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# COMPARATIVE CONSTITUTIONAL LAW

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1. After *Casey* and the 1993 German abortion decision, how different are the U.S. and German formulations of (1) the nature of the problem in regulation of abortion, (2) the nature of government power, or obligation, to regulate abortion and (3) the nature of the pregnant woman's power to decide? Consider, for example, the *Casey* Court's upholding the 24 hour waiting period, reversing *Akron* to do so. Professor Neumann argues that the post-*Casey* situation in the U.S. is very close to that in Germany in essentially permitting first trimester abortions following counseling.[h]

2. To the extent that there are differences, do these differences invite normative judgments of which is "better"?

3. Is it possible to make such judgments outside of the particular legal system and time in which they were developed?

4. Is there a substantive aspect to constitutional governance implicated in the abortion controversy? Is the 1975 German abortion decision inconsistent with constitutional governance? Is *Roe*? Are each consistent with constitutionalism?

## C. Concluding Note on Comparisons

You have now read major abortion decisions from three different western constitutional democracies—the U.S., Canada and Germany. What can be learned by such comparative readings? Would you describe the current state of the law in these three countries as dramatically different or basically similar? In what ways?

Prominent scholars have debated the utility of such comparisons for the development of U.S. constitutional law.

1. *Glendon's Argument*: In the 1980s Professor Mary Ann Glendon argued for U.S. adoption of the European approach, which she saw as more communal and as more respectful of the conflicting views of those who favor women's right to choose and those who oppose abortion as murder. In discussing the French abortion statute,[i] she argued that "the French

**h.** Waiting period provisions are common in many countries—six days in Belgium, 3 days in Portugal, 7 days in Italy, 5 days in the Netherlands, 1 week in Luxembourg and, in France, one week from the date of the woman's request and 2 days from the date of counselling. Charles Stanley Ross, *The Right of Privacy and Restraints on Abortion Under the Undue Burden Test: A Jurisprudential Comparison of Planned Parenthood v. Casey with European Practice and Italian Law*, 3 Ind. Int'l & Comp. L. Rev. 199 (1993).

**i.** The 1975 French law states that abortion is permissible in the first ten weeks of pregnancy if the mother is placed "in distress" as a result of her pregnancy, and if the woman obtains counseling from a physician, a private interview with a government counselor with a view toward enabling her to keep the child, and a waiting period of one week from the woman's initial request for abortion and two days from the date of the counseling interview. Under this standard, women who want abortions in the first ten weeks will generally be able to have one; social security in France covers about 70 percent of the cost of a nonmedically necessary abortion. Glendon, 16–17. After the tenth week, abortion is permissible only (1) when the health of the mother is in danger or (2) when the child will likely have a birth defect

statute names the underlying problem as one involving human life, not as a conflict between a woman's individual liberty or privacy and a non-person. While showing great concern for the pregnant women, it tries, [through counselling provisions of a type that, at the time she wrote, had been struck down in a series of American cases] to make her aware of her alternatives without either frightening or unduly burdening her." Mary Ann Glendon, Abortion and Divorce Law in Western Law: American Failures, European Challenges 19 (1989). Glendon argued (pre-*Casey*), that U.S. abortion law is unique among Western nations

> "not only because it requires no protection of unborn life at any stage of pregnancy, in contrast to all the other countries with which we customarily compare ourselves, but also because our abortion policy was not worked out in the give and take of the legislative process. Our basic approach to, and our regulation of, abortion was established by the United States Supreme Court in a series of cases that rendered the abortion legislation of all states wholly or partly unconstitutional and severely limited the scope of future state regulation of abortion."

Far better, she argues, to have allowed the issue of abortion to be worked out in the state legislatures, 19 of which, in the seven years before *Roe*, had reformed or repealed abortion prohibitions; European experience suggests that ultimately most states would adopt schemes that permitted abortions provided appropriate medical findings or counselling were present, she suggests. Cf. Kim Scheppele, Constitutionalizing Abortion, in Abortion Politics: Public Policy in Cross–Cultural Perspective (Marianne Githens & Dorothy McBridie Stetson, eds., 1996) (arguing that constitutional law should not be used to resolve abortion controversy because it legalizes debate and thus diminishes the possibility for compromise solutions).

