1971

The Basic Course—A Mild Dissent

Whitmore Gray

University of Michigan Law School, wgray@umich.edu

Available at: <https://repository.law.umich.edu/articles/709>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

Part of the [Comparative and Foreign Law Commons](#), and the [Legal Education Commons](#)

Recommended Citation

Gray, Whitmore. "The Basic Course—A Mild Dissent." *Am. J. Comp. L.* 19 (1971): 633-44.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

The Basic Course—A Mild Dissent

Perhaps it is unusual to start a discussion of a topic with a dissent from the assumption underlying its choice, but I think that in the present case this may be justified. The present topic was no doubt selected because for many years teachers have viewed the course in "comparative law" as a basic course, leading subsequently to specialized courses or research in various subject matters or geographical areas. In fact, the other two speakers on this afternoon's program, Professors Rudolf Schlesinger of Cornell and Arthur von Mehren of Harvard, are both on record in the form of their casebooks as advocating this type of course, with a generous focus on Western Europe, and Germany and France in particular.

In the past, a number of factors have contributed to a rather general acceptance of the idea that the proper subject matter for the "basic" comparative law course was a combination of legal history and legal method, and that its proper focus was Western Europe. Not only did this look like a normal complement to our teaching of common-law history and method, but in fact familiarity with one or more Western European systems was the background of those who taught in the field. In addition, this focus could be justified as being related to some extent to the mainstream of American legal contacts abroad.

My own view is that it is time for a fresh look at the appropriate, or at least the possible, focus of a "first" course in comparative law, which is in fact likely to be for most students their only course in comparative law. I think it is also time for us to re-examine our teaching method in such courses, in order to make sure that we are making the best use of the limited time normally available to us for the impartation of the information and insights which make up our teaching objectives.

Let me start first by simply listing some of the factors which I think should be taken into consideration in this re-evaluation of appropriate subject matter and teaching methods for a first course in comparative law.

First, we are now facing a student body in the law schools which has had very little exposure to legal history of any sort. Not only our students, but also the new faculty prospects in this field, have often had no formal background course in English or American legal history, and are moreover the product of subject matter teaching which had little

WHITMORE GRAY is Professor, University of Michigan Law School, Member of the Board of Editors.

time for thoughtful presentation of historical development. In other words, they are neither oriented toward a historical presentation as a necessary element of "learning the law", nor are they equipped with sufficient knowledge of common law legal history to make possible direct comparison with the legal history of any other system under consideration.

Second, our students today tend to show a good deal of impatience with thorough study of legal doctrine. Not only our students, but also our colleagues, seem to show a disposition to avoid winnowing out doctrine by re-evaluation of masses of case material, and prefer instead to discuss how doctrine can be used or misused in the deciding of current cases. In fact, our training of students has consisted in large part of making them skeptical of any black letter rule of law, and trying to equip them to argue effectively either side in a case in which the rule might come up, i.e. how to manipulate doctrine. I would suggest that for these students, the necessarily somewhat superficial comparison of our general doctrinal propositions with those of foreign systems presents a less than exciting prospect.

Third, the fact that we are under considerable pressure from students for relevant material in our courses, i.e. that dealing with their interests of the moment. Legal aid, consumer protection and environmental law are obvious foci, but there will no doubt be others in the near future. While some of us may tend to reject this invasion of our professional prerogatives, it appears to me to give us a ready guide for re-evaluating some of our traditional subject matter, or at least for introducing some flexibility into its presentation. I, for one, have been convinced by the argument of the educational psychologists that students only learn what they want to learn, and that it is thus desirable to take into account interests already held, as well as to create the artificial stimulus of having to learn certain subject matter because it will be covered on the examination.

Fourth, students today are under considerable time pressure in the selection of their courses. Until more law schools undertake a recompression into survey courses of the basic practice material, the student of the next decade will be confronted with a proliferation of offerings in important practice areas as well as of offerings in the jurisprudential (including comparative law) field. While this proliferation and consequent pressure is particularly acute at larger law schools, it seems realistic to me to think that relatively few students anywhere will take more than one course dealing with foreign law or legal systems. In fact, most will be deciding between a course in our field and one dealing with a jurisprudential or sociological presentation of domestic problems, or perhaps a course in the international trade field for those already oriented toward foreign practice problems. I would suggest that few students in either category will be attracted by a traditional com-

parative law offering, particularly one which does not emphasize possible practical implications for the practitioner or social reformer.

