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## HEREIN LIES THE RUB WITH COMPARATIVE LAW RESEARCH – FROM AN AMERICAN PERSPECTIVE

### Abstract

*The legal community in the United States has good reasons to be interested in the laws of other nations, but there are real barriers to finding and understanding comparative law. This article describes important differences in how law is envisioned in the United States: the pre-eminence of the adopted Constitution as the ultimate statement of rights and government powers, the interpretive role of judges in a unique federalist system, and the importance of case law in learning and talking about the law. This article also describes overarching obstacles that interfere with finding and reading comparative law: the influence of language and culture on formulating and carrying out research enquiries, and the increasingly bewildering array of interferences in accessing law authority and scholarship even when its existence is known.*

### Keywords

*foreign law – comparative law – American law – legal research – language*

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*The life of the law has not been logic: it has been experience. ... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.*

Justice Oliver Wendell Holmes, Jr.

*To know that we know what we know, and to know that we do not know what we do not know, that is true knowledge.*

Mikołaj Kopernik

## INTRODUCTION

American law professionals have good reason to be interested in the laws of other nations. They can gain in perspective from looking beyond a nationally insular view about law and society, and the caretakers of any legal system should look to the broadest context to best understand how law can protect fundamental human rights and promote effective government. Knowledge about the law of other nations can also have practical benefits in an increasingly global political and commercial world. American law students have some opportunities for this kind of learning. They read a few English law cases in their foundational courses in contracts and property, and can take an optional international law course. They may also interact with students from other countries who are attending American law schools. Still, for a culturally diverse society, comparative law study in the United States is far more limited than in other nations that have similar political systems.

The limited exposure of most American legal professionals to the laws of other nations has several causes, some of them readily apparent. One is a practical matter: few American lawyers and courts deal with the law of other nations. Their attention naturally is focused on the unusually complex United States federalist legal system, involving interwoven federal and state statutes and a vast body of common law that is constantly evolving as a result of court decisions. Learning how to work through this web of law is challenge enough. The challenge is heightened by the reality that when the laws of other nations do seem important, there is no

easy path for comparative law research. There are real barriers to finding and understanding comparative law, more so than in nations that are members of supra-national legal systems such as the European Union.

The problems with comparative law research – from an American perspective – occur at several levels. Despite the many similarities among legal systems that aim to be based on a rule of law, there are significant differences in the way legal professionals in those systems think about law. The first three parts of this article summarize salient differences: the pre-eminence of the adopted Constitution within the United States as the ultimate statement of rights and government powers, the interpretive role of judges in the federalist system, and the importance of case law in learning and talking about the law. The next two parts of this article describe overarching obstacles that interfere with finding and reading the law: the influence of language and culture on formulating and carrying out research enquiries, and the increasingly bewildering array of interferences in accessing law authority and scholarship even when its existence is known.

## I. PRE-EMINENCE OF THE ADOPTED CONSTITUTION

Implicit in American legal culture is the notion that the US Constitution is supreme law. Citizens casually refer to having “constitutional rights” protected against infringement, which is a reference that signals an important distinction about how Americans think about the source of their rights. This notion is fundamental. The American republic was established based on the premise that the law’s legitimacy stems from the “consent of the governed”. According to philosopher John Locke, whose ideas were embraced in the Declaration of Independence, although we are born into a state of natural law and no one has inherent power over others, “every man, that hath any possessions, or enjoyment, of any part of the dominions of any government, doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of government, during such enjoyment, as anyone under it”.<sup>1</sup> According to this view of

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<sup>1</sup> J. Locke, *Second Treatise of Government*, 1690, § 119, available at: <https://www.gutenberg.org/files/7370/7370-h/7370-h.htm> [last accessed 15.7.2021].

a government's legitimacy, the people empower their representatives to make and enforce rules for the common good, which are applied to everyone. In the United States those rules have been expressed in its Constitution, as a statement of formal law to which all other formal laws are subject. This expression of consent to be governed is subject only to the people's inherent right to alter that consent through the amendment process. Article V of the US Constitution provides that amendments may be proposed by either two thirds of both houses of Congress or through a convention called by two thirds of the state legislatures, and the amendments become effective if three-fourths of the states or state conventions approve.

The American legal framework took its shape as the judicial branch reinforced the principle that the Constitution was supreme law. In what was the most important US Supreme Court case to outline the interrelationship of the branches of government, Chief Justice John Marshall wrote in the landmark opinion *Marbury v. Madison*<sup>2</sup> that the Court's role is to "say what the law is", and that "the Constitution is to be considered in court as a paramount law".<sup>3</sup> This judicial role of reviewing challenges to the acts of the other branches through the lens of the US Constitution has been accepted authority to define rights only vaguely expressed in the constitutional text, such as "due process" and "equal protection". A focus on the Constitution also has been the basis for judicial invalidation of legislative or executive acts deemed beyond powers given to those branches.

In the authors' experience, students typically have not thought through the full implications of the foundations of constitutional supremacy. They might think, for example, that there is something akin to human rights that would override what they deem to be an offensive constitutional provision. For example, when given the hypothetical of an absurdly inhumane constitutional amendment that forbids anyone from having a certain color of hair, American students who are new to studying law will say that such a law would be "unconstitutional" for some vague reason, without being able to say just why. A student more familiar with constitutional law may argue that such a law would

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<sup>2</sup> 5 U.S. (1 Cranch) 137 (1803), available at: <https://caselaw.findlaw.com/us-supreme-court/5/137.html> [last accessed 15.7.2021].

<sup>3</sup> *Ibid.*, pp. 177-78.

fail strict scrutiny under the Equal Protection Clause, which “requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination”.<sup>4</sup> But this would mean re-elevating the Supreme Court’s interpretation of a right once expressed in very general terms – the Equal Protection Clause – over a later, more specific amendment. By ordinary interpretive rules, the amendment prohibiting a hair color would be deemed an exception to the earlier Equal Protection Clause. With this fuller understanding, students can see that the self-restraint of their government and the voters’ power of constitutional amendment are what prevent absurd constitutional provisions – not any supra-constitutional legal authority that judges can invoke. While American students may share the same basic sentiment as their European peers, the foundational legal question may be very different: in the American system, there is no resort beyond the Constitution.

As Israeli law scholar Yaniv Roznai described the theory of supra-constitutional limits, “in some jurisdictions, international law may be normatively positioned even above the constitution itself”.<sup>5</sup> A Bavarian Constitutional Court expressed this theoretical possibility in judicial terms when it declared, “There are fundamental constitutional principles, which are of so elementary a nature and so much the expression of a law that precedes the constitution, that the maker of the constitution himself is bound by them. Other constitutional norms... can be void because they conflict with them”.<sup>6</sup> Or, as Roznai said, according to this view, “a constitution is valid only with regard to those sections within the integrative and positivist legal order that do not exceed the predetermined borders of ‘higher law’. In other words, the ‘higher law’, which is characterized as ‘natural law’, becomes a part of the constitution”.<sup>7</sup> These supra-constitutional limits are “unamendable”, and courts would have the power to declare such amendments

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<sup>4</sup> *Loving v. Virginia*, 388 U.S. 1, 10 (1967), available at: <https://caselaw.findlaw.com/us-supreme-court/388/1.html> [last accessed 15.7.2021].

