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The methods and the politics

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Comparative law as governance

The broad mainstream of comparative law today is careful to distance itself from the work of governance and the choices of political life. Discomfort with politics is common to comparatists who seek knowledge about foreign legal systems more or less for its own sake and those who see themselves as technicians in a project whose political direction has been determined elsewhere. This has not always been true of comparative law and it distinguishes the field from other legal disciplines today. This essay explores the argumentative machinery that generates comparative law's apolitical sensibility and asks whether this practice itself has a politics. I develop some hypotheses about its historical origins and disciplinary specificity and end with some thoughts about its contribution to global governance.[1]

A professional discipline might be thought 'to be political' or 'participate in governance' in a variety of ways. Sometimes, disciplines participate actively in ideological debates within the broader society, taking positions we can associate easily with the left, centre or right. Sometimes, they harness their expertise to the interests of one or another social group, so that we identify their work with the interests of workers or industrialists, men or women. Disciplines may take positions on the broad choices governments make, promoting, say, centralization over decentralization or assimilation

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[1] This essay builds on ideas I published initially in David Kennedy, 'New Approaches to Comparative Law and International Governance', [1997] Utah L.R. 545.

over cultural diversity. Professions may urge their members to participate in public life, exercising the levers of governmental authority by applying the profession's special knowledge or viewpoint. Some disciplines encourage professionals to experience their work as the ongoing exercise of power, to see themselves making choices framed, but not compelled, by their professional context and expertise.

Comparative law today distances itself from politics and rulership in each of these senses, eschewing identification with ideological positions and social interests, retreating to the academy from public life and from the application of comparative knowledge. The discipline encourages its practitioners not to take positions on issues facing government and to think of their professional work as the exercise of academic good judgement rather than political choice. Comparative law today is about knowing, not doing.

Perhaps the largest comparative-law undertaking now underway – the effort to uncover and describe a 'common core' in European private law under the loose auspices and funding of the European Union – well illustrates the attitudes of many mainstream comparatists toward engagement with the choices involved in governing. Although the European Union has a clear project of harmonization and unification, those involved in the common-core project present themselves as coming to the effort agnostic about the existence or shape of the common core they are exploring. Their work will be objective, descriptive and scientific. In the words of Mauro Bussani, co-founder of the project:

> We wish to correct this misleading information; we do not wish to force the actual diverse reality of the law into one single map to attain uniformity [...]. This project seeks only to analyse the present complex situation in a reliable way. While we believe that cultural diversity in the law is an asset, we neither wish to take a preservationist approach nor do we wish to push in the direction of uniformity.[2]

Or, later:

[2] Mauro Bussani, 'Current Trends in European Comparative Law: The Common Core Approach', (1998) 21 Hastings Int. & Comp. L.R. 785, p. 787. The first two studies from the 'common-core' project have now appeared as Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000) and James R. Gordley (ed.), *The Enforceability of Promises* (Cambridge: Cambridge University Press, 2001). See also Mauro Bussani and Ugo Mattei (eds.), *Making European Law: Essays on the Common Core Project* (Trento: Università degli Studi di Trento, 2000).

> It is true that through the use of the comparative method many common features that remained obscure in traditional legal analysis will be unearthed. This is because the instruments and techniques provide more accurate and correct analysis, not that they force convergence where it does not exist [...]. It is also true that common core research may be a useful instrument for legal harmonization in the sense that it provides reliable data to be used in devising new common solutions that may prove workable in practice. But this has nothing to do with the common core research itself, which is devoted to producing reliable information, whatever its policy use might be.[3]

Of course, many professional and academic disciplines struggle, now as in the past, to protect their reputation for objectivity, scientific neutrality, technical precision and insulation from ideological distortion. Still, the contemporary comparatist stands out, particularly from the perspective of the US legal tradition. Other contemporary legal disciplines seem far more comfortable with rulership and with the idea that they could be said to have a political project. They are more comfortable thinking of their work in ideological terms or associating it with particular social interests. They move more easily toward application of their expertise and think of themselves as exercising power with less hesitation.

In many ways, this comfort is the legacy of a century-long methodological effort to break down the barriers – psychological, institutional, doctrinal – between the work of law and the work of politics. The methodological revolution in legal thought begun by sociological jurisprudence, US legal realism and interests jurisprudence aimed in various ways to connect law with what seemed the realities of social and political life. As this methodological assault slowly became common sense in the years following the Second World War, most legal disciplines replaced the notion of a specific 'legal method' with the more pragmatic idea that 'thinking like a lawyer' means drawing on a range of different disciplines and methods in an intuitive effort to solve problems and exercise good judgement. As anti-formalism became the dominant professional vocabulary, it brought with it both methodological eclecticism and more comfort with the politics

[3] Bussani, *supra*, note 2, p. 796. Bussani goes on to differentiate the common-core project from 'any restatement-like enterprise. The latter involves the pursuit of rationality, harmony and reform ideals, whereas the Common Core Project implies the selection of the legal rules and materials best suited for the task. The restatement-like enterprise discards whatever does not fit into its framework. This approach is anathema to an analytical perspective: the very fact that rules and materials exist in a legal system requires that they be taken into consideration in the analysis and become part of the final "map" ': *ibid.*

of policy management. Most legal workers – lawyers, judges, scholars, bureaucrats and activists – now take it for granted that legal work is a practical matter of balancing, negotiating and managing competing political visions, ideals and outcomes.

That said, lawyers and legal scholars vary widely in their comfort level with rulership. Some are quite comfortable with the idea that their expertise expresses an ideological commitment, others are not. Some would be offended if accused of preferring one social interest to another, others not. Most are proud to think of their work as a contribution to governance, although few experience the exercise of professional judgement as the making of political choices. Although some legal disciplines embrace the work of governance (think of torts, local government law or any public regulatory field), in other fields (think of property or contracts) rulership remains an acquired taste, even if comfort with the politics of law has long since become the coin of the realm. The many shadings of the word 'policy' in legal thought mark a range of professional positions between 'it's-all-politics' and 'it's-all-law'. For some, 'policy argument' is a limited and regrettable necessity for judges who must sometimes look to legislative intent or social context to complete their interpretive mission. For others, legal 'policy-making' by administrators, legislators or judges is a sophisticated and specialized professional practice, drawing on cost-benefit analysis, welfare economics, sociology, psychology and more. For most, the ambition is a law which embraces the politics of reason, progress, welfare maximization and institutional pragmatism while rejecting the politics of bias, passion and ideology.

In my own field of public international law, to take an example, the dominant posture is somewhere in the middle. International lawyers are generally proud of their contribution to the resolution of 'disputes' in society, if by this they usually mean the rarefied society of states. The contribution they propose is more often procedural than substantive and they distance their work from disputes about the distributions of wealth or power in society, all but the clearest and most egregious of which seem to happen below the line of national sovereignty and, therefore, outside their normal purview. They understand themselves to have a disciplinary position in broad political debate among right, left and centre positions, but it is a very vague humanist position, cosmopolitan, tolerant, open. They often speak as if they sought engagement with the institutions of government and were confident that the more they were allowed to participate in global governance, the better

off the world would be. But they also seem more comfortable advising, criticizing or desiring power than exercising it.

Comparative law today does not share even this ambivalent comfort with rulership. On the contrary, comparatists are sensitive to 'accusations' that their work might have anything one could regard as a politics. To my ears, their sensitivity on this point can seem so extreme that it is hard to think of it as fully ingenuous. This is particularly so when one reflects on the history of comparative law. Early comparatists were significant players in the broad methodological assault on law's seeming parochialism and isolation from political and social life. At the 1900 Paris Congress often thought to have inaugurated the field of comparative law, comparatists shared a professional vision about their contribution to the management of international society and established the comparative profession to pursue it. Looking back, their shared vision seems political in a variety of ways which would be extremely unusual in the field today. Many participated actively as comparatists in public life, indeed, were eager to participate in governmental and academic management. Associating law with the realities of social, economic and political life translated easily into concrete projects associated with ideological positions (generally, but not exclusively, on the left) or with the interest of particular groups (labour, commerce) or nations. They promoted comparative law in the name of quite specific cosmopolitan, internationalist, humanist and socially progressive political visions. They meant comparative law to be applied and harnessed their expertise to broad projects of unification and harmonization of law.

If we jump ahead to the post-1945 period, the aspiration to establish a 'profession' has been fulfilled. Post-war comparatists are part of a stable academic profession. Their work differs from their predecessors' in two crucial respects: the insistent anti-formalism has been replaced by a sensible methodological pluralism and they have become far less comfortable thinking of their work politically in any of these senses. Indeed, methodological pluralism has become the mark of political detachment and both have come to seem necessary for comparative law to remain a professional endeavour.

It is a puzzle to understand how this came about and what the politics of this professional practice and self-image might be. In most other post-war legal fields, methodological pluralism accompanied pragmatic engagement with policy-making – only the methodologically nimble being able to move easily across the boundaries between science and politics.

Identify interesting differences and similarities among legal phenomena in different legal regimes

We begin by finding a legal phenomenon in one legal regime which can be 'compared' with a legal phenomenon in another. The 'legal phenomenon' could be a rule, an institution, a practice, an approach to an economic problem, a custom, a professional ethic, just about anything.[11] Often, comparatists set out with a hunch or loose first impression. Perhaps they visited Mexico and found a whole world of family law which seemed outside the range of variation they were used to in the United States. Maybe they learned Japanese in the army and got interested in Japan – now that I am a law professor, let us see how the Japanese handle a problem I am interested in. Sometimes, it is a matter of broader academic fashion – it is the late 1970s and everyone is trying to figure out why Japan is hot and Europe is cold or it is the 1990s and everyone is talking about US dominance of the high-tech/internet sector: I am a law professor, perhaps there is a legal explanation.

Of course, hunches like this do not just happen – there is usually also a wish. Perhaps that the United States be more or less like Japan or that differences and similarities be understood in a new way by some relevant elite. But these purposes, projects, motives will generally not be visible on the surface of the work. Quite the contrary – the comparative performance presents itself as coming upon the materials it compares disinterestedly, accidentally. For many comparatists, the starting-point is assigned – in the European common-core project, for example, teams have been assigned to canvass a range of jurisdictions to map similarities and differences in contract rules about 'good faith', property rules about 'adverse possession' and so forth, with the goal of eventually covering the whole of private law for the whole of Europe. And doing so without any a priori wish for more or less uniformity.

Once underway, comparatists have preferences about how to define the phenomena to be compared. Some start with formal rules which interest them, others start with aspects of the legal context or social outcomes which seem to stand out. These may be relatively abstract social functions (how do these regimes strengthen kinship or encourage entrepreneurship?) or, as in the common-core project, specific fact-patterns whose legal treatment

[11] Indeed, there is a little sub-literature on the question whether there are things which cannot, in their nature, be compared. Although opinions differ, the non-comparability list, even of enthusiasts, is very short. For example, see H. Patrick Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000), pp. 30–55; *id.*, 'Are Legal Traditions Incommensurable?', (2001) 49 Am. J. Comp. L. 133.

can then be compared. The 'legal regimes' which host the legal phenomena to be compared can also be identified in different ways. Some define the regimes in formal jurisdictional or national terms, others in looser cultural and economic terms. For some, legal regimes are organized in a roughly hierarchical stack – local, national, international – while for others, they are more fluid, interpenetrating and overlapping. Looking at this work, we might say comparative performances could be seen to make choices along a continuum, as in figure 11.1.

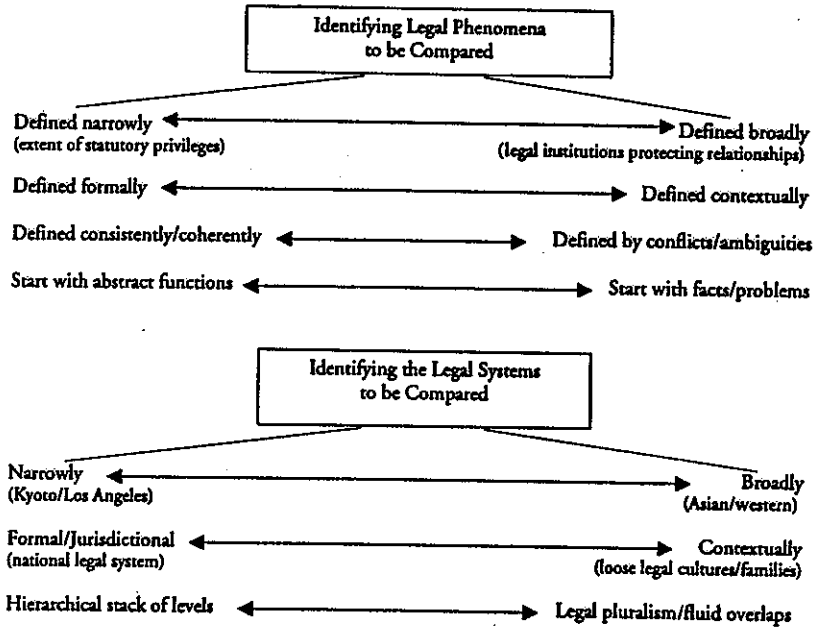

Figure 11.1

Although these preferences sometimes are disputed in methodological terms, more often regimes and legal phenomena are identified in a very fluid and *ad hoc* way.[12] Legal phenomena can be narrow or broad, multiple or

[12] To get a sense for the extreme fluidity of this practice – even when described in methodological terms – see Wenceslas J. Wagner, 'Research in Comparative Law: Some Theoretical Considerations', in Ralph A. Neuman (ed.), *Essays in Jurisprudence in Honor of Roscoe Pound* (Indianapolis: Bobbs-Merrill, 1962), p. 519: 'What should be the subject matter of comparative studies? Legal principles and rules can either be similar or dissimilar both in space and time, and occasionally they have no counterpart in other legal systems. In the tremendous maze of materials from which the comparatist may draw, which should he select for his research? The simple and obvious reply is that the answer to this question should depend on the purpose of the study undertaken.

specific, formal or situationally embedded; regimes can be of any number and situated at almost any degree of difference from one another.[13] At the end of this 'research' phase, we have a loose map. Divorce as a legal institution is *this* in a legal regime we call 'Japanese' and *this* in what we call the 'legal regime' of the United States.

When these preferences *do* become the focus of methodological debate, the comparative work of the article ends. Taking a methodological tack aborts the analysis. The point of the article could then be to demonstrate either the correct way of identifying or the extreme difficulty of identifying phenomena in a methodologically defensible way. The difficulty of identifying what should and should not be in the 'divorce regime' in numerous places might illuminate a general argument about the embedded and contextual nature of law. The ability to identify phenomena which 'function' as adjudication in widely varying cultures might substantiate an argument for the centrality of adjudication to the abstract transhistorical or transcultural thing we call 'law'. This moves the discussion to questions of legal philosophy – we have an essay about what law is rather than an account of similarities and differences among legal regimes.

The best contemporary comparative work simply aggregates these points of view, multiplying ways of thinking about the phenomena to be compared. Indeed, doing so seems the only way to keep going with the comparative project – to avoid becoming entangled in a philosophical debate. It is abstentions such as these which honour the memory of the method 'war-as-tar-baby'. Do not go there – we have had those philosophical debates and they did not end well, no one won a decisive victory, they distracted us from learning anything useful or interesting, they entangled legal scholarship in ideology. It is the echo of this memory which stays the comparatist's hand from methodological rumination and permits the analysis to continue.

And in this vagueness, this abstention from method, there is a default position. By far the most common default remains the national legal system – one compares the legal phenomenon of 'divorce' in, say, Japan and

Zweigert states, in this connection, that "the comparative jurist will mainly refer to such legal systems which are likely to supply him with a special stimulation for the problem to be examined".' The reference to Zweigert is Konrad Zweigert, 'Zur Methode der Rechtsvergleichung', (1960) 13 Studium Generale 193, p. 195.

[13] Legrand synthesizes these choices into two broad traditions, that is, 'the exposition of families of legal systems and the juxtaposition of (mostly private law) rules': Pierre Legrand, 'Comparative Legal Studies and Commitment to Theory', (1995) 58 Modern L.R. 262, p. 263. Twining synthesizes them as 'macro-comparison' and 'micro-comparison': *supra*, note 4, pp. 31–2.

the United States, or 'administrative discretion' in South Korea and Austria, without too much attention to the coherence of the idea that there is a 'Japanese legal system'. These sort of pairings are then aggregated into more complex arrangements – a number of European, American or Asian national systems might be cross-compared. Perhaps the Japanese legal regime is part of a broader 'Asian' legal order or family of law, perhaps not.

We have already here some clues to the work of methodological abstention – or eclecticism – in contemporary comparative law. There is a problem, what to write about, there is a set of choices, arranged in terms which might be, even have been, methodologically disputed. There is a methodological agnosticism. And then there is a default, wrapped in the enigmas of abstention. If the default has a politics, it will be protected here. Likewise the wish which animated the endeavour.

