Main-Streaming Comparative Criminal Justice: How to Incorporate Comparative and International Concepts and Materials into Basic Criminal Law and Procedure Courses

Richard S. Frase
University of Minnesota

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Comparative and Foreign Law Commons, Criminal Law Commons, Criminal Procedure Commons, and the Legal Education Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol100/iss4/7

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
MAIN-STREAMING COMPARATIVE CRIMINAL JUSTICE: HOW TO INCORPORATE COMPARATIVE AND INTERNATIONAL CONCEPTS AND MATERIALS INTO BASIC CRIMINAL LAW AND PROCEDURE COURSES

Richard S. Frase

I. INTRODUCTION ........................................ 774
II. TEACHING GOALS: WHY INCLUDE COMPARATIVE & INTERNATIONAL MATERIAL IN BASIC COURSES? ............... 775
III. WHAT COMPARATIVE AND INTERNATIONAL TOPICS? MACRO AND MICRO-LEVEL SUGGESTIONS ................................ 776
   A. Macro-level: Three Things Every Law Student (and Lawyer) Should Know ................................ 776
      1. Differences ........................................ 777
      2. Similarities ....................................... 779
      3. Regional and International Human Rights Norms .. 781
   B. Micro-level: Some Specific Topics to Address in Readings or Class ........................................ 783
      1. Criminal Procedure Issues - General or Systemic Points ........................................ 783
      2. Pretrial Procedures .................................. 784
      3. Trial and Post-Trial Procedures .................... 786
      4. Substantive Criminal Law Issues (in Germany) ... 788
      5. Sentencing Issues .................................... 788
      6. Human Rights Norms (ICCPR; ECHR) that May Go Beyond Current United States Law ........ 789
IV. HOW TO INCORPORATE COMPARATIVE AND INTERNATIONAL MATERIAL INTO BASIC COURSES ......................... 789
   A. First Objection: “My Syllabus Is Full – Where Do I Find the Time to Add this Stuff?” .................. 790
   B. Second Objection: “Coverage of Such Material in Basic Courses Would Be Superficial.” ............... 790

* Benjamin N. Berger Professor of Criminal Law, University of Minnesota. A preliminary version of this paper was presented at the 1998 Annual Meeting of the Association of American Law Schools during a panel sponsored by the Section on Comparative Law, entitled: “Is There a European Advantage in Criminal Procedure?”
I. INTRODUCTION

For most students taking introductory criminal justice courses in American law schools, the world beyond United States borders either does not exist, or is largely populated with alien, "inquisitorial" legal regimes. In this essay, I will argue that law teachers (and textbook writers) must begin to incorporate comparative and international perspectives into introductory-level criminal law and criminal procedure courses. Despite the difficulties it entails, I will explain why it is so important to make this change. I will also suggest some of the broader points and specific topics that could be covered and describe suitable teaching materials now in print or soon to be published.

The idea of adding global perspectives to basic courses will probably strike many readers of this "comparative law" symposium as a good thing. Yet I suspect that very few American law teachers actually do much of this now. Thus, even at the risk of "preaching to the choir," I think it is important both to articulate the importance of covering such material in basic courses, and to honestly admit -- and then attempt to deal with -- the practical problems of main-streaming such "specialized" material.

The task facing us is both practically difficult and broad in scope. First, it concerns not only teachers of criminal procedure but also of criminal law. Traditionally, criminal law teachers and textbook writers have neglected sentencing, but some very important comparative points can be made in this area. Second, the foreign concepts and materials that need to be taught in basic courses must draw upon international as well as comparative law. As I will explain in a moment, the "fair trial" and other procedural and substantive norms embodied in international and regional human rights agreements are having a growing impact on the law and practice in other countries, and thus, are an important factor determining contemporary "comparative" law. Moreover, these agreements have direct United States policy relevance. Third, I will consider rules and practices in other common law countries as well as in Continental civil law systems. The potential "European advantage" is not necessarily limited to the Continent. Because of their similarity to our system and the availability of descriptive materials in English, practices in England and other common law systems lend themselves more readily to study and comparative learning.

To summarize, this essay addresses three fundamental pedagogic questions:
II. TEACHING GOALS: Why Include Comparative & International Material in Basic Courses?

Traditionally, comparative and international law material has been presented in specialized, upper-level courses on comparative law, international or human rights law, comparative criminal procedure, and, occasionally, in "advanced" criminal procedure or criminal law courses. But relatively few students take these advanced courses; the great advantage of main-streaming comparative and international material into basic courses is that we can reach a much broader group of students.

Of course, main-streaming has disadvantages as well – three in particular:

1. The typically crammed syllabi in these basic courses – Where do we find the time to cover this new material in class, or even add it to outside readings?
2. The inevitable superficiality of coverage, when comparative and international material is added to basic courses.
3. The limited expertise that most instructors have on non-United States law, and the limited available materials to help students and instructors “get up to speed.”

There is no point in denying or trying to minimize the importance of these problems (although, in a later section of this essay, I will suggest some specific strategies to mitigate their impact). For present purposes, I admit that these problems pose major barriers to main-streaming comparative and international material. So, why bother to try? What are the positive benefits for our students?

