



Institute for International Law
and Justice

IILJ International Legal Theory Colloquium

Interpretation and Judgment in International Law

NYU Law School

Professors Benedict Kingsbury and Joseph Weiler
Pollack Colloquium Room, FH 9th Floor, 245 Sullivan St.
Thursdays 4.00pm-5.50pm

Note: speakers' topics listed are indicative of areas, not final titles, and may change

January 17 – Jeremy Waldron, NYU Law School

Topic: "Partly Laws Common To All Mankind": Foreign Law In American Courts

- January 24 - Catharine MacKinnon, University of Michigan Law School
Topic: *Women's Status, Men's States*
- January 31 - Beth Simmons, Harvard University Government Department
Topic: *Participation in and Effects of Human Rights Treaties*
- February 7 - Richard Stewart, NYU Law School
Topic: *Accountability in Global Governance*
- February 14 - Joseph Weiler, NYU Law School
Topic: *The Theory and Practice of Interpretation in International Law*
- February 21 - NO COLLOQUIUM
- February 28 - Derek Jinks, University of Texas Law School
Topic: *Fragmentation of International Law concerning Individuals in Armed Conflict*
- March 6 - Robert Howse, University of Michigan Law School
Topic: *Interpretation in the World Trade Organization*
- March 13 - Martti Koskenniemi, University of Helsinki/NYU Law School
Topic: *Natural Law between Moral History and Raison d'Etat: Understanding the Pre-History of International Law*
- Note: March 14 and 15, the Program in the History and Theory of International Law convenes in the same room a conference on Roman Law and Imperialism in the Foundations of Modern International Law (all welcome – see iilj.org)
- March 20 - NO COLLOQUIUM – Spring Break
- March 27 - Jose Alvarez, Columbia University Law School
Topic: *Interpretive Problems in International Investment Law*
- April 3 - Ryan Goodman, Harvard Law School
Topic: *Sociological Theory Insights into International Human Rights Law*
- April 10 - Sally Engle Merry, NYU Anthropology Dept & Law and Society Institute
Topic: *Indicators in Global Governance*
- April 17 - Christopher McCrudden, Oxford University/U. of Michigan Law School
Topic: *Human Dignity in Human Rights Interpretation*
- April 24 - Stephen Gardbaum, University of California at Los Angeles Law School
Topic: *Is U.S. Constitutional Rights Jurisprudence Exceptional?*

Program and papers available at: <http://iilj.org/courses/2008IILJColloquium.asp>

Storrs Lectures¹
"PARTLY LAWS COMMON TO ALL MANKIND":
FOREIGN LAW IN AMERICAN COURTS²
Jeremy Waldron³

Note for the Colloquium:

What I have given you here is more or less the whole of Lecture 2 (which is what I mainly want to concentrate on in discussion). This begins on p. 13 and ends on p. 38

To give you some context, the extract from Lecture 2 is preceded by a big chunk of Lecture 1 (pp. 1-12), and it is followed by a bit of Lecture 3 (pp. 39-56). These pieces are single-spaced, which means you don't have to read them. :) --JW

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Lecture 1.

Democracy, Judicial Review, and "the Disapproving Views of Foreigners"

1. *The Merchant of Venice* [omitted]
2. Riggs v Palmer
3. Roper v Simmons
4. The American controversy and the need for jurisprudence
5. Ius gentium
6. The distinction between ius gentium and natural law.
7. Laws common to all mankind: a consensus concept.
8. How can a consensus be normative?
9. *Ontological objections: Erie RR v Tompkins* [omitted]
10. *Judicial review and democracy* [omitted]
11. What claim does ius gentium have on us?

In March 2005, the U.S. Supreme Court decided that a state could not execute a man for a crime committed when he was a child. The case is Roper v Simmons.⁴ Christopher Simmons was 17 in 1993, a junior in High School, when he and a bunch of friends (who were even younger than he was) cruelly murdered a

¹ Delivered at Yale Law School, September 2007.

² I would like to acknowledge my research assistant, Lindsey Weinstock, for her help with this project. I am also very grateful to the following for discussions and comments on early drafts of these lectures: Philip Alston, Dan Beller, Arthur Chaskalson, Dennis Davis, Norman Dorsen, Ronald Dworkin, Moshe Halbertal, Benedict Kingsbury, Campbell McLachlan, Gerald Neuman, and Ricky Revesz. I am particularly grateful to Carol Sanger for her very detailed comments and suggestions.

³ University Professor, NYU (Law School).

⁴ Roper v. Simmons, 543 U.S. 551 (2005)

Missouri woman. They burgled her home, they tied her up, they bound her face completely with duct tape, and then they drove her to a railroad trestle and threw her in a river. They told themselves they could get away with it because they were minors.⁵

After bragging about the murder to his friends, Simmons was arrested and confessed to the police. A few months later, once he was eighteen, he was tried as an adult, convicted, and sentenced to death. He appealed on the ground that execution for a crime committed when he was a minor would be cruel and unusual punishment. His argument was that since minors are, on the whole, less mature than adults, they are less culpable for the offenses they commit; and since Eighth Amendment jurisprudence requires the states to reserve the death penalty for their most heinous offenders, it should not be applied to people in this category. The Missouri Supreme Court accepted that argument and overturned the death penalty, substituting life imprisonment without parole. And then the state appealed to the Supreme Court of the United States.

The Court split 5-4, with a bare majority ruling that the imposition of the death penalty for a crime committed when the offender was a juvenile was cruel and unusual punishment. In reaching that decision, Justice Kennedy, who wrote for the Court, noted that the juvenile death penalty was already unusual in the United States; only three states had executed people in this category in the last ten years and eighteen death penalty states explicitly forbade it. Plus – and this was the controversial bit—he said it was also highly unusual by world standards. We ought to consider, he said,

the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. ... [O]nly seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. [And] Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice.

Justice Kennedy acknowledged that “the task of interpreting the Eighth Amendment remains our responsibility.” But he said that American courts needed to take the foreign consensus into account for this case, just as they did when they decided in 2002 that states couldn’t execute mentally retarded defendants. “It is proper,” said Justice Kennedy, “that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty ... The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” So: is this an instance of

⁵ Cite from O’Connor’s dissent in Roper v Simmons.

Justinian’s maxim, “Every community governed by laws and customs uses partly its own law, partly laws common to all mankind”?

Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur... Every community governed by laws and customs uses partly its own law, partly laws common to all mankind.⁶

As you know, the citation of foreign law in Roper v Simmons exploded in controversy, inside and outside the Court. Justice Scalia blew up. He said “the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.” And outside the court, there were ferocious newspaper editorials, death threats against some of the justices, ugly talk of impeachment, and legislation was introduced in the Congress which would prohibit any reliance by a federal court on foreign legal materials.⁷

These lectures are devoted to this controversy. It is something I have written about before, in a 2005 Comment in the Harvard Law Review.⁸ There I defended the practice of referring to foreign law in constitutional cases—which may surprise some people in light of my well-known background opposition to judicial review. (We will come to that later.) It is something that lots of other scholars have written about also, including people in this room, and that is how it should be. This is an important and interesting topic and there are lots of different aspects to confront. Even in the generous space of these three lectures, I will not attempt to survey everything that has been said in favor of the citation of foreign law, nor will I attempt to answer everything that has been said against it.

What you are going to hear is a sort of “jurisprudence meets Roper v Simmons.” I said in the 2005 piece that one of the frustrating things about Simmons is that no one on the Court bothered to articulate a general theory of the citation and authority of foreign law. The justices who cited foreign law just gave the impression that they thought it was a good idea. And those who opposed it simply denounced the practice, without giving us any sense of the theory they took themselves to be denouncing or even the position from which their own denunciation was legitimately launched.

And I have to say there hasn’t been much in the way of sustained philosophical discussion subsequently, not even in the voluminous law review

⁶ Institutes, I. ii.

⁷ Constitution Restoration Act, s. 201. “In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.”

⁸ Waldron, “Foreign Law and the Modern *Ius Gentium*,” 119 Harvard Law Review 129 (2005).

literature on this issue. A lot of that literature is just abuse, for example by liberal supporters of the practice making fun of what they regard as the know-nothing parochialism of those who want to prohibit reference to foreign law. But that's not enough. (One of the first things I learned in logic at college was that refuting a bad argument for proposition p is not a way of establishing that p is true.)

Too many scholars who support the citation of foreign law say simply that it is common-sense to do so. Every other country does it, so why shouldn't we? But isn't that exactly where you would expect the jurists to come in? Isn't that what we're hired for? It's our job to investigate the concepts (and the platitudes) on which the ordinary operation of law depends. If citing foreign law is obvious, if it's a ubiquitous practice, then that should tell us something about how the legal world is shaped, and what its various divisions amount to. And actually I'm not sure that contemporary legal philosophy has ever checked to see whether modern positivism, for example, can really handle a legal world that is shaped like that. ... What I want to do over the next three days is to consider the citation of foreign law by American courts in light of the maxim from the Institutes that I have taken as my motto: "[E]very community, subject to the rule of law, is governed in part by its own laws, and in part by laws common to all mankind."