Where there are similarities, deal with the 'transplant' hypothesis

The next step is to determine whether any similarities between the two legal phenomena so identified result from the 'transplant' of a legal idea or institution from one place to another or to both places from the same third source. It is hard to understand why the relationship of 'influence' gets such preliminary and, therefore, prominent, treatment in comparing. Of course, there is no question that legal regimes influence one another. If things which seem similar in two places are similar because one has influenced the other, one need look no further for an 'explanation'. Perhaps the similarities in Japanese and US legal codes about divorce are rooted in the post-1945 US occupation of Japan. Perhaps the North Korean administrative code is really still based on a German implant from the nineteenth century which continues to have echoes in Austrian law. To the extent one has influenced the other, perhaps the places are really not different and no 'comparison' is possible.

That said, comparatists differ a great deal in how seriously they pursue the search for evidence of transplantation or influence. As a result, there are choices to be made at this stage as well. The more formally one defines the phenomena to be compared, the more often similarities which seem to arise from transplant will strike one. The more one thinks of law as an autonomous professional practice, or as a universal problem-solver, and the less one thinks of it as a cultural expression, the more one will be interested in similarities and the more transplantation will seem a good

starting-point for analysis. Again, comparative work might be arranged along a continuum, as in figure 11.2.

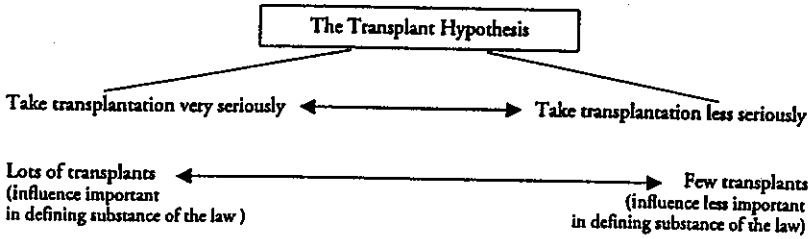

Figure 11.2

There is a further point. In searching for influence, one might focus on differences as well as similarities. Although the transplant idea has been used disproportionately to explain similarities rather than differences, we might imagine that patterns of cultural influence would as readily produce differences as similarities. Failed transplant efforts, indigenous reactions against transplantation, intentional or accidental misreadings of transplanted material, ideas at the source of the transplant about what was needed 'in the periphery' might all generate differences. The more one thought of law in formal terms, the more likely one might think of influence as a matter of similarities. The more one focused on the historical and social context, the more likely one would foreground the hand of influence in resistance, misreading and difference. We could add an axis of choice open to the comparatist at this stage of the work, as in figure 11.3.

Figure 11.3

Most of the choices encountered in this second phase of the comparative performance have been the subject of a quite polarized methodological debate within comparative law, in which each side views the other to be short-circuiting the analysis.[14] Those hostile to transplantation question

[14] The main proponent of the significance of influences and transplantation has been Watson. For example, see Alan Watson, *Legal Transplants*, 2d ed. (Athens, Georgia: University of Georgia Press, 1993) [hereinafter *Legal Transplants*]; *id.*, *Law Out of Context* (Athens, Georgia: University of Georgia Press, 2000); *id.*, 'Legal Transplants and European Private Law', (2000) Electronic J. Comp. L. [http://law.kub.nl/ejcl/44/art44-2.html#N8] (hereinafter 'European Private Law'). Perhaps the clearest denunciation of the transplant hypothesis has come from Legrand, *supra*, note 13; *id.*, 'Against a European Civil Code', (1996) 60 Modern L.R. 44; *id.*, 'The Impossibility of "Legal Transplants"', (1997) 4 Maastricht J. Eur. & Comp. L. 111 [hereinafter 'Impossibility'].

whether it is possible, in the sense of 'intellectually defensible' or 'logically coherent', to identify legal phenomena in one place as having an 'identity' which could be moved. The degree of legal autonomy necessary for there to be a transplant hypothesis to investigate reflects, from this point of view, a failure to continue the search for a cultural/contextual/historical understanding of what has happened. On the other side, transplantation proponents question the coherence of the category of 'culture' as anything other than a default name for social or economic needs and functions which have not yet been explained. For these people, one should continue the analysis until all aspects of a legal order can be understood as either learning or innovation in solving problems or performing functions which are universal, at least within a given type of economy or stage of development.

We have here not the memory, but the living potential for disciplinary death by method. Taking the transplant hypothesis too seriously – either way – sidetracks the basic comparative project, moving us off into legal theory – to what extent is law a universal problem-solver or form of professional specialized knowledge and to what extent is it rooted in, and expressive of, local cultural life?[15] Indeed, participants on both sides of this debate say that they do so out of dissatisfaction with the conventions of comparative-law practice. For the sophisticated comparative analyst embarking upon a project as ambitious as mapping the common core of European private law, it does not pay to become entangled in such debates. Instead, we find agnosticism, restraint and reasonableness about whether to stress similarities or differences. In this work, metabolized into the mainstream comparative activity, the transplant debate simply blurs the edges of legal phenomena and regimes identified in the first phase of the work – perhaps these phenomena are not so similar, perhaps these regimes are not so different. We can think further about the importance of influence later

[15] Taking either side of these debates too seriously would undermine the comparative endeavour completely. We see this in Watson's fear that opponents of influence or convergence explanations would support a kind of cultural relativism, which would render legal regimes incommensurable, and in his opponents' fear that taking influence too seriously would eliminate the space for cultural particularity altogether. These fears animate the debate on 'incommensurability' (see *supra*, note 11). Having heard debate on this subject at numerous conferences, I can report that it is standard to accuse one's opponent of hyperbole and to claim the high ground of sensible eclecticism for oneself. If you favour serious investigation of the transplant hypothesis, you do not say that you want to eliminate cultural particularity – you say that your opponents are cultural relativists. And *vice versa*. For the mainstream comparatist, both sides sounds shrill and you can observe the older and wiser scholars in the room go silent, as if waiting for a storm to pass. They have learned not to get entangled in such a controversy in the first place.

in the work, transplant will be one among many explanations of the degree of difference or similarity among legal phenomena in various regimes.

Although this eclecticism protects the enterprise, here too there is a default position – the priority accorded hypotheses about transplant focuses the comparatist's attention first on similarities and on reception, while foregrounding the autonomy of legal phenomena from context. And here too, if this default has a politics, it is methodological restraint which defends it.

Allocate the similarities and differences which remain variously to cultural and technical factors

This is where the real work begins. We have a map of similarities and differences among legal phenomena in different legal regimes. We are heading for an explanation of variation. In this phase, the comparatist identifies the factors, other than transplantation, which might go into the explanation. Generally speaking, there are two broad types of factors, which we might call 'cultural' and 'technical'. The preliminary separation of cultural and technical factors is largely a matter of intuition or common sense.

On the culture side, we have, obviously, different legal cultures: Japan is Japan and the United States is the United States. Legal cultures could be defined as national legal regimes, but they could also be loose descriptions – the Japanese 'way of resolving disputes' or the 'US approach to business' – which float a bit free of their moorings in national legal regimes. Legal cultures might be framed as large cultural families (Asian law, African law, European law, Socialist law and so forth) or more parochially (the New York regulatory system, California law, Inuit practice in a specific community with this much Canadian influence, etc.). As one begins to allocate some of the similarities and differences one has uncovered to 'culture', all these possible ideas about what legal cultures are will be in play. Indeed, the word 'culture' itself may or may not be used – sometimes these factors are more fashionably described as 'social' or 'socio-economic' or simply 'contextual' considerations.

On the technical side, something similar is at work. The idea is to identify a technical dimension of society which might be responsible for legal phenomena in more or less the same way as a legal 'culture'. We start with the common-sense idea that there are, obviously, different economic/social systems in the world, different levels of economic advancement, from primitive

hunter/gatherer economies right up through late industrial democracy and advanced industrial capitalism. A legal phenomenon might be part of the 'advanced industrial capitalism' package in the same way it might be part of the 'Japanese legal culture' package. Technical levels might be drawn in very broad historical terms – primitive society, underdeveloped economies and late industrial capitalism (or feudalism and bourgeois capitalism). But the technical factors responsible for legal phenomena might also be associated with broad economic functions – resolving disputes, securing debt, facilitating price signalling, etc. – which might cut across historical stages of economic development. Like legal cultures, moreover, technical factors might also be framed more narrowly – the specific needs of an urban global banking centre or a complex commodities market. As we begin to associate the legal phenomena we have identified with different aspects of the regimes in which we have found them, all these various ways of framing technical explanations will be in play.

So, let us say we have decided that something called a 'divorce regime' can be identified in both Japan and the United States. And let us say we decide that the Japanese and the US legal systems are different enough to make comparison worthwhile – maybe they are Asian and we are western, maybe they are just Japanese and we are American, maybe it is Kyoto and Los Angeles, whatever. And let us say we eliminate the transplant hypothesis in assessing similarities (and maybe even differences) between the Japanese and US divorce regimes. We can imagine that Japan and the United States are both culturally different (perhaps Asian/western) and culturally similar (modern democratic consumer societies, for example). And we can imagine that they are both technically similar (perhaps both late industrial capitalism) and technically different (perhaps industrial systems based on different functional relations between work-family, for example). Now we need to figure out, with more or less precision, which of the aspects of each divorce system should be attributed to culture (Asian/western, say) and which to *tekhnè* (late industrial capitalism, say).

In allocating similarities and differences in legal phenomena to cultural and technical differences and similarities among legal regimes, the comparatist faces a series of choices. How much should be attributed to culture, how much to *tekhnè*? How should the cultural and the technical be defined? Individuals will have preferences. Some comparatists favour broad 'family-like' cultural categories, others more local cultural contexts. Some work more with stages of economic development, others with social/

economic functions. Some think in terms of broad categories, others in more narrowly defined institutional or sectoral terms.

These preferences are analogous to others we have seen. It is easy to imagine that a comparatist sympathetic to a formal identification of legal phenomena, to the transplant hypothesis, to the autonomy of law and legal professionals or to law as a universal phenomenon, might lean toward a broad sense about legal cultures. Comparatists who tend to think of legal cultures as large-scale families of law may well lean toward thinking of the technical in terms of broad historical phases of economic development. We might line these choices up, more or less as follows, in figure 11.4.

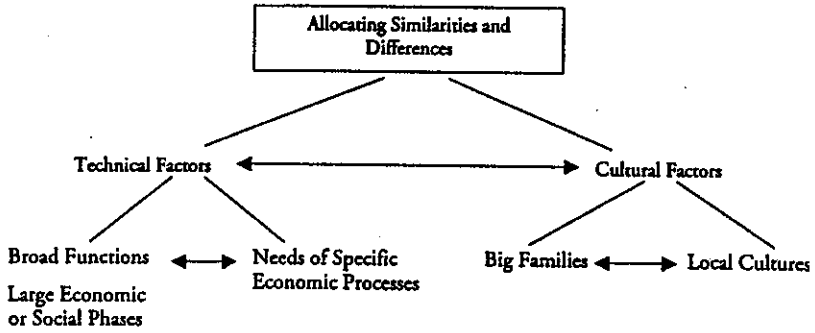

Figure 11.4

These choices certainly could be debated in methodological terms and these debates might well – on analogy to debates about transplantation – be joined in strongly polarized terms. In the best contemporary comparative work, however, this tends not to happen. Instead, the cultural and the technical are understood in very loose terms – a looseness which blunts the emergence of bold methodological claims. This is encouraged by the loose overlap of the terms: is 'modern democratic consumer society' a cultural type or a stage of technical development? What about 'industrial economy with communal work-family structures'? The process of allocation is guided less by method than by the hand of professional good judgement, intuition and experience. One allocates bits here and there as seems to make sense, given one's judgement as a scholar about how things work.

A number of background assumptions are nevertheless at work, such as that technical explanations can be validated by data from other places, while cultural explanations can be validated by data from other legal or social dimensions of the same location. The technical is, in this sense, global,

the cultural local. The technical is somehow a more rational, the cultural a more irrational domain. The cultural requires an explanation in the language of history and meaning and leaves room for – indeed, *is* the room for – the mysteries of social connectedness. The cultural seems linked to the domains of either private life or national public patriotism, while the technical seems linked to the intermediate spaces of commerce and the economy and expresses itself in the language of function and performance rather than meaning. Where these background ideas have a politics, where their extension participates in a broader political project, the professional judgements of comparatists to stress one or the other contribute to that politics. And that support would be shrouded in the fog of methodological restraint and eclectic good sense.

Default judgements also emerge in this phase of the work. *Similarities* between legal phenomena in different locations (once the transplant hypothesis has been dealt with) tend to be allocated to economic stages or functional necessities, while *differences* tend to be allocated to cultures. The most conventional comparatist piece might well suggest that differences in the Japanese and US divorce regimes reflect cultural differences and similarities reflect the common economic or functional situation of women and families in modern industrial democracies. This common default arises from the common-sense idea that what modern economies *are*, are similar, rational, regardless of where they are located, and what cultures *are*, are different.

Although this is the default judgement, it is only a default. It can be, and often is, confounded, if not directly contested. It just turns out that in allocating things to the technical and the cultural, it sometimes comes out the other way. So, we often find legal similarities allocated to culture (Japan and the United States turn out to be culturally similar on this point) and differences allocated to the technical (but the functional needs of different industrial models for workers places different demands on the divorce system in the two locations). Two different economic models can turn out, on this point, to be similar, while two very similar cultures can, paradoxically, turn out to be different. In the same way, similarities in legal phenomena can be allocated to differences in technical or cultural positions, just as legal differences can be allocated to technical or cultural similarities.

These choices are loosely analogous to choices we have seen made at earlier stages in the work. When people associate legal similarities to cultural or

technical differences or legal differences with cultural or technical similarities, they make law an outlier to the general situation. When they associate legal similarities with cultural/technical similarities and differences with differences, by the same token, they make law expressive of cultural or technical identity. And, naturally enough, we can imagine that comparatists would differ in their tendency to treat law as an outlier, either to economic/functional or cultural identities. We might organize these choices in the following way, as in figure 11.5.

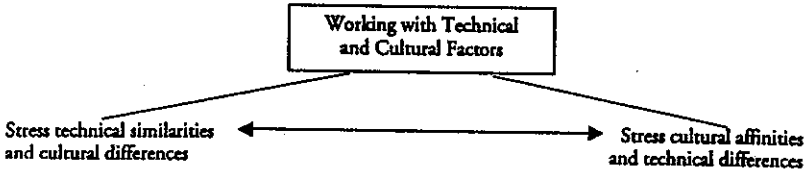

Figure 11.5

The sophisticated comparatist appreciates the range of different ways of articulating cultural identity and achieving economic objectives in a given system and is attentive to the possibility that particular legal phenomena can play a variety of roles, even conflicting ones, in these different domains of social life. One simply does the best one can in developing an understanding of the differences and similarities between these legal phenomena and these legal regimes, taking all of this into account. But if there is a default here, and that default has a politics, it is defended and obscured by this open and pragmatic methodological eclecticism.

Generate a plausible causal account of what you have mapped

The most capable hands have picked their way slowly, meanderingly, to this point, resisting methodological contestation.[16] And some comparative work simply stops here, as if to say, 'here are some similarities and differences among legal phenomena and legal regimes, suggesting cultural and technical differences and similarities of various kinds – I thought you would like to know'. In Twining's words, '[t]he concern is with description

[16] In describing the effort to uncover patterns of influence and transplantation, Collins despairs that 'no one ever succeeds in pursuing this method satisfactorily, for the budding comparatist always leaves out one of the dimensions of culture, society, economy, history, politics, and legal logic': Hugh Collins, 'Methods and Aims of Comparative Contract Law', (1991) 11 Oxford J. Leg. Stud. 396, p. 398.

and analysis rather than evaluation and prescription.'[17] For the hardy, however, there is more – some sort of an explanation – the 'analysis' part, which can pull it all together.

What we want here is a story which qualifies our original identification of the 'same phenomena in different regimes' in important ways, but which does not run us into philosophical disputation or political commitment. Staying descriptive is helpful. After study, it might turn out that what is really going on is a bit of transplantation, so the regimes are not really different, some cultural specificity, which makes the legal phenomena more different than we thought, but also some economically or technically driven uniformity. But it can be difficult to develop a stable and plausible account with such a range of diverging factors and interpretive modes.

One common method for doing so is to invent some idiosyncratic intermediate models which combine cultural and technical similarities and differences. Having looked at the legal phenomena of 'good faith' across Europe, we might find that there are two or three different regime types and a couple of outlier countries. We might find, say, a Dutch model and a corporatist model and a full-liability model, with Iceland and Greece as outlier regimes. Stories about these types can contain a range of thoughts – about the effects or purposes of one regime or another, about the intentions of legislators foiled and achieved and so forth. There might be a reference to distributional consequences – perhaps the 'Dutch' way of thinking about 'good faith' reflects a commitment to consumers, as a cultural trait or political achievement. A description of this type preserves the absence of methodological or legal-philosophical controversy. The best description you are likely to get will be custom-tailored to the complexity of these legal phenomena and regime types. It all turns out to be very complex, indeed.

Such an account can be extended in time. Relations among the models might suggest the process of cultural consolidation, or of convergence of technical rationality, or of cultural variation or of technical experimentation. It is hard to avoid an illustration of the sorts of background narratives which can be confounded or confirmed by analysis, as in figure 11.6.