The simple answer is: because all of our students, not just those who choose to take advanced courses and seminars, need to appreciate certain basics of foreign criminal justice and relevant international norms for criminal procedure, criminal law, and sentencing. All American students need to have at least a minimum degree of comparative and international perspective, not only to properly understand their own system of criminal justice, but also to appreciate what other countries have
learned from us and what we can learn from them. Particularly in the field of criminal justice, such global perspectives form an essential part of the core legal concepts that all lawyers and jurists require as part of their general legal training (what might be called "law liberal arts"). Just as all students should have a basic understanding of the fundamental moral and constitutional issues addressed in introductory criminal law, criminal procedure, and constitutional law courses, they need to understand that these issues now have a global dimension. This new dimension is the result of the recent rapid growth in three inter-related spheres: international human rights law; domestic constitutional law of foreign countries; and international cooperation and exchange of ideas among criminal justice scholars and officials. Some specific examples of "things every United States law graduate should know about world criminal justice" are provided in the next section.

III. WHAT COMPARATIVE AND INTERNATIONAL TOPICS? MACRO AND MICRO-LEVEL SUGGESTIONS

It is relatively easy to agree, in principle, that we need to give all of our basic courses a more global perspective; but what about the specifics? What comparative and international concepts and materials is it important, and feasible, to introduce in basic criminal law and procedure courses? In this part of the essay, I will suggest some macro-level ("big picture," major-concept) points that students need to understand, as well as some specific legal issues or processes to address in readings or class sessions.

A. Macro-level: Three Things Every Law Student (and Lawyer) Should Know

In terms of overall teaching objectives — the most basic concepts that we hope to impart to our students, and which we hope they will remember long after the specific details of readings and classes have been forgotten — I would suggest that there are at least three things every law student (and lawyer) should know about comparative and international criminal justice at the close of the twentieth century: first, that foreign systems, whose legal systems we ought to respect, have successfully employed very different approaches than we have on important procedural and substantive issues; second, that foreign systems are increasingly similar to ours, in important ways; and third, that regional and international human rights conventions include many provisions relevant to criminal justice, some of which are more fully complied with in foreign countries than they are in the United States. These three points, and illustrative examples, can be introduced without extensive readings or class time, and without extensive research and preparation by the instructor.
Differences

Comparative law perspectives have traditionally been valued as a way to open the student’s, and the scholar’s, mind to the possibility of adopting very different approaches to fundamental legal problems. This is still true today; indeed, comparative perspectives are even more valuable now than in the past. The increasing similarity of the world’s criminal justice systems, described below, means that the differences that remain are more and more instructive for Americans; such differences cannot simply be dismissed as interesting oddities, having nothing to do with our own legal and policy decisions.

Among the many different approaches that foreign systems take on particular issues of criminal law, procedure, and sentencing (see partial list in Part B, below), the choice of specific illustrative examples will depend on the available time and interests of the instructor. Here are some of the key differences I usually try to emphasize in my basic courses. First, students of criminal procedure should know that trial judges are much more active in many foreign systems. As suggested in Professor Pizzi’s article in this issue, the “adversariness” of trial procedures is a continuum, not a clear dichotomy. American judges are not totally passive, especially in certain types of cases, and judges in some foreign systems (e.g., England and Italy) are only moderately more active than their United States counterparts. However, trial judges are considerably more active in other foreign systems (e.g., Germany), and they completely dominate trials in the most traditional “Civil Law” systems (e.g., France). But this broad spectrum of “adversariness” makes foreign systems an even more interesting and valuable subject of comparative study because it suggests that any system – including our own – may be able to marginally shift its location on this continuum (for example, American judges could make greater use of court-appointed experts). At the same time, systems at the “other end” of this spectrum – in which the presiding judge calls and examines the witnesses, based on a detailed “dossier” containing evidence favorable to both sides – pose a continuing challenge to the basic assumptions underlying our own system: that adversary collection and presentation of evidence, with all its excesses and weaknesses, is the best way to get at the truth and protect fundamental rights.

---

1 See Mary Ann Glendon et al., Comparative Legal Traditions: Text, Materials and Cases 9-10 (2d ed. 1994).

Of course, we don’t actually use an adversary trial, or any kind of trial, in most cases. The vast majority of criminal cases are disposed of through plea bargaining — a procedure that is both “adversary” (dominated by the parties, and their attorneys), and “inquisitorial” (strongly encouraging, and relying upon, self-incrimination). American students need to know that foreign systems rely much less heavily than we do on plea bargaining and analogous, consensual dispositions, even though both explicit and implicit forms of plea bargaining probably exist in all foreign systems, and their use has increased in recent years. The existence of foreign analogues to plea bargaining may suggest that consensual disposition has certain positive benefits (e.g., avoiding unnecessary litigation of uncontested issues; giving the parties more input into and satisfaction with the final disposition) that are widely recognized in otherwise vastly different systems. At the same time, the remaining differences are very important: foreign systems tend to forbid or sharply limit consensual disposition in the most serious cases. Moreover, only fairly modest charge and sentence concessions are made to cooperative defendants, thus limiting the degree of coercion, the risk of false self-incrimination, and the charge and sentence disparities among similarly situated offenders.

In introductory criminal law courses, there are a number of different foreign approaches to liability issues that can be usefully noted, as well as important differences in sentencing. The latter topic seems especially important today, given the recent dramatic increases in the size and cost of American prison and jail populations. Criminal law students need to know that European countries have much lower incarceration rates, relative not only to their national populations, but also relative to their crime and arrest rates. Prison terms tend to be shorter, and the death penalty has been abolished. For non-violent offenders, European courts impose a variety of non-custodial sanctions (e.g., fines and day fines; community service; and forfeiture of objects or privileges).

---


4 See infra Part III.B.

2. Similarities

Although the differences between United States and foreign criminal justice are interesting and instructive, the similarities are just as important, especially for students of criminal procedure. Students need to understand that foreign systems are changing rapidly in a number of important respects; that they have borrowed many procedural rules from us, and from each other; and that as a result, foreign criminal procedures are increasingly similar to American procedures.

