

1958

Teaching of Comparative Law in the Course on Criminal Law, The

Gerhard O. W. Mueller

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Gerhard O. W. Mueller, Teaching of Comparative Law in the Course on Criminal Law, The, 49 J. Crim. L. Criminology & Police Sci. 101 (1958-1959)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

THE TEACHING OF COMPARATIVE LAW IN THE COURSE ON CRIMINAL LAW

GERHARD O. W. MUELLER

Professor Mueller, member of our Editorial Board and frequent contributor to this and other Journals, delivered the following paper at the 1957 Annual Meeting of the Association of American Law Schools, Roundtable on Comparative Law, in San Francisco. Then affiliated with West Virginia University, College of Law, Dr. Mueller is now Associate Professor of Law at New York University.—EDITOR.

INTRODUCTION

My topic is not concerned with comparative law *in* a course *vs.* comparative law *as* a course. Comparative law has its place in a modern curriculum, and what I have to say does not in any way reflect on comparative law as a curricular subject. Of course, where comparative law is presently being taught as a course itself, it may be necessary to correlate coverage so as to prevent undue overlaps if and when comparative law is introduced into various orthodox courses. But this question does not interest us here.—I have been asked to state my own opinions and to relate my own experiences. This limits the content and extent of this paper.

I

WHY INTRODUCE COMPARATIVE LAW INTO THE REGULAR COURSE ON CRIMINAL LAW?

I think there are several good reasons why the comparative method should be employed in every curricular subject, and some of these reasons may be identical for all subjects. But certainly nobody would contend that the criminal law course should be comparative for reason of immediate practical usefulness, *i.e.*, we do not expect our students to make a living by practicing comparative criminal law. Nor do I anticipate that any appreciable number of our American law students will ever have to utilize foreign criminal law in court, either here or abroad.¹

In search of some good statement of the reasons

¹ But the number of contact points is growing steadily. For recent articles in the area of expanding contacts see SCHWENK, *Comparative Study of the Law of Criminal Procedure in Nato Countries under the Nato Status of Forces Agreement*, 35 N.C.L. REV. 358 (1957); GARCIA-MORA, *Criminal Jurisdiction of a State over Fugitives brought from a foreign Country by Force or Fraud; a comparative Study*, 32 IND. L.J. 427 (1957).

for the integration of foreign law materials in the criminal law course I have come across the late Professor Dession's ideas, stated in the introduction to his case book.² Dession believed that criminal law ought to be taught comparatively for two reasons:

1. Comparative law in the criminal law course is desirable in the interest of enlightenment. General enlightenment always is desirable. Although this reason appeals more to the scholar than to the practitioner, it is of some definite importance to the practicing attorney. He is, after all, a particularly respected member of the general public. His off-the-cuff remarks on legal matters are quite influential in forming public opinions. If he is enlightened on matters of foreign law, he will be able to pass this enlightenment on to the general public. Think of the Girard case where, through gross ignorance and stupidity in Washington, D. C., and elsewhere, especially on the part of members of the legal profession, the relations between the United States and Japan became strained. The Japanese themselves finally destroyed the myth of inquisitorial Japanese criminal justice and calmed an unduly alarmed American public. If the American legal profession were properly enlightened on the principles of criminal justice abroad, no silly statements could have been made on the floor of Congress, no alarming stories could have appeared in the American press and American-Japanese relations never would have been strained.³ But general enlightenment cannot

² DESSION, *CRIMINAL LAW ADMINISTRATION AND PUBLIC ORDER* IV (1947; 1948).

³ Two recent good articles which helped to destroy the myth of inquisitorial continental criminal procedure are REED, *Aspects of French Criminal Procedure*, 17 La. L. Rev. 730 (1957); MEYER, *German Criminal Procedure: The Position of the Defendant in Court*, 41 A.B.A.J. 592 (1955).

be a major reason for teaching criminal law comparatively in the strained curriculum of today, especially due to its relative remoteness from the immediate objectives of American legal education.

