

# THE END OF COMPARATIVE LAW AS AN AUTONOMOUS SUBJECT\*

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## I. RADICAL CHANGES AND OLD HATS

We should abandon comparative law as an autonomous subject in American legal education.

Comparative law was established as a course in its own right in the decades after World War II by the immigrant generation of European scholars. This was an important accomplishment which I do not mean to belittle. Nor do I advocate the abolition of comparative legal studies in American law schools—as I will explain, quite to the contrary. But I do believe that we need critically to reevaluate the status of the discipline today.

Such a reevaluation suggests that we should no longer treat comparative law as a self-contained and separate area of study, like contracts or legal history, *i.e.*, as a subject with its own basic course and students, casebooks, and exams. Instead, we should break it up into several component parts. Some of these parts should be studied in their own right. The core of the discipline, however, the truly comparative study of law, should become part and parcel of other courses. As a result, comparative law as an autonomous subject would cease to exist.

This is a fairly radical call for change. When first considering it, I believed it to be an entirely original idea. But as is often the case, an important part of it turned out to be an old hat: the suggestion to integrate comparative studies into the teaching of other courses was first made by Roscoe Pound more than sixty years ago.<sup>1</sup> Later, such leaders in the field as Max Rheinstein<sup>2</sup> and Hein Kötz endorsed it,<sup>3</sup> and members of the Michigan law faculty (and perhaps others) even put it into action for a

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1. Roscoe Pound, *The Place of Comparative Law in the American Law School Curriculum*, 8 TUL. L. REV. 161, 168 (1934).

2. Max Rheinstein, *Teaching Comparative Law*, 5 U. CHI. L. REV. 615, 622-23 (1937-38); MAX RHEINSTEIN, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 190 (2d ed. 1987).

3. Hein Kötz, Book Review, 36 RABELS ZEITSCHRIFT 565, 571-72 (1972) (reviewing RUDOLF B. SCHLESINGER, *COMPARATIVE LAW, CASES-TEXT-MATERIALS* (3d ed. 1970)). Professor Kötz, however, disagrees with the proposal to abolish the basic course in comparative law (*see infra* Part IV.D). *Id.* at 571; *see also* KONRAD ZWEIGERT & HEIN KÖTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 23 (3d ed. 1996); Murad Ferid, *Ius Privatum Gentium, Bericht über die Festschrift Rheinstein*, 35 RABELS ZEITSCHRIFT 537, 546 (1971). The inclusion of comparative aspects in first year courses seems to be implied in the classic article by Otto Kahn-Freund, *Comparative Law as an Academic Subject*, 82 LAW Q. REV. 40, 60 (1966).

number of years in the 1950s and 1960s.<sup>4</sup> Professor Rudolf Schlesinger, however, explicitly rejected the concept.<sup>5</sup>

So why revive a sixty-year old idea? In a scholarly community that prizes novelty above virtually everything else (including relevance, utility, and good sense), this is a legitimate question. But leaving that obsession aside,<sup>6</sup> there are at least three good answers. First and foremost, it is simply a very good idea that deserves not to be forgotten, but rather to be put into practice. Second, the proposal has never been thoroughly discussed but only presented, and dismissed, in summary fashion.<sup>7</sup> And last, but not least, the idea is much more timely today than it was when first proffered (and rejected).<sup>8</sup> Comparative legal studies desperately need to change if American students are not to miss the boat to the twenty-first century, and following the course suggested here would go a long way towards that goal.

My call to abolish comparative law as an autonomous subject is limited in several important ways. It applies only to teaching, not to scholarship; while there is also a serious question whether comparative law should be considered a separate discipline for scholarly purposes, beating this dead horse is not my objective here. Also, the following discussion focuses on the American law curriculum; much of it applies—*mutatis mutandis*—to other countries (notably the European ones) as well, but the situation there differs in enough ways to warrant separate analysis. Finally, my argument reflects the current situation in comparative law teaching; it may become obsolete if we manage to develop more sophisticated approaches and frameworks.<sup>9</sup>

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4. Following a grant by the Ford Foundation in 1954, about a half-dozen faculty members at the Michigan Law School included comparative aspects in their research and teaching. These efforts faded with the coming of a new generation of teachers who focused on the great domestic issues of the 1960s and 1970s. I owe this information to conversations with my retired colleagues Whitmore Gray and Eric Stein.

5. Rudolf B. Schlesinger, *The Role of the "Basic Course" in the Teaching of Foreign and Comparative Law*, 19 AM. J. COMP. L. 616, 616-17 (1971).

6. The license to do so is one of the blessings of tenure.

7. The contributions cited *supra* notes 1, 2, and 5, devote at most two pages to the idea and contain no in-depth analysis.

8. Even the Association of American Law Schools has recently considered the idea of including comparative perspectives in traditional courses. See Judith Wegner, *The Association of American Law School's Role as an International Learning Society*, THE NEWSLETTER, Aug. 1995 (No. 95-3), at 1, 3; see also *Symposium on Globalization*, 46 J. LEGAL EDUC. 311 (1996).

9. A conference held at the University of Michigan Law School on September 20-22, 1996, entitled "Comparative Law in the United States—Quo Vadis?," generated first steps in that direction. A particularly promising model would be to study legal systems and processes as such from a comparative perspective in order better to understand how they work in modern societies;

The discussion begins with a brief look at the current malaise in comparative law in the American curriculum. I then suggest that we overcome this malaise in two steps. Step one is to abandon the current kitchen sink approach to the subject by drawing clearer distinctions between its various component parts. This will allow us to identify the core of the discipline, the truly comparative study of law. Step two is to merge this core into the mainstream of the curriculum. The last part points to a few carrots and sticks that could move the agenda along and help to overcome human inertia and vested interests.