Ius Gentium

"Laws common to all mankind"—what did the author of the Institutes mean? The term he used was the law of nations, ius gentium. But he didn't mean what we sometimes use it to mean: international law, i.e., the law that governs princes or sovereign communities in their dealings with one another. Actually, "the law of nations" has at least two meanings today; it is used either as a synonym for international law, or as some sort of clean-up category that deals with matters that otherwise fall between the cracks—the rights of ambassadors, pirates, and so on.⁹ For a thousand years, however, "ius gentium" had a much broader meaning than either of those. The law of nations comprised something like the common law of mankind on legal issues generally – on contracts, property, crime, delict, and government. It was understood as a set of principles whose authority stemmed from the fact that they had established themselves as a normative consensus on the topics they addressed among lawmakers, judges, and jurists around the world. I don't just mean an intellectual consensus; it was a consensus derived from these principles' having become established in practice as actual legal arrangements all over the known and civilized world.¹⁰

⁹ [Mention technical meaning that has been given to it, in terms of Alien Torts Act and also Article 1, section 8 of the Constitution: "The Congress shall have Power to ... define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."] Also *Sosa v Alvarez Machain*.

¹⁰ (This wasn't quite the original meaning of the term: in archaic Roman law, the ius gentium was the law that governed the position of foreign merchants in the city who were not entitled to the benefit of the ius

The terminology itself is not important: Harold Berman uses the phrase “world law,”¹¹ and others might use the geographically more restricted idea of “ius commune,”¹² i.e. the sort of common law, not rooted in any particular jurisdiction, that combined secular Roman and canon law sources in Europe from the recovery of Roman law at the end of the Dark Ages until well into the modern period.¹³ (Portia’s Dr Balthazar would have described himself as an expert in the ius commune.) I am not trying to get at anything particularly technical here: I’m happy just to use the descriptive phrase of the Institutes, “laws common to all mankind.” The point is that jurisprudence has traditionally offered these concepts, and I think we might take advantage of that in order to help figure out what is going on and what ought to be going on, in regard to this business of the courts in one country citing the legal authorities of another.

1.2: Riggs v Palmer

Here’s a second case: the case of Riggs v. Palmer,¹⁴ A young man poisoned his grandfather and was sent to prison. Under the terms of the grandfather’s will, the killer stood to inherit a great deal of property. This result struck many people as offensive, most notably the residual beneficiaries. But what was to be done? The matter seemed to be completely settled by statute. The terms of the statute of wills were fully satisfied; there was no defect in the drafting or execution of the will. And the law of homicide was clear too: it punished Mr. Palmer with the prison sentence he was serving, but it did not dictate any general expropriation. Still, the New York Court of Appeals held (by a majority) that the killer was not entitled to inherit.

[A]ll laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.¹⁵

civile. But certainly by Justinian’s time, it had acquired this much more extended meaning, and as I said, it held that extended meaning—which is the meaning I want to consider—for a thousand years or more after that, before it began shrinking)

¹¹ Harold Berman, World Law, 18 FORDHAM INT’L L.J. 1617 (1995).

¹² Randall Lesaffer, Argument From Roman Law In Current International Law: Occupation And Acquisitive Prescription 16 EUR. J. INT’L L. 25 (2005).

¹³ Ralf Michaels and Nils Jansen, Private Law Beyond The State? Europeanization, Globalization, Privatization 54 AM. J. COMP. L. 843 (2006).

¹⁴ 115 N.Y. 506, 511-2, 22 N.E. 188, 189-90 (1889).

¹⁵ *Ibid.*, at 512 (Earl J.).

In the majority opinion, Judge Earl cited a case from federal insurance law, where a similar principle applied.¹⁶ But he also cited foreign materials, from the Civil Code of Lower Canada, the Code Napoléon, civil law in general, and the principles of Roman law.¹⁷ Judge Earl seemed to be agreeing with Justinian that “every law-governed community ... uses partly its own law, partly laws common to all mankind.” It uses not only its statute of wills but these general principles of universal law.

In the 1960s and 70s, Riggs v Palmer became the leit-motif of a whole new jurisprudence.¹⁸ It was “Exhibit A” in Ronald Dworkin’s argument that a legal system does not consist only of rules, as H.L.A. Hart seemed to assume, but that we also have to take into account deep background principles, like the norm appealed to in Riggs v Palmer, which exist and operate in quite a different manner. It was very important for Dworkin that the invocation of principles in a case like this should not be construed as reaching beyond the law for something moral. The principle appealed to in Riggs v Palmer was already and implicitly part of the law, even though it had not been specifically enacted and even though there was no litmus test (like a rule of recognition) for discerning it. Dworkin argued—convincingly in my view—that the status of such principles as law “lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time.” We might cite cases in which they figure—and the majority did that in Riggs v Palmer—but basically, identifying a legal principle is a matter of “grappling with a whole set of shifting, evolving and interacting standards, ... about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards,” and that can’t be reduced to a formula.¹⁹

The New York Court of Appeals said two things about the principle they cited. They said it was a fundamental maxim of the common law. And they said it was “universal law administered in all civilized countries.” Dworkin focused on

¹⁶ It cited New York Mutual Life Insurance Company v. Armstrong (117 U. S. 591).

¹⁷ “Under the civil law evolved from the general principles of natural law and justice by many generations of juriconsults, philosophers and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered. (Domat, part 2, book 1, tit. 1, § 3; Code Napoleon, § 727; Mackeldy’s Roman Law, 530, 550.) In the Civil Code of Lower Canada the provisions on the subject in the Code Napoleon have been substantially copied. But, so far as I can find, in no country where the common law prevails has it been deemed important to enact a law to provide for such a case. Our revisers and law-makers were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this subject. This is not a casus omissus. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case and that a specific enactment for that purpose was not needed.”

¹⁸ See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, ___ (1977).

¹⁹ Pincite to “The Model of Rules”

the first of these. In 1967, his aim was to expand our sense of what any given legal system comprised, not necessarily expand our sense of the law to include what is done in other countries. I suspect that most participants in the debate about Dworkinian principles read the passage about “universal law administered in all civilized countries” (if they notice it at all) as a natural law idea, picking up the side of Dworkinian principles that refers to their moral appeal rather than their positive grounding. But that is wrong. The New York Court of Appeals was not appealing to natural law, or if it was, it was to natural law as it has been embodied and administered in the positive laws of many jurisdictions.

So what I invite you to think about, in connection with Riggs v Palmer, is the possibility that deep background principles may be inferred not just from existing positive law in the way that Dworkin argued, but from multiple legal systems. Principles whose presence may not be so apparent in one system, may come more clearly into view when we look at a whole array of legal systems. And if that’s the case, then their presence as legal principles will be a characteristic of law in the world—laws common to all mankind—rather than just the property of the individual systems where they figure one by one.

1.6: The distinction between ius gentium and natural law.

There is one more or less technical point I do want to emphasize. The author of the Institutes is at pains to distinguish between natural law and laws common to all mankind, he is at pains to distinguish ius gentium from ius naturale; and I think we should follow him in that.

It is tempting to say that whenever we move away from the positive law of a particular country and postulate some sort of universal and overarching jurisprudence, we must be invoking natural law. We should resist that temptation. Natural law is something like moral truth or perhaps, for some of us, the commands of God inasmuch as these can be accessed by reason. No doubt, the law of nature in either of these senses could be described as “law common to all mankind.” But the Institutes’ notion was a grounded notion—not just a transcendent ideal. To the extent that it was an ideal, it was an ideal not just postulated in thought but tested by the real-world facts of enactment, decision, and establishment, and by longevity and by practices of imitation from one society to the next. “Laws common to all mankind” is a concept of grounded consensus, not something in the airy domain of the philosophers.

When the Nuremberg tribunal refused to decline jurisdiction over crimes against humanity merely because there was no German law regarding them at the time the genocide was committed, everyone said that this represented the resurrection of natural law.²⁰ And people got very excited about that. Whereas in

²⁰ For example: Ronald C. Slye, Review of *Human Rights in Theory and Practice*, ed. Shute & Hurley, 18 FORDHAM INT’L L.J. 1566 at 1584 “It was natural law that justified the Nuremberg verdicts, preventing

fact what was relied on at Nuremberg and also in the Eichmann trial in Israel in 1961 was not natural law in the sense of transcendent moral truth, but something like the concept that I am referring to: ius gentium, universal law, law that has a positive existence among the nations, despite its not being law particular to Nazi Germany. As Attorney-General Hausner said in Jerusalem in his response to the defendant's preliminary objection in the Eichman trial:

Nazi Germany abused the sacred principles of the maintenance of law ... and by ... a series of unprecedented crimes created a vacuum, a legal chaos, an abdication of the law ... Against the legal vacuum ... mankind employed new legal principles, or more correctly—gave expression to those principles which had been entrenched and rendered sacred and which had become the heritage of all civilized peoples.²¹

-- not just moral principles, not just God's principles, but principles which had their own positivity right here on earth—principles which had become, which were already “the heritage of all civilized peoples,” even if the Nazis had sought to repudiate them. That is exactly an instance of the concept I am trying to get at: ius gentium, laws common to all mankind, as a positive law concept, not a natural law one.²²

1.7: Laws common to all mankind: a consensus concept.