Once again, the choice of specific examples of these changes and similarities will depend on the instructor and the course, but I would argue that the following three topics are particularly important. First, as discussed more fully in Professor Van Kessel’s article in this issue, many foreign systems have recently expanded the procedural protections applicable to pretrial interrogation of suspects. Most European systems have some version of the Miranda rule, which may be narrower than the United States rule in some respects (especially regarding the right to counsel), but broader in other respects (e.g., time limits, required record-keeping, and right to notify family or friends). Second, pretrial procedural safeguards are enforced with exclusionary evidence rules in most European systems, and these rules have been expanding rapidly in recent years (especially in the interrogation context). Finally, the right of the defendant to confront and cross-examine adverse witnesses at trial is now recognized in all European systems, because this right is guaranteed under the European Convention on Human Rights and Fundamental Freedoms. The result is a somewhat more “adversary” trial (increased use of oral testimony, rather than written proofs), even in countries like France, in which the trial is still conducted in a “non-adversarial” (judge-dominated) mode. The recent changes in French criminal procedure, in all three of the areas noted above, can only be described as revolutionary, considering that France invented the “civil law” system of criminal procedure, exported that system to the rest of Europe and much

---


9 See infra Part III.C.
of the Third World, and retained that system longer than most other European countries.

The growing similarity of European and American systems of criminal procedure is important for at least two reasons. First, this trend increases the likelihood that Americans can learn something from, and even adopt, foreign practices. As foreign systems become more like our own, and less "inquisitorial," there will be less American prejudice against the very idea that foreign systems might have something to teach us.

Moreover, increasing similarity means that potential "donor" and "recipient" systems have become more compatible, thus lessening the risk of "rejection" of legal transplants. The fact that foreign systems have already borrowed many practices from the United States, and from each other, shows the such international legal transplants are indeed feasible, even across systems that remain fundamentally different in important respects.

Second, the fact that foreign systems have at least partially adopted many United States procedural rights and remedies, including some that remain controversial in this country, helps to validate the fundamental value choices we have made and the legal processes by which we made them. In particular, the rapid growth in pretrial and trial "due process" guarantees under the European Convention, reveals a growing international consensus that procedural fairness is important, and is no longer an American peculiarity. The European experience also shows that the exclusionary rule is not an American peculiarity. Europeans have invoked exclusionary rules for the same reason that we have: because other remedies are inadequate.10 Finally, the growth in European procedural rights and exclusionary remedies has increasingly occurred through judicial interpretation, as well as by legislation. Both the domestic courts in Europe and the European Court of Human Rights have shown a willingness to fashion rights and remedies from ambiguous statutory, constitutional, and convention texts.11 Thus, judge-made procedural rights and remedies are no longer an American peculiarity; indeed, the European Court of Human Rights, and many national courts, have created a "due process revolution" in criminal cases, comparable in many ways to that created by the Warren Court in the 1960s.

10 Craig M. Bradley, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 105 (1993) (Germany); Frase 1990, supra note 3, at 586-87. Moreover, although the use of exclusionary remedies has grown in recent years, they have existed in several European countries since the 19th Century. See, e.g., Craig M. Bradley, The Exclusionary Rule in Germany, 96 HARV. L. REV. 1032, 1061-62 (1983) (discussing a 1889 case in which the German Supreme Court ordered exclusion of the results of an illegal search).

11 See Frase 1999, supra note 7 (discussing cases in French courts, and in the European Court of Human Rights, defining search powers, exclusionary rules, and trial confrontation rights).
3. Regional and International Human Rights Norms

One of the major reasons why foreign criminal justice systems are becoming more like our own is that these systems have increasingly been influenced by international and regional human rights conventions — in particular: the International Covenant on Civil and Political Rights ("ICCPR") and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"); the latter agreement has been signed and ratified by most of the member states of the Council of Europe (currently numbering about forty). These conventions include many provisions relevant to criminal procedure and a few that limit the type and severity of punishment.

At a minimum, our students need to know that these human rights agreements exist; that they are having an increasing impact on how other countries (especially in Europe) enforce their criminal laws; and that in some respects these agreements go further than current United States law. If there is not time for extended readings or class discussion, students can at least be shown the relevant (and fairly compact) text of these agreements, and asked to compare their provisions to those contained in the United States Bill of Rights. Students can also be given a few examples of cases interpreting supra-national norms for criminal justice. Although these international conventions were partly inspired by United States constitutional provisions and case law, United States students and instructors should not assume that we have nothing to learn from other countries in this domain. It is true that the United States "wrote the book" (or at least, the first edition) on criminal due process standards, but in recent years we have not kept up: current regional and international norms go further than current United States law in some important respects, and some are more fully complied with in foreign countries than they are in the United States.

Here are three examples of areas in which the United States lags behind. First, under both the ICCPR and the ECHR, and under the domestic laws of several European countries, defendants are entitled to notice of the nature of the charges promptly after arrest, and to detailed notice of the charges and evidence prior to

---


trial. American arrestees appear to have no such rights, and the Supreme Court has upheld Miranda waivers by suspects who were seriously misled as to the nature of the offenses the police were investigating. As for defense “discovery” prior to trial, defendants and their counsel in some states, as well as in federal courts, receive very limited notice of the nature of the evidence and witnesses. A second area of deficiency is in the provision of public compensation to defendants held in pretrial detention but never convicted. Such compensation is required under both the ICCPR and the ECHR, and is provided by domestic law in several European countries; public compensation is rarely available in the United States, and tort remedies (e.g., for malicious prosecution or false imprisonment) are unlikely to succeed. Finally, as noted previously, the death penalty has been abolished under the ECHR. The ICCPR does not go this far, and capital punishment is still widely imposed in many parts of the world outside of Europe; however, American students should be made aware that the ICCPR discourages use of the death penalty and forbids it for crimes committed by juveniles. In contrast, the United States Supreme Court has allowed execution of defendants who were sixteen or seventeen at the time of the offense.


