROIT COMPARÉ—THÉORIE GÉNÉRALE ET PRINCIPES* 213 (1978) ("Le choix des références et leur présentation doivent toujours obéir à l'éthique de la recherche.").

45. See K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 25; see also Lepaulle, *supra* note 20, at 852.

46. "If the picture presented by a scholar is colored by his background or education, international collaboration will correct it." Rabel, *Deutsches und Amerikanisches Recht*, 16 *ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* (RABELS Z) 359 (1951).

47. See M.A. GLENDON, *supra* note 1, at 10-11.

48. See K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 25, 33.

49. Apparently practiced by H. VAN MAARSEVEEN & G. VAN DER TANG, *supra* note 9, in their computerized study of written constitutions. See also Reh binder, *supra* note 41, at 62, who distinguishes "pure" and "applied" comparison.

the "true" story of similarities and dissimilarities between legal cultures, traditions, systems, families, styles, origins, solutions and ideas. "Getting it straight" can be interpreted as a practical reaction to an amorphous subject matter and to the problem of adequately selecting, analysing and evaluating the vast comparative materials. Being in control has as well its merits in academia or elsewhere. Comparatists, tormented by the Cinderella Complex, might wonder, however, whether such economy of research can indeed fulfill the promise of a learning experience, and whether it kindles the enthusiasm of those who take that promise seriously.

III. SURVEY OF COMPARATIVE METHODOLOGIES

Despite ethnocentrism, the prejudices of cognitive control, and the Cinderella Complex, comparative law has a venerable academic tradition. Of yore, comparatists sought to imagine the divine or at least the ideal legal order. Later they speculated about the law of nature and of reason. Modern comparatists have tried to come up with the optimal legal system or at least the best possible legal solutions for the problems and conflicts arising in organized societies. Comparatists have done their work in a variety of spirits, reaching from noble humanism to straightforward instrumentalism. They have compared the law as philosophers and historians, as lawyers and social engineers, and some even as social scientists. The heterogeneity and vastness of the subject matter dooms any attempt to render a detailed picture of the past and present of comparative law to failure. Any attempt at "the true story" of comparative legal studies presupposes that complexity caused by the various elements be drastically reduced and inevitably falls back on the technique of getting it straight. I cannot therefore claim to tell the whole and true and only story of comparative law past and present or reprivilege what I have already characterized as a necessarily distorted and limited picture. I undertake, instead, to tell one possible story that, to my knowledge, has not yet been told.

This section will focus on the methods of legal comparison and how they relate to the goals set forth in the discourse on comparative law. To achieve distance from the official narratives and to identify their characteristics (a shared view of the concept and purpose of comparative law at a given time),⁵⁰ I shall freeze them into ideal types or paradigms. To establish difference, I shall try to elucidate within each paradigm how the comparatist's participation in a specific culture and in the profession of law influences her perspective. As far as necessary, I shall identify the mechanisms with which perspective is denied. These

50. See generally T. KUHN, *STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

paradigms shall tell one possible story about the ways and means of legal comparison and how they relate to the goals set forth in the discourse.

The dominant paradigms in comparative law are:⁵¹

(1) *Encyclopedic Comparison* is the comparative portrayal of the laws of all peoples, places and times. It was originally suggested by Leibniz' design for a *Theatrum legale mundi*,⁵² later put into scholarly practice notably by Wigmore⁵³ and more recently by the International Encyclopedia of Comparative Law.⁵⁴

(2) *Constructive Comparison* is the only openly prescriptive approach to comparative law. Constructive comparison ranges from Aristotle's reasoned speculation about the ideal constitution (based on a comparison of the constitutions of the Greek city states) via Montesquieu's *De l'esprit des lois*⁵⁵ to more recent efforts to update, unify, and improve the international legal order through comparative legislation.⁵⁶

(3) *Comparative Historical Reconstruction* is the enterprise of legal ethnologists⁵⁷ and the more philosophically oriented school of historical jurisprudence.⁵⁸ Their aim was to reveal through investigation of the origins and developments of institutions, forms, and categories of modern law the evolutionary principles of law, to give a detailed account of legal pluralism or to discover the "right law" that satisfied the cultural demands of a given stage of human-social development.

(4) *Juxtaposition-plus*, the comparative method favored by most textbook authors, is strictly speaking not a paradigm or ideal type because it draws from and cuts across the other approaches to comparative law. Juxtaposition-plus will be discussed and criticized below.

51. For a fuller discussion of each paradigm, see G. Frankenberg, *The Cinderella Complex and Other Problems of Comparative Legal Studies* (1984) (unpublished manuscript on file in the Harv. Int'l L.J. Library).

52. See G. LEIBNIZ, *NOVA METHODUS DISCENDAE DOCENDAEQUE JURISPRUDENTIA* (1748).

53. J. WIGMORE, *supra* note 36.

54. *The International Encyclopedia of Comparative Law* is undoubtedly the most ambitious and prestigious enterprise in global comparison. The contributions of several hundred scholars up to this point add up to fifteen volumes.

55. See C. MONTESQUIEU, *DE L'ESPRIT DES LOIX* (Geneva 1748).

56. Ancel, *Les grandes étapes de la recherche comparative au XXe siècle*, in *STUDI IN MEMORIA DI A. TORRENTE* 26 (1968). See E. LAMBERT, *LA FONCTION DU DROIT CIVIL COMPARÉ* (1903); K. ZWIGERT & H. KÖTZ, *supra* note 1, at 44-45; Herzog, *Les principes et les méthodes du droit pénal comparé*, 9 R.I.D.C. 339 (1957); Pollock, *The History of Comparative Jurisprudence*, 5 J. SOC'Y COMP. LEGIS. (n.s.) 74 (1903).

57. See A. POST, *DER URSPRUNG DES RECHTS: PROLEGOMENA ZU EINER ALLGEMEINEN VERGLEICHENDEN RECHTSWISSENSCHAFT* (1876); A. POST, *GRUNDRISSE DER ETHNOLOGISCHEN JURISPRUDENZ* (1894). For an account of more recent ethnological studies, see HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* 6-54 (1975).

58. See Kohler, *Die Anfänge des Rechts und das Recht der primitiven Völker*, in *ALLGEMEINE RECHTSGESCHICHTE* (J. Kohler & L. Wenger eds. 1914); J. KOHLER, *LEHRBUCH DER RECHTSPHILOSOPHIE* (2d ed. 1917); H. MAINE, *ANCIENT LAW* (London 1861). See generally Pollock, *supra* note 56.

(5) *Comparative Functionalism*, the modern paradigm, claims to have solved the problem of establishing a neutral referent for comparison. It focuses on the functions of legal solutions in social conflicts. This approach will also be discussed and critized below.

The five paradigms can be classified in terms of their philosophical, historical, doctrinal, and sociological (functionalist) content [See figure]. The philosopher-comparatist relies on the law in the books while conceptualizing the ideal state, constitution, and society. The historian-comparatist regards legal relations and institutions to find out how, over time, the natural or universal history of law has evolved. Both the philosophical and the historical paradigms stand for ambitious enterprises: how to imagine good life in society, whether as an abstract ideal or as the necessary outcome of social development. Both paradigms are homocentric in that their constructive and reconstruc-

General Theoretical Orientation

	Philosophical	Analytical/ Doctrinal	Historical	Sociological
Theory of Law	Ideal body of (natural) law Law as universal reason	Law as a body of coherent precepts	Law as the realization of the <i>Volksgeist</i> or instincts for survival	Law as answer to needs of society and as instrument for social change
Method of Comparison	Ideal construction Comparative legislation	Compare rules of different systems and formulate general principles or revise doctrines	Look into the past to disclose the principles of the law today	Functionalist analysis (analogous problems equals equivalent solutions)
Goal	Ideal State: universal principle of justice Rational legislative science	Internationalization of law Precepts for all cases	Universal legal history/ jurisprudence Practical improvement of the law	Rationalizing the law Lawful change of society
Academic Label/School	Philosophy: Elegant Jurisprudence Applied Comparative Law	Analytical/ Practical Jurisprudence	Legal Ethnology/ Historical Jurisprudence	Functionalism Law and Development
Politics of Law	Idealism or Humanism Reformism	Positivism/ Utilitarianism	Evolutionism/Social Darwinism	Social Engineering Modernization

tive efforts are based on an a prior idea of human nature. Both work with methods that bring to mind Procrustes' Bed: diverse phenomena, fitting or not, are forced into a uniform bed, measured by the divine, natural or logical order of things. By contrast, the doctrinal comparatist pursues a less ambitious goal. She takes the law of each society as a body of (potentially) coherent precepts and tries to fill the gaps or to straighten out inconsistencies in the domestic law by cross-cultural comparison. Similarly, the functionalist discards all metaphysical ideas of what the law ought to be and turns from reasoned speculation or analogies to the natural sciences, to systems theory, and to sociology.⁵⁹ In place of ideal types and archetypes, divine providence, human reason and nature, function becomes the universal principle that orders the realm of law.

