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The Gap between Comparative Law and Communications Theory

Recent discussion of scholarly communication in the emerging internet landscape of hypertext has brought the study of law into an interdisciplinary, intertextual framework . Initially the very nature of international and comparative law (ICL), both inside and outside the academy, appeared less sharply distinct in its boundaries from other disciplines, at least regarding the historical and social sciences. Research in international and comparative law always seemed more daunting, both as to the unusual nature of the resources, such as civil codes or extended commentaries on same, and also just as to language and legal culture. Now this may be a strength in a world now global in both trade and terror, encountering and understanding the legal Other is of crucial importance.

The rise of internet-based legal research has made the retrieval of the texts and sources of ICL easier to perform, but this paper will argue that there is another less obvious outcome: hypertext and its instantaneous cross references bring to those legal texts an ancient methodology, made new again and crucial to modern legal analysis. That methodology is one of *simultaneous commentary*, which brings associations, sources, and suggested interpretations into the present moment all at once. The hypertext experience is similar to medieval marginalia and commentaries, both for civil codes in the Roman law tradition¹ and for religious texts such as the Bible, and for religious legal texts. This is not a new or entirely non-obvious observation; it has even been argued that commentary arrayed around the main text as a core visually centered on a printed page takes control of the text. The *Glossa Ordinaria* of canon law (to be examined further on in this essay) may be seen as equal to its base text, by analogy, just as Biblical commentary may “displace” and draw the reader away and into an ever-expanding web of connections that dilute the meaning and substance of the original text.

McLuhan in particular went on to argue that a medium of communication does not merely express ideas. Indeed, alphabetic writing, and especially its explosion into the dominant medium of western, and eventually world, culture with the invention of movable type and the printing press, came to affect culture by exerting pressure towards rationality and the linear, sequential presentation of ideas.

My paper examines instances of major ICL texts that manifest their meaning, internal coherence, and related documents particularly well in the hypertextual universe, and indeed, have done so throughout history, using print and analog technologies. The text types considered in the paper are treaties, constitutions, and codes. Detailed examples will be drawn from codes in the religious legal tradition in order to show, first, how marginal commentary in canon law, Islamic law and Talmudic law texts has been a precursor to modern intertextual and hypertextual research; second, how this marginal commentary has migrated to the electronic text; and third, what implications this phenomenon may have for new interpretive models that are emerging independently in the interdisciplinary approaches of Anglo-American scholarship. Another purpose of this paper was to build upon the principle of the visual in the arrangement of text on the pages of what we now have in print and on computer screens and to explore the points of convergence among text, tradition, and interpretation in documents that form our codes of law. To further this exploration, we must next look at some of the original connections and convergences between law and the sacred, especially as written law collections emerged in early cultural history. Finally, comparative study of textual structures for codes may be ultimately the most valuable bridge between common and civil law methodologies. It may narrow the gap between the codex as a physical form, the hallmark of religious and civil law systems, and the internet code that is hypertext and which has transformed case law interlinkages through Westlaw and Lexis.

Looking at Law and the Sacred

The primary example offered for this essay was in the area of Christian canon law through a “research encounter” as I will call it, with a medieval manuscript I viewed in late July, 2007, with the gracious permission of the librarians and curators of the Rare Books and Manuscript Library of the University of Pennsylvania, *MS. Codex 1059, or the Decretalis Gregorii IX, with gloss of Bernardo da Botone of Parma (d. 1266), in Latin, decorated manuscript on vellum, France, c. 1280-1300*. After laying out background in canon law texts such as this and a predecessor text, Gratian’s *Decretum*, which I use as an image in the article, go on to describe what I found in the text I could not reprint owing to its rarity and unavailability for photographing, namely, the later Gregorian Decretals. There is a gloss there of the phrase “love and do as you will” next to a discussion of natural law as divine law, and as opposed to the customary laws of people. This phrase resonates hypertextually for the medieval and the modern

readers, who see an expression of John's Gospel and its meaning for a possible relaxation of legalism. If you love, your will is already conformed to God's law.

Similar insights arise in Jewish Talmudic law in the commentary which surrounds core text. The oral Torah or Mishnah and the Talmud or commentary on it, continuing on through rabbinic decisions or *responsa*, and including some partial codifications, trace a path similar to secular developments insofar as ordinances and codifications reveal a concern for continuity and fidelity to truth in interpretation on the part of a human legal community responding to texts of deep significance to their lives and beliefs. A recent consideration of the Talmud and the Maimonidean, code-like commentary on it addresses concerns about this very progress of religious law toward a model of human application very like what we see in the most important texts of secular law; in this case the status of the Talmud both as divine law and "law-to-be-applied." [show image and read translation].