<sup>5</sup> Y. Roznai, “The Theory and Practice of Supra-Constitutional Limits on Constitutional Amendments”, *International and Comparative Law Quarterly*, 2013, Issue 3, p. 592.

<sup>6</sup> Decision from 4 April 1950, 2 Verwaltungs-Rechtsrechnung No 65, quoted in Roznai, *supra* note 5, p. 564 (omission in Roznai).

<sup>7</sup> Roznai, *supra* note 5, p. 565.

to be void.<sup>8</sup> There is no such limit, even conceptually, in the American constitutional system.

The foundation of American law also contrasts with legal systems in which there is a supra-constitutional code, as with an international convention such as the European Convention on Human Rights.<sup>9</sup> This principle was expressed in a case about a conflict between German law and European Union law, in which the European Court of Justice stated that “the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure”.<sup>10</sup> The enforcement of supra-national law decrees still depends on the national legal system’s response to it. But as a conceptual matter, those who are learning and arguing about the law in Europe may have as a backdrop the notion of supra-national law constraints.

Although the United States has been party to international human rights instruments, the provisions of those instruments are not invoked in the interpretation of federal or state law. When ratifying international treaties, the US Senate routinely includes in its resolution a reservation that the treaty is non-self-executing within the United States, which means that it is not a basis for a private cause of action domestically unless the US Congress enacts legislation allowing it.<sup>11</sup> There is no trend in the United States toward giving more effect to international conventions. An international scholar noted, “while the United States once had a legal system that was international-law friendly, this is certainly no longer true today. In fact, the United States has moved from being a pio-

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<sup>8</sup> *Ibid.*, pp. 559, 568.

<sup>9</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocol No. 16, 2013, available at: [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) [last accessed 15.7.2021].

<sup>10</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fir Getreide und Futtermittel*, Case 11/70, Judgment of 17.12.1970, para. 3, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61970CJ0011&qid=1624972743822&from=EN> [last accessed 15.7.2021].

<sup>11</sup> D.P. Stewart, “United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations”, *DePaul Law Review*, 1993, Issue 4, p. 1202, available at: <https://via.library.depaul.edu/law-review/vol42/iss4/4> [last accessed 15.7.2021].

neer in this area to being a nation that, unlike some other Western democracies, puts increasing obstacles in the way of giving domestic effect to its international legal obligations".<sup>12</sup>

The US Supreme Court has been almost entirely unwilling to give weight to international law or the law of other nations in its interpretation of the US Constitution. On one notable issue, the justices have had incidental debate about the significance of extra-national law: whether the death penalty is a "cruel and unusual punishment" in violation of the US Constitution's Eighth Amendment. In *Roper v. Simmons*,<sup>13</sup> the Court considered whether a state could constitutionally execute a 17-year-old boy who took a woman from her home and murdered her by throwing her off a bridge. The majority of the justices said the test for what was "cruel and unusual" and therefore impermissible depends on an "evolving standard of decency", and concluded that there was a consensus that a juvenile did not have the maturity that could justify the death penalty. The majority noted, "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions".<sup>14</sup>

Although the world community may be overwhelmingly of one view about the death penalty, the Supreme Court justices were not. Three of the nine justices disagreed with the Court's majority about the constitutional issue. Justice Antonin Scalia, writing for the dissenters, said that "the basic premise of the Court's argument - that American law should conform to the laws of the rest of the world - ought to be rejected out of hand".<sup>15</sup> He described the majority's references to foreign law as momentary and of no weight. He said, "The Court should either profess its willingness to reconsider all these matters in light of the views of for-

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<sup>12</sup> T. Buergenthal, "Modern Constitutions and Human Rights Treaties", *Columbia Journal of Transnational Law*, 1998, Issues 1&2, p. 212.

<sup>13</sup> 543 U.S. 551 (2005), available at: <https://www.supremecourt.gov/opinions/boundvolumes/543bv.pdf> [last accessed 15.7.2021].

<sup>14</sup> *Ibid.*, p. 578 (citation omitted).

<sup>15</sup> *Ibid.*, p. 624 (Scalia, J., dissenting).

eigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry".<sup>16</sup>

The disinclination to rely on foreign law in part follows from the theoretical preeminence of a written constitution adopted with the consent of those governed by it. Almost a century ago, for example, law professor Joseph Ingham described the illogic of a court decision invalidating a constitutional provision. He said, "If the Supreme Court, created by, and owing its authority and existence to the Constitution, should assume the power to consider the validity or invalidity of a constitutional amendment on other than the strictly formal ground of due and proper observance of the requisites for proposal and ratification, it would be assuming the power to nullify and destroy itself, of its own force, a power which no artificial creation can conceivably possess".<sup>17</sup> As he explained, "The only tribunal which can give ear to these arguments is a constitutional convention, having due and proper authority to speak for the people, the constitution makers. 'Vox populi, vox Dei'".<sup>18</sup> From this premise follows the dominant perspective that judges do not go beyond the limits of the Constitution when declaring "what the law is".

## II. JUDICIAL INTERPRETATION IN A US CONSTITUTIONAL FRAMEWORK

The legal issues that receive the most attention in the United States naturally are the ones that are most controversial. They conspicuously include police powers, freedom of speech, freedom of religion, and abortion. The text of the US Constitution describes the rights at the center of these issues in very general terms. Those who study the meaning of this text focus their attention on how the US Supreme Court has interpret-

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<sup>16</sup> *Ibid.*, p. 627 (Scalia, J., dissenting) (emphasis in original).

<sup>17</sup> J.F. Ingham, "Unconstitutional Amendments", *Dickinson Law Review*, 1929, Issue 3, pp. 166, available at: <https://ideas.dickinsonlaw.psu.edu/cgi/viewcontent.cgi?article=1189&context=dlra> [last accessed 15.7.2021].

<sup>18</sup> *Ibid.*, p. 168.



ed it in prior decisions, and how the current Court's justices are likely to construe this precedent in modern disputes. The same is true with controversial state law issues – expectations about how they will be resolved are based on precedent and a sense of the interpretive inclinations of the judges who decide the cases.