In following the changing styles in comparative legal analysis, we can trace the metamorphosis and crises of reason, culminating in the functionalist's instrumental rationality.⁶⁰ Human reason—that triumphed philosophically over divine authority when it at once satisfied and created a seemingly full normative vision of human life—has itself come to be seen as empty. But rather than replacing it with another normative vision, the literature has seemingly come to accept simply its logic. The rest of this section will consider in detail those approaches to comparative law which, for the time being, mark the end of a long historical experience and claim to turn from idealistic speculation to realistic analysis and from high aspirations to an allegedly modest legal science—Juxtaposition-plus and Comparative Functionalism.

A. Juxtaposition-plus

Text books on comparative law promise good traveling: changes of scenery, moments of release from the domestic legal personality and language, and a vantage from which to review, re-evaluate, and re-imagine our legal education and our legal world. Textbooks invite the student to think about and compare texts taken from various cultural legal contexts, and to relate them to what they already know about "their" own law. Most authors of textbooks (as well as monographs) on comparison seem to be reluctant to part with the tradition of legal education and its focus on cases, statutes, and doctrines. In fact, their option for doctrinal comparison underscores the notion that the reality of law can be grasped in the various texts. Their method can be

59. See W. BUCKLEY, *SOCIOLOGY AND MODERN SYSTEMS THEORY* (1967); PARSONS, *THE SOCIAL SYSTEM* (1969).

60. The classical analysis of the crises of reason and of instrumental rationality was presented by Horkheimer. See M. HORKHEIMER, *THE ECLIPSE OF REASON* (1947).

described as Juxtaposition-plus: the juxtaposition, excerpts from cases, statutes, and doctrinal treatises⁶¹ and the "pluses," a variety of interpretive and explanatory additions ranging from brief introductory remarks via descriptive sketches of historical backgrounds or systemic contexts to a more detailed analysis of similarities and contrasts.⁶² Depending on the author's choice and intentions, Juxtaposition-plus is meant to enhance a deeper knowledge of the domestic laws and their inherent foreign elements, or to open up foreign legal horizons, or to further insights into international law or conflicts of law.⁶³ At first glance, Juxtaposition-plus appears to have the advantages of a fairly unobtrusive comparative method that clearly represents "the facts" and restrains evaluative comments, thus allowing the student to make up her mind independently about the old and the new law fashions.

If we follow the paths of Juxtaposition-plus more closely, we can discern a pattern that is less objective and open than we may have originally thought. First, the comparatist selects the historical or national context (legal systems, periods of legal history or areas of law, etc.) which constitutes and limits the field and objects of comparison. This seems necessary and quite common-sensical, for nobody can compare everything in the world of laws. Generally and rather implicitly, however, the textbook authors assume that legal cultures are objects whose reality can be grasped adequately through texts and excerpts. And they further assume that law is a coherent body of precepts with clear internal structures ("contracts," "torts," "criminal law," etc.) and external boundaries ("legal systems"/"culture"). Therefore almost anything is comparable: common law and civil law and Soviet law, torts in Turkey and in the United States, or the federal executive in Mexico, West Germany and the United Arab Emirates. Which context is picked, not surprisingly, depends upon the author's field of study, area of competence and preconceptions about law and comparison. Surprisingly, however, comparatists rarely find it worth mentioning by which criteria they select their material. In general, the "relevant legal systems" or "major legal traditions" are represented

61. See J. BARTON & J. GIBBS, *supra* note 14; J. MERRYMAN & D. CLARK, *supra* note 9; R. SCHLESINGER, *supra* note 1; A. VON MEHREN & J. GORDLEY, *supra* note 1; G. GLOS, *COMPARATIVE LAW* (1979); W. MURPHY & J. TANENHAUS, *COMPARATIVE CONSTITUTIONAL LAW* (1977); K. KARST & K. ROSENN, *supra* note 9.

62. On a continuum ranging from meager to elaborate plus-es, Cappelletti and Cohen, Barton and Gibbs and Karst and Rosenn would have to be distinguished for theoretical elaboration.

63. R. SCHLESINGER emphasizes foreign elements in domestic law. Barton and Gibbs, Liebesny, Murphy and Tanenhaus, and Karst and Rosenn focus on the foreign laws. The contributions to W. BUTLER, *INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE* (1980) connect comparative law with international legal problems.

as the legitimate objects of study.⁶⁴ Typically France and West Germany represent the civil law world, while the United States and England stand for the common law world. Other systems are often included for purposes of contrast.

Which legal texts are selected to represent a system or culture again depends on the author's choice, approach and (implicit) theory. Three major variations and combinations of Juxtaposition-plus can be distinguished: (1) The systematic approach starts with general characteristics and abstract concepts or with the institutional infra-structure of a "real" or ideal type legal system. It proceeds to identify similarities or dissimilarities in the other subsystems or areas of law within the relevant context.⁶⁵ (2) More common is the casuistic approach with a "factual focus of presentation."⁶⁶ In order to illustrate the technique of how conflicts are legally resolved, the author singles out cases, taken randomly from different legal cultures and epochs. (3) Related to the casuistic method is the topical approach which focuses on cross-culturally selected social-legal problems and claims to grasp the "law in action."⁶⁷

The selected materials are then juxtaposed accordingly. From a systematic perspective, the objects of comparison are classified on the basis of their likenesses and grouped in "families," "styles" or "traditions." On a lower level of abstraction the casuists juxtapose the various legal answers and concrete factual situations, thereby audaciously bridging time and space—especially once they leave the civil/common law world.⁶⁸ The topical approach promises to overcome the random nature of the selected items by stressing the commonality of the problems in, say, Botswana, the People's Republic of China, Egypt and California (representing the West).⁶⁹ Thus, juxtaposition conveys the message that legal problems and solutions are universal and perennial.

64. See, e.g., R. SCHLESINGER, *supra* note 9, at xi ("legal systems of those parts of the world with which we have the most significant human and commercial contacts"); M.A. GLENDON, *supra* note 1, at xvii–xviii ("settled resolutions to problems"); H. LIEBESNY, *supra* note 14, at 3.

65. The systematic approach apparently appeals more to the civil-law trained and/or European scholar. See, e.g., R. DAVID & J. BRIERLEY, *supra* note 11, K. ZWIEGERT & H. KÖTZ, *supra* note 1, and, less so, M. CAPPELLETTI & W. COHEN, *supra* note 9.

66. See R. SCHLESINGER, *supra* note 1, at xv.

67. J. BARTON & J. GIBBS, *supra* note 14, at xv–xvi, choose four "common social problems"—inheritance, embezzlement, contract and population planning. K. KARST & K. ROSENN, *supra* note 9, at 1, consider "four subject areas" that "are unified by a common theme, and that theme is 'participatory development.'"

68. R. SCHLESINGER, *supra* note 1, at 410–29, for instance, discusses in juxtaposition decisions of the Supreme Court of the Philippines from 1920, of a Louisiana Court from 1821, and of the German Reichsgericht from 1928 and 1932.

69. M. CAPPELLETTI & W. COHEN, *supra* note 9, at 3–5. See W. MURPHY & J. TANENHAUS, *supra* note 61, at ix.

The next step would be a thorough comparative processing of the material requiring some comments on the criteria of comparison and the neutral referent (*tertium comparationis*). Few textbook authors take that step. More often they limit their enterprise to setting up parallel columns (or chapters) or comparable cases, supplemented by comparative remarks. They abandon the idea of a logical and neutral referent for comparison. Instead, the domestic legal system, culture or experience becomes the basis of and provides the conceptual framework for comparison. In comparative constitutional law, for instance, it is tempting to take the United States experience as the measure for contrast and evaluation.⁷⁰ The common lawyer will, as a matter of course, look at the civil law, and vice versa.⁷¹

To set out from the law one is accustomed to and informed about seems plausible; indeed, simply ignoring it would be quite impossible. Yet, it is crucial how the domestic law and legal experience are introduced; and how the others are picked. Typically, comparison starts and ends on the legal home turf. Before the student is exposed to foreign systems, alternative visions and new ideas, her own "system" is posed as authoritative, influential, principal and natural, and so the measure of the other:

There exist today two groups of legal systems that have had wide influence throughout the world, both are of European origin. One is the civil law, the other the common law. . . . *In addition*, there are *other* legal systems such as Islamic law, Hindu law, Chinese law and *others* which developed outside the realm of civil law and common law.⁷²

70. See W. MURPHY & J. TANENHAUS, *supra* note 61, *passim*; Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657 (1980).