2. *Tribe's Response*: Professor Tribe disagrees with Glendon's assumption that a European approach would work in U.S. constitutionalism. The "codification of a truly empty promise . . . whose vision is belied by the people's day-to-day experience . . . can take an unacceptably high toll on confidence in the rule of law and the integrity of the legal system as a whole. The French solution, within an Anglo–American legal system that has long insisted that law be composed of enforceable norms, seems to teach mostly hypocrisy." Laurence H. Tribe, Abortion: The Clash of Absolutes 73–84 (1992). If Glendon's argument is that "it might be wise for us to denounce abortion in principle while we permit it in practice," Tribe doubts its effectiveness in validating the views of pro-lifers: "To anesthetize through rhetoric those who wish to protect fetal life . . . is a far cry from genuinely protecting fetal life or its value."

Tribe argues further that Glendon underestimates the strength and value of American commitment to individual rights, which he sees as at odds with regulations that empower government agents to affect abortion

or serious disease. See Bonnie L. Hertberg, Note, *Resolving the Abortion Debate: Compromise Legislation, An Analysis of the Abortion Policies of the United States, France and Germany*, Suffolk Transnational L. J. 513, 548 (1993).

decisions. He also raises concerns that at least in the U.S., regulatory schemes that afford substantial discretion to the government to ignore or not prosecute apparent violations of law—as may be the case in some European countries in which safe, but illegal, abortions are available—risk exercises of power that disadvantage minorities and other less privileged groups. Tribe notes that regional differences within apparently homogeneous European countries affect the practical availability of abortion. In Switzerland, for example, he notes that pregnant women from predominantly Catholic areas must travel to Protestant areas to obtain abortions, because the exception for "women's health" is read more broadly there. "Abortion by caprice," he argues, in which access to abortion depends on where one lives, "would not conform to American legal norms of equality." (Recall the District Court's finding in *Casey* that "because of distance many women must travel to reach an abortion provider").

In response to Glendon's argument for allowing democratic legislatures to work out compromises on the regulation of abortion, Tribe recognizes that such an approach might "soften the frustrations of those who oppose abortion rights." But, he concludes,

> "the gap between stated principle and actual practice that would be necessary for us to sustain the European approach would probably make such a solution too costly for us. And of course, urging a democratic solution just begs the question of whether or not the regulation of abortion is properly *for* the legislative arena. . . ."

3. *Do Different Constitutional Regimes Matter?* A German scholar disagrees with the claim that there is now a significant difference between European and American approaches to abortion. Writing in 1996 (after both *Casey* and the 1993 German abortion decision), Udo Werner, *The Convergence of Abortion Regulation in Germany and the United States: A Critique of Glendon's Rights Talk Thesis*, 18 Loyola (L.A.) Int. & Comp. L.J. 571, 601 (1996), asserts: "[A] demand for abortion services existed in German society despite the pronouncements of the Constitutional Court. This demand proves to be relatively independent from the legal prohibition of abortion. After the Court's 1993 ruling, this demand is likely to be satisfied by the ability to obtain an illegal but unpunished abortion. Furthermore, the distinction between 'illegality' of a crime and its punishment represents a concept lawyers have difficulty understanding. This is more true of the average citizen. How illegal is an abortion that goes unpunished not only in exceptional cases but in principle? The illegality of abortion, stressed by the Constitutional Court, may be transformed in reality into an empty legalistic shell."

4. *Differences In Constitutional Consensus and Duties:* Note that the basis for the German court's abortion decisions lies in an affirmative conception of the state having a positive duty to protect the life of the fetus, and to do so not only through prohibiting abortion but through counselling. Even though Germany requires that the state say that most abortions are illegal, it also requires the state to pay for medically necessary abortions. Compare Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 US 297

(1980) (government has no obligation to provide financial assistance to women for abortions even where other medical services are provided, and even if the abortion is medically necessary). Can the U.S. and German abortion decisions be compared without taking into account differences in the two nation's commitments to "social welfare," e.g., medical and other support for pregnant women and for children?