2. Dession spoke of an urgency to extend the domain of public order to the international sphere. He cited the Nürnberg war crimes trials as an example. These were uppermost in his and everybody else's mind at the time (1947). Nürnberg indeed seemed to indicate what should be done with criminal law in the international sphere. But all hopes in this direction have been in vain, and all efforts, such as the U. N. project of an international criminal code, have ended in frustration, because one Nürnberg experience had been neglected or forgotten. The experience of which I speak is an event which happened in the city of Nürnberg just about 500 years prior to the war crimes trials. The Nürnberg magistrates had apprehended and summarily tried a notorious bush-whacker baron and highway robber, Epelein von Gailingen, who had long plagued the traders of Nürnberg. When they led him to the place of execution in the Nürnberg castle, Epelein managed to talk the magistrates into granting him a last request, to sit once more on horse back. No sooner was he astride when he galloped through the crowd and jumped clear across the castle wall to freedom; and from the other side he called back to the stunned magistrates and burghers: "The Nürnbergers can't hang anybody unless they have him!"—In one sentence this robber baron explained better than a scholar could have done in an entire book why criminal law ends at the castle wall. Unless, through diplomacy, we can build a castle wall which is world-wide, criminal law in the sense in which we understand it, is bound to fail on the international level. I have only slim hope that an international criminal law which is truly a law will come about in the foreseeable future.⁴ This, then, is certainly not the reason why, in my opinion, we ought to practice a little comparative law in the criminal law course.

I have, rather, a much more immediate objective in advocating a modest and discreet use of foreign law materials in the criminal law course. My principal reason is my dissatisfaction with a

⁴ For somewhat more optimistic views see J. HALL, *International Criminal Law*, in 1 AKTUELLE PROBLEME DES INTERNATIONALEN RECHTS DER SCHRIFTENREIHE DER DEUTSCHEN GRUPPE DER AAA 82 (1957); JESCHECK, *Die Entwicklung des Völkerstrafrechts nach Nürnberg*, 72 SCHW. Z. f. Str. 15 (1957).

good deal of doctrinal matter in Anglo-American criminal law, especially in the so-called general part, *i.e.*, what we refer to, technically, as the principles and doctrines of the criminal law, rather than the rules governing specific crimes.

How does the criminal law teacher usually proceed? To satisfy his own curiosity, especially in an effort to present to his students the best rationales and most enlightened views, he ordinarily surveys the available Anglo-American literature, in addition to the case law. This may explain the matter to his satisfaction, or it may not. But in any event, he can hardly say that he availed himself of the best and most considered opinions on the matter. What he has done amounts simply to a checking of what the legal minds of the smaller part of the world have thought on the point.

In science everybody realizes that it is simply foolish to attempt to discover again what somebody else has discovered already, unless, of course, the information on the first discovery is withheld. We lawyers of the common law have as little a monopoly on legal brains as our scientists have a monopoly on scientific brains. That we know now. Yet in both fields, science and law, including law teaching, we run around in circles like the horses in Jamaica or Wheeling Downs, fully equipped with blinders. All of us were probably shocked when we recently learned that some of our scientists had been working on problems of applied science, with the greatest urgency and secrecy, when in fact these problems had not only been solved behind the Iron Curtain, but had long been fully published there in scientific journals which nobody had read in this country.⁵ The same holds true for law. I would not be so bold as to contend that foreign criminal law scholars and legislators have solved all problems about which we are completely in the dark. But I certainly have found that on many questions, especially those of the general part of criminal law, our foreign colleagues are making much more sense than we do. A few examples may suffice. One is the treatment of attempts which is a subject wrought with great and unsolved difficulties in our law. A substantive discussion is outside the scope of this paper, but those interested may wish to examine Professor Ryu's article in point.⁶ I think that in this article Professor Ryu has given us a new insight into a tough problem by

⁵ N.Y. TIMES, Nov. 24, 1957, §1, p. 1, at p. 12, col. 3.

⁶ RYU, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U.L. REV. 1170 (1957).

skillfully utilizing the comparative method. Another example is the question of corporate criminal liability where our law has never done anything but muddle in the dark and where foreign law and legal experimentation sheds new light on the subject.⁷

It was particularly with respect to the *mens rea* problem that I found foreign law ideas to be helpful. I don't suppose there is any criminal law teacher who would contend either that he fully understands our Anglo-American doctrine of *mens rea* (at least I have not found a single satisfactory comment in the English language), or that he can satisfactorily explain to his students the concept of *mens rea* (which is a recurring problem in all the cases), or, indeed, that he can tell his students that Anglo-American *mens rea* is sensibly used to achieve rational, consistent and functional results. This is the kind of problem which drives me to consult the experiences of other countries. And on *mens rea* I have indeed found such foreign law study to be most rewarding. Many foreign systems, for instance, distinguish strictly between a substance of *mens rea*, denoting an ethico-legal value judgment, guilt, etc., and the form in which it may appear, intention, recklessness, criminal negligence, or whatever the terminology of form classification may be. We don't do that and get mixed up. Most all foreign systems distinguish strictly between the mental process aspect of conduct, or act, and *mens rea*. We don't do that ordinarily and again get mixed up. Look at the result achieved with either rule: There are countries in Europe where absolute criminal liability is being completely avoided because one has begun to understand the nature and purpose of *mens rea*, and it has been shown that no results detrimental to effective law enforcement have resulted from this *mens rea*-conscious law. On the contrary, all indications are to the effect that criminal law works better there than before, now that absolute criminal liability in its overt and covert forms has been abolished. We, on the other hand, permit absolute criminal liability because we have not been able to properly understand the meaning of *mens rea*. That means we practice absolute criminal liability because, for instance, we are confounding the mental process aspect of conduct, act or *actus reus*, and the guilt, or *mens rea*, with results that shock the