The importance of a judge's decision-making in the American system is reflected in the considerable attention paid to judicial appointments in the United States, particularly the President's power to appoint and the Senate's prerogative to confirm new justices to the US Supreme Court pursuant to article II, section 2 of the US Constitution. Political debate and public commentary tend to expect justices to decide cases in a manner aligned with the policies that the nominating President advocates. This has not always proved to be a sound assumption.<sup>19</sup> Former President Donald Trump, who appointed three new justices against loud partisan criticism, recently said about two of them, "I am very disappointed. I fought very hard for them, but I was very disappointed with a number of their rulings".<sup>20</sup> What more closely aligns with judges' decision-making are their views about the courts' role in the uniquely federalist American constitutional system, of which there tend to be two orientations.

One view about judicial interpretation is described as "originalist" or "textualist", according to which the Constitution is interpreted as putting the power to change law in the hands of elected legislators and not judges with lifetime appointments. Originalists look to the constitutional text and adoption context to determine what general terms mean. They reject the notion that justices are better able than legislators to decide what the law should be. A thought leader with this perspective was US Supreme Court Justice Antonin Scalia, who argued that justices are not empowered to "update" the Constitution by applying their notion of current societal values – that is for the people to do through the amend-

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<sup>19</sup> C. M. Cameron, J-K Park, "How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006", *Journal of Empirical Legal Studies*, 2009, Issue 3, p. 485.

<sup>20</sup> S. McLaughlin, A. Swoyer, "Trump 'Very Disappointed' in Justices Kavanaugh, Barrett over Obamacare Ruling", *The Washington Times*, June 22, 2021, available at: <https://www.washingtontimes.com/news/2021/jun/22/donald-trump-very-disappointed-justices-kavanaugh-/> [last accessed 15.7. 2021].

ment process.<sup>21</sup> A differing perspective is that the constitutional framers intended to create a flexible instrument that would need to be applied in unforeseen circumstances. The essence of this so-called “living constitution” approach is a view that the Constitution is meant to be “elastic, expansile, and is constantly being renewed”.<sup>22</sup> Its advocates point out that the Constitution was made difficult to amend and its general terms meant to be interpreted based on later experiences. Few judges declare allegiance to an originalist or living constitution approach. Some seem to invoke variant approaches depending on the issue. But the choice of approach is reflected in many of the most notable disagreements among the justices.

An originalist constitutional interpretation turns on deference to locally elected representatives. At the federal level this involves a view that unelected judges do not reign over that democratic process. It also involves respect for the federalist system and the ability of states to choose differently unless in direct conflict with the US Constitution. Although a living constitution approach might seem to free judges to look at a modern, broader context, with which comparative law might seem to be of some use, even the most flexible living constitution approach has had a national perspective. These perspectives can be seen clearly in a landmark Supreme Court case that laid the foundation for the Court’s later expansion of implied constitutional rights, including abortion. In the 1965 case *Griswold v. Connecticut*,<sup>23</sup> the Court considered the constitutionality of a state statute forbidding anyone from giving advice about use of contraceptives. All nine justices agreed that the law was a relic and bad social policy. Two of them did not see the Court as having the constitutional authority to invalidate a law that a state had enacted and its courts had upheld. One of these justices, Hugo Black, who had been a civil rights lawyer, made his opinion clear that “the law is every bit as offensive to me as it is to my Brethren of the majority”, and agreed with his fellow dissenter that it was an “uncommonly silly law”.<sup>24</sup> But he add-

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<sup>21</sup> A. Scalia, “Originalism: The Lesser Evil”, *University of Cincinnati Law Review*, 1989, Issue 3, p. 849.

<sup>22</sup> H.L. McBain, *The Living Constitution*, 1927, p. 3.

<sup>23</sup> 381 U.S. 479 (1965), available at: <https://caselaw.findlaw.com/us-supreme-court/381/479.html> [last accessed 15.7.2021].

<sup>24</sup> *Ibid.*, p. 507 (Black, J., dissenting).

ed that the justices “are not asked in this case to say whether we think this law is unwise, or even asinine”.<sup>25</sup> He said, “The Constitution makers knew the need for change and provided for it. Amendments suggested by the people’s elected representatives can be submitted to the people or their selected agents for ratification”.<sup>26</sup>

The Court’s seven-member majority in *Griswold*, holding the Connecticut contraception law to be unconstitutional, could not agree on a specific provision in the US Constitution on which they could rely. Instead, the majority opinion concluded that the law violated a right of privacy that was a blend of other expressed rights, famously saying about precedent, “The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”.<sup>27</sup> Realizing there is danger with such an expansive declaration of Court power, the majority struggled to say on what basis new definitions of rights could be based in the future. The only articulated guidance among the majority in *Griswold* about how to do this was that the Court “must look to the ‘traditions and [collective] conscience of our people’ to determine whether a principle is ‘so rooted [there] . . . as to be ranked as fundamental’. The inquiry is whether a right involved ‘is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’”.<sup>28</sup>

The centrality of questions about the courts’ role in the constitutional system and the “conscience of our people” has persisted, including in a recent highly controversial decision involving same-sex marriage. In *Obergefell v. Hodges*,<sup>29</sup> a bare five-to-four majority of Supreme Court justices held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process and Equal Protection Clauses of the US Constitution. As the case was being considered, there was an

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<sup>25</sup> *Ibid.*, p. 527 (Stewart, J., dissenting).

<sup>26</sup> *Ibid.*, p. 522 (Black, J., dissenting).

<sup>27</sup> *Ibid.*, p. 484.

<sup>28</sup> *Ibid.*, p. 493 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 US 97, 105 (1934), and *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (alterations by the Court)).

<sup>29</sup> 576 U.S. 644 (2015), available at: <https://www.supremecourt.gov/opinions/preliminaryprint/576US2PP.pdf> [last accessed 15.7.2021].

accelerating trend in the states to allow same-sex marriages through legislative action. In some states, the legality of same-sex marriage was popular and established. Still, in other states, a social and political majority saw traditional marriage as needing to be preserved. The majority in *Obergefell* traced these changes and remaining differences and acknowledged that “the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights”.<sup>30</sup> They decided, however, that same-sex marriage prohibitions violated rights in a general sense similar to the holding in *Griswold* fifty years earlier. They said, “It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry”.<sup>31</sup> The majority said same-sex couples have a right to marriage because it is an “institution at the center of so many facets of the legal and social order” in national life.<sup>32</sup>

As in *Griswold*, none of the dissenters defended state-law restrictions as good policy. They objected to the majority’s exercise of power to override state legislatures. As Chief Justice John Roberts said, “Those who founded our country would not recognize the majority’s conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges”.<sup>33</sup> The Chief Justice asked of the Court, “Just who do we think we are?”<sup>34</sup>

When news of landmark Court decisions such as *Griswold* and *Obergefell* spread in the United States and abroad, reactions naturally focus on how the outcome aligns with an individual’s concept of a proper balance between individual rights and government restrictions. These cases illustrate that the Constitution leaves room for interpretations that seem to allow judges to take sides in a debate about social policy. What usually goes unmentioned is that the Court’s legal analysis often turns

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<sup>30</sup> *Ibid.*, p. 676.