Fifth, I am sure I do not need to point out to most of you that we are in a period of financial pressure in legal education in general. The problem is particularly acute for those in our field, for we are in a very high expense area. Work with foreign law requires substantial investment in library resources, as well as in foreign travel for training and research. We should certainly pay attention to adequate public relations as to what we are teaching and researching, not only vis-a-vis our students for their interest and information regarding course selection, but also vis-a-vis our colleagues, so as to continue to enlist their support for our endeavors. Some of this can be done simply by more informative designations for the courses we teach, and I will come back to this later.

Sixth, we have come into a period of more mature student interest in what goes on in our courses in this field. If there was a day when students looked at courses dealing with foreign law and legal systems as being purely academic and remote from any possible practical implications for their subsequent work, that time is long since past. Many are looking for information and stimulation to use in their thinking about contemporary social problems, but more importantly, an increasing number are looking forward to imminent involvement in a wide variety of foreign experiences. For example, in recent years my students have gone on after law school to Peace Corps legal work in Latin America, Africa, and Micronesia; to VISTA or legal services work with Eskimos and American Indians; to law teaching in places as diverse as Ethiopia and Papua and New Guinea; to do field work investigating interrogation abuses in French criminal law practices, legal aid in Belgium, housing for the poor in Colombia and effluent-based taxation of pollution in the Ruhr; a number have, of course, gone directly into practice in places such as Paris, Tokyo and Frankfurt, and a few have gone on to do more traditional academic work in administrative law, tort law, taxation, etc. at European universities and specialized institutes. In other words, not only do the students bring into the class a generally higher level of preparation in area studies and language work than many of us have been used to in the past, they in addition were already thinking of immediate use for the information and insights which go to make up our courses in this area.

Last, and this is no doubt the most important factor, the law schools have acquired rich new resources in teaching potential in this area. We have now a growing group of young teachers at a wide range of law schools who have had considerable practical experience in foreign legal systems. Many of the students of the kind I have just described, in other words, are now coming back to teach, bringing with them not only a wealth of practical experience in day-to-day legal problems of

the foreign systems, as contrasted with the more scholarly doctrinal research and writing preparation for teachers in this field common in an earlier period, but also they have had this experience in a much broader range of legal systems than in the past. While one would not head for Costa Rica or Liberia in order to pursue sophisticated doctrinal research, for example, these countries have provided equally exciting laboratories for looking at the inter-action between the legal system and contemporary economic and social problems. In fact, the range of sources of information and "research" techniques has increased correspondingly, for in many cases the information acquired by these teachers has been in the form of interviews and personal observation rather than research in legal writings.

No doubt you have already sensed in this list of factors much of my own orientation toward the appropriate content and method for a first (or only) course in the comparative or foreign law field. I would like now, however, to make a few more specific comments on the name of such a course, its content, and the way in which it might be taught.

Does it matter what such a course is called? Definitely YES. I would suggest that the title should be as accurate a description as possible of what is actually taught, not only to avoid criticism for false advertising, but in order to gain the benefits of adequate description of our wares. (My own course, for example, has gone through an evolution from "Comparative Law" to "Introduction to Civil Law" to "European Legal Systems".) Of course, an accurate description may put off someone who had his own particular image of what he would like to see taught in an offering entitled "Comparative Law", but I would suggest that if you are going to deal mainly with tort and contract law it is better to warn off early the student who is hoping that you will spend time on the right to counsel in foreign legal systems of the accused following arrest. If the examples you use to teach the basic truths concerning the evolution of legal systems and problems of legal method are drawn from your experience in African countries, it might be much better to call the course African Law or African Legal Systems, and if the same ideas are to be communicated using a Mexican orientation, why not call it Mexican Private Law? If on the other hand, you are trying to present insights into the way different systems have dealt with a similar problem, i.e. the different way in which administrative law matters are dealt with in France, Germany, and some of the Latin American countries, I would suggest that this sounds much more interesting if fully described than when called "Comparative Law" or "Theories of Public Law".