Let us pause for a moment. The practice of citing foreign law can be understood in two different ways.

(a) In the first and most straightforward way, we, in country A, refer to the law of country B for some insight, and for other insights we refer to the law of country C, and so on. We do it one jurisdiction at a time, and we justify it (or criticize it) one jurisdiction at a time.

(b) But on a second way of understanding, what is going on is that we cite, not so much to the law of particular countries one by one, but to the significance of whatever of consensus has emerged among them. So for example, there is a consensus in world legal opinion on the juvenile death penalty, and it's the consensus that mattered in Roper v Simmons—in Justice Kennedy's words, "[t]he

them from being tainted as an exercise in retroactive legislation.” See also David Luban, Moral Responsibility In The Age Of Bureaucracy, 90 MICH. L. REV. 2348 (1992) at 2352: “[I]nternational revulsion at the official criminality of Hitler's regime, as manifested legally in the Nuremberg trials, represents a triumph for natural law thinking”

²¹ For the relevant parts of the Eichmann transcript, see <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-002-02.html> and <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-002-03.html>

²² GROTIUS: “As for jus gentium, it is a species of jus humanum voluntarium; it is the agreement of positive law as between all or a number of peoples....”

opinion of the world community"—not the holding of any particular foreign legal system.²³

In a moment I want to ask and answer a couple of philosophical questions about this. First, how can a consensus, which in itself is just a description of a commonality, become a normative resource? How can the “is” of a consensus become an “ought” for our judges? And, secondly, even if it does become an “ought,” how can a world-wide consensus become anything other than a moral ought? What authority, what legal claim on us, can a consensus possibly have? I promise I’m going to pose and answer those questions—probably pose them in a more convincing way than I answer them. But let’s wait and see.

1.8: How can a positive consensus be normative?

For much of our era, jurists have preferred to use ius gentium rather than ius naturale as a basis for legal criticism and reform. As a consensus, as a preponderance of effective juristic opinion, the ius gentium had a grounding in the real world that the more abstract idea of the law of nature never had.

But then there’s a problem. How can something positive perform a critical function. How can the “is” of the ius gentium become an “ought” for the law of the land? Not only that, but how can a consensus concept be normative? If the ius gentium represents a consensus of laws among all civilized nations, then what sense does it make to say that it is normative for a member of that group? The United States is a civilized nation, so any consensus of civilized nations if there is one, already embraces our legal arrangements and so can hardly be used as a normative ground for criticizing or reforming them. Either it’s a false consensus or it’s normatively redundant.

One possible answer might be that a consensus need not represent perfect unanimity, and that the ius gentium (on any given topic) might comprise the legal positions of the overwhelming majority of civilized nations, even though there are one or two outliers. And then the consensus might be thought of as normative, so far as the outliers are concerned. (This seems to have been what was going on in Roper v Simmons, when the US was portrayed first as one among seven rogue outliers, and then as a solitary outlier.) But it’s a pretty unsatisfactory idea, for it begs all sorts of arithmetical questions about what proportion counts as a consensus and why?

A slightly better answer would say that certain issues may be open or undecided in some jurisdictions and settled in others, and we might consider a

²³ You may say: Well, if it is not OK to cite any particular foreign law or precedent, then surely it follows that it’s not OK to cite any accumulation of them—indeed accumulation simply compounds the felony, by subjecting American constitutional law to the whole world rather than to individual states (like Britain), one at a time. But maybe something like the fallacy of composition is going on here. There may be a fallacy of composition here: the consensus may have a status that particular citations lack, at least when they are considered in and of themselves. And what I want to do in these lectures is consider what sort of consensus that might be, what it is composed of, and what its normative force for us may be based on.

consensus, perhaps a unanimous consensus among those jurisdictions where the issue is settled as normative for those where it is not. So we might say, not that the US is an outlier on juvenile death penalty, but—more charitably—that the issue is not yet settled here (which is why it is before the Supreme Court)²⁴ So we are using a consensus of settlement across the Atlantic to put the issue to sleep here in America.²⁵

A third answer is more difficult but I think it is much more promising. Think of Riggs v Palmer (the lad who poisoned his grandfather). In that case, the New York Court of Appeals used foreign law to help tease out principles which it said were already implicit in its own common law jurisprudence. Maybe it could have done that by concentrating purely on its own resources: but maybe some principles implicit in its own law became easier to see when they were writ large as part of a more general consensus in the legal world. So there was a sense in which New York was already part of the relevant consensus, but it took the foreign law to help it see that. And in that way the consensus played a normative role in the New York court's reasoning.

1.10: What claim does the *ius gentium* have on us?²⁶

Remember that Justinian's observation in the Institutes was not that every society is governed partly by laws common to all mankind, but that every society ruled by law is governed partly by laws common to all mankind. Being ruled by law is not just a matter of the enactment and observance of a few edicts. It has a depth to it that can take us out of ourselves and relate us and our doings to a great heritage of legal ideas.

I know the Rule of Law can be conceived in many ways. Elsewhere I have described it (not in a derogatory way) as an essentially contested concept.²⁷ The standard conception of the Rule of Law looks for a society to be governed by general rules laid down publicly in advance and stable enough to form a reliable basis for people to organize their lives in freedom; it looks also for procedural guarantees and virtues of legal form, such as clarity, consistency, and prospectivity. All that is of great importance. But we know too that there are conceptions of the Rule of Law that go much deeper than this. Some go deep in order to establish find subterranean connections between the form of law and the

²⁴ In 2005 I said: "Since it is an open question in our system whether this practice [of possibly executing adults for crimes committed when they were children] is constitutional We need all the help we can get [and] the accumulated legal wisdom of mankind ... may ... have something to offer us."

²⁵ Furious reaction likely to this from Scalia—so long as our own people are undecided, foreigners shouldn't decide for us.

²⁶ I am most grateful to Moshe Halbertal for discussion of these last few paragraphs.

²⁷ Jeremy Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? LAW AND PHILOSOPHY, 21 (2002), 137-64.

form of morality: Lon Fuller's work continues to exert great fascination in this regard.²⁸ Some look for deeper connections of substance: they say the Rule of Law is not confined to form and procedure (important though those may be), but it also requires—and requires directly—the promotion of human rights, the pursuit of justice, and (for some people) the protection of property and the facilitation of commerce. Ronald Dworkin, for example, famously distinguished between rulebook conceptions of the Rule of Law and what he called the “Rights conception.”²⁹

Those substantive conceptions are not exactly what I have in mind when I say that the claim of the ius gentium upon us is rooted deeply in the idea of the Rule of Law. Instead what I have in mind is this, and it is also, as it happens, a Dworkinian idea.

The Rule of Law is not just the rule of the rules that happen to have been enacted. It is a matter of plumbing beneath the rules to discover the principles that are also an intrinsic part of the law—the tissues of principle that surround, sustain, and inform the rules and their application. Dworkin's early work gave us a taste of that for cases like Riggs v Palmer (the boy who poisoned his grandfather): stay shallow and it looks like the statute of wills settles the matter; dig deeper and you can find principles that moderate the application of the surface-level rules. But then as we have seen, you do not just find principles of the legal system of the State of New York, when you dig down to that level. You find all sorts of connections between those principles and the principles of other legal systems, and you tap into underground currents down below—the principles of the legal tradition, “universal law administered in all civilized nations.” That's the excitement of the legal enterprise and the challenge of the Rule of Law. The law properly plumbed and sounded can take us deep into ourselves but at the same time it takes us out of our self-preoccupation and into a heritage of principles and ideas that, in our civilization, have helped define what it is for any society to be governed by law.

We can stay isolated, if we like, and if we stay isolated, we will stay shallow and sit here with our laws—curiously uninterested in the deeper structures that sustain them. Some Americans are not worried by that prospect, but it is a terrifying prospect for most legal systems. In my lectures tomorrow and on Wednesday, I will give you some examples of how the citation of foreign law works in other systems—the examples will be from New Zealand and South Africa. The sense I get from jurists in those countries is that it is simply inconceivable that judges and lawyers there could proceed adequately without reference to foreign law or without a grasp of this deeper and more pervasive legal enterprise. To give that up, if they were ever persuaded by home-grown versions

²⁸ LON L. FULLER, THE MORALITY OF LAW.

