The teaching of Comparative Law long has been a fixture of law school education in the United States. Teachers and textbooks classically have taken one of two (or plausibly two and-a-half) articulable approaches. Initially, the dominant iteration consisted in listing and comparing the methodologies and institutions that were seen to be characteristic of problem solving within three seemingly distinctive families of legal systems –Common Law, Civil Law and Socialist Law – and in-so-doing, to illuminate the claimed “real” similarities and differences between and among these systems. Litigation processes provided the archetype for anchoring such discussions. More recently, an alternative approach has emerged. “Comparative Constitutionalism” is a framework that expands the methodological and institutional approaches of predominantly “private law” problem solving to embrace the discussion of substantive “public law” or “constitutional” norms. Beyond rules of governance such as those involved in concepts of separation of powers and judicial review, this approach might include discussions of substantive social norms that are privileged within legal systems in such areas as contract, tort, property and criminal law and procedure. An ambitious teacher might attempt to combine both the litigation and constitutional approaches. Such a teacher might also attempt to expand the family of legal systems beyond the traditional three to include possibly Islamic and “Chinese “legal orders. But however conceived and implemented, often explicit but always implicit in these approaches to Comparative Law is the brooding influence of European enlightenment thought. That influence is central in two ways. First, it defines law in highly positivistic ways as the product of the political community that is the nation state. Second, law is presented primarily in terms of the force that is exerted by formal rules and institutions. Intended or otherwise, Eurocentric practices and expectations are thus advanced as ideal types. Jurisprudence, although often rarely explicitly acknowledged as such, has thus always been integral to the teaching of Comparative Law.

Despite its longevity as an item in the curriculum, Comparative Law for the most part has been a poorly understood component of legal education. Not infrequently, it is confused with or conflated into International and/or “foreign” law. But four factors are now conspiring to give it a more prominent place. The first is the mainstreaming of international law. The same forces of economic, environmental and political globalization and claims about the universality of human rights which seem to demand uniform or standardized rules in the International Law arena have, inadvertently or otherwise, raised the profile of the less well understood cousin. Second, the reemergence of a significant role for religion

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1 DRAFT (05/22/2009). This paper has been prepared for the purpose of facilitating discussions at the 2009 Law and Society Annual Meeting. The claims and assertions made here are provisional. Use at your intellectual risk.
Comparative Law a special pedestal; for even as Western societies debate the optimality of the values of relativism and pluralism, none of them seem to question – at least directly – the relevance of religion in the shaping of legal norms. And since every good liberal accepts the right of the “other” to have religious beliefs that are different from yours or mine, arguments for the effective harmonization of laws compel an effort to understand that difference of beliefs. Third, there are of course the events of September 11, 2001, or more accurately, the aggregation of issues symbolized by those events, and more generally, the so-called “war on terrorism.” The al Qaeda attacks (of which September 11, 2001, was but one) demonstrated less the willingness but more the capacity of a marginal group of non-state actors to inflict substantial pain on a highly organized and disciplined society. More significantly the extralegal responses of various states to “terrorism” have suggested the fragility of law and legal rules as adequate tools of state-craft. Collectively, academics and their students look to Comparative Law to understand and evaluate these forces.

The fourth factor relate to the changing demographics of the law school class room itself. If there was an earlier “golden” age of Comparative Law – at least in the twentieth century – it surely lay somewhere between 1950 and 1970. The disintegration of civil life in Continental Europe prior to and during World War II had led to a significant outflow of some of the best-trained intellects of the Continent, particularly Jews fleeing from persecution in Central and Eastern Europe. Many found hospitable homes in academic institutions in the United States. In law schools, as elsewhere, these intellectuals applied the scientific methods of modeling and theorizing to the study of law, and in a Common Law environment, few areas appeared more susceptible to effective adoption of the methodology than Comparative and International Law. But the methodology was supplier driven, and in time became irrelevant, especially as its one area of possible demand – the relevance of law to the economic development of post-colonial societies – lost luster among policy makers and academics. But a new sociological environment has emerged. There is now in American law schools a sufficiently large cadre of students with cosmopolitan interests in law to create a viable market for the return of Comparative Law. Among these are the children of immigrants as well as students bred in the multicultural ethos of the undergraduate diversity class rooms of the 1980s, 1990s and early twenty-first century.