<sup>31</sup> *Ibid.*, p. 677.

<sup>32</sup> *Ibid.*, p. 670.

<sup>33</sup> *Ibid.*, p. 709 (Roberts, C.J., dissenting).

<sup>34</sup> *Ibid.*, p. 687 (Roberts, C.J., dissenting).

on views about the judiciary's proper role in the balance of powers in the American system, a balance that is delicately balanced among three branches of government and between a constitutionally limited federal government and the states to which all other powers were reserved. In this ongoing disagreement about a proper balance, there has been no recourse to the law of other nations.

### III. DOMINANCE OF COURT DECISIONS IN THE COMMON LAW TRADITION

The United States inherited much English common law, tempered by distinctive federalism and other variations adopted in the US Constitution. In the common law tradition, courts develop legal principles when issuing decisions in the disputes that come before them. Applying the principle of *stare decisis* (Latin for "to stand by things decided"),<sup>35</sup> courts honor the precedent of prior decisions. Common law governs when necessary to decide a dispute over an issue about which the legislature has not spoken. The US Constitution and all of the nation's state constitutions give the power to "make law" only to legislatures. Accordingly, as a matter of constitutional authority, a legislature can supersede a court's common law decision. Still, some state law fields are mostly judge-made, unaddressed by the legislature, as with much of the law governing property ownership, private contracts, and recoveries for personal injuries – all of which are foundational courses in the American law school curriculum.

As the prior parts of this article describe, court decisions also are the primary authority for understanding the application of constitutional provisions and legislation. The dominance of court decisions in the common law tradition contrasts with the focus on codes in the civil law tradition that characterizes most other nations that aim to have a rule of law. Only one state in the United States, Louisiana, with uniquely close ties to French legal traditions, distinguishes itself as having features of a civil law system. As succinctly stated by William Tetley, a law professor in both Louisiana and in Montreal, Canada, both of which he calls

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<sup>35</sup> B.A. Garner (ed.), *Black's Law Dictionary*, (9th ed.), West, 2009, p. 1537.

a “mixed jurisdiction” of civil and common law, “A major difference between the civil law and common law is that priority in civil law is given to doctrine (including the codifiers’ reports) over jurisprudence, while the opposite is true in the common law”.<sup>36</sup> As he explained, “In common law jurisdictions, most rules are found in the jurisprudence and statutes complete them. In civil law jurisdictions, the important principles are stated in the code, while the statutes complete them”.<sup>37</sup> In an extensive analysis of the challenges of practicing in these jurisdictions, he notes the importance of “the *awareness* of judges, lawyers, legislators and academics of the distinctiveness of the legal traditions underlying the system”.<sup>38</sup> This distinctiveness is not always acknowledged in practice.

The manner in which law is learned shows fundamental differences between common law and civil law systems. The predominant American law school pedagogy uses, almost exclusively, the casebook method.<sup>39</sup> Course materials are collections of case excerpts, and classroom discussions are an analysis of those cases and their implications. With what is sometimes called the “Socratic Method”, law professors engage individual students in a series of questions and answers, with each question building on the previous questions and answers, in a manner understood as preparing law students for the spontaneous analytical skills encountered in practice.<sup>40</sup> As law professor Steve Sheppard described in his study of law pedagogy, “The essence of the case method, as created by its progenitor and promoters at Harvard, is to heighten student understanding of the nature of law, not just to train students in the content of the rules”.<sup>41</sup> In the authors’ experience teaching in civil law jurisdictions, students expect lecture, but some have had seminars with a different kind of case method. Rainer Grote, a German professor

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<sup>36</sup> W. Tetley, “Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)”, *Louisiana Law Review* 2000, Issue 3, p. 701, available at: <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5822&context=lalrev> [last accessed 15.7.2021].

<sup>37</sup> *Ibid.*, p. 684.

<sup>38</sup> *Ibid.*, p. 738 (emphasis in original).

<sup>39</sup> S. Sheppard, “Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall”, *Iowa Law Review*, 1997, Issue 2, p. 547.

<sup>40</sup> C. Szypszak, “Socratic Method for the Right Reasons and in the Right Way: Lessons from Teaching Legal Analysis Beyond the American Law School”, *Journal of Political Science Education*, 2015, Issue 3, p. 358.

<sup>41</sup> Sheppard, *supra* note 39, p. 593.

and international law scholar, analyzed the difference between the German approach and the case law method that is common in the United States. He summarized that the German case method “teaches the student to find the appropriate applicable law, subsume the facts of the legal problem, argue for or against subsumption by using the appropriate interpretation techniques, consider the consequences of each possible decision, consider gaps in the law, and consider whether an analogy is possible”.<sup>42</sup> As he describes this pedagogy, “The system of sources of law, which puts statutory law at the top and does not recognize judicial decisions as an independent source of law, favours a deductive approach of legal reasoning”.<sup>43</sup> He observes “that the approach to the case method is deeply rooted within the respective legal culture. As with legal institutions and principles themselves, there is no easy way of transferring methods of teaching law from one legal system to another”.<sup>44</sup>

The American law school curriculum includes study of commonly encountered statutes that are mostly uniform among the states, such as the Uniform Commercial Code and the Rules of Civil Procedure and Evidence. But as Sheppard noted, “Perhaps the oldest complaint against the case method is that it is inherently biased toward law issued from the bench, relegating the study of legislation and executive acts to the dim recesses of specialized courses and casebook footnotes”.<sup>45</sup> Additionally, in fields of practice that are heavily reliant on statutory interpretation – such as taxation, securities, banking, bankruptcy, and environmental regulation – students may become familiar with the basics of key governing statutes through an introductory course in law school, but their professional expertise will be gained in practice. Even subjects that involve statutory regimes will include study of case law that interprets those statutes and related principles. The upshot of American legal education is that students and graduates are mostly accustomed to analyzing reasoning in judges’ opinions.

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<sup>42</sup> R. Grote, “Comparative Law and Teaching Law Through the Case Method in the Civil Law Tradition – a German Perspective”, *University of Detroit Mercy Law Review*, 2005, Issue 2, p. 177.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, p. 180.

<sup>45</sup> Sheppard, *supra* note 39, pp. 621–22.