But an eclectic description calls for an eclectic temporal explanation – a combination of historical influences and functional/evolutionary developments. No culture has come to dominate but neither have cultures disappeared, no economic function has figured out the one and only best

[17] Twining, *supra*, note 4, p. 34.

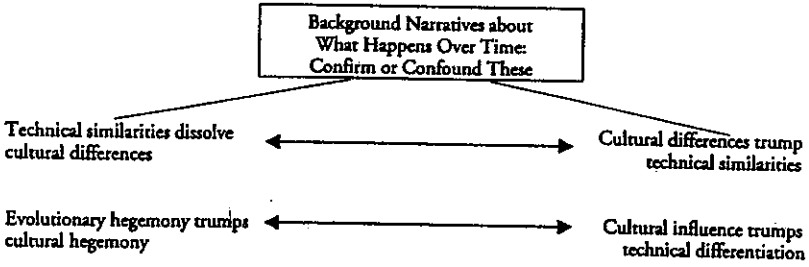

Figure 11.6

practice. Still, some cultures are getting stronger, others weaker, and the field of technical possibility has undoubtedly been usefully narrowed. The more complex the story, the more intricate the history, the harder it is to think of such an account as illustrating a method, much less having a politics. The more eclectic the descriptive account, the more likely we have to conclude that although things have come a long way, there is a long way still to go.

If we look back at the various stages in the development of a comparative performance, the comparatist faced choices at every point. How to identify legal phenomena or regimes, how to identify and weigh the significance of transplantation, how to assess the relative weight of cultural and technical factors in understanding similarities and differences, how to assemble these factors into a satisfactory descriptive account and analysis? All of these choices seem ripe for methodological controversy – they raise eternal questions about the nature of law which have been the stuff of methodological debates in most other legal fields (figure 11.7).

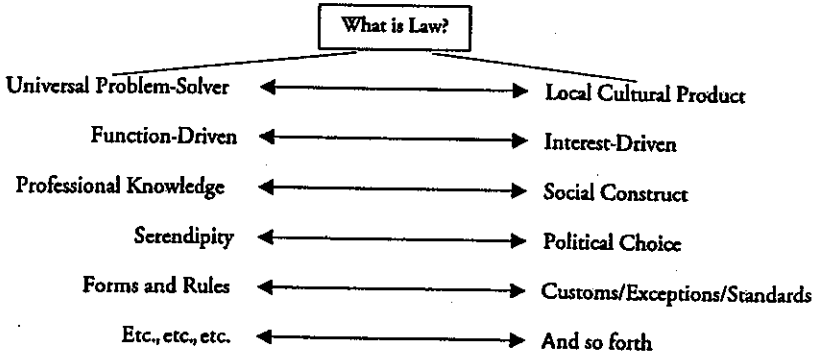

Figure 11.7

Were legal philosophy the queen of the sciences, there would be no cost and some benefit in leaving comparative analysis to pursue such questions. We would expect young scholars seeking to make their mark and elder statesmen seeking to sum up what they have learned to abort the comparative inquiry at the first plausible moment. Legal scholars in other fields have often felt strongly that these philosophical choices had political consequences. So have comparatists of earlier generations. Knowing that law was one way rather than the other would legitimate some political endeavours and delegitimate others. Different law-reform proposals seemed consistent with the left- and right-hand columns.[18] If comparatists had political projects to pursue, it would not be surprising to find them mobilizing their expertise on behalf of one or the other of these methodological alternatives.

This does sometimes happen, of course.[19] But the posture of the common-core project expresses the professional standard – agnostic about these questions, even hostile to their overt exploration. That said, these alternatives have not been discarded in favour of other inquiries and debates. These choices continue to define the factors to be taken into account in respectable professional accounts of similarities and differences. They constitute the background common-sense of the field and the vocabulary of the comparatist's expertise. Nor are comparatists able to complete their work on a perfectly ambivalent knife-edge. Despite the posture of careful doubt and ambiguity, default paths emerge. It is the politics of this vocabulary and these default practices which mature good judgement denies.

The rise of the comparative law professional and the fall from method and politics

The replacement of political and methodological engagement with eclectic professional judgement was the work of post-war comparatists – people like Konrad Zweigert and Hein Kötz, Otto Kahn-Freund, Max Rheinstein, Rudolf Schlesinger, Wolfgang Friedmann and Arthur von Mehren – who

[18] See Duncan Kennedy, 'Form and Substance in Private Law Adjudication', (1976) 89 Harvard L.R. 1685; David Kennedy, 'When Renewal Repeats: Thinking Against the Box', (2000) 32 New York J. Int. L. & Politics 335.

[19] For a particularly striking example, see Rodolfo Sacco, 'Diversity and Uniformity in the Law', (2001) 49 Am. J. Comp. L. 171. Sacco's succinct and extremely general reflections on the virtues and likely extent of legal diversity and uniformity, built on a tissue of class-room examples, contrast nicely with the apparently endless and agnostic common-core project described by Bussani, *supra*, at text accompanying notes 2 and 3.

were all eager to establish the field as a respected academic discipline.[20] These men wrote more about method than about politics. They stressed the need to differentiate comparative work from political engagement. Methodologically, they differed on many points – most famously on the relative weight to be accorded cultural and historical developments as opposed to social or economic functions in explaining diverse legal phenomena. But they wrote as if it were imperative to keep methodological disagreements from getting out of hand. Each wrote as if methodological controversy was elsewhere – in other people's work, in earlier work, in the work of younger colleagues. Each pitched his project as a resolution of methodological divergence. Taken collectively, their project was to escape politics and intellectual controversy into methodological eclecticism. If for their predecessors comparative law had been an anti-formalist crusade with clear [illegible]

refugees in this generation – Wolfgang Friedmann, Otto Kahn-Freund, Clive Schmithoff, F. A. Mann, Max Rheinstein, Friedrich Kessler, Albert Ehrenzweig, Rudolf Schlesinger – it is a long list.[21] The intriguing thing is that these men succeeded in routinizing their intellectual and political trauma, transforming it into a professional training, restaged in the memory of individual comparatists as they put away political or methodological commitments to adopt the mature voice of the detached professional.

The original nature of post-war agnosticism stands out by comparison both to those who founded the discipline between the 1900 Paris Congress and the Second World War and to those precursors interested in foreign law who were not part of the project of disciplinary establishment. Many of the most significant nineteenth- and early twentieth-

There are probably many reasons for this and we should not feel too badly about it – many of these people have secure places in the canons of other fields. Even Wigmore has found a home in the law of evidence. But when 'comparative law' took off as a discipline at the 1900 Paris Congress, these people were not part of it. They shared neither the political projects nor the methodological commitments of the field's founding fathers. In retrospect, it is hard not to be struck by their amateurish and undisciplined way of proceeding. As comparatists, they do seem to lack methodological rigour or discipline. They were not eclectic or pluralist in any contemporary sense – they were simply outside the set of methodological alternatives about which we have since become agnostic. The factors they considered, the range of questions they asked about legal phenomena, seem all over the map. They were not at all careful in their differentiation of technical and cultural explanations, were not even focused particularly on similarities and differences. They often had completely different intellectual agendas and dipped into knowledge about different legal regimes en route to conclusions about other things. They were, in short, simply not working in what would become the professional idiom.

At the same time, their comparisons of different legal systems were part of a wide variety of diverging political projects – efforts to introduce particular legislative changes in one place by reference to laws in place elsewhere, efforts to promote commercial opportunities in far-flung locations by suppression of local laws, efforts to govern and understand colonial possessions, efforts to strengthen the universal appeal of laissez-faire liberalism or legitimate the peculiarities of 'bourgeois law' or 'freedom to contract' by comparative historical accounts of the move from feudalism. From a contemporary perspective, their work is far too politically engaged to be respectable. But this does not place them outside the field – the masters of the comparative canon shared and expressed a political agenda for the discipline they founded. The problem with people like Maine or Marx is that they did not share the discipline's specific political projects. No method, wrong politics.

The great comparatists of the pre-war period – people like Raymond Saleilles, Edouard Lambert, Frederick Pollock, Roscoe Pound, Ernst Rabel, Karl Llewellyn – promoted a more self-conscious discipline of comparative law and shared a loose methodological and political consensus.[24]

[24] Pollock's critique of Maine for speculation and unsystematic use of historical evidence illustrates this desire for a discipline: see Frederick Pollock, 'The History of Comparative Jurisprudence', (1903) 5 J. Society Comp. Legis. 74.

In methodological terms, they were all exuberant participants in one or another way in the rise of anti-formal and sociologically attuned legal thought. They focused on the questions which continue to structure comparative analysis – how should one identify the legal phenomenon and regimes to be compared, how significant is influence in accounting for similarities, what is the mix of cultural and technical factors which account for variation, how broadly or narrowly might cultures or economic/social phases of development be identified? Their answers all fell to the right end of the various alternatives sketched in the last section. Their common project was to align law with what they saw as a transformed social and economic world – to make it at once more international, more expressive of cosmopolitan and humanitarian values and more responsive to social and economic needs. None shared Bussani's agnosticism about the desirability of uniform international rules – all were committed internationalists and all favoured more harmonization of law. Method seemed to have social and political consequences – awakening legal science to anti-formalism through comparison would strike a blow for humanist liberal cosmopolitanism. Some went further – comparative anti-formalism offered a mode of progressive or leftish engagement on behalf of the socially disadvantaged or the culturally different. All felt comfortable participating in public life, making choices and advocating positions on issues facing government on the basis of their comparative knowledge.

Of course, these early masters of comparative law also differed in both their methodological and political emphases. Should law be internationalized by universal codification or by exhortations for each legal order to develop an embedded response to what were increasingly universal social and economic problems? What was the place of cultural specificity in the law being developed for the newly international economic system? Was the comparatist's contribution better made from the academy or in public service? How could law best respond to the needs of social development, how best to ameliorate the sharp edges of industrialization? How left-wing is the project of responding to new social needs or economic conditions? What social interests should the legal system be newly attentive to – commercial interests, labour? Still, they shared broadly anti-formal methodological styles and broadly reformist political motives. No one advocated preserving law's detached autonomy or protecting corporate and governmental institutions from demands for social change.

There was not much debate among these early comparatists about either method or politics. They seem to have been in only rather loose contact with one another and to have been far more influenced by philosophical traditions in other jurisdictions – sociological jurisprudence, interests jurisprudence, the Free Law school, legal realism – than by the particular styles of comparative work. Each had a way to use their common vocabulary to promote his own particular project without feeling the need to disassociate from the others. Each took from the anti-formal vocabulary different pieces which, in retrospect, can seem at odds with one another. Each seems to have been far more interested in his political and institutional projects than in refining his comparative method. It bears returning to at least three of these figures – Lambert, Pound and Rabel – to remember how strikingly they differed from their post-war successors. They represent probably the leading comparative voices of the inter-war period in France, the United States and Germany, respectively.

Lambert was not shy about the social import of his project.[25] Comparative law was to be a law-reform project designed to develop more uniform and international rules and to do so with a view to ensuring that the new rules would be better suited to the social needs of a new industrial economic order. Lambert concludes his essay on the sources of comparative law as follows:

> *La constitution de cette science internationale du droit privé représente la contribution qui incombe aux juristes dans l'effort collectif pour passer du stade de la concurrence coupe-gorge entre les nationalismes, dont chacun ne veut supporter d'autre loi que la sienne, à un régime de concurrence réglée et de coopération internationale. Mais cette nouvelle forme de la science juridique en est encore à ses premiers balbutiements. [...] Les juristes polonais, roumains, tchécoslovaques et yougoslaves ont d'ailleurs fort bien compris que leur participation au mouvement d'ensemble de la jurisprudence comparative était un des meilleurs moyens de s'outiller pour travailler à une codification unificatrice de leurs lois nationales.*[26]

[25] My understanding of Lambert's comparative project and its influence relies heavily on two excellent recent studies: Amr A. Shalakany, *The Analytics of the Social in Private Law Theory: A Comparative Study*, Harvard Law School SJD dissertation (April 2000), on file with the author; Marie-Claire Belleau, 'Cross-Atlantic Fertilization: Edouard Lambert and Roscoe Pound on Comparative Law', paper presented at the Northwestern University conference 'Rethinking the Masters of Comparative Law', 18 March 2000, on file with the author.

[26] Edouard Lambert, 'Sources du droit comparé ou supranational: législation uniforme et jurisprudence comparative', in *Recueil d'études sur les sources du droit en l'honneur de François Gény*, vol. III (Paris: Sirey, 1934), p. 502.

The profession of comparative law, institutionalized under Lambert's direction in the law faculty at Lyon,[27] was directed to train a cadre of elite legal professionals capable of understanding law across national contexts, soothing international tensions and finding uniform solutions to modern social problems. To do so, they would need to bring new voices to the table – not just the law of jurists, but the law made by social actors, such as unions, professional associations or chambers of commerce. In reflecting on the significance of the 1900 Paris Congress, Lambert says:

> *Depuis 1900 les perspectives ouvertes à l'action du droit comparé se sont singulièrement élargies. Elles se sont élargies, elles s'élargissent chaque jour un peu plus, sous l'action d'un triple courant d'idées qui se dessine dans l'ensemble de la communauté internationale des peuples industrialisés. C'est d'abord l'éveil de l'esprit international créé par les conséquences économiques de la guerre [...]. Ce sont ensuite les réclamations, de plus en plus énergiques, des opinions publiques des divers pays en faveur de la socialisation du droit, c'est-à-dire d'une interprétation plus souple et plus éclairée de lois et de précédents judiciaires datant souvent d'un autre âge, et de leur adaptation aux conditions économiques de la vie contemporaine. [...] Le mouvement vers la socialisation et le mouvement vers l'internationalisation du droit se prêtent un mutuel appui et l'un et l'autre subissent la poussée d'un troisième mouvement dont la concurrence accélérera de plus en plus leur marche. Ce troisième mouvement, c'est l'entrée en compétition avec le droit des juristes des droits faits, pour leur discipline intérieure et pour le règlement des rapports économiques entre leurs membres, par les groupements de justiciables, tels que les syndicats professionnels ou les chambres syndicales et les associations corporatives des diverses branches du commerce et de l'industrie. [...] Dès sa naissance [le droit de ces groupements de justiciables] prend une humeur internationale parce que les activités, dont il règle et rationalise la concurrence, sont déjà, et deviennent chaque jour davantage, des activités internationales.*[28]

[27] For example, see *id.*, *L'institut de droit comparé: son programme, ses méthodes d'enseignement* (Lyon: A. Rey, 1921).

[28] *Id.*, 'Rapport fait à la séance d'inauguration de la session de 1929 à La Haye sur le rôle d'un congrès international de droit comparé en l'an 1931', in *Travaux de l'Académie internationale de droit comparé*, vol. II (1929), fascicule 1, pp. 4–5. Lambert describes the objectives of the congress in these terms: '*La tâche essentielle d'un pareil Congrès sera de préparer et de mettre en mouvement le travail collectif et réfléchi de l'élite des juristes des divers pays par lequel la profession légale internationale – c'est-à-dire le vaste groupement naturel formé par les hommes qui se consacrent à l'étude et l'application du droit – adaptera son activité scientifique d'ensemble aux devoirs et aux sources d'influence sociale que lui crée la naissance de cette communauté économique et politique supra-nationale*' (*id.*, p. 8).