moral philosopher and would worry the economists, the trade associations and the consumers, if they were given the facts.⁸

My personal experience, especially with the comparative law of *mens rea*, points to two merits of the comparative method for the criminal law course:

1. Foreign law has given me a better insight into our own law and the problems it faces. This was possible because matters like the aims of criminal law or the nature and use of the concept of criminal guilt are truly cultural problems with which all humanity is concerned and which find expression in the municipal law of every country. Different treatment of these problems merely dramatizes the fact of lacking exchange of ideas. But behind outwardly differing appearances we can easily detect identical substances. Thus, an evaluation of similarities and differences leads us to a better recognition of the concepts as applied in our own law.

2. By getting acquainted with foreign ways of handling any given legal problem, e.g., the *mens rea* problem, we are enabled to engage in intelligent comparison of the foreign method with our own, with the results to be achieved by either method in mind. In other words, having found out, by comparing, what our rule of law is technically, we can then ascertain whether, with that technical concept, our system achieves results which are equally acceptable, morally, economically, etc., as the results achieved elsewhere with a technically different concept.

For my criminal law class this meant, I think, that I could give them a more intelligent and plausible explanation of our own law, e.g., on *mens rea*, and a pointer or two on what mistakes to avoid when it comes to arguing *mens rea* questions in court, or the drafting of statutes or ordinances, with which a majority of my students, by the nature of our conditions, will be concerned at some time during their careers as lawyers.

II

HOW CAN SUCH FOREIGN LAW MATERIALS BE PLACED BEFORE THE CLASS?

It would certainly be out of order to tell the class: "This is the way it has been done in West

⁸ As indicated, in this context the merits cannot be discussed in detail. I must ask for the indulgence of my readers until my study of *mens rea*, which includes Anglo-American as well as foreign law, has been fully published.

⁷ MUELLER, *Mens rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957).

Virginia and it's ridiculous, and this is the way it has been done in France, or Italy, or Germany, and it works wonders." Perhaps my own method is naive and crude, but I think it works pretty well. Let me distinguish between the two distinct merits arising from the two distinct uses to which I put comparative law materials:

1. When I consult foreign law merely for theoretical and analytical reasons, *i.e.*, to gain a better insight into the problem and its interpretation or formulation, then I see absolutely no reason for making a big issue out of the fact that I gain insight by the study of foreign law. In oral discussion I generally do disclose sources of information, *e.g.*, by pointing out that the U. S. Supreme Court has taken one position and the Model Penal Code another, and that in the particular case my own view accords more closely with the one than the other. And so when my sources are foreign, I may make a reference to the source which influenced my thinking most, though, on the whole, I refrain from giving bibliographical instructions. I think my students know that I often consult foreign law and they usually care little whether my source has been *Donnedieu de Vabres* or *Mezger* or whoever he may be.

2. But when I employ comparative law for its second merit, I may, after discussion of the case book opinions in point, direct the discussion to some seemingly hypothetical alternative ways of solving the particular problem, which is usually one with an unsatisfactory solution in our own law. We then consider the advantages and disadvantages of the alternative and, since the material for this discussion has been carefully selected in advance, come to the conclusion that the alternative is bound to achieve more acceptable results. Then I will conclude with a reference to the foreign law which has actually adopted the alternative position: "This, gentlemen, is the way the problem has been dealt with under section 124 of the Swiss Federal Penal Code of 1937,⁹ or under section 56 of the 1954 version of the German Penal Code of 1877."¹⁰ The students may take note of the reference to the English translation of the particular provision, if any. If I were to use only

meritorious examples from foreign law I would do American criminal law a disservice. Whenever I know of a pertinent provision in foreign law which is clearly bad, legally, morally or sociologically—as for instance the old analogy provisions of the 1935 version of the German Penal Code, Sec. 2,¹¹ and Section 6 of the Soviet Penal Code,¹² which no longer seems to be applied in fact,¹³—then I will also point them out, and I am usually much more blunt in my presentation. But ordinarily I make this use of the comparative method only if there is some need to counteract a tendency in our own law, or if some student raises the question.