While American law students will learn about statutes, their course work will probably give little opportunity for learning methods for statutory interpretation in a more general sense. Some law schools offer a course on the subject, and a few require it. Law professor William Eskridge, a leading scholar of legislative interpretation, summarized that “most law schools still give students an overdose of common law learning and a ridiculously small amount of statutory interpretation learning”.<sup>46</sup> For American law schools that offer a course in legislation, Eskridge says, “The most popular format for an introductory legislation course is one that surveys the electoral process, the legislative process and direct democracy, statutory interpretation, and administration”.<sup>47</sup> This single offering is but a drop compared to the bucket of legislative study in a nation with a civil law tradition. The typical law course in a civil law country involves intensive study of a codebook, and the examination questions require application of the appropriate code article to a question.<sup>48</sup>

A judge’s interpretive perspective can be important even when statutes have a plain meaning. Some judges have gone so far as to see their role as allowing them to override what they consider to be obsolete statutory law when the legislature is too slow to do so. A leading figure in development of modern common law was Justice Roger Traynor of the California Supreme Court. He argued, “Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values”.<sup>49</sup> According to Justice Traynor, “No longer can we easily say, invoking the slack equations of the majority with the people and of the people with their legislatures, that courts have no active responsibility in the safeguard of those civil liberties that are the sum and substance of

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<sup>46</sup> W.N. Eskridge, “The Three Ages of Legislation Pedagogy”, *New York University Journal of Legislation and Public Policy*, 2004, Issue 1, p. 8.

<sup>47</sup> *Ibid.*, p. 7.

<sup>48</sup> Z. Gostynski, A. Garfield, “Taking the Other Road: Polish Legal Education during the Past Thirty Years”, *Temple International and Comparative Law Journal*, 1993, Issue 2, pp. 263–64, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1694200](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1694200) [last accessed 15.7.2021].

<sup>49</sup> R.J. Traynor, “Law and Social Change in a Democratic Society”, *University of Illinois Law Forum*, 1956, Issue 2, p. 232.



citizenship”.<sup>50</sup> When law students and professionals know some judges feel empowered to reformulate even code-based law when they deem it to have lost touch with “new conditions and new moral values”, they must be finely attuned to the inclinations of judges for an understanding of how all law will be interpreted and applied.

#### IV. LANGUAGE AND LEGAL CULTURE

Many American lawyers and law students are eager to learn about and practice in the field of international law. Lawyers who specialize in comparative law spend many years acclimating themselves to the civil law system that dominates in European countries and the international legal establishment. However, the realities described in the previous sections provide a stark truth: practitioners and students in the United States face a steep uphill battle with regards to fully understanding the legal environment of foreign states and how domestic law and foreign law interrelate. There are several levels to ascend in this climb.

The challenges of learning international law begin with language. The research of sociologists and anthropologists, among other social scientists, gives insight into the importance of language in communication and understanding. Language has psychological roots in that words are a way to convey thoughts, emotions, and feelings. It is equally cultural, something that societies and peer groups share when communicating simple and complex ideas and something to which outside groups are not as privy. The message is muddled to those who cannot speak or understand the language. Each nation’s or culture’s language establishes a united commonality among its citizens and residents. However, language also presents problems when individuals collaborate across borders.

Many scholars have noted the role of language as being the center of all human interaction and cognition.<sup>51</sup> For example, the research of

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<sup>50</sup> *Ibid.*, p. 241.

<sup>51</sup> V.G. Curran, “Comparative Law and Language”, in M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed., Oxford University Press, 2019, p. 681; G. Lupyan, “The Centrality of Language in Human Cognition”, *Language Learning*,

linguists, who are experts in the scholarly field about the spoken word, illuminate many communication difficulties. They study the syntactic complexity of words, the origins of particular spellings, the history of the speaker's native and studied language of study, and the ways other cultures use similar words and concepts, among other things. Both research and experience prove that earnest people commonly misunderstand terms and seemingly simple concepts because of the language barrier. Clearly, fluency is not a universal skill, and this fact is an important variable contributing to the barriers of international exchange. Those who do not regularly interact with individuals who converse in a language different from their own native language are faced with a hurdle. Colloquially, this can be referred to as a "non-starter" for sincere and deep collaboration, and such a reality is a detriment to global advances.

Americans are generally not multi-lingual, for a number of reasons including geographical relative isolation, so introductory foreign language education generally focuses on simple lingual concepts, elementary vocabulary, and conversational basics. Immersion language learning – acquiring the ability to convey simple ideas – is fairly uncommon.<sup>52</sup> By contrast, those who live in other regions may be naturally immersed in daily exposure to multiple languages. In these nations conversational ability is paramount.

Along with the difficulty in one-to-one term translation, international collaboration involves cultural norms that evade straight-forward interpretation. Dialogue involves cultural phrasing as well. Scholars have argued that translators should be focused just as much on cultural

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2016, Issue 3, p. 516; D.W. Maynard, A. Peräkylä, "Language and Social Interaction", in *Handbook of Social Psychology*, Springer, 2006, p. 233.

<sup>52</sup> American Councils for International Education, *The National K-12 Foreign Language Enrollment Survey Report*, p. 31 ("As Table 14. shows, a standard approach to foreign language teaching was the most common method across languages taught at the K-8 levels. The second-most common was exploratory, an approach that emphasizes general exposure to the language and culture which, in the 2008 CAL survey data, was also reported by elementary schools as the second most commonly-used approach. In this current survey, immersion programs were the third-most common, followed by online and hybrid models"), available at: <https://www.americancouncils.org/sites/default/files/FLE-report-June17.pdf> [last accessed 16.7.2021].

intangibles as literal word-for-word translation.<sup>53</sup> Idioms play an enormous role in the way individuals communicate with one another, but idioms present a particular issue across the borders of fluency. Linguistic expert Dmitrij Dobrovol'skij explained the complexity of idioms by delineating the various types – “full equivalents”, “partial equivalents”, “phraseological parallels”, and “non-equivalents”.<sup>54</sup> The distinctions between the types of idioms relate to the ability for speakers of different languages to comprehend an idiom because of the available equivalent in the native tongue, which Dobrovol'skij explains is rare.<sup>55</sup> Culture is the dominant variable in the value of idioms. Culture is described as “the total pattern of human behavior and its products embodied in thought, speech, action, and artifacts and dependent upon man's capacity for learning and transmitting knowledge to succeeding generations through the use of tools, language, and systems of abstract thought”.<sup>56</sup> For instance, idioms relate to ethical values and norms held by a society, including even the type of humor that the majority of individuals find amusing. Linguistic scholar Joanna Szerszunowicz wrote about a variable similar to idioms. She described a form of cultural expression known as “winged words”, which she said “is used as an umbrella term for various units, such as: catchphrases, slogans, sententious remarks quotations, etc.”<sup>57</sup> As an example she described Polish Solidarity leader Lech Wałęsa's use of such phrases and related translation efforts. She explained, “Lech Wałęsa's winged words [specifically *Nie chcę, ale muszę!* or, roughly, *I want not, but I have to!*] are well-known to Poles, but it can be assumed they are not familiar to English speakers. Therefore, translating them requires adopting a different perspective. The virtual

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<sup>53</sup> B. Temple, “Crossed Wires: Interpreters, Translators, and Bilingual Workers in Cross-Language Research”, *Qualitative Health Research*, 2002, Issue 6, p. 844.