Managing a legal order rooted in the social fabric can easily go awry – judges and others may rely too much on the formal rules or might be tempted to substitute their own preferences for the law. For Pound, all this was particularly worrying when, as he experienced the 1930s, the legal system needed not only to be managed, but defended:

> A time of transition, a time of creative lawmaking, a time of legislative and judicial and juristic experimentation, a time of novel theories as to what the law is or of theories that there is no law – that there is only a process none too thoroughly concealed with a camouflage of technical development of the grounds of its operation from the authoritative materials – such a time demands a deeper and wider knowledge of the technique and of the materials of judicial and administrative determination than is called for in an era of stability and quiescence. In the latter minute and accurate information as to the legal precepts recognized and applied by the tribunals of the time and place could make a learned and effective lawyer. In the former these precepts are on trial. They are not thought of as finally established, but as subject to inquiry as to their force and validity. Hence one who merely knows them as they are in comparison to themselves, is likely to be found wanting.[37]

As a result, Pound had a very concrete project in mind for the discipline of comparative law and proposed a particular method of work to achieve it. Comparative law was to be enlisted in the struggle within the legal intelligentsia against those – the 'new realists' or 'radical new realists' – who would see law only in its effects or would root law in the subjective and personal attitudes of particular judges. At the same time, the legal establishment needed to defend itself against those who would seek to disconnect law from social life, either retreating into the 'old systems of natural law' or, like the 'analytic jurists' of the previous century, ignore the urgent need to align law with social needs and ideals. The legal order must be grounded in reality, which, for Pound, meant the reality of what ought to be done:

> Let it be repeated. Faithful portrayal of what courts and law makers and jurists do is not the whole task of a science of law. One of the conspicuous actualities of the legal order is the impossibility of divorcing what they do from what they ought to do or what they feel they ought to do [...]. Critical portrayals of the ideal element in law, valuings of traditional ideals with respect to the actualities of the social and legal order, and the results to which they lead in the social and legal order of today, are as much in touch with reality [...] as psychological theories of the behavior of particular judges in particular cases.[38]

[37] *Ibid.*

The way to do this was to uncover the 'ideal' elements in a legal system and use them both as a basis for rationalizing and systematizing legal rules and to give nuance and flexibility to the interpretation of formal legal rules. These 'ideals' are a part of the law, but may easily be overlooked or not understood.[39] It is here that the comparatist can be helpful – by comparing the law of a legal system with itself over time and with other legal orders, the ideal element within it can be illuminated:

> But I look forward most, for the purposes of the immediate future, to a study of the ideal element in law, a study of the received ideals of American law, which, if it is to be what it should be, must be carried on comparatively. It must be comparative as to the received ideals of the past, in different stages of legal development, in comparison with those of yesterday and today. It must be comparative as to the ideal element in different bodies of law in comparison with each other [...]. I look forward to a comparative philosophical jurisprudence which shall be able the better to do the needed work upon the ideal element.[40]

By identifying the ideal element in law through comparative study, it will be possible to animate and defend the legal order without relying on the attitudes of particular judges, but also without making the 'mistake [...] to set off the ideal element as something of independent validity above the law – as in the old systems of natural law, and [...] to set it off in order to ignore it, as did the analytical jurists of the last century'.[41]

Comparative study would not only reinforce the authority of the established legal order, but it would also encourage the legal system to become more international as legal elites become more aware of the 'universal character of law'.[42] Through comparative work, jurists will learn that:

[38] *Id.*, 'A Call for a Realist Jurisprudence', (1931) 44 Harvard L.R. 697, p. 700.
[39] On the importance of the ideal element of law in Pound's sociological jurisprudence, see *id.*, 'A Comparison of Ideals of Law', (1933) 47 Harvard L.R. 1, pp. 3–4.
[40] *Id.*, *supra*, note 35, p. 60. [41] *Id.*, *supra*, note 39, p. 4.
[42] See *id.*, *supra*, note 35, p. 60; *id.*, 'Comparative Law in Space and Time', (1955) 4 Am. J. Comp. L. 70, pp. 83–4.

> law is general, tending more and more to be universal, while it is laws that are local [...]. The legal order (*ordre juridique, Rechtsordnung*) is general and tends to be universal with the continually increasing economic and cultural unification of the world. Advent of comparative law as a practical subject of study, writing and teaching is but an item in the process of world unification which has gone on increasingly on every side in the history of civilization. War of small town with small town, of clan with clan, tribe with tribe, country with country, empire with empire, and today reaching to continent with continent, shows a process of erasing the minor distinctions that make for local polities and jurisdictions and call for local legal orders and multiplied local laws [...]. And, what is specially significant, the foregoing items of closer jural relations of peoples with peoples today do not have behind them any movement toward an omnicompetent universal super-state. On the contrary, peoples are insistent as ever upon local political independence [...]. Today comparative law becomes, as it were, a book of sketches toward a map of a law of the world, not a chart of a tangle of Main Streets leading nowhere.[43]

Pound's reflections on comparative law are as methodologically self-confident and politically brash as those of Lambert. They share Lambert's broadly anti-formal and social orientation, as well as his internationalist and universalizing objectives. Like Lambert, Pound manages to put together things which no longer combine so easily – universal ideals which are part of the law of particular places or ideals which are facts of a legal culture. He developed elaborate models of stages of legal development, which were both historically specific to particular legal traditions and more general trans-historical phenomena.[44] He privileges neither customary nor legislative materials in accounting for foreign legal orders:

> A developed body of legal precepts is made of two elements, an enacted or imperative and a traditional or habitual element.[45]

Pound's programme is not Lambert's – locating hidden legal ideals is not learning the customary laws of unions and commercial associations. Countering the American realist challenge is not building a more socially

[43] *Id.*, 'The Passing of Mainstreetism', in Kurt Nadelmann, Arthur von Mehren and John Hazard (eds.), *Twentieth-Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema* (Leiden: Sijthoff, 1961), pp. 12–14.

[44] For an excellent account of this ambivalence in Pound's comparative writing, see generally Lasser, *supra*, note 34.

[45] Roscoe Pound, *Jurisprudence*, vol. II (St Paul: West, 1959), p. 9, as quoted in Lasser, *supra*, note 34.

progressive legal order in the sphere of French legal influence. Encouraging jurists to navigate by universal ideals is quite a long way from promoting codification of standards which will be interpreted to accord with local social and economic needs. Although Pound and Lambert are not in methodological debate – they both develop their comparative-law ideas as if they spoke for a consensus in the field – the material for a recollection of methodological struggle is there. Once one has learned both, anti-formalism offers choices, not solutions, and we are ready for the emergence of eclecticism.

In Germany, Ernst Rabel was the most significant comparatist of the inter-war period.[46] Rabel began as a historian of Roman law, turning to comparative law only after the First World War. In the years before emigrating to the United States just before the outbreak of war, Rabel sat on numerous arbitral tribunals, served several times as an *ad hoc* judge at the Permanent Court for International Justice, was an active advisor to a wide range of German commercial interests and was the founder and director of the Kaiser-Wilhelm Institute for Foreign and International Private Law in Berlin, where he was also professor. Like Lambert, Rabel saw the institutionalization of comparative legal work as an important project. Looking back on his career after the war, these other more engaged roles slipped from view and it was his work building the institutional and professional resources for sustained comparative work which he remembered as his most lasting contribution – and which he repeatedly urged on his US colleagues.[47]

Like Lambert, Rabel was a lifelong enthusiast of uniform international legal rules for private law and a passionate advocate of codification. He worked extensively preparing for the Hague Conference on the

[46] I am indebted to two excellent recent studies of Rabel's comparative legacy. See David J. Gerber, 'Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language', in Riles, *supra*, note 22, pp. 190–208; Bianca Gardella Tedeschi, 'Anti-formalist Strands in Comparative Legal Thought' (2001), on file with the author. Representative works by Rabel in English are: Ernst Rabel, 'Draft of an International Law of Sales', (1938) 5 U. Chicago L.R. 543 [hereinafter 'Draft']; *id.*, 'On Institutes for Comparative Law', (1947) 47 Columbia L.R. 227 [hereinafter 'On Institutes']; *id.*, 'The Hague Conference on the Unification of Sales Law', (1952) 1 Am. J. Comp. L. 58; *id.*, 'Unpublished Lectures: *Schriften aus dem Nachlass*', RabelsZ, 1986, p. 282 [being a series of speeches and lectures by Rabel in English on a variety of topics in comparative law] (hereinafter '*Schriften*'); *id.*, 'Private Laws of Western Civilization', (1950) 10 Louisiana L.R. 1, 107, 265 & 431 [hereinafter 'Private Laws']. See also *id.*, *The Conflict of Laws: A Comparative Study* (Chicago: Callaghan, 1945), 4 vols. [hereinafter *Conflict*].

[47] See Rabel, 'On Institutes', *supra*, note 46, p. 227. Rabel cited Pound on the significance of comparative law as 'a chief weapon in the armory of the American jurist': *id.*, p. 225.

International Sale of Goods and devoted effort as well to the potential codification of a uniform law of conflicts. He was a strong supporter of the American Law Institute's restatement projects:

> We are pleased to imagine what it would mean, if over great stretches of the earth for the first time a central chapter of the law of obligations would be governed by uniform legislation. What a field for judges like Holmes and authors like Williston, what interchange of solutions, methods, systems! It is not true that unification is practically useless without a common court of appeals. Good decisions have a persuasive power. Common legal science is a greater benefit than is generally imagined. Within each country the international sales law would rival the domestic law by intrinsic strength, as did in Rome the *ius gentium* with the *ius civile*. Looked at in this way, it is well worthwhile to help the international law of sales to come into existence.[48]

Rabel was anything but agnostic about the relative desirability of uniformity and diversity in law. At his most fair-minded, he admitted that divergences would need to be attended to – but similarity was the objective:

> On the international plan, of course, we would not dare to play down the differences. We have to ascertain dissimilarities as well as similarities. Both are equally important and we have to investigate the causes of both. Nevertheless, at the present stage consideration of the common features and the basic ideas are still in the foreground.[49]

Rabel consistently advocated comparative legal study in practical terms – as a guarantee against provincialism, a source of better regulations and rules. During the inter-war period, he also advocated comparative law as an urgent aid in resolving European conflicts by promoting an international spirit for the solution to international problems. But he was also a strong advocate of German national ambitions and saw more professional comparative law as offering competitive advantages to Germany, German business and German lawyers:[50]

> The reconstruction of the fatherland and its strengthening vis-à-vis the outside world require a sharpened perception of the events of the world. The new tasks must also find the jurists armed.[51]

[48] *Id.*, 'Draft', *supra*, note 46, p. 565.
[49] *Id.*, '*Schriften*', *supra*, note 46, pp. 319–20.
[50] See Gerber, *supra*, note 46, p. 14.
[51] Ernst Rabel, 'Das Institut für Rechtsvergleichung an der Universität München', Zeitschrift für Rechtspflege in Bayern, 1999, p. 3, as quoted in Gerber, *supra*, note 46, p. 198.

Only through comparative engagement with foreign law could German commercial interests be defended internationally and only through engagement with an international 'spirit' could German national and commercial interests be achieved on the world stage.

In methodological terms, Rabel was influenced by the German 'jurisprudence of interests' and by sociological jurisprudence. His uptake of these ideas reflected the influence of the distinctively German nineteenth-century legal tradition in which he was trained – but this tradition urgently needed reformation to permit German commercial interests to achieve their objectives on the world stage. Specific legal rules were best understood in the context of the 'system' of which they were a part. Understanding a legal system, in turn, required first, historical analysis of the system's development, second, an awareness of the existing legal system as it worked in practice and third, an understanding of a broader 'component that penetrated philosophy, where historical and systematic legal science, together with legal philosophy, examine the deepest issues of the evolution and impact of law'.[52] Although Rabel began as a legal historian, he focused most of his inter-war comparative effort on an attempt to understand the working of foreign legal systems in practice. He never devoted much energy to the 'deepest philosophical issues' and his methodological commitments are never very clearly articulated. He expressed eagerness to pursue comparative law as a 'pure science' by looking beneath the surface of legal language and doctrine to understand the workings of legal rules in practice. And his analysis of legal rules was consistently attentive to the needs and interests of commercial players.

In the United States after the war, Rabel completed a number of short reflective essays and speeches and two major projects. The largest of these was a multi-volume study of comparative conflict of laws rules sponsored by the American Law Institute and intended to serve as the basis for an international effort to unify conflict of laws.[53] Without methodological or historical gloss, these lengthy descriptions focus on the outcomes achieved through various conflicts rules in different systems. His one post-war comparative study was a magisterial overview of the 'Private Laws of Western Civilization' published in a series of articles by the *Louisiana Law Review*.[54] These lectures consider Roman law, the French civil code, the German and

[52] *Id.*, p. 2, as quoted in Gerber, *supra*, note 46, p. 197, n. 18.
[53] See Rabel, *Conflict*, *supra*, note 46.
[54] Rabel, 'Private Laws', *supra*, note 46.

Swiss codes and the common and civil law in historical terms, enumerating various salient differences and similarities. If there is a common theme, it is the identification of the difficulty, encountered differently in each tradition, of escaping the practical constraints of legal formalism to allow for a more practical attention to 'the social purposes more than the technical qualities of the law'.[55]

In comparison to Lambert and Pound, Rabel's focus was far more on the practical outcomes of legal rules as they were encountered by practitioners and commercial actors. He places little emphasis on ideals or normative commitments, although his historical surveys often conclude that a system is committed to a specific idea, such as legalism, precedent, etc. In peering through the language of the law to practice, he was not looking for customary law and, unlike Lambert, was not seeking the views of business people or union leaders about what the law was or should be. He was seeking to canvass the practical outcomes which resulted as different legal systems were in fact applied – and he was confident that these could be harmonized by legislative codification.

Max Rheinstein describes Rabel's methodological preoccupations this way:

> As a comparatist, Rabel had, of necessity, to apply the method which has come to be called in Germany that of the jurisprudence of interests and in these methodological convictions of his. Indeed, he avoided participation in the methodological controversy by which German juristic thought was agitated. He simply handled the legal concepts in his own way both in his writing and his teaching.[56]

We can hear in Rheinstein's 1956 eulogy the voice of the post-war eclectic – the image of methodological choice as a 'necessity', the evasion of methodological ambivalence in earlier work, the focus on the practical jurist, deftly aiming to use law for 'good policy'. Putting Lambert, Pound and Rabel together, we can say that by the end of the inter-war period, the broadly anti-formal comparative-law project had been elaborated in a range of quite different directions – emphasizing ideals, social facts, practical effects – and in quite different institutional and ideological projects.

René David illustrates what began to happen next.[57] David is also in the anti-formalist tradition and is committed to transforming law so as to align it with changing social and economic needs.[58] He speaks as one

[56] Max Rheinstein, 'In Memory of Ernst Rabel', (1956) 5 Am. J. Comp. L. 185, p. 187.

[57] Basic references for David include René David, *Traité élémentaire de droit civil comparé* (Paris: L.G.D.J., 1950). In relation to this book, David himself later said, in a collection of articles, speeches and essays written over more than thirty years, grouped by topic, and introduced by a general comment on the place of the particular topic in David's work, that it was generally out of date, but that the methodological and theoretical dimension of the work, which was its real focus and purpose '*mérite encore d'être lue*': *id.*, *Le droit comparé: droits d'hier.*

about how common problems are solved elsewhere to the legislator or judge. They are careful to distinguish 'theoretical-descriptive' comparative law from 'applied' comparative law and caution that applied comparative law, which 'suggests how a specific problem can most appropriately be solved under given social and economic circumstances' and 'provide[s] advice on legal policy' can place comparatists under 'considerable pressure'.[75]

For Zweigert and Kötz, there is no particular reason to think the result will be more uniform law or more international law. The most one might shoot for would be to 'reduce the number of divergencies in law, attributable not to the political, moral or social qualities of the different nations, but to historical accident or to temporary or contingent circumstances'.[76] Their concern is far more for the science of law itself, which can now be carried out on an international basis:

> It now becomes unmistakably clear that an international legal science is possible. After a period of national legal developments, producing academically and doctrinally sophisticated structures, each apparently peculiar and incomparable, private law can once again become, as it was in the era of natural law, a proper object of international research, without losing its claim to scientific exactitude and objectivity. To this recognition of the fact that law, and especially private law, may properly be studied outside national boundaries, comparative law has greatly contributed, though other legal disciplines also have long been pointing the way. [...] What we must aim for is a truly international comparative law which could form the basis for a universal legal science. This new legal science could provide the scholar with new methods of thought, new systematic concepts, new methods of posing questions, new material discoveries, and new standards of criticism: his scientific scope would be increased to include the experience of all the legal science in the world, and he would be provided with the means to deal with them. It would facilitate the mutual comprehension of jurists of different nationalities and allay the misunderstandings which come from the prejudices, constraints, and diverse vocabularies of the different systems.[77]

Their aspiration for comparative law is oriented toward enhancing a 'scientific' understanding of law and 'no study deserves the name of science if it limits itself to phenomena arising within its national boundaries.'[78] The echoes of sociological jurisprudence survive in the aspiration that comparative law provide a good heuristic for what have become pragmatic mental habits. Training in comparative law

[75] *Id.*, p. 11. [76] *Id.*, p. 2. [77] *Id.*, pp. 45–6. [78] *Id.*, p. 15.

> shows that the rule currently operative is only one of several possible solutions; it provides an effective antidote to uncritical faith in legal doctrine; it teaches us that what is presented as pure natural law proves to be nothing of the sort as soon as one crosses a frontier, and it keeps reminding us that while doctrine and categories are essential in any system, they can sometimes become irrelevant to the functioning and efficacy of the law in action and degenerate into futile professional games.[79]

Zweigert and Kötz place themselves proudly in the history of comparative law, but they are not entirely sanguine about the work of their predecessors.[80] They stress the range of diverse methods and approaches which have been taken to the subject and the numerous sources and influences on the comparative profession. For them, the discipline has come into its own as an institutionalized profession through the establishment of 'special institutes, fully equipped with the personnel and plant needed for sustained work, and finally, the representation of comparatists from all countries in the *Association internationale des sciences juridiques*'[81] – and, most importantly, through methodological consolidation.

For Zweigert and Kötz, the pre-war comparative-law world offered a number of alternative approaches, among which Rabel had emerged as the dominant voice:

> The methods of Rabel and his contemporaries at home and abroad have won through. The problems they identified and the programmes they established constitute the tasks of comparative law today.[82]

The only puzzle here is that Rabel was not in a method war with Lambert or any other comparatist. The specific differences which divided Rabel and Lambert – more or less attention to customary law in codification, say – are not what concern Zweigert and Kötz. They are agnostic about choices of this type. Nevertheless, in some way Rabel has come to stand for a tradition which is more practical in its orientation, more interested in uniform practical needs and less in cultural differences, while Lambert has come to stand for a comparative law more attuned to history, culture,

[79] *Id.*, p. 22.