Of course, much of this is already being done. Particularly at larger law schools, a proliferation offerings in the area normally takes this form, though even there teachers seem to have a tendency to call their courses comparative constitutional law, etc., rather than describ-

ing them as comparative studies of the particular problems on which they tend to focus. Perhaps there is a reluctance at the school with only one course being offered in this area to describe it more narrowly than the pretentious comparative law designation, but I would suggest that this should be reconsidered. Student, faculty, and alumni reaction may in fact be more supportive of a course entitled *The Legal Profession Abroad*, if that is in fact your focus, than of one entitled *Comparative Law*.

It might even be that in implementing this "truth in labeling" we find a tendency to unify somewhat the theme of the material we have been presenting. If in fact a great deal of your material has been designed to describe legal education, the organization of the bar and the participation of the lawyer in the litigation and counseling process in the foreign countries which you know best, perhaps the course will benefit from a more focused presentation of the material along this line, with the substantive or illustrative materials more obviously introduced for the limited purpose they are designed to serve.

This discussion of an appropriate name for the course obviously involves the choice of content, and I would simply like to pass on a few of my own thoughts on this subject. In general, my advice is to pick a substantive area, as well as, if possible, a geographical area, in which you feel somewhat at home.

The choice of a substantive focus for the course within the teacher's area of domestic competence has a two-fold benefit. One by-product not to be overlooked is its long-range beneficial impact on his teaching of the domestic law in the area chosen. More importantly, I think that the teacher who chooses to operate within a field where he is most at home domestically will find it easier to weave into the foreign examples chosen the jurisprudential goals of a course dealing with foreign law. He will be more apt to comment helpfully on the patterns of development of rules of law in cases and statutes, the inter-relationship of the part under consideration to the other legal institutions and to other substantive legal rules in the country under consideration, and is at least less apt to err fundamentally in drawing conclusions about the relationship between law and the economic context of the country under consideration.

In addition, I think the teacher should limit his primary focus to countries where he has had some direct contact with the legal system at work. While all of us have to rely on second-hand information to some extent, my observation is that we teach better about things that we can put into an observed frame of reference. While it may be especially true of the legal systems in Eastern Europe, Africa or Asia, even France and Germany are hard to present without at least some first-hand frame of reference. The mistaken information we encounter in others' comments on things we do know first-hand should make us

somewhat cautious in straying too far from our own experience in our teaching. Unless we confine our subject-matter coverage to doctrinal comparisons, the students will quickly press beyond what is available in published descriptive materials. A few weeks spent in any country in contact with lawyers, courts and the social context is better than any amount of background reading which one is likely to do here. But I suppose this is not the group to whom I have to sell the advantages of foreign travel.

I would urge the young (or older new) teacher in this field, then, not to stray too far either from familiar substantive areas or from foreign comparisons in systems with which he has had some first-hand contact. Encourage students who push you beyond these limits to do additional work on their own along these lines, but keep the limited class time for developing your own areas of competence.

This limitation on the class time available also leads me to recommend an effort to keep the illustrative material used as limited as possible. This economy in the use and re-use of material is well illustrated in Professor Schlesinger's casebook. Not only does he provide a system of cross references to pull back earlier material into subsequent discussion topics, but the experienced teacher can provide a good deal of re-enforcement because of the type of material selected. For example, the portions of a trial transcript of the examination of an expert witness on foreign law can be used as a realistic basis for questions and observations concerning foreign legal education, the practice background which qualified the expert for the testimony in question, the method of developing rules of law in the foreign system under consideration, as well as the substance of the rule itself. At the same time, the student will have been getting some practical training in preparation for the examination of a foreign witness and the actual courtroom technique. Also, to illustrate the point made above, the American teacher would obviously be most effective if the testimony in question concerned a substantive point with which he is thoroughly familiar in American law, though this is not necessary for confident presentation of the *method* insights involved.