71. See F. LAWSON, *A COMMON LAWYER LOOKS AT THE CIVIL LAW* (1953).

72. H. LIEBESNY, *supra* note 14, at 1-2 (emphasis added). Other comparatists take a similar approach. Schlesinger begins by applying the comparative method to domestic problems, stressing the importance of *casus* to keep the focus on legal techniques and to supplement systematic exposition. R. SCHLESINGER, *supra* note 1, at xvi *passim*. Murphy and Tanenhaus establish the presence and authority of their own "system" by first introducing the constitutional system of the U.S. and by beginning nine of eleven chapters with one or more U.S. Supreme Court decisions. Altogether they offer 157 excerpts from court decisions, of which 62 are cases decided by the U.S. Supreme Court. W. MURPHY & J. TANENHAUS, *supra* note 61. Even Barton and Gibbs, who promise a journey to the "Law in Radically Different Cultures," deradicalize their enterprise by introducing the Western concept of law as a framework for comparison. "The following excerpt (from Merryman, *The Convergence (and Divergence) of the Civil Law and the Common Law*) identifies a number of variables that are useful in comparing legal systems within the West and that *should* be no less effective when comparing legal systems in radically different cultures." J. BARTON & J. GIBBS, *supra* note 14, at 1 (emphasis added). A good example of difference laid out and not leveled are the contributions to *THE WESTERN IDEA OF LAW* (J. Smith & D. Weisstub eds. 1983).

The comparatist's own "system" is never left behind or critically exposed in the light of the new. The new "system," inversely reflecting the comparatist's own insofar as the new is "radically different," or antagonistic (e.g. Socialist law), is finally under cognitive control—and affirms the uncritical priority of the comparatist's own system in the course of carrying out a discourse that premises its critical intent. The comparatist travels strategically, always returning to the ever-present and idealized home system:⁷³ Other societies or legal systems are "not yet" developed, but may be considered on their way. Indonesia has made "progress toward a unified legal system," but problems still remain. Primitive law is rather "formless" and could use some Western rational shaping. Civil law is "more rigid" (which has its merits), but flexibility, though it has its price, helps courts solve practical problems. "The practice of the Norwegian Supreme Court is perhaps closest to that of the United States"; by contrast, "Danish Supreme Court opinions are very brief and reveal little of the court's reasoning." "In France attorneys always wear gowns," "in Germany usually, but not invariably."

As a "method" of doctrinal jurisprudence, Juxtaposition-plus compares legal rules and statutes and theories of different systems in order to formulate or at least indicate the general principles and precepts, common cores or the constants of law. The implied adequacy of *law* to solve what appear to be the universal and perennial problems of life in society betrays and underscores not only how the comparatist's own country's approach is supposed and privileged, but more particularly with respect to the United States, British, German, and French studies considered here, how their notion of law is itself privileged. We can perhaps call this phenomenon the legocentrism of the discourse: the constant reaffirmation of a central notion of law in the avowed attempt to re-evaluate and re-imagine it. There is little outside the law a jurist has to think about when solving one of these problems. Legal texts, supplemented by introductory or conclusive comparative remarks, contain all the ingredients for its solution. The message sounds familiar to the ears of common and civil lawyers. Their concept of law prevails, as do legalism and Anglo-Eurocentrism—through a method that purports to be objective.⁷⁴

Where only facts are presented—in a systematic, casuistic or topical fashion—there seems to be no need for establishing subjectivity. Yet, Juxtaposition-plus is less detached a method than most authors tend to think. Indeed, some come up with refreshingly honest revelations:

73. These examples are taken from W. MURPHY & J. TANENHAUS, *supra* note 61, at ix; H. LIEBESNY, *supra* note 14, at 10, 155, 345; J. BARTON & J. GIBBS, *supra* note 14.

74. See, e.g., R. SCHLESINGER, *supra* note 1, at 1, 35–37 (regarding the analytical method).

The selection of subjects, growing out of the editors' research interest, is arbitrary.⁷⁵

If one were conducting a scientific experiment to list hypotheses, one might well pick other—and more—countries. Indeed, at one time we considered including India and Italy in this book. But if the purpose is, as here to illustrate on a cross-national basis judicial involvement in formulating public policy, the six countries we have chosen will do quite nicely.⁷⁶

Other comparatists, in fact most, are less candid and mask their arbitrary choices in the convincing rigors of logical presentation. References to an established understanding or to a vast teaching experience and objective didactic concerns serve as mechanisms to deny the author's interests and perspective. For some hints at biographic contingencies, specific academic (and career) interests or technical restraints that are likely to have directed the comparatist's research and writing, one need only read the marginal stuff: forewords, acknowledgments, introductions.⁷⁷ That the academic production of knowledge, more often than not, hinges upon contingent factors rather than scientific logic is in itself trivial. It is not contingency as such but its translation into necessity which makes academic work in general and doctrinal comparison in particular dubious.

B. Comparative Functionalism

Comparative Legal Functionalism⁷⁸ can be characterized and will be criticized here as a vulgar version of sociological functionalism.⁷⁹

75. K. KARST & K. ROSENN, *supra* note 9, at 1. See M. CAPPELLETTI & W. COHEN, *supra* note 9, at viii.

76. W. MURPHY & J. TANENHAUS, *supra* note 61, at ix.

77. This is not to say that the various approaches to comparative law can be reduced to contingent factors. However, an author's legal studies in France and West Germany may explain why his later comparative work focuses on their very legal systems. See A. VON MEHREN, *supra* note 9, at xi; A. VON MEHREN & J. GORDLEY, *supra* note 1, at x; von Mehren, *supra* note 17, *passim*. Cappelletti and Cohen quite frankly admit that one author's devotion to "problems of access to justice" determined their focus on procedural systems and institutions. M. CAPPELLETTI & W. COHEN, *supra* note 9, at viii.

78. Though functionalism has become dominant in the more recent approaches to legal comparison, it can be traced back to the "Founding Fathers." C. Montesquieu's *DE L'ESPRIT DES LOIX* and, more distinctly, H. Maine's *ANCIENT LAW* bear the earmarks of functionalism. However, only with the rise of *Interessenjurisprudenz* and sociological jurisprudence has functionalism become the dominant paradigm of comparative legal research. The influence of von Jhering and Pound cannot be overemphasized. See R. VON JHERING, *DER GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG* (10th ed. 1968); Pound, *The Influence of French Law in America*, 3 *ILL. L. REV.* 354 (1908); Pound, *Philosophy of Law & Comparative Law*, 100 *UNIV. PA. L. REV.* 1 (1951); Pound, *Comparative Law in Space and Time*, *supra* note 8. My critique of functionalism owes more than could be footnoted to Robert Gordon's lucid and persuasive article. See Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984).

79. From the many versions of sociological functionalism, I picked and relied on the works of Luhmann, who I think has developed the most systematic and refined functionalist theory. See generally N. LUHMANN, *AUSDIFFERENZIERUNG DES RECHTS* (1981); N. LUHMANN, *SOZIALE SYSTEME—GRUNDRISSE EINER ALLGEMEINEN THEORIE* (1984).

While they share some of the basic theoretical assumptions, they follow quite different methodological paths. Both assume that systems do exist and that they have an environment to which they are structurally oriented and functionally related. Functionalism as a sociological theory undertakes to solve or rather reduce the problem of causal explanation. Instead of directly inferring from specific effects, say, changes in legal doctrine, specific cause, the cautious functionalist at least claims that he only makes a hypothetical experiment in which he tries to specify the relations between problems and solutions. On the level of hypothetical analysis, the complexity of these relations is reduced to one or more possible functions. The identified relation between problems and problem solutions is meant to guide the search for other possibilities or "functional equivalents." Whatever the analytical gains of this theoretical strategy may be, it seems to have at least two significant advantages for comparative work: it allows one to reduce complexity in a theoretically controlled way and by its very nature and design it has to be comparative. Under the proviso that the functionalist takes her analytical statements as statements that are hypothetically related to the real world, but not the real world itself, her comparative method promises "good" abstractions and insights into a complex universe.

Comparative Functionalists, sociologically informed and wary of the isolated dead letter, yet less cautious than their sociological colleagues, analyze the living law in its two basic elements: in books and in action. Legal texts and institutions represent solutions for the problems of life in organized societies. The legal system in general and its institutions and norms answer to social needs or (organized) interests. Society constitutes the environment for law—law conceptualized as a sub-system of the social system. Broadly speaking, social life either determines the law or the law influences social development. More refined (and cautious) versions of Comparative Functionalism, such as the one nourished by the "Law and Development" movement, conceptualize law and society as interdependent but separate entities.⁸⁰

80. Three main strands of legal functionalism can be distinguished which represent variations on the theme of social engineering. The legal "reactivists" hold that law answers to social needs or interests and, consequently, emphasize law reform as the adaptation of the legal system to the changing socio-economic environment. Typically, they focus on "developed legal systems." See, e.g., K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 27-31; O. KAHN-FREUND, *COMPARATIVE LAW AS AN ACADEMIC SUBJECT* (1965). The "activists" stress the leading role of law in bringing about social change; they try to use law to change society. The "Law and Development Movement" epitomizes socio-legal activism. See, e.g., Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*. The "interdependentists" combine the active and reactive properties of law and call for tinkering—i.e., incremental legal reforms and social modernization through law. The most systematic version of functionalist comparison, from which this summary is drawn, has been worked out by Zweigert. See K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 1-41. They developed the functionalist paradigm with

In general, the functionalist's comparative activity begins with a question or a feeling, such as a feeling of dissatisfaction with, say, the way product liability is regulated in the domestic legal system. Comparison is then spurred on by the intuition that other legal systems may have produced something better. Functionality becomes the pivotal methodological principle determining the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and the evaluation of the findings. How to identify cross-cultural legal solutions that serve comparable functions is, of course, difficult.