Professor Kommers cautions that meaningful comparisons between U.S. and German abortion decisions are difficult because in Germany, "the most non-religious Social Democrat could agree with the most religious Christian Democrat" that the state has a duty to protect the fetus at all stages of pregnancy; no such consensus exists between pro-life and pro-choice advocates in the United States. Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?* 10 J. Contemp. Health L. & Pol'y 1, 28 (1993). Is Kommers correct about the U.S. consensus or lack thereof? If so, how is that relevant to evaluating constitutional decisionmaking?[j]

j. Note that constitutional questions about abortion laws have arisen in those countries of eastern Europe that engaged in constitution-making beginning in the late 1980s. For example, on May 28, 1997, the Polish Constitutional Tribunal ruled that a law allowing abortion for social reasons (such as economic inability to afford the child) was unconstitutional and in violation of the constitutional guarantee of the right to life. The decision came just before the Pope's visit to Poland, prompting proponents of the law to question the Court's motives. After parliamentary elections, the Sejm (a legislative body) in December 1997 by a substantial margin approved of the Tribunal's decision, reinstating the former regime of very restricted legal availability of abortion. For discussion of earlier legislation and litigation, concerning the permissible scope of abortion in Poland, see Mark Brzezinski & Leszek Garlicki, *Judicial Review in Post–Communist Poland: The Emergence of a Rechtsstaat?*, 31 Stan. J. Int'l L. 13, 50-53 (1995).

CHAPTER II

# WHAT IS COMPARATIVE CONSTITUTIONAL LAW?

Our readings so far present several basic questions: What do we do when we "compare" decisions? What does the subject "comparative constitutional law" consist of? And why study comparative constitutional law?

*Why study comparative constitutional law*? Standard arguments involve the claim that more knowledge of other legal arrangements enhances one's general understanding of the world, and that understanding how other constitutional systems work may reveal as choices aspects of one's own legal system that appear simply to be "natural" or "necessary" practices. In addition, comparative study may help generate hypotheses about the structures of governance, and their effects in different settings, that are then testable. As the materials that appear below on the *Soering* case suggest, moreover, understanding something about comparative constitutional law may affect lawyers' practices, both before our domestic courts and in international law settings.

*Comparing Decisions*: We have read decisions concerning reproductive rights in several different countries. Has our discussion assumed that these decisions could be compared? Into what category did we place these decisions? What justified that choice? Why are we reading judicial decisions, rather than other legal texts or descriptions of law? More generally, what can be learned by comparing constitutional systems? Does anything unite "constitutions" in a way that makes comparative study meaningful?

*Constitutions and Constitutionalism*: What is "constitutionalism" and how, if at all, does it differ from "constitutions"? How closely is our concept of constitutionalism tied to a written constitution? To judicial review?

The readings in this chapter and in chapter III explore these questions in a more systematic way.

## A. The Value of Comparative Constitutional Study: Competing Perspectives

Proponents of comparative legal studies often argue that they help dispel the sense a person embedded in a single legal system may have that his or her own system's legal arrangements are the only ones that could reasonably accomplish the legal system's goals. For example, U.S. law

students are likely to think that a constitutional system could not possibly sustain a reasonable level of civil liberties without an independent judiciary enforcing constitutional restrictions on government power. Examining the protection of civil liberties in Great Britain or Israel, reasonably well-functioning democracies, may weaken the confidence that such a student would have in the statement that judicial review of statutes is necessary for protecting civil liberties.

By seeing how different constitutional systems handle the same or related questions, students may discover that the U.S courts, or the U.S. Constitution, simply fail to address adequately arguments that apparently sensible people in other nations have addressed. Recall here Glendon's argument about the relative merits of the U.S. and European approaches to the abortion issue.

But we must also think carefully about whether comparative study really can dispel a sense of "false necessity". True, different legal systems can accomplish roughly similar goals in quite different ways. But each system may be so closely tied up with its political, economic and cultural surroundings that each legal system's arrangements may be truly necessary as part of the "ensemble" of legal, political, cultural and other institutions. Thus, for example, a federal system in a nation with strong political parties organized nationally along distinctive ideological lines, as in Australia, is likely to be quite different from a federal system in a nation with relatively weak and non-ideological parties, as in the U.S. It may therefore be very difficult to support a claim that, with respect to any particular issue, the legal arrangements you are studying represent either "false" or "true" necessities.