Most teachers in planning a first course will probably envisage a combination of practical and jurisprudential goals. Most will feel it appropriate to prepare the student to some extent to work with foreign law or lawyers. In other words, they will feel that they should give him some sophistication as to the kinds of sources of information he will have regarding foreign law, and will also try to sensitize him to the difficulties in communicating with people from a different cultural and particularly legal education background. They will probably look for some by-product in the form of perspective or insights regarding domestic legal institutions and problems, and also as to the way the component parts of any legal system interact. In this connection, they may

also be trying to get additional perspective through the use of some foreign legal history material, or foreign writing in the area of legal philosophy based on the experience of that foreign system.

Since few courses will be able to cover so many topics in much detail, a good deal of this may be relegated to coverage through background readings. We tend to forget that our students thought that 50 pages of expository writing was a normal day's assignment for a course in undergrad, and some can still handle this after a year or two of law-school brain-washing. Fortunately the literature is rich, and becoming richer, in good background material on which a more specialized course can build. At the head of the list I would certainly put John Dawson's *Oracles of the Law*, for it not only gives a rich and penetrating panorama of European legal history, but also supplies in a brilliant hundred-page summary the background in English legal history which most students sadly lack. Close behind this I would put the introduction to non-Western legal systems by Derrett, entitled *An Introduction to Legal Systems*. Particularly fine background material for China is provided by Professors Bodde and Morris and Sybil van der Sprenkel in their excellent books dealing with pre-modern China. For the pre-Dawson period I have found particularly helpful H.J. Wolff's *Introduction to Roman Law* and J.A. Crook's *Law and Life in Ancient Rome*, and of course Vinogradoff's *Roman Law in Medieval Europe*. These books provide insight into Roman law without an overwhelming amount of technical detail, and each lends itself well to further classroom discussion. As a complement to a classroom focus on more technical legal problems, I have used Sybille Bedford's book *The Faces of Justice*. Her rather miscellaneous but perceptive journalism covering observations of the courts in France, Germany, Switzerland, and Austria provides a more comprehensive anecdotal background than any one teacher is likely to give in the course of his serious discussions of casebook materials.

Before passing to the subject of teaching method, I would simply like to voice the hope that increased flexibility in a first course in foreign or comparative law will also encourage further specialized offerings in the field. While I do not see much of a role for such courses for the average student, I would hope that we would not neglect our opportunity to train students to become scholars in the field. Two courses which I would particularly like to see taught as a complement to our normal geographically or substantively specialized advanced offerings would be courses in legal terminology and translation as well as in research techniques in foreign legal materials. As to the former, it seems desirable to me to provide a somewhat more formal medium for the transmission of an expertise acquired through long and painful hours of struggle in rendering intelligible foreign legal ideas using alien terminology. An example of the kind of study which might be pursued

might be found in the excellent studies on Communist Chinese legal terminology in *Contemporary Chinese Law: Research Problems and Perspectives*, edited by Jerome Cohen, as well as in the terminology notes which have appeared as prefaces to translations of Soviet materials in the series *Soviet Statutes and Decisions*, under the supervision of Harold Berman. The other course, in foreign legal research, is probably one which is given on a rather basic level by a number of teachers in the field, but at least I have found that the wealth of material and the proliferation of problems particular to the various systems is so great that much more could be done in this area. Obviously the person who should be teaching it for all of us is Charles Szladits, for his published volumes on France, Germany, Switzerland and Italy must necessarily serve as models for all work in this field. I hope that others will be encouraged to take up the cause, however, with similar offerings in their areas of expertise for interested students, in order that we may develop a group of people who are sophisticated in researching a problem in a large number of foreign legal systems. So often we tend to rely on people who simply have linguistic ability as a substitute for sophistication in legal research in the foreign systems.