## II. THE STATE OF COMPARATIVE LAW TEACHING IN THE UNITED STATES

### A. *A Subject on the Margin*

At present, comparative law teaching in this country leaves much to be desired. In fact, it is in a rather sorry state.

In the vast majority of American law schools, comparative law is either not taught at all or lingers somewhere on the margin of the curriculum.<sup>10</sup> Even where comparative law courses are offered, as is the case in most of the so-called leading schools, such courses are rarely thorough or sophisticated. Instead, they often amount to a more or less superficial introduction to various aspects of foreign law or legal systems with incidental comparative observations.<sup>11</sup> Moreover, interest in the subject is very limited among both faculty and students. There are but very few full-time teachers in the field even at the top law schools. Students mostly ignore the subject; I would be very surprised if more than ten percent of the American law graduates ever took a comparative law course. In short, the subject is neither rigorously taught nor widely studied, though there are exceptions here and there. This situation is so familiar to comparatists as well as nonspecialists that I need not describe it at any greater length.

Of course one can reply that comparative law is no worse off than many other noncore subjects such as jurisprudence, legal philosophy, or legal history. But in our day and age, this argument, even if correct,

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the idea was proffered by David Gerber. Currently, however, comparative law in the United States is far from having such a model; for a notable exception, see MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

10. See John Langbein, *The Influence of Comparative Procedure in the United States*, 43 *AM. J. COMP. L.* 545, 546 (1995).

11. See *infra* Part III.B.2.

simply has no force. The increasing internationalization of business, of communication, and of life in general, plainly requires that we imbue today's students not only with an international but also with a comparative perspective on law. *At minimum* we must show them that their law is part of a larger universe, that the American way is only one among many, and that the alternatives are not necessarily inferior. This also has been belabored ad nauseam.

Thus there is a huge discrepancy between what we, the comparatists, currently do and what our students need. Many teachers recognize this discrepancy but few have the courage openly to admit what it means: we are committing a form of educational malpractice. We must, and can, do better.

#### B. *A Brief Look at Reasons*

If we want to cure comparative law teaching of its current ills, we need to understand their causes. They fall into three major categories.

Some causes lie in the intellectual and cultural predisposition of the majority of American *lawyers*, as is widely known and much bemoaned. Among them are parochialism, belief in the superiority of the American way (*i.e.*, arrogance), the lack of language skills, etc.. These problems are pervasive, and tackling them is a major reason for teaching comparative law, but they are not my principal concern here.

Other causes relate to the nature of American *law* as such. They are rarely noticed but are nonetheless serious. On the one hand, the diversity of the American legal system makes most legal work inherently comparative, albeit on a purely domestic level; as a result, comparing legal solutions does not seem all that novel or exciting. On the other hand, the American legal system is already so diverse, complex, and huge that the teachers' and students' reluctance to venture beyond it is quite rational. These problems require further exploration, but I must leave that for another day.

Finally, there are causes within the *discipline of comparative law* itself, *i.e.*, systemic ones. They are my concern here because comparatists have no one but themselves to blame for them. With regard to teaching in particular, I see two concrete problems. First, comparative law teaching wants to do too many things at the same time which leads to confusion and frustration. Second, it remains in isolation from the mainstream of the curriculum and thus invites marginalization. Both problems are interconnected and can be solved with moderate effort.

## III. STEP ONE: GETTING OUT OF THE KITCHEN SINK

Most comparative law courses lack a clearly stated and realistic agenda. In particular, they make many more promises than they can possibly keep. This frustrates and confuses both students and faculty and has left the discipline ill-defined and unattractive. You cannot expect people to work hard if they have no clear view of their goals and no realistic chance of reaching most of them.

Today, it is very difficult clearly to state what comparative law teaching is designed to achieve because it claims to be about a plethora of different things at the same time. Treatises, casebooks, and articles fervently reiterate long lists of practical and academic benefits for the students, the law, and the world at large. One can list at least ten such potential objectives, although the exact count depends on how one defines and groups them. In particular:

1. the comparative study of law provides foreign models for the improvement of domestic law;
2. it promotes the international unification (or at least harmonization) of law;
3. it does so in part by revealing the common core of all law;
4. it teaches basic skills for international legal practice;
5. it provides an overview of law on a world-wide scale by introducing the major legal families;
6. or at least it provides knowledge about certain foreign legal systems;
7. it familiarizes students with foreign rules, concepts, and approaches and thereby facilitates communication with foreign lawyers;
8. by forcing students to compare their own law with foreign alternatives, it provides critical perspectives on their domestic legal system;
9. it helps students to understand law as a general phenomenon, in particular its contingency on history, society, politics, and economics;
10. by providing critical perspectives and functionally explaining alternative approaches, it fosters tolerance towards other legal cultures and thus overcomes parochial attitudes.<sup>12</sup>

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12. See, e.g., RENÉ DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 4-16 (John Brierly trans., 2d ed. 1978); MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 1-17 (2d ed. 1994); JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 1-2, 28-54 (1994); Max Rheinstein, *Comparative Law—Its Functions, Methods and Usages*, 22 ARK. L. REV. 415 (1968); RUDOLF B. SCHLESINGER ET AL., COMPARATIVE

It should be obvious that no two or three hour course can effectively pursue all, or even most, of these goals. There is neither enough time in the classroom nor space in anyone's head for that. Moreover, pursuing these very diverse goals calls for teaching different substance and in different styles. It is true that few, if any, courses actually try to do it all at once. Nonetheless, this overabundance of objectives creates two very serious problems.