In the first of two selections below, Professor Donald Kommers is quite enthusiastic about the benefits and values of comparative constitutional study, including the possibility of discovering universal truths about "principles of justice and political obligation that transcend the culture bound opinions and conventions of a particular political community." Donald Kommers, *The Value of Comparative Constitutional Law*, 9 J. Marshall J. of Practice & Procedure 685 (1976). Kommers also argues that by having to meet the challenge of responding to arguments found persuasive by other constitutional courts on similar issues, the quality of U. S. constitutional jurisprudence will be improved.

Günter Frankenberg offers a more skeptical view about the possibility of knowledge (and particularly any form of universal truth) from comparative study. While his article focuses on comparative law generally, his observations are pertinent to the study of comparative constitutional law. Frankenberg is concerned that knowledge about other legal systems is understood in categories formed by the perceiver's embeddedness in her own social and legal realities, creating obstacles to achieving critical understandings of multiple legal realities including our own. Efforts at objectivity can be no more than a "fictitious neutrality" which "destabiliz[e] the influence and authority of the comparativist's own perspective. . . ." He argues that problems both of false neutrality and mindless relativism can

be overcome by comparativists learning that they are inevitably "participant observers," and thus have to be prepared to question all of the categories—including "law"—with which they approach comparative study. He seeks a "liberating distance" that "takes nothing for granted, least of all the forms and rationality of law . . ."

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Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. Marshall J. of Practice & Procedure 685 (1976)

Since the end of the Second World War, several nations have created courts of judicial review modeled after the United States Supreme Court. Judicial review, once regarded as a unique mark of the American governmental system, has been explicitly provided for in the written constitutions of several newly independent nations, although in many of these places it has not evolved into a living principle of juridical democracy; that is particularly true of several emergent nations of Asia and Africa, where judicial review has succumbed to authoritarian rule. . . .

Judicial review is also known in various commonwealth countries, although it is not an articulate principle of their constitutions. . . .

As a mere accident of Empire, judicial review appears to lack a firm philosophical foundation in commonwealth legal theory, and some commonwealth courts are even uneasy with the very notion of "unconstitutionality" as applied to national legislation. . . .

The constitutional courts of the aforementioned countries have been the objects of considerable research in recent years. Legal scholars have tended to write analytical commentaries on selected decisions of these courts, dwelling mainly on certain "headline" cases—the atypical cases, it must be added—that have caused high political tension in the applicable countries. Judicial scholars in political science have . . . [not focused on constitutional interpretation but rather on] the political significance of constitutional courts in the totality of the governmental process. These studies express the belief of American scholars that a high level of comparability is to be achieved by relating the U.S. Supreme Court to the constitutional tribunals of Western European nations and the supreme courts of other countries heavily influenced by western models of politico-legal organization.

Yet it is possible to suggest that nations do differ to such an extent in the details of their political structure, legal culture, or the wording of their constitutions that no meaningful comparison of constitutional law across national boundaries is possible. That caveat might be made even in connection with the German and American abortion cases. Perhaps this matter should be addressed for a moment, using West Germany and the United States as examples. True, the structure of their governments differ. West Germany, following the parliamentary model, unites legislative and execu-

tive authority in a government with a chancellor, elected by Parliament, as its head. The United States follows the presidential model, with a popularly elected executive separated from the legislature. Judicial review also differs in operation. . . .

Finally, the German Court's organization differs from that of the U.S. Supreme Court's. Whereas the latter is a single collegial body of nine justices with life-time appointments, the former is divided into two senates with mutually exclusive jurisdiction; the eight justices on each senate are elected by Parliament and serve for a single, non-renewable term of twelve years.

But these differences would seem to be of minimal value in explaining variations in constitutional doctrine. . . .

