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# Why Are U.S. Lawyers Not Learning from Comparative Law?

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# Why Are U.S. Lawyers not Learning from Comparative Law?

ERNST C. STIEFEL\* & JAMES R. MAXEINER\*\*

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\* 1907-1997. Dr. Stiefel died September 3, 1997 just short of his 90th birthday, when he was to have been honored by New York Law School with the dedication of the Ernst C. Stiefel Chair in Comparative Law. Formerly, Senior Counsel, Coudert Brothers. Dr. jur. Heidelberg 1929; Licencie en Droit 1934 (Paris); Member of the British Bar 1937 (Middle Temple); Professor New York Law School 1947; Dr. jur. h.c. (mult.).

\*\* Vice President & Associate General Counsel, Dun & Bradstreet, Inc. J.D. Cornell 1977; LL.M. Georgetown 1981; Dr. jur. Munich 1986.

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The state of comparative law could not be more different between the United States and Europe. In Europe, Abo Junker observes: “Whoever today advocates turning one’s view across borders — “to substitute a global for a national horizon” — can be sure of broad approval. He is riding a mighty wave of the *Zeitgeist*.”<sup>1</sup> But in the United States, Alain A. Levasseur despairs, “[O]utside the realm of some U.S. law schools, the relevance of comparative law is almost non-existent, which is really a euphemism for ‘nil’.”<sup>2</sup> Despite lifetimes of labor by distinguished comparativists such as Max Rheinstein, Rudolf Schlesinger, John Hazard and others living and deceased, the United States persists in legal isolationism.<sup>3</sup> In this contribution we discuss some explanations of this phenomenon.

## I. The Problem Of Comparative Law in the U.S.A. Today

### 1. *The Present State of Comparative Law in the United States*

The United States pays comparative law no mind. Judges, as Alain A. Levasseur demonstrates, virtually never consider foreign legal

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<sup>1</sup> “Rechtsvergleichung als Grundlagenfach,” 1994 *Juristenzeitung* 921. Translations are the author’s.

<sup>2</sup> “The Use of Comparative Law by Courts (II),” 42 *Am. J. Comp. L. Supplement* 41 (1994).

<sup>3</sup> The conflicts scholar, Ernest G. Lozenzen of Yale, seems to have been one of the first writers to use the term “legal isolationism.” Book Review, 54 *Yale L.J.* 886 (1945). (“Now that we have at long last abandoned our political isolationism, the legal profession must awake to the fact that our law has been bogged down by an attitude of legal isolationism. Our new position in the world makes it imperative that we become better acquainted with other legal systems. We cannot properly maintain our leadership if we remain ignorant of the legal order under which other countries live.”) See also Hessel E. Yntema, “Comparative Legal Research, Some Remarks on ‘Looking Out of the Cave,’” 54 *Mich. L. Rev.* 899 (1956).

materials.<sup>4</sup> Legislators and administrators do not commission comparative studies of law such as are commonly conducted in connection with legislation in Europe.<sup>5</sup> Even in the universities, comparative law is literally dying out; few legal academics engage in serious comparative law studies.<sup>6</sup>

Comparative law has less importance in the United States today than it did a generation ago, and, indeed, less than it did in much of the nineteenth century.<sup>7</sup> While there has never been a golden age of comparative law in America, Basil Markesinis notes that central European émigré scholars did achieve “phenomenal success” in the 1950s, and 1960s when they made comparative law a “recognized, even admired, topic at a time when there was

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> One recent example: all the proposals for “civil justice reform” of recent years essentially ignored foreign examples. See Ernst C. Stiefel & James R. Maxeiner, “Civil Justice Reform in the United States – Opportunity for Learning from ‘Civilized’ European Procedure Instead of Continued Isolation?”, 42 *Am. J. Comp. L.* 147, 154 (1994).

<sup>6</sup> If our assessment seems too dismal, the reader may consult: Alain A. Levasseur, *supra* note 2; P. John Kozyris, “Comparative Law for the Twenty-First Century: New Horizons and New Technologies,” 69 *Tulane L. Rev.* 165, 177 (1994) (influence described as “minimal” and “marginal”); John Langbein, “The Influence of Comparative Procedure in the U.S.,” 43 *Am. J. Comp. L.* 545 (1995) (“The study of comparative procedure in the United States has little following in academia, and virtually no audience in the courts or in legal policy circles.”); Mathias Reimann, “The End of Comparative Law as an Autonomous Subject,” 11 *Tulane Eur. & Civil L. Forum* 49, 52 (1996) (“A Subject on the Margin ... interest in the subject is very limited among both faculty and students.”).

<sup>7</sup> The nineteenth century’s most important American jurists—Story, Kent and Field—were intimately familiar with the Civil Law and advocated its study. See, e.g., Joseph Story: “There is no country on earth which has more to gain than ours by the thorough study of foreign jurisprudence. ... Let us not vainly imagine that we have unlocked and exhausted all the stores of juridical wisdom and policy.” *Progress of Jurisprudence, Address Delivered Before the Suffolk Bar at their Anniversary September 4, 1821, at Boston*, reprinted in *The Miscellaneous Writings of Joseph Story* 198, 235 (1852). See also James Kent, *An Introductory Lecture to a Course of Law Lectures* 15 (1794) reprinted in 2 *American Political Writing During the Founding Era 1760-1805*, at 936, 945 (1983); David Dudley Field, *Democratic Review*, April 1844, reprinted in 1 *Speeches, Arguments and Miscellaneous Papers* 491 (1884). For the influence of civil law ideas on 19th century American law, see, inter alia, Mathias Reimann (ed.), *The Reception of Continental Ideas in the Common Law World 1820-1920*, 89, 91 (1993); Stefan Riesenfeld et al., in 37 *Am. J. Comp. L.* 1-184 (1989) (special issue).

really little practical need for it." Unfortunately, he laments that it "flounder[s] at a time when a shrinking world needs it more than ever."<sup>8</sup> The émigré generation retired decades ago and is reaching its twilight years. Even before its retirement comparative law began a decline in the United States. Whitmore Gray has pointed out that in the 1960s the money stopped, the interest stopped and the faculties turned to domestic problems.<sup>9</sup>

## 2. Globalization and the Future of Comparative Law

In its ignorance of comparative law, the United States stands close to alone among its principal trading partners. Because of global and regional forces – known now colloquially as "globalization" – its trading partners are paying comparative law more and more mind. This is obvious in Europe, where the Single Market is becoming a reality through harmonized legislation attainable only after thorough comparative law studies. It is obvious in the emerging democracies of Central and Eastern Europe, where foreign examples figure prominently in drafting new laws.

"Globalization" is a defining concept of our time. Globalization is a recognition that the societies of the earth are not separate, hermetically-sealed units, but one. More than anything else, the collapse of communism and with it the artificial division of the world into competing camps has contributed to globalization. The development of the Internet and its improved possibilities for global communications will help speed these developments. For law, globalization may spell the reversal of that development of national codifications of the nineteenth century that meant the end of a common law of Europe and the development of national sciences of law.<sup>10</sup> Laws may increasingly become more global.

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<sup>8</sup> *The Gradual Convergence: foreign ideas, foreign influences, and English law on the eve of the 21st Century* 8 (1994).

<sup>9</sup> "Teaching the First Generation of Global Lawyers, Address to an AALS Mini-Workshop January 1993," reported in *Newsletter of the American Foreign Law Association*, Spring 1994, 5.