In order to be able to compare, the functionalist has to assay either what "the law" is or what "the same function" could be. A minimal requirement of a strictly functionalist analysis would be an acknowledgement of this dilemma and then experimentation with a variety of possible cultural means involved in the resolution of particular social conflicts in different societies. Only then could hypothetical statements be made about "the law" or "legal system" and about "the same function." Comparative functionalists tend to disregard the basic problem of their theoretical strategy and typically offer two pseudo-solutions. The first is an a priori notion of the "legal system" and the second is an assumption about the "essence" of what law is all about: "The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results."⁸¹ This answer reveals the first transcendental moment of functionalism—the first move from a puzzling and confused reality into a neat and well packaged theoretical framework for understanding. The sameness of the problems produces the relative sameness of results—whatever the legal means may look like. And if the same function cannot be identified, a similar function will do. Grand similarities and not differences in detail are what the functionalist is out for.⁸² Such synthetic vision is helped by the presumption that all practical results are similar:

As a working rule this is very useful, and useful in two ways. At the outset of a comparative study it serves as a heuristic principle—it tells us where to look in the law and legal life of the foreign legal system in order to discover similarities and substitutes. And at the end of the study the same presumption acts as a means of checking our results: the comparatist can rest content

regard to the "Legal Families of the World," *id.* at 57–380, and applied it to contracts, unjustified enrichment, and torts. For a critique see 3 L. CONSTANTINESCO, *supra* note 1, at iii, 54–68.

81. See K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 25.

82. *Id.* at 3–4.

if his researches through all the relevant material lead to the conclusion that the systems he has compared reach the same or similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be put on notice and go back to check again whether the terms in which he posed his original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough.⁸³

To put this presumption of similarity to work, all fundamental differences, say, between antagonistic legal systems, have to be excluded. Comparison is considered useful only with regard to laws that fulfill the same function. One might argue that this restriction on the scope of comparison is commonsensical if not logical, for one can only compare what is comparable. Yet this argument presupposes knowledge of what is same and different. Besides, the comparative functionalist implicitly reduces her claim that the functionalist method can grasp all possibilities that occur in the real world. So we may conclude that she is basically out for the variations on a theme that are organized in terms of the categories and interpretive patterns she has borrowed from the domestic legal system.

Furthermore, those areas of law have to be singled out which are "marked by strong political or moral views and values." Thus the functionalist reduces the law to a formal technique of conflict resolution, stripping it of its political and moral underpinnings, and tries to cope with the problem that social and economic conditions, apparently similar in relevant respects, have actually produced radically different legal solutions. The comparative functionalist may celebrate this analytical operation as a necessary reduction of complexity. Yet, it may be interpreted as a further vain attempt to escape the implications of the functionalist creed. Whether she believes that law is determined by social problems or social development is (co-)determined by law or whether law and society are interdependent entities, the functionalist has to account for the basic difficulty that apparently not all legal norms and doctrines are functionally related to social life because they run counter to any conceivable need or interest, or because they do not make a difference in social life. So the functionalist may either revise her theory or exclude the non-technical properties of law or reduce the explanatory claims of her theory. While in comparative law, scholars tend to embrace the second strategy, sociological functionalism "goes abstract" by adding two new categories—the "dys-

83. *Id.* at 31. See Zweigert, *Die "Praesumptio Similitudinis" als Grundsatzvermutung rechtsvergleichender Methode*, in *INCHIESTE DI DIRITTO COMPARATO—SCOPI E METODI DI DIRITTO COMPARATO* 735 (M. Rotondi ed. 1973); Lepaulle, *supra* note 20, at 852.

functional" and the "socially trivial," dangerously supplementing the overall "functional." The danger comes with the non-functionalist's intuition that functional (let alone causal) relations between social problems and legal solutions are underdetermined or rather randomly interdependent. The functionalist's move to higher and higher levels of abstraction suggests the emptiness of her theoretical conception.

Like her historical forebears (and like most sociological functionalists), the comparative legal functionalist entertains an evolutionary vision of legal development. Law progressively adapts to social needs or interests, or develops through interacting with its environment. The "modernizers" even grant law an activist role. It is understood to be a crucial instrument in bringing about social change. Both versions of evolutionism—legal development in reaction to social change and social modernization through law—are questionable. Multiple and cross-cutting processes contributing to the change of legal norms, doctrines and institutions are dissected and formalized only to be translated into one master process of evolution, which betrays a lack of the very quality functionalism purports to promote—differentiation.

Typically, the evolutionist perspective focuses on the actions and decisions of certain specialized agencies (courts, legislatures, etc.), negating or marginalizing the effects of legal forms and ideas in the realm of consciousness as ideologies and rituals. By stressing the production of "solutions" through legal regulations the functionalist dismisses as irrelevant or does not even recognize that law also produces and stocks interpretive patterns and visions of life which shape people's ways of organizing social experience, giving it meaning, qualifying it as normal and just or as deviant and unjust. That is why it is implausible to situate law vis-à-vis society and to separate the legal form from its social contents. The "interests" of social life that make demands upon the agencies and officials law are "not self-constituting pre-legal entities but owe important aspects of their identities, traits, organizational forms and sometimes their very existence to their legal constitution."⁸⁴ The functionalist notion of law as a regulatory technique or as a bundle of techniques for the solution of social problems can also be criticized as legocentric. There is nothing outside legal texts and institutions for functionalists. Law as consciousness or cluster of beliefs is beyond a perspective that focuses on the instrumental efficiency of legal regulations. Functionalism has no eye and no sensitivity for what is not formalized and not regulated under a given legal regime. What started out as a fascinating hypothetical experiment has turned into a rather dry affirmation of legal formalism.

84. Gordon, *supra* note 78.

The functionalist assimilates herself to her object of study by positioning herself as a neutral analyst, who has to face neither hermeneutic difficulties nor the impact of perspective. We are invited to enter the Weberian realm of value-freedom. The functionalist assumes an objectivist stance, thus betraying the false modesty of her project. Again, functionality has to do the neutralizing job, this time magically transforming or rather superceding the comparatist's ethnocentric perspective. Neutrality, or rather its guise, begins with terminology that translates the language of legal formalism into the language of universal problems: "Thus instead of asking 'What formal requirements are there for sales contracts in foreign law?', it is better to ask 'How does foreign law protect parties from surprise, or from being held to an agreement not seriously intended?'"⁸⁵

Neutrality continues with the right attitude and research program and leads to a disinterested evaluation of the results. In order to free oneself from the preconceptions of one's native legal system, one must be open and ready to execute a rigorous scientific ideal:

The student of the problems of law must encompass the law of the whole world, past and present, and everything that affects the law, such as geography, climate and race, developments and events shaping the course of a country's history—war, revolution, colonisation, subjugation—religion and ethics, the ambition and creativity of individuals, the needs of production and consumption, the interests of groups, parties and classes . . . Everything in the social, economic and legal fields interacts. The law of every developed people is in constant motion, and the whole kaleidoscopic picture is one which no one has ever clearly seen.⁸⁶

Are we obliged to study the history, economy, ecology, sociology, psychology and politics of law? Of course no one could possibly do this—and the comparatist who dealt with the more practical problems in the field of, say, conflicts of law, did not have to execute such a rigorous intellectual program. So does that mean that no one will ever see the whole picture? The functionalist-comparatist realizes the difficulty and suggests a realistic approach. She breaks down Rabel's research program into pragmatic methodological rules of comparative common sense: beware "natives lying in wait with spears" (Rabel); if one comparatist falls into error, the other workers in the field should "kindly put him right" (Zweigert/Kötz); comparative research should be done by multinational teams to correct biased evaluation; compar-

85. K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 25.

86. Rabel, *supra* note 4, at 89.

inferring that, for example, only the Continental systems, with their tendency to abstraction and generalization, develop the grand comprehensive concepts, while the common law, with its inductive and case-by-case habits, produces low-level legal institutions especially adapted to solve isolated, concrete problems (Zweigert/Kötz).

In order to be objective the comparatist is basically asked to exercise sober self-restraint and is assured that the functionalist method guarantees both—objectivity and restraint.