Perhaps a more crucial explanation of variations in constitutional doctrine across national boundaries than any feature of governmental structure are the general philosophical values and historical traditions that inform the meaning of constitutions. Constitutional interpretation in West Germany and the United States would seem to depend more on these values and traditions than on any variation in the textual content of their constitutions. For instance, there was nothing inexorable about the abortion rulings in Germany and the United States; they might have gone the other way. The German Constitution states that "[e]veryone shall have the right to life and to inviolability of his person." . . . But whether "everyone" within the meaning of the Basic Law includes unborn persons is a point of hearty contention among German constitutional lawyers. The United States Constitution is less explicit about the right of persons to life. In addition, there is dispute over whether the fifth and fourteenth amendments impose an affirmative duty upon government to protect persons against encroachments upon their life or liberty by private individuals and institutions. The U.S. Supreme Court could very easily have found that the unborn fetus is a person. . . . The point to be underlined here is that the constitutions of the countries we would want to include in studies of comparative constitutional law are all adaptable to changing circumstances and flexible enough to spur the mind and imagination of creative judges.

In the final analysis, what really makes West Germany [and] the United States . . . fitting subjects for the study of comparative constitutional law is their commitment to political democracy and constitutional government, especially in the area of civil liberties and human rights. Equally relevant is the fact that these countries are secular political cultures; they are technologically sophisticated and pluralistic societies; socio-economically, they are advanced polities faced with similar problems of political order. . . . [T]hat . . . Germany and the United State[s] are also federal systems of government powered by competitive political parties is a further reason why these two countries along with Australia, Canada and perhaps India, are particularly good candidates for the study of comparative constitutional law. In addition, each of these countries feature courts with authority analogous to the U.S. Supreme Court. . . .

As noted earlier, several new courts of constitutional review have in the last quarter century produced a large body of jurisprudence. The case law of the West German Federal Constitutional Court alone is currently bound in forty volumes of *Entscheidungen des Bundesverfassungsgerichts* published since 1951. This excludes about 20,000 cases disposed of without opinion. The constitutional case law of other nations is equally rich, and it continues to multiply with each passing year as precedents accumulate and old constitutional principles gather new meaning. . . .

. . . [T]rans-national studies of constitutional law should be more than mere statements of positive law or mechanical comparison. Useful teaching materials would include analytical commentaries and historical treatises on the uses of judicial review. The relation of constitutional doctrine to philosophy, history, tradition, and sociology—to resurrect Cardozo's terminology—would be a major focus of exploration. It would be the special task of the comparativist to explain the variations and similarities in constitutional doctrine from country to country. Successful achievement of this task would require complete familiarity with methods of constitutional interpretation used in the nations under study, together with knowledge of thought-forms predominant in varying legal cultures.

Now that the possibility of a systematic study of comparative constitutional law has been discussed, what then is the value of embarking upon such a study? First, comparative constitutional law can provide Americans with valuable insight into the experience of other constitutional democracies, including that of non-western cultures. . . . Straddling the line between jurisprudence and political theory, this body of case law has much to say about notions such as consent, contract, due process, equality under law, justice, representation, and fraternity, elements all inherent in the principle of constitutionalism. Men who call themselves free ought to be acquainted with the range of human experience expressed by these ideals in order to provide them with a greater sense of the community they share with the peoples of other constitutional democracies.

Second, comparative constitutional law can be helpful in the quest for a theory of the public good and right political order. It can represent a disinterested quest for a public philosophy and a statement of the rights and duties that would be assigned in a more perfect constitutional polity. Constitutional courts are reflective institutions. In a very real sense, they represent political man writ large and *thinking* about where to draw the troublesome line between liberty and order. It would therefore be interesting to know what constitutional values and ideas about man and his relationship to the state are commonly shared across national boundaries. . . . Thus, the study of comparative constitutional law can be a search for principles of justice and political obligation that transcend the culture-bound opinions and conventions of a particular political community. As such, it can lead men to the attainment of truth and a better understanding of man's political condition.

Third, comparative constitutional law can enrich the study of comparative politics. It could restore the linkage of constitutional norms to political

ideologies, intra-governmental relations, and public policies.... In examining the values that inform the constitutional law of various nations, students might begin to explore the reasons for the similarities and differences in constitutional rulings. By scrutinizing the conditions and historical circumstances out of which these rulings emerge—some rulings may not represent long-range solutions to problems of governance, but rather temporary adjustments of conflicting interests—students might also begin to appreciate which constitutional doctrines or policies can be transferred across national lines and which cannot....