<sup>10</sup> Cf. Reinhard Zimmermann, "An Introduction to German Legal Culture," in Werner F. Ebke and Matthew W. Finkin, *Introduction to German Law*, at 7 (1996).

U.S. comparativists familiar with the East Bloc were quick to see the opportunity for comparative law created by the demise of communism. John N. Hazard and Wenceslas J. Wagner in their optimistic preface to the report of the U.S. contributions to the XIIIth Congress of the International Academy of Comparative Law observed already in 1990:

An era of democratization is dawning. Since the XIIth Congress of Comparative Law, held in Australia in 1986, much has happened. Fresh winds are blowing on every continent. ... New models for government are being sought. Comparisons between legal systems are being made in the search for satisfying relationships between state and citizen and between citizen and citizen.

Comparative lawyers with broad understanding of cultures, politics, and economics are in demand.<sup>11</sup>

Their insights have proven true—elsewhere—but not in the United States.

To be sure, globalization has caught fire in the United States. Everyone talks of it, lawyers included. Law firms are now *global* law firms. U.S. firms compete with each other to open foreign offices. While reaching out for world business, the organized bar has reached out sincerely to assist the emerging democracies of the former Soviet Union through its “CEELI” (Central and Eastern European Law Initiative) program. The law schools have joined in the globalization. Scores of them have programs abroad.<sup>12</sup> Law schools’ internal magazines proudly announce to their alumni how the law school is going global.<sup>13</sup> One law school

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<sup>11</sup> 38 *Am. J. Comp. L.*, Supplement iii (1990).

<sup>12</sup> Brenden Kirby, “A National Geographic Summer,” *National Jurist*, January 1996, lists more than 100 programs in some 39 countries.

<sup>13</sup> E.g., “Preparing International Leaders for the 21st Century,” *Georgetown Law Res Ipsa Loquitur*, Fall 1996; “Cornell: An International Law School,” 23 *Cornell Law Forum* 3 (March 1997); “Europe 1992,” *Wake Forest University School of Law Jurist*, Spring/Summer 1991; “Connecting the World to the Classroom,” *Washington University Law School Magazine*, Spring 1993.

now even calls itself, “The First Global Law School.”<sup>14</sup> Dozens of law schools maintain their own international law journals; some even have two!

There is, however, an element curiously lacking in the globalization of U.S. law: comparative law. U.S. law firms that open foreign law offices employ U.S. and foreign lawyers, but rarely encourage their U.S. lawyers to learn foreign law. The CEELI program, for all its commendable efforts, has something of a missionary-to-the-savages appearance in the little attention it seems to have given the indigenous legal cultures. U.S. common law institutions are not likely to take root in the republics of the former Soviet Union, whose legal systems are rooted in the civil law.<sup>15</sup> U.S. law schools send their students abroad, gladly accept foreign students, but do not “globalize” their own faculties, which remain decidedly mono-cultural when it comes to knowledge of foreign legal systems.<sup>16</sup> The numerous law school international law journals rarely include serious comparative law work.<sup>17</sup> Law school programs that bring foreigners to the United States to teach them about the U.S. system and ignore foreign systems are reminiscent of the British imperialism nascent in the Rhodes’ Scholarship Program.<sup>17a</sup>

### 3. *Why Comparative Law Matters*

We lament that comparative law is unimportant in the United States when elsewhere it is of great importance. Some readers might disagree and assert that comparative law is of little importance. While we think that the importance of comparative law

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<sup>14</sup> “The First Global Law School,” *NYU The Law School Magazine*, Autumn 1994; “Special Issue 1995: The Global Law School Program,” *NYU The Law School Magazine*, 1995.

<sup>15</sup> See Ernst C. Stiefel, “Von der Berufung deutscher Juristen zum Aufbau des Rechts im Osten,” 1994 *Juristenzeitung* 109, 110.

<sup>16</sup> Whitmore Gray, *supra* note 9.

<sup>17</sup> See Eric Stein, “Uses, Misuses – and Nonuses of Comparative Law,” 72 *Nw. U. L. Rev.* 198, 214 (1977).

<sup>17a</sup> The first sentence of the first book produced by the “Global Law School” is: “The importance of American Law in today’s world cannot be overstated.” Editor’s Preface, New York University School of Law, *Fundamentals of American Law*, v (1996).

ought to be self-evident<sup>18</sup>—and it probably is to most contemporary European lawyers—, we pause here to mention briefly three of the most obvious, most practical and most important uses for comparative law in the United States:

- Foreign law is important for U.S. business. The United States does business around the world. In that business, it encounters other legal systems. U.S. business needs to know about the foreign laws it encounters.
- Still more important is that U.S. law is not perfect. Even its most ardent advocates concede that. The United States could find in foreign legal solutions answers to problems it presently faces. The United States could adopt the foreign solution or, in the interest of world-wide harmonization of law, seek to reach a solution that works for all legal systems.
- Perhaps most important is that comparative law provides critical perspective on U.S. law. Without the benefit of comparative law the United States cannot well measure its own law.<sup>19</sup>

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<sup>18</sup> Cf. P. John Kozyris, *supra* note 6 at 167 (1994) (“utility of the comparative method is beyond dispute”).

<sup>19</sup> Americans and Europeans alike have long recognized the value of perspective. For example, Caleb Cushing, who later became U.S. Attorney General, observed in 1820: “[I]t is by comparison of our rules and practice with those of foreigners, that we become fully sensible of what is defective or excellent, and therefore of what is to be cherished and upheld, or to be disapproved and abolished in our institutions. Nothing more inevitably checks improvement than a jealous or contemptuous rejection of foreign, and an overweening admiration of domestic habits, customs, and principles.” “The Study of the Civil Law,” 11 *North American Review* 407, 408 (1820). Gustav Radbruch, in simple strong words in 1946 in the wake of the Hitler catastrophe, wrote: “What in the law is fleeting and what eternal becomes most vividly clear through comparison.” “Erneuerung des Rechts,” in 3 Arthur Kaufmann, *Gustav Radbruch Gesamtausgabe* 80 (1990) (emphasis in original). To the same effect, see also Rudolf Schlesinger, Book Review, 37 *Cornell L.Q.* 120, 124 (1951); Young B. Smith, Dean of Columbia University School of Law School, quoted in Francis Deak, “The Place of Foreign and Comparative Law in the American L. Rev.s,” 23 *Va. L. Rev.* 22 (1936); Pierre LePaule, “The Function of Comparative Law,” 35 *Harv. L. Rev.* 838, 858 (1922), reprinted in Konrad Zweigert and Hans-Jürgen Puttfarcken, *Rechtsvergleichung* 63,

Only the most short-sighted of lawyers would allow comparative law to flounder and die in the United States. Instead, every right-thinking lawyer should endorse the comparative study of law.<sup>20</sup>

## II. Reasons why U.S. Lawyers are not Learning from Comparative Law

An understanding of reasons why U.S. lawyers are not learning from comparative law is helpful in considering the obstacles to changing that condition. In this contribution we suggest some possible reasons. Our enumeration is neither comprehensive nor empirically grounded. The reasons we discuss fall into four broad classes:

- lack of necessary skills;
- lack of institutional support for systematic comparative law work;
- legal structures that resist comparative law influences; and,
- an attitude that there is little to learn from foreign law.

### 1. *Lack of Skills and Skilled Persons*

#### a. Lack of Foreign Language Skills

Lack of foreign language skills is an apparently simple matter, but one of enormous importance for comparative law in the United

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82 (1977). See generally for many current statements along the same lines from around the world, Peter Gilles, *Prozeßrechtsvergleichung* 105-12 (III.4: "Ziele und Zwecke, Leistungen und Nutzeffekte der Prozeßrechtsvergleichung") (1996).