I would now like to turn to what to me is at least as important a problem for the teacher planning a course in this area, namely, the choice of appropriate classroom techniques for presentation and discussion of whatever subject matter has been chosen. I think the problem merits special attention in this area, for the teacher is often moving into a field which, by contrast with his domestic, method-oriented teaching, involves the conveying of a great deal of straight information. He may well find himself tending to spend time on simple drill on background readings during the class hour, a procedure which is at least as unpleasant for the teacher as it is for the student. Teachers of legal history have long been aware of this problem, and I would suggest that as comparative law courses move farther away from historical or cultural common denominators into exotic (and perhaps fascinating) fields where large amounts of background information must be imparted, the problem is a substantial one for us as well.

Many of the techniques which make for good class hours in this field are the same ones which have done much to enliven domestic law classes. Here it is particularly true, however, that the teacher should try to create sincerely open-ended situations in which the student can put to use whatever information he has gathered from the material, or at least try to create an atmosphere in which the student is encouraged to formulate questions for class discussion. Obviously the sophisticated teacher will not spend much time on questions such as "What are the three reasons for the reception of Roman Law in Germany at the end of the Fifteenth Century?" or "In what year was the civil code in force in the Federal District of Mexico adopted?" I would suggest that he

would try to create a framework for discussion in class which would make this information helpful or necessary, but would do so within a meaningful student role in the discussion.

For example, the question of the reception in Germany might well come up in connection with a look at a substantive problem in German law in a private law area in which a number of Latin terms are regularly used by the Germans, e.g. in the restitution area. In a discussion concerning how to phrase an American problem for a German lawyer or vice versa, the reception (and possibly some of the reasons for it mentioned briefly, including a reference to Dawson) as well as the study of Roman law in the 19th Century in Germany, come in in a natural way. In fact, if the teacher finds that it is not easy to think up a context dealing with modern substantive law or terminology to which the question is immediately relevant, it might suggest an elimination of that problem from his material in the future, or at least its relegation to background reading.

Before suggesting some problems which might be used as a focus for blocks of classroom time, I would like to urge the teacher in this field to consider the range of teaching devices which might be used to contribute to classes in this area. Certainly the law schools have been well behind the elementary schools in making imaginative use of modern educational hardware, and it seems to me that teaching in the comparative law field could particularly benefit from their use. For example, a class discussing French criminal procedure would learn more from a viewing of the Brigitte Bardot movie "La Verite", or at least remember more, than from reading the studies prepared in connection with the adoption of the NATO status of forces agreements. The courtroom scenes show the roles of the professional and lay judges and the various attorneys for the government and the accused, as well as those representing the party to the civil action being tried at the same time. B. J. George, Jr. has excellent films of Japanese criminal procedure in action which could be used as illustrative material in a seminar in that field.

All of us have used foreign faculty visitors whenever possible in order to give a certain immediacy to the discussion of a foreign system. I might suggest that foreign students can also be helpful in this regard, but with the caveat that they be called on for their expertise only in the area they know, often limited to foreign legal education and practical training programs. They can get out of their depth very quickly in substantive areas, and often show their professors' disregard of the practice aspects of a problem.

With both types of "experts" I have found that optimum input for the class usually requires a rather focussed presentation, of the American teacher's choosing. For example, foreign students asked to speak on legal education in their own countries will often give a rather dry

summary of subject matters taken and the topics covered in their examinations. On the other hand, in a panel in which the foreign students were asked to give a very short statement on student power in their home universities and then respond to questions from the class, much of the same information regarding curriculum, examination methods and the relationship of these to practical training and eventual practice came up in the interstices in much more lively fashion.

I certainly do not want to belabor the point, for it is obvious to the experienced teacher in the field that he must make a conscious effort to maximize the impact of his material through imaginative utilization of the classroom time. I mention it here in order to encourage those who are about to undertake teaching in the area to be innovative as they approach their task. For example, it might well be that the most satisfactory context for a course in African law would consist of dividing the class into two groups representing two competing factors, e.g. colonial legal system and traditional cultural pattern, in the country, and letting much of the class debate arise from role playing by the members of each of the groups.

Another approach, which does not involve the use of any modern technology whatsoever, has not been particularly fashionable in serious comparative law classes. This involves a conscious placing of the comparative problem in a practical context, e.g. as in the example given above of the use of the testimony by an expert witness. Perhaps some of this hesitancy has been based on fear of opening up the Pandora's box of procedure problems often involved in practical applications of foreign law, as well as the considerable research difficulties, but I would suggest that it is precisely because these elements *are* normally present in solving practical problems that we should bring them into the classroom.