Fourth, the comparative perspective can enrich the study of American constitutional law. Such a perspective will provide critical standards for reviewing the work of the U.S. Supreme Court. It will require the student to come to terms with the force and merit of arguments found in the opinions of foreign constitutional courts.... [I]n looking at constitutional problems through the eyes of foreign courts, the student is able to draw upon traditions, insights, and values that transcend the American experience.... In the abortion cases, for example, the German Court frontally addressed and forthrightly answered questions—important questions of value—which the American Court consciously avoided.... That the highest tribunals of two nations equally respectful of the humanity and basic freedoms of their people have decided the question of the unborn child's right to life under their respective constitutions differently would give him pause for reflection. Upon reflection he might deepen his understanding of what the constitutional problem or issue is all about. For some this would be an intellectually liberating experience, challenging conventional wisdom and bringing into question old and new assumptions and preconceptions. For others, the comparative perspective would lead to a deeper appreciation of the meaning and wisdom of American constitutional values and practices.

Finally, the comparative perspective can contribute to the growth of American constitutional law.... In light of a full generation of constitutional governments in other countries, perhaps Americans can now in turn learn from these related constitutional experiences....

Many German justices have a close familiarity with American constitutional law. Indeed, a full set of the United States Supreme Court Reports is available in the library of the West German Federal Constitutional Court. Perhaps one day this manifest interest in our constitutional jurisprudence will be reciprocated by U.S. Supreme Court Justices....

Obviously, many German constitutional rulings could not be assimilated into American constitutional law. But in some areas, such as the right to vote and to political representation, German and American constitutional principles and theories could be blended fruitfully and seasonably to produce more equitable balances between rights and duties within the American political order. The day may possibly dawn when the high constitutional tribunals of the world's major industrial democracies will be citing each other's opinions and drawing from each other's jurisprudence

with increasing frequency. The academic study of comparative constitutional law may hasten the arrival of that day.

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Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 Harv. Int'l L. J. 411 (1985).

This essay will consider the aims of comparative law and focus on how the de-emphasized theoretical discussions and foundations of comparative work influence the various comparative approaches. It will argue that because of comparative legal scholarship's faith in an objectivity that allows culturally biased perspectives to be represented as "neutral" the practice of comparative law is inconsistent with the discipline's high principles and goals. In response, this essay will suggest a critical approach that recognizes the problems of perspective as a central and determinative element in the discourse of comparative law.

## I. Distance and Difference

Comparative Law is somewhat like traveling. The traveler and the comparatist are invited to break away from daily routines, to meet the unexpected and, perhaps, to get to know the unknown. Traveling promises opportunities for learning both about one's own country and culture and about other countries and cultures. Going places and gazing at a strange world do not, however, automatically open up new horizons. . . .

As long as we understand foreign places as like or unlike home, we cannot begin to fully appreciate them, or ourselves. We travel as if blindfolded: visiting only landmarks of our past, that restore confidences and banish fear. Only close attention to detail—variety and heterogeneity—can prevent our leveling others in images taken from our vision of the order of our own world.

Comparative law offers the same opportunities and risks. . . . I suggest that the dialectic of learning requires at least two operations that prevent the old categories and ways from being merely projected onto the world and that allow the new to speak for itself. These operations I call "distancing" and "differencing." Distance is needed to gain a vantage on who we are and what we are doing and thinking. Distancing can be described as an attempt to break away from firmly held beliefs and settled knowledge and as an attempt to resist the power of prejudice and ignorance. From a distance old knowledge can be reviewed and new knowledge can be distinguished as it is in its own right. Distance de-centers our world-view and thus establishes what might be called objectivity.

Mere distance, however, neither opens our eyes nor makes us see clearly. As long as foreign places only look like or unlike home . . . as long as they are treated as same or other, they do not speak for themselves. In order to break the unconscious spell that holds us to see others by the

measure of ourselves without abandoning the benefits of criticism, traveling as well as comparison has to be an exercise in difference. By differencing we not only develop and practice a sharp sense for diversity and heterogeneity but, more importantly, we make a conscious effort to establish subjectivity, that is, the impact of the self, the observer's perspective and experience, is scrupulously taken into account. Differencing calls into question the neutrality and universality of all criteria; it rejects the notion ... [that] the categories and concepts with which new experiences are grasped, classified, and compared have nothing whatsoever to do with the socio-cultural context of those who see in terms of them. Differencing is necessary to prevent the observer-comparatist from confusing the present content of (Western) ideas and concepts with the criteria of a universal truth and logic....

