THE IMPACT OF MIXED JURISDICTIONS ON LEGAL EDUCATION AND THE VALUE OF THEIR SCHOLARSHIP & LAW *

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Introduction

A mixed jurisdiction provides the student, teacher, and scholar with a natural and formidable foundation to learn and analyze law. Louisiana allows scholars and students a unique prism through which to envision law, legal thinking, and analysis. Louisiana is a natural creator of comparativists and international lawyers. Louisiana also provides the thinker a unique foundation upon which to ponder more exotic subjects, including law and philosophy, geography and law ; language and law ; religion and law. Students are provided the opportunity to study the basics of both the Romanist and the common law traditions. I will focus on those aspects of Louisiana's mixed jurisdiction that have provided insight to me for my favorite subjects. This paper is a rumination on how and why this alchemy occurs, on how and why it works. It considers reasons why it may work best in Louisiana or other mixed jurisdictions. It is also a rumination on how best to do one's own reading, research, writing, class preparation, and class presentation in a mixed jurisdiction and on how we, as scholars from Louisiana, may be of value to and an influence on others in both common law and "civilian" systems.

Although it is only Louisiana's *Civil Law* that is *Romanist*. Teaching civil law subjects and working in an ambiance of Louisiana's mixed jurisdiction inspires not only "pure civilians" or those who work in pure "civil law" subjects, they inspire anyone who deigns to delve into the ambiance. I am enthralled by my "Code courses", such as family law or "civil law system", but also take inspiration for my work basic substantive criminal law and criminal justice, not to mention

comparative and international law. This is not surprising for public international law, which of course, is based on a *Romano-Germanic* model, buffeted by a long-term influence of common law thinking. Actually, come to think of it, international law is a conceptual "mixed-jurisdiction". One who understands both the common law and Romano-Germanic models is better able to understand the methods, analytical approaches, sources, and problems of international law. This is also true for international criminal law and goes without saying for comparative law of any sort. Thus, everything I teach or write about is influenced and improved by my privilege of working in Louisiana. Every day of teaching and writing piques my interest in and understanding of the purpose and possibilities of comparative law. Each day becomes a rumination on comparative law.

This paper presents a few thoughts about these things and about why legal education in Louisiana is so interesting and valuable. I argue that teaching and studying law in Louisiana is superior to that in a unitary system of any focus. Everyone perceives law, its strengths and weakness, through his or her own prism tinted by culture and formal training. The works of good comparativists give us a chance to see law, through a wider angle lense, but still, culture and language tint or fog even the good comparativist's fine prism (1). As Anglo-Americans read good works from a continental, Latin American, or other legal cultures, the reading, if dutifully engaged, is automatically an exercise in comparative law. The obverse is true, of course, for comparative study by those of the *Romano-Germanic* tradition. Comparison, provides us with a better understanding of our own system, as well as an understanding of the foreign system that one is comparing. One beauty of a mixed-jurisdiction is that, for those who are dutiful, such comparison is part and parcel of the extant legal culture. Comparison happens naturally. Comparison is better in Louisiana. The good scholar from a mixed jurisdiction has a better chance to penetrate the fog or refine the tint to make it better to highlight differences and similarities. Working in Louisiana provides a prism with multiple colors and tints.

(1) *Eg. in* Bernhard Grossfeld, *The Strength and Weakness of Comparative Law* (Tony Weir Trans. 1990), one sees comparative law through the prism of a formal German and Pandectist tradition. The German and the French Civil Codes provide the world with the two great civilian codal systems. Nations around the world have essentially adopted and adapted either the French or the German paradigm. Christian Wolff (1679-1754) was the founder of the German Pandectist School, which was fruitful especially during the nineteenth century. It, like the French tradition, began with the premise that territorial and political unity required a comprehensive, accessible, systematic and coherent body of law. The Pandectists esteemed mathematical precision in legal inquiry. Herman & Hoskins, *Perspectives on Code Structure : Historical Experience Modern Formats, and Policy Considerations*, 54 Tul. L. Rev. 987, 1019 (1980). Wolff's approach excluded al inductive and empirical elements through deduction, without gaps, of all natural law rules from axioms, down to the smallest details ; every particular rule is derived from the previous more general one, and so on, in the strictest logical sequence. Structure and analysis requires the exactness of geometrical proof, which is achieved by a logical chain of reasoning by exclusion of the opposite. Thus, a closed system is produced, whose validity is based in its freedom from logical contradiction of all its assertions. This tradition was expanded and developed over the years to its culmination as a movement in 1862 in the work of Windscheid. Herman & Hoskins, *Perspectives in Code Structure*, *supra* this note, at 1019, *quoting*, F. Wieacker. *Privatrechtsgeschichte der Neuzeit* 193, *cited and translated in* Dawson. *The Oracles of the law* 237 (1973) ; *see also*, S. Symeonides, *An Introduction to the Louisiana Civil Law System* 50-52 (5th ed. 1989). Professor Grossfeld, to be sure, is no *mere* Pandectist. He is also a scholar who has had extensive training and experience in the Anglo-American schools. He has spent several months in Cambridge, England as Visiting Fellow at Wolfson College. He spent more time as visiting professor at Southern Methodist University. He has used English and American scholars as sounding boards for his thoughts and perceptions. Thus, Professor Grossfeld aims his book at the German legal community, to provide it with some understanding of the importance of comparative law in practice and scholarship. This he does very well. The way he does it provides the American reader with insight into how a sophisticated German comparativist perceives and analyzes law and legal problems.