<sup>54</sup> D. Dobrovol'skij, “Cross-Linguistic Equivalence of Idioms: Does it Really Exist?”, in A. Pamies, D. Dobrovol'skij (eds.), *Linguo-Cultural Competence and Phraseological Motivation*, Schneider Verlag Hohengehren, 2011, p. 7.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Webster's Third New International Dictionary of the English Language Unabridged*, 1993, p. 552.

<sup>57</sup> J. Szerszunowicz, “On Intracultural Winged Words and their Translation Equivalents (Based on Lech Wałęsa's Words)”, in A. Pamies, D. Dobrovol'skij (eds.), *Linguo-Cultural Competence and Phraseological Motivation*, Schneider Verlag Hohengehren, 2011, p. 381.

receiver is devoid of the cultural knowledge the native speakers of Polish have".<sup>58</sup> This important part of Poland's political and legal history is a great example of the centrality of language and culture in international relations and collaboration.

A close relative of the idiom is the "term of art," which Black's Law Dictionary defines as "a word or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts" or, "loosely, a jargonistic word or phrase".<sup>59</sup> The legal field involves many terms of art. For example, the concept of negligence in American common law is defined as including elements – the existence of a duty, a breach of that duty, the showing of causation (including but-for and proximate causation), and the availability of a remedy for the damages caused by the breach of the duty owed. In casual conversation, individuals may use the term negligent, but in the judicial system the concept encompasses the history of the courts' authority in issuing decisions. Another example is the heavy presence of Latin and Latin-used-in-English phrases to describe a legal issue. For instance, "res ipsa loquitur", which literally translates to "the thing speaks for itself", is the doctrine in tort law establishing that in some instances, "the mere fact of an accident's occurrence raises an inference of negligence that establishes a prima facie case".<sup>60</sup> This is not a concept that can be made fully understandable in just a few words.

The law itself can be argued to be the equivalent of a foreign language. Thinking and speaking like a lawyer takes years of study and practice; the language of law is not something one can casually pick-up or dabble in. As a result, individuals wishing to work within comparative law face an unavoidable uphill battle, as a personal example can illustrate. In the late 1990s, one of the authors was giving a lecture on basic mortgage financing to judges and administrative officials in Vologda, Russia. Two local English teachers with extensive experience working with American judges and lawyers were translating the lecture. Early in the lecture, a participant asked for an explanation about the meaning of the word "lien" after it was translated. Even to an American lawyer the concept of a lien is a complex one. It includes obvious

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<sup>58</sup> *Ibid*, p. 385.

<sup>59</sup> Garner, *supra* note 35, p. 1610.

<sup>60</sup> *Ibid*, p. 1424.

security agreements such as mortgages and deeds of trust, as well as government tax liens and pre-judgment liens in civil proceedings. Some interests in real property are more difficult to conceptualize as liens or not as liens, such as easement rights and condominium fees. Translation of the term to the participants wound up taking a substantial part of the allocated time for the lecture, and no one was satisfied that it became well understood. Such an experience points to the significance of translators holding a law degree or having experience with legal translation. Both authors have been in situations when translators were unfamiliar with specialized terms because they lacked a legal background, and legal professionals in the lecture audience who were particularly fluent had to step in to assist the hired translator. There is usually no guarantee in international collaboration endeavors that such highly skilled translators or participants will be available.

## V. THE MIRAGE OF AUTHORITY ACCESS

Professionals working and students studying in the comparative law field encounter problems related to language, translation, and general cultural differences that create misunderstandings and unaligned expectations. Research in comparative law is another area rife with complications, including for Americans researching into the law of European states and the European Union supra-national system. Significant differences in forms of law, primary source availability and comprehensiveness, and stylistic features cause many in the American legal field to consider comparative law often to be impenetrable.

As explained in greater detail in earlier sections of this article, American law is so established upon a common law system that it presents a challenge for domestic professionals to navigate the civil or Roman law judicial structure of other nations. The layers of each nation's civil law structure are not only difficult to grasp, but additionally frustrating to research as there are few sufficient analogues in the United States. This struggle also relates to the immediately previous discussion regarding language and vocabulary. Legal research requires intentional, systematic, and exhaustive study into the controlling and persuasive authority related to a legal dispute. American law students spend a full

academic year in required legal research and writing courses and may elect to take an advanced legal research course in their second or third years of study. Still, very few graduate with a solid understanding of how to approach foreign and European Union law. For instance, the international arena of human rights can be mystifying to dilettantes. Even the roles of the most important courts may seem confusing. Those studying and practicing law in Europe may readily know the purview of the European Court of Justice versus the European Court of Human Rights versus the International Court of Justice, but few American law professionals have that knowledge.

Different international cultural norms in judicial opinion writing also can present a barrier for American legal professionals researching international court opinions. Their law schools' focus on the case law reading method carries with it certain idiosyncrasies; the European classroom ascribes to a different pedagogy and content focus. These two styles of presentation of primary legal authority are at odds in some ways. In the United States, required casebook readings in law school provide excerpts of court opinions organized by topical chapters with added discussion questions for contemplation. In other words, American law students are accustomed to *excerpts* of cases; it is usually only in later years of study that law students read entire opinions in elective courses or extracurricular activities. By comparison, court documentation available for international study often seems voluminous.<sup>61</sup> The final reported case often includes a lengthy summary of the procedural posture and counsels' arguments at various stages of the proceeding. Unfamiliarity with so many pages dedicated to procedure and record may result in impatience or even an overlooking of the core legal issues if the international court positions such legal analysis near the end of the published opinion. The judges' writing convention may also seem very different. For instance, legal scholars have criticized the European Court of Justice for its writing style, saying that opinions are inscrutable and opinions fail to reveal the true motivations of legal decisions.<sup>62</sup> Consequently, foreign judicial opinions can seem more unwieldy and enig-

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<sup>61</sup> J.L. Dunoff, M.A. Pollack, "International Judicial Practices: Opening the 'Black Box' of International Courts", *Michigan Journal of International Law*, 2018, Issue 1, p. 76.

<sup>62</sup> L.N. Brown, T. Kennedy, *The Court of Justice of the European Communities*, 5th ed., Sweet & Maxwell, 2000, p. 55.

matic than the American court decisions with which American students and practitioners are familiar.