[80] *Id.*, p. 3 [discussing the importance of Lambert's and Saleilles's initiative to launch the 1900 Paris Congress]. Zweigert and Kötz examine the history of the discipline in their short chapter entitled 'The History of Comparative Law': *id.*, pp. 48–62.

[81] *Id.*, p. 62.

[82] *Ibid.* Besides themselves, they counted among Rabel's functionalist successors Rheinstein, Kessler and Kahn-Freund.

context, difference. Rabel and Lambert have come to stand for opposite ends of the various spectrums sketched in the last section.

For Zweigert and Kötz, the pull of practicality and uniformity leads to a comparative legal science which could resist both the tendencies of cultural particularism or rule-scepticism and of traditional formalism, by focusing on 'function':

> The basic methodological principle of all comparative law is that of *functionality*. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfill the same function. This proposition may seem self-evident, but many of its applications, though familiar to the experienced comparatist, are not obvious to the beginner. 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 with quite different means though very often with similar results. The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concepts of one's own legal system.[83]

In a sense, nothing could be further from David's contemporaneous notion of 'legal families'. 'Legal families' and 'functions' do mark poles of the cultural-technical spectrum for comparative law in the 1950s. And yet, just as David's legal families were proposed as a middle way between cultural particularism and universalism, so the idea of function is designed to float between universals and the particularities of specific contexts and ensure that the comparatist has fully grasped the details of each legal regime's specificity.[84]

[83] *Id.*, p. 34. Although Rabel is remembered as the founder of the functionalist approach, and as a forerunner to Zweigert and Kötz, in Rabel's last large comparative study, I was unable to locate the word 'function'. See Rabel, 'Private Laws', *supra*, note 46. *Cf.* Rodolfo Sacco, 'One Hundred Years of Comparative Law', (2001) 75 Tulane L.R. 1159, p. 1167: 'Following Rabel, the comparatist began to pose questions that had to be grappled with in functional terms.'

[84] For example, see Zweigert and Kötz, *supra*, note 4, pp. 35–6: 'The beginner often jumps to the conclusion that a foreign system has "nothing to report" on a particular problem. The principle of functionality applies here. Even experienced comparatists sometimes look for the rule they want only in the particular place in the foreign system where their experience of their own system leads them to expect it: they are unconsciously looking at the problem with the eyes of their own system. If one's comparative researches seem to be leading to the conclusion that the foreign system has "nothing to report" one must rethink the original question and purge it of all the dogmatic accretions of one's one system. [. . .] This, then, is the negative aspect of the principle of functionality, that the comparatist must eradicate the preconceptions of his native legal system; the positive aspect tells us which areas of the foreign legal system to investigate in order to find the analogue to the solution which interests him. The basic principle for the student of foreign legal systems is to avoid all limitations and restraints. This applies particularly to the question of "sources of law"; the comparatist must treat as a source of law whatever moulds or affects the living law in his chosen system, whatever the lawyers would treat as a source of law, and he must accord those sources the same relative weight and value as they do. He must attend, just as they do, to statutory and customary law, to case-law and legal writing, to standard-form contracts and general conditions of business, to trade usages and custom. This is quite essential for the comparative method. But it is not enough. To prepare us for his view of the full requirements of the comparative method, Rabel says: "Our task is as hard as scientific ideals demand [. . .]." '

The post-war comparative discipline of David and Zweigert and Kötz had become a respectable participant in the mainstream of post-war anti-formalist thought. The social and practically engaged projects and energy of Pound, Lambert or Rabel have disappeared, replaced by far more modest objectives for the professionalization of the discipline itself. It would be easy to associate Lambert, Rabel or Pound with ideological positions and social interests – far less so David or Zweigert and Kötz. In a sense, as the academic establishment of the comparative profession was consolidated, its social aspirations diminished. The new profession would make a contribution more to knowledge than policy.

On the methodological side, the story is more complex. David and Zweigert and Kötz write both more and more explicitly about method. David and Zweigert and Kötz do differ on method and talk about their method, but they each present their own method as a mediation of a methodological controversy which they locate in the past. Zweigert and Kötz associate this earlier division with the names of Lambert and Rabel, David with the names of Pound, Lambert and Gény. They each propose a methodological synthesis. And yet, looking back, their own proposals have become marks for the methodological alternatives of cultural differentiation and technical universalism. Indeed, in retrospect, it is easy to overlook their efforts at synthesis – 'functionalism' has been remembered as a technical assault on the embeddedness of law, rather than as a heuristic to ensure attention to differences.[85] 'Legal families' seems like a crude substitute for careful attention to similarities, differences and influences.[86]

The methodologically eclectic and politically neutral comparative-law sensibility reached its first best expression in the work of Rudolf Schlesinger's

[85] There has been much criticism of the functionalism in comparative law for its assumptions of universalism. A good selection is cited by Twining, *supra*, note 4, p. 37.

[86] See Watson, *Legal Transplants*, *supra*, note 14, p. 4.

influential Cornell project of the 1950s, which provides the methodological origins for the ongoing effort to identify the common core of European private law.[87] In many ways, it was Schlesinger who routinized the professional activity of post-war comparatists. His project was enormously ambitious, involving dozens of students over many years. The objective was to compile as accurate and complete a picture as possible of similarities and differences among leading private-law systems. Schlesinger offers none of the broad social or cosmopolitan political justifications of Lambert or Pound. His concerns are directed exclusively toward the development of knowledge and the enrichment of legal education.

This work was to be carried out in the tradition of anti-formalism, but Schlesinger's objective was neither to demonstrate the truth of anti-formalist insights nor to mobilize them in a project of legal reform. His goal was to generate an accurate description and analysis of legal similarities and differences among legal regimes. Anti-formalism provided a taken-for-granted background conception of what law is so as to guide the comparatist in identifying legal phenomena for comparison.

In doing comparative work, Schlesinger exhorted his students, it was important to deal with the 'living law'. To do so, one should use a 'factual' rather than a 'concept-oriented approach'.[88] Schlesinger was interested in

[87] See Rudolf B. Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems* (Dobbs-Ferry: Oceana, 1968), 2 vols. [hereinafter *Formation of Contracts*]. These are the published results of the Cornell project. The introduction particularly deals with the methodology of the project and the 'factual approach': *id.*, 'Introduction', in *id.*, vol. I, pp. 2–58. See also *id.*, 'The Common Core of Legal Systems: An Emerging Subject of Comparative Study', in Nadelmann, von Mehren and Hazard, *supra*, note 43, pp. 65–79 [hereinafter 'The Common Core']; *id.*, *Comparative Law: Cases and Materials* (New York: Foundation Press, 1950). The preface, in particular, deals with 'Objective and Method': *id.*, pp. ix–xvi. This reference is to the first edition, the book currently being in its sixth. See also *id.*, 'The Past and Future of Comparative Law', (1995) 43 Am. J. Comp. L. 477 [hereinafter 'The Past and Future']. See generally Ugo Mattei, 'The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence', in Riles, *supra*, note 22, pp. 238–56.

[88] Schlesinger, 'The Common Core', *supra*, note 87, p. 73: 'It is a well known truism in comparative law that different legal systems, even in the countless instances in which they arrive at identical results, usually proceed along divergent conceptual routes. [...] Misunderstandings among lawyers brought up in different legal systems can be effectively minimized if *a segment of life* is chosen *as the focus and the normal unit of discussion.* In this way, and only in this way, can one be sure that all members of the group always address themselves to the same point, and that they penetrate through the layers of classification and concept with which each legal system covers its actual solutions of social problems. [...] If used by a team of comparatists, the case-oriented factual method forces each participant to face and to answer the question: how does your legal system react to this particular fact situation? What remedy, if any, does your system make available to the plaintiff in this case? If the question is posed in this form, functional similarities between legal systems will be uncovered upon which a concept-oriented approach would throw no light. It will be found in countless instances that many or all legal systems reach a similar result, although they do so by the use of widely divergent theories and labels' [emphasis original]. Schlesinger adds moreover: 'In a comparative research project, as in other contexts, it is doubtless convenient to use reported cases as ready-made materials for discussion; but it does not follow that one should either limit oneself to reported cases, or use them without constant appraisal of their real importance as living law': *ibid.* On the relevance of history and historical context in comparative work, see also *id.*, 'The Past and Future', *supra*, note 87.

cultural differences and sympathetic to the idea that these differences might well run in families. But he was not pursuing a global taxonomy of legal systems. Rather, he was seeking a micro-description of similarities and differences. He was sympathetic to the functionalist idea and often suggested that an accurate identification of the 'same' legal phenomena in another legal culture required attention to whatever in that culture performed the same 'function'. But his functionalism was instrumental to his descriptive endeavour. The key for Schlesinger was the use of hypothetical fact-patterns or 'problems' against which the reactions of various legal systems can be compared.[89] Investigators from various legal systems were asked how a given fact-pattern would be assessed in their own legal regime so as to facilitate understanding of similarities and differences free from the distraction of pre-existing ideas about legal rules and categories, but also from preferences rooted in particular cultural needs or technical functions.

Distance from practical engagement with government is explicitly promoted by Rodolfo Sacco, the Italian comparatist who provides the link between the Cornell project and the current effort led largely by Sacco's students to mobilize researchers for a description of the common core of European private law.[90] Sacco goes out of his way to deride efforts to justify comparative legal study on the basis of its usefulness:

> Like other sciences, comparative law remains a science as long as it acquires knowledge and regardless of whether or not the knowledge is put to any further use [...]. Comparative law is like other sciences in that its aim must be the acquisition of knowledge. Like other branches of legal science, it seeks knowledge of law.[91]

[89] The practical details of the 'factual method' are presented in the general introduction to the Cornell project's results in the area of contract law in *id.*, *Formation of Contracts*, *supra*, note 87, pp. 30–41. On the relationship between the 'functional' and the 'factual' method, see *id.*, 'The Common Core', *supra*, note 87, p. 74.

[90] For a comparison of Sacco and Schlesinger, see Mattei, *supra*, note 87.

[91] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law', (1991) 39 Am. J. Comp. L. 1 & 393, p. 4.

Even the objective of increased international understanding and harmony seems to be going too far:

> In general, then, the use to which scientific ideas are put affects neither the definition of science nor the validity of its conclusions. Jurists are generally aware of this truth. They do not think their work is valid because it can be used to achieve this or that practical end. In the case of comparative law, however, a different standard is applied, or at least it was thirty years ago. Those who compare legal systems are always asked about the purpose of such comparisons. The idea seems to be that the study of foreign legal systems is a legitimate enterprise only if it results in proposals for the reform of domestic law. [...] The effort to justify comparative law by its practical uses sometimes verges on the ridiculous. According to some sentimentalists, comparison is supposed to increase understanding among peoples and foster the peaceful coexistence of nations. According to that idea, the statesmen who triggered the two world wars would have stopped at the brink of catastrophe had they only attended courses in comparative law. Napoleon himself would have given up his imperialistic dreams had he spent less time over the code that bears his name and more on the *gemeines Recht* and the *kormchaia pravda*.[92]

Sacco's approach to comparative law is also rooted in his anti-formalist conception of law. Sometimes, as for Schlesinger, anti-formalism seems a background assumption which guides good comparative practice. Comparison of legal systems and rules from the most diverse socio-economic and political traditions is possible only if one pushes behind law's formal appearances, avoiding false similarities and differences.[93] At other times, anti-formalism seems an idea of which jurists constantly need

[92] *Id.*, pp. 1–2.

[93] Thus, for example, Sacco exhorts us that the 'operative rules of [...] two systems may be more similar than the vocabularies in which they are expressed': *id.*, p. 13. Or: 'it is wrong to believe that the first step toward comparison is to identify "the legal rule" of the countries to be compared. That is the typical view of an inexperienced jurist. It is a misleading simplification which the student of comparative law has a duty to criticize. Instead of speaking of "the legal rule" of a country, we must speak instead of the rules of constitutions, legislatures, courts, and, indeed, of the scholars who formulate legal doctrine. The reason jurists often fail to do so is that their thought is dominated by a fundamental idea: that in a given country at a given moment the rule contained in the constitution or in legislation, the rule formulated by scholars, the rule declared by courts, and the rule actually enforced by courts, have an identical content and are therefore the same': *id.*, p. 21. Or: 'We should not think, however, that we understand a legal system when we know only how courts have actually resolved cases. Knowledge of a legal system entails knowledge of factors present today which determine how cases will be resolved in the future. We must not only show how courts have acted but consider the influences to which judges are subject': *id.*, p. 23.

to be reminded, for which purpose comparative law provides a good heuristic:

> A comparative method can thus provide a check on the claim of jurists within a legal system that their method rests purely on logic and deduction. [...] The comparative method may thus be a threat to any process of legal reasoning which does not employ comparison. The threat is most direct to those 'scientific' methods of legal reasoning that do not measure themselves against practice, but formulate definitions that are supported solely by their consistency with other definitions. In destroying the conclusions reached by these methods, comparison may provide an alternative method that is more valid.[94]

Law is simply 'society's response to the need of social order', and these responses might be extremely varied. There is certainly a functionalist echo here, but the aim is broader – an engagement with the largest category of social needs across human societies at all stages of economic and social development.

For most post-war comparatists, this anti-formalist idea seemed to suggest at least a weak preference for greater international harmonization. National differences were forms – pushing through them to understand how common problems were solved or how a broader cultural family approached the issue seemed bound to lead not only to greater understanding, but also to the possibility of greater harmonization. Not so for Sacco, whose agnosticism is a more thorough one. Attaining uniformity might be a good idea, 'worthy of encouragement', but there are also advantages to diversity, which might also be useful to progress. There is no compelling proof, moreover, that comparative law has led to uniformity, although comparative study might well illuminate similarities which had hitherto been unknown. The roots of Bussani's insistent agnosticism about the valence of the common-core project lie here.

Sacco is best known for introducing the term 'legal formants' into comparative law's methodological lexicon. In many ways, legal formants play the same role in Sacco's scheme that 'factual problems' do in Schlesinger's Cornell project.[95] They offer a point of reference for the comparatist identifying and analysing similarities and differences in legal

[94] *Id.*, p. 24.

[95] On the relationship between Sacco and Schlesinger, see *id.*, pp. 27–30 [where Sacco mentions the Cornell project as an important step in the same direction as the theory of legal formants]. See generally Mattei, *supra*, note 87.

phenomena across different legal regimes which are neither technical nor cultural, providing a middle way between attention to formal rules and social contexts. But where Schlesinger's problems seemed to direct the comparatist to identify the one solution which would emerge in different legal systems, Sacco's notion of 'legal formants' makes it possible to keep the ambivalence and multiplicity of legal rules in each system at play in the comparison. The truly careful comparatist will write an account of similarities and differences among legal phenomena which keeps in mind that legal phenomena are often, even quite often, multiple, contradictory and ambivalent, even within one legal culture:

> Thus even the jurist who seeks a single legal rule, indeed who proceeds from the axiom that there can be one rule in force, recognizes implicitly that living law contains many different elements such as statutory rules, the formulations of scholars, and the decision of judges – elements that he keeps separate in his own thinking. [...] [W]e will call them, borrowing from phonetics, the 'legal formants'. The jurist concerned with the law within a single country examines all of these elements and then eliminates the complications that arise from their multiplicity to arrive at one rule. He does so by a process of interpretation. Yet this process does not guarantee that this is, in his system, only a single rule. Several interpretations will be possible and logic alone will not show that one is correct and another false. Within a given legal system with multiple 'legal formants' there is no guarantee that they will be in harmony rather than in conflict.[96]

The 'legal formant' idea permits investigation of elements within a legal system which are in tension with one another:

> Comparison recognizes that the 'legal formants' within a system are not always uniform and therefore contradiction is possible. The principle of non-contradiction, the fetish of municipal lawyers, loses all value in an historical perspective, and the comparative perspective is historical par excellence.[97]

The 'legal formant' idea is not intended as an intervention in debates about what law or government should be or do, nor does it take sides in methodological debates between, say, functionalism and the tradition of legal families.[98] For Sacco, the aim is simply anti-dogmatic:

[96] *Id.*, pp. 22–3. [97] *Id.*, p. 24.

[98] It would certainly be possible to read Sacco's theory of 'legal formants' as a challenge to functionalism, both as a method of comparison and as an idea about law and society, as Michele Graziadei does elsewhere in this book. The different levels or spheres in which law operates, each quasi-autonomous *vis-à-vis* the other, suggest the importance of differing legal forms even where the results for one or another hypothesized 'function' are identical, and the fact that legal orders are often in contradiction within themselves suggests a critique of universalism, as well as of the idea, hidden but present in functionalism, that societies do things differently to express their 'cultures' in a world of universal functions.