Why Comparative Law is Good and Why it is Better in a Mixed-Jurisdiction

Thus, comparative law and comparative analysis are natural elements of studying and teaching in a mixed jurisdiction. Comparison is not an intrusion of the mere exotic ; but deep study of basic, natural, and rigorous classic elements of both systems. Furthermore, comparative legal study and scholarship in Louisiana runs deeper than mere comparison. Just as comparative law is much more than "matching laws" (2), studying, teaching, or writing in Louisiana awakens us to the value, indeed the necessity, of considering more than one spirit of analysis or mode of solving similar legal problems. Comparative law and comparative insights are always valuable tools for clear understanding of one's own legal system. Reading the work of good comparativists and students interacting with good comparativists or good "civilians" in class allows an important alchemy to develop. Again, this alchemy occurs naturally for the good teachers, scholars, readers, and students.

Study in Louisiana is Practical

Skeptics in other disciplines, or in practice, like many unitary system chauvinists (whether of the common law or "civilian" bent), sometimes suggest that the study of comparative law or foreign legal systems as arcane, exotic, or perhaps even useless fluff, too luxurious for the hard working "practical" jurist (3). Some even claim, in their ignorance, that there really is no difference (apparently because all legal systems have similar legal problems to face and solve). These sceptics should dive into the waters of a mixed jurisdiction. Although the lazy person would like it otherwise, a mere sprinkling is not enough ; true immersion is required. If they do immerse themselves, they will feel the freshness and the cleansing effect of a clear, new perspective on the very practical problems on which they work. We can provide the cold water of realization. This essay is an attempt to provide a bit of that treatment ; an invitation to take a dip in our blue bayou. Once immersed, the sincere skeptic may begin to see the value of comparative approaches and theory. The value of considering the laws and analytical style of a mixed or foreign jurisdiction, may ring true. Even the skeptic may begin to grasp the practicality and value it provides for solving actual daily legal problems of interpretation, argumentation, and drafting, that face jurists in all legal systems. To become more incisive and innovative is as practical as it gets.

Pedagogy in a Mixed-Jurisdiction

Anyone who attended law school in a non-Louisiana U.S. law school knows the frequently stated epithet that Louisiana and Louisiana law are exotic, to put it kindly. You will recall the comment : "[t]he law is [...], *except in Louisiana, where it is* [#!-+ %%$ *]". The only thing about Louisiana that many people, even law school faculty, know, is that the law (and maybe everything) down here is "different". No doubt, Louisiana and Louisiana Law are exotic and unique in the U.S.. Sometimes, however, the use of that term is a bit pejorative and based on ignorance and superficiality. Differences exist, but that is good. Louisiana is the only

(2) Grossfeld, at 73.

(3) As those who have lived in Louisiana know very well, the water of a swamp may appear to the uninitiated to be murky and foul, but in truth, they are pristine and clear.

state of the Union that has a *Civil Code of the European style* (4). Because of the *Civil Code,* and because we also have a common law foundation in other legal arenas, we are able to teach students all *of the basics* of both. We teach them how to resolve legal problems as would common law, as well as European or Latin American jurists. They are able to understand how their colleagues from both of these systems think about the law and solve legal problems. The study of law in Louisiana is unique, perhaps exotic in a wonderful way, much like our fine cuisine, music and art.

Thus, the "*Civilian" or Civil Code System* provides us with a wonderful legal history, as well as the wherewithal to educate our students both in the common law and the civilian traditions. We have the best of both worlds, both substantively and pedagogically. We are able to prompt deep analysis of our coherent, systematic, and complete Civil Code *and* classic Socratic style case analysis and synthesis in the common law tradition. This double benefit is not available in law schools in unitary systems like other states in the United States or in nations of the *Romano-Germanic* tradition. The benefit has some costs, of course : our students are required to take more hours than in other law schools so that we can properly incorporate both systems. They take all of the "common law" courses required in sister state schools, as well as the basic "civil law" courses required in Europe or Latin America (obligations, family law, torts, civil law property, civil law system or the science of the civil law).

A brief discussion of some courses might be of interest. Torts is interesting and different from some of the other subjects, as it has been buffeted quite vigorously by common law solutions, approach, and analysis. There are very few Civil Code articles on torts, so the "general principles" controlling the arena are broad enough to allow some interesting admixture. Family law is also interesting. The Code has some very strong and interesting principles relating to the family arising out of Louisiana's French and Spanish heritage (5). The family law parts of the Code present a coherent system of laws that promote the sanctity of the family, the protection of children, the fair allocation of family property, and, of course, all of this in the context of marriage, nullity, divorce, and other difficulties that face the family and family law everywhere. U.S. constitutional law, of course, including equal protection, procedural and substantive due process impact family law and the Civil Code, which make its study even more fascinating. The "civilian," constitutional, common-law, public and private intermixture necessary for a comprehensive study of family law is wonderful. The alchemy is magical and most helpful in solving family law problems facing scholars, judges, and practitioners in unitary common law or "civilian" systems (6). They should take heed ; we should let them know of the benefits.

Our students are better common law lawyers for having had civilian methodology and they are better "civilians" for having had the common law. Having inculcated both "civilian" and "common law" systems of thought and analysis, our

(4) Puerto-Rico, of course, is not a state, but has a true Civil Code, as well.

(5) *Eg.*, Christopher L. Blakesley, *The Putative Marriage Doctrine,* 60 Tulane L. Rev. 1 (1985) (showing how several states in the U.S. have adopted versions of this venerable "civilian" palliative. I recall an article written in an important U.S. law review from a common law state, in which the author claimed to have come up with an important innovation. The author suggested that it would be a very good idea if ascendants and descendants had a support obligation. Duh ! The writer and the editors were blissfully ignorant of Louisiana Civil Code article 299.