See Frase 1990, supra note 3, at 672-73; FED. R. CRIM. P. 16.

See ICCPR, supra note 12, art. 9, ¶ 5, art. 14, ¶ 6; ECHR, supra note 12, art. 5, ¶ 5; Frase 1990, supra note 3, at 601, n.338; CODE DE PROCEDURE PENALE, 39TH EDITION (Daloz 1997), arts. 149-50; Law on Compensation for Prosecution Measures (Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen), §§ 2, 4, 6, & 7.

See Frase 1999, supra note 7.


See ICCPR, supra note 14, art. 6, ¶ 5.

Thus, although Americans can take pride in the efforts of other countries to imitate our criminal due process ideals, we must not be too smug about it. The United States is in danger of losing its leadership role, both internationally and regionally. In part this has been deliberate; the Senate ratified the ICCPR subject to five "reservations," five "understandings," and four "declarations."22 Moreover, the United States has not yet agreed to be subject to the Inter-American Court of Human Rights (which enforces the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man).23 American law students and lawyers need to know more about all of these conventions, in order to decide whether and how to implement them, and also in order to deal with international criticism of our limited implementation efforts.

B. Micro-level: Some Specific Topics to Address in Readings or Class

Some of the foreign rules and practices and international norms of particular importance to criminal law and procedure students have already been cited as examples of one or more of the three suggested "macro-level" points. The following is a more extensive (but certainly not exhaustive) list of possible topics that can be explored by means of the materials discussed in Part IV, below.24 Human rights norms are cited when relevant to specific issues and are also listed separately at the end. Of course, it is important to stress that no single foreign system or human rights convention embodies all of the rules and practices summarized below and probably never will. Moreover, some of these aspects of foreign systems are related to each other, or to other facets of the foreign legal or political culture, and would be difficult to adopt separately. But the topics on this list are worth studying even if they cannot be easily adopted, separately or in their entirety, because they challenge students to think more critically and creatively about American law and practice in these areas.

1. Criminal Procedure Issues – General or Systemic Points
   
a. Foreign systems generally take a less constitutionalized (more code-based) approach. This is true not only in

---


24 The French and German practices mentioned on this list are discussed in Frase 1999, supra note 7, and in Frase & Weigend, supra note 3.
Continental “civil” law countries, but also in England.25

However, legislative dominance has been declining in many of these countries, due to the growing impact of national constitutions and supra-national human rights conventions.

b. Case law implementing the European Convention on Human Rights (both in the European Court of Human Rights, and in domestic courts) is producing a Warren-Court-like “due process revolution.” These developments are particularly striking in countries, like France, which previously employed strongly non-adversary procedures.

c. Germany and France use separate search and interrogation rules, and separate courts, for certain types of crime (e.g., terrorism or drug-trafficking), rather than “bending” generally-applicable rules to accommodate these problematic cases.

d. Crime victims, their families, and victim-advocacy groups have broader rights (notice of charges and hearings, right to be heard, and rights to appeal, request state or offender-paid compensation, and conduct a private prosecution) in Germany and France than in the United States. These rights are generally provided by statute rather than by constitutional or Human Rights law.

2. Pretrial Procedures

a. Germany and France appear to make more limited use of custodial arrest and pretrial detention.

b. Defendants must receive prompt notice of charges after arrest (ICCPR 9.2; ECHR 5.2).

c. Germany and France have explicit “identity-check” laws (compare United States “Stop and Frisk” law, which permits questioning on any subject, but gives the police no power to insist on identification).

---

25 For examples of the more detailed foreign procedure codes, see (Brit.) Police and Criminal Evidence Act 1984, which is discussed in Hatchard, supra note 8; see also THE FRENCH CODE OF CRIMINAL PROCEDURE, supra note 7 (English translation of the French Code as of January 1987) and G. HARFST & O. SCHMIDT, GERMAN CRIMINAL LAW, VOL. II: THE CODE OF CRIMINAL PROCEDURE, THE YOUTH LAW (Harfst & Schmidt, trans. 1989). For a discussion of the value of a code-based approach, see generally CRIMINAL PROCEDURE: A WORLDWIDE STUDY, supra note 7.
d. Germany forbids "jail plant" informants, active deception in questioning, and all deception as to the law.

e. Germany and France require domicile searches to be witnessed by a resident or someone not working for the police.

f. Germany, France, and England apply quite different interrogation rules, which are stricter than United States rules in some respects, looser in others.  

g. The British have detailed administrative regulations, enacted pursuant to statute, regulating lineups and other identification procedures.  

h. Germany, France, and England employ a number of exclusionary rules to sanction procedural violations; most are narrower (especially regarding searches), but some are broader than in the United States (e.g., no requirement to show prejudice to the defendant in France for certain procedural violations affecting important public interests).

i. Some countries (e.g., France) use judicially-conducted or supervised investigation of serious or complex cases.

j. French law limits certain arrest, search, and other investigatory powers to prosecutors and designated police officers, and gives prosecutors general supervision of police investigations.

k. Defendants enjoy broader pretrial discovery rights in Germany and France than in many United States courts (compare ICCPR 14.3a; ECHR 6.3a).

l. German prosecutors have limited discretion to decline or dismiss provable charges; French prosecutors have broad discretion to decline, but no formal power to dismiss charges once they are filed or referred to an investigating judge.

m. The French do not engage in explicit plea bargaining, and Germans do it much more rarely than we do (however,

---

26 English custody and interrogation rules are discussed in Hatchard, supra note 8, at 192-95.


28 See Hatchard, supra note 8, at 216-18; CRIMINAL PROCEDURE: A WORLDWIDE STUDY, supra note 7, at 104-8.
both countries employ various forms of consensual disposition, somewhat analogous to plea bargaining).