> The comparative method is thus the opposite of the dogmatic. The comparative method is founded upon the actual observation of the elements at work in a given legal system. The dogmatic method is founded upon analytical reasoning. The comparative method examines the way in which, in various legal systems, jurists work with specific rules and general categories. The dogmatic method offers abstract definitions.[99]

In both Europe and the United States, the comparative-law discipline of Schlesinger or Sacco is methodologically eclectic and careful to remain 'objective', neutral and disengaged from ideological debate and the application of its insights by government. Post-war comparatists speak much less in terms which resonate easily with ideological positions in the broader society and are less easily linked with particular social interests (labour, German commerce, etc.) than their pre-war predecessors. They participate less readily in public life or governmental work. They hesitate more about the application of their knowledge and insist more intently on the virtues of disengaged knowledge than their predecessors.

They do speak a great deal about method. But the methods they propose are extremely nuanced mediations of more extreme methodological alternatives identified with comparative work in the past or with work done by others. Nevertheless, their methodological middle-positions continue to differ, or to seem in retrospect to differ, and to do so in a more structured way than did those before the war. We might say that the post-war authors are insistent eclectics, whose debates occupy an ever-shrinking centre of the anti-formalist spectrum, while their pre-war predecessors were more pluralist in their anti-formalism, ranging more widely among the methodological options.

How can we make sense of this story? The clearest story would be the chastening of overt political commitment by anti-formalism in legal science. The comparative-law profession has been, from the start, insistently anti-formalist about legal materials. For the founders, anti-formalism and sociological realism seemed vital methodological assaults on the mainstream legal science of the time. They were associated with strong projects

[99] Sacco, *supra*, note 91, pp. 25–6.

of internationalization and law reform, with defences of particular social interests against others and with projects of governance and modernization. After the war, as anti-formalism became mainstream – and as the discipline moved from Europe to the United States – the tone shifted. Anti-formalism now would guarantee comparative law's disciplinary place in the mainstream legal academy and would serve pedagogic purposes in helping 'beginners' overcome parochialism and the common tendency to overestimate the importance of legal forms. Anti-formalism remains the vocabulary for comparative work. Comparatists in each generation are insistent on the need to awaken the legal establishment to anti-formalism. But the anti-establishment and anti-parochial edge of early work has been redirected against those who are naive – students, beginners – who need comparative legal education to become sophisticated participants in establishment life. The project in society has become a knowledge project.

Within this story lies a second – the role of debates within the anti-formalist tradition in bringing about that chastening. For each scholar in the founding generation, anti-formalism had a relatively clear meaning – for Lambert, attention to social and economic needs and desires; for Pound, attention to legal ideals; for Rabel, attention to practical outcomes. These were all offered as departures from textual positivism and as corrections for overinvestment in existing legal forms. We could situate all of them on the right end of the spectrums of the last section; each was proposed and defended as an assault on those who thought about law in terms we now associate with the left-hand columns. And yet, looking back, these were quite different ideas, which were understood to have quite different ideological associations and social consequences. With hindsight, we could say that in some way the spectrum between anti-formalism and traditional jurisprudence repeated itself in the choice between, say, legal ideals and social needs or between social needs and practical results, between codification by legislation and codification by custom and so forth. The rift with the establishment became a rift *within* anti-formalism. Social and political choices were sublimated by methodological choices.

If we were to align our comparatists on the spectrums developed in the last section from relatively more formal and universal to relatively more cultural and differentiated, the results would look something like figure 11.8.

We could say that the 'great debate' between embedded social/cultural needs/ideals and universal functions has continued. But something has

Pound	is to	Lambert
	as	
Rabel	is to	Pound
	as	
Zweigert/Kötz	is to	David
	as	
Schlesinger	is to	Sacco

Figure 11.8

changed: the debate has become both muted and muddy. Muted, in the sense that the positions are getting closer together – the debate is evermore a matter of the narcissism of small differences. Schlesinger's 'factual problems' and Sacco's 'legal formants' are more similar than Zweigert and Kötz's 'functions' and David's 'families'. Although 'fact problems' lies further to the universal/technical end of things than 'legal formants', both were proposed as middle positions, efforts to bridge the gap between culturally embedded and universal/technical emphases. And the same could be said of 'families' and 'functions'. As the space of the debate narrows, the extremes disappear into the past, into the naivety of youth, into the positions of unnamed extremists.

The debate has also become muddy in the sense that it is evermore difficult to tell what goes where. Figuring out where to put Pound in the story suggests the difficulty. Compared to Lambert, Pound seemed far less interested in the details of factual difference and far more interested in the discovery of universal ideals. And yet, his ideals were also specific to a culture – by looking abroad, understanding the 'ideal element' in law, one could see the factual presence of an 'ought' in one's own legal culture. Compared to Rabel's attention to practical commercial outcomes, Pound's orientation seems very much to the culturally embedded side of the spectrum.

The fluidity of association among the various positions – among the various choices enumerated in the last section – is what makes it possible to mute the debate over time. The left-to-right alignment of the choices comparatists make within the anti-formalist tradition is a matter only of loose analogy. We might say there is an iron law at work here: the more scholars seek to find a middle way between these methodological alternatives, the muddier the terms will become. But the more what had seemed

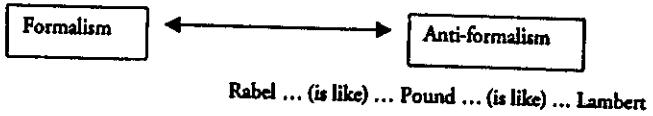

Figure 11.9

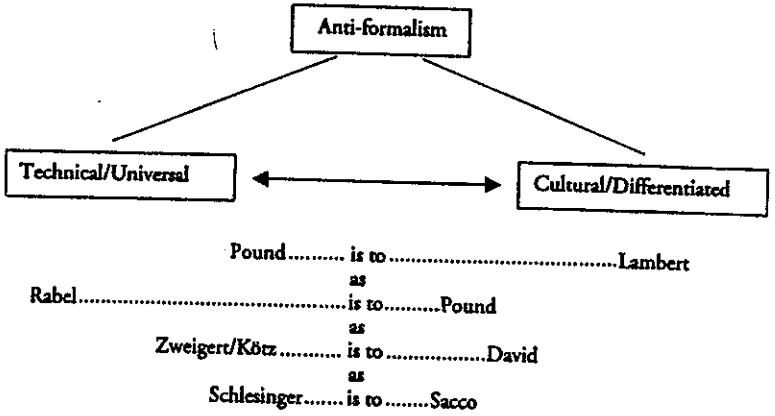

Figure 11.10

diverse preferences within a large tradition will come to seem analogous choices between two unpalatable extremes.

It might be possible to redraw figure 11.8 to take into account something like perceived degrees of separation between the terms. Looked at in 1935, it might appear something like figure 11.9. Looked at in 1955, it might appear something like figure 11.10. And from 2000, it looks like figure 11.11.

This trend highlights a third story – the effects of the slow coming to consciousness of these first two stories. The key difference between the pre- and post-war comparatists is a shift in the tone with which these methodological matters are discussed. The pre-war comparatists cast themselves as outsiders to convention, as engaged social and political actors and as methodological mavericks. The post-war comparatists, by contrast, present themselves more often as insiders, neutral scientists and methodological mediators. This posture reflected in large part, of course, changed circumstances. After the war, largely in the United States, the field of comparative law was aligned with the legal academy's mainstream post-realist common sense. But methodological pronouncements also seem chastened by awareness of

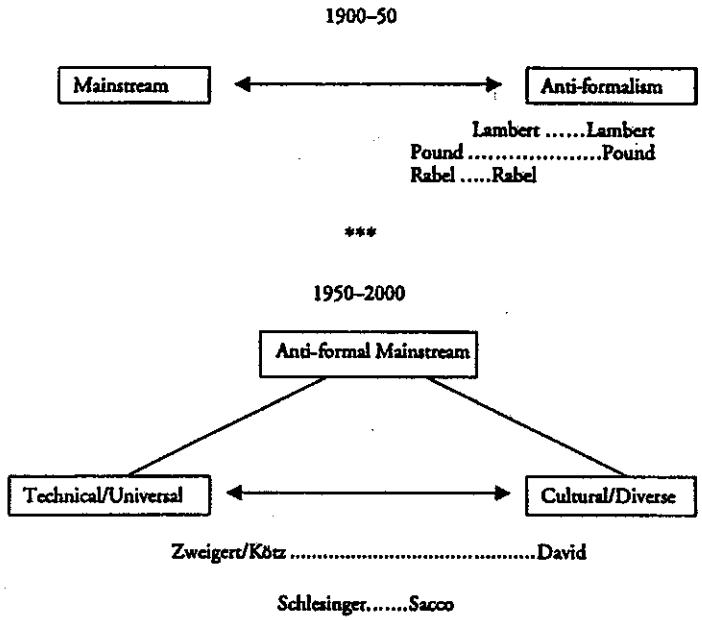

Figure 11.11

the earlier methodological struggle. There certainly was intellectual and political struggle in the 1930s – just not much in comparative law. Standing on the shoulders of giants after 1950 meant seeing their feet of clay – their relative methodological naivety – and reading it as an extreme. Writing yourself into the field after 1950 meant writing yourself against extremism – and against your predecessors. For our predecessors, methodological choices were there to be made – for us, they are there to be balanced, managed, blended, avoided.[100]

The process of disengagement from methodological commitment seems to have been repeated as the field progressed. The 'great' comparatists seem great because they had a strong, if idiosyncratic, methodological formulation. But it is increasingly difficult to find a comparatist who associates with – or even can state clearly – the methodological position of these

[100] Duncan Kennedy has written the best study I know of the post-war anti-formalist consciousness of factor balancing. See Duncan Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"', (2000) 100 Columbia L.R. 94.

early masters. When a great comparatist enters the canon, he is proposing a method which seems like common sense, good professional judgement. At least some people are willing, at least for a moment, to affiliate themselves with this work. Each person who affiliates with a master will want to tweak the method, amending and complexifying it, adding elements from other places, before settling down to wise professional judgement of his own. Indeed, to write as a master, one must write one's predecessors into the margins and occupy the sensible methodological middle. The earlier master is increasingly remembered not for good sense, but for tilting too far and being too preoccupied with methodological matters. Taken together, past masters stand for clear methodological positions, current masters are mature eclectics. In this sense, the moment of methodological division, the clean separation of the poles in the above lists, is always happening and never happened at all.

It is not surprising that scholars of later generations, among them my own contemporaries, are tempted to unsettle the eclectic post-war comparatist by insisting on the significance of methodological clarity. And there have been periodic outbreaks of methodological extremism – the Pierre Legrand–Alan Watson debate might be an illustration.[101] But I do not think these efforts have laid much of a glove on the sensibility of the post-war generation. And indeed, the practical work of the common-core project proceeds with a post-war method of pragmatic eclectic judgement. From the point of view of the field's elder statesmen, these new debates have a definite 'been there, done that' quality.

I have a great deal of sympathy for their reaction – it does seem too late to put the genie of methodological scepticism back in the bottle. An eclectic and unstable effort to pick one's way among all these choices seems unavoidable in thinking about similarities and differences among legal regimes. But this methodological conclusion leaves us with no sense for what has become of the social and political engagements of comparative law. My intuition is that the post-war generation were fleeing more than methodological controversy, that they fled to the method-of-no-method as a sublimation of politics and as a retreat from engagement with governance projects. From my point of view, the problem with the post-war generation was not

[101] For example, see Legrand, 'Impossibility', *supra*, note 14; Watson, 'European Private Law', *supra*, note 14.

its methodological eclecticism, but the politics-of-no-politics which this eclecticism facilitated.

It was much easier to understand pre-war comparatists as political actors. They offered polemics for large-scale law-reform projects – to harmonize and codify international rules, to make domestic law more international or social in orientation, to strengthen commercial interests and so forth. They easily associated methodological choices with ideological positions and social interests. To be an anti-formalist about law implied something about one's political commitments and building a more anti-formal legal order seemed hard to distinguish from building a legal system more attuned to 'social' interests, international harmonization, etc. As a more eclectic methodological spirit overtook the field, comparatists seemed to withdraw from politics. Polemics for legal reform were replaced by careful agnosticism about the desirability of, say, legal harmonization. We find instead polemics for the autonomy and neutrality of comparative research. At the same time, methodological commitments became harder to associate cleanly with ideological and social positions.

These may simply have been parallel developments – methodological maturity and political disengagement. But eclecticism also contributed to disengagement. To the extent methodological commitments could still be easily associated with ideological positions or social interests, post-war eclecticism blurred the picture. After the war, moreover, 'anti-formalism' no longer seemed the natural methodological vocabulary of the left alone. With eclecticism came an attenuation of the associations between methodological commitments and ideological positions or social interests. This attenuation compounded the distance post-war eclectics felt from political engagement and seems to have strengthened their determination not to launch polemics for projects of law reform. Or, perhaps more accurately, attenuation sapped something of their confidence as participants in law-reform polemics. For pre-war comparatists, methodological commitments – to various strands of anti-formalism – had provided not only the language, but also the authority, for political engagement. Once anti-formalism ceased to provide stable political guidance, and comparatists ceased to feel stable in their anti-formal commitments, they felt incapacitated from overt political engagement.

To reframe the work of contemporary comparatists in political terms does not mean resurrecting a reliable drive-shaft between method and

politics, although if it could be done it might be welcome. The challenge is to render the projects and commitments of methodological eclecticism visible and contestable, disputing the intuitively appealing idea that avoiding methodological dogmatism avoids or neutralizes political effects. My proposal is that doing so may embolden comparatists to pursue political projects even in the absence of clear methodological guidance – harnessing their mature eclectic pragmatism to political objectives which can be embraced or contested. But doing this requires a sharper sense for what it means to say that a professional discipline 'participates in governance' or 'has a politics'.

The politics of contemporary comparative law

The apparent un-politics of today's global regime results in large part from the fact that those who govern are not the people we normally think of as global governors – they are rarely politicians and only very rarely work for foreign ministries or international governmental agencies. Nor are they shadowy 'capitalists' plotting behind closed doors. The international world is largely governed by professional people exercising their expertise: by lawyers and economists, by political scientists and policy professionals, by engineers and business managers.

The most important impediment to appreciating the governing role of experts managing the background norms and institutions of global society is the widespread sense that their work is simply not political or contestable because they *are* experts, managers, pragmatic problem-solvers, technical people. The norms and institutions they manage lie in the background, their professional work involves advising, implementing or interpreting rather than deciding, their decisions seem compelled by their expertise, their expertise rarely takes the form we think of as the terms of political debate. Their vocabularies do not seem like the vocabularies of power – they seem like vocabularies of advice, implementation, technique, know-how.

To contest the politics of expert governance requires that we both identify the decisions these experts make and then associate them with the ideological positions and social interests we usually imagine when we think of contesting something 'politically'. Contesting professional choices requires translation – from the key of knowledge to the key of power, from the vocabulary of expertise to the vocabularies of ideology and interest. A discipline like comparative law participates in global governance when people

practising the discipline do things – decide things, place some and not other knowledge in play, argue in one way and not in another – which have consequences that can be associated either with the ideological positions in the broader society through which political debate happens or with social interests which we understand to be in political contestation. This process of translation can be relatively easy or more difficult.

When comparative work is put to use by non-comparatists in their more overtly political projects, it is usually rather easy to associate it with the ideological positions or social interests implicated in those projects. Once comparatists identify two types of legal regime – say regimes of 'status' and of 'contract' – we might well predict that someone else will make it their project to move from one to the other. If such a move can plausibly be thought to benefit 'the left' or 'the right', we can contest the comparatist's contribution in these terms. Should comparative analysis reveal that the global hegemon has a different rule about a problem than whatever prevails locally, someone else – a hegemonic investor, a local politician, a business or labour group – will likely make adoption of the hegemonic approach their own political objective. It may be easy to see this new rule as benefiting one social interest over another and to contest it in those terms.

Associating the *uses* made of comparative work with ideology or interest can often be done even where the work itself is insistently neutral or agnostic. Indeed, claims to neutrality may simply enhance the effectiveness of the work and strengthen its association with politically contestable positions. If the European Union seeks to harmonize European private law and funds an inquiry into the existence of a common core of private law, it may not matter if the project discovers a core or not – if not, the work strengthens the impetus to legislate. Either way, the project's self-conscious agnosticism about the desirability of uniform rules strengthens its authority and its contribution to the Union's political project.

Once we depart from the use or application of comparative law, it becomes more difficult to translate it into politically contestable terms. In the most compelling case, we would identify *effects* of the comparative work and associate those effects with ideology or interest. The whole point of a knowledge project like comparative law is to affect what people know. If knowing *this* rather than *that* will strengthen one ideological position, legitimate or channel elite action to strengthen one social interest, we can contest the comparative work as an act of governance. It is easy to imagine comparative work having an effect on those who consume it, changing

their ideas about law and the world in some way which could affect what they do.