(6) For a taste of this, *see. e.g.*, Christopher L. Blakesley, *Comparativist Ruminations from the Bayou on Child Custody Jurisdiction : The UCCJA, the PKPA, and the Hague Convention on Child Abduction,* 58 La. L. Rev. 449 (1988) ; Blakesley, *Scientific Testing and Proof of Paternity : Some Controversy and Key issues for Family, Law Counsel,* 57 La. L. Rev. 379 (1997).

students may become, not only good case analysts and synthesizers, but also better conceptual thinkers, statutory analysts, drafters, and interpreters than their common law counterparts. Thus, they have gained a unique perspective from which to solve legal problems in either system. I have already mentioned how they are better internationalists and better comparativists than those from any unitary system. Good students from Louisiana become naturals at negotiating and resolving problems relating to international contracts, interpreting treaties or other international instruments, and litigating international law cases.

From the Practical to the Metaphysical

Understanding several approaches to resolving legal problems is a practical capacity, for any lawyer or thinker, whether from an Anglo-American, continental, Latin American or other legal culture ? A mixed jurisdiction provides this capacity and understanding. This is quite helpful for comparative law scholars. Its value, however, is not limited to comparativists. Practitioners, judges, and others in different, unified systems benefit when they take the opportunity. For example, if a lawyer, judge, scholar, or legislator faces foreign or international law problems from time to time (and most do), ideas from mixed jurisdictions is invaluable. Even if ones focus is fully "domestic," it is self-deception to think that a comparative perspective is not helpful. Legislators, for instance, who fail to realize this may promulgate significantly inferior legislation. Judges render inferior decisions. Although wholesale or simplistic borrowing is wrong and actually proves often to be harmful, careful comparative study, especially comparison of how a mixed jurisdiction solves similar problems is most helpful (7). Works from a mixed jurisdiction, therefore, naturally provide the reader, not only with insight into the discipline of comparative law, but also into how other scholars, judges, legislators and practitioners perceive, read, and interpret the law. One is able to see how one's foreign counterparts litigate, negotiate, adjudicate, draft legislation and how they envision the legal system and problem solving from their different perspective. This is most practical and stimulating. It is available naturally to those who care to take advantage of a mixed jurisdiction.

The metaphysical Lightness of Being in a Mixed Jurisdiction

When one considers the impact of religion, language, art, and culture, on the law, one senses its metaphysical qualities. For a scholar this may be quite important, and it comes through more clearly in a mixed-jurisdiction. Penetrating the values underlying a mixed jurisdiction may provide new perspective on problems of a philosophical, even metaphysical nature. Study in a mixed jurisdiction allows different visions on what is law, what is learning, teaching, thinking, or being. These may seem like useless abstraction to the self-absorbed or chauvinistic reader,

(7) *See, e.g., discussion of this in fn. 5. supra* and Christopher L. Blakesley, *The Evisceration of Human Rights in the War on Drugs : Differing Notions of Crime & Individual Autonomy,* Speech at N.Y.U. Symposium (1997) (lengthy article on the subject submitted) ; Blakesley, *The Role & Impact of Constitutionalism, Constitutional Courts, & Supreme Courts on the Evolution & Development of Criminal Justice Systems : From Diversitity, to Rapprochement Chapter in Book by Press France,* Blakesley, *Inquisitoire - Accusatoire : un écroulement des dogmes en procédure pénale ?,* Speech, le 10 juin 1997, at Aix-en-Provence, France. *See also,* Christopher L. Blakesley. Terrorism, Drugs, International Law & The Protection of Human Liberty (1991) ; Blakesley & Curtis, *Criminal Procedure,* Chapter in Introduction to the Law of the United States (Kluwer 1991) ; Blakesley & Curtis, *Le Développement du Droit Pénal aux Etats-Unis* (1991). Sadly, systems both on the Continent and the US seem to be adopting parts of each other's systems, but based on caricature, not sophisticated reality.

but thoughts prompted by good work from foreign or mixed jurisdictions may provide keen new insight into how to approach law, legislation, jurisprudence, doctrine, philosophy and life.

Law as Language & the Creation of "Bilinguals"

Law is a form of language. Language and law are both creative forces. Language study relates to the study of law (8). Language study is a metaphor for the best in legal study. No doubt, language gives form to our thoughts and perceptions. Learning a foreign language gives one a new personality: a new dimension to thought and perception. It is through language, our own and any others that we take the time and effort to learn, that we become what we are. Thus, if law is language, in this sense, studying law from within more than one system or from within a mixed one, creates a "bilingual".

Dr. Grossfeld quotes Kipling's aphorism that language is the "mightiest drug" of humankind and notes that this drug has legal side effects (9). Works like the Bible, the Odyssey, Wagner's music, Goethe's Faust, and the beliefs of the Bambara of West Africa make a similar point (10). In all of these works, creation, even of ourselves, occurs *with the "word"* (11). Yes, language gives our perceptions form. Learning a new language gives us a new personality.

I recall my own first linguistic and cultural metamorphosis, which occurred while spending three years living on my own in France beginning at age 19 (12). When I arrived, I did not speak a word of French. I decided to study hard every morning and to memorize phrases to use during the day. I also challenged myself not to think idly in English, but to force my mind continually to work on phrases in French. I forced myself to speak only French. This immersion allowed me to *become* rather quickly a person who spoke French. Soon, I was dreaming in French. I remember distinctly the feeling of astonishment that I once was unable to understand that language ; once learned, it seemed so natural and so much a part of me. By immersing myself in the language and using it all day every day, I *became* a different person from the one I was before.