Function is the start-point and basis of all comparative law. It is the *tertium comparationis* For the comparative process, this means that the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need.⁸⁷

How solutions can be “cut loose” from their context and at the same time be related to their environment, how law can be “seen purely” as function satisfying a “particular” need, escapes me. It seems to require two contradictory operations: first, suppressing the context and considering it; and then moving from the general (function) to the specific without knowing what makes the specific specific. The functionalist negates the interaction between legal institutions and provisions by stripping them from their systemic context and integrating them in an artificial universal typology of “solutions.” In this way, “function” is reified as a principle of reality and not taken as an analytical principle that orders the real world. It becomes the magic carpet that shuttles us between the abstract and the concrete, that transcends the boundaries of national legal concepts, that builds the system of comparative law, the “universal” comparative legal science or “the general law.”⁸⁸

Despite these allusions to a universal legal science, the comparative functionalist should not be mistaken for a philosopher, her ideal is rather practical: to devise the most efficient legal system and to order the reasonable expectations. In the end the neutral observer reveals herself as a lawyer in defense of the status quo.

IV. RE-IMAGINING COMPARATIVE LEGAL STUDIES

What is to be done? The critiques of the discourse on comparative law and of the dominant paradigms might suggest that we should

87. K. ZWIEGERT & H. KÖTZ, *supra* note 1, at 36–37.

88. *Id.* at 39. See Lepaulle, *supra* note 20, at 852; R. VON JHERING, *supra* note 78, at 15.

give up legal comparison because there is no neutral referent and because it seems quite impossible to devise "good" abstractions. Moreover it is still doubtful whether "comparative law" exists at all—and even if it does it might not have anything significant to contribute to legal education and practice. Besides, comparatists, whatever their intentions may be, seem to be invariably and hopelessly trapped by the ethnocentric mechanisms of cognitive control.

To abandon comparative legal studies would be wrong-headed, I think, for it would freeze the tradition and current conditions into an eternal pattern. It would be equally wrong to go on with a comparative muddling-through. And from reading through the various approaches and from such highlights as Pound's *Comparative Law in Time and Space*, I infer that it is not just a more complex and longer process of comparison⁸⁹ that is needed. Comparative Law never had too little baggage in the overhead compartment. To this very day it is crammed with thoughts and oughts, with aims and claims.

For Comparative Legal Studies to become a learning experience, much more critical work has to be done. Stated in very broad terms, critical comparisons require a greater sensitivity to the relationship between the self and the other rather than merely intellectual sophistication. Instead of continuing the endless search for a neutral stance and objective status, comparatists have to recognize that they are participant observers, therefore their studies have to be self-reflective and self-critical. Instead of presupposing the necessity, functionality, and universality of law, critical comparisons have to question "lego-centrism," the religion guiding and pervading legal education and practice. Instead of "getting straight" the histories and diversities of laws, critical comparisons must call for a rigorous analysis of and tolerance for ambiguity.

I suggest that we try to free comparative legal studies from its present condition as "an esoteric and relatively undynamic specialty"⁹⁰ by critically reviewing the scholarly discourse. I want to argue that comparing the law can be empowering and liberating, provided that we do not take our terms of and perspective on law for granted but are open to a radical re-evaluation of the domestic legal consciousness. In particular, we can begin the journey only by both emphasizing self-criticism—and not affirming a quest for neutrality—and re-examining specifically the assumed centrality of "law" in comparison. The remainder of this section will discuss these requirements and employ them in describing how one would critically discuss and compare abortion decisions.

89. McDougal, *supra* note 17, at 926.

90. Merryman, *supra* note 80, at 482.

A. From Ethnocentrism to Self-Criticism

Comparatists have to face a basic contention against their work—that it is necessarily laden with concepts, values and visions derived from their local legal culture and experience. Instead of coping with ethnocentrism, most comparative legal scholars avoid or hope to circumvent the problem of perspective by positioning themselves as neutral observers. The Encyclopedist implies that she gives every legal culture its due, by the very fact that none is excluded from the panorama and each is merely regarded and not weighed. The doctrinalist may claim that she merely juxtaposes texts, implying that perspective is limited to the “comparative remarks”—and even there under jurisprudential control, if not neutralized by the basically universal style of legal argument. The philosopher relies on strictly reasoned speculation that leads to universal legal principles, the law of nature or the portrait of an original position. The legal historian claims to retell a story that anyone can retell. Protagonists of a universal legal history have no qualms about biases: they rely on human nature, constants and archetypes of legal development that are said to be universal. How could a particular perspective taint the law’s universality? The legal ethnologist derives objectivity from her vantage point as a quasi-natural scientist who observes and analyzes in detail and cross-culturally the laws and its stages of development. The functionalist trusts that functional, based on the essential likeness of all problems and legal solutions in modern societies, and the discourse with other comparatists will automatically rid her of hegemonic thinking and cultural biases.

Yet, despite all these claims that the comparatist be open-minded and think supra-nationally, the civil and common law still rule over the comparatists’ world. And the individual as an abstract legal entity bestowed with rights and duties has been transplanted from the Western to almost every other legal culture. The law that “We” have dominates the law that “Others” have. Our schema dictate to a degree what we find in others and classify them as relevant or marginal, familiar or exotic, and so on.

Perspective is not only a cognitive or emotional defect or disposition that can be manipulated or cured by a “right” ethic, attitude or reasoning. It is an integral aspect of every person’s history of learning. Being socialized into a particular culture—or simply: growing up—means to become familiar with, to gain a particular perspective on and be biased toward that environment. Are we therefore victims to our culture? Can a Western head only think in Western terms? I do not think so. We can transcend perspective, we can learn about, understand and empathize with what we find “strange” or “foreign”

or "exotic," provided that we always recognize that we are participants of one culture and observers of any other. To transcend perspective means to realize that we use our language, which is culture-based, to grasp what is new and seemingly other than us. While the self, our cognitive history and its baggage of assumptions and perspective, cannot be disposed of at will, we can still try to honestly and consciously account for it, exposing it to self-critical re-examination. Though using our language is necessary, there is no *a priori* truth or universal logic to how we use it. That is why comparative work could be enlightened by a skeptical attitude toward allegedly authentic interpretations and universal categories.

Comparison has to be self-reflective. The comparatist has to reflect upon herself as a subject of and to law. Instead of pretending to the posture of a neutral, objective, and disinterested observer, the comparatist has to regard herself as being involved: involved in an ongoing, particular social practice constituted and pervaded by law; involved in a given legal tradition (a peculiar story of law); and involved in a specific mode of thinking and talking about law. Once the comparatist asks herself how she came to be what she is in terms of the law (an "individual" with "rights" and "duties," a "tenant," "taxpayer," "parent," "consumer," etc.) and how she came to think as a "legal scholar" about her own law and the other laws the way she does, notions of normality and universality begin to blur. It becomes clearer then that any vision of the foreign laws is derived from and shaped by domestic assumptions and bias.

To cope with ethnocentrism, we have to analyze and unravel the cultural ties that bind us to the domestic legal regime. A practical and rather fascinating beginning could be a deviant reading of comparative legal literature focusing on the marginal stuff that is normally skipped for lack of relevance. Forewords and prefaces have interesting stories to tell about how comparison, despite higher aims and claims, is inspired and organized, in part at least, by contingent factors that reveal perspective: the comparatist's legal education and exposure to specific legal cultures, honeymoons and travels, invitations to conferences, and so on.⁹¹ The marginal remarks indicate why and how the purportedly objective discovery and comparison of the "compared" legal culture is undercut by the comparatist's assumptions.

After deciphering scholarly motives, interests and perspectives, one should then move on to systematically exploring the mechanisms for denying perspective. The deviant reading of marginal information would thus precede and prepare a critical reading of the "real" com-

91. See *supra* note 77 and accompanying text.

parative stuff.⁹² Once aware of perspective, the student would no longer fall for its cover-ups, but be able to trace and criticize how the scholars' subjective interestedness and particular perspective, though always and already there, is denied and dangerously supplements⁹³ a comparative project that is defined in seemingly objective and neutral terms.

Philosophers, sociologists, and ethnologists have made suggestions on how to deal with ethnocentrism.⁹⁴ Their discussion has yet to be fully recognized in the discourse on comparative law. Once comparatists have made "hermeneutics" part of their vocabulary they will begin to feel uneasy about the distinction between comparison and evaluation, between understanding and interpreting, between facts and value judgments. Once comparatists are prepared to recognize subjectivity and perspective they will be able to disengage from objectivism and

92. To give some examples for such a critical reading: Wigmore's "realistic impressions" of other peoples' (legal) lives are intermittently supplemented by the imagery of his own (legal) culture: Hojo Yasutoki comes across as "a genuine Edward I." The basic maxim of Confucian political philosophy is "the reverse of our own." British colonialism in India is said to have been benign. J. WIGMORE, *supra* note 36, at xi, 145, 215, 272, 475 (emphasis added).