Sometimes, these effects arise because experts are pursuing a political agenda, either within the discretionary space offered by their professional vocabulary or by subverting its terms. In these cases, we could say the discipline has been *captured* by ideology or interest. Professionals may proclaim their ideological commitment and interest or they may keep them to themselves. In the easiest case, the expert says 'I do this for labour' and his action does help labour. Somewhat harder is the case where the expert says 'I do this for labour' and the decision misfires or has unexpected effects which hurt labour, or the expert was mistaken or dissembling about his intention. These cases will benefit from sociological attention to the effects, rather than the intention or expressed justification for professional judgement. They encourage us to take professional expressions of interest with a grain of salt. But government by expert makes these easy cases rare indeed. The vocabularies experts use to make and justify decisions are rarely vocabularies of interest or ideology.

Experts generally say something more like 'I do this as an exercise of professional judgement.' In these cases, we can simply ignore what the expert said and focus on the effects of their decisions. If we focus on effects and patterns emerge favourable to one or another interest or ideology, and we do not think the discipline has been 'captured', we will be inclined to think the effects result from the materials and methods of the discipline itself – perhaps from its default practices and background assumptions, perhaps from some bias in the vocabulary of professional judgement. The expert may not have been aware of the effects of his decision, much less of their association with ideology or interest. We might say that the discipline has a *bias* or *blindspot* which affects – even swamps – the discretion of professionals working in it.

We can also try to translate the *professional vocabularies* experts use to make decisions directly into the political vocabularies of ideology and interest. Sometimes, expert vocabularies give us clues to the ideological impact of their work, even where they eschew saying directly 'I do this for labour.' The vocabulary experts use for discussing their background assumptions and default practices – the vocabulary of method – may give us clues to the political biases of everyday professional practices. Sometimes, these methodological commitments offer quite reliable predictors for the political valence and impact of expert decision – think of 'strict interpretation' in debates about US constitutional interpretation. More often, however, it is difficult to associate methodological commitments with ideology or interest without investigating the impact of decisions in concrete cases. And, of course, not everything experts do by default will have given rise to overt methodological discussion. Sometimes, there are background assumptions shared across methodological lines of which professionals may be only partly conscious. Nevertheless, when assumptions and defaults are brought to the attention of the professional as methodological commitments, they sometimes can be associated with ideology or interest in ways which will make them seem political.

This can sometimes be done without reference to outcomes or effects. Imagine an expert saying 'I do this applying the blue method', a method widely associated with the interests of labour but which it is impossible to demonstrate will generate decisions favouring labour in any determinate way. Imagine this particular 'blue-method' decision has consequences which are themselves difficult to associate with labour or that it has no identifiable consequences. There may even be cases 'applying the blue method' which were deeply harmful to labour and this might be such a case. It might nevertheless turn out that saying 'I do this applying the blue method' strengthens the position of labour-friendly rhetoric among elites or allows labour-friendly experts to identify and ally with one another, strengthening their position for *other* projects. Where this happens, we can associate the expression of methodological commitment with an ideology or interest even if the comparative work done using this method has no significant effects favouring that ideological position or interest.

Identifying the political stakes in expert work is most difficult where the expert says, in effect, 'I am not doing anything and I am not applying any method, but I thought you would like to know about this.' This posture makes it more difficult to identify the choices experts make – choices to make *this* known rather than *that* – and removes any clue in the expert's vocabulary to the ideological or interest impact of the decision. It makes it difficult to see the methodological expression as making an independent contribution to the rhetorical power of one or another ideology or interest among elites. Professionals who are proud of their neutral disengagement will often criticize one another's work for ideological or other bias. They work hard to pull one another back from application and use – to cleanse one another's projects of any clue to an association with interest or ideology. Their disengagement from ideology and interest is self-enforcing. This is

the posture exemplified by the post-war comparatist, making it particularly difficult to locate a contestable politics or participation in governance.

In this sense, it has become far more difficult to identify the politics of comparative law since the Second World War. Before the war, comparatists associated their own work with ideological positions, social interests and governance choices in ways which seemed plausible and which provided the basis for their participation in large-scale efforts of legal and political reform. Others pursuing related reform projects could recognize these comparatists as allies because they spoke a methodological language which translated easily into political terms. Pre-war comparatists pursued a wide range of projects in the broad methodological vocabulary of anti-formalism which were easy to associate with ideology and interest. They used the anti-formal vocabulary to express rebellion against what they saw as the mainstream of their profession and to express solidarity with broad reform efforts to make law more responsive to political reality, more attuned to social needs and interests, more modern, international and uniform. Sometimes, they expressed more specific political projects and affiliations – assist German commercial interests, defend US legal tradition against realist scepticism, transform the law in the French colonial sphere of influence.

The pre-war anti-formalist tradition had lots of pieces which had not yet been systematized into a series of choices to be made or avoided. And the vocabulary seemed compatible with – seemed even to express – a range of quite different political initiatives. We would need more sociological work to determine whether their ideas about the politics of comparative law were realistic. Did comparative work focusing on the needs of commerce actually benefit German commercial interests? Would comparative attention to legal ideals really strengthen the US democratic order in a time of crisis? Would replacement of legal forms by the voice of customary law provide the basis for more harmonious international life or advance the interests of social forces, labour and so forth? But comparatists were both confident that their anti-formalism would contribute to these political projects and willing to say so. After the war, the situation became far more complex. The anti-formal tradition had become mainstream and many of its internal ambivalences and ambiguities had been systematized as loosely homologous choices. Seen with post-war hindsight, pre-war anti-formalism seemed far more uniform politically – if diverse methodologically – than it had seemed to those who inhabited it. Post-war comparatists, having become eclectic and agnostic, also inhabited a vocabulary which supported a fluid range of

political associations – but these associations had become far less easy to identify or contest.

Although post-war legal professionals in many other legal disciplines are more comfortable making 'policy' or contributing to 'governance' than comparatists, they share comparativism's eclecticism about method and historical relationship to the tradition of anti-formalism. The argumentative choices which structure analysis of similarities and differences among legal regimes have much in common with the routine arguments of many allied fields.[102] Although the comparatist's political disengagement is rather extreme, a sensibility which allies methodological pluralism and modesty about governance or detachment from ideological debates is quite common elsewhere. Understanding how to translate the work of post-war comparatists into a politically contestable vocabulary is suggestive for thinking about the politics of other legal fields which share this methodological history and broad sensibility.

My colleague Duncan Kennedy is developing a hypothesis about the history of legal method and doctrine over the last century and a half which might provide a basis for translating professional performances into more overt projects, contestable in ideological or interest terms. He identifies three quite different projects of legal 'globalization' within the lifetime of comparative law – 'classical legal thought' from 1850 to 1900, 'social legal thought' from 1900 to 1950 and 'policy/rights consciousness' from 1950 to 2000. Each period was characterized by an enormous collective effort to develop and spread a specific way of doing law and politics which combined ideas about law, priorities for legal and political work, methodological commitments for lawyers and legal scholars.[103] Moreover, each period saw the primary influence of a national legal system, German to French to US, and focused attention on a set of political priorities and concerns, from laissez-faire individualism through various social-welfare projects to global commerce, development and human rights.

[102] My own work on public international law and international economic law turned up a strikingly similar set of argumentative choices with a similar history and sensibility. See David Kennedy, *supra*, note 18; *id.*, 'The International Style in Postwar Law and Policy', [1994] Utah L.R. 7.

[103] See Duncan Kennedy, 'Receiving the Three Globalizations: Classical Legal Thought, Social Legal Thought and Contemporary Rights/Policies Legal Consciousness' (2001), on file with the author. See also *id.*, 'The Rise and Fall of Classical Legal Thought' (1975), on file with the author; *id.*, 'Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850–1940', (1980) 3 Research L. & Society 3.

Comparative legal work has played a range of supporting roles in broad global endeavours of this kind – sorting targets of opportunity, conveying knowledge about the project from the centre to the periphery, legitimating its ideas about law, politics and the world. It is now clear that inter-war comparatists played a significant role in spreading anti-formal and socially orientated ideas about law. A great deal of excellent work has already been done tracing the involvement of comparatists in these projects of the global legal intelligentsia.[104] It is reasonable to imagine that their post-war successors participated in the development and spread of more eclectic, agnostic and pragmatic ideas about law and politics. But these post-war knowledge-projects are more difficult to translate into the languages

A quick general example will illustrate the potential – but also the difficulties – of identifying the politically contestable effects of background assumptions and defaults in post-war comparative work. In multijurisdictional big-firm practice, people often compare laws with a motive. Lawyers might compare insurance laws in twenty-five European countries to figure out where to base a new venture offering, say, direct-mail cross-border insurance services. (I once did such a study.) Unlike an academic comparative study of the same regimes, a study generated in law practice will focus on differences in the distributional consequences of various regimes – which ones are good for insurers, reinsurers, consumers, business clients and so forth. By contrast, academic comparatists talk about [illegible]

Much will depend on time and place. More overt attention to the distributional consequences of legal regimes by comparatists might make it easier for left-wing regulators to generate redistributional proposals – but this effect might be swamped by the knowledge now also in the hands of their opponents or by the delegitimation effected by attention to distribution on the status of the field as a whole. And so on. The work of translating knowledge projects into politically contestable terms will need to be done in very specific contextual terms.[106] It is often tempting to forgo inquiry into the context-specific effects of a discipline's default practices or background assumptions and rely instead on the associations people in the field themselves make between their broad methodological commitments and ideological positions or social interests. Although eclectic agnosticism will make this difficult, it may still be possible from time to time. But it can be very misleading.

Inattention to distribution could be either an overt methodological commitment or something which somehow just keeps happening, the result of a blindspot in the dim reaches of professional consciousness, of character, of sensibility or professional training. Either way, once contested, the decision to background distribution would be brought forward to methodological consciousness. Now imagine that a 'distributionist' school emerges. Proponents of the school might defend distributionalism in political terms – perhaps as a progressive strategy to make left-wing legislative experiments more likely or to reset the field's centrist balance by removing an anti-progressive bias. But they could also do so in apolitical terms – as a scientific desire to 'tell the whole story'. And the mainstream, now conscious of its inattention to distribution, might defend it as scientific neutrality. But they might also do so as centrist politics – or even as a bulwark against

[106] For example, see Esquirol's investigation of the role played by comparatists in a variety of particular legal elites in Latin America in the second half of the twentieth century, *supra*, note 104. Esquirol contends that Latin American comparatists throughout the post-war period propounded an understanding of Latin American law as essentially 'European' and equated this cultural affinity with a relatively formal, and often quite specific, conception of law. In his analysis, this attitude about the 'nature' of the local legal system came to be shared more widely among legal elites and had a series of identifiable political consequences. As he sees it, this conception strengthened the hands of those within particular elites who, at various times, sought to blunt North American inspired reforms, at first coming from the left and then from the right. At other times, it helped consolidate the hold of a nineteenth-century 'liberal' political elite in its resistance to locally inspired populist legislative and democratic reforms, keeping the same elite from feeling implicated in the public-law transformations wrought during periods of dictatorship and so on.

leftist efforts to make rent-seeking too prevalent in transnational regulatory projects. In reading this exchange, we might well be struck by the apolitical commitment of *both* sides. Or we might find the difference expressed in sharply ideological terms. Either way, we should be sceptical. The association of oneself or one's opponent with an ideological position can represent a professional commitment *and/or* itself be a political strategy.

The associations post-war eclectics make between their routine practices and social interests or ideological positions are particularly likely to be misleading because post-war comparatists use methodological debates to signal political preferences to one another in ways which are cut off from any sense about consequences. It is as if, in taking their vows of disengagement, they also preserved a kind of shadow vocabulary for discussing their personal political preferences with one another. This signalling vocabulary is largely built from fragments of earlier methodological debates and is based on a memory that anti-formalism before the war had been associated with the left. As we have seen, this memory is inaccurate – anti-formalism was associated with a range of political initiatives. Nevertheless, the idea of pre-war left-wing anti-formalism survives as a kind of genetic political tag on the expression of methodological choices on the anti-formal *end* of all the choices *within* the post-war anti-formalist mainstream vocabulary. As post-war comparatists identify and analyse similarities and differences between legal regimes the choices they make seem coded more or less as in figure 11.12.

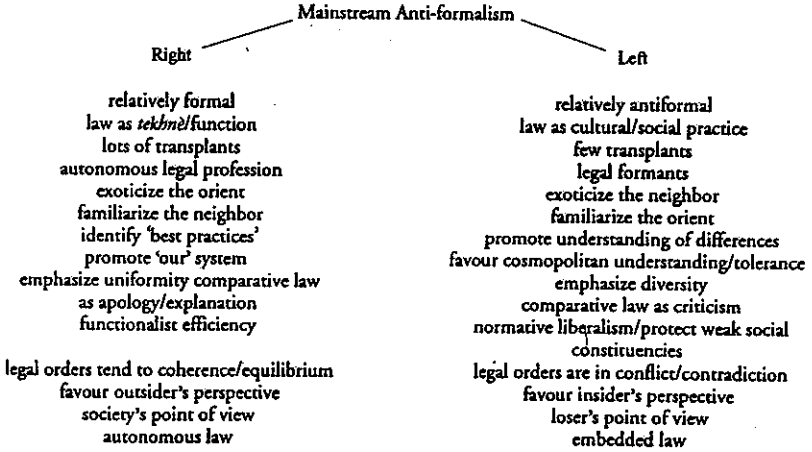

Figure 11.12

This sort of identification can be significant – if only because saying it is so can sometimes make it so. If comparatists with leftist sympathies use particular methodological arguments to recognize one another and to consolidate their positions within the field, and if the field then does become engaged in a political project, this language can become the vocabulary of their progressive gesture – even without a persuasive link between thinking about law in these terms and, say, redistributing income.

For post-war comparatists, however, these method fragments carry only a very light and tentative political charge. The new eclecticism encourages people with all sorts of different projects to pick among these methodological bits in an *ad hoc* way so that any given piece of comparative-law work will contain a range of method fragments, each of which will help neutralize the political charge of the others. It has also become easy to imagine a leftish argument in the language of universal/technical functionalism or a right-wing argument in the language of cultural identity. Moreover, agnosticism about political commitment and enthusiasm for disengagement have stilled the impulse to investigate the effects of comparative work in ways which could substantiate associations between any of these methodological choices and social interests or ideological positions.

Consequently, internal disciplinary discussions in this shadow vocabulary are far too vague and mushy to provide the basis for much common political engagement – or for reliable assessments on our part of the relations between comparative work and ideological positions or social interests. At the start of a comparative-law conference, I heard the participants getting to know one another by speaking very generally about their discipline in a way which seemed charged with political energy. But just what were these people communicating about their political character? The code has become so uncertain that I became increasingly suspect that they liked talking about their politics in terms which both announced and obscured their commitments. To give you an idea of what I mean, here is what I came up with after a couple of hours – perhaps you can rearrange these quotations more successfully:

Left:

'attention to the losers';
'everyone has a standpoint';
'we can certainly learn from the subaltern – what we learn is critique, engagement';

'we must judge and engage from where we are, comparative law is a political process';
'colonialism is a general phenomenon, but we must engage it in its particularity';
'anthropology';
'functionalism'.

Centre:

'standpoint analysis always underestimates the powers of resistance – losers are savvy';
'We can learn from other legal orders – Canada borrows from Inuit sentencing circles';
'Judgement is unavoidable, but we should focus on sensitivity and not engagement';
'When you analyse a colonial situation, the point is to generalize, of course, but it could also be valuable to know if and to what extent it was specific';
'functionalism'.

Right:

'I'd like to contrast work which focuses on description, on analysis, from that which focuses on judgement';
'the aim should be a description without an agenda';
'you can only really judge where you are from yourself – so not in comparative work';
'the story of progress to modernization remains the central story for comparative law';
'To me, colonialism is interesting as history, but otherwise only if we can generalize from it in some way';
'best practices can only be identified if we understand the efficiencies';
'there is an inner world of differences and an external world of similarities – communication and understanding are about similarities, coherences';
'functionalism'.

I am sure I got code quite off – but I bet they did too. Moreover, it seems unlikely that the consequences of adopting these methodological commitments could be associated with ideological positions with enough plausibility to provide much guidance about the discipline's participation in the work of rulership or governance. Let us take one which is rather clear: 'attention to the loser'. That does signal 'left' (maybe 'left fuzziness') in today's academy, but it does not seem at all clear that

comparative-law work which either repeated this phrase a lot or described legal phenomena with extreme sensitivity to the viewpoint of the loser could be said to participate in governance as a leftist – to be a left political act, as it were. That would totally depend on who read it and what they did with it. For all we know, it could end up identifying targets for winners.[107]

Of course, even post-war eclectics also do sometimes discuss the effect they hope their work will have in terms we should be able to associate with political interests or ideological positions. These tend to be private backroom conversations, strategic assessments which range from furtive to bumptious and from cynical to idealistic. At a recent meeting of comparatists involved in the common-core project, many were willing to speak to me between sessions in terms which contrasted sharply with the agnosticism of Bussani's description and with the eclectic restraint of the actual work they were producing. Restricted to background conversation, these political strategies remained vague and untested, their fantastic, almost magic realist tone conflicting sharply with the modest restraint of the comparative work itself.