But even as these forces push towards a decreased marginalization of Comparative Law, a persistent -- One might say existential – question remains: why teach or study Comparative Law? That question could essentially be elided when those interested in comparative Law were self-selecting pedants or true believers of esoteric subjects in law, but with increased attention and enrollment, providing rationally functional answers can no longer be avoided. Such answers, at a minimum, help select topics to be taught, and help frame the nature and scope of the conversations that might go on in the class room.
The first obvious point is a paradoxical one. Whether one views Comparative Law as a functionally utilitarian course, or as an engagement with a non-consequentialist subject of learning, it cannot prepare the student to engage in the substantive practice of what it teaches. No Common Law lawyer studies the Civil Law system in order to effectively conduct or even practically critique the conduct of an inquisitorial investigation of wrongdoing within a living Civil Law order. And so, in an age in which “experiential learning” is the coin of the classroom realm in American law schools, we have the strengthening of a discipline in which hands-on practice of the substance of the course will not be a reality for the lawyers who undertake to study it.

And yet, there are certainly functionally utilitarian reasons for studying Comparative Law. It is to law and to lawyers what Anthropology is to the humanities, and certainly in the past, to policymakers. It seeks to reveal the hidden and not infrequently unconsciously influential metastructures and constellation of forces that propel the legal order within a given society. Armed with such knowledge the lawyer can deploy it benignly or not so benignly, offensively or defensively. The effectiveness of legal exportation or transplantation depends almost exclusively on how accurately one engages in the study of Comparative Law. The success of “legal aid” to so-called “transitional societies,” of “rule of law” promotions in “emerging societies,” and of “world justice” programs will depend in the last analysis on how well the promoters of these schemes have understood and deployed the lessons of Comparative Law. Rich and worthy lessons exist from the last failed efforts of the experiments with “legal liberalism” in the “Law and Development” programs in Latin America, Africa South and East Asia during the 1950s and 1960s. The report cards of the 1990s have not been entirely satisfactory.

Good Comparative Law may also teach us something about our own legal system. In this sense, it functions much the same way that learning about a foreign language can actually enrich one’s appreciation of the hitherto taken-for-granted structures and nuances that underpin her native language. In some ways, much of the currently fashionable debate about the extent – if at all – to which the United States supreme Court should invoke (if you prefer “cite”) foreign law in the articulation of its Constitutional Jurisprudence easily can be viewed as homage (or at least a backhanded compliment) to the revival of Comparative Law as a subject to be taken seriously. Similarly, debates over the validity of so-called “cultural defenses” in Criminal Law, or what effects to give foreign judgments in the social arena exemplify affirmative utilitarian uses to which Comparative Legal studies are being put in the domestic corridors of power. Because these are demand driven, they are more likely to withstand and be embedded within the cultural forces that shape the study of law.

But comparativists do not see themselves primarily as plumbers. This is true both for students and for teachers. Indeed, notwithstanding the forces of globalization or the demographic pulls that may be responsible for the resuscitation of Comparative Law as a mainstay of a law school’s curriculum, students who enroll in Comparative Law classes likely do so despite rather than because of its potential
to advance their future professional careers. My experience is that many do so because they see in
Comparative Law – and more particularly Comparative Jurisprudence – as a journey both of exploration
of the “other,” and of self-discovery. In any event, these are possibilities that shape my approach to
Comparative Jurisprudence, and that I invite students to examine in my course:

The primary objective of the Seminar is to provide a formal forum for reflecting on the nature of law and
the worth of “Comparative jurisprudence” in providing us with a trans-cultural perspective of
law and legal institutions. . . . What is law? Is it amenable to being studied through the
application of the “scientific method?” What connections or relevance does it have to or for
such human conditions, virtues or aspirations as justice, peace, love, happiness, aesthetics,
ethics, morality, culture, religion and language – among others?

More importantly, I find that students used the forum to explore and systematize ideas that they had
picked up at various points in their lives, ranging from remarks by their immigrant grandparents
to sophisticated but confusing discourses in the philosophies of politics and of rights. As in any
course, conversations flowed more smoothly when there were shared starting points. For this
purpose, I found most useful having an initial set of classes that systematically dissected the
standard classifications of schools of thought in Western Jurisprudence: “Natural Law” “Legal
Positivism” and “Sociological” (or “Reform”) Jurisprudence.” Attempts to elucidate and apply
these ideas to contexts outside of those commonly associated with the development of Western
Analytical Jurisprudence (in my case, general Islamic Law, the Hindu legal order and African legal
traditions) provide powerful rationales for the various articulations of “pluralism” as an
unavoidable mode of jurisprudential thought.