<sup>20</sup> Comparative law in the sense in which we are advocating it here requires studies that cross the common law—civil law divide, if not the Western, non-Western line. True comparative studies should not be limited to purely Common Law jurisdictions. Thus a comparison of rules of descent in U.S., English and French law would satisfy us, while the same comparison limited to U.S. and English rules would not.

States. Most U.S. lawyers – indeed most educated Americans – are monolingual.<sup>21</sup>

Max Rheinstein called attention to the importance of proficiency in foreign languages for comparative study of law. He felt that every English-speaking comparativist should have thorough knowledge of at least French or German and preferably both, in addition, possibly, to other languages.<sup>22</sup> The need of a comparativist for foreign languages is obvious: a jurist limited to English is limited to secondary sources if he or she wishes to read about the civil law. Detlev Vagts put the handicap succinctly: ignorance of foreign languages limits the lawyer's ability to "penetrate foreign legal systems."<sup>23</sup>

It is understandable that most Americans do not study foreign languages to the point of proficiency required for comparative law work. America is a huge continent and there is little reason at home to know foreign languages. Abroad, everyone – or so it sometimes seems – speaks English. In many cultures, even limited knowledge of a foreign language brings commercial rewards. Not so in the United States, where even proficiency is apt not to be rewarded at all. So, as a result, few Americans study foreign languages and fewer still study foreign languages to the level of proficiency required for comparative law. In fall 1995, fewer than one in ten of all Americans enrolled in post-secondary education – just about 1.1 million students total – was enrolled in a foreign lan-

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<sup>21</sup> Compare John H. Langbein, *supra* note 6, at 547 ("A background factor of great importance is the weakness of foreign language knowledge even among the most able and highly educated of American lawyers.").

<sup>22</sup> "Comparative Law – Its Functions, Methods and Usages," 22 *Ark. L. Rev.* 417, 424 (1968), reprinted in 1 *Max Rheinstein – Gesammelte Schriften* 251, 259 (1979). Rheinstein no doubt advocated French and German because those are the languages of the two sub-traditions generally regarded as leading the Civil Law world. See Ugo Mattei, "Why the Wind Changed: Intellectual leadership in Western Law," 42 *Am. J. Comp. L.*, 195, 200 (1994).

<sup>23</sup> "Editorial Comment, Are There No International Lawyers Anymore?," 75 *Am. J. Int'l L.* 134, 135 (1981). See also Hessel E. Yntema, *supra* note 3, at 906-07 (1956) ("But for the study of law, a central part of human culture, no such modicum of linguistic preparation is expected – not even for appointment to a law faculty. ... [T]he percentage of those who in this essential respect are qualified for comparative legal research has become exiguous indeed in the United States .").

guage course.<sup>24</sup> Moreover, Americans studying foreign languages disproportionately concentrate on Spanish: the number of students studying Spanish far exceeds the number studying French, German, Italian, Russian, Chinese and Japanese *combined*.<sup>25</sup>

The lack of foreign language skills, however, has an even more detrimental effect on comparative law than simply depriving the country of scholars able to do comparative work. The lack of language skills marginalizes comparative law work.

Lack of knowledge of foreign languages reduces the audience for comparative law work. Someone with even limited familiarity with a foreign language is more likely to be open to reading in his or her own language about a foreign system conducted in that language than is someone who has no familiarity with the language at all. With the text in the mother tongue at hand, the bilingual reader may be emboldened to investigate some aspect of the foreign system on his or her own. It is hard to imagine the recent "reception" of U.S. law in Europe<sup>26</sup> were English not so widely known, or for that matter, the reception of Roman law in Europe had not Latin been widely known then.

More invidious than the lack of an audience is that lack of foreign language skills can lead those without foreign language knowledge to regard scholarship requiring that knowledge as peripheral and even to denigrate those who have that knowledge. Alan Watson pointed out this phenomenon: "the scholars do not have the tools for the job; hence the job can't be worth doing."<sup>27</sup>

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<sup>24</sup> William H. Honan, "Language Study Shifts Again: Chinese Is Up, Russian Down," *New York Times*, October 9, 1996, B9 (reporting the results of a survey of the Modern Language Association of America).

<sup>25</sup> 1995 approximate enrollments: Spanish 606,000, French 205,000, German 96,000, Japanese 45,000, Italian 44,000, Chinese 26,000 and Russian 25,000. Id.

<sup>26</sup> Regarding the "reception" of American law in Europe, see Wolfgang Wiegand, "Die Rezeption amerikanischen Rechts," *Festsache zum Schweizerischen Juristentag 1988*, Sonderband 124 of the *Zeitschrift des Bernischen Juristenvereins* 229 (1988); Wolfgang Wiegend, "The Reception of American Law in Europe," 39 *Am. J. Comp. L.* 229 (1991) and Rolf Stürner, "Die Rezeption U.S.-amerikanischen Rechts in der Bundesrepublik Deutschland," in *Festschrift für Kurt Rebmann* 839 (1989).

<sup>27</sup> *Joseph Story and the Comity of Errors, A Case Study in Conflict of Laws* 96 (1992). Further: "It is not that scholars in legal history are lazy: it is only that foreign languages and foreign law are not part of their basic training and seem peripheral." Id. at 97.

Does this mean that comparative law is actually unwelcome? Will a law journal that does not have the foreign language power necessary to conduct the compulsory cite check be as open as one was recently and admit that,<sup>28</sup> or will it simply reject the submission? We recall receiving back a draft book review from one law journal stating that it had already published reviews of enough books in foreign languages.

#### b. Lack of Individuals Skilled in Comparative Law

Closely related to the shortage of language skills is the resulting shortage of individuals sufficiently skilled to conduct comparative law research. This absence was recognized decades ago when the émigré generation of comparativists began to retire, but nothing was done.<sup>29</sup> Today, the shortage of qualified comparativists is more acute than ever. P. John Kozyris noted:

High-level legal work cannot be done without comparative study, and America has a serious lack of human resources in this field. The great comparativists of the eighteenth century who shaped American law in its formative years, such as Story and Kent, are long gone. Moreover, the generation of expatriates from Hitler's Germany and Central Europe, such as Rhenstein, Ehrenzweig, Rabel, Schlesinger, Riesenfeld, and Stein, who enriched

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<sup>28</sup> For example, one review prefaced an article with the note "The author of this Article was able to translate German sources into English. Unfortunately, The Pace International L. Rev. is unable to verify these sources. Thus, we are relying on [the author's] translation, which we trust to be accurate." See Thomas Swenson, "The German 'Plea Bargaining' Debate," 7 *Pace Int'l L. Rev.* 373 n.\* (1995).

<sup>29</sup> See "The Present State of the Science of International Law in the United States—An Address by R.R. Baxter Delivered on 13 November 1976, during International Law Weekend [New York City]," reprinted in Michael H. Cardozo, *The Practical State of Teaching and research in International Law 1974*, at 6 (1977).

the American legal scene, is fading away and successors are hard to come by.<sup>30</sup>

The reasons for this serious lack of human resources are fairly easily identified. Serious comparative law work requires, as Max Rheinstein emphasized, serious preparatory work. One does not learn one's own legal system overnight; years are required. A similar attention to the project is necessary for a U.S. lawyer seeking to learn how foreign lawyers think. Max Rheinstein was explicit: he thought two years of study of a foreign system the minimum.<sup>31</sup> We agree. The first year is necessary to understand the system as system to be able to place the individual objects of study within that system. Thorough and systematic study of two legal systems is characteristic of the careers of the best comparativists.