²⁹ DWORKIN, A MATTER OF PRINCIPLE, Ch. 1.

of the parochialism we hear in the United States, would leave them isolated and the roots of their Rule of Law frighteningly shallow.

It is always tempting when one invokes something like the ius gentium—these laws common to all mankind—to use metaphors of ascent: we go upwards from our local system to some over-arching law, up there, a sort of sky-bridge between the towers of national legal systems, some sort of brooding omnipresence in the sky. I think I like the subterranean metaphors better: law seeps (as Judith Resnick puts it) from one system to another (it doesn't fly); currents of principle run deep into and beyond the foundations of particular legal systems; to go deep is to reveal hidden springs and geological strata of commonality. Those are the metaphors I find most helpful. But metaphor is not everything, and tomorrow we will begin a plainer, yet an equally challenging discussion, of some of the ideas of global fairness and consistency that might justify some of this rhetoric.

MAIN FOCUS OF DISCUSSION BEGINS HERE > > >

Lecture 2. The Expansion Of Integrity: Treating Like Cases Alike (Here And There)

1. Hopkinson v Police
2. Why is Hopkinson interesting?
3. The case for harmonizing the law on human rights—preliminary discussion
4. Is US (constitutional) rights law human rights law?
5. Treating like cases alike
6. The agency problem
7. Fairness and reciprocity
8. The community of humans with rights
9. Loose or tight consistency?
10. Dworkin's soap opera
11. From consistency to ius gentium

2.1: Hopkinson v Police³⁰

In 2003, a young man called Paul Hopkinson set fire to a flag on the grounds of the New Zealand Parliament in Wellington.³¹ He was arrested, charged and convicted of an offense under the Flags, Emblems, and Names Protection Act 1981, a statute which makes it an offense to destroy the New Zealand flag with the intention of dishonoring it. Mr. Hopkinson appealed on the ground that burning a flag in protest was not a way of dishonoring the flag, at least not under any interpretation of “dishonor” that would avoid conflict with the free speech provisions of the New Zealand Bill of Rights Act.³² To understand this, it helps to know that New Zealand has a form of very weak judicial review, which does not permit courts to strike down legislation, but which requires them to choose,

³⁰ Hopkinson v Police [2004] 3 NZLR 704. There is useful discussion in Sigrid Brigitte Buschbacher, “Protection of Public Symbols in New Zealand and the United States of America: Flag Burning versus Freedom of Expression,” The New Zealand Postgraduate Law E-Journal Issue 2 / 2005, available at [http://nzpostgraduatelawejournal.auckland.ac.nz/PDF%20Articles/Issue%202%20\(2005\)/3%20Siggi's%20Final.pdf](http://nzpostgraduatelawejournal.auckland.ac.nz/PDF%20Articles/Issue%202%20(2005)/3%20Siggi's%20Final.pdf)

³¹ Hopkinson was protesting the New Zealand Government's hosting of the Australian Prime Minister (protesting it on grounds having to do with Australia's support for the United States in the war in Iraq).

³² Under section 14 of the New Zealand Bill of Rights Act, “[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”

among available interpretations of offending statutes, those that are most congenial to the spirit and the letter of the Bill of Rights.³³

The court hearing the appeal had no doubt that prohibiting Mr. Hopkinson's conduct was prima facie a breach of his right to freedom of expression." But like many modern bills of rights, the New Zealand Bill of Rights Act allows rights to be qualified by such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". And so the court had to consider whether the protection of the flag satisfied that test.

Mr. Hopkinson contended that protecting the flag was a goal of relatively little importance in New Zealand's multicultural society. The judge, Justice Ellen France, disagreed. She said:

I believe the objective remains an important one. In Texas v Johnson 491 US 397 (1989) at p 414 the United States Supreme Court ruled that the Texas flag-burning legislation was unconstitutional, but did consider that the state's aims of preserving the flag as a symbol of national unity and preventing breaches of the peace were legitimate ones.

That was the court's first reference to foreign law in Hopkinson. The second came when Justice France turned to consider whether a ban on flag burning was a rational and proportionate means of advancing this legitimate objective. She noted the disagreement on this matter among justices on the US Supreme Court in the Texas v Johnson.³⁴ And she also referred to a case from Hong Kong involving the mutilation and defacing of both the Chinese flag and the flag of the Hong Kong

³³ Section 6 directs an interpretation consistent with the Bill of Rights to be preferred and applies "wherever an enactment can be given a meaning that is consistent with the rights and freedoms" in the Bill of Rights.

³⁴ Also, in US v Eichman 496 US 310 (1990), by a majority, the Court ruled unconstitutional the Flag Protection Act 1989 enacted after Texas v Johnson which imposes criminal penalties against anyone who knowingly "mutilates, defaces, physically defiles, burns, maintains upon the floor or ground, or tramples" upon a flag of the United States.

region.³⁵ There the Hong Kong court upheld a flag protection statute, on grounds of special exigencies of public order having to do with the newness of Hong Kong's constitutional arrangements and the delicacy of its position in relation to the rest of China. Observing that there is "room for differing views" on this issue, Justice France reached her own conclusion:

Obviously, the flag is important. However, even in the United States where the flag is such a dominant symbol, the majority concluded its protection did not warrant the interference of the criminal law. ... In the end I have concluded that the rational connection part of the s 5 test is not met here so that the prohibition on this appellant's conduct was not a justified limit on his free speech.

She then turned to the question of interpretation and adopted Hopkinson's suggestion that "dishonor" in the flag protection statute should be read in a very narrow way to mean "defile" or "vilify." She drew on a 1941 New Jersey case for this definition.³⁶ And she said that this definition would be consistent with the New Zealand Bill of Rights Act and yet not cover Mr. Hopkinson's conduct.

2:2: Why is Hopkinson interesting?

Why have I chosen to talk about this case? Well, it involves the citation of foreign law, that is, law from outside the jurisdiction of the court faced with the issue, though this time a foreign court is citing our law, rather than a US court citing foreign law. I think turning the tables in this way is good, on several counts; it

³⁵ HKSAR v Ng Kung-Siu 8 BHRC 244 (1999).

³⁶ "Dishonour . . . as respects the flag, to deface or defile, imputing a lively sense of shaming or an equivalent acquiescent callousness." State v Schleuter , 127 NJL 496, 23 A 2d 249, 251.'

helps us see that what seems like a big deal in the American context is done easily and as a routine matter in other courts around the world.³⁷

Second, Hopkinson shows how the citation of foreign law can work in constitutional or rights cases even when there is not strong judicial review. Justice France used her citation of Texas v Johnson not to strike down a statute but assist in the interpretive task she faced. Hopkinson is an example of what I was so defensive about last night: judicial review and the use of foreign law are separable issues.

Third, this is not a very high appellate decision. The High Court is one step up from the District court where Mr. Hopkinson was convicted. (There are two appellate levels above that in New Zealand.) This is just a regular working judge, learning from foreign law, not a top jurist in the country's most distinguished forum.

Fourth, I think it is interesting that Justice France found it useful to cite foreign law even though, as she said, the results were inconclusive, leaving room for her own judgment. (She was at pains to point up the dissensus among U.S. Supreme Court justices on the matter, even while she was encouraged by the holdings in Texas v Johnson and some subsequent cases.)

Fifth, Justice France cited cases from jurisdictions that were administering similar statutes under circumstances somewhat different from New Zealand. She mentioned the delicate position in Hong Kong and the greater culture of reverence for the flag in the United States. But, like any good lawyer, she was able to identify the differences and calibrate their bearing on the New Zealand case accordingly.³⁸

³⁷ (In the American debate about foreign law, there are all sorts of complaints about the difficulty and impracticability of expecting judges in one jurisdiction to cite cases from another; quite apart from the fact that American state court judges do this all the time, this objection simply withers when confronted with the day-to-day reality of the operation of Commonwealth legal systems.)

³⁸ (Again, I am amazed at how often the point about different contexts is cited as a conversation-stopper in the US debate about recourse to foreign law, as though we were not skilled in referring holdings to different circumstances and adjusting our sense of their relevance accordingly.)

As I said yesterday, I want to explore two ideas in these lectures—two ideas that might justify the use of foreign law in American constitutional cases by reference to an overarching body of law—ius gentium, laws common to all mankind—to which our decisions and foreign decisions are both contributors and from which we are all beneficiaries. One of the arguments that I want to explore is that there is something to be learned from foreign law. I'll argue that the ius gentium makes resources available for learning, not piecemeal, but as a body of jurisprudence containing important principles and offering techniques for solving difficult legal problems. I want to talk about that in Lecture 3. But clearly the case of Hopkinson is already an illustration of it: Justice France has learned from the American cases how to proceed step by step with something like strict scrutiny, distinguishing various stages in a constitutional rights inquiry just as an American court might do.