One is that teachers (or casebooks) may pursue a large number of potentially inconsistent objectives. The result of such over-ambition is often failure—by trying to reach too many goals, most are actually missed. Comparative law becomes something like “Non-American Law 101” in which students learn interesting tidbits about this or that, but rarely acquire any broad knowledge or deep understanding. At the end of the course, ask them to state what they have learned, and most will be unable to give a coherent answer. In short, comparative law means everything and therefore nothing.

The other problem results if a teacher defines the objectives of the course more narrowly, choosing only one or a few of the traditional goals (or a nontraditional one altogether). While this allows more focused teaching, it also means that courses differ so greatly from each other that the label “Comparative Law” becomes well-nigh meaningless. In one course, one may study a particular legal system including its actors and institutions,<sup>13</sup> in another the emphasis is mainly practical (*e.g.*, on how to work with foreign law or experts),<sup>14</sup> while in a third students compare contract and tort law<sup>15</sup> or, in yet another course, focus on historical<sup>16</sup> or intellectual developments.<sup>17</sup> Of course, there should be room for different approaches, but where virtually no common ground is left, the discipline can no longer be defined in any meaningful manner. Comparative law, again, tends to mean everything and nothing.

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LAW 1-43 (5th ed. 1988); KONRAD ZWIEGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 1-17 (Tony Weir trans., 2d ed. 1987).

As should be obvious from the authors cited here, this traditional canon of goals of comparative law is primarily a European import, reflecting European predispositions. It is highly questionable whether it fits the modern American situation at all.

13. See, *e.g.*, GLENDON ET AL., *supra* note 12; MERRYMAN ET AL., *supra* note 12.

14. See, *e.g.*, SCHLESINGER ET AL., *supra* note 12, at 127-228.

15. ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM 555-1123 (2d ed. 1977).

16. See ALAN WATSON, LEGAL TRANSPLANTS 1-9 (1974).

17. See generally William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1995).

The study of comparative law must define its agenda more clearly and soberly. It needs to get out of the kitchen sink and to decide which objectives to pursue under which labels. I suggest that we first weed out some goals as unrealistic (Nos. 1 through 3) and then divide the remaining ones into three categories: legal practice skills (No. 4), introduction to foreign legal systems or laws (Nos. 5 through 7) and last, but not least, the benefits of truly comparative studies (Nos. 8 through 10).

#### A. *Abandoning Unrealistic Teaching Goals*

I consider several of the traditional goals unrealistic *in the law school classroom*, and certainly in a basic, introductory course. We should strike these goals from the list of primary objectives, thus avoiding frustration when we cannot reach them.

##### 1. Domestic Law Reform

While the reform of domestic law through the adoption of foreign models may be a sensible practical goal, a comparative law course should not focus on it. The reason is mainly that such a course cannot make a meaningful contribution towards that goal. Lest I be misunderstood, let me say that we should of course employ comparative perspectives in the classroom critically to evaluate our own law.<sup>18</sup> But such a critical evaluation is not the same as actual law reform in the sense of legislative or judicial adoption of foreign ideas. Such actual law reform is not a realistic teaching goal. Law students stand virtually no chance ever to pursue it in practice because, in contrast to many other countries, American judges and legislators pay next to no attention to foreign ideas. Also, importing foreign models is fraught with enormous practical difficulties and dangers that are quite beyond the ken of the student in a basic course.

##### 2. International Unification or Harmonization of Law

It is true that comparative studies are a prerequisite for the international unification and harmonization of law, and comparative law teachers should let their students know that. And again, comparative law can open one's eyes and shape one's ideas as to the promises and difficulties of such endeavors. But actual unification and harmonization

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18. See *infra* Part IV.B.1.

is practical business of the most difficult sort. We should not even try to teach it in the law schools, mainly because one cannot possibly learn it in a classroom. Even if one could, it would not make for good teaching material because it requires highly-detailed studies of individual rules on a very technical level and often in the most tedious manner.

### 3. Establishing the Common Core of Law

In a similar vein, establishing the common core of legal systems or of individual areas of law is an enterprise of staggering dimensions and daunting practical difficulties. It requires enormous breadth of perspective which usually only a team of experts can provide, as well as lengthy and painstakingly detailed study which normally extends over several years.<sup>19</sup> It is simply not a task that law students can perform in any meaningful fashion. Indeed, even in the hands of sophisticated scholars and after huge efforts, such attempts have met with questionable success.<sup>20</sup>

#### *B. Distinguishing the Realistic Objectives*

The remaining objectives are realistic and valuable but they are still too numerous and too diverse to fit under one umbrella. They should not be pursued in a single course but rather in several different ones. This is particularly true because many of them are not goals of truly comparative study.

#### 1. Teaching International Legal Practice Skills

The teaching of comparative law is often said to prepare students for international legal practice. This can mean either of two things.

In a very general sense, it means that students learn about the law of other countries and develop an awareness of different approaches and foreign ways of thinking. This generates some practical benefits; it can, for example, facilitate communication with foreign lawyers (*supra* No.

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19. The most famous endeavor of this sort was the so-called Cornell Project, *see* PIERRE BONASSIES ET AL., *FORMATION OF CONTRACTS—A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* (Rudolf B. Schlesinger ed., 1968). A European successor project is underway at the University of Trento, Italy, under the auspices of Mauro Bussani & Ugo Mattei, and with the title *The Common Core of European Private Law*.