Grossfeld also discusses Wittgenstein's aphorism that "the limits of language (*the* language I understand) mean the limits of my world" (13). To me, this makes perfect sense. "[W]hen we learn another language we unconsciously adopt its speakers' world of thought : "[L]anguage thinks in us"" (14). Referring to language's capacity to shape a people's cultural history, the poet Schiller wrote : "[a] developed language that composes and thinks for you" (15). Language is certainly a world

(8) Grossfeld, Strength & Weakness, *supra* note 1. at Ch. 13. Grossfeld's discussion of language and the law inspired this section and, in keeping with the title of his book, exhibited both some of the strengths and the weaknesses of comparative law.
(9) Grossfeld, at 86.
(10)Discussed in Grossfelt, at 88-91.
(11) *Id.* This is simply the theory that "[i]t is through the "word" that things obtain their existence". That is, things do not exist until a name is bestowed upon them. *Id.* In addition, most of these works were derived by "comparative" work and are comparative works.
(12) My experience in France was wonderfully cross-cultural immersion in the various French cultures and *patois*. I lived in Southern France for 3 years. I also lived for 10 months among the various Maghrebians in *"Le Panier"*, a rough and tumble section of Marseille, and on stilts over a garbage dump with the Gypsies (*mes amis des Gitanes*) near Arles. Please. Bury Me Standing. I honor them all !
(13) Grossfeld, at 92, quoting Wittgenstein, Tractatus Logico-Philosophicus 62 (1933).
(14) Grossfeld, Strength & Weakness, *supra* at 96 ; *quoting* Wezel, *Sprache und Geist* iv (1935 ; Holldack, *Grenzen der Erkenntnis auslandischen Rechts* 82 ff. (1919).
(15) Grossfeld, at 96, (quoting Johann Christoph Friedrich von Schiller, *Dilettant* in *Tabulae Votivae*, I *Werke* 319 (1952).

picture, given form (16). Similarly, "[m]an has as many hearts as he has languages" (17). I felt these things in France and felt them again in Louisiana.

Preparing this paper brought this wonder back to me. Learning to become a lawyer is analogous to becoming fluent in a foreign language - to becoming part of another culture. It is a matter of becoming. One becomes a French speaking person ; one becomes a person who can solve legal problems (who can "think like a lawyer"). There is no shortcut. Becomming a cross-cultural, bi-lingual attorney or scholar is better than being limited to one perspective. A diligent student in a mixed jurisdiction like Louisiana becomes "bi-lingual" in this sense. Learning is an ongoing process, not an event. Some seem to believe that becoming a lawyer or a scholar is like being "born again", but it is not (18). Daily experience in Louisiana (if one takes advantage of it) gives access to a rich and varied culture and legal universe.

Louisiana & A Few Manifestations of Law as Language and Process

Working in a mixed jurisdiction, like Louisiana, reminds us daily of aspects of law as language and process. This is evident each day along with the need to take ones study to the range of broad diversity and to the various legal languages. It also reminds us that this is not possible unless we master the basics of each separate culture or system. Too many pretend to be comparativists, mouthing platitudinous statements about "comparative law", but their work is so often only a characiture of real law. More on the dangers of this shortly.

The linguist and radical philosopher, Naom Chomsky, poses serious questions about the nature of langage, which are applicable to law or systems of legal thought. He theorizes that people are born with a deep linguistic structure, a "*proto-human-grammar*" embedded into them, from which all human grammar's flow (19). Perhaps, there is also some deeply embedded "*proto-human legal grammar*" in each of us (20). Chomsky means that all languages (and all humans) are related in this way. Similarly, perhaps all legal systems are related. As we study different languages and different legal systems, we see that there is a basic similarity (21). Goethe wrote about : "[T]he law innate in us". He said :

> Laws are transmitted, like some dread disease,
> Father to son, and spread from place to place.
> Reason turns to folly, boon becomes a bane
> To later generations. Yet the law
> Innate in us is meanwhile quite ignored (22).

Is this good or is it bad ? Is it both good and bad ? Probably. Whether it is good, bad, or both, it is clear that we may risk making it bad when we allow ourselves to be limited by our own personal "national" language or legal system.

(16) Grossfeld, at 92, referring to Gottfried Benn, *Worte* : "Alone : really alone - just you and words".
(17) J. Burckhardt. *Uber das Studium der Geschichte* 276 (e. Ganz, Munich 1982) ; *cited*, Grossfeld, at 95-96. Also, didn't Victor Hugo say that a person has as many personalities as he or she has languages ?
(18) Perhaps being born again is that, as well. A fine book on this sort of becoming is, Mortimer Adler's, How to speak : How to listen.
(19) Naom Chomsky, Language and Mind 76 (9d ed. 1979). *See also*, discussion in Grossfeld, Strength & Weakness, at 103.
(20) Grossfeld, Strength & Weakness, at 103-105.
(21) Some simpletons suggest that this means that there are no differences.
(22) Goethe, Faust, Part One The Student Scene. *Sée Grossfeld's discussion of this* in Strength & Weakness, at 44, 104. Grossfeld asks us to compare this with Thomas Jefferson's view that "[t]here should be a revolution every twenty years". *Citing* Gary Wilis, *Inventing America*, *Jefferson 's Declaration of Independence* 124 (1978).