The other line of argument I said I wanted to consider was the idea that reference to foreign law might be understood as a way of securing consistency in the world. I mean consistency in the sense of treating like cases alike. Reading the decision in the New Zealand case, I got the impression that Justice France thought it important that her treatment of Mr. Hopkinson should not be too far out of line with the way flag-burners the world over are treated. It was important to her to see whether his conviction in the face of free speech guarantees would introduce a jarringly dissonant note into free speech jurisprudence, not just in New Zealand but in the world. (Not that the world necessarily worries about flag-burners in Wellington; but you know what I mean.) She was also looking to apply the New Zealand version of the provision that many modern bills of rights have—that rights may be subject to “reasonable limits [such as] can be demonstrably justified in a free and democratic society,” and she wanted to apply that in a way that would be consistent with the way that it was administered in other countries. Her inquiry into foreign law, then, was in large measure a way of finding out how

things stood—so far as a possible decision, one way or the other by her was concerned—in relation to the consistency or the integrity of this body of law.

So this is the question that grabs my attention for today's lecture. How important is the demand for sheer consistency—treating like cases alike—in justifying the citation of foreign law?

2.3: The case for harmonizing the law on human rights—preliminary

Here's another way of raising the same question: what is the case—is there a case?—for attempting to harmonize the way in which the laws about basic individual and minority rights are administered all over the world? Should judges be trying, each as far as she can, to harmonize the jurisprudence of the New Zealand Bill of Rights Act, with that of the Canadian Charter, the U.S. Bill of Rights, the UK Human Rights Act, the European Convention, and so on?

An obvious answer says, “Well, yes, of course there is case for harmonization. What each of these countries administers under its Bill or Charter of Rights are human rights, and human rights are surely the same the world over.” It's an argument of principle: human rights are the same everywhere; they are based on universal principles; so the law of human rights should be roughly the same in every country (give or take a margin of appreciation).”

There are also pragmatic arguments for harmonization: the administration of radically dissonant conceptions of rights can undermine comity between nations, making things like extradition more difficult. As Harold Koh has argued, since “concepts like ‘liberty,’ ‘equal protection,’ ‘due process of law,’ and privacy have never been exclusive U.S. property, ... [t]o construe these terms in ignorance of these foreign and international precedents virtually ensures that our Supreme Court rulings will generate conflict and controversies with our closest global allies.”^{39 40}

³⁹ Excerpt from: 98 Am. J. Int'l L. 43, at 47

The pragmatic argument is no doubt important. But I don't think the principled argument from universality is very good. I know that many human rights scholars believe that the universality of human rights is sufficient by itself to justify a harmonization requirement. But harmonization with a given line of decisions does not guarantee that we have got the right answer; all it requires is that we have the same answer. Our common answer may be wrong, and if it is wrong, it might be better if some of us moved away from the consensus and started looking anew for the right answer. In its earliest stages, that would almost certainly involve a decline in consistency. Like cases would be treated differently, as different courts went off in different directions in search of the one common universal truth. So: even if the truth about human rights is singular and universal, we shouldn't be worried by the variety that different institutions' search for the truth would entail. It is better that truth prevail somewhere - and a few people get the benefit of it - if the only alternative is no truth at all in the world.

So we need a better explanation than this of why consistency is important among different national courts dealing with (say) flag-burning? Universality gives us a strong sense of why the cases are alike; but why should any given national court feel pressure to conform to whatever global consensus has become established on these issues? Why is it important to treat like cases alike?

International law doesn't give us much of an answer. The Universal Declaration of Human Rights raises the issue in the final "whereas" of its preamble, where it says that "a common understanding of these rights and freedoms is of the greatest importance for the full realization" of the pledge that

⁴⁰ (Think, for example, of the 1989 Soering case, *Soering v United Kingdom* 11 EHRR 439, where it proved impossible for Virginia to extradite a young German man from the UK to be tried for the murder of the parents of his American girlfriend. Since no credible assurance could be given that he wouldn't face the death penalty and hence suffer from "death row syndrome," which in itself is regarded in European human rights law but not in American law as an unacceptably cruel form of punishment. (What is judged cruel here is not the death penalty per se, but languishing for years under a sentence of death).

Member States have given, to promote universal respect for human rights. “A common understanding” among them is of “the greatest importance.” This is an announcement of the value of consistency. But it is not an explanation.

One line of argument might be that a patchwork of disparate human rights provisions and judgements would be something of a scandal; it would create an impression of relativism; it would create an impression that countries were not really signed on to the human rights enterprise at all, but were just parading their own parochial standards. (Jeremy Bentham said something along these lines in response to the claim that inheritance was a natural right: “Succession a natural, a universal right? How can that be?—when in no two nations it is the same!”)⁴¹

I think it would be unfortunate to have to fall back on this “avoiding scandal” argument. It’s a bit too pragmatic, for my taste, a bit too much about packaging, presentation and PR. It reminds me of the portion of the opinion in Planned Parenthood v Casey,⁴² where the Court said that

[t]here is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

The Court in Casey is worried about the scandalous appearance of variation over time; we are worried about the scandalous appearance of variation across jurisdictions. Perhaps this is a reasonable concern, but does it really take us to the heart of the matter.

⁴¹ Jeremy Bentham, Supply without Burthen or Escheat Vice Taxation, in Volume I of JEREMY BENTHAM'S ECONOMIC WRITINGS (W. Stark ed., 1952), p. 332. See also Jeremy Waldron Supply Without Burthen Revisited 82 IOWA L. REV. 1467 (1997).

⁴² Citation

2.4: Is US (constitutional) rights law human rights law?

In any case, aren't we getting a little ahead of ourselves here? Even if it is important that there be some harmonization or standardization of the way human rights are administered in the world, who says that American constitutional law is part of that enterprise? Unless we fill in that step of the argument—that national rights law should be seen as part of human rights law—we can talk all we like about global consistency, but it won't have any bearing on what our Supreme Court should do.

To review, the case I am making in this lecture is a two-step case. (1) We have to see our Bill of Rights and the bills of rights of other countries as parts of the global human rights enterprise; and (2) it is desirable for there to be consistency in the global human rights enterprise (so understood). I said on Monday that one of my aims is to illuminate not only the case for the use of foreign law in our courts, but also the jurisprudence of the case against it. So right here we see two possible points of opposition: one could deny the need for uniformity; or, whatever one thought of that, one could deny that American constitutional rights law is to be conceived as part of that enterprise. So let's focus for a while on step (1).⁴³

A term that I find useful in thinking about continuity between international human rights law and the administration of national bills of rights is a term used by my former Columbia colleague, Gerald Neuman: “dual [or double] positivization.”⁴⁴ Human rights—like the right to free speech, religious freedom, or the right not to be tortured—begin, no doubt, as moral ideals. But they are made into positive law at two levels. They are laid down in the form of treaties like the International Covenant on Civil and Political Rights (ICCPR) or the Convention against Torture. And they are also laid down, made into positive law

⁴³ The next few paragraphs are taken from my Phi Beta Kappa oration at Harvard: see (or rather hear) <http://www.harvardmagazine.com/2007/commencement/waldron.html>

⁴⁴ Cite to Neuman article.

in the form of national charters, like our Bill of Rights in our Constitution or the Canadian Charter of Rights and Freedoms or the British Human Rights Act.⁴⁵ Neuman talks about “dual positivization,” but “multiple positivization” would probably be more accurate, for there are regional layers in between (like the European Convention on Human Rights) and there are statutory layers, too, below the level of national constitutions.

The treaties, at the top level are no doubt very important. But probably for most people in most rights-respecting nations, it is the national bills and charters that offer their primary and most reliable line of defense against rights-violations. I’d think I was in a pretty sorry state if I had to rely, for the protection of my rights, on the International Covenant (ICCPR) and its attendant institutions, without the benefit of a national Bill of Rights. This picture sometimes makes human rights scholars a little uneasy, as they see their turf being eroded by constitutional lawyers—and as a result, as Philip Alston has noted, “bills of rights tend to be neglected . . . in terms of their relationship with the international human rights regime.” The fact is that that is how human rights law works.⁴⁶ The treaties are important, but the primary expectation is that treaty obligations will be fulfilled by the terms of the treaties being mirrored in the laws and constitutions of particular nation-states.