20. *See generally* Richard M. Buxbaum, *Rudolf B. Schlesinger—A Tribute*, 43 AM. J. COMP. L. 317 (1995).

7). This is, however, only one small item on the list of international legal practice skills.

If preparation for international legal practice means that students should acquire the actual knowledge and basic skills required in that field (*e.g.*, how to find and use foreign law, how to work with foreign experts, etc.), such preparation should be offered as a separate course for two reasons. First, comparative legal studies and the acquisition of actual international practice skills are different matters.<sup>21</sup> While a course aiming at the latter will certainly contain comparative elements, just as it will include aspects of public international law, such elements are only means, not ends in themselves. Thus, an international legal practice course is not really one about comparative law, and even the title should leave no doubt about that (it may be called International Legal Practice, International Litigation, or the like). The second reason for a separate course is that even a superficial preparation for international legal practice must include so much material that it requires two or three credit hours in its own right.<sup>22</sup> Mixing it into a comparative law course almost invariably leads to incoherence and superficiality.

## 2. Teaching Foreign Legal Systems and Foreign Law

In the United States today, teaching comparative law mostly means introducing students to foreign legal systems or laws. Such introductions differ in generality, ranging from overviews of the great legal systems in the world, or at least the major Western ones, through individual families, and down to single countries. They also vary according to their subject matter, *i.e.*, as to which system (mostly that of the civil law) or country they examine. Finally, there are numerous introductions to specific areas of foreign law.

Such introductions can serve several important purposes. An elementary overview of the world's major legal systems, for example, is desirable for every law graduate for the same reason that a basic knowledge of geography is desirable for every high school graduate—simply as an element of general education. An introduction to a specific foreign legal family or system provides students with knowledge about other parts of the world and is valuable just as is the knowledge of a

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21. This is why I would not include SCHLESINGER ET AL., *supra* note 12, at 43-228, in a comparative law course.

22. See generally GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (3d ed. 1996); ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION (1993); RUSSELL J. WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION (1994).

foreign language. Introductions to the substantive law of specific countries have the lowest general value but may be interesting to those with a specific intellectual or professional interest in the respective area.

Yet again, there is a serious question whether these courses should be considered comparative law. If we are entirely honest, we must admit that most of these introductions are not truly comparative at all. They mainly describe, and perhaps explain, a foreign legal system or law.<sup>23</sup> Such a description and explanation is not without value and will normally require a two or three hour course in and of itself. But, as has often been noted, it is only a first step toward comparison; it is not yet comparison itself. Of course, American students will inevitably (and often unconsciously) match what they learn in such a course against their own legal system, and teachers should and often do encourage that. But this kind of comparing is incidental and haphazard rather than explicit and systematic.

I suggest keeping such courses in the curriculum but proffering them in their own right and as what they are. This has several implications. To begin with, we should come out of the closet. We should openly admit that true comparison is not their main focus; we should thus teach them as introductions to foreign legal systems with more or less incidental comparative components. Next, we ought to stop mislabeling them. We should not list them, as is frequently done, as Comparative Law but give them a proper title: An Introduction to The Civil Law Tradition, European (or Asian) Legal Systems, French Law, or the like; this would sharpen their focus, reduce student confusion, and avoid unfulfilled expectations. Finally, we should stop fooling ourselves as to what they accomplish. Because they are, for the most part, not exercises in true comparison, they cannot fulfill the goals of comparative law proper.<sup>24</sup>

There is another good reason for according introductions to foreign legal systems separate status: it forces us to define more clearly what the truly comparative study of law is all about and how best to pursue it.

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23. This is also true for most of the established treatises in the field, most obviously for DAVID, *supra* note 12, but even for large parts of ZWEIGERT & KÖTZ, *supra* note 12.

24. See *infra* Part IV.C.4.

### 3. The Truly Comparative Study of Law

The truly comparative study of law requires at least four steps. At the outset, the student must acquire a solid knowledge of his own law. Then he needs to learn enough about a foreign legal system or law to understand its rules and underlying principles. Step three is to juxtapose domestic and foreign law and clearly state the similarities and differences. Finally, from the observations made, the student must draw conclusions as to what they mean, *i.e.*, derive insights of one sort or another.

Only such true comparison can fulfill the last three objectives on the list above. When forced directly to compare their own law with alternative solutions, students will gain critical perspectives on both the foreign and their own rules or systems. They will be able to see how different approaches and rules reflect different doctrinal methods, underlying assumptions, socioeconomic environments, and policy choices. And they will soon begin to abandon parochial views and learn tolerance towards other legal cultures. Thus, they will come to see law in a cosmopolitan context. These are the benefits of the truly comparative study of law and the reasons why such study has general educational value.

Yet, there is a major problem with such true comparison: it hardly ever happens. Most so-called comparative law teaching simply never gets that far.

It is quite easy to see why. To begin with, many students who enroll in a comparative law course simply do not yet know much about their own legal system; this is particularly true if the course is offered as a first-year elective. Next, even if they have a solid grasp of their own law, they need to study the foreign alternatives at some length and in some depth. More often than not this takes up so much of a comparative law course and of the students' energy that by the time they know and understand enough (if they ever do), the course is over. Thus even the third step of true comparison, *i.e.*, the careful observation of similarities and differences, is often missing. The final, most difficult act, the drawing of meaningful conclusions, is rarely performed.