Unfortunately, few tenured law professors or partnered practitioners have the time to spend two years studying a foreign legal system. If there is a time in one's career when this can be done, for most lawyers it is at the outset of their careers. At that time, however, there are many competing considerations: paying off student loans, attractive offers, etc.

The present reward system of U.S. law does not, however, encourage recent graduates to do this. Neither the U.S. academic world nor the U.S. practice world values foreign legal study in the slightest. (It is different abroad.)<sup>32</sup> The international legal exchange between the United States and Germany, Mathias Reimann noted, has been largely a "one-way-street".<sup>32a</sup> The academic world and, to a lesser extent the practice world, values one and only one kind of "post-graduate" project: the judicial clerk-

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<sup>30</sup> Supra note 6, at 178 (1994).

<sup>31</sup> Supra note 22.

<sup>32</sup> Cf. John Engle in *The Chronicle of Higher Education*, March 17, 1995 ("It is not an exaggeration to say that nearly everywhere but in America foreign study is considered to be a vital element of higher education, worthy of intelligent scrutiny and public support.").

<sup>32a</sup> "Abschied von der Einbahnstraße," Address given for the Thanksgiving Program of the Deutsch-Amerikanische Juristen-Vereinigung (DAJV), Nov. 23, 1996, reported in Cordula Woeste, "Gedanken zum Ausbau der deutsch-amerikanischen Studienbeziehungen," 22 *DAJV-Newsletter* 20 (1997).

ship. However one values clerking with a trial or appellate judge for learning about the U.S. judicial process, one certainly has to regard it as of extremely limited value for learning about foreign legal systems. Yet, that is the principal alternative career development path open and, with respect to an academic career, increasingly essential.<sup>33</sup>

## *2. Lack of Institutional Support for Comparative Law Study*

### *a. Comparative Law Institutes*

The shortage of skilled comparative law researchers might be quickly remedied were there sufficient institutional support for such work. Institutional support is essential for comparative law work just as it is for work in any other area of concentrated, systematic research. The ideal situs for such work might well be independent research institutes such as are found in other areas of scientific endeavor. Then one would not have to look to legal practitioners, who are paid by clients, or to law faculty who are paid for teaching, to conduct comparative law research. Ernst Rabel thought that Germany, by creating comparative law institutes, had “filled a gap that neither law schools nor law firms could close.”<sup>34</sup> Such an institute can bring together jurists from many different legal traditions and produce scholarship that no single jurist could ever hope to accomplish alone. A half a century ago, Rabel called for creation of such a U.S. institute of comparative law along the lines of the present Max Planck Institutes, i.e., an institute composed of 15 or more professional members inde-

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<sup>33</sup> See Robert J. Borthwick and Jordan R. Schau, “Note: Gatekeepers Of The Profession: An Empirical Profile Of The Nation’s Law Professors,” 25 *U. Mich. J. Legal Reference* 191, 212 (1991) (“... the percentage of professors teaching today who began teaching in the 1980s and who completed clerkships is more than twice the percentage of professors who clerked and who were hired in the 1960s.” at 214 ).

<sup>34</sup> Ernst Rabel, “On Institutes for Comparative Law,” 47 *Col. L. Rev.* 227, 230 (1947), reprinted in 3 *Ernst Rabel – Gesammelte Aufsätze* 235, 238 (1967).

pendent of any university.<sup>35</sup> P. John Kozyris recently renewed Rabel's call for a U.S. institute of comparative law:

We have national endowments for the humanities, the arts, and the sciences, so why don't we have a National Endowment for Law and Justice? Under the auspices of this endowment, an American Institute of Comparative Law (Institute) could play an important role by injecting wisdom from abroad into our understanding of policy choices and policy implementation in the United States. In addition, the Institute could become the main source for information on foreign laws and experts, providing a service of increasing value to legal practitioners. The Institute is only a dream, so let us make it a dream worth having, which means that it would be adequately funded and able to attract the best and the brightest comparative law minds from home and abroad. In the alternative, these functions could be dispersed among two or three existing workshops of comparative law, such as the Eason-Weinmann Center, provided that the public funding is adequate and long-term.<sup>36</sup>

Continued funding is a major obstacle to such a comparative law institute in the United States and it is not likely that we will see such an institute in the foreseeable future.

#### b. Comparative Law in U.S. Law Schools

Since we do not expect Professor Kozyris' dream to be fulfilled in the United States any time soon, we would like to believe that the best hope for comparative law study is to be found in the law schools. At first blush, the health of comparative law in U.S. law schools seems good. Membership in the institutional organization

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<sup>35</sup> *Id.*

<sup>36</sup> *Supra* note 6, at 178 (1994).

that sponsors the *American Journal of Comparative Law* is at an all time high. Dozens of law schools sponsor programs abroad; dozens sponsor journals of international and comparative law. Yet, as John Langbein has pointed out, this masks a “Potemkin Village.” While many courses may appear in catalogues, “virtually nobody—only a handful of students—actually takes these courses. The vast majority of U.S. law students graduate in complete ignorance of comparative law.”<sup>37</sup> The pages of U.S. law reviews are practically devoid of the work of serious comparative law scholars.<sup>38</sup> The law school that has enthusiastically and systematically supported comparative law study is the exception.

The present precarious state of comparative law in U.S. law schools is probably a by-product of larger forces at work in U.S. law schools. For a long time, U.S. law schools have been torn between competing professional and academic missions. More recently, they have experienced turmoil as new forms of scholarship have challenged past ways of doing things.

Richard Stith has observed the “extraordinary educational distance between the two sides of the Atlantic” in legal education.<sup>39</sup> Where the civil law professoriate is “deeply imbued with an academic ethos,” the U.S. law school world is “strikingly different[:] ... legal study is often called ‘professional’ rather than strictly ‘academic’.”<sup>40</sup> Unlike Europe, where law was always a central part of the university, legal education in America grew up as a substitute for apprenticeship training with lawyers. Initially,

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<sup>37</sup> *Supra* note 6, at 546 (1995). Accord, M. Reimann, *supra* note 6, at 52. Reimann proposes to change matters by eliminating the “basic course” in comparative law and substitute “decentralized” teaching of comparative law in substantive law courses generally. While we appreciate Professor Reimann’s efforts and have nothing against introducing comparative elements in courses generally, we do not agree that the Basic Course should be jettisoned. We also believe that the issue of use and non-use of comparative law, even limited to consideration within the academy, extends well beyond the calculus of how many students register for courses denominated “comparative law.”

<sup>38</sup> One exception is *The American Journal of Comparative Law*, which is a consistent source of high quality comparative law work. However, many—perhaps most—of the works it publishes come from abroad.

<sup>39</sup> “Can Practice Do Without Theory? Differing Answers in Western Legal Education,” 80 *Archiv für Rechts- und Sozialphilosophie* 426, 429 (1994).

<sup>40</sup> *Id.* at 427.

law schools to be attractive to their clientele had to provide their students with a better form of legal training than could be had in the old apprenticeship system. They were so successful in their development, however, that they completely drove apprentice training from the field.<sup>41</sup> Today, only university education is required for bar admission; there is no practical training required. Accordingly, U.S. law schools often respond first to their students need for training and only second to the needs of legal scholarship. As Michael G. Martinek observed, they provide “Training instead of education.”<sup>42</sup>

Comparative legal research has long been a victim of the “box office”. Since students do not demand comparative law courses, law schools are not quick to provide them. But since law schools staff their faculties to teach particular classes and not to support broader research missions, they have not demanded comparative law scholars.