I hope nobody will get the impression that I am turning a course on American criminal law into a comparative criminal law course. That I cannot do, even if I had the time, because primarily I have to prepare my students for a bread and butter practice. My comparative law insertions into the course are few and far between and they are restricted to issues that really matter, where I am convinced that our law is in poor shape and some foreign law has found a better solution. These restrictions narrow the scope of the comparative aspects of my course considerably.

How can I measure the success of this sparing use of the comparative method? I can answer only with hunches. Of course, I can state positively that my comparative references do not interfere with the orderly conduct and timely conclusion of the course. But I do not know whether, for instance, my students will heed my advice, arising out of comparison of law in drafting the penalty provisions of regulatory statutes, because none of them has achieved such a responsible position as yet. Only time can tell. But when I see that a matter explained after comparative study is better grasped by all than in the year before when I used American experiences only, I do feel that comparative law has done some good.

III

WHAT IS NEEDED FOR AN INTELLIGENT USE OF COMPARATIVE LAW MATERIALS IN THE CRIMINAL LAW COURSE?

I personally had the benefit of criminal law training, and I hope a good one, at various law

⁹ Act of June 28, 1935. See J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 42, n. 55 (1947).

¹² Penal Code of the Russian Socialist Federal Soviet Republic of 1926, art. 6. See MICHAEL AND WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* 1305 (1940).

¹³ See BERMAN, *Soviet Law Reform: Dateline Moscow 1957*, 66 *YALE L.J.* 1191, 1203-1204 (1957).

⁹ Swiss Federal Criminal Code of Dec. 21, 1937, approved by popular referendum on July 3, 1938, sec. 124. See FRIEDLANDER AND GOLDBERG, *THE SWISS FEDERAL CRIMINAL CODE*, (Supplement No. 1 to 30 *J. CRIM. L. & CRIM.* 1939).

¹⁰ Third Amendatory Law to the Penal Code of May 15, 1871, of August 4, 1953, sec. 56. The problem here selected for demonstration is that of result-qualified criminal liability.

schools in this country and abroad. I know that there are only three or four colleagues with similar training and specialization in American universities, all in the senior category, one of whom teaches only part time, and one is not in the continental United States. Our aggregate influence is necessarily limited, and it may be contended, moreover, that what is possible for the few of us is not at all possible for the remaining 200 American criminal law teachers. That is not so at all.

True enough, the few of us with overseas training may be in a preferred position in using the comparative method, but on a very limited and selective scale—and it is only that which I am advocating at this time—every criminal law teacher is in a position to enrich his course by comparative law. What does he need in order to do that?

1. He should have a basic understanding of codified criminal law and its workings. Our own experiences in America indicate that the gap between codified law and common law is narrowing. That helps the understanding of codified law a little, though by the nature of our so-called codes, this understanding may be quite misconceived. But certainly enough good material has been printed in our language so that anybody who can read can also find out how continental codes have been put together, and how law enforcement and adjudication in a code jurisdiction works.

2. He should have an understanding of comparative law method. Many of those who went through post-graduate training since the second World War have availed themselves of special courses in comparative law—and practically all of the national law schools have excellent courses of this nature. But here again, anybody who can read can also find out what comparative law is all about and how it should be handled.

3. He should select the topics of greatest need. That is probably the least difficulty. Everyone of us has his pet subjects on which he desires more understanding and elaboration. Apart from that, there are probably few among us who are satisfied with every principle, doctrine or rule of the common law of crimes. We should pick those in greatest need of analysis, understanding or reform, like *mens rea*, responsibility, corporate criminal liability, accessoryship, the theories of punishment, etc. Perhaps one should select only one such problem for the first year, two for the second, and so on. After all, it does take time to do research, to understand and to put into presentable form whatever aspects of foreign law one may have

decided upon for use in the regular criminal law course. And that takes us to the next problem, that of materials.

4. Of course it is best to utilize primary and/or secondary foreign authority first, the codes and interpretative cases and the treatises, and then to learn by studying reports from abroad how the particular rule of law works out in practice. That is a pretty discouraging thing to say, because it requires:

- a. some familiarity with the foreign culture;
- b. a working (reading) knowledge of the foreign language;
- c. a fairly well-stocked foreign law library.