3. Trial and Post-Trial Procedures

a. Germany and France employ expedited trial scheduling of simple cases.

b. Germany and France impose a non-waivable right to counsel at trial, for very serious charges and in certain other cases.

c. There are fewer general trial evidence-admissibility limits (e.g., hearsay; defendant's prior record) in Germany and France (but see ICCPR 14.3e and ECHR 6.3d, and decisions in both the European Court of Human Rights and in German and French courts, granting defendants substantial rights of "confrontation"; furthermore, testimonial privileges are more extensive in Germany than in the United States).

d. France does not forbid adverse inferences from defendant's pretrial and trial silence, and England expressly allows them,29 Germany does forbid such inferences.

e. As discussed more fully in Professor Pizzi's article in this issue, many foreign countries use a more or less judge-run trial procedure, based on a detailed "dossier," in which the presiding judge calls and questions witnesses, and the court usually appoints its own experts. However, the role of the attorneys, especially for the defense, is becoming more and more active in these countries (due in part to the growing number of defense "rights" and exclusionary remedies),30 and several countries have replaced their former judge-run trial procedures with more or less "adversary" (party-controlled) trials.

f. Many countries (e.g., France and Germany, but also some

29 Criminal Justice and Public Order Act 1994 (c. 33), §§ 34 to 38. In Murray v. U.K., 23 Eup. Ct. H.R. 29 (1996) the European Court of Human Rights held that similar provisions in a statute applicable in Northern Ireland did not violate article 6.1 and 6.2 of the ECHR (guaranteeing "fair trial" and the presumption of innocence). However, the Court based its holding on the particular facts of the case, and also stated that conviction may not be based "solely or mainly" on an accused's silence.

30 Frase & Weigend, supra note 3, at 342, 358-59.
countries with at least partially "adversary" trials, e.g., Norway, begin the trial by questioning the defendant, who is usually not required to take an oath, and cannot be charged with either perjury or contempt.

g. Civil law systems (e.g., Germany and France) generally provide no "bifurcation" of the guilt and sentencing phases of trials.

h. Germany, France, and many other civil law systems use collegial professional courts (multi-judge panels) or mixed (lay and professional) courts, instead of lay juries. On the other hand, some non-common law countries (e.g., Norway) continue to use a separate lay jury for certain cases, and a few countries (e.g., Spain and Russia) have recently adopted jury trials.

i. In German and French collegial courts, conviction requires a two-thirds majority vote; both systems also recognize a concept analogous to "proof beyond a reasonable doubt," although perhaps not as demanding.

j. German judgment orders require a detailed statement of reasons for both the verdict and the sentence.

k. For most crimes, convicted defendants in Germany and France can appeal issues of fact, law, or sentence.

l. For most crimes, German and French prosecutors can appeal from acquittal or conviction, on issues of fact, law, or sentence.

m. Under German and French law, defendants held in pretrial detention who eventually receive an acquittal or dismissal of the charges may apply for compensation from the state (compare ICCPR 9.5, 14.6).

---


32 Id.

4. Substantive Criminal Law Issues (in Germany)\textsuperscript{34}

a. There are fewer "morals" crimes (\textit{e.g.}, prostitution; adult consensual homosexuality).

b. There is no strict liability, and no corporate "criminal" liability, although corporations can be charged with non-criminal infractions, subject to heavy fines.

c. There is a fairly broad "duty to rescue" (liability for omission), not only in Germany, but also in France.\textsuperscript{35}

d. There is no prosecution of juveniles as adults (compare ICCPR 10.2b, 10.3); moreover, young adults (eighteen, nineteen, or twenty) may be given juvenile court sanctions when that disposition is more appropriate to the offense and offender.

e. Unavoidable mistake of law is a defense; if avoidable, mistake is a mitigating factor.

f. Excusing (as well as justifying) necessity is a defense.

g. The prosecution has the burden of proof as to all defenses, including insanity and other excuses.

h. Conspiracy, soliciting, and attempt liability are only allowed for certain crimes.

i. Accessories who merely aid (not instigate) must receive mitigated punishment.

5. Sentencing Issues

a. The death penalty has been abolished pursuant to ECHR Protocol 6 (1983). Under ICCPR 6, capital punishment is discouraged, and is never permitted for crimes committed by juveniles.

b. Convicts must be given the benefit of all post-offense penalty reductions, under ICCPR 15.1.

\textsuperscript{34} This list is very preliminary, because substantive criminal law is not an area in which I currently have much comparative expertise. In addition to Frase & Weigend, \textit{supra} note 3, the principal source for these items is Hermann, \textit{The Federal Republic of Germany}, in \textsc{George F. Cole et al., Major Criminal Justice Systems} 109-123 (2d ed. 1987).