As a result, comparative law promises great educational benefits but hardly ever delivers. This problem is not anyone's fault. It is systemic. It is also very serious. As long as comparative law routinely gets stuck at the preliminary steps and does not generate meaningful

insights, it does not deserve a central place in the curriculum. Can this problem be solved?

#### IV. STEP TWO: MERGING INTO THE MAINSTREAM

The answer is no as long as we teach comparative law as an autonomous discipline, that is as a general but separate course.<sup>25</sup> The main reason is that no such course of reasonable length can properly do it all: assure sufficient student knowledge of domestic law, teach enough foreign law, carefully compare both, and still find time to discuss and evaluate the results. The best, though perhaps not the only,<sup>26</sup> way out of this dilemma is to abandon the truly comparative study of law as a separate subject altogether and instead to integrate it into other courses.

##### A. *A Decentralized Approach to Comparative Law*

Instead of offering one separate course with one book, one exam, etc., we should include comparative elements throughout the curriculum. In other words, we should decentralize the teaching of comparative law. In practice that means that many law school courses should contain a comparative component.

First-year courses in particular should each take up one or two comparative aspects within the concrete context of the material they cover. There are many obvious topics: in contracts, the different approaches to contract formation can be taught in connection with the Convention for the International Sale of Goods;<sup>27</sup> in property, the Anglo-American estate system stands in contrast to the civilian combination of indivisible property and encumbrances as limited rights; in torts, the American influence on European products liability law provides a striking example of borrowing among legal cultures; in civil procedure, the absence of a jury or of pretrial discovery in most of the world challenges the very bases of the American system; in criminal law, most Western systems react much more leniently to crimes than their

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25. Roscoe Pound and Max Rheinstein, two of the greatest protagonists of comparative law in this country, who had no illusions about the inherent difficulty of the discipline, saw no place for a separate comparative law course in the basic law curriculum either. The reasons they gave, however, were mainly practical and poorly explained. See Pound, *supra* note 1, at 162; Rheinstein, *Teaching Comparative Law*, *supra* note 2, at 622.

26. Comparative courses on special topics can avoid much of this problem as well, see *infra* Part IV.C.4.

27. UN Convention on Contracts for the International Sale of Goods, *opened for signature* April 11, 1980, 19 I.L.M. 668-99.

American counterparts; and in constitutional law, exposure to different conceptions of judicial review, federalism, or individual rights will greatly broaden the students' minds.

In upper-class courses, comparative perspectives may also create educational benefits though this is more true for some courses than for others. Some areas of law are almost inherently comparative, *e.g.*, conflicts, immigration, and human rights. Others have recently become internationalized so that a look beyond domestic law is highly appropriate, as is the case for antitrust, corporate, or securities law. In yet other areas with a more decidedly domestic focus, comparative perspectives are not a necessity but a useful luxury, as in family law, trusts and estates, or labor law.

In the overall picture, it is of minor importance exactly which courses contain comparative components. Instead, it is crucial that such perspectives pervade the curriculum as a whole, ensuring that students will be exposed to them on several occasions throughout their three years of study.

#### *B. The Case for Integrating Comparative Studies*

The principal argument for such an approach is that it makes true comparison feasible, that it has a greater educational impact than an isolated course, and that it leads comparative law out of its current isolation.

##### 1. Making True Comparison Possible

True comparison becomes much easier within the concrete context of a regular law school course because it becomes more user-friendly. Of the four steps required, the first can be skipped and the second handled with less investment so that there is room actually to proceed to the third and fourth.

As mentioned before, the difficulties encountered in a separate comparative law course begin at the first step, *i.e.*, in assuring sufficient knowledge of American law. At best the class starts from very uneven ground. At worst, most students have no real grip on their own system. Either they have not yet studied the topic in question or they have already forgotten most of it. Thus the majority simply does not know or remember much at all and comparative studies are doomed to failure before they have even begun. A decentralized approach almost completely avoids this problem. It introduces a comparative component

at a time when the whole class has just covered the relevant domestic law. All start from common ground, and all know the basics of the subject.

The second step, acquiring the requisite knowledge of foreign alternatives, also becomes considerably easier because the students can focus on a fairly narrow segment. In most cases, it will be quite enough to read a few sources, for example a chapter from a constitutional textbook in combination with a few constitutional provisions and a foreign decision about the constitutionality of abortion laws. Students can easily do this from one class to the next. Of course, this entails its own risks and must be handled with care.<sup>28</sup>

On the very next day, they will then know both sides—not thoroughly, to be sure, but sufficiently to take the third and fourth steps, *i.e.*, to observe the similarities and differences and to discuss their meaning under the guidance of the teacher. In other words, they will now engage in what a separate course rarely offers: true comparison. Suddenly, this becomes not only possible but well-nigh inevitable.

Such true comparison is not only more feasible, it is also more promising in the concrete context of another course than in isolation from it. A separate course first needs artificially to create or revive the students' interest in a particular issue which some have never heard of and others have long laid to rest. When approached from within another course, however, the students' minds will focus on the problem currently before them, and interest in the topic will be alive. Where the issue is fresh and already on the table, foreign alternatives excite much more interest and almost automatically become part of an ongoing discussion.

As a result, comparative law can now reach its educational goals. In the concrete context of an ongoing class, students simply will have to look back at their own system from a foreign vantage point. Where such a look back is concrete and immediate, it will generate a more critical perspective. Having to face the sometimes deeply rooted differences between the laws compared, students will be able to relate them to their different historical backgrounds, cultural traditions, and socioeconomic policies, many of which will already have been discussed from a domestic point of view. And students will have a better chance to recognize that there are different ways of handling the problem, that

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28. See *infra* Part IV.C.4.

foreign solutions have their own advantages and drawbacks, and that American approaches are not necessarily superior.<sup>29</sup>

## 2. Enlarging the Impact

Teaching comparative law in a decentralized fashion also has a greater educational impact because it leaves deeper impressions and reaches more students.