Many of us can learn the bare essentials of (a), foreign culture, by traveling, conversation with visitors, correspondence with friends abroad and by reading good books. That is easy enough. But (b), the language difficulty, is much more serious. I take it from this year's report of the Committee on Foreign Exchange of Law Teachers that among the roughly 2,500 teachers at American law schools, both full-time and part-time, there are, surprising as it may seem, only

| | |
|----|----------------------------|
| 92 | who can lecture in French, |
| 51 | “ “ “ in German, |
| 47 | “ “ “ in Spanish, |
| 15 | “ “ “ in Italian |

and only very few who can lecture in Chinese, Danish, Dutch, Hebrew, Japanese, Lebanese, Norwegian, Portuguese, Russian and Swedish.¹⁴ But I should think that the number of those who can intelligently *read* a foreign language must be much larger. Nevertheless, a great number of our colleagues never did have the opportunity to learn a foreign language properly, and relief is not in sight for some time to come.¹⁵ Thus, a great number of colleagues is barred from the most original

¹⁴ AALS, PROGRAM AND REPORTS OF COMMITTEES 85 (1957).

¹⁵ Recently published figures on language training in the Soviet Union show that 40% of all students in secondary schools study English, 40% German and 20% other languages. 65% of all students in institutions of higher learning study English. While these quantitatively impressive figures do not tell us anything about the quality of foreign language teaching in Russia, they will nevertheless serve as a stimulus for increased language training in the United States, especially in view of the recent Soviet advances in science which are, directly or indirectly, attributable to this educational achievement. See U.S. OFFICE OF EDUCATION, DIVISION OF INTERNATIONAL EDUCATION; DEP'T OF HEALTH, EDUCATION AND WELFARE, EDUCATION IN THE U.S.S.R. 74 (INTERNATIONAL EDUCATIONAL RELATIONS BRANCH BULL. No. 14, 1957).

approach to comparative law. I shall get back to those colleagues in a moment. For the present, then, and even as to colleagues conversant with a foreign tongue, we are still left with problem (c) the need of a good comparative criminal law library. I have personally worked in but one excellent and four or five very good such libraries in this country. Certainly the University of Michigan Law Library is superbly stocked with foreign criminal law materials, including the latest treatises of all countries of the world. I understand that the Harvard Law Library is in similar condition. The Columbia and Northwestern Law Libraries are very good for our purposes. The University of Chicago Law Library was in similarly good condition last time I used it and Yale has now reached the level of its peers again. There is, of course, the well stocked Library of Congress for the District of Columbia area, and there are several major law schools with good foreign law collections, although I am not personally familiar with their acquisitions.

All that is very fine for the people who are at such schools or at least in their vicinity. What about all the rest of us, in Morgantown, W. Va., Gainesville, Fla., Fayetteville, Ark., or Lexington, Ky.? There is, of course, an inter-library loan system. I always have had very cheerful service from the Elbert H. Gary Comparative Law Library of Northwestern University in Chicago, and I am sure other libraries will respond as courteously and promptly. Thus, inter-library loan provides one possible solution. In addition, even the one-hoss townsmen converge on the large cities occasionally and can use the big library there. But, after all, one can also buy a few of the leading foreign treatises on criminal law, Jimenez de Asúa for those who read Spanish,¹⁶ Donnedieu de Vabres¹⁷ or Vidal-Magnol¹⁸ for those who read French, and Mezger,¹⁹ Welzel²⁰ or Mayer²¹ for

those who read German. Perhaps some of us may even want to own a few of these basic and reliable works personally, as I do. Next, it certainly is easy enough to obtain the foreign specialized legal periodicals: trade your own law review! I found that most foreign editors are eager to trade.²² In any event, there remains the difficulty of ascertaining which are the best and most reliable foreign works. There is, at this moment, no bibliography in the English language which tells us that much, though Dr. Szladits of Columbia University is in the process of completing a bibliography, nay, more than that, a critical survey, of foreign materials in all fields of law, for the three or four major European countries, with guidance text for American use.²³ This bibliography will be a real help. Furthermore, book reviews, especially in the *Journal of Criminal Law, Criminology and Police Science* keep the profession informed about the most important foreign works on criminal law. Lastly, I should think that any of those colleagues who profess to know a little about foreign criminal law will be glad to render advice.