Perhaps the law "innate" in us is similar in all legal systems. We are often manipulated into perverting common aspects this by a propagandistic appropriation of law and language (23). More on the dangers of this momentarily. We make our basic inborn "grammar" work for good, when we find its lofty common elements. The differences among us, then become different ways to implement the lofty and good. Comparison helps us to sort through these differences and to find the similarities. The danger is that sometimes we allow linguistic, legal, cultural chauvinists or propagandists to control or manipulate us - thus to appropriate our language and law. Our conscious and subconscious mind carries various perspectives, attitudes, biases, and understandings (24) - and a common "grammar". To find a way to see commonalities and differences is healthy. Studying in Louisiana helps one grasp both the good and the bad in ourselves and in each other. I believe that I am more sensitive to these points, for having spent so much time in foreign cultures, and for having had the privilege of working and teaching in Louisiana's mixed system.

Yes, law is language, the "constitutive and cognitive power of [which] is especially significant for law, for only in language do the concepts of positive law have any being at all" (25). Different languages and different legal systems represent different "world-views" (26). This has obvious practical and theoretical import. Take, for example, the term *VERDICT* in its Latin derivative, where it means telling the truth : "*verum dicere*". Comparing the philology and focus of the continental, formerly inquisitorial, systems of criminal justice with that in the Anglo-American adversarial systems is eye-opening and fascinating in this regard. I have discussed elsewhere the implications of evolution in these two systems or paradigms, which today seem to be converging, either legitimately or illegitimately (27). The goal of a continental criminal investigation and trial, for example, was [and still is] to "find the objective truth" (28). Anciently and in mediaeval times, this principle was so important that formulary tortures were promulgated to be applied to "find the truth" (29).

(23) For more on this, *see* below, and *Christopher L. Blakesley, The Modern Blood-Feud*, Ch. 1. in Terrorism, Drugs, International Law, *supra*.
(24) "*See, e.g.*, Sigmund Freud, Civilization and Its Discontents (Strachey trans., College ed. 1961). For an interesting fictional study of this, *see*, Irvin D. Yalom, When Nietzsche Wept : A Study of Obsession (1992). For an horrifically poignant and wonderfully thoughtful book on the evil side, *see* Primo Levi, The Drowned and the Saved (1988).
(25) Grossfeld at 92.
(26) Grossfeld. at 96.
(27) Christopher L. Blakesley, *The Evisceration of Human Rights in the War on Drugs : Differing Notions of Crime & Individuel Autonomy*, Speech at N.Y.U. Symposium (1997) (lengthy article on the subject submitted) : Blakesley, *The Role & Impact of constitutionalism, Constitutional Courts, & Supreme Courts on the Evolution & Development of Criminel Justice Systems From Diversity to Rapprochement Chapter In Book by Eres Press, France*), Blakesley, *Inquisitoire - Accusatoire : un écroulement des dogmes en Procédure pénale ?* Speech, le 10 juin 1997, at Aix-en-Provence, France. *See also* Christopher L. Blakesley, Terrorism, Drugs, Internvaitonal Law & The Protection of Human Liberty (1991) ; Blakesley & Curtis, *Criminal Procedure*, Chapter in Introduction to the Law of the United States (Kluwer 1991) ; Blakesley & Curtis, *Le Développement du Droit Pénal aux Etats-Unis* (1991). Sadly, systems both on the Continent and the US seem to be adopting parts of each other's systems, but based on caricature, not sophisticated reality.
(28) Blakesley, *Evisceration of Human Rights, supra* note 27 ; Christopher L. Blakesley, Jurisdiction, Definition of Crimes, & Triggering Mechanisms, 25 Denv. J. Int'l L. & Pol. 233 and authority cited in note 1 (1997).
(29) *See, e.g., Bernardus Guidonis [1261 or '62 - 1331] (Bishop of Lodeve), Manuel de l'Inquisiteur (2 vols., reprinted by Les Belles Lettres, Paris, 1964)* ; C. Blakesley, Terrorism, Drugs, *supra* note 7, at Ch. 1.

Thus, comparative law, language, and etymology tell us a great deal of each other's legal culture and this let us understand how each other thinks. Most people take their own world-view for granted as the product of our natural sane common sense, but in reality it is provided by our mother tongue. Vox populi, vox dei (30). This feeling is usually more of a weakness than a strength. It is a weakness from which many judges, attorneys, and scholars in the United States, as well as other unitary systems, suffer. It may be overcome by comparative law. It is overcome more easily in a mixed jurisdiction.

The Impact on International and Comparative Criminal Law - Avoidance of Superficial or Erroneous Assumptions

Grossfeld's discussion of language and the value he puts on words such as verdict tell us some about his instinctive reaction to the word, based on his cultural perspective and predilection. It is an example of a comparativist comparing, but seeing a bit askew, as he looks through his own cultural and linguistic prism. Grossfeld's prism causes him to assume that the United States concept is the same, because the very same term is used. The term *verdict*, however, came to mean something totally different in the United States, although the current Supreme Court seems to be moving toward the continental model in caricature. This is where being truly "bi-lingual," and from a mixed jurisdiction would come in handy. The Bill of Rights and its evolution through some of the Warren Court jurisprudence attempted to make functional the "*don't tread on me*" vision of the proper relationship of the state and the people. This, of course, was the position articulated by revolutionaries such as Thomas Payne and Patrick Henry. The serious need for this was fortified after World War II, when judges were shocked by the depredations wrought by the totalitarian states of Europe facilitated by their criminal "justice" systems. Using criminal procedure as a mechanism to promote general human and civil rights and to prevent the arrogation of governmental power gained its most recent impetus when the judiciary viewed with horror these depredations (31). Once installed, the totalitarian regimes taught graphic lessons about the potential of using criminal law and procedure as instrumentalities for systematic destruction of values upon which free society rests (32).