Now, the treaties of course embody a single set of global formulations—especially on civil and political rights, laying down common standards for the whole world. At the level of national law, the positivization is more piecemeal and fragmentary, more of a patchwork. There are numerous distinct national

⁴⁵ Article 2 (2) of ICCPR requires countries to positivize rights at a national level: “2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

⁴⁶ See Philip Alston, *A Framework for the Comparative Analysis of Bills of Rights*, in Alston (ed.) *PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES* (OUP, 1999), (p. v).

documents, many of them inspired by the treaties at the top level and many of them imitative of one another, but differing—in some respects slightly, in some respects significantly—as to their content and wording, and certainly as to the history of their administration.⁴⁷ Which is fine, so long as each of them is considered only in its own terms. But when we consider them together as a single layer of positivization of the global human rights idea, then the introduction of some degree of harmonization becomes a challenge.⁴⁸

Now we in the United States are not really accustomed to thinking of our Bill of Rights in this way.⁴⁹ For one thing, our Bill of Rights is part of our constitution, and most people don't think of the Constitution as part of a world-wide consensus.⁵⁰ We think of the Bill of Rights as part of our quintessentially American constitutional heritage, and in law schools, human rights law and constitutional law are treated as two quite different subjects. So it's a bit of a wrench to look at the Bill of Rights and the law surrounding it in this different way. We are not accustomed to looking at it as a mechanism by which we discharge our international duties and play our part in the common responsibilities laid down at the top level by the law of international human rights.⁵¹

But I think it is important to see it in that light, and I think those who cite to foreign law are seeing it in that light. Our Bill of Rights recognizes many of the core rights that both the international documents and the other foreign charters

⁴⁷ While some differences in content, 'there is a core set of civil and political rights which is reflected almost without fail' (Alston, p. 2)

⁴⁸ "For many years, human rights advocates have sought to demonstrate that there were sufficient similarities between the provisions of various national constitutions and legal codes and those of the key international human rights treaties as to justify a quest to develop a code of human rights drawing upon a coherent corpus of jurisprudence." (Alston, p. 11) Cites to Sieghart, *The International Law of Human Rights*, xix.

⁴⁹ But cf. Charles Black: constitutional rights as human rights and on relation between Bill of Rights and Declaration of Independence

⁵⁰ (I say "most people." I know Bruce Ackerman has urged that we see it in exactly that light, in his work on "World Constitutionalism.") Citation

⁵¹ Also Alston thinks this makes stale ("rapidly diminishing importance") the old monism/dualism and incorporation debates. (p. 13)

recognize. It is true that we have chosen to positivize our beliefs about fundamental rights in our Constitution; some other countries, like South Africa, do this as well; others like Britain and New Zealand, however, do it through specific legislation or in the case of Canada, through a free-standing Charter of Rights and Freedoms. But differences in the form of positivization should not obscure the important points about continuity that we are pursuing here. The point is that we recognize these rights not just as rights for Americans but as fundamental rights associated with the dignity of the human person. They weren't called "human rights" when we embodied them in our constitution at the end of the eighteenth century. But it was the US example—among others—that taught the world to take them seriously. We started out as pioneers in this common enterprise, and it is odd now that we should have such difficulty in acknowledging this now.

The other obstacle in way of seeing the Bill of Rights as part of global human rights law, as a layer of the positivization of human rights law, is (if you like) the path-dependence of history. America was a pioneer in this business, but it was such a pioneer that it has had ample time to follow paths that are not really coordinate with those whom we influenced. Our Bill of Rights predates the modern human rights movement by 150 years and we have elaborated it very well, thank you, without always paying much regard to this wider enterprise of which (as I say) it can now be seen as a part.

2.5: Treating like cases alike.

Let us turn now to the second step of the argument. Let's assume that we are all now on board with viewing national bills of rights as part of the global human rights enterprise. I want to return to the case for harmonization or consistency in that enterprise—remember we left it hanging, after the failure of the simple argument from universality. Recall how in Hopkinson, Justice France gave the impression that a disparity between the New Zealand and the American way of

treating flag-burners would be a bad thing; we ought to administer the right to free speech in a harmonious manner. And in *Roper v Simmons*, Justice Kennedy implied that a disparity between the US and the rest of the world on the punishment of juveniles would be a bad thing; the human right that prohibits cruel punishment ought to be administered in a harmonious manner. Like cases in the world must be treated alike. But why?

In our national law, we sometimes justify following precedent, treating like cases alike, by appealing to the need for predictability and respect for established expectations. It is better that the law be settled, we say, than that we get it right on the merits, because only if it is settled can it serve as a basis for secure expectations. However, I doubt that this argument is going to carry us very far in the international context. I am inclined to agree with those who foresee a decline in predictability as a result of haphazard citation of foreign law and, to tell the truth, I don't think there would be much in the way of an accrual of predictability even if foreign law were invoked in a more thorough and principled manner.

It is possible, perhaps, that recourse to foreign law might promote predictability, if people's expectations of the rights they held against their government depended as much on some broad understanding of human rights as on the technicalities of (say) American constitutional law. This may be the case in other countries; I suspect it is much less true in the United States.

Two other principles that are sometimes used to illuminate the idea of treating like cases alike are the principle of fairness—it is unfair to treat case B differently from the way case A was treated, when the two cases are similar in all relevant respects—and the idea of integrity, which in Ronald Dworkin's jurisprudence, is a requirement that law be developed in a coherent way, to give credibility to the idea that it governs a genuine community, even when the members of that community are divided about what the principles that govern them ought to be. The two ideas are connected. In his earlier work, Dworkin used fairness to explain what keeping faith with a precedent amounted to: the question,

he said, is “whether it is fair for the government having intervened in the way it did in the first case, to refuse its aid in the second.”⁵² In his later work he adopted the language of “integrity” and gave the term “fairness” a different use; but the two ideas are very close.

2.6: The agency problem

Either way, there is a big question-mark hanging over the use of these principles in an international context. Treat like cases alike, they say: but that sounds like an admonition addressed to a particular agent, and surely the point about foreign cases and American cases—surely the point about Hopkinson and Texas v Johnson or about Roper and the global consensus—is that there is no single agent or no single institution that can be condemned for treating them disparately. “Treat like cases alike” doesn’t seem to be violated by anyone when X treats case A in one way and Y treats case B, similar to it, in a different way. It’s like a little kid who complains that his friends are allowed to stay up late on Sundays whereas he has to go to bed at 7:30: “It’s not fair!” he says. And we respond that no one is being unfair; other parents’ practices are not binding here; that’s not how we do things in this house.⁵³

We might say, analogously, that it can’t be fairness that requires a New Zealand judge in Hopkinson to follow an American precedent even when all the circumstances are the same. Why? Because the New Zealand court was not responsible for what was done in Texas v Johnson—from which it follows that the New Zealand court has no duty of fairness to let Mr. Hopkinson off as well.⁵⁴ Other parents’ practices are not binding in this house.

⁵² Dworkin, Hard Cases, in TAKING RIGHTS SERIOUSLY, p. 113.

⁵³ See Richard Bronaugh, Persuasive Precedent, in L. Goldstein (ed) PRECEDENT IN LAW (OUP 1987), 217 at 228.

⁵⁴ This is adapted from McCrudden, A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights in HUMAN RIGHTS AND LEGAL HISTORY: ESSAYS IN HONOUR OF BRIAN SIMPSON (2000, eds. K. O’Donovan and G. Rubin) 29, at p. 44

Likewise if we are talking about the principle of integrity. In one of Dworkin's formulations, integrity is the duty of the state to speak with a single voice, not with one voice to A and another voice to B. But there is no single state talking to flag-burner Hopkinson and flag-burner Johnson; there is one state talking to Hopkinson and another to Johnson and it's not clear who the duty of integrity is incumbent upon.

OK, what are going to do? There are two ways to respond to this point about no single agent in the international context. The first is to stretch to try and find a single agent, to cover the cases even across national boundaries. The second is to argue that the single-agent requirement is in fact dispensable.

For maybe it is a mistake to push too hard on the "single agent" point. We surely don't want to end up saying that what goes wrong when like cases are treated differently is just a failure of Kantian rationality on the part of some agent, and that the focus of concern is on the agency of the person who treats the two cases disparately rather than on the disparity as viewed from the point of view of the people who are suffering the disparate treatment. If we really do think of this as an issue of fairness, we ought to be focused primarily on the people and think in terms of their having a claim to be treated alike, a claim that is incumbent on all the agencies that have dealings with any of them. This would be a sort of bottom-up demand for fairness rather than a top-down approach.

And we might make a similar move also, from an agent-focused concern to a concern for the people who are being treated differently in the case of integrity as well. For although Dworkin sometimes uses a state-centered formulation, often he says that integrity requires members of a community to treat one another (and to demand treatment for one another) on the basis of a consistently administered set of principles.⁵⁵ Again it's a bottom-up approach. The challenge, then, is to

⁵⁵ See Dworkin, LE p. 189.

expand our sense of community rather than expand our sense of the agency that is responsible for the treatment of these similar cases.