It will be remembered that I am still talking for the benefit of those who read a foreign language. Those, incidentally, who do read French, or Spanish, or German have the key to practically the whole world-wide range of criminal law. The French under Donnedieu de Vabres and Marc Ancel, as well as others,²⁴ the Latin American (Spanish) under Jimenez de Asúa,²⁵ and the

²⁰ WELZEL, *DAS DEUTSCHE STRAFRECHT* (5th ed. 1956).

²¹ H. MAYER, *STRAFRECHT, ALLGEMEINER TEIL* (1953).

²² Every significant country maintains one or more criminal law periodicals. For titles and names of publishers see the reviews of foreign legal periodicals in the *JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE*.

²³ SZLADITS, *GUIDE TO THE USE OF FOREIGN LEGAL MATERIALS*, to be published by the Parker School of Foreign and Comparative Law, Columbia University. I had occasion to examine a preliminary, mimeographed, version of the chapter *Repositories of the Law, 1 French Law*, and found it to be extremely useful.

²⁴ DONNEDIEU DE VABRES, *op. cit. supra* n. 17, and other works. The extensive French literature on comparative and foreign criminal law is presently being further enriched by publication of all foreign criminal codes in French translation. See 1 ANCEL ET MARX, *LES CODES PÉNAUX EUROPÉENS 1956*, covering Germany, Austria, Belgium, Bulgaria, Denmark and the Danish Code of Crimes for Greenland. Volume 2 has been published in 1957, though it had not been received when this study was made. Publisher is the *Centre français de droit comparé*, 28 rue St-Guillaume, Paris, France.

²⁵ JIMENEZ DE ASÚA, *op. cit. supra* n. 16, and other works.

¹⁶ Professor Jimenez de Asúa, formerly of Spain and now of Argentina, has written widely on the criminal law of virtually all countries. His encyclopedic knowledge and analytical mind make all his works extremely authoritative. His *opus magnum*, *TRATADO DE DERECHO PENAL*, which draws on the penal law of the entire world, is in progress. Volume V, *EL DELITO*, 1117 pages, has appeared in Buenos Aires, 1956.

¹⁷ DONNEDIEU DE VABRES has written several works; most of them are comparative. See esp. *TARITÉ DE DROIT CRIMINEL ET DE LEGISLATION PENAL COMPARÉE* (3rd ed. 1947).

¹⁸ VIDAL ET MAGNOL, *COURS DE DROIT CRIMINEL ET DE SCIENCE PENITENTIAIRE* (9th ed. 1949, 2 vols.).

¹⁹ I MEZGER, *STRAFRECHT, ALLGEMEINER TEIL* (7th ed. 1957).

Germans under Mezger, the late Professor Schönke, Jescheck, and others,²⁶ have left no country or criminal law problem unexplored. Their efforts, especially those of the Germans, are virtually unimaginable for Americans. They have translated over 70 criminal codes into German, including those of New York, California and Louisiana. Their monographic and periodical discussions, substantively and bibliographically, are inexhaustible. The Institute of Foreign and International Criminal Law, at the University of Freiburg, Germany, under the directorate of Professor Jescheck, has begun the second series of short texts (100-250 pages each) on the criminal law of all major countries of the world, primarily for the benefit of German criminal law revision; but there is no reason why we should not also benefit from these magnificent efforts.²⁷ The French and Latin-American efforts have not been in progress for quite as long as the German endeavours which, in their present concentration, date roughly sixty years back, but they are equally thorough and useful.

But, actually, in our own language we have very similar opportunities, and this, finally, leads me back to the colleagues without foreign language training. Who knew, prior to publication of Szladits' bibliography on foreign and comparative law in the English language, in 1955, that there are roughly 800 books and articles in our language which deal with foreign criminal law, not even counting the frequently valuable book reviews?²⁸

²⁶ The majority of the excellent German works on foreign and comparative criminal law have come from the *Institut für ausländisches und internationales Strafrecht*, at the University of Freiburg i.B., Germany, formerly under Prof. Schönke and now under Prof. Jescheck. Among the most important of the Institute's publications are the series of translations of foreign penal codes in the German language (*Sammlung ausländischer Strafgesetzbücher*), presently numbering 72 volumes, the collection of texts on foreign criminal law (*Das ausländische Strafrecht der Gegenwart*), covering in the first two volumes Argentina, Denmark, Japan, Yugoslavia and Finland, as well as monographs, periodical contributions (*Auslandsrundschau*, in *ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT*) and bibliographic materials. The East Germans likewise have begun comparative efforts in criminal law, though in a rather one-sided manner.

²⁷ See n. 26, *supra*. Of special interest are the comparative studies contained in the *MATERIALIEN ZUR STRAFRECHTS-REFORM*, which the government has published over the past several years and which will continue, preparatory to a new German penal code.