The educational impact of a separate course is usually very limited because it is impossible to get the timing right. In most law schools, the course is offered in the second or third year. In that case, comparative perspectives enter the picture at a time when the students' basic view of law, formed overwhelmingly in the first year, is already firmly in place. At this late stage, few new perspectives will leave a deep impression, particularly in the third year when students already have one eye on the bar exam and the other on the job market. In other words, comparative law as an upper-class course is trying to teach old dogs new tricks. Some schools offer the course in the first year, *e.g.*, as a second semester elective. That, however, only exacerbates the problem of ignorance of American law and thus leads to a superficial discourse which is ruled by presumptions rather than knowledge.

A decentralized approach escapes much of this dilemma. On the one hand it presents comparative views early on, possibly within the first few weeks of law school, before parochial views can take a firm hold. At this point, it can still make a deep impression. On the other hand it does not overtax the students' knowledge because it presents comparative perspectives only in the context of material already covered by the class.

A decentralized approach also ensures much wider distribution. A separate comparative law course reaches only a part of the student body, and often a very small part at that. The vast majority never takes it and thus graduates in blissful ignorance of the law of the rest of the world. At the end of the twentieth century, this is a serious problem. But if every first year course and many upper class courses contain comparative elements, every student will at some point be exposed to them. This exposure will come in small doses, but like a public

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29. Even if one believes in the objectives I have rejected as unrealistic for teaching purposes, *supra* Part III.A, they are better pursued in the context of other courses than in isolation from them. Deliberating law reform, striving for international unification, or identifying commonalities among all legal systems is practically feasible, if at all, only in a concrete context and with regard to clearly identified issues.

vaccination program, it will immunize all of them against at least the worst forms of parochialism.

### 3. Breaking Out of Isolation

One of the major problems with comparative law today is that it leads to an insular existence within American law schools. This isolation is not primarily a question of curricular structures, course descriptions, and class syllabi because these matters are merely external expressions of thought patterns. It is primarily an issue of consciousness, *i.e.*, of how one conceives of comparative law.

The current prevailing conception is that of a separate (and esoteric) discipline that matters only to a few people with special interests. A separate course fosters that view because it presents comparative aspects as a separate area of law: there is civil procedure, and there is comparative law; one casebook for the former, another for the latter; civil procedure is taught by one professor in one room, comparative law by another somewhere else; each has its own exam, and the student may of course get different grades. There may be some connections, but teaching comparative law as an autonomous discipline de-emphasizes, rather than highlights them.

A decentralized approach creates quite a different consciousness because it starts from a concrete topic and then explores possible approaches: civil procedure is thus in the United States, but it is very different in continental Europe; both aspects are opposite sides of the same coin; they are studied together, absorbed together, and remembered together. In this fashion, students will learn to think beyond American borders as a matter of routine. This is as it should be.

As for the students, so for the teachers. If law professors include comparative components in many of their courses, they will come to accept them as standard aspects of instruction. Comparative perspectives will become routine considerations, just like social policy and moral principles, economic analysis and critical theory.

### C. *Difficulties and Costs*

More than a quarter century ago, Professor Schlesinger called similar ideas unrealistic.<sup>30</sup> While he raised some serious objections, they are far from putting the matter to rest. They are too summary and can by

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30. Schlesinger, *supra* note 5, at 616-17.

and large be overcome with reasonable effort. Most of what we need to do is to set realistic goals, to shed our specialist arrogance, and to make the comparative study of law more user-friendly for faculty and students.

#### 1. Time Concerns

Professor Schlesinger's main argument was that there is simply no time for comparative elements in existing courses because these courses are too full already. This is a serious concern, but it must not be overrated. It is mitigated by three considerations.

Most importantly, we must be modest. To demand, as Max Rheinstein did, that "*all* students ought to be exposed *all* the time in *all* courses"<sup>31</sup> to comparative aspects is indeed unrealistic and self-defeating. After all, the goal is not to turn every student into a comparative lawyer, but only to expose all of them to the comparative dimension of law. Even an average of one or two such exposures, *i.e.*, one or two class hours per course, amounts to a half dozen or more comparative exercises in the first year alone and about twice as many in three years. This will be quite enough to drive home the essential points: that there is law out there beyond America's borders, that it may be worthwhile to consider it, that it may differ and why, and that looking at foreign alternatives helps one to understand one's own law better.

Moreover, the amount of time available depends on the respective instructors and their attitude toward the need for comparative perspectives. That attitude has changed over time. Even if it was true when Professor Schlesinger voiced his concerns that few were willing to sacrifice class time for such purposes, it is not necessarily true anymore. The need for comparative and international elements in the curriculum is much more obvious, pressing, and widely accepted today than it was in 1971. Particularly among the younger generation of law teachers, there is an increasing willingness to bring in such elements—or at least a feeling of guilt for not doing so.

Finally, the willingness (or lack thereof) of our noncomparatist colleagues is not an absolute datum. It depends on how we represent our discipline and make our case. If we continue to stay in isolation and treat it as an esoteric subject, the benefits of which are obscure, it is indeed unattractive. But if we reach out, clearly explain our objectives, and

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31. Rheinstein, *Teaching Comparative Law*, *supra* note 2, at 623 (emphasis in the original).

present a compelling argument, we will find a large part of the faculty open to persuasion.