There are, of course, cases in between, cases where it is arguable that the different state entities treating A and B are linked somehow in a single system. Stare decisis often involves different courts on opposite sides of the continent, and we never think it is right for a judge to say, “Well, I’m not bound by precedent A because it wasn’t me who decided it.”⁵⁶ Usually we say that decisions by different courts in a single legal system can be imputed to the state as a unitary actor. Or we say, they belong to the same legal system, and it is the system that is required to treat like cases alike. But then we have to be very careful to avoid begging the question: is the only way in which different courts can be linked together so that the duty of fairness kicks in, their being bound into a system associated with a single state. What about other sorts of legal system? For that matter, what about the ius gentium, which is what we are considering here?

Even if we are preoccupied with the state as the basis of a legal system’s unity, we know that for certain purposes states (I mean nation-states) do operate as a single system. For example, they jointly administer the arrangements whereby everyone is supposed to be accorded citizenship of at least one country—the system by which the world and its population are divided in what we hope is an orderly manner into territories and citizenships, with not too many ragged holes for stateless persons to fall through. They have joint responsibility for the integrity of that network. This helps explain at least one case involving citation of foreign law by the US Supreme Court. In Trop v Dulles (1958),⁵⁷ the Supreme Court ruled that depriving an individual of his citizenship was an impermissible punishment and one of their grounds for thinking this was that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as

⁵⁶ (Although Circuit Courts in the United States come close to saying that sometimes about each others’ decisions!)

⁵⁷ 356 U.S. 86 (1958),

punishment for crime.” So we mustn’t move too quickly in supposing that just because different states are involved, there is nothing remotely like a common agent.

On the other hand, we should be wary of moving too quickly in the other direction as well. Anne-Marie Slaughter talks about the emergence in the world of a “global community of courts.”⁵⁸ She says that “the institutional identity of all these courts, and the professional identity of the judges who sit on them, is forged more by their common function of resolving disputes under rules of law than by the differences in the law they apply and the parties before them. It stretches too far to describe them all as part of one global legal system, but they certainly constitute a community.”⁵⁹ I am very sympathetic to this approach. But to ground a requirement of consistency, it is not enough that the judges like each other and enjoy cocktails together in Venice or the Côte d’Azur. We have to have reason to describe them as a single unit for the purposes of the principle of fairness. Or else, we have to go the other route and say that a duty of fairness applies because the people they are dealing with are bound together sufficiently to generate the type of bottom-up demand for fairness that I have been talking about.

2.7: Fairness and reciprocity

From a bottom-up point of view, there may be some common idea of reciprocity underlying both the demand for fairness and the requirement of integrity. To be bound together in community is not just to think of oneself as located in the same space with a bunch of other people; it is to think of oneself as obligated to the others in some sort of reciprocal respect and mutual assistance, so that what others in the community are willing to do for you, you are willing to do for them. The mutuality of this sense of obligation helps explain why we would look to what we have done for each other in the past or why we interrogate what we are doing for

⁵⁸ Anne-Marie Slaughter, A Global Community of Courts 44 HARV. INT’L L.J. 191 (2003)

⁵⁹ Id. 192

each other already, in order to get a sense of what it would be to go on in that same associative spirit.

Carol and I have a house upstate in New York and we have a very obliging neighbor who helps us out with various things: he plows our drive, he helps us move old lumber, once or twice he even cut our lawn. And let's say we do certain things in return for him, like minding his child or bringing him stuff from New York City that you can't get at the local Price-Chopper. Now, suppose one day he came to us and asked if he could live in our house for the rest of the winter because his wife had thrown him out. We might demur, and if he drew attention to all the things we had asked him to do for us, then Carol and I would have a big row about whether this demand was sufficiently like the previous demands that it would be unfair now to refuse it.

Well, something similar can explain the legal use of precedent. X, who has been a defendant in a number of cases and has accepted the burden of the rules which impose liability on him in that capacity, may reasonably think that in fairness, when the day finally arrives that he is a plaintiff, the rules should not be changed on him: he should be entitled to the benefit of the very same rules as those whose burden he previously labored under. It doesn't much matter to him whether the agent who decided the earlier cases is the same as the agent deciding his case now; what matters is that he be treated fairly in his reciprocal relations with other members of the community.

Maybe we can come up with some similar relations of reciprocity to make sense of global community or a bottom-up argument for fairness on a global scale.

This of course is not as easy as it looks. The primary cases we are considering—human rights cases—don't really have the reciprocal structure of the example I have just mentioned. Maybe if human rights were mostly pursued horizontally and horizontally across boundaries—which they hardly ever are—then the argument might work. But mostly, the defendants or respondents in human rights cases are states, and it's not clear how the fairness argument gets

going for their benefit. I guess you could say, “Well, states are kind of in competition with one another, and they are limited or hobbled in that competition by being required to respect individual rights. Perhaps they might demand, as a matter of fairness, a level playing field: something like this is sometimes heard in relation to the laws of war, for example, or international humanitarian law.

But it’s not very convincing, because we don’t usually think of the demand for fairness as being put forward on behalf of states (as opposed to subjects) in the human rights context.

2.8: The community of humans with rights

Let’s review where we are. The argument has two steps to it: (1) the administration of national bills of rights is to be understood as part and parcel of the broader enterprise of securing human rights in the world; and (2) that broader enterprise is to be understood as subject to a principle of consistency, integrity or fairness that requires that like cases, even in different countries, be treated alike.

We are focused now on step (2) and we are sort of stuck between a conception of the fairness principle which requires us to identify some sort of single entity or system that has this obligation to treat like cases alike, and a competing bottom-up conception of fairness that originates with the people whose treatment is in question, and the associative relations between them.

I think you can go either way. You can say that the very existence of a treaty regime binds states together into a single system, where they have resolved jointly as well as severally to promote human rights.⁶⁰ We can say that that system of states, with responsibility for everyone’s rights, has a duty to treat like

⁶⁰ (I don’t want to exaggerate this. The prime responsibility of states party to, say, the ICCPR is responsibility (under Article 2) for their own conduct not other countries’ conduct. There is formal provision for states to complain about one another’s rights violations under Article 41(1)⁶⁰ of the ICCPR; but apparently it has never been used, and only 47 states have signed for participation in that facility. ALSTON AND STEINER, INTERNATIONAL HUMAN RIGHTS IN CONTEXT (2000), p. 739.

cases alike; and individual countries and courts have a constitutive part to play in ensuring that that duty is properly discharged.

My hunch, though, is that the second way through this—the bottom-up associative idea—is more promising and that it is possible to think about all peoples as members of a single community so far as the administration of human rights law is concerned. I don't mean to be fanciful about any broader cosmopolitanism (or at least not today).⁶¹ I am not talking about an all-purpose global community. I am talking about something like a club of us all, dedicated specifically to advancing the idea of human rights, dedicating to pressuring governments (for whom we all have a lot to fear in this regard, as well as a lot to hope for)⁶² to take rights seriously, and watching out for each other in this regard.

It is not easy to state this conception precisely, but it goes something like this. Neither modern human rights law nor national bills of rights came into existence by magic. A historian will tell you that both ideas can be traced, at various eras, to the activity of certain élites—philosophers and statesmen at end of the eighteenth century and a small group of influential statesmen and diplomats in the decades following the Second World War. These elites were certainly the immediate sponsors of these ideas. But there is a broader sense in which the emergence of individual rights, guaranteed by law, was the product of a popular movement among the rights-bearers themselves. The people themselves—the peoples themselves—in various ways indicated that they were no longer willing to be ruled, and no one should be willing to be ruled, without these layers of guarantees. It was not the rulers of the world, but the peoples of the world who insisted on this, though the rulers responded affirmatively to their demands.

⁶¹ But see the arguments about cosmopolitan law in Jeremy Waldron, *Teaching Cosmopolitan Right*, in Kevin McDonough and Walter Feinberg (eds.) *EDUCATION AND CITIZENSHIP IN LIBERAL-DEMOCRATIC SOCIETIES: COSMOPOLITAN VALUES AND CULTURAL IDENTITIES* (Oxford University Press, 2003).

⁶² Liberalism of fear

(I have emphasized this a lot in my work, trying to lessen the distance between respect for rights and respect for democracy, and to present rights as originally a democratic idea as well as presenting democracy in rights-based terms.⁶³)

For now, the point I want to emphasize is that the peoples of the world, have constituted themselves as a single community so far as the demand for human rights is concerned. We look out for each other in this regard. And we develop a global consensus on rights to help sustain certain demands for rights that may be made here and there in the world, as well as to scrutinize and perhaps downplay or discredit other demands that strike the global rights community as fanciful or utopian.