Thus, criminal procedure in the U.S. is "adversarial" for important historical and political reasons. Obstacles to gathering and admitting evidence exist to prevent the state from abusing the criminal process. In this sense the obstacles are for everyone's protection, not just the defendant's. The government generally has an overwhelming advantage over an accused criminal. Barriers, therefore, were established to prevent government from having so much power to "find the truth" that it could risk an establishment of a police state (33). So, procedural protections are necessary to give the accused a fair chance, and sad experience here and abroad

(30) Grossfeld, at 97.
(31) Francis Allen, *The Judicial Quest for Penal Justice : The Warren Court and the Criminal Cases*, 1975 U.Ill.L.F.518, 521-25 (noting that "modern law of constitutional criminal procedure" began in 1932, with the decision in *Powell v. Alabama*, 287 U.S. 45 (1932), decided within a few months of Hitler's rise to power in Germany).
(32) Allen, *Judicial Quest*, *supra* note 24, at 521-25.
(33) See discussion of this in : C. Blakesley, Terrorism, Drugs, International Law, & the Protection of Human Liberty (1991) ; Blakesley & Curtis, *Criminal Procedure*, Chapter in Iintroduction of the Law of the United States (Kluwer 1991) ; Blakesley & Curtis, *Le Développem ent du Droit Pénal aux Etats-Unis*, (1991) ; Blakesley, *Finding, Harmony Amidst Disagreement Over Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law*, 24 Vand. J. Trans'l L. 1, 65-68 (1991).

has shown that the criminal process is easily abused as a primary tool for government to try unrighteously to extend its power. Herbert Packer's due process model is based on ideas of *confrontation* and *irreconcilable differences* between the individual defendant and the state prosecuting him. The obstacles and barriers in the U.S. system may or may not make prosecution more difficult, but the Founders believed that barriers were necessary to protect against governmental arrogation of so much power to itself that it endangers the rights of the people and the Republic. The Bill of Rights is a safeguard against these dangers. This set of limitations frustrates many in the public and the media because of ignorance and propaganda. What does this have to do with being and teaching in a mixed-jurisdiction ? Much.

In sum, well developed comparative analysis, enhanced by working in a mixed jurisdiction erodes the misinformation clarify why other values, *in addition to finding the truth*, are at play in U.S. criminal procedure. It can establish how simplistic adoption of foreign moels is dangerous but that sophisocated and careful comparison is valuable. In 1968, when Herbert Packer wrote his significant work on the U.S. criminal justice system, U.S. society was in turmoil due to social change and the Vietnam War. Largely in reaction to police abuses, the "Warren Court" attempted to reform the criminal justice system to promote civil liberty and to protect against abuse. The "Warren Court" tried to promote human rights values (34), and to ensure that the liberties guaranteed in the Constitution received sufficient judicial protection to be functional. In Packer's somewhat oversimplified terms, the Court attempted to move the system toward a more vigorous "adversarial" or "due process" model (35). Burdens of evidence production and proof are imposed on the prosecutor. Evidence production in the U.S. is not part of the judicial function as it is in Europe. Obstacles to evidence gathering and production were developed in the U.S. to protect against arrogation of power in the executive branch, sometimes attempted in the name of "finding the truth" (36). Purposes of the limitations on prosecutorial power include ensuring fairness in finding the truth, protecting the innocent, and preventing the creation of a police state.

Over the past few years, especially in relation to the "war on drugs", these values have been eroded. Insecurity and fear have been generated by government and the press to create a perception that crime and criminals tyrannize us all and that public order is collapsing (37). Sensationalist news media have promoted the notion that civil and human rights only cause criminals to go free (38).

The Tendency Toward Facile and Superficial Adoption of Foreign Models

The adversarial system and the U.S. Bill of Rights are venerable and valuable. Legislators and courts in the U.S. have developed a dangerous tendency. Some recent decisions by the U.S. Supreme Court have adopted, in caricature, some

(34) Sayler, et al. The Warren Court *supra.* Alschuler, *Failed Pragmatism : Reflections on the Burger Court* 100 Harv. L. Rev. 1436 (1987).
(35) Herbert Packer, The Limits of the Criminal Sanction (Stanford U. Press. 1968) ; Packer, *Two Models of the Criminal Process*, 113 U.Pa.L.Rev. 1 (1964) ; Packer, *The Courts, the Police and the Rest of Us*, 53 J.Crim.L.C.&P.S. 238 (1966). Although relied on by many scholars, some commentators have found Packer's models oversimplified, un-illuminating and misleading. Peter Arenella, *Rethinking the Functions of Criminal Procedure : The Warren and Burger Courts'Competing Ideologies*, 72 Geo. L.J. 185, 209-228 (1983) ; Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 U.Pa.L.Rev. 506 (1973) (especially pp. 575-76).
(36) *See*, Mirjan Damaska, *Evidentiary Barriers, supra.*
(37) *Id.*
(38) *See, e.g.*, Finchenauer, James O., *Public Support for the Death Penalty : Retribution as Just Deserts or Restitution as Revenge ?*" 5(1) Justice Quarterly 81, 84-90 (1987).

parts of the inquisitorial systems of the Romano-Germanic legal culture. Parts are adopted with a pretense of comparison and sophistication, but, in reality are mere caricature. In addition, these charicatures are designed to enhance the powers of the police and prosecution. Many recent U.S. decisions articulate the age-old inquisitorial aphorism that the sole purpose of the criminal trial is to find the "objective truth". The actual truth, so to speak, with the adversaval system this is one purpose among others. A dutiful scholar or jurist from Louisiana, or possibly from some other mixed jurisdiction, understands both systems, not by caricature, but in depth. He or she will not make the same mistakes or subconscious assumptions.