## 2. The Lack of Properly Trained Faculty

Presuming our colleagues are willing, are they also able? Can they handle comparative elements without prolonged training in comparative law? I believe the answer is clearly yes.

It is true that the danger of amateurism looms large—even among comparatists and certainly among others. Yet, that argument proves too much because it is true for virtually every other general perspective on law. We routinely discuss ethical values, historical developments, economic efficiencies, and social policies in the classroom without professional training in any of these areas. Comparative perspectives are no easier and no harder to master than any of these disciplines. Specialists are always tempted to believe that nonspecialists just cannot do it, but at least on a basic level, they often can.

It is true that teaching comparative perspectives, like anything else, requires preparation and thus time and effort. If this investment turns out to be particularly onerous, few teachers will make it. It is our, the comparatists', job to keep it reasonable by assisting our nonspecialist colleagues. We should, for the first time around, offer to come to their class and teach a comparative law segment ourselves. The year after, we can co-teach it with them, and before long, they can do it on their own. Such cooperation is a learning experience for both sides and a delight for the students who enjoy the change of style. In many schools, foreign visitors will be available for co-teaching and joint learning.<sup>32</sup>

## 3. Lack of Teaching Materials

For the time being, we lack readily available teaching materials for such an undertaking, and nonspecialist faculty cannot be expected to put them together all by themselves. Thus it falls, again, upon the comparatists to help. This is quite easy because there is an abundance of material out there from which to choose, including translations of codes, statutes, cases, and other sources. Once we have put a set of problems

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32. This, of course, means extra work for the comparatist(s) on the faculty. Deans and colleagues must recognize and reward this. In particular, comparatists must receive credit for decentralized teaching just as they would for a separate course.

together, we can easily re-use it, occasionally updating it like any other teaching material.<sup>33</sup>

#### 4. Educational Costs

While the practical difficulties can be overcome with reasonable effort, a decentralized approach also entails educational costs. Abandoning a separate course in comparative law has two undeniable disadvantages. While I do not consider them very serious, there is room for disagreement and debate.

One undeniable cost is that a piecemeal approach cannot present a broad view of a foreign legal system. Thus it cannot demonstrate the interdependence of its various elements, and exposing the students only to bits and pieces can create misunderstanding. A student reading a case from a civil law jurisdiction may be misled “if he does not realize that in a civil law country there is no jury; that as a rule the parties cannot testify under oath; that the principal source of ‘facts’ relied upon by the ‘civil chamber’ may have been the dossier of a previous criminal proceeding,” etc.<sup>34</sup>

Again, this cost is not unique to comparative studies, but is a price of all broader perspectives on law. Moral precepts, historical backgrounds, economic principles, and social policies are just as easily misunderstood if taken out of context. Still, that does not keep nonspecialists from discussing them in class. And as with these other areas, students can still learn about the larger context elsewhere, namely in an introduction to foreign legal systems course (which, as explained above, we should continue to offer).<sup>35</sup> Moreover, a competent teacher can avoid at least the more serious misunderstandings. After all, it is her job to put the material discussed in class into perspective, *e.g.*, to point out that in this case there was no jury involved, no discovery conducted, etc. This is exactly why her comparatist colleague should assist her at least initially.

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33. I plan to put together such a set of materials for use in first-year courses with a view to publication.

34. Schlesinger, *supra* note 5, at 617; *see also* MICHAEL BOGDAN, *COMPARATIVE LAW* 48-50 (1994).

35. *See supra* Part III.B.2. To be sure, this is no help to those students who have not taken such a course when they are exposed to comparative elements elsewhere, and this is likely to be the majority. Yet, this majority is no worse off than in the traditional curriculum: it never gets such an overview anyway. Under a decentralized approach, it is at least exposed to some comparative aspects.

A further undeniable cost is the loss of a solid basis for advanced comparative studies. A special course in comparative law can provide such a basis but a piecemeal approach cannot. This cost also turns out to be much lower than one might think. After all, the basis for further studies consists of two main elements. The first is a fundamental knowledge of foreign legal systems which students can acquire in the respective introductory courses.<sup>36</sup> The second is a basic understanding of the comparative method, and at least some of that can be learned in piecemeal fashion just as well. Finally, the need for a more solid basis exists only where advanced studies actually take place. But few institutions even offer, and very few students pursue, them.

*D. The Case Against a Separate Course*

Most law teachers—comparatists as well as others—will find it relatively easy to agree that integrating comparative perspectives into a variety of courses would have considerable educational benefits. Many may even be persuaded that the practical difficulties are manageable and the educational costs tolerable. Yet, I suspect that particularly the comparatists themselves will dislike the idea of abandoning the traditional basic course.<sup>37</sup> Why not do both, they will ask: spread comparative law throughout the curriculum and still teach a separate course in it? There are four principal arguments against that.

The simplest reason is practical: we cannot have our cake and eat it too. The time and energy that teachers as well as students are willing to devote to comparative law is, and will remain, limited. Actually, it should be. Comparative perspectives must become important elements of legal education, but they are not more important than many others. Therefore the distribution of the time and energy they deserve is a zero-sum game. If we inject comparative aspects into a variety of courses throughout the curriculum, we must cut back elsewhere.

There will also be little need for a separate comparative law course if we implement a decentralized approach. If we offer training in international legal practice, introductions to foreign legal systems or laws, and expose all students to comparative views in many other contexts, there is simply not much left to do in a separate, basic course. Teaching it would largely be redundant, and students will see no point in taking it. It would have merged into the rest of the curriculum.