Law scholarship in the American common law system also tends to have a different outlook than in civil law jurisdictions. Law professor and international law scholar John Henry Merryman noted that with a civil law perspective “legal scholarship is pure and abstract, relatively unconcerned with the solution of concrete social problems or with the operation of legal institutions. The principal object of such scholarship is to build a theory or science of law”. Within a common law perspective, he observed, scholars “tend to think of the work of legal scholarship as another aspect of social engineering; it is our business as scholars to monitor the operating legal order, to criticize it, and to make recommendations for its improvement”.<sup>63</sup> These different outlooks matter in both how scholarship is generated and how it is interpreted.

Difficulties researching the law of other nations have a practical effect on resolution of disputes in the United States. Issues of foreign law arise in cases involving matters such as immigration, divorce, and international trade. Courts make rulings of American law based on the legal arguments that the parties submit as well as the court’s own confirmatory or supplementary research. The procedural rules have a special provision for foreign law: “A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence”.<sup>64</sup> Applying this rule, courts commonly put the burden on the parties to produce evidence of the foreign law, instead of doing their own research, and they rely on affidavits of foreign law experts and attached copies of codes.<sup>65</sup> According to federal circuit judge and law scholar Roger Miner, “the tendency of the federal courts is to duck and run when presented with issues of

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<sup>63</sup> J.H. Merryman, “Legal Education There and Here: A Comparison”, *Stanford Law Review*, 1975, Volume 27, p. 859.

<sup>64</sup> Federal Rule of Procedure 44.1 (2021).

<sup>65</sup> R.J. Miner, “The Reception of Foreign Law in the U.S. Federal Courts”, *American Journal of Comparative Law*, 1995, Issue 4, p. 584.

foreign law".<sup>66</sup> This entails obvious challenges for parties to find appropriate experts and pay their compensation.

Judges' reliance on foreign law experts is understandable given the resources that a court would have to invest to research primary law from other nations, particularly current statutes or cases that have not been translated into English. Putting the burden on advocates to present the law in an understandable way also is consistent with the American adversarial litigation system in which advocates are responsible for vigorously articulating and arguing their clients' cases. This may also result, however, in judges treating cases involving foreign law differently than they treat other cases. As international law professor Matthew Wilson said, judges "may fear that cases involving foreign law are extraordinarily difficult and time consuming to resolve. Based on such fear, the judges may directly or indirectly look for ways to dismiss cases involving foreign law on the grounds that the forum selected by the plaintiff is inconvenient or otherwise unsuitable".<sup>67</sup> He urged courts to "seriously consider ways of approaching foreign courts or governments for guidance on complex or ambiguous matters of foreign law", including development of cooperative agreements that would enable certification to a foreign court for a determination.<sup>68</sup> This would certainly advance accessibility to expert guidance, but there is no evidence of momentum for development of such collaboration.

Locating binding authority is paramount in both American and foreign law practice. However, American students and attorneys face obstacles with getting foreign primary in hand. For example, there are some cases that Americans tend to be naturally interested in studying, particularly developments and issues related to human and individual rights. Barriers to researching these legal happenings are threefold. First, without knowing which databases are most robust and respected, American legal professionals might resort to haphazard research approaches and general Internet queries. Second, when reviewing a results list from such searches the majority of returns will be mainstream

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<sup>66</sup> *Ibid.*, p. 581.

<sup>67</sup> M.J. Wilson, "Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding", *Wake Forest Law Review*, 2011, Issue 5, p. 887.

<sup>68</sup> *Ibid.*, p. 914.



current event materials and news sources, not primary legal materials. Even citations to primary authority are overwhelmingly missing from these results. Third, when researchers are able to identify an on-point database within which to conduct a more formal query, there is no guaranty that the results will be translated into English. It is impracticable to expect European courts and legislating bodies to immediately translate their rulings and statutes, which puts researchers back against the language barrier described in the previous section. Examples of recent international happenings to which this research dilemma applies include the French Senate's vote to ban anyone under the age of eighteen from publicly wearing a hijab,<sup>69</sup> the Polish high court's ruling allowing abortion in only very narrow circumstances,<sup>70</sup> and Hungary's new law that prohibits sharing content about homosexuality or gender reassignment to under eighteen year-olds in school sex education programmes, films, or advertisements.<sup>71</sup>

Legal research services on which most American practitioners and students rely present challenges when these individuals attempt to conduct comparative law research. A major point of emphasis in American law is ensuring that one's research is up-to-date. Lawyers are required to check all citations for new law that may have negative treatment of prior decisions, possibly overturning the decision. Lawyers are bound by rules of professional conduct to check for the authority and currency of their authority. Relating to the notion previously explained about lengthy judicial decisions with a heavy emphasis upon procedural history, American legal professionals may face difficulty with confirming currency and authority of foreign law. As a result of their training and experience, they rely heavily upon what is known as citator tools. The two dominant legal information providers are Westlaw (a Thomson Re-

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<sup>69</sup> E. Beardsley, "French Senate Voted To Ban The Hijab For Minors In A Plea By The Conservative Right", *National Public Radio*, April 8, 2021, available at: <https://www.npr.org/2021/04/08/985475584/french-senate-voted-to-ban-the-hijab-for-minors-in-a-plea-by-the-conservative-ri> [last accessed 17.7.2021].

<sup>70</sup> "Poland enforces controversial near-total abortion ban", *British Broadcasting Corporation*, January 28, 2021, available at <https://www.bbc.com/news/world-europe-55838210> [last accessed 17.7.2021].

<sup>71</sup> "Hungary's controversial anti-LGBT law goes into effect despite EU warnings", *France 24*, available at: <https://www.france24.com/en/europe/20210707-hungary-s-controversial-anti-lgbt-law-goes-into-effect-despite-eu-warnings> [last accessed 17.7.2021].

uters company) and LexisNexis, both of which offer citator functions created by hundreds of intellectual indexers. These databases are very expensive and provide nearly countless functions aimed to help legal professional understand the law and practice efficiently. Citator tools include, among many things, what are called headnotes. These annotations are brief summaries of the points of law in a case. They appear within the case and help attorneys navigate the court's discussion of the relevant legal issues. Furthermore, these headnotes are linked within a larger intellectual web of cases. Headnotes show other cases that address the same point of law and how other courts have treated the decision in their analysis. The citator tool gives an up-front indication if that particular point of law has been upheld by later courts, scrutinized with negative analysis, or overruled. Such cross-referencing in the American legal information landscape is invaluable. In fact, law libraries struggle to protect access to these expensive resources as pirating and intellectual property violations have increased drastically, especially given the surge of international students visiting from places like China. Law schools purchase accounts for law students so that students have free reign to get accustomed to the massive amounts of capabilities the databases provide. As such, law graduates are conditioned to research the law according to the affordances of the legal information tools.<sup>72</sup> To the authors' knowledge, there is no equivalent widespread citator service for foreign case law the way Westlaw and LexisNexis dominate throughout the United States. Without those search capabilities legal professionals likely struggle even to approach comparative law.