The State both as a player and as an arbiter among players is of course a central feature of Western
jurisprudential thought. Non-Western legal traditions give as much – and frequently more –
space to such other institutions as ecology, social custom and religion. Since these institutions
exert their influences over a society in multiplicities of ways, determining which of those
influences constitute law and which do not generates some of the most interesting discussions
about the nature and scope of the idea of law. In the process, students get to reflect on the idea
of law in ways that they might not ordinarily have thought of. The need for the explicit
articulation of rules and doctrines, the extent to which custom and/or habit should be viewed as
serving primary or interstitial roles, the importance or otherwise of codification, the extent and
advisability of legal borrowings and transplants, and the role of coercion and other incentives
and disincentives in promoting trans-cultural legal exchanges generate lively discussions. The
result, one hopes, is that each individual student’s understanding of law, even as a concept
within Western societies is enriched by the lessons drawn from the idea of law in various non-
western socio-cultural and legal traditions.
Even when operating in the milieu of the centrality of the State as an import of non-Western legal orders, variations over time in its role in framing the content and scope of such legal concepts as binding or individually non-derogable obligations, duties and rights may be more clearly conveyed through the experiences of those societies than they are in the state’s original place of birth. Seeking to return and apply these insights to understandings of Western legal orders present interesting intellectual challenges. Quite often, the teacher will find striking the difficulties encountered by some students in translating back to her more familiar Western legal environment lessons that had been more or less effortlessly deconstructed and absorbed in the context of non-Western legal orders. Thus, in thinking about the African, Asian or Islamic legal traditions, one can conveniently divide their experiences into their pre-colonial non-state-based legal orders, the cohabitation of their traditional legal orders with the relevant nascent state-based colonial legal regimes, and the reconstitution of their thoroughgoing state-based post-colonial legal systems. The elasticities and responsiveness of law to socio-political needs and economic demands are amply evident in these deconstructions of legal orders. Suggesting, for example, that those experiences may have lessons to teach about the cohabitation of the civil and religious regulation of family law in contemporary Western societies may not be quite as easily accepted.

That legal pluralism does not automatically mean divergence or even necessarily irreconcilable difference is one of the unexpected but pleasant results of engaging in Comparative Jurisprudence. Although the specifics of structures and answers may differ, similarities in approaches and methods can sometimes be remarkable. And so, it is not only that one may puzzle over the sanctity and veneration accorded certain texts across cultures and time, but the accommodative willingness of legal traditions to dispense with such homage when socially suitable seems equally widespread. The gradual but systematic development of cadres of professional interpreters, the grouping of these professionals into competing technocratic schools, the development of modes of accommodation within and among schools through such processes as reasoning by analogy and legitimation through consensus, and ultimately the emergence and institutionalization of an authoritative arbitral class whose constant bid for independence invariably puts it in conflict with the dominant political or religious leadership are stories that are told and retold in pretty much all of the legal traditions one encounters. Of course, all of these forces have not acted in identical ways nor with equal effectiveness in all legal systems. Thus, for example, to say that regardless of the substantive rules or norms in play, each legal system invariably has created an interpretive technocratic cadre that bids for independence from the religious or political power structures is not to argue that all such technocratic cadres invariably act as effective checks on such leaderships. But that they exist in all systems is a finding worth relating, and deserving of further investigation and elaboration.
The above should not be read as contending that there are no irreconcilable differences among legal orders. To the contrary. Demands for uniformity and claims of universalism are fated to be illusory precisely because legal orders are responsive to the particularistic needs of a society, and those needs cannot be made subservient to idealized abstract visions of humanity; especially when those “visions” turn out to be little more than masks for the particularistic preferences of their sponsors. The strengths of arguments for legal pluralism at core lie in acceptance of this reality, and the urging that since uniformity of rules – at least across legal orders – is therefore unattainable, the optimal solution in a world of unavoidably conflicting traditions is the empathetic recognition by each of the other’s circumstance, and attempts whenever possible to accommodate difference. Thus, in the conflict between state-based legal traditions and those that derive order from religious beliefs, one or the other will, at any given moment, be dominant. But the dominant order ought to deploy its grace to enable the other to flourish, recognizing of course that the latter does so because of the dispensation from the former.

Beyond the absorption of exotic knowledge, then, the study of comparative Jurisprudence offers the possibilities that emerge from the opening up of new vistas and prisms through which legal traditions, whether of one’s own society, or of foreign societies can be gazed at. There’s also much that reinforces conventional teachings of one’s own legal tradition. Learning to accept difference is important, but recognizing that “difference” is not always present (or that when it is it can be accommodated) seems an equally valuable lesson.