\textsuperscript{35} \textsc{Code Penal: Nouveau Code Penal, Ancien Code Penal}, art. 223-6 (Daloz, 95th ed. 1997). This is the provision under which the "paparazzi" who were allegedly chasing Princess Diana's car when she died might have been charged. \textit{See also id.} at art. 223-5 (punishing interference with rescue efforts).
c. Germany and France make much more varied and frequent use of non-custodial penalties, especially for non-violent crimes.36

6. Human Rights Norms (ICCPR; ECHR) that May Go Beyond Current United States Law37

a. ICCPR 6.5: no death penalty for juveniles; ECHR, Protocol 6: no death penalty at all.
b. ICCPR 9.2; ECHR 5.2: prompt notice of charges, after arrest.
c. ICCPR 9.5; ECHR 5.5: compensation for unlawful arrest or detention.
d. ICCPR 10.2b and 10.3: separate and appropriate treatment of juveniles.
e. ICCPR 10.3: penitentiary system shall include treatment, "the essential aim of which shall be their [prisoners'] reformation and social rehabilitation."
f. ICCPR 14.3a; ECHR 6.3a: prompt and detailed notice of nature and cause of the charge.
g. ICCPR 14.3e; ECHR 6.3d: at trial, the accused shall have the right to summon and examine defense witnesses "under the same conditions as witnesses against him."38
h. ICCPR 14.6: compensation for wrongful conviction (i.e., "miscarriage of justice").
i. ICCPR 15.1: right to post-offense penalty reductions.

IV. HOW TO INCORPORATE COMPARATIVE AND INTERNATIONAL MATERIAL INTO BASIC COURSES

Despite the important teaching goals and topics discussed above, I suspect that few instructors include much comparative and international material in their

36 See supra Part III.A.

37 For an overall discussion of this topic, see Frase 1998, supra note 13.

38 Although United States defendants have most of the same formal powers to obtain witnesses that are enjoyed by the prosecution, American police and prosecutors have certain additional, informal powers, not only prior to trial (e.g., arrest and grand jury subpoena powers) but at the trial itself (e.g., formal immunity grants; discretion to offer charging and/or sentence-recommendation leniency, in return for testimony).
introductory criminal law and criminal procedure courses. Even instructors who agree about the value of this material confront a number of serious practical obstacles. In this part of the essay, I will try to respond to these problems, and suggest ways to overcome them.

A. First Objection: "My Syllabus Is Full – Where Do I Find the Time to Add this Stuff?"

Teachers of basic courses -- especially introductory criminal procedure courses -- have no shortage of important American material to cover (and the longer we teach, the worse the problem seems to get). There is no denying the crammed-syllabus problem, but it is not a new problem, and most of us already know the solution: cut, and cut some more. Indeed, this process can actually improve the course: syllabi, like plants, benefit from occasional pruning. Or, to use another analogy, more familiar to academics: syllabi, like first drafts, always contain unnecessary material that can and should be edited out. My own experience has been that, whenever I am given a strict word or page limit, I start out grumbling but end up greatly appreciating the more streamlined and persuasive result.

B. Second Objection: "Coverage of Such Material in Basic Courses Would Be Superficial."

Comparative and international criminal justice material is often quite complex and difficult to fully understand, especially for students who are just beginning to learn about American criminal law and procedure. When such material is added here and there in an introductory course, rather than addressed in a course of its own, the coverage will inevitably be limited in its depth, and also risks being confusing or misleading.

Again, there is much truth to this objection. Indeed, I myself have argued in previous articles that researchers must examine foreign systems comprehensively, both in theory and in practice; particular foreign rules or procedures cannot be properly understood without taking into account both the broader systemic and social context, and the actual functioning of the rules in practice. However, there are different tradeoffs in teaching than in research; as noted in Part II above, failure to even mention important comparative and international perspectives has negative consequences of its own. Moreover, as teachers of basic courses, we are often called upon to present complex issues in a more simplified manner than we would accept as scholars (while warning students, when appropriate, that the issues are complex).

---

39 Frase 1990, supra note 3, at 545-53; Frase, 1995, supra note 5, passim.
I believe it is both desirable and feasible to give introductory students at least a few examples of differing foreign rules, increasing similarities, and the growing international normative consensus reflected in Human Rights conventions. In some cases, foreign differences and similarities will be readily understandable to introductory-level students, even without any background readings or extended lecturing, because such foreign examples will correspond to contemporary United States reform proposals or “minority rules;” the instructor need only add: “and in addition, this is already being done in some foreign countries” (or: “this is already required under the ICCPR/ECHR”). More complex or novel foreign examples can be briefly noted or summarized as a means to spark student interest in further study of this material in advanced courses.

C. Third Objection: “There Aren’t Any Good Teaching and Resource Materials for This.”

Most American teachers of introductory criminal law and criminal procedure courses probably have very little expertise on non-United States law, and standard textbooks contain almost no comparative or international material. How can teachers even lecture or comment usefully on such material, let alone plan class discussions and select readings for the students? And what sorts of published materials are available to be selected?

These problems have traditionally posed a very serious barrier to main-streaming of comparative and international material in basic courses. But help is on the way, and some is already here. In recent years there has been a virtual explosion of English-language descriptions of foreign systems, and a number of additional, useful works are on the verge of publication. The Appendix to this essay provides an annotated bibliography of resources to help both teachers and students of criminal law and criminal procedure “get up to speed” on issues of contemporary comparative and international criminal justice.

V. Conclusion

This paper was presented at the 1998 Annual Meeting of the Association of American Law Schools, during a panel entitled: “Is There a European Advantage in Criminal Procedure?” My own view is that there is much we can learn from the Europeans, not only on issues of criminal procedure, but also in substantive criminal law and sentencing. Moreover, recent changes in foreign criminal justice systems show that procedures can be borrowed from foreign systems, and grafted onto existing domestic stock, or recombined to create new, hybrid approaches. Indeed, the growing similarity of criminal justice practices and norms around the world is steadily increasing the viability of such legal transplants. Donor and
recipient systems are becoming more and more compatible. As a result, it is even more true today than it was twenty years ago, when Professors John Langbein and Lloyd Weinreb wrote: "The [reform-borrowing] issue should not be posed as 'this model or that,' as if criminal procedure came in indivisible packages." Increasingly, it seems, law reformers may chose from a global cafeteria of legal options, and the variety of approaches and combinations provide researchers with a natural laboratory of procedural law.