While the U.S. is adopting mere caricatures of parts of the inquisitorial model, European nations are doing the same with parts of the adversarial system. Adoption and adaptation are good, but only if done with care and caution. This problem is exacerbated by an appropriation of the "adoption process" by propagandists and those who would erode basic liberties. This must be avoided. It is absolutely crucial to build into any adaptation the essences and important basic features of the traditional legal culture that inform the content of any part adopted. Some of these problems and dangers arise because the adopters do not really understand the subtleties of the foreign system they are attempting to emulate. Careful jurists from mixed-jurisdictions may help avoid these dangers and assist in proper borrowing.

Care and vigilance are required. What is often occurring, however, is adoption of caricatures, rather than meaningful application of comparative learning to adopt the best possible *melange*. The adaptation process has been coopted by those who have agendas that include, intentionally or unintentionally, the erosion of civil liberty and human rights in the criminal justice arena. Working in a mixed-jurisdiction helps one see this. In the name of fighting crime, we erode our democratic institutions applying simplistic charicatures of foreign systems for this purpose (39). We continue to see reports that police regularly perjure themselves, sometimes with prosecutor and judicial acquiescence (40). The FBI has been embarrassed by revelations of widespread fabrication of evidence at their "elite" crime laboratory (41). This year Arizona, California, Kansas, Minnesota, Washington, and Wisconsin have promulgated laws calling for Orwellian like *indefinite* "civil commitment" of convicted "sexual predators" *after they have already served their penal sentence.* The state must only prove that the convict has a vaguely defined "mental abnormality" or "personality disorder", or is likely to engage in "future predatory acts of sexual violence" (42). The U.S. Supreme Court rejected a constitutional challenge to these laws (43). This is being exported purposefully by some U.S. prosecutorial agencies. The U.S. has tended to be isolationist in accepting pro-human rights initiatives and ideas, while being expansionist in exporting the opposite. We must not allow hysteria to cause us to accept denigration of the Constitution and arrogation of power by any one branch of government. Although the congressional process is sometimes cumbersome, and

(39) For a discussion of the fight against terrorism and this risk, *see,* Blakesley, Terrorism, Drugs, International Law & the Protection of Human Liberty at Chs. 1 and 2 (1992) ; Covey T. Oliver, Edwin B. Firmage, Christopher L. Blakesley, Richard F. Scott, & Sharon Williams, The International Legal System : Cases & Materials Chs. 1, 3, 11, 17, 18 (4th ed. 1995).
(40) Stuart P. Green, *The Victim's Righis Movement Reaches Middle Age : A Chronique of American Criminal Law*, 68 J. Int'l Dr. Pén. (1998).
(41) *Id.*
(42) *Cited & analyzed, Id.*, at 11.
(43) *Kansas v. Kendrick*, 117 S.Ct. (1997) ; cited, *Id.*

although the judiciary may make mistakes, they are set in the Constitution as checks and balances for our protection against autocracy. Whether combating drug traffic or terrorism is accomplished by means of extradition, by prosecution of alleged perpetrators, or by other means, we must maintain our integrity and preserve the rule of law and constitutional order. We must avoid the temptation to create executive-controlled security state through the evisceration of civil liberties in the name of combating scourges. To avoid manifest hypocrisy, the destruction of the rule of law, and the erosion of our primary democratic and constitutional values, we must be vigilant to avoid participating directly, or as aiders and abettors, in unconstitutional conduct.

Perhaps it is true that "our basic feeling for play, rhythm, and proportion" [plus even our sense of right and wrong ?]" are inborn. Perhaps they are manifest in our sense of self, our language and law (44). Law, if it is really is law and not some pathological analogue, should cause an appropriate response in our "spiritual wave-length" (45). Comparative law and comparative thinking help us address these issues in their various manifestations. No doubt, what is called law may function for good or evil. Some counterfeit "law" actually tricks people and pulls them along to evil, danger, or illegality, like music in the Pide Piper of Hamelin (46). While law "innate in us" may be good, counterfeit law is not. There are, of course, "laws" or "rules" which are bad. For example, it was "legal" under Hitler's counterfeit law to slaughter those perceived "enemies" of the Reich. "[L]anguage [and law] uses cultural sensibility we have inherited with our genes ; we obey the law from a consensual, inner impulse which we experience as moral duty, even as joy. Law resonates within us, is our own ; we now want to do what we should do because we are in harmony with it" (47). The classic example is presented by the German "laws" that allowed the Nazi depredations during World War II. "Rules" that lead or force people to do evil things are not law. They are inconsistent with our inner harmony. Although rules may be established which abuse our desire or need to conform - to be in rhythm with authority, but lead us to illegality.

Back to Law as Language and War as a Metaphor

Thomas Merton, one of our great moral thinkers and a master of language(s) used the Trojan War to illustrate war's horrible silliness. His point about war applies just as well to other subjects where morality and law are at risk : "[T]he only one, Greek or Trojan, who had any interest in Helen was Paris. No one, Greek or Trojan, was fighting for Helen, but for the "real issue" which Helen symbolized. Unfortunately, there was no real issue at all for her to symbolize. Both armies, in this war, which is the type of all wars, were fighting in a moral void, motivated by symbols without content, which in the case of the Homeric heros took the form of gods and myths" (48). This was not so bad for the Greeks, because their myths limited them. For us, our myths are absolute and bring us to total war. "[Our myths] penetrate the whole realm of political, social, and ethical thought" (49). When we go to war, we destroy our own ; we condone or promote terroristic behavior by government officials either here or abroad, "because of "secret plots" and

(44) *See*, Grossfeld, at 104.
(45) *Id.*
(46) *Id.*
(47) Grossfeld, at 104.
(48) T. Merton, *The Answer of Minerva : Pacifism and Resistance in Simone Weil,* in The Literary Essays of Thomas Merton 134 (1981).
(49) *Id.* at 137.

sinister combinations, because of political slogans elevated to the dignity of metaphysical absolutes" (50).