The dilemma of understanding foreign (legal) cultures and of transcending the domestic (legal) culture can neither be resolved by "going rational" nor by "going native." The rigorous rationalist who relies on conceptual or evolutionary functional universals is prone to give her worldview and norms, her language and biases only a different label. In the end, she may bring home from her comparative enterprise nothing but dead facts and living errors, the progeny of ethnocentrism. The rigorous relativist who naively deludes herself into believing that cultural baggage and identities can be dropped at will, is prone to oscillate between ventriloquism and mystification. As a cultural ventriloquist she would reproduce ethnocentrism under the guise of a pseudo-authentic understanding. As a cultural immigrant she might over-identify with the mystified new way and thereby be unable or unwilling to relate anything her sympathetic eye happens upon in travel to what she learns at home.

Both universalism and relativism tend to reproduce the dichotomy between the self and other; they are non-dialectical in the sense that they either come up with "bad" abstractions or with no abstractions at all. Comparison however presupposes that one abstract from a given context....

The problem then is how to produce "good," that is, non-ethnocentric abstractions....

[Frankenberg also describes efforts by comparative law scholars to achieve "cognitive control," which he asserts "is characterized by the formalist ordering and labeling and the ethnocentric interpretation of information, often randomly gleaned from limited data."]

Dichotomies measure the object in terms of inclusion in the category of one or the other extreme of two opposed terms, such as the civil law/common law dichotomy constituting the "relevant" legal world. This dichotomy implies the existence of less relevant or even irrelevant as well as legal or non-legal worlds. This dichotomy can be related to the dichotomy between the law in cultures sharing a "common core" and the law "in radically different cultures." This second dichotomy overlaps somewhat with the Western/Eastern dichotomy and the mature/immature, developed/developing, modern/primitive, parent/derivative dichotomies. Such dichotomies

over-simplify complexity and almost invariably put the Western legal culture at the top of some implicit normative scale. Such self-confirming hierarchies threaten the comparatist's claim to non-ethnocentric, impartial research. . . .

The comparatist always returns to the original and prior conception, which is never exposed to criticism from the vantage the new conception allows. The foreign law is conceived of as like or, unlike, derivative or opposite. Strategic comparison confirms the antagonism between "capitalist" and "socialist" law; it idealizes modern law, for example, common law, as mature and rationally superior. . . .

Underlying these distinctions is the notion that law exists first and foremost as written text: statutes, court decisions and scholarly opinions. The texts and their normative commands have or do not have operative effects. In order to find, compare and evaluate these effects, the comparatist has to move back and forth between texts and their application. Although this procedure is certainly more complex than mere legal philology, . . . the law is located "out there." It can be grasped quite positively as text—written and practiced by legal officials and subjects. Hence law as a series of discrete legal events is given a life of its own. It can be distinguished from its socio-economic and politico-cultural "environment," with which it is said to interact causally. Though considered interdependent with other spheres of social life, the legal is analytically isolated from, and later added to, the non-legal reality of society and its sub-systems. This apartheid of law allows for situating it in a social vacuum and for stylizing it as a prism, allegedly enabling the legal scholar to look through it at reality and to detect and normatively criticize political ideologies.

Defining law as an additive to and not (as I shall later propose) as a constitutive element of social reality confirms the domination of the text (dead or alive) over social experience and makes it difficult if not impossible to analyze legal ideologies and the rituals pervading social life. . . .

Positioning the comparatist as pure spectator, objective analyst, and disinterested evaluator is the final mechanism of cognitive control.

[T]he fictitious neutrality stabilizes the influence and authority of the comparatist's own perspective, and nurtures the good conscience with which comparatists deploy their self-imposed dichotomies, distinctions and systemizations. The objective posture allows the comparatist to present and represent her own assumptions and what she observes in a scientific logic, with the balances and measures that project neutrality and conceal the weigher's complicity with both selection of the units on the scale and the objects to be measured. . . .