But whatever one thinks about the merits of European approaches to particular issues of criminal law and procedure, and the feasibility of international transplants, Europeans have one clear advantage over us: their perspective is much less parochial. Our European teaching colleagues, their students, and many European lawyers and judges are often quite familiar with what we do. They are also much more willing to consider changing their system, based in part upon what other countries (including the United States) are doing. Europeans have also been quite busy defining and implementing international criminal justice standards; we need to get into the act, or we will be left behind, increasingly out of step with a global normative consensus developed without our input. Finally, even from the narrowest pedagogic perspective, the study of comparative and international norms and practices can help our students to better understand and appreciate their own criminal justice system. In short, as we enter the twenty-first century, legal and educational isolationism is no longer an option.

Since most students will never take a specialized course or seminar in comparative or international criminal law – or even an advanced criminal law or advanced criminal procedure course – we must begin to introduce comparative and international perspectives into introductory courses. This will ensure that our students are at least aware that such perspectives exist, and have important implications for American law and policy. Main-streaming comparative and international perspective is also a good way to recruit students for advanced courses, where these complex issues can be examined in much greater detail.

To be sure, there are significant practical difficulties in adding comparative and international material to basic courses, due to the limitations of class time, instructor expertise, and published materials. But there is now a substantial and fast-growing body of suitable background material for instructors and students, some of which will eventually find its way into course textbooks. As instructors gradually develop more familiarity with comparative and international material, they will find ways to work it into their basic courses (and will also insist that more of this material be included in their textbooks). This process will take some time, and some extra effort. But as educators, as well as researchers and providers of

---

expertise on issues of criminal justice, we cannot continue to ignore the legal world outside our borders.
APPENDIX - RESOURCES FOR FURTHER STUDY

A. Materials and Resources for the Professor

1. Published Works

JOHN LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY (West 1977). This 200-page volume includes translations of the charging document and formal judgment order from a German manslaughter case (Brach), along with excerpts from a British journalist’s account of the trial, notes and questions for class discussion, and general background information on the German criminal justice system as of the mid-1970s. Many of the details of German law are out of date, but the Brach case itself provides a wonderful introduction to non-adversary trials, and a great teaching tool for a two- to four-hour series of classes. The book is now out of print, but may be found in some law school libraries. In the past, the publisher has given permission to photocopy the book for instructional use.

CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY (Christine van den Wyngaert, ed. 1993). Contains brief summaries (twenty to fifty pages each) of criminal justice in the following countries: Belgium, Denmark, England and Wales, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Scotland, and Spain. These summaries are written according to a common outline, which permits the reader to compare how each of these countries approaches each issue.


Richard Frase, Sentencing Laws and Practices in France, 7 F. SENT. R. 275 (1995). Compares inmate populations in France and the United States, relative to national population and to rates of serious crime, and examines the features of French sentencing law, as well as other aspects of the French criminal justice system (e.g., scope of the criminal law; arrest and pretrial detention practices) that

41 The same authors are currently writing a book, which will contain both an expanded “nutshell” description of the German system, and chapters discussing a number of key procedural issues and the manner in which they are resolved in Germany and the United States.
explain the much lower French incarceration rates.\textsuperscript{42}

PHIL FENNELL ET AL., CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE
STUDY (Clarendon Press, 1995). This collection of essays by over thirty authors
examines various aspects of criminal justice in The Netherlands, and in England and
Wales, emphasizing two themes: convergence of adversarial and “inquisitorial”
justice, and the increasing “Europeanization” of criminal justice in the member
states of the European Community.

JOHN HATCHER, BARBARA HUBER, & RICHARD VOGLER, COMPARATIVE
CRIMINAL PROCEDURE (Brit. Inst. of International and Comparative Law, 1996).
This work includes chapters (written according to a common outline) describing
criminal justice in France, Germany, and England and Wales.

THE RIGHT TO A FAIR TRIAL (David Weissbrodt & Rudiger Wolfrum, eds.,
1998) (also available on the University of Minnesota Human Rights Center Library
Webpage, at http://www.umn.edu/humanrts/fairtrial). Contains reports (written
according to a common outline) on the extent to which the “fair trial” principles
(also including norms that apply to the pretrial and post-trial stages) contained in
the ICCPR and other international conventions have been implemented in the
following countries: Brazil, Canada, China, Denmark, England and Wales,
Germany, India, Israel, Malaysia, Mexico, Morocco, Norway, Poland, Senegal,
South Africa, Spain, Tunisia, Uganda, the United States, and Islamic countries
generally. The book also contains general chapters on fair trial principles and cases
under: the African Charter on Human and People’s Rights; the ECHR; the Inter-
American system for the protection of human rights (under the American
Convention on Human Rights and the American Declaration of the Rights and
Duties of Man); and the ICCPR. Additional chapters examine cross-cutting issues
such as the protection of individuals in pretrial procedures; the right of the accused
to be tried in his presence; and the independence and impartiality of judges.