For some, the project would spread legal anti-formalism and ideas about 'legal formants' to other areas of legal thought – on the view that this would be a more significant (maybe leftist?) political intervention than anything which might come from any increase in either harmonization or differentiation. Others thought people in those other fields, once contaminated by anti-formalist thinking, would experience a Brechtian moment of alienation from the naturalization of their own working assumptions, wake up and join the vanguard. Well, maybe. Or perhaps the project would give academics access to a process of law reform which would otherwise be handled by technocrats in Brussels, in the hopes that this would make it more... progressive or humanist or who knows. Perhaps the agnostic self-presentation will tip the balance back from a pro-unification agenda and

[107] At another point, we were discussing 'the state' and whether it was an important way of defining the 'regimes' whose legal phenomena would be compared. Someone asked what we meant by 'the state' and it immediately emerged that for some the key idea, or moment of state creation, was the consolidation of force across a territory in the criminal law, for others the consolidation of boundary control, for others the consolidation of administration, for others the consolidation of the welfare state, for others the consolidation of Keynesian monetary policy. Each of these seemed to signal a political affinity, though I must say I found this code even more obscure. An exercise to try at home: figure out which signals left, which right, which centre.

should be understood, in that sense, to be an anti-federal intervention. Or maybe the idea is to train students working on the common-core project in a mode of scholarship (attentive to all possible conflicting legal formants) which, when used by them in law firms, will have some good political effect, sharpening their critical impulses precisely by modelling how to eschew the critical. All expressed confidence that a known law would be more reasonable and democratic than an obscure and local law – that obscurantism is the totalitarian devil's plaything.

The interesting point is that these assertions and motives remain beneath the surface, hunches, private hopes – despite the fact that they would often make excellent hypotheses for comparative study. Does it turn out that obscurantism lines up with extremism and totalitarianism, clarity about rules with calm and centred democracy? It sounds possible, but we can quickly think of counter-examples, different interpretations of the relationship between democracy and the mystical, reason and fascism. The puzzle is the hesitation to speak about these possible political projects concretely enough to assess their plausibility.

To identify and assess the politics of an agnostic project like the common core, we need better hypotheses about the possible effects of this kind of work. Where these effects seem plausible and can be associated with ideological choices or social interests we might then contest them. We might develop hypotheses about individual comparative-law projects in particular contexts, about the effects of the field's routine default practices or background assumptions on the thinking of elites who consume comparative legal work and about the role of the comparative-law profession itself in the broader intellectual division of labour and the distribution of comparative legal services.

The projects of individuals and groups in the comparative discipline

Sometimes, of course, comparatists do work intended to have effects which are easy to interpret in political terms. One might compare capital punishment regimes to find out how to make one work more effectively, just as one might do so to assess their different effects on minority communities. The projects of pre-war comparatists were easier to identify and more attention to their effects would give us a better sense for their politics. Amr Shalakany's study of the work of Lambert and his Egyptian student Sanhouri seeking simultaneously to modernize, Islamicize and socialize Egyptian law

avoid charges of 'orientalism' by avoiding 'normative' interpretations of the differences between legal regimes and by describing similarities and differences in complex ways which avoid simple contrasts between east and west or north and south. But the default practices of this post-orientalist practice – distinguishing regimes in loose cultural 'families' and economic 'stages' of development – may also reinforce elite notions about natural affinities and differences in ways which affect policy-making. It is easy to imagine, for example, that elites will think differently about efforts to link Israeli and Egyptian law if they see these two regimes as 'European/late industrial capitalism' and 'Islamic-traditional/underdevelopment' rather than as two 'post-colonial/developing' legal regimes.[114] Assisted by comparative-law study, European elites understand relations among European Union Member States in terms of 'cohesion' or 'subsidiarity' and relations with central European countries in terms of 'preparing' less well developed nations to 'catch up'. Knowing this affects both the way they shape internal regulatory systems and the way they relate to the international trade system. This interpretive frame makes Greece and Denmark seem more similar than they otherwise might appear, Austria and Slovenia more different.[115]

Dividing legal regimes for comparison in this way can also make it seem evident that *the* question for 'other' societies is whether and how to modernize and westernize. 'Knowing' this may strengthen or weaken the hands of some elites – 'modernizers' perhaps – against others. Imagine a small 'transitional' central European regime when the post-orientalist comparatists come to town with the precise intention of explaining the rich diversity within the European/Modern Capitalist tradition. They come not to dominate, but to empower by pointing out the range of choices available. And they may well – but they also bring the message that there is such a thing as legal modernity. However various its forms, the modernization of legal culture in one of these ways is what it means to transit the transition. When this happens, the agnostic comparatist has participated in governance – delivered a message whose effects we can associate with ideological positions and social interests. The comparatist offers lenses through which the centre can know itself and interpret the periphery, the global can know itself by contrast to the local, and lenses through which the periphery and the local can express their identity and understand the centre. The impact

[114] See Yishai Blank, 'Legal Education and the Archeology of Israeli Law', on file with the author.

[115] For an explanation of this effect, see David Kennedy, 'Turning to Market Democracy: A Tale of Two Architectures', (1991) 32 Harv. Int. L.J. 373.

of this work might be felt in the self-confidence and strategy of both the international policy class and culturally remote elites.

The effects of shared knowledge practices: what are the legal phenomena?

As in the identification of legal regimes, both *how* legal phenomena are identified for comparison and the fact *that* they are identified at all in comparative terms may have effects. The phenomena comparatists select for comparison affect what the elite knows. If comparatists spend lots of time on financial regulations and little time studying family law, this may encourage an elite to think of financial regulations in comparative terms and family law in local terms. This may affect the choices these elites make among doctrinal alternatives in each of these fields. Knowing how foreign legal systems manage health care, not how they regulate sports, how they deal with intellectual property, but very little about what they do with real property, lots about comparative private law but very little about public law, may influence the range of regulatory options elites consider or the strength of their attachment to some, but not other, local laws. Preferences of this type are often easy to associate with ideological commitments or the interests of different social groups.

In selecting phenomena suitable for comparison, the comparatist also bears witness to the 'fact' of law's quasi-autonomy. Legal regimes are made up of rules, institutions, practices which are instances of something more general also found in other legal regimes. For eclectic comparatists, it is neither all transplants nor incomparable difference. Legal phenomena in different regimes 'are' similar enough – and different enough – to make comparison worthwhile. In some places, knowing this may strengthen elites proposing technical reform or cultural modernization. Or it may help justify distributions effected by legal rules by placing their origin somewhere outside politics and culture. Or it may make it seem more plausible for judges to fill gaps in legislation without themselves legislating. Knowing that law is quasi-autonomous may make the import of harmonized legal rules seem more palatable by making them seem the product of technical necessity, cultural influence or accidental professional borrowing rather than political contestation.

Like other legal knowledge-makers, comparatists develop and reinforce a typology of legal phenomena. As they distinguish legal phenomena for comparison, they allocate *this* to divorce, *that* to contract, *this* to dispute

resolution and so forth. When elites learn the default typologies which emerge, they will have their imagination about regulatory initiatives and reforms channelled in particular ways. Those seeking to improve the status of women may find their imagination limited to the category of law about women – especially if that category has a transcultural force. This sort of effect may occur even where the comparatist compared precisely in order to open up imagination about how a divorce regime might be structured.

The default typologies in comparative work routinely reinforce the idea that public and private law are different – essentially, technically, transculturally – in ways which are not a function of local culture, politics or legal history. Public law is hierarchical, constitutional, procedural, disciplinary, political, distributional and linked very closely with regime identity. Private law is horizontal, consensual, produced by individuals, about problem-solving and economic efficiency, relatively apolitical and only loosely linked with regime identity. These differentiations reinforce the idea that the work of governments and the work of markets are different. Markets make themselves, while governments need to be constructed. Governments originate in mystical historical moments of constitutionalization, markets emerge from numerous pragmatic decisions by individual market actors and so forth.

The default typologies comparatists use to identify legal phenomena for comparison also shape what elites think can appropriately be placed in one or another category. When comparatists work with public law, they represent it to lie closer to cultural and historical developments than private law. And they identify elements within public law for comparison in ways which highlight procedural and technical aspects of a constitutional order. It makes sense to compare a phenomenon like 'constitutional adjudication' or 'judicial review' in different national western legal systems, say, Austrian, Italian and US. The comparison might sensibly focus on the presence and powers of the constitutional court in each system. Differences which emerge might be attributed to national culture and history or we might compare them in philosophical terms – which is more Kantian, more Rawlsian, more in tune with Montesquieu.

These defaults can affect how elites think about constitutional choices. Imagine the authors of a comparative study of constitutional courts describing their work in an eastern European capital in the period of transition and constitutional reform. Our authors are eclectic, agnostic, they come not to influence, but to inform. They have been careful not to express preferences among the regimes, nor to privilege either cultural or technical modes of evaluation in their report. Like their colleagues bringing a comparison of intellectual property regimes, they will bring a message about what it means to be modern and the direction of the transition. But more concretely, they will clarify options for members of an eastern European elite. Perhaps the east European consumers of this comparative performance have long preferred John Rawls to Kant or felt more culturally attuned to Austria than Italy. Perhaps they feel priority should be given the legislature or that the regions should dominate the centre. On all these points, the study will be helpful. But let us say someone represents the farmers' party or wants to know which system will best preserve the power of the ex-*nomenklatura*, be most favourable to women or be most likely to get the country into the European Union fast. He or she will have to infer, reason back from what is manifest in the study and perhaps come to understand that this is not really an appropriate way to think about constitutional reform.[116] The comparatist's default typology for legal phenomena has reinforced the invisibility of some political considerations while foregrounding others for contestation.

The effects of shared knowledge practices: comparing phenomena across regimes

The default choices post-war comparatists make as they identify similarities and differences among legal phenomena for comparison can also have effects we might associate with ideological positions or social interests. By foregrounding the transplantation of similarities and underemphasizing the role of influence in establishing differences, comparatists reinforce the idea that differences should be thought of as aspects of tradition, culture, history. This can make local strategies of resistance and misreading seem more rooted in tradition, culture and history than efforts at assimilation.[117] Comparatists can strengthen the idea that differentiation is naturally a matter of struggle, linked to culture and history, while assimilation is a more benign process, linked to technical alignment with best practice and economic

[116] For an excellent study of the process by which the distributional allocations between men and women lost visibility in the legal reforms which accompanied the east/central European transition, see Rittich, *Recharacterizing*, *supra*, note 108.

[117] For an excellent study of the effects of misreading, see López-Medina, *supra*, note 104. See also Doris Sommer, 'Attitude, Its Rhetoric', in Marjorie Garber, Beatrice Hanssen and Rebecca L. Walkowitz (eds.), *The Turn to Ethics* (New York: Routledge, 2000), pp. 201–20.

development. All these differences can change the balance of authority or legitimacy felt by different elements in a national elite.

The distinction between cultural and technical dimensions of legal regimes which lies at the heart of the post-war comparative endeavour can also have effects. Knowing that legal regimes can be broken down in this way strengthens international legal regimes whose legitimacy is based on the claim that there *is* a relatively technical domain in which they can exercise authority without disturbing local culture. Default ideas about what counts as technical and what as cultural – treating the economy as technical, the family as cultural – can also influence the distribution of governmental regulatory attention. Associating a group or activity (women, the religious, children, the educational) with 'the cultural' changes the legitimacy of political measures which affect it. International regulators propose far more dramatic interventions to deal with balance of payments problems, environmental damage or agricultural development, than they do when they think of themselves regulating the status of women or religion – even when it can clearly be predicted that the more technical intervention will, in fact, have a more intense impact on the lives of women or on the incidence of religious belief in society.

In a more general way, moreover, the default associations of cultural and technical with irrational and rational, mystical and instrumental, local and global, social connection or meaning and economic function, all influence the relative legitimacy of elite projects. Elites might feel quite differently about regulatory initiatives were they to understand global governance as 'cultural' and local initiatives as 'technical'. The association of culture with location makes it seem less legitimate to 'intervene' in far-away places without a good reason. Knowing that a divorce regime is part of such a thing as 'Japanese legal culture' makes it seem less legitimate to argue that 'the French system is just better' and makes arguments about 'women's rights' seem automatically to be about foreign cultural intervention. We might see this as an anti-imperialist bias in comparative work, despite the apparent agnosticism about whether difference or similarity is to be desired.

Being a discipline in the intellectual class

Comparatists differ in the ambitions they have for their profession. Some urge the profession to commit itself methodologically in ways we are urged to interpret in ideological or interest terms. In this book, Upendra Baxi

urges us to adopt a stance of empathy with those who have little, who have been marginal or losers in one or another way. But simply being – and being seen to be – a profession may also have political effects, if only as the size and prestige of the profession multiplies the effects of comparative work. Moreover, the effects of comparative work will vary with the distribution of comparative capacity.

Imagine that you work for an international agency aiding countries making the transition from socialism to capitalism. The agency sponsors legal reforms which introduce at least legislative simulacra for the legal institutions of a 'market society'. Let us say you promised your board or parliament that you would produce a market in mortgage-backed securities in a given recipient country and they gave you a lot of money to do so. You spent the money moving the legislation which seemed necessary for a market in mortgage-backed securities through the local political process. Then there is a snag. In the recipient country, it turns out that the name of any person with a security interest in a mortgage, even a secondary one, must be registered, making it impossible for bonds secured by mortgages to change hands fluidly. You came up with a technical solution and sold it to the locals with an interest in getting the necessary legislation off the ground – appoint a representative of the bondholder class and register his name. Your favourite ministry supports this idea, but the ministry of justice has not certified this to be in compliance with the local law and has not yet been willing to register representative members of a class. You are not sure why – perhaps someone in the justice ministry is attached to the principle of registration, perhaps no one seriously thinks there will soon be a market in mortgage-backed bonds, perhaps this technical question has become symbolically part of other political machinations between ministries, between forces in the government favourable and hostile to 'opening' the economy.

You could apply political and economic pressure, try to influence the internal balance of power between the various ministries, hold up payment of the next aid package. And you might commission a study of how this 'problem' is handled in an array of countries which share, let us say, the 'civil-law' culture of the aid recipient but which do have secondary-mortgage bond markets. The existence of a profession which can transform this sort of political problem into a description of technical solutions to a problem common in different cultures – or different technical solutions within the same legal family – may affect the relative strength of participants in the debate, even if the report is never completed. The influence may be more

pronounced if access to comparative study is differentially distributed, more available, say, to the 'haves' than the 'have-nots'.

Moreover, like other disciplines, comparative law is a tiny life-world of its own, within which resources, honours and opportunities are distributed in various ways. The consolidation of methodologies, the availability of funding, the projects of individuals in the field – both their own will to power in the profession and their projects in the broader establishment – will affect the distribution of resources among members of the profession. This process is, if in a small world, also a project of governance, a form of politics. We can often associate gains and losses in this small world with broader ideological positions or social interests; and the politics of this small world can affect other elites. Small victories can alter the broader balance of power among forces within the larger elite.

Putting all these hypotheses together, it is striking how little we know about the politics of comparative law and how difficult it is to translate the work of eclectic post-war professionals into politically contestable terms. It is not hard to imagine that knowing one thing rather than another might affect what rulers do, but we are not accustomed to translating knowledge work into political work. Post-war comparative law has successfully insulated itself from the taint of association with the choices of political life. All we have are hypotheses, directions, hints for rendering its eclectic and agnostic surface in the politically contestable terms of ideological commitment and social interest. By following these leads, we might nurture the habit of reading professional judgements as political acts. Imagine each comparative-law project coming with an ideological and interest 'impact statement', articulating the effects that knowing this, rather than something else, might have on the distribution of ideas and things in the world. Become a habit, this heuristic might heighten the comparatist's experience of himself as a ruler. Whether they seemed compelled by expertise or open to eclectic discretion, the quotidian choices professionals make would routinely be understood to have politically contestable consequences and to be part of the fabric of global governance.

And why, might you ask, should we do this? Surely there is also a politics to making known the politics of the profession – to translating our knowledge vocabularies into vocabularies of political contestation. Post-war comparative law is animated by a powerful urge to know. Bussani, speaking of the European common-core project, puts it this way:

> It is true that through the use of the comparative method many common features that remained obscure in traditional legal analysis will be unearthed. This is because the instruments and techniques provide more accurate and correct analysis, not that they force convergence where it does not exist. Of course, from better knowledge may follow more integration, and therefore, the common core research may also be considered as pushing indirectly towards more uniformity and less diversity. This objection, however, should not impress us. Change following knowledge is a phenomenon that can be avoided only through obscurantism.[118]

But this urge falls still at the threshold of political life. And the discipline obscures its political effects. I do not know what changes will come as the politics of the profession become known. I have an intuition that the profession does more to sustain than remedy the world's *status quo* injustice, that expression will bring contestation and contestation change. But it is only an intuition. I am wary of a disciplinary power whose politics can barely be glimpsed through the hedges of its agnostic and eclectic professionalism. And I worry about an urge to knowledge which averts its eyes just as it would enter the terrain of contestation. But I am sure I also sometimes share with the post-war comparatist the perfectly human wish to enjoy the Dionysian pleasures of acting precisely when we know not what we do.

[118] Bussani, *supra*, note 2, p. 796.