²⁸ SZLADITS, A BIBLIOGRAPHY ON FOREIGN AND COMPARATIVE LAW—BOOKS AND ARTICLES IN ENGLISH 324-346 (Parker School of Foreign and Comparative Law, 1955). The figure 800 includes works listed in the first supplement, *infra* n. 29. On the importance of Dr.

This material was largely unavailable prior to 1955, because it could not be found, and now it is at our finger tips, mostly in the periodical collections of even our smallest law school libraries, or, in any event, easily obtainable. True enough, much of the material is outdated, though Dr. Szladits' valuable annotations and markings guard against possible misuse. But much of it pertains to current law and practice, on both sides of the Iron Curtain. This material is crying to be used. I have checked much of it and I found a good deal of worthwhile material right there in our own language. Let us use it! Among others, there is a surprising number of translations of current foreign statutory materials. If someone becomes a comparative law enthusiast, he may even wish to assign some of these materials to his class as general reading, though I personally have not done so, except in the case of especially interested students individually. Incidentally, the Szladits bibliography is being supplemented periodically in the *American Journal of Comparative Law*.²⁹

Aside from collateral reading and source materials, the question arises: is there any one case book which lends itself particularly well to a comparative-law-minded teaching of the criminal law course? Examination of all current case books shows that, unquestionably, Michael and Wechsler's case book has the largest number of foreign law references,³⁰ skillfully inserted, including large excerpts from English translations of the positivist-influenced Italian and Russian penal codes and that of Cyprus. The otherwise excellent 1956 supplement, unfortunately, is rather weak on foreign law.³¹ Besides, a number of first rate articles on comparative criminal law has been published since.³² Michael and Wechsler refer at various places, to the criminal law of France, Italy, Belgium, the Netherlands, the Soviet Union,

Szladits' work see DAINOW, *The Civil Code and the Common Law*, 51 N.W.U.L. REV. 719, 732, n. 32 (1957); MUELLER, *Book Review*, 58, W. VA. L. REV. 213 (1956).

²⁹ The first interim supplement appeared at 5 AM. J. COMP. L. 341 (1956). These interim supplements will appear once a year. Cumulative supplements are scheduled to be published every five years.

³⁰ MICHAEL AND WECHSLER, *op. cit. supra* n. 12.

³¹ WECHSLER, 1956 SUPPLEMENT TO MICHAEL AND WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION (1956).

³² Apart from those mentioned, *supra*, *passim*, attention is called to RYU, *The New Korean Criminal Code of October 3, 1953*, 48 J. CRIM. L., C. & P.S. 275 (1957); RYU and SILVING, *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421 (1957).

Argentina, Germany, Switzerland, Austria, Sweden, Egypt, Palestine, Cyprus and Iraq.

Next there is Dession's case book,³³ also quite strong on comparative law. Dession has a common feature with Michael and Wechsler: the footnote references are explanatory and not solely referral notes. Dession's use of foreign materials often tends to be more contrastive than comparative, which is evidenced by his frequent references to Soviet law. But the positivist approach seemed to have a special attraction for him, as indeed he was one of the best known advocates of a scientific or behavioristic approach to criminal law. The French references are principally to Garraud's 1934 edition of the *Précis de droit criminel*.³⁴ The most serious shortcoming of Dession's work is his omission of German law, though, ten years ago, this was perhaps politically understandable.

You will next find a discreet but skillful use of foreign law references in Hall and Glueck's case book,³⁵ as indeed, on a much smaller scale, there are a good number of case books which do refer to foreign materials occasionally. Jerome Hall's case book has no foreign law references at all,³⁶ nevertheless, I have been using it all along for two reasons: first, it lends itself beautifully to a comparative law-minded teaching of criminal law if used in conjunction with Jerome Hall's *Principles of Criminal Law*,³⁷ which is a work rich in classic foreign law discussion. Secondly, the case book itself utilizes continental method splendidly in the arrangement of the contents of the book, and in the designation and sub-division of the concepts. It is this which I called the first, or primary, benefit of the comparative method in criminal law.

I have no recommendation on text books. The few foreign law references in Bishop and Wharton are largely outdated and current text book writers have not ventured outside our-city walls, to use my initial metaphor.

CONCLUSION

I have arrived at the end of my paper, but for one thing. While I hope to have shown success-

³³ *Op. cit. supra* n. 2.

³⁴ GARRAUD, *PRÉCIS DE DROIT CRIMINEL* (15th ed. 1934).