Perhaps a more acceptable reason for avoiding a practical context is that we would prefer to give full play to individualized efforts in a problem of this type. For example, I have found it helpful for students to write opinion letters, prepare background memoranda, rough out a pattern for examination in court, etc., in connection with the foreign expert testimony mentioned above. In each case, the range of approaches and solutions merits individual attention to each student's work. Unfortunately, we find ourselves caught here in the same bind as is the case for the rest of legal education, i.e. the impossibility of individual supervision and comment in any class involving more than a handful of students. For the present, we simply must accept the inevitable limitation imposed by our poor faculty-student ratio, and must standardize problems and assignments, and perhaps prepare the materials to be used in their preparation because of inadequate library facilities.

One objection voiced by teachers to whom I have talked about us-

ing practical problems in the course is the difficulty of preparing these materials. While it may be more difficult to work up practical materials in a realistic context than to discuss academic topics which have been the subject of extensive comparative writing, many practicing lawyers have files (as well as experience) involving foreign law problems from which very good classroom materials can be created. I am not suggesting here the conversion of the course into a foreign business activities course, but simply that it is worth the additional effort for the teacher to create a realistic context for the problem under discussion. For example, practical problems concerning family law, inheritance and property problems involve concepts as stimulating as the more traditional tort and contract subject matters, and of course the modern international fields of antitrust and taxation give rise to practical problems which can be used to present a whole range of basic propositions dealing with foreign administrative and substantive law in one inter-related context.

Even more familiar material can sometimes be brought more sharply into focus simply by changing the course format. For example, last year I taught a seminar in comparative contract law, using approximately the same list of topics for research as had been used the previous year. The course was much more successful the second time, however, because the questions were related to a much more immediate problem. We used the work of UNCITRAL (which was meeting in New York during the seminar) on the new draft of an international sales contract law as the focus of our discussion and of each paper, and each student thus had a legislative as well as a comparative focus for his thinking. In working with the national position papers as well as the background memos from the Secretariat they saw the best kind of interplay between scholarship and politics. I hasten to add, also, that the discussions were enlivened by the regular participation in our sessions of Professor Shinichiro Michida from Kyoto University, who brought the diplomatic debates to life with his personal insights as the Japanese delegate to the meetings. Obviously this happy combination of timely topic and available visitor will not likely be present again, but the favorable experience certainly will lead me to be receptive to another modified format for the offering should it present itself the next time around.

In addition to choosing an appropriate focus for the group, I think it is particularly important to try to encourage the individual student to go beyond the common subject matter treated in readings and class discussions. Many already have in mind a specific area of interest in the field after graduation, or have a particular domestic subject matter in which they are involved which would benefit from comparative work. I have encouraged people to write a short research paper on an individual topic as a substitute for part of the final examination in the

course, hoping that this would encourage an application of the general method and material to the topic of their particular interest.

A number of people have stated that the interest in comparative law is part of the wave of the past as we enter the seventies, having been preempted in both money and interest allocations by domestic problems. My own experience leads me to think that we are only beginning to see the growth of healthy interest in and utilization of foreign legal materials. Student dissatisfaction with American law and institutions is high, and the foreign setting provides a natural arena in which both supporters and detractors of our present laws and institutions can test the merits of their cases. While the practice-oriented student will continue to be aware of the importance of some skill in recognizing and dealing with foreign law problems, it is my impression that the student oriented toward the social science approach to law study is now becoming equally aware of the importance of acquiring a foreign perspective. Both students and faculty seem to accept this point of view, providing that the questions are pulled down from a theoretical, "comparative law" plane to that of actual information about foreign solutions to practical problems.

I think it is inevitable that those who, in increasing numbers, are teaching a first or only course dealing with foreign law and legal institutions in our law schools will be re-evaluating the content and method which have been used. My hope would be that they try to take only the best of the past patterns of the "basic course" approach, and that they combine it with maximum utilization of their own individual experience in the area.