EFFECTIVE TECHNIQUES FOR TEACHING ABOUT OTHER CULTURES AND LEGAL SYSTEMS: CHALLENGING THE INHERENT ASSUMPTION

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What is 'other' about "other cultures and legal systems"?
The phrase "other cultures and legal systems" is a curious one. We cannot talk of 'other' until we have some idea of 'self'. So it seems that what is envisaged is some discussion of comparative law. Yet the terminology of the distinction between 'self' and 'other' tends to suggest some sort of privileged relationship. 'Self' is the norm, 'other' the stranger or alien who causes discomfort but who has apparently to be accommodated. Indeed, this is how many teachers of law see the incorporation of materials from legal systems other than their own into their syllabuses.[1] Thus the first response to suggestions mooted at the Association of American Law Schools Annual Conference in January that teachers should routinely at least consider incorporating materials from jurisdictions outside the United States tended to be met (at least within my earshot) by the retort that "there is no time" or "it will get very confusing". This eavesdropper was not quite sure whether it was the students or the teachers who were likely to get confused.

It is submitted here that the difficulty is actually more one of perspective. As a Brit teaching at an American law school, I do not have any proprietary feelings for English law. While I live and work in Florida, that state's (and federal) law affects me as much as any American – and yet, equally, I am too familiar with English law to regard it as 'other'. The issue becomes even more apparent in the context of international law. When I taught the Vienna Convention on International Sales of Goods (CISG) at a law school in Lithuania – which I did for five years before coming to Florida – I have no idea what I might have been supposed to regard as 'mine' and what as 'other'. If someone had insisted on drawing that distinction during my class in Lithuania, I would have denied that the distinction had any validity. CISG was the subject of the class; it could hardly be described as 'other'. But, as any teacher of CISG knows, the provisions in the Convention can really be understood only if students are given some sense of their origins in the laws of contract within either common law or civil law traditions. Since both systems have contributed to making the CISG what it is, it is difficult to see either of them as 'other'. Any suggestion that they are alien, making the task of the teacher more uncomfortable and difficult is the very opposite of the truth.

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[1]This plural is by design. 'Syllabus' is a corruption of the ancient Greek 'syllabos' and not originally a Latin word; attempts to render the plural as 'syllabi' are therefore misguided.

Lessons to learn

So what has this all to do with effective teaching "about other cultures and legal systems"? I would suggest that it has a very great deal to do with it. I wish to emphasize three lessons of general application, but they are probably more easily appreciated if I begin with a more specific observation. Although especially applicable to those of us teaching within the United States, it does have broader implications too.

Like, I suppose, every other Torts teacher in the United States, I discuss in my first-year

class the famous case of *Palsgraf v Long Island Railroad*.[2] This is, of course, one of the most famous cases in the American canon. But note the inherent paradox in that statement. There is, after all, no such thing as American tort law. The United States may boast a common law system, but it does not have a common law. Instead, reflecting the federal nature of the country, there are fifty and a half bodies of tort law.[3] Indeed, as a study by my colleague, Peter Lake, demonstrated a few years ago, one of the most striking features of *Palsgraf* is that, while it is taught in every American law school, only the state in which it was decided (New York) actually follows the majority holding.[4] So the question arises as to which (and whose) law is 'normal' and which (and whose) law is 'other' when duty of care and proximate causation in negligence are under discussion. The often-overlooked truth is that many classes in American law schools are almost inevitably compelled to discuss laws from more than one jurisdiction. Anyone who teaches torts, for example, has to discuss the law both with and without joint and several liability; so too the law with contributory negligence as compared with pure and modified comparative fault systems. So immediately every torts teacher is engaging in comparative law whether he or she realizes it or not. Indeed, some cases in the 'American' canon are actually English, such as *Rylands v Fletcher*.[5] (Indeed, *Rylands* is actually still good law in most American states at a time when it has been emasculated to the point of extinction in England.)[6] When that is understood, any perceived complications or difficulties in teaching comparative law within a standard doctrinal course suddenly melt away. Moreover, the most important requirements for effective comparative law teaching become readily apparent.

The first lesson is surely self-evident. It is that the attitude of the teacher is fundamental to the success of a comparative approach. Anyone who tries to bring in material from an additional jurisdiction, but who regards that effort as an unwelcome inconvenience, will find that he or she is engaged in a self-fulfilling prophecy. By contrast, anyone who makes points of comparison by willing design or – as with many American torts teachers without actually realizing that he or she is doing it, will inevitably find that the class proceeds very smoothly. If the teacher is comfortable using comparative materials, it just seems entirely

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[2] 162 N.E. 99 (NY.1928)

[3] While the federal courts no longer apply their own body of substantive law, they do still maintain their own procedures which necessarily have an impact on the resolution of torts cases.

[4] Peter F. Lake, *Common Law Duty in Negligence Law* (1997) 34 San Diego L. Rev. 1503.

[5] (1868) LR 3 HL 330.

[6] *Cambridge Water Co. v Eastern Counties Leather plc* (1994) 2 WLR 53.

normal to the students.

Secondly, comparative legal materials should not be seen as an addition or supplement to the 'standard' materials to be used in class. That is not, for example, how differences in the law of torts within American jurisdictions are taught. Despite being in Florida, I do need teach my students that Florida boasts the paradigm of American tort law, and then (if time permits) supplement the Floridian position with a few mentions of cases from (say) New York or California. Cases from several different jurisdictions are, on the contrary, used to explain different aspects of the law. Cases from outside the United States are utilized in the same fashion. So, just as I used *Ultramares Corporation v Touche*[7] when I was in the UK as a means through which both to discuss liability in negligence for pure economic loss and also to distinguish negligence from the intentional torts, nowadays I employ cases from England[8] and Canada[9] to exemplify, for example, current trends in the application of the doctrine of vicarious liability. (They are also useful because so many suits in the US for alleged child molestation have been settled out of court.) Damages are discussed by comparing torts not just with other forms of compensation, such as workers' compensation and life insurance, but also by comparing cultures and legal systems with and without jury systems, contingency fees and socialized medicine. None of these cases or issues is additional or supplementary; they are actually central to the syllabus. Without them the picture would be radically incomplete. The notion of 'other' is thus, once again, somewhat misleading.

Thirdly, the jurisdictions with which comparisons are made need to be consistent throughout the course. It is no use picking a case from one jurisdiction, a statute from another, and some systemic or cultural issue (like the existence or absence of juries) from a third. At best this looks like some disorganized form of legal 'lucky dip'. At worst, it looks as though the teacher is just picking bits of law to suit his or her own views. Teaching the law is not about the imposition of dogma. For students to benefit most from the use of comparative materials, regular exposure to the same cultures or legal systems encourages familiarity and helps students to link issues together. Moreover, regular usage of the same comparators reduces drastically the likelihood that the comparator is automatically consigned to be treated as 'other'. It is simply evaluated against other options on its own merits. Perhaps in the end, a student will feel that a particular jurisdiction is 'his' or 'hers' and that the rest are 'other'. But for me as a teacher, whatever appears on my syllabus is mine: none of it is 'other'.

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[7] (1931) 255 N.Y. 170, 174 N.E. 441.
[8] Lister v Hesley Hall Ltd. [2002] 1 AC 215 (HL).
[9] *John Doe v Bennett* [2004] 1 SCR 436 (SCC).