Textbook authors come close to admitting that the selection and presentation of the comparative materials are not all that objective but influenced by their experience and educational (if not other) purposes. Still, most of them claim to present texts representing the "relevant" or "major" legal systems and traditions, which almost invariably include their domestic legal system. Usually—in analytical jurisprudence always—the categorical framework is provided by the domestic legal culture. In spite of authors' claims that the juxtaposed texts speak for themselves, the comparative remarks, the "pluses," are prone to become dangerous supplements, for they appear to be necessary to make the texts speak—in the comparatists' voice.

Modern comparatists, particularly in the fields of comparative constitutional and public law, rely on the dichotomy of substance and procedure. They attempt to "solve" the problem of perspective merely by comparing culturally "neutral" legal processes and institutions. McWhinney distinguishes the "value-neutral recording of institutions and processes and ethnic-cultural relativism as to substantive aspects." This distinction is meant to strip comparative legal studies that focus on formal and procedural aspects of cultural biases. E. MCWHINNEY, *CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE* 6 (1981). See also Z. NEDJATI & J. TRICE, *ENGLISH AND CONTINENTAL SYSTEMS OF ADMINISTRATIVE LAW* (1978); M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1969); F. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW* (1893). The "proceduralists" and "institutionalists" typically claim neutrality for their comparative work because legal processes and institutions (courts, judicial review, civil procedure, etc.) cross-culturally fulfill the same or a comparable function. A different strand of comparative law operates with theories of natural law that allow the comparatist to identify substantive legal principles (freedom, human rights, fundamental values, etc.), which "transcend national boundaries"; and thus neutralize particular cultural traditions and perspectives. See E. MCWHINNEY, *supra*, at 7–8, 89–90 ("open-society values"); M. CAPPELLETTI, *supra*, at v–vii (fundamental values); Claude, *Introduction to COMPARATIVE HUMAN RIGHTS* ix (R. Claude ed. 1976) ("love of freedom").

93. For a rigorous and fascinating application of the "dangerous supplement" analysis to legal doctrine, see Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277 (1984).

94. See C. EVANS-PRITCHARD, *WITCHCRAFT, ORACLES, AND MAGIC AMONG THE AZANDE* (1937); *MODES OF THOUGHT: ESSAYS ON THINKING IN WESTERN AND NON-WESTERN SOCIETIES* (Horton & Finnegan eds. 1973); *RATIONALITY* (B. Wilson ed. 1970); R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM—SCIENCE HERMENEUTIC AND PRAXIS* (1983); C. LÉVI-STRAUSS, *TRISTES TROPIQUES* (Eng. trans. 1961).

move beyond the dichotomy between relativism and universalism to a critique of positivist models of knowledge and rationality. From the vantage of that critique one's own language and culture can be rethought as a chance as well as a trap; a chance to shed new light on a foreign culture from a distance. There is no guarantee against misunderstanding what is strange and new, but there is always the possibility that such misunderstanding can be productive and inspiring.

B. From Legocentrism to a Critique of Law

In order to be liberating, comparative legal studies would also have to overcome the legocentrism that characterizes the comparatists' as well as the non-comparatists' discourse. By legocentrism I mean that law is treated as a given and a necessity, as the natural path to ideal, rational or optimal conflict resolutions and ultimately to a social order guaranteeing peace and harmony. Most of legal scholarship and practice centers around law—how it works or ought to work, and how it can be made to work better. Jurists—legally educated and socialized, intrigued by legal techniques, overwhelmed by the legal vision of life—think and talk and act in terms of the law. Diachronic as well as synchronic comparison teaches us, however, that the law is not immutable, but that it is in constant flux, that there are quite different paths to social conflicts, and, more importantly, that other societies seem to get by with little or no law of the type to which we are accustomed. So even the traditional discourse, when carefully read, reveals that there is no absolutely right, superior, and exclusive legal technique and necessity at work. This may lead the student to intuit that no such technique exists and, hence, to question the objective rationality and hegemony of any one legal system.

Insights based solely on the historical and cultural relativity of law as a framework for social order are shaky, though; they are vulnerable to the suggestion that, given a more consistent construction of the body of laws and a more efficient legal technique, the law we are accustomed to would be necessary and rational. Legocentric thinking and legalism, its political strategy, draw their strength from an idealized and formalized vision of law as a set of institutions, rules and techniques that function to guarantee and, in every possible conflict, to vindicate individuals' rights. If legal provisions do not live up to the promises inherent in the rule of law, this may be interpreted as an unfortunate and atypical accident, a singular event of justice mis-carried. Thus the overall legitimacy and efficiency of the legal order remain intact.

Legal formalism affirms the inevitability and unquestionable or superior rationality of law by focussing on its reified elements—forms,

procedures, texts—and by emphasizing the relations between the agencies and agents of law. The legocentrist dichotomizes law and reality, legal and social practice, granting law a realm—a reality, logic, and language—of its own. This dichotomy permits the non-comparatist to conclude that the legal language is malleable, that legal doctrines and provisions and their application are indeterminate. We are to believe that the unpredictability of legal trends and decisions is merely an expression of the law's development lagging behind the developing social demands emanating from the environment. All the law needs, then, is to improve, shape up, and be more in touch with reality.

Legal realism and, to a lesser degree, sociological jurisprudence have undermined this legocentrist-formalist syndrome by connecting law with social purposes, political interests and problems of language/writing. They have challenged the idea of a politically neutral normative structure determined by legal reasoning and forming a coherent system.⁹⁵ The realist message and, of course, its radicalization by critical legal scholars⁹⁶ go to a large extent unnoticed in the discourse on comparative law. Mainstream comparatists, so it seems, try to escape from the critique of the legal order⁹⁷ by comparing and affirming the relative determinacy, rationality, and consistency of modern (civil and common) law. While the critics assert that there is clearly a body of legal doctrine and legal provisions, albeit one short of the status of "system," comparatists talk of systems of law and presuppose that legal norms and doctrines provide a determinate answer to all questions that may arise and cover all conceivable situations.⁹⁸ While the critics reject the vision of jurists as applying doctrine and statutes to reach results that are untainted by the jurist's interests and biases, comparatists generally do not question that there is a neutral and autonomous mode of legal rationality; some even go on to claim, often implicitly, that there is in essence a universal or world style of legal reasoning.⁹⁹ While the critics contend that the law reflects competing ideas of social life and normative ideals, and contradictory ideological visions of individuality and collectivity, comparatists generally hold

95. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Llewellyn, *Some Realism about Realism*, 44 HARV. L. REV. 1222 (1930-31); J. FRANK, *LAW AND THE MODERN MIND* (1930).

96. See Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 281 (D. Kairys ed. 1982).

97. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 577-79 (1984).

98. Comparatists, as if sensing the sticky problem of indeterminacy, emphasize process and procedures, legal forms and relations over substantive ideas and norms. See, e.g., textbooks on comparative law: J. MERRYMAN & D. CLARK, *supra* note 9; M. CAPPELLETTI & W. COHEN, *supra* note 9.

99. See ZWIEGERT & KÖTZ, *supra* note 1, at 16, 19-21, 25, 30-31, 39. The "juxtaposers" at least imply such a universal style beneath the apparent differences.

firm to the view that legal provisions and doctrines contain a coherent and justifiable concept of human relations.

If this adequately summarizes the comparatists' overall reaction to standard critiques of law, then it would be naive to postulate a re-imaginative discourse. To begin with, comparatists have to rise above modestly sociological insights, such as the interdependence of law and its environment, and have to try a little realism—and then more: critical legal theory. Theoretically and practically this would mean to stop conceptualizing law as a supplement to reality, based on the oppositions of nature and culture and society and law. Legal institutions, techniques and rules are not just cultural phenomena regulating and ordering a temporarily prior and originally unregulated state of nature. Such a pure state or original position never existed, however strong the desire for it or however powerful a myth creating it may be. It is equally misleading to place law outside and vis-à-vis reality and society. Social life, so I have argued above, is constituted by law also. Some form of order has *always already* structured nature, reality and society, although it is true that only at various but rather uncertain points are these structures referred to as "law."

Once these oppositional distinctions are given up, law can be seen as an equivocal phenomenon. Institutions, techniques, and procedures symbolize only one side of the law. The formalized relationships between agents and agencies in terms of the law are only the frozen aspects of a social practice constituted by specific ways of thinking and acting alienated from immediate experience, by a specific normative imagery ("rule of law," "rights," "due process," etc.). Law teachers and students, legal practitioners as well as law-abiding, law-avoiding, and law-breaking citizens are deeply involved in, sustain and develop this practice. Isn't it true that "legal gains" have been made? That "rights" when enforced have protected individuals and minorities? That freedom of speech is essential? A pervasive legal consciousness keeps us in a Kafkaesque and fascinating world of rights and duties, rules and standards, procedures and substances, crimes and punishments. It is not so much the law's institutional framework or symbolic representation, not so much courts, texts and arguments or conscious use of the instruments of law. It is rather its hiddenness and pervasiveness as a social agenda and as our "second nature"—framing our minds, kindling fantasies, structuring and limiting our social visions, and influencing our actions—that account for its mystique and magic spell.

