

ON NOURISHING THE CURRICULUM WITH A TRANSNATIONAL-LAW LAGNIAPPE

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Overview: Our program declares that “it is important for first-year law students to gain experience in transnational law, both for purposes of their later legal education and to prepare them for the kind of law practice they are likely to engage in after graduation.” (Program brochure, 2006 Annual Meeting: *What is Transnational Law and Why Does it Matter?*) Such “experience,” according to this claim, should come early in the first year, the locus of most required courses in the J.D. curriculum. I use the word “lagniappe” here to critique the claim as applied to current law school pedagogy. Around the Gulf Coast of the United States, a lagniappe is a small frill, gift, or bonus, often of an edible nature. It’s peripheral and, though often enjoyable to give and receive, nothing serious. This particular lagniappe—not all that new a notion--will have no almost impact on legal education or the practice of law until curricular reformers resolve to link the measure with consequences.

THE PROBLEM, MACRO VERSION:
PROVINCIALISM IN AMERICAN LEGAL THEORY AND PRACTICE

If integrating transnational perspectives into the first-year curriculum is the solution, what is the problem? Let us postpone consideration of the possibility that this measure is a fad with no objective, or perhaps window-dressing to make law schools look like something they are not. Attempting to deal sincerely with the proposal, I would use the framework offered in Patrick M. McFadden, *Provincialism in United States Courts*, 81 Cornell L. Rev. 4 (1995). He identifies their “three faces of provincialism”:

First, *jurisdictional* provincialism, whereby courts refuse to hear cases containing international law through a tendentious reading of doctrines about jurisdiction (e.g. the political question doctrine, forum non conveniens, foreign sovereign immunity) that may not in fact bar the case from being heard.

Second, *doctrinal* provincialism, whereby courts trim international law as it emerges from its main sources: “treaties, custom, and general principles of law.” For example, a doctrinally provincial court will exploit a rule that both treaties and custom must be “self-executing” to limit their effect.

Third, *methodological* provincialism, whereby courts use American-style precepts and patterns of analysis to adjudicate international cases. American-style analysis,

contrary to foreign and international-law traditions, places heavy weight on published decisional law to the neglect of statutes and scholarship. American judges have interpreted treaties as if they were statutes or contracts, and use domestic citations to support claims with a strong foundation in international law. (McFadden, pp. 8-15)

THE PROBLEM, MICRO VERSION:
GRADUATING LAW STUDENTS ILL-EQUIPPED FOR THE IMMINENT GLOBAL THINKING AND PRACTICE OF LAW

If we identify provincialism in U.S. courts as the problem, or at least a significant fraction of it, then harms to legal education attributable to a similar provincialism, this time within the law schools, may be placed within the McFadden framework:

Jurisdictional harm: Without transnational supplementation, first-year students do not learn that the domestic law found in required courses is congruent with--and also occasionally different from--the law of particular foreign nations and international law more generally. They also receive a tacit message that domestic law is superior to international law.

Doctrinal harm: First-year students do not learn various international-law doctrines, such as the law of custom, that might enable them to help a client in a few years. Of course, when “provincial” American courts refuse to consider this alternative law, such an invocation of it would likely be unavailing in these forums. But a pioneering young lawyer could join a larger effort to introduce international law to these provincial judges, helping to pave a way to acceptance later. Lawyers who can exploit transnational material on behalf of clients can advocate more effectively in forums abroad, as well as in the handful of foreign-like forums in the United States.

Methodological harm: Although training in legal research and writing is part of the first-year norm, few students learn transnational legal research in their first year. The “provincial” overemphasis on decisional law at the expense of statutes and scholarship has been extensively critiqued over the decades in these pages (i.e. *JLE*). To build on this critique, one might repeat that methodological provincialism can fail a lawyer who would do better as an advocate, a few years later, with the help of these alternative routes to a favorable outcome.