Merton's vision translates into one of my interests : criminal justice and the "war on drugs". Many in the popular press and culture, believe, for example, that drug traffickers (or any criminals) do not "deserve" the protection of the Constitution ; they deserve war. In the name of the war on drugs, we fail to realize that we risk destroying our own liberty, when we destroy "theirs". Our myths and reasons for using war rhetoric, war tactics and strategy have no content. "We seek to impart content to them by destroying other men... [in the war on drugs, gangs, cartels, or those in the communities most impacted by this scourge]. These men [who insist on war] believe in enemy-words, also in capital letters [and equally without content]" (51). Even national security has been raised as reason for the "war on drugs" and, as usual, this is "a chimerical state of things in which one would keep for oneself alone the power..." (52). Michael Reisman has noted that "war, instead of a periodic evanescent episode in American life, became a continuing political, psychological and financial preoccupation, with a claim to defer or depreciate in varying degree other key rights and liberties. Because foreign affairs was invading and subordinating domestic affairs, whoever called the tune in foreign affairs increasingly called it in domestic matters (53). This is also the danger of the "war on drugs". Simone Weil and Thomas Merton were not far off when they wrote : "the great beast, ... the grimmest of all the social realities of our time", is the urge to collective power (54). This lust for power is masked by symbols and fiery rhetoric (55). We allow this lust for power to be brought to bear on our own people and Constitution. Even though the goal to prevent drug trafficking, addiction, and abuse, is lofty, overreaction and ulterior purposes prevail over reaching the goal (56). Working and teaching in a mixed jurisdiction helps me to be more sensitive to the qualities of language and law as language ; it prompts sensitivity to these thoughts. The life is stimulating.

Another example of conceptual confusion and damage caused by it comes ; to mind. The confusion and damages could be avoided if jurists from a mixed jurisdiction were involved. The term to represent in English is the same in French. Yet the conceptual meaning and mental picture created by the word in the mind of an United States attorney and his or her French counterpart is different. Startlingly, my superiors in the U.S. Department of State did not seem to understand this difference, in a case in which the United States sought to extradite Willie Holder, who was charged with hijacking an American airliner (57). Under the terms of the U.S. - French Extradition Treaty, the French *Avocat Général* was charged with "representing" the U.S. before the *Cour d'Assise* in extradition hearings. In this case, the *Avocat Général* presented our evidence against Holder to the Court, but then he proceeded to recommend that Holder not be extradited ! The *Avocat Général* argued that Holders crime was one of a political character. The Extradition Treaty exempted such political offenses from extradition.

(50) Pnina Lahav, A *Barrell Without Houps : The impact of Counterterrorism on Israel's Legal Culture,* 10 Cardozo L.Rev. 529 (1988).
(51) Merlon, *supra* note 199, at 138.
(52) T. Merlon, *supra* note 175, at 139 (quoting Simone Weil).
(53) W. Michael Reisman, *War Powers : The Operational Code of Competence,* 83 AJIL 777.778 (1989) ; citing Manning, Congress, the Executive and Intermestic Affairs, 55 Foreign Aff. 306 (1977).
(54) *Id.*
(55) *Id.*
(56) *See Ecclasiestes* 1-9 (King James) (noting that anything is vanity [and evil] if abused).
(57) *In re Holder, reprinted in* 1975 Dig. U.S. Prac. Int'l L. 168-75.

The United States Government was outraged that the person "representing" the United States in France would simply present the evidence and then argue against the United States position. The American vision of "represent" conjured up the aggressive adversarial paradigm. On the other hand, the French *Avocat Général* was functioning just as he was required under the French concept of the term "*représenté*". French law requires a prosecutor to present all the papers in evidence, but also requires him to speak as his perception of justice would require : "*la plume est fix ; la parole est libre*". Thus, the *Avocat général* must present exculpatory evidence and arguments, if he feels that they are appropriate. Thus, paradoxically, both sides in this controversy were right, from the point ov view of their own frame of reference on the term "representation". Notwithstanding the use of the same term, misunderstanding arose due to different visions of criminal justice triggered by the term (58). Obviously, the practitioner needs to become familiar with the legal culture behind the legal language. Again, this comes naturally to the diligent jurist from a mixed jurisdiction.

Comparative law and our daily work in a mixed jurisdiction provoke us to consider what we are trying to teach our students in both "domestic" and "comparative" or international courses. It prompts us to consider what we want our students and readers to come to understand about law in general, about "our law," about law in other legal systems, and about how to approach legal problems. It even provokes us to gain a better perspective on the potential good and evil in ourselves and provides ideas on how to avoid the evil and do that which is good. If we do it right, our work can provoke judges, practitioners, students and scholars in other jurisdictions (both in the common law and in the *Romano-Germanic* tradition) to think about their own system in a manner different from how they have done before. It will prompt the reader to find some time to do comparative research in cases in which there is a foreign, transnational or international element.

(58) Ce sont *des faux amis* (false friends).