What good can comparison do in this situation? How can comparative legal studies prevent us from being totally mystified by the law? How can comparative law make us see where and when rights protect or help or disempower or depoliticize? A comparative perspective could

be *one* of the methods for questioning and distancing oneself from the dominant legal consciousness. And, as I have argued, distance does not come naturally. A comparative analysis may well be and often is as mystifying and involving as its non-comparative sibling. Distance requires taking nothing for granted, least of all the forms and rationality of law. A liberating distance begins with investigating what the law does to us, to our world views, and to human relations. Intuitively we know or have a hunch that legal provisions and procedures—whatever their positive effects may be—also disempower by channeling conflicts to legal agencies, reify by turning personal relations into matters of law, and alienate by imposing an exclusive and excluding language and logic and by imposing a time-frame that abstracts from real persons and their life. A non-comparative approach might be more prone to discount these features and effects of law as necessary evils if not as rational mechanisms. I believe that the comparatist is in a privileged-position by the very fact that she is confronted with different legal forms and categories, with alternative legal and non-legal strategies all of which may be more or less realistic, adequate, mystifying, reifying, alienating, and so forth. All I suggest, therefore, is that comparative legal studies offer a better chance for distance and for exposing in law deficiencies, contradictions, ideological components and competing visions.

If the tradition of comparative legal scholarship does not promise that comparatists will make much of this chance, another consideration might. Comparatists are under pressure. The Cinderella Complex is real. Their discipline, interesting as it may be, is chiefly regarded as a cognitive burden without adequate compensation. That is why comparative legal research is more and more done outside the law schools. In order to reverse this trend and to root comparative law firmly in legal education, comparatists have to demonstrate that comparison is worth the extra effort and that it makes a difference.

C. A Non-legocentric Look at Abortion Decisions

To illustrate how comparison could make a difference, I shall briefly discuss how court rulings on abortion have been compared and how they might be compared from a critical and non-legocentric perspective.

Conventional comparison basically follows the path of doctrinalism relying on the method of Juxtaposition-plus.¹⁰⁰ From all available court decisions generally those are selected that allow for some cultural

100. See M. CAPPELLETTI & W. COHEN, *supra* note 9, 563–622; W. MURPHY & J. TANENHAUS, *supra* note 61, 409–42.

and national variety and cover the relevant legal aspects of abortions—within the authors' scheme and educational purpose. Excerpts direct the students' attention to the statutory basis and to the different strands of legal reasoning. Doctrinal neatness, normative consistency and ultimate legal solutions are up for comparison. Brief "Editors' Notes" or more elaborate "Notes and Questions" or a synthesizing description¹⁰¹ of the institutional setting, the sources of law and the history and development of the legal dispute are meant to tie the disparate decisions together and to help the student look beyond each case and country. The juxtaposed texts produce a not too dazzling variety-in-law: most courts acknowledge that abortion is a complex and sensitive issue; none of them, however, finds it difficult to single out, focus on and decide the essential legal elements.¹⁰²

Some courts treat the legal issue merely as a procedural matter: what is the scope of parliament's criminal law power and of judicial review—¹⁰³which leads from the (il)legality of abortions to the perennial but relatively comfortable debate on judicial activism versus self-restraint.¹⁰⁴ Other courts stress the substantive rights involved in the legal definition of the abortion problem¹⁰⁵ and translate the political, moral and psychological implications into the maternal "right to privacy" versus the fetus' "right to life," or the mother's "right to choose" whether or not to have a baby versus the state's "duty" to protect the "unborn life" or "to restrain a pregnant woman from submitting to a procedure that placed her life in serious jeopardy."¹⁰⁶ The "powers" (of courts and legislators) and "rights" are then limited and/or placed in hierarchy according to whether, on balance, they are

101. M. Cappelletti & W. Cohen elaborate the legal problems while W. Murphy & J. Tannenhaus give only brief sketches. For a synthesizing discussion see Kommers, *infra* note 105.

102. This is what judges indeed (must) claim to establish or confirm their authority: "Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection." *Roe v. Wade*, 410 U.S. 113, 116 (1973). "The Constitutional Court can examine . . . legislative regulations [concerning abortions] only with respect to their compatibility with the Basic Law." 39 Bundesverfassungsgericht [BVerfG] 1 (1975).

103. Compare *Morgentaler v. The Queen*, 53 D.L.R.3d (Can. 1975), with the decision of the French Conseil constitutionnel of January 15, 1975 (quoted in M. CAPPELLETTI & W. COHEN, *supra* note 9, at 577-79). Both emphasize judicial caution and affirm the legislative decision to restrict or permit abortions, respectively.

104. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (criticizing judicial activism); Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

105. See the decision of the Federal Constitutional Court of West Germany on the abortion reform law, 39 BVerfG 1 (1975). See also Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255 (1977).

106. *Roe v. Wade*, 410 U.S. 113 (1973). Compare *Roe* with the decision of the Italian Corte costituzionale in *Carmosina et al.*, 20 Giur. Ital. 117 (Feb. 18, 1975). See also *Doe v. Bolton*, 410 U.S. 179 (1973); *Maher v. Roe*, 432 U.S. 464 (1977). For a paradigmatic rights debate on the subject, see THE RIGHTS AND WRONGS OF ABORTION (M. Cohen, T. Nagel & T. Scanlon eds. 1974).

"fundamental," "compelling," "absolute" or "subject to regulation." Once all the crucial variables have been identified—"activist"/"self-restrained" court; procedural/substantive judicial strategy; "positive" (criminal law, constitution)/"supra-positive" (natural law) legal sources with rationales pro/contra choice and pro/contra medical discretion, and legal notions of personhood (conception/first trimester/birth)—the comparatist can proceed to map out cross-culturally "permissive" or "restrictive" court rulings sanctioning "voluntary termination of pregnancy" or affirming "restrictive abortion legislation." Typically, commentators—comparatists and non-comparatists alike—only present the "juridical point of view," thus implicitly or explicitly restating abortion as a genuinely legal problem,¹⁰⁷ and compare the legal intricacies of the courts' arguments:

Consider carefully the arguments of the majority and the dissent in the German decision as to whether it is appropriate for courts to interpret the Constitution to require the legislature to enact affirmative laws, as opposed to interpreting the Constitution to negative an invalid law.

Notice that the dissent [in the German case] relies tangentially on the holding of the United States Supreme Court in *Roe v. Wade*. . . . Of course, the majority decisions of the German and United States courts are poles apart in their resolution of the abortion controversy. Are they nevertheless very much alike with reference to the issue of the appropriate spheres of judicial activism?

One obvious similarity of the decisions of *Carmosina* and *Roe v. Wade* is in their immediate results There is another striking similarity *Roe v. Wade* conspicuously avoids treating the issue. So, too, does the Italian Constitutional Court.¹⁰⁸

By contrast, a critical and non-legocentric comparatist starts where conventional scholarship tends to conclude: this is it. Or where, at best, the scholar asks: "Can the moral and constitutional issues which surround the subject of abortion be resolved without considering the impact of those laws on women as opposed to men?"¹⁰⁹ Self-reflection, distance from legocentrism and difference inspire one to look beyond the intra-legal context of abortion decisions. The first step of non-legocentric analysis concerns the crucial phase in which a complex social, political, moral, psychological, and medical question is reduced and fitted into a given legal framework. What happens?

107. M. CAPPELLETTI & W. COHEN, *supra* note 9, at 584.

108. M. CAPPELLETTI & W. COHEN, *supra* note 9, at 607, 608, 614.

109. *Id.* at 615.

The many dimensions are flattened out into a "private" and a "public" sphere. The differing and conflicting feelings, interests and considerations of women, parents, physicians, and communities are filtered and framed as "rights" and "duties" suggesting that abortion is simply a legal matter. Once taken out of the context of immediate social experience and alienated from the persons concerned, only those emotions, needs and interests underlying abortions are allowed to reappear and to be considered which are recognized by the law as "legitimate" and "reasonable." Once (il)legalized—or, to be precise, juridified—abortions almost naturally become the State's business. Once "up there," abortion ceases to be one of the means of birth control. The question is now murder or legitimate personal choice? Juridification, whether the liberal or the conservative version, isolates "abortion" from its cultural and personal context (which includes the legal) and re-invents it as exclusively a legal licence or prohibition involving problems that can be resolved without reference to the role of mothers/fathers in childrearing, the implications of the division of sex roles, interests in family planning, population policy, and social control.