Within the framework of the professional school, moreover, law schools can easily satisfy the limited demand that does exist for comparative law courses. One comparativist at a leading school wrote us that law schools see no need to add faculty members in the comparative law field, since established faculty “with virtually no foreign law, language, or cultural background” can become “instant experts” – at least sufficient for course-teaching purposes – based on a short week’s visit abroad. Specialized knowledge is not necessary if all that is required is to offer enough to permit a law school to say, “check, done that.”

The instant expert would not be satisfactory if scholarship were a decisive criterion in selection of law faculty, but it is not.<sup>43</sup> Unlike in most of the American university, there is no requirement in law schools that professors have completed a doctorate

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<sup>41</sup> On the history of American law schools, see generally William P. LaPiana, *Logic & Experience, The Origin of Modern American Legal Education* (1994); Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983). See also, Craig Evan Klafter, “The Influence of Vocational Law Schools on the Origins of American Legal Thought, 1779-1829,” 37 *Am. J. Legal Hist.* 307 (1993).

<sup>42</sup> “Der Rechtskulturschock: Anpassungsschwierigkeiten deutscher Studenten in amerikanischen Law Schools,” 1984 *Juristische Schulung* 92, 93.

<sup>43</sup> See James Gordley, “Mere Brilliance: The Recruitment of Law Professors in the United States,” 41 *Am. J. Comp. L.* 367 (1993).

and have established themselves as scholars. Richard A. Posner observed that “The essence of most graduate education is not the courses and the exams, but the preparation for a career in scholarship that is afforded by the experience of writing a dissertation. Few law professors, even when they are practitioners of the new scholarship, have that experience.”<sup>44</sup> Law professors possess, according to Richard Stith, “not knowledge but intelligence;”<sup>45</sup> according to James Gordley they are selected for “mere brilliance.”<sup>46</sup>

In Europe, as Richard Stith has observed, law is an academic field of study where students aspire to scientific understanding.<sup>47</sup> The mission of a European law faculty would seem fairly clear. According to Horst Ehmann:

The mission of the law faculties is the safeguarding, improving and further development of the law as well as the education of future lawyers with the ideal view of our time in the hope that the students of these faculties will be able to realize in their professional lives a little bit of the ideal conceptions of which we can only dream.<sup>48</sup>

The goals that we have identified above for comparative law—knowledge of the laws of one’s trading partners, models for law reform and perspective on one’s own legal system—all fit quite easily within that mission.

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<sup>44</sup> *Overcoming Law* 101 (1995). The usual requirement is only a J.D., or Juris Doctor, which while styled a doctorate, is not in any conventional sense. All 175 U.S. law schools combined bestow only a handful of true doctorates in law, the S.J.D., each year—less than twenty, typically. Richard Stith, *supra* note 39 at 428. See also Robert J. Borthwick and Jordan R. Schau, “Note: Gatekeepers Of The Profession: An Empirical Profile Of The Nation's Law Professors,” 25 *U. Mich J. Legal Reference* 191, 212 (1991) (noting the sharp decline in the last generation of new law professors with advanced degrees in law).

<sup>45</sup> *Supra* note 39, at 428.

<sup>46</sup> *Supra* note 43.

<sup>47</sup> *Supra* note 39, at 427.

<sup>48</sup> “Die Aufgabe der Zivilrechtslehrer,” in Juristische Fakultät der Universität Trier (ed.), *Die Aufgabe der Juristenfakultäten, Festgabe für Otto Theisen*, 11, at 34 (1996).

The world of the U.S. law school is quite different. Even though the last generation has seen a departure from the professional orientation of U.S. law schools toward what Richard Posner terms the “new scholarship,” it remains a world quite different from the European law faculty. It is a world beset by turmoil.<sup>49</sup> Beginning with the so-called Legal Realists, U.S. law schools have whole-heartedly endorsed social science work and have promoted interdisciplinary studies such as are typical of the law and economics, critical legal studies, feminist law and critical race theory schools.<sup>50</sup> Critics such as Richard Stith have observed that “if the Realists have largely failed to bring serious social theory into U.S. law schools, they have succeeded in driving out most serious legal theory.”<sup>51</sup> Few today would deny the decline in the more traditional forms of legal scholarship that focus on doctrine. Richard A. Posner observed that “[d]octrinal scholarship has been in relative decline for many years, having been abandoned by many law professors, especially young ones and especially at elite law schools.”<sup>52</sup> According to Alan Watson:

To an extent unparalleled elsewhere, students are not exposed to systematic treatment of law, with clear-cut concepts, institutions, and rules, but are presented with individual cases, outside of a his-

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<sup>49</sup> See generally Richard A. Posner, *supra* note 44, chapter 2 (“The Triumphs and Travails of Legal Scholarship”) (1995); Mary Ann Glendon, *A Nation Under Lawyers*, part III (“The Lamp of Learning”) (1994).

<sup>50</sup> Critical Legal Studies in particular creates something approaching consternation for some foreign observers. Alexander Somek, Professor at the University of Vienna, notes that “most of the cls trademarks, such as ‘trashing’ or ‘deconstruction’ would appear to German scholars to be something threatening, dangerous, or indeed, nihilistic.” “Lecture: From Kennedy to Balkin: Introducing Critical Legal Studies from a Continental Perspective,” 42 *Kan. L. Rev.* 759, 764-65 (1994). See also Gerard Quinn, “Legal Theory and the Casebook Method of Instruction in the United States,” in Micheál Ó Súilleabháin (ed.), *Legal Theory and Cases: Shifting Frontiers* 9 (1994).

<sup>51</sup> *Supra* note 39, at 434.

<sup>52</sup> *Supra* note 44, at 84. Posner notes that Judge Harry T. Edwards has spoken eloquently of “The Growing Disjunction Between Legal Education and the Legal Profession,” 91 *Mich. L. Rev.* 34 (1992), which has led to a decline in “practical” scholarship. Judge Edwards’ article was the subject of a symposium issue of the *Michigan L. Rev.*, August 1993. See 91 *Mich. L. Rev.* 1921 (1993).

torical, doctrinal, legal context but against a background of social interests. Since this is the culture of U.S. scholars involved with law, and since it is hard to see the culture one lives, they take for granted that this is the way law does develop everywhere and at all times. They greatly underestimate the role of doctrine and of a purely legal culture.<sup>53</sup>

There is little place in that world for comparative law.

Comparative law scholarship, which was probably the first field of legal scholarship to recognize the importance of historical, political and cultural factors, now seems quaintly old-fashioned to some adherents of the new scholarship because of its heavy reliance on legal science and doctrine. Historical conceptions of comparative law—both in the United States and abroad—view law as a “science”.<sup>54</sup> This is science not in the limited sense “science” is most frequently used in the United States, namely of an empirical science along the lines of physics or chemistry, but science in the broader European sense of an organized body of knowledge, such as in the German sense of *Rechtswissenschaft*.<sup>55</sup> Edouard Lambert, one of the French leaders of comparative law, spoke of the “science of comparative law.”<sup>56</sup> As recently as 1976 Richard R. Baxter,

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<sup>53</sup> *Supra* note 27, at 118 n. 29. But see Ugo Mattei, “Why the Wind Changed: Intellectual Leadership in Western Law,” 42 *Am. J. Comp. L.* 195 (1994) (noting American intellectual leadership in law promoted, in part, by its the distance of American legal scholarship from authoritative texts).