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36. *See id.*

37. *See, e.g.,* Kötz, *supra* note 3, at 571.

Beyond the fact that we could not have and would not need a basic course, there is the argument that we should not even want one. Offering a separate course is, in a sense, actually detrimental to the well-being of the discipline. As I have explained before, teaching comparative law as an autonomous subject perpetuates its image as an area separate from the rest of law. This is exactly what we must overcome. We should not even keep a separate box into which comparative law can conveniently be fit, only to be ignored.

Finally, a basic course in comparative law is an educational oddity. This is often vaguely felt but rarely openly recognized. As we all know, there is no comparative “law” as such; there is only foreign law and comparison between laws. Foreign law is substance but comparison is simply a method. If taken seriously, a course in comparative law proper is therefore a course about a particular method of legal discourse and analysis. To be sure, it is not impossible to teach a course about a method. But it makes sense only if we truly understand that method and rigorously employ it towards a clearly defined goal. None of this is true for the comparative method today. As long as we do not have a clear view of exactly how and why we wish to compare laws, we would be better off if we gave up teaching courses about it altogether.

These arguments apply with full force only to a general course. They are much weaker when it comes to comparative studies of special areas. Special courses do not try to introduce students to comparative perspectives generally, but focus on a particular subject, such as constitutional, corporate, or criminal law. Therefore, they do not directly compete with other general perspectives for time and resources, nor does a decentralized approach to comparative law teaching make them superfluous. They also do not create or perpetuate the perception of comparative studies as an autonomous discipline; quite to the contrary, they employ them as a tool to think more broadly about concrete topics. Thus specialized (upper-class) courses can be compatible with the approach advocated here. In fact, this approach will probably increase their popularity because the comparative perspectives presented throughout the first-year are likely to whet many a student’s appetite.

## V. CARROTS AND STICKS

A generation ago, Professor Schlesinger predicted two things: that the argument against a separate course and for comparative studies throughout the curriculum will be heard again, and “that it will not be

taken more seriously in the future than in the past.”<sup>38</sup> While this essay proves him right on the first count, I hope to prove him wrong on the second. I hope so not for the sake of the comparatists, but for the benefit of the students.

The stick is this: if we continue to teach comparative law as a comprehensive and autonomous discipline, it will continue to trudge along as an ill-defined, over-inclusive subject, and it will remain isolated from the mainstream of the law curriculum. The majority of students (and teachers) will continue to ignore it—not without reason. Thus comparative law will fail to contribute as it should to the education of the lawyers for the twenty-first century.

But there is also a carrot: if we dismantle comparative law as an autonomous discipline, we can first break up the current hodgepodge into more clearly defined, separate elements that we can teach in more clearly defined, separate courses. We can then deliver the core of the discipline, the truly comparative study of law, from its isolation by integrating it into a variety of other courses. As an integral perspective on law as a whole, it will reach virtually every student and thus finally foster the cosmopolitan view of law that has become imperative.

In making this choice, it helps to note the fate of other general perspectives on law. Where they managed to enter the mainstream of legal discourse, they have flourished. The premier success story is legal realism. The realists of course never dreamt of teaching a separate course or writing special casebooks about it, but presented their views as integral elements of legal thought. A more modern example is law and economics. It has vigorously reached out to, and thus become part of, many substantive areas of law. As a consequence, it pervades large parts of the present-day curriculum.<sup>39</sup> In contrast, where general perspectives or methods have remained in isolation, they have withered. Jurisprudence and legal philosophy, for example, have stayed within the confines of basic courses and out of other areas. The result is that they are isolated from the mainstream and that their influence is small and waning. Comparatists should learn the lesson.

Dismantling comparative law as an autonomous discipline and merging it into the mainstream of the curriculum is not an easy task. To

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38. Schlesinger, *supra* note 5, at 616.

39. It is true that law and economics is occasionally taught as a separate course as well. In contrast to comparative law, however, this makes sense because law and economics has developed a sophisticated methodology worth studying in its own right.

be sure, there are forces pushing in that direction: the urgent educational need for international and comparative perspectives, the students' rapidly increasing interest in these areas, and the younger faculty members' slowly growing willingness to include them in their teaching and scholarship. But poised against such a change, there is also a phalanx of forces that have nothing to do with my agenda's intrinsic merit. Instead, they are of a purely human nature.

Change means work. Breaking up the discipline and particularly carrying comparative perspectives into other subjects requires effort. Thus a new approach must overcome inertia—often the most serious obstacle of all.

Change also carries a threat to vested interests. We, the comparatists of today, have such interests galore. We have established our courses, planned our syllabi, written our class notes, and published our casebooks (or compiled our own teaching materials). Perhaps even more importantly, we have staked out comparative law as a separate area of the curriculum over which we rule. This is *our* field of expertise. Dismantling it threatens our professional role and self-image. Without comparative law as an autonomously-taught subject, can we still be comparative lawyers? And if not, then what are we?

Finally, one need not be cynical to recognize that maintaining an ill-defined discipline in isolation has its advantages. Pursuing an overabundance of goals, we can better hide that we miss most of them. Remaining in isolation insulates us from the view, and thus from the criticism, of outsiders. And lingering on the margin of the curriculum conveniently protects us from the quickening pace and rising demands of present-day law teaching.

These interests are serious obstacles to change, and it would be foolish to ignore them. But they are no justification for the status quo and no excuse for inaction. After all, the responsibility for them is entirely ours, and it is upon us to overcome them. The sooner we begin, the better.