The second step of a self-reflective analysis would be to subject the variety-in-law to a closer scrutiny. While the legocentrist explains away the conflicting and contradicting legal answers to essentially the same problem—by referring to differences in the constitutional or statutory texts, in the historical settings or relevant precedents¹¹⁰—the critical comparatist has to dig into the shifts and rifts of judicial balancing and public/private distinctions. From a critical distance the uncertainty and ambiguity of legal arguments become visible. We can discern the various roads courts take to "publify" the private or to "privatize" the public. They may simply assert the governmental power to prevent "some evil or injurious or undesirable effect upon the public" and to punish "socially undesirable conduct." Or they may endorse a right (of the unborn) to life which the State has a duty to protect. Or else they may recognize a (mother's) right to privacy, which, however, is limitable by "compelling" public interests; and the State may legitimately intervene when the public's interest, on balance, outweighs the mother's concerns. Is there a clear distinction between the private and the public sphere? The law doesn't say. The judges both among various countries and even within individual countries and courts disagree. They set and revise the borderline according to their visions of individual self-sufficiency and autonomy and their notion of collective or public responsibility.

110. *Id.* at 622.

To weigh a "compelling interest" or to qualify a "reasonable regulation," here as elsewhere, clearly depends on the judges' and legislators' emotional reactions, social visions, moral convictions and political choices. Whatever choice they make is then stylized as the authoritative decision of the law. Critical comparison extracts from beneath the claims to legal rationality competing political visions and contradictory normative ideals. Not mesmerized by intricacies of legal reasoning in terms of the public/private distinction and arguments for or against judicial activism or self-restraint, the "distanced" comparatist uncovers the political underpinnings of legal doctrines and decisions, thus working towards a political theory of law.

The third step of critical comparison would re-introduce what the legal discourse ignores, marginalizes or transforms. The law and legal discourse have to narrow down and individualize and isolate the questions at issue to fit them into the legal frame of mind: "rights" and "duties," "liberty" and "licence." Distancing therefore means a shift of focus from the dilemma of rights to the politics of reproduction.¹¹¹ And differencing means recognizing how deeply legal scholars and judges are involved in the controversy over abortions—as fathers and mothers, men and women, and as participants in a social life-world as well as a legal discourse. The bitter and heated controversies over court decisions on abortion and abortion laws suggest that there is more at stake than the morality and legality of a method of birth control. Indeed, abortion and birth control in general bear on socio-political issues crucial to societal development and political domination: sexuality, population size, the role of women and men in child-rearing, and the division of labor in society.¹¹² In a different sense than is shared by most participants in the legal discourse, governmental regulation of birth control has to do with "fundamental values." Fundamental seems to be who determines human reproduction—women, parents, physicians, psychologists or the State.

A contrasting view from, say, the practice of coerced abortions in China after the first child for the sake of population control or the legal regulation of abortion in Western countries would allow for an experience of distance and difference. Such contrast brings to the fore the contours and peculiarities of the categories ("infanticide," "unborn life," "right") and of the sets of relationships ("individual"/"state," "private"/"public") of the domestic world as well as our own normative preferences and emotional reactions. It elucidates options and per-

111. See L. GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: BIRTH CONTROL IN AMERICA* (1976).

112. For a discussion of what the legal discourse ignores, see, e.g., *id.* chs. 1, 13; N. CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); D. DINNENSTEIN, *THE MERMAID AND THE MINOTAUR* (1977).

spectives not allowed by the traditionally closed systems of comparison. Comparison can show that there are whole other issues, such as population control and other (not necessarily better) solutions. To turn in on the public and legal discourse on abortion in the United States, Canada, West Germany, and Italy from the vantage point of a "radically different" culture like China means to recognize alternatives, to recognize behind moral/legal debates the imposition of "modernization" on a traditional culture there and the sustenance of patriarchy and state authority against women's movements and democratization here. Comparison thus can contribute to learning—beyond the conservative "infanticide"-discourse and the liberal "rights"-discourse on abortion¹¹³ and brings out that birth control is not an essentially legal issue that can be discussed more fully and adequately beyond the horizon of legal regulations and reasoning. This way critical comparisons call into question the formalist distinction of the "legal" and the "non-legal" and enhance alternative visions of how to resolve social conflicts and individual problems.

D. From Truth to Ambiguity

As we can see in the abortion case, re-imagining comparative legal studies calls for a radically different historical vision. Forms of continuity and concepts of unity have to be suspended.¹¹⁴ Analogies and the presumption of similarity have to be abandoned for a rigorous experience of distance and difference. This means that there can no longer be short-cuts through history to natural or universal or optimal developments. Instead, disruptions and heterogeneity, lost struggles and marginal events will have to be brought to the light.

Once minimally aware of the extent to which their work has been projective (anticipating the past from the present's point of view) and hegemonic (imposing a domestic perspective on what is foreign),¹¹⁵ comparatists may find it hard if not impossible to carry on, in good conscience, their discourse of truth. Besides, the various truth-versions, all claiming universal validity for the laws of nature or reason or evolution, defeat the idea of one universal truth that is verifiable in the history of legal cultures and institutions. Tired and wary of truths, the teachers and students of comparative law should develop fresh enthusiasm in analyzing law as an omnipresent and ambiguous

113. Critical comparison also reveals the liberal heritage of the feminist movement's call for a right to "reproductive self-determination." See L. GORDON, *supra* note 111, at 403–18.

114. For a critique of the unitary discourse on history, see M. FOUCAULT, *L'ARCHÉOLOGIE DU SAVOIR* (1969) (Engl. trans.: *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* (1972)).

115. See Frankenberg, *supra* note 51, at Part 3.

phenomenon,¹¹⁶ and in focusing on what the dominant discourse leaves out, suppresses or marginalizes.

Where does that leave us and with what? Bereft of one universal truth and one universal path of (legal) development, we can no longer have only one historical explanation available but a multiplicity of developmental possibilities and explanations with which to deal. Wary of watertight definitions locating the law in texts or institutions or actions, we have to get used to the idea that law is a ubiquitous, amorphous, and ambiguous phenomenon. To locate it only here or there would be like trying to nail a pudding to the wall. We have to trace it everywhere: in texts, institutions, actions, ideas, and fantasies—a rather disquieting but also fascinating prospect.

If it makes sense to assume that law-making and law interpreting institutions and officials produce rules and decisions and, more importantly, pictures of order and disorder, patterns for the interpretations of reality and images of "the only possible world of any attainable world in which a sane person would want to live,"¹¹⁷ then it follows that laws can no longer be seen as mere technical solutions to social problems or natural outcomes of history. Each rule or doctrine or case has to be regarded as a place where a variety of distinct social processes intersect. A critical style of historical analysis and explanation has to retrace the various roads crossing and situate each event

not on a single developmental path, but on multiple trajectories of possibility, the path actually chosen being chosen not because it had to be, but (where relevant) because the people pushing for alternatives were weaker and lost out in their struggle, and also (in part) because both winners and losers shared a common consciousness that set the agenda for all of them, highlighting some possibilities and suppressing others completely.¹¹⁸

In order to be able to imagine roads not taken, to think and explore counterfactual trajectories, comparison would have to inform us about the experience of other societies dealing with the problem of how to create a good and just order, about routine practices the same or another society has tried out in other spheres, about developmental alternatives that were dropped and hopes that were frustrated in the political struggles. Comparative legal studies would thus contribute to writing history from below and from the present to the past. And they would offer moments of release from all-encompassing grasp of the habit of our own truths and orders—from the concept of a master

116. See E.P. THOMPSON, *THE POVERTY OF THEORY & OTHER ESSAYS* 96 (1978).

117. Gordon, *supra* note 78, at 109.

118. *Id.* at 112.

process of socio-cultural development which, so we were taught, puts the First World, that is, our world, first.

V. CONCLUSION

I have chosen to critique comparative law because of how starkly it reinforces the justificatory construction of our domestic reality and marginalizes or even silences the "primitive," the "non-relevant," the Other. I have tried to show that—whatever our comparative paradigm and neutral referent may be—we look upon, compare and judge the world against the standard of our own satisfaction.

With my critique of the scholarly discourse I have attempted to show that comparing the law can be an intellectual adventure, though, and that there is a lot to be learned from what appears to be strange, marginal or extreme. As a matter of therapy rather than theory I have suggested that in order to learn we have to cope with the risk of too much footing (or cultural bias) or too little footing. My argument for self-criticism, non-legocentrism, and tolerance of ambiguity is an attempt to take our position as participant observers seriously. My methodological suggestions—such as a deviant reading of comparative works, the identification of those mechanisms with which perspective is denied, the analysis of what is left out, marginalized or taken for granted by the official discourse—are meant to educate our "ethnological view." Essentially, we have to turn what we come upon against our own assumptions and let it speak for itself. This is a risky business, for it may reveal our arbitrariness and may undermine our confidence in the various rationalizing strategies the scholarly discourse offers. At the same time, the risk we take with critical legal comparisons may allow us a vantage—in uncertainty—from which to re-evaluate the givens of our legal world and to re-imagine our possibilities and our freedom.