<sup>54</sup> See, e.g., Hessel E. Yntema, *supra* note 3, at 903 (“comparative law is another name for legal science”).

<sup>55</sup> See generally David S. Clark, “Tracing the Roots of American Legal Education—A Nineteenth Century German Connection,” 51 *Rabels Zeitschrift* 313 (1987). This was the view held in early nineteenth century America as well. See, e.g., Daniel Mayes, “Whether Law is a Science,” 9 *Am. Jurist* 349 (1833).

<sup>56</sup> “Conception générale et définition de la science du droit comparé, sa méthode, son histoire; le droit comparé et l’enseignement du droit” (1905), reprinted in Konrad Zweigert and Hans-Jürgen Puttfarcken, *Rechtsvergleichung* 30 (1977). Cf. Edouard Lambert, “Comparative Law,” 4 *Encyclopedia of the Social Sciences* 126, 129 (1931) (“comparative jurisprudence and law as a social science are two aspects of the same thing”); M. Schmitthoff, “The Science of Comparative Law,” 7 *Cambridge L.J.* 94 (1941).

late U.S. Justice on the International Court of Justice, was not embarrassed to speak of “The Present State of the Science of International Law”.<sup>57</sup> Today, however, we are informed that “the typical law faculty person would only laugh” at the idea of a science of law.<sup>58</sup> According to Richard Stith, U.S. law students “never even hear that word.”<sup>59</sup>

An important part of the science of comparative law—though by no means the only part—is the careful exposition of foreign doctrine or, black letter law, if you will.<sup>60</sup> But today that part is under direct attack. William Ewald published a book-length critique of contemporary comparative law that in large measure is addressed toward what he sees to be comparative law’s weakness: too much attention to doctrinal matters.<sup>61</sup>

John Langbein has directly connected disdain for doctrine to the sad state of comparative law: “Th[e] instinctive disdain for other legal cultures derives in part from the intellectual movement known as legal realism, a movement that has, since the 1930s, strongly devalued the doctrinal integrity of American law.”<sup>62</sup> Lawyers and academics that are skeptical of doctrine are not likely to have much interest in comparative law with its implicit searches for the common core concept or the “better” solution. If

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<sup>57</sup> “The Present State of the Science of International Law in the United States—An Address by R.R. Baxter Delivered on 13 November, 1976,” *supra* note 29.

<sup>58</sup> This was a remark in 1996 of a retired comparativist at a leading law school. See also, Paul D. Carrington, “Legal Education for the People: Populism and Civic Virtue,” 43 *Kansas L. Rev.* 1, 36 (1994) (to the effect that medicine is a science, while law finds its role in politics). For Europe, see, e.g., Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 45 (2d revised ed. 1992) (“What we must aim for is a truly international comparative law which could form the basis for a universal legal science.”)

<sup>59</sup> *Supra* note 39.

<sup>60</sup> Joachim Zekoll, “Kant and Comparative Law: Some Reflections on a Reform Effort,” 70 *Tulane L. Rev.* 2719, 2725 (1996) (“Those who engage in comparative legal studies traditionally pay close attention to the text of foreign and domestic law. This should not come as a surprise, for the attempt to explore a normative system requires an exposition of its components, and the descriptive element inherent in this task is of basic importance.”).

<sup>61</sup> William Ewald, “Comparative Jurisprudence (I): What Was it Like to Try a Rat?,” 143 *U. Pa. L. Rev.* 1889, 1896 (1995). For a pointed response, see Joachim Zekoll, *supra* note 60.

<sup>62</sup> *Supra* note 6 at 551.

law is politics, well, why bother studying foreign examples? As usual, Langbein made his point with punch: "If you have been trained to view legal doctrine as a pack of feeble or even dishonest excuses, excuses masking the real interests and forces that underlie and explain the work of the courts, you will not have much regard for the *Bürgerliches Gesetzbuch* and for the style of legal reasoning that it embodies and fosters."<sup>63</sup>

### 3. U.S. Legal Structures Resist Comparative Law Influences

#### a. U.S. Law-making Methods Leave Little Room for Comparative Law

Although the United States may have entered an "era of statutes",<sup>64</sup> U.S. law-making is still dominated by common law thinking. Common law thinking and law creation are not be receptive to comparative law, whether the law making takes place in the context of judicial decision or legislation.

Insofar as judges make law, there is relatively little room for comparative law. Case law deals with authoritative points and does not seek to create a rational system; it is not abstract. In litigation, the initial search is for binding precedent: the decision of the court superior to the one determining the case. If that can be found, no law-making is necessary. Obviously, a superior court's decision does not involve comparative law. If no superior court decision is found and judicial law making becomes necessary, the law making involved is interstitial, that is, the judge is only filling in the "gaps."<sup>65</sup> Again, there is no obvious role for comparative law.

Even when the United States turns to legislation, however, the form of its legislation is not generally conducive to comparative studies. Its pragmatic approach to legislation means that it tends to legislate about like it decides cases: one particular point at

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<sup>63</sup> Id. Compare David Fraser, "The Day the Music Died: The Civil Law Tradition from a Critical Legal Studies Perspective," 32 *Loyola L. Rev.* 861 (1987).

<sup>64</sup> Compare Guido Calabresi, *A Common Law for the Age of Statutes* (1982).

<sup>65</sup> See James R. Maxeiner, *Policy and Methods in German and American Antitrust Law: A Comparative Study* 30-31 (1986); Benjamin N. Cardozo, *The Nature of the Judicial Process* 113-14 (1921).

a time. The United States prefers to minimize legislation and disperse the authority for it.

When U.S. lawyers think of forward-looking legislation, they normally think of one of three forms of legislation: federal legislation, "Restatements of the Law," and uniform state legislation. Restatements of the law, by their nature, offer the least room for comparative law example. A restatement is supposed to "restate" the law with only a gentle motion to reform of law; that does not allow room for major departures from prior practice.<sup>66</sup> In most instances, the only room for comparative law might help to choose the "better" solution from several options, but that would only where the comparative example would fit right in. Unfortunately, uniform state legislation does not offer substantially better opportunities for comparative work. Uniform legislation, to be effective, requires that most of fifty different state legislatures adopt the same law. That requirement is not conducive for substantial departures from existing law and practice; the political exigencies require an appeal to that which we already have. That leaves federal legislation.

Federal legislation, even if it did not have similar political problems of acceptability for adoption that uniform state legislation has, would still have the basic problem of common law skepticism of legislation. It faces the strong U.S. preference for pragmatic, particularistic solutions. The United States simply does not choose to legislate abstract systems, but prefers to solve very particular problems. A striking example of this is the U.S. approach to data protection. While the principal trading partners of the United States now all have so-called omnibus statutes that apply to personal information generally, the United States legislates such protection only on what is called a sectoral or industry-specific basis.<sup>67</sup> Thus the United States has strong protections for personal

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<sup>66</sup> See Hessel E. Yntema, "The American Law Institute," in Max Radin & A.M. Kidd (eds.), *Legal Essays In Tribute to Orrin Kip McMurray* 657, 660 (1935); see also James Gordley, "European Codes and American Restatements: Some Difficulties," 81 *Col. L. Rev.* 140 (1981).