³⁵ L. HALL AND S. GLUECK, *CASES ON CRIMINAL LAW AND ENFORCEMENT* (1951), esp. nn. at 73-74, 116-117.

³⁶ J. HALL, *CASES AND READINGS ON CRIMINAL LAW AND PROCEDURE* (1949).

³⁷ J. HALL, *op. cit. supra* n. 11. It is for reasons of this theoretical-dogmatic clarity that this work has become the leading source of information on American criminal law in Europe.

fully that a discreet and limited use of foreign law, or the comparative method, in the course on criminal law, is both desirable and possible, even for the uninitiated, I am sure that everyone will realize that what I have proposed for immediate practice amounts to a rather amateurish application of the comparative method. Nobody should be bold enough to believe that more can be done at this moment.³⁸ But much more can and should be done in the near future (a) in order to prepare the American criminal law teacher for his task, and (b) to put comparative law to the best possible use for teaching, adjudication and especially legislation in our country. It is foolish politically, economically and morally not to utilize the recognitions and experiences of others which they have gained in hard work and experimentation. If foreign countries are ahead of us in criminal law, and many countries are ahead of us in many respects, so is one of the principal reasons, therefore, that they have never passed any important piece of criminal legislation without first ascertaining what everybody else's experiences have been. While they learned from us practically all we know, we have learned little of what they know. Worse than that: the preservation of Western freedom and culture in the world is closely tied to the prestige which this country enjoys in the world. We have always watched the military, political and economic prestige barometers. We have neglected the cultural prestige barometer. Criminal law thought, enlightenment and accomplishment are a matter of culture. Do we have that culture? If so, does the world prestige barometer give us a good reading on the very cultural matter of criminal law? We will know the reading after answering these questions: Where is America when criminal law scholars gather for international meetings?³⁹ Where on the international

³⁸ See the warning given by the late JEROME FRANK, *Civil Law Influences on the Common Law—Some Reflections on "Comparative" and "Contrastive" Law*, 104 U. PA. L. REV. 887 (1957).

³⁹ Rarely have the United States been represented at international conferences on criminal law. Sporadically a Fulbright scholar may be able to avail himself of the opportunity to participate as an individual, e.g., Prof. Jerome Hall of Indiana University. I am not aware of any American membership in permanent criminal law organizations on the international level. From various reports it appears that in the field of criminology the U.S.A. has been somewhat more cooperative. Professors S. Glueck of Harvard University and Sellin of the University of Pennsylvania have probably become our best known ambassadors of good will abroad in the criminological field. Both also are members of the editorial boards of several foreign periodicals devoted to criminal law and criminology.

market are American salesmen of ideas and experiences in criminal law?⁴⁰ Do we have anything to sell in criminal law besides guntoting frontier sheriffs on screen and alarming crime statistics?

What we need, and need badly and right now, is a permanent American Institute of Comparative Criminal Law, operated under the auspices of this Association of American Law Schools and/or within the framework of teaching and research at a major law school. This Institute should inform the American legal profession about advances and

⁴⁰ American contributions in foreign criminal law periodicals have long been conspicuous through their absence. But there are indications that the picture may change. See the following recent contributions: J. HALL, *Ignorantia Legis*, 26 *REV. INT. DE DROIT PÉN.* 293 (1955); *id.*, *International Criminal Law*, *op. cit. supra* n.4; SCHWARTZ, *Le projet de Code pénal de l' American Law Institute*, [1957] *REV. DE SC. CRIM. ET DE DROIT PÉN. COMP.* 37; MUELLER, *Das amerikanische Bundesstrafrecht*, 69 *ZTSCH. F. D. GES. STRFW.* 37 (1957). Professor Wechsler, Columbia University, has recently been appointed to the advisory board of the *REVUE INTERNATIONALE DE DROIT PÉNAL.*

experiences abroad in a professional manner, through releases, monographs, conferences, etc. The main task of this Institute must be the publication of works which explain legal principles abroad in their cultural and institutional setting, and their social and political origins and effects. Then, when the American criminal law teacher can study foreign criminal law as a living law, rather than as a dead emanation from the sovereign, will the comparative method in criminal law really become useful and influential.

It will be a second task of such an institute to help capture some of the foreign market in criminal law ideas, in peaceful competition. Such an institute will prepare American teachers of criminal law to do a better and better job in teaching criminal law with the aid of the comparative method. Our teaching will determine the nature of the American criminal law of tomorrow. This is the main force which compels me to use and to advocate the comparative method in criminal law.