Some scholars argue that modern search tools have made foreign legal research much easier. This is no doubt true as compared to decades ago and before access to the Internet was widespread. As Professor Wilson wrote, "Many governmental and intergovernmental entities now have their own open-access websites complete with English language translations of statutes, regulations, and even court decisions. There has also been recognition and push for greater and freer access to electronic materials on foreign law".<sup>73</sup> Some free and low-cost resources exist for access to comparative law materials, but problems persist with

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<sup>72</sup> D. Dabney, "The Universe of Thinkable Thoughts: Literary Warrant and West's Key Number System", *Law Library Journal*, 2007, p. 229.

<sup>73</sup> Wilson, *supra* note 67, p. 895.

navigation and comprehensiveness. For example, WordLII is a “free independent non-profit global legal research website that provides links to online primary law materials from nearly 50 jurisdictions, including statutes, regulations, and cases”.<sup>74</sup> Other examples of resources are GlobaLex, EUR-Lex, N-Lex, and Parline. A common setback with these resources, however, is that their collections are not complete so there is no guaranty that a particular statute or case will be available. One of the authors worked as a reference librarian in a law school library and was frequently asked by law students studying international or comparative law for assistance locating a primary source of authority. Some of the accessibility issues related to unpublished European Union opinions, which in many instances the author was unable to understand why certain opinions were unpublished, yet still reported – that is, a citation to the case was apparent, but the full text was not retrievable. Users in the United States may not have access even to European free and low-cost resources, as another problem with researching across jurisdictions is the blocking of websites with certain domain suffixes. The authors have both experienced having different levels of access in the United States compared to abroad. Online searching also presents some realities in how information is retrieved, technologically-speaking. Americans searching in common search engines will have their queries processed by algorithms with English aspects, and if foreign resources are not indexed on the World Wide Web with English “tags”, the resources are unlikely to be returned high on the search results list, or perhaps not retrieved at all. So, not knowing how resources are organized in databases and “behind the scenes” affects the success of retrieval.

The largest mirage of electronic authority access may stem from the growing problem with paywalls. Libraries, even large ones, might not purchase findability tools like indices and full-text databases that include foreign content, even for comparative law scholarly articles written in English, because of the prohibitive cost. Most scholarly material is not available through open access platforms, and without an affiliation with a library that purchases academic periodicals by subscription, most legal professionals will have no hope of access. Although in-

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<sup>74</sup> UNC Kathrine R. Everett Law Library, “Conducting Legal Research in a Foreign Jurisdiction” in *Foreign and Comparative Law Research*, 2021, available at: <https://guides.lib.unc.edu/foreignlaw/primarysources> [last accessed 17.7.2021].

ter-library loan sometimes allows for students and practicing attorneys to request monographs or circulating primary materials, the service is rarely available for scholarly articles because of copyright and licensing details on behalf of the journal publisher. Even primary law may be barred from minimal scanning and sharing across jurisdictions if the code or opinion is proprietarily annotated.

One hope for an American researcher is that a nearby law school holds primary foreign law material in its collection and hard copies can be referenced. This is common in large American law school libraries, especially those in major cities like Washington, DC, and New York. However, for the majority of mid-size and small law schools, the law library will likely not hold a significant foreign and international law collection. American law school libraries are not generally obliged to acquire or maintain foreign law materials. The American Bar Association (ABA), the national association for legal professionals, sets standards for legal education, known as accreditation, which include an evaluation of a law school's overall suitability. For example, the ABA *Standards and Rules of Procedure for Approval of Law Schools* ("Standards and Rules") address qualifications of deans and administrators,<sup>75</sup> core courses and minimum required competencies, academic honesty policies, and disability accommodations, among other subjects.<sup>76</sup> The ABA Standards and Rules also address library and information resources.<sup>77</sup> Similar to the general standards for administration and staffing, law libraries must hire a director and professional library staff with adequate credentials. With respect to collections, law libraries of accredited law schools must purchase and make available all federal and state primary law, current published treaties and international agreements, and other materials appropriate to the mission of the school.<sup>78</sup> Foreign and international materials are not explicitly mentioned. Consequently, at law schools that

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<sup>75</sup> American Bar Association "Chapter 2: Organization and Administration", in *Standards and Rules of Procedure for Approval of Law Schools*, 2020-2021, p. 11, available at: [https://www.americanbar.org/groups/legal\\_education/resources/standards/](https://www.americanbar.org/groups/legal_education/resources/standards/) [last accessed 15.7.2021].

<sup>76</sup> *Ibid.*, "Chapter 3: Program of Legal Education", p. 17, "Chapter 7: Facilities, Equipment, and Technology", p. 43.

<sup>77</sup> *Ibid.*, "Chapter 6: Library and Information Resources", p. 39.

<sup>78</sup> *Ibid.*, p. 41-42.

do not prioritize international law, students, faculty members, and others using the libraries may need to invest considerable time and energy to identify and find relevant comparative law research materials.

## CONCLUSION

The problems with comparative law research from an American perspective are not going to change much any time soon. Although many legal issues are taking on an increasingly global character, there is no current movement toward internationalizing the law, at least not in the United States. There are global counter-forces with intensifying nationalistic impulses. The American influence in global commerce is also an insulating force against greater familiarity with the laws of other nations. Americans enjoy the luxury of English being a primary language in global law and commerce, a trend intensifying with use of the Internet. As a Harvard Business Review article plainly put it, “Global Business Speaks English”.<sup>79</sup> While participants in international trade sometimes need to work within other nations’ legal systems, that work largely occurs through alliances with foreign legal professionals who themselves have educations and experience with American law.

Consequently, while many Americans have sincere interest in learning about other legal cultures, for most there is little direct benefit for that effort in the way that may exist for professionals in other nations. The demand for access to legislation and case law translated into the English language is not likely to increase to the point where it makes economic sense for the issuing authorities to redirect resources to increasing its availability. Advances in translation software available to interested researchers in the future may help, but primary law authority and scholarship involve special translation challenges due to the complexity and meaningful nuances of law vocabulary and analysis. The dynamics of publishing and proprietary databases also do not bode well for much change in accessibility. While many primary sources have be-

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<sup>79</sup> T. Neeley, “Global Business Speaks English”, *Harvard Business Review*, May 2020, available at: <https://hbr.org/2012/05/global-business-speaks-english> [last accessed 15.7.2021].

come more freely available through the efforts of court administrators and others, many important sources are commonly locked behind pay walls and accessible only to the few academics and private practitioners who can justify the expense.

These realities make academic, professional, and cultural exchanges all the more important for comparative law learning. The authors hope that legal professionals will appreciate how precious such opportunities will continue to be for learning about better ways to approach common legal challenges and for broadening our perspectives through self-reflection in a global context.