<sup>67</sup> See Paul Schwartz and Joel R. Reidenberg, *Data Privacy Law* (1996); Joel R. Reidenberg, "Setting Standards for Fair Information Practice in the U.S. Privacy Sector," 80 *Iowa L. Rev.* 497, 499 (1995) (arguing that "U.S. standards derive from

information contained in consumer credit reports and for video tape rental records, but little protection for medical records.

b. Comparative Law Invites Law Reform which Offends Vested Interests

One of the virtues of comparative law is that it challenges one to think critically about one's own legal system. That suggests law reform and a change in the status quo.<sup>68</sup> Machiavelli observed the obstacles would-be reformers face: "It should be borne in mind that there is nothing more difficult to arrange, more doubtful of success, and more dangerous to carry through than initiating changes in a state's constitution. The innovator makes enemies of all those who prospered under the old order, and only lukewarm support is forthcoming from those who would prosper under the new."<sup>69</sup>

In the case of the United States legal system the forces for the status quo are particularly strong and well-entrenched. One observer of the U.S. court system observed: "The central obstacle to change in the courts is not the resistance to reform, but is, more fundamentally, the lack of interest in even thinking about change."<sup>70</sup> There is "a systematic tendency to retain the status quo."<sup>71</sup> The forces behind the status quo have the advantage that a legal system is a highly technical structure. Laymen are not well-situated to reform it; but they, who have the knowledge to reform it, have vested interests in not doing it.<sup>72</sup> As one critic who noted how well lawyers are doing within the current system put it, they

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the influence of American political philosophy on legal rule making and a preference for dispersed sources of information standards").

<sup>68</sup> See Rudolf B. Schlesinger, "Reflections of a Migrant Lawyer," in M. Lutter, Ernst C. Stiefel & M.H. Hoeflich (eds.), *Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland*, 487, at 490 (1993).

<sup>69</sup> *The Prince*, translated by G. Bull.

<sup>70</sup> Malcolm M. Feeley, *Court Reform on Trial: Why Simple Solutions Fail: A Twentieth Century Fund Report* 192 (1983).

<sup>71</sup> Raymond T. Nimmer, *The Nature of System Change: Reform Impact in the Criminal Courts*, 176-77 (American Bar Foundation, 1978)

<sup>72</sup> *Supra* note 70, at 196.

are going to protect “the goose that lays the golden egg.”<sup>73</sup> Many U.S. lawyers have done so very well in that system, that there is talk of an opulent “litigation industry”<sup>74</sup> and of a “Litigation Gravy Train.”<sup>75</sup> According to Professor Mary Ann Glendon, the United States has become “A Nation Under Lawyers.”<sup>76</sup> The hand of the vested interests is further strengthened by what John Langbein has called the “interconnectedness” of the system, that is, that all the parts work together as a whole. There really is no such thing as a “small reform.”<sup>77</sup> Hessel E. Yntema pointed out the effect on comparative law of this “powerful complex of vested professional interests.”<sup>78</sup>

### c. The 18th Century U.S. Constitution Hinders Certain System Changes

Opponents of law reform often appeal to the 18th century U.S. Constitution to frustrate change. Wherever the Constitution controls, change is especially difficult, since amendments to the Constitution are so difficult to produce: they require two thirds majorities in both houses of Congress, consent of the President and approval by the legislatures of three-fourths of the states. Rudolf B. Schlesinger noted how the U.S. Constitution contains a number of “positive provisions which, based as they are on common-law concepts, constitutionalize and thus perpetuate ancient and in part archaic rules and institutions.”<sup>79</sup> Schlesinger identified the civil jury as a serious instance of such “antiquarian constitutional rules” impeding law reform.<sup>80</sup> The jury as thus perpetuated constitutionally has not been limited to the basic concept of lay participation in legal decision-making, but has extended to specifics of

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<sup>73</sup> Robert V. Wills, *Lawyers Are Killing America, A Trial Lawyer's Appeal for Genuine Tort Reform* 8 (1990).

<sup>74</sup> Walter K. Olson, *The Litigation Explosion* 11, 46, 300 (1992).

<sup>75</sup> Editorial, “Ending the Litigation Gravy Train,” *New York Times*, January 21, 1997, at A22.

<sup>76</sup> *Supra* note 49.

<sup>77</sup> *Supra* note 6, at 551-52.

<sup>78</sup> *Supra* note 3, at 900.

<sup>79</sup> *Supra* note 68, at 490.

<sup>80</sup> *Id.*

just what a jury must look like, namely, a panel of purely lay persons, who decide as they wish without providing any legal justification (Begründung), who must be protected from hearsay evidence, whose decision should not be subject to review, etc.<sup>81</sup> In other areas, the United States Supreme Court through interpretation of constitutional provisions, has constitutionalized large areas of the law, most notably, the law of criminal procedure, thus creating, as Schlesinger observed, “a giant obstacle to legislative reform.”<sup>82</sup>

#### 4. *An Attitude that Foreign Law has Little to Teach: Willful Blindness*

Willful blindness is our last reason for U.S. indifference to foreign law. Amazing as it may seem, many U.S. lawyers simply do not want to hear about foreign legal ideas. They are convinced—without examination of competing choices—that their law is better. It is nothing other than the “not invented here” idea. Rudolf B. Schlesinger observed this phenomenon:

[W]hen it comes to problems of criminal procedure, [U.S. lawyers and Americans generally] are possessed by a feeling of superiority that seems to grow in direct proportion to the ever-increasing weight of the accumulating evidence demonstrating the total failure of our system of criminal justice. In large part, this feeling of superiority is caused by plain ignorance concerning the details and even the basic nature of the leading foreign systems. ... This belief, which generates an attitude of unthinking contempt toward foreign systems, is 200 years our of date.<sup>83</sup>

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<sup>81</sup> See John H. Langbein, “Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?”, *American Bar Foundation Journal* (1981).

<sup>82</sup> *Supra* note 68, at 491 (1993). To the same end, Charles Maechling, “Borrowing From Europe’s Civil Law Tradition”, *ABA Journal*, January 1991, at 59.

<sup>83</sup> “Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience,” 26 *Buffalo L. Rev.* 361, 363 (1976).

The U.S. legal system enjoys the imprimatur of more than two centuries of constitutional and democratic development. In the last century, when the governments of civil law countries were still debating the merits of popular participation in government, the United States already had a democratic system. In this century, when America responded to a world-wide depression by democratic means, civil law Europe fell under totalitarian control. The legal system enjoys the fruits of the successes of the political system. A lay observer, Anne Strick, noted that "Among patriotic fictions rooted marrow-dear is that which equates America's legal system with truth and justice."<sup>84</sup> What would the United States, which has three times in this "American century" saved the world from tyranny,<sup>85</sup> have to learn from these unreliable civil law systems? John Langbein has called this phenomenon the "Cult of the Common Law":

The Cult of the Common Law is centered in that fusion of public and private law that seems so peculiar to persons trained in European legal systems. My suggestion is that the successes of Anglo-U.S. public law have given an aura to our courts and our legal system that protects the system whenever criticism is directed toward serious shortcomings in the procedures and institutions that handle routine matters of private law and criminal law. Implicit in the Cult of the Common Law is the contention that the legal system is an indivisible package ... and that any tampering with this complex structure risks the political liberties that have been historically associated with the Anglo-American legal systems. Expressed in this way, the Cult of the Common Law is profoundly chauvinistic and reactionary. It seizes upon the relatively precocious development of constitutionalism

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<sup>84</sup> *Injustice for All: How Our Adversary System of Law Victimizes Us and Subverts Justice* 15 (1977).