2. Other works, currently in process

CRIMINAL PROCEDURE: A WORLDWIDE STUDY (tentative title) (Craig
Bradley, ed., forthcoming). Contains descriptions, written according to a common
outline, of criminal procedure in the following countries: Argentina, Canada, China,
England, France, Germany, Israel, Italy, Russia, Scotland, South Africa, Spain, and

\textsuperscript{42} For an earlier, more comprehensive, reform-oriented discussion of French criminal justice,
\emph{see} Frase 1990, \textit{supra} note 3.
the United States.\footnote{See also BRADLEY, \textit{supra} note 6, Professor Bradley's earlier book. Although the focus of that book is on United States law, it also contains a chapter (pp. 95-143) briefly exploring evidence-gathering limitations and exclusionary remedies in six foreign countries (England, France, Germany, Italy, Canada, and Australia), and suggesting common features found in the approach of these countries.}

The AALS Comparative Law Section recently voted to sponsor a series of comparative law "readers" for basic courses. Edward Wise, of Wayne State Law School, has agreed to edit a reader on criminal procedure. In addition to excerpts from sources such as the books and articles described in this essay, the reader might include sample course syllabi, texts of human rights conventions, and English-language versions of foreign statutes and illustrative cases from national and human rights courts.

Richard Frase and Michael Tonry are editing a book of essays based on papers submitted at a conference entitled "Sentencing in Comparative and International Perspective," held at the University of Minnesota Law School in May, 1998. In addition to single-country reports on sentencing practices and trends in Australia, England, Germany, The Netherlands, and the United States, this book will contain cross-cutting papers dealing with sentencing developments in many countries in the areas of "Pre-adjudication" sentencing (e.g., pretrial diversion programs); post-adjudication sentencing; comparative law perspectives on sentencing reform; international law norms and procedures related to sentencing; and normative (philosophy of punishment) perspectives on international sentencing developments.

B. \textit{Materials for Students}

1. Published Works

If the instructor has one or more class hours to devote to comparative or international topics, portions of the sources above will provide suitable supplemental reading assignments and source materials. Ideally, of course, instructors would find suitably concise comparative and international material in criminal law and criminal procedure textbooks. At present, however, only a few textbooks contain any such material, and most contain none at all. Here is a sampling of what is currently available:

\textsc{Kaplan, Weisberg & Binder, Criminal Law, Cases & Materials, 3D Ed.} (1996), includes international punishment and crime figures in its opening section on punishment theory, and also makes several references to German criminal law theory.
Miller & Wright, Criminal Procedures: Cases, Statutes & Executive Materials (1998), examines some foreign practices (e.g., limits on plea bargaining; adverse comment on defendant’s silence), as well as American practices from earlier times (which provide another useful “comparative” perspective).

Slobogin, Criminal Procedure: Regulation of Police Investigation, Legal, Historical, Empirical and Comparative Materials (1993), includes some comparative and historical material, and a brief discussion of several Human Rights conventions (ECHR, ICCPR, and the International Convention Against Torture), along with an illustrative case from the European Court of Human Rights (Ireland v. United Kingdom, holding that certain interrogation methods used in Northern Ireland violated the ECHR).

2. Other Materials

The texts of the ICCPR, ECHR, and other International and Regional Human Rights conventions can be downloaded from the University of Minnesota Human Rights Center Library Webpage at http://www.umn.edu/humanrts/.

Many instructors provide students with photocopied “handouts” containing additional notes, questions, and/or hypotheticals for each class session. With such materials, it is a simple matter to add brief notes and/or questions with a comparative and international dimension. For example, here are some of the references to non-United States law that are contained in the handouts I give my students in introductory Criminal Procedure:

—re: Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) (warrant, and issuing judge’s participation in its execution, violated Fourth Amendment “particularity” and “neutral magistrate” requirements)
—“In France and some other countries, specialized judges conduct or supervise all aspects of pretrial investigation of serious or complex cases. These judges often go to the scene and directly supervise searches and other operations; more often, however, they issue broad delegations of investigatory authority to specially-designated police officers.
—re: constitutional and statutory requirements for execution of warrants—“Should search warrants normally be executed when the occupants are present? Should neutral observers at least be present? (Some foreign countries impose these requirements.)”
—re: powers of the police during a Terry stop—“Can the suspect refuse to provide information or documentation as to his or her identity?” (Some foreign countries give police explicit authority to
obtain identification from persons suspected of crime or found in certain areas.)”
—re: Miranda and its possible alternatives or supplements —
“Should the entire waiver and interrogation process be tape-recorded? (This is required under some state laws (see, e.g., State v. Scales, 518 N.W.2d 587 (Minn. 1994)); taping is also required by administrative regulations, enacted pursuant to statute, in England and Wales.)”
—“Should interrogation be conducted by prosecutors or judges, rather than by the police? (Questioning by prosecutors is common in many European countries. Some of these countries also employ judicial interrogation in serious or complex cases (a procedure that has also been proposed by a number of American scholars)).
—“Could the police get around the no-impeachment-with-silence rule of Doyle v. Ohio by adding a fifth warning, regarding possible adverse consequences of remaining silent? (A similar warning is now given to suspects in England, and adverse inferences may be drawn from both pretrial and trial silence.)”
—re: the defendant’s Fifth Amendment privilege at trial — “In many Continental European (“civil law”) legal systems (e.g., France and Germany) the criminal trial usually begins with questioning of the defendant. In most of these systems, the defendant is not placed under oath, and he or she may refuse to answer specific questions without incurring contempt sanctions or other formal penalties; some of these countries permit adverse inferences from silence, other countries do not. Modern European criminal justice systems are increasingly “adversarial,” not “inquisitorial,” and recognize most of the fundamental Human Rights and jurisprudential values recognized in the United States.”