THE LAGNIAPPE SOLUTION

Admissions officers in law schools tell me that “international law” is the #1 or #2 curricular interest that prospective students recite on survey forms. Unsurprisingly in this consumer-driven milieu, law schools often claim to offer “international” or “global” opportunities for students. Looking on the Web for specifics, I found some favorites: (1) study-abroad programs (2) references to a

large number of elective courses in international and comparative law (3) student-edited journals (4) claims to have many foreign students, especially graduate students (5) centers and institutes.

Without accusing any school of insincerity, I suggest that this promotional stance, at least in the aggregate, presents transnational law as if it were (you should forgive another metaphor) a dim sum brunch--a change of pace for cosmopolitans to sample, by nibbling, until they have had enough. Students who grew up holding the remote are invited to choose a school where they can switch to the transnational channels when the fancy strikes them. Nothing is taken away; no obligations arise. Promotional materials promise painless options to alleviate the boredom and stress that applicants have been told to expect when they arrive at law school.

BUT WHY NOT BUILD A TRANSNATIONAL CURRICULUM BY LAGNIAPPE?

The basic problem, I think, is a failure to confront what exactly this curricular change is trying to do. Particular questions arise for law faculty who seek reform:

Which supplements count as active constituents of your solution, and which are just frills?

How do you know whether you are succeeding or failing?

You haven't abolished scarcity: nobody can. What will be displaced to make room (in money, time, space, faculty energies) for the lagniappe?

Without a defined end point, when will you conclude that you have had enough of your lagniappe? Will boredom tell faculty, not just student-consumers, when to move on to the next entertainment?

If you are willing to consider detriments that go beyond the interests of your own school, consider the commons. Competing with other schools on 'who is the transnational-est of them all' eventually breeds cynicism among everyone who consumes what law schools say about themselves. Institutions that claim to be global or international when they are really just like everyone else will eventually sound as silly as those that prattle about excellence.

A HEARTIER MEAL

More borrowing, this time from Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 A.J.I.L. 69 (2004). I share Ramsey's taste for rigor in the activity of transnationalism. Without rigor, we are in lagniappe-land. Rigor calls for obligations rather than, or in addition to,

options for students and faculty. Reforms that fit this model include compelling students to take a course in international law before they graduate (a commonplace requirement one century ago); empowering an external body like the American Society of International Law to sort meaningful curricular change from frills; working to put international law topics on bar exams; and consciously making sacrifices for the sake of the transnational curriculum.

Ramsey makes demands on judges who seek to use foreign sources in judicial opinions, as has taken place in recent Supreme Court case law. The transnational-minded innovator must hew to four Ramsey rules, slightly modified for this purpose:

1. Define the theory: what are you trying to do?
2. Take the bitter with the sweet.
3. Get your facts right.
4. Avoid false shortcuts.

1. Are you fighting the provincialism that McFadden identifies, or doing something else? I have suggested this one is the best rationale for integrating transnational materials into the first-year curriculum. Or are you trying to lure student applicants to your website? Working to make good use of a new collection of donated library materials? Trying to boost scholarly output (evidence suggests that, other things being equal, an international-law specialist on a law faculty is more likely than a domestic-law specialist to be a prolific writer)? Perhaps you want to polish your new graduates to a high gloss with sophistication-enhancing experiences during their time in school, to improve their performance in the job market. The possibilities vary, and they call for distinct measures—for example, building a study-abroad program would fulfill some but not all transnational-curriculum agendas.

2. Take the bitter with the sweet, indeed. Meaningful curricular reform, unlike a lagniappe, is disruptive and painful. Integrating transnational materials into the first-year curriculum will not come easily to most institutions.

3. Get your facts right: One starting point is price: are you underestimating the cost of this reform? Consider your faculty. How many will be on board with this program? What will it take to persuade the skeptics? How's your library?

4. Avoid false shortcuts: The lagniappe approach might represent this very pitfall. It's a shortcut around #1, the obligation to figure out what you want to do before trying to do it.