<sup>85</sup> Inaugural address of William Jefferson Clinton, January 20, 1997, *New York Times*, January 21, 1997, at A14.

in the Anglo-American legal tradition, and uses that as a shield against criticism based on foreign example. Again and again in discussions about the shortcomings of the contemporary legal system I find that when I draw upon foreign example, that I am met with responses such as, "Before you go on telling me any more about the virtues of German civil procedure, please explain why they had Hitler and we did not."<sup>86</sup>

Patrick M. McFadden has identified a similar phenomenon connected with the reaction of U.S. courts to international law which he calls "Provincialism in United States Courts."<sup>87</sup>

The Cult of the Common Law is pervasive if rarely so crassly expressed as to deprecate foreign law. It is present at the highest levels of the bar. For example, the President of the American Bar Association in the December 1996 issue of *ABA Journal*, after acknowledging problems with the civil justice system, nevertheless wrote: "For all its faults, the American system of justice continues to be the envy of the world. It's not perfect, but it works better than virtually any other system on Earth."<sup>88</sup> It is clearly present wherever Americans see in their system a reference point for other legal systems as they develop their own legal regimes without considering whether other legal systems might serve as reference points for the American. Moreover, the Cult of the Common Law is neither new nor limited to less intellectual members of the

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<sup>86</sup> *Supra* note 6, at 554. See also John H. Langbein, "The Influence of the German Émigrés on American Law: The Curious Case of Civil and Criminal Procedure," in Marcus Lutter, Ernst C. Stiefel and Michael H. Hoeflich (eds.), *Der Einfluß Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* 321, 329 (1993).

<sup>87</sup> "Provincialism in United States Courts," 81 *Cornell L. Rev.* 4, 5 (1995) ("Over the past 200 years, United States judges have developed a series of rules and practices that minimize the role of international law in domestic litigation. Considered collectively, these rules and practices embody a thoroughgoing, deeply rooted provincialism—an institutional, almost reflexive, animosity toward the application of international law in U.S. courts.").

<sup>88</sup> N. Lee Cooper, "President's Message: All We Ask for Is Fairness," *ABA Journal*, December 1996, at 6. Maxeiner's letter in response is in the February 1997 issue at 10.

bar. An American as profoundly aware of Continental legal ideas as Arthur L. Goodhart seems to have suffered from it.<sup>89</sup>

A result of the Cult of the Common Law is rejection of foreign legal ideas without even considering them. Over sixty years ago Karl Llewellyn counseled Stefan Riesenfeld that to identify a proposal as based on foreign law was to give it “the kiss of death.”<sup>90</sup> With respect to the recent abortive reform of civil procedure, the one “foreign” proposal seriously considered—the loser pays rule of England, and most other countries—was rejected with contempt, but without study. In the ABA’s section journal for lawyers one reads “The Truth about the “English Rule: “We should ‘stop, look, and listen’ to the facts about this so-called Loser Pays Rule before we simply assume that this idea, created in foreign legal jurisdictions, would beneficially apply to our own civil justice system.”<sup>91</sup> In the realm of criminal procedure, the O.J. Simpson trial should have shown to even the densest observer—regardless whether one feels the defendant innocent or guilty—that the U.S. system of criminal justice is in sore need of reform. Yet in the *ABA Journal* one reads that those who would jump to conclude that the United States might want to consider foreign solutions are clearly in the wrong.<sup>92</sup> One is constantly told, that for

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<sup>89</sup> See Carola Vulpius, *Gustav Radbruch in Oxford* 59 (1995). Goodhart (an American at Oxford) apparently discouraged Radbruch from having his *Rechtsphilosophie* translated into English and complained that German jurists always seemed to want to bring their science to England but did not want to make English jurisprudence useful for Germans. Goodhart wrote: “It is because of the uncertainty of political life on the Continent that these questions have so profoundly affected legal thought in those countries, and not because, as is sometimes said, foreigners are more capable of philosophical thought than are Englishmen.” “Law and the State, 47 *Law Quarterly Review* 118, 121 (1931).

<sup>90</sup> Stefan Riesenfeld, “The Impact of German Legal Ideas and Institutions on Legal Thought and Institutions in the United States,” in Mathias Reimann (ed.), *The Reception of Continental Ideas in the Common Law World 1820-1920*, 89, 91 (1993).

<sup>91</sup> G. Marc Whitehead & Robert B. MacDonald, “The Truth about the “English Rule”, 21 *Litigation* 3, 62-63 (1995).

<sup>92</sup> E.g., “In the end, viewers’ comments suggest that most people do not understand the adversary system. ... Indeed, many people seem to view the justice system as a pristine search for truth, where lawyers on both sides ought to serve as assistant truth-seekers. Many people’s comments appear to suggest that they would be more comfortable, at least in theory, with an inquisitorial [sic] system based on the European model. ... If, however, the legal profession and the organ-

all the warts of the U.S. system, any alternative would surely be worse.

### III. Comparative Law in the U.S.A. – *quo vadis?*

The reasons that we have discussed above suggest that there are very real obstacles to U.S. lawyers learning from comparative law. We regret to say that we are more pessimistic than optimistic with respect to whether these obstacles will be overcome anytime soon. Here is our view how the obstacles we have discussed are likely to play out in the next quarter century.

- Americans will not suddenly start learning foreign languages in appreciable numbers. The best that we feel we can hope for is that enlightened U.S. law schools will prefer as students and faculty those rare individuals who are proficient in foreign languages. But Hessel E. Yntema called for that four decades ago and few law schools heard him.
- U.S. law schools are not likely to find a place for comparative law, a step-child of all of three of the principal conflicting interests that are battling for the soul of U.S. legal education. Comparative legal research is too doctrinal at a time when doctrine is out, but neither sufficiently practical nor sufficiently theoretical for proponents of the principal alternatives to doctrine. Comparative law is on life-support at most U.S. law schools given their disinclination to bring in new comparativists. One comparativist at a major state university wrote us that “most of us are happy just to hold our own.” If no new blood comes in, time promises extinction.

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ized bar want the public to be truly informed rather than just inflamed about the issues in criminal procedure, the educational campaign needs to begin—the one that will demonstrate that the adversarial system, ugly as it often is to watch, is not a sausage factory, but the very basis of liberty.” Charles B. Rosenberg, “The Law After O.J.,” *ABA Journal*, June 1995.

- The U.S. legal system is not going to change its methods of law-making and substitute scientific legislation. Llewellyn's Uniform Commercial Code was more likely an aberration than a harbinger of the future. While the United States may turn more to legislation, it is not likely to build that legislation on foreign models or utilize studies of foreign law. The United States is likely to hold fast to its peculiar institution of procedure: the adversary system. The entrenched special interests will not suddenly give up their power.
- Americans may persist in a worldview formed in 1945 when the United States stood almost alone unharmed by World War II. Fifty years later even educated Americans seem no less convinced of the righteousness of their legal and political system and no more willing to accept the necessary idea of comparative law that foreigners might actually have something to teach. After all, the United States is still the first choice of the world's emigrants. It was the United States that "beat" the U.S.S.R. in the Cold War. Such attitudes foster the continued vitality of John Langbein's Cult of the Common Law. The best we hope for is that globalization will gradually change these attitudes. Until these attitudes are abandoned, we have no hope that U.S. lawyers will learn from comparative law. So long as they persist, U.S. law will suffer. U.S. law reform will be timid and inadequate. Americans will have only themselves to blame: U.S. lawyers' ignorance of foreign law is no excuse.