Consequently, comparison is not open-textured and infinite, self-critical and self-reflective, but a way of getting it straight—"it" being the "true" story of similarities and dissimilarities between legal cultures, traditions, systems, families, styles, origins, solutions and ideas.

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### Questions and Comments

1. Consider the extent to which our earlier discussion of the treatment of the abortion issue is subject to criticisms like those of Frankenberg.

2. Consider whether the "units" of comparing abortion rights should include more, or different, materials on (a) public financial support for abortion and for childbirth and (b) public financial support for child-care, upbringing, health care and education.

3. For further explication of Frankenberg's position, see below in this chapter, section B(7), (8).

## B. COMPARING LEGAL DECISIONS AND THE CONCEPT OF BORROWINGS

### 1. THE DEATH PENALTY: STANFORD AND SOERING

### Stanford v. Kentucky

492 U.S. 361 (1989).

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court [in the sections included here].

These two consolidated cases require us to decide whether the imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age constitutes cruel and unusual punishment under the Eighth Amendment.

I

The first case involves the shooting death of 20–year-old Barbel Poore in Jefferson County, Kentucky. Petitioner Kevin Stanford committed the murder on January 7, 1981, when he was approximately 17 years and 4 months of age. Stanford and his accomplice repeatedly raped and sodomized Poore during and after their commission of a robbery at a gas station where she worked as an attendant. They then drove her to a secluded area near the station, where Stanford shot her point-blank in the face and then in the back of her head. The proceeds from the robbery were roughly 300 cartons of cigarettes, two gallons of fuel, and a small amount of cash. A corrections officer testified that petitioner explained the murder as follows: " 'He said, I had to shoot her, [she] lived next door to me and she would recognize me.... I guess we could have tied her up or something or beat [her up] ... and tell her if she tells, we would kill her.... Then after he said that he started laughing.' " ...

Stanford was convicted of murder, first-degree sodomy, first-degree robbery, and receiving stolen property, and was sentenced to death and 45

years in prison. The Kentucky Supreme Court affirmed the death sentence, [stating] that petitioner's "age and the possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him."

The second case before us today involves the stabbing death of Nancy Allen, a 26–year-old mother of two who was working behind the sales counter of the convenience store she and David Allen owned and operated in Avondale, Missouri. Petitioner Heath Wilkins committed the murder on July 27, 1985, when he was approximately 16 years and 6 months of age. The record reflects that Wilkins' plan was to rob the store and murder "whoever was behind the counter" because "a dead person can't talk." While Wilkins' accomplice, Patrick Stevens, held Allen, Wilkins stabbed her, causing her to fall to the floor. When Stevens had trouble operating the cash register, Allen spoke up to assist him, leading Wilkins to stab her three more times in her chest. Two of these wounds penetrated the victim's heart. When Allen began to beg for her life, Wilkins stabbed her four more times in the neck, opening her carotid artery. After helping themselves to liquor, cigarettes, rolling papers, and approximately $450 in cash and checks, Wilkins and Stevens left Allen to die on the floor. . . .

On mandatory review of Wilkins' death sentence, the Supreme Court of Missouri affirmed, rejecting the argument that the punishment violated the Eighth Amendment.

We granted certiorari in these cases to decide whether the Eighth Amendment precludes the death penalty for individuals who commit crimes at 16 or 17 years of age.

II

The thrust of both Wilkins' and Stanford's arguments is that imposition of the death penalty on those who were juveniles when they committed their crimes falls within the Eighth Amendment's prohibition against "cruel and unusual punishments." Wilkins would have us define juveniles as individuals 16 years of age and under; Stanford would draw the line at 17.

Neither petitioner asserts that his sentence constitutes one of "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." Ford v. Wainwright, 477 U.S. 399, 405 (1986). Nor could they support such a contention. At that time, the common law set the rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7. In accordance with the standards of this common-law tradition, at least 281 offenders under the age of 18 have been executed in this country, and at least 126 under the age of 17.

Thus petitioners are left to argue that their punishment is contrary to the "evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). They