Consider, for example, the clause that I mentioned in the New Zealand Bill of Rights Act: Section 5: “The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” You’ll find something similar in many bills of rights the world over, in Article 1 of the Canadian Charter of Rights and Freedoms,⁶⁴ for example, or in section 36 of the South African Constitution.⁶⁵ These “reasonable limitation” clauses are based on a shared sense that claims of right do sometimes need to be modified for the sake of the common good and they embody a shared standard for evaluating such limitations: the

⁶³ See especially Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, OXFORD JOURNAL OF LEGAL STUDIES, 13 (1993), 18, at __; JEREMY WALDRON, LAW AND DISAGREEMENT (OUP 1999), Chs. 10-11.

⁶⁴ Canadian Charter, Article 1: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

⁶⁵ South African Bill of Rights: s. 36 “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

general idea of what can be justified in a free and democratic society. Now there is an obvious danger that clauses like these will be used opportunistically, as a sort of “Get-out-of-jail-free” card for states and their publics, i.e. that it will be used whenever convenient as a way of avoiding political costs associated with particular rights demands in particular countries, to the detriment and demoralization of individuals or minorities that might have thought that there were rights here to rely on. I can imagine an individual complaining that the reasonable limitation clause was being administered inconsistently to his detriment, as between one legal system and another. Other flag-burning statutes are not given the benefit of this clause, but now in exactly similar circumstances the flag-burning statute of his country is being upheld. He might say, “I have no quarrel with a reasonable limitation clause,” but when it refers to a common idea, it is only fair that it be administered consistently. If no effort is made for consistency, then that gives the lie to any claim that we are all bound together in this common enterprise of securing one another’s human rights in a sensible and moderate way. That’s the sort of case, I think, that can be made in favor of global fairness and integrity.

2.9: Loose or tight consistency?

My argument in this lecture is certainly not compelling or cast-iron. I have been exploring what there is to be said for a requirement of consistency in rights-adjudication, a duty to treat like cases alike even when the cases are brought before different legal systems. And I have given you a pretty loose and ramshackle argument, with a number of stages at which dissent might be invited. People might get off this rickety train at many different stations. Even for those who stay on board, fairness and integrity might not seem very compelling considerations in this context.

Even the most charitable reading of what I have argued shows only that there is something to be said for harmonizing our rights-adjudication with that of

other countries—something to be said in the name of fairness or integrity—not that harmonization is the be-all and end-all. Other factors must be taken into account as well. I said the quest for the universal truth about rights doesn't explain the need for consistency, but it is important nonetheless and often it will have to be balanced against the need for consistency, such as it is. Then there are demands of local integrity, and also predictability and certainty within particular legal systems; these must be given their due. All in all, the argument for treating like cases alike is pretty modest and it certainly wouldn't support anything remotely like courts in one country having to regard a decision by a court in another country as a binding precedent.

I say this, because people get very concerned about giving foreign decisions authority in the United States. In an effort to disarm opposition on that ground, Mark Tushnet wrote recently:

I know of no one who believes that it is appropriate to use non-U.S. law as a precedent, where “precedent” is defined, as it should be, as a judicial holding that carries weight on grounds other than the correctness of the reasons provided by the court for its holding.⁶⁶

I am trying to be modest, but I am not prepared to go that far. The argument I have been considering is an argument for giving weight to foreign holdings on grounds other than the correctness of its reasoning; it is not an argument for overwhelming weight, but it is an argument for weight nonetheless.

Some people use the phrase “persuasive authority” to capture this sense of loose consistency between a precedent and a present decision. But the phrase is ambiguous. Sometimes it does mean treating a precedent as having less than binding force. Sometimes it means treating a precedent as having force by virtue

⁶⁶ Mark Tushnet, When Is Knowing Less Better Than Knowing More? Unpacking The Controversy Over Supreme Court Reference To Non-U.S. Law, 90 MINNESOTA LAW REVIEW 1275 (2006) at 1276.

of the extent to which one is persuaded by the reasons that it embodies. In this lecture, I am not talking about the latter; that's for tomorrow. I am talking—in the way that Tushnet thought no one on my side of the debate talks—about weight (though not decisive weight) being accorded to foreign authorities in interests of consistency—fairness and integrity.⁶⁷

2.10: Dworkin's soap opera

For thinking about this, Ronald Dworkin provides an image that is helpful: I mean the image of the chain novel or a long-running soap opera in Chapter Six of Law's Empire. We are to imagine a group of authors each assigned to write a different chapter or episode of a soap opera. Obviously each wants to make his story the best it can be; but he also has strong obligations of continuity—narrative and characterological continuity—to the earlier episodes. Dissonance or disparity with an earlier episode might not be fatal; but it is an embarrassment. Other things equal the authors should want to avoid it; and the case for their particular story line would have to be pretty good, and continuity in other regards would have to be pretty strong, if we were let some disparity with an earlier episode slide.

⁶⁷ I suspect I have something of an advantage here, because as a Commonwealth lawyer I am familiar with the ways that in New Zealand and Australia, for example, we routinely cite English decisions that are not in a strict sense binding precedents in our jurisdictions. The House of Lords and the English Court of Appeal are outside the court structure of our legal system: even when the final court of appeal for New Zealand was the Judicial Committee of the Privy Council, which overlapped substantially in its judicial personnel with the House of Lords, a subtle distinction was observed between the more or less binding authority of the Privy Council and what was regarded as the “persuasive” (albeit highly persuasive) decisions of the House of Lords. A lot of ink has been spilled in New Zealand and Australia to chart the slow decline of that persuasive authority, even in areas where there are not marked differences of statute law. (A lot of it exploits the ambiguity of “persuasive” that I mentioned a moment ago.) It still remains the case, I think, in New Zealand, a House of Lords decision, squarely on point, but contrary to the doctrinal argument that one is pursuing, is seen as an embarrassment, i.e. as something that counts against one's line of argument, even though it is by no means fatal. All things considered, it is better if one's argument fits the English precedents as well as the New Zealand ones, but the moral force of one's argument or the weight of local precedents or indeed—and this is interesting—the weight of (say) Australian, Canadian or even American precedents can make up for a shortfall in one's ability to fit one's argument to the English case. And although the distinction is artificial, all of this can be understood as a matter of greater or lesser weight being accorded to English decisions on grounds other than the correctness of the reasons provided by the court for its holding.

And that's the sort of thing I am envisaging here. In Dworkin's metaphor, the past episodes are analogous to previous decisions within a given legal system. We strive to follow precedent, but often our decision is inconsistent with one or two precedents in the past, especially if they are from many years ago. And I am saying there may be a case for including not just local precedents but foreign decisions too, in the array of decisions whose inconsistency or dissonance with our present line of argument might pose some sort of potential embarrassment.

Think of a television show that was piloted by a local cable channel, and ran there for a season or two, acquiring a sort of cult following, before being picked up by one of the networks. Now obviously, as it begins the network season of this show, CBS or whoever it is will want to avoid disparity among the episodes it broadcasts; continuity among the season's episodes will be crucial during the first network season. One can imagine, however, that a good storyline in the network season might suffer from some disparity with the earlier local series of the show that most of the viewers haven't seen (just the culties in Seattle). And this would clearly count against the storyline; it would embarrass the show in the eyes of some of its keenest fans; but it would not be an insuperable embarrassment. Continuity with the earlier non-network episodes is a consideration that would carry weight, and discontinuity there would have to be outweighed by other considerations. But it is not decisive weight.⁶⁸

Well something similar can be said of foreign law. We might acknowledge a problem of discontinuity with foreign decisions, but argue that what we propose to do in the present case is worth doing even in the face of that. We might say, for

⁶⁸ If I had unlimited time, I could characterize this also in terms of Dworkin's theory of interpretation. Our decision to enlarge the array of past episodes or past cases is something that occurs in what Dworkin calls the pre-interpretive stage; the stage where we identify what it is we are trying to interpret. In literature, it's the stage at which the particular play or the novel is identified as a topic for interpretation. In law, it's the stage at which we identify the statute or constitutional provision we are reading or, as I have said, the array of precedents we are trying to fit. And what we are looking at, I think, in this debate about foreign law, is a debate taking place at the preinterpretive stage. What ought to be counted, we are asking, as among the cases we are trying to interpret—the cases that our theory of flag-burning or cruel punishment is trying to fit? Should only American cases be counted, or British and French ones as well?

example, that we are trying a particular experiment about how to deal with some issue about rights, an experiment which we are well aware other countries are not trying. And there we might well want to resist the view that we should automatically fall into the line with the rest of the world. One or two opponents of the decision in Roper v Simmons made a claim of that sort.⁶⁹ They said: we have a unique approach to human rights that the rest of the world might want to watch and learn from: we leave some of these death penalty judgments to juries rather than laying down per se rules. And it is worth the world watching to see how that works, rather than suppressing the experiment. That would be an honorable argument to make.

But of course that is not what was said in most of the criticism of the Supreme Court's use of foreign law. Most of that criticism just said peremptorily that this was a purely American matter and none of the world's business. And that's what I have been arguing against. Upholding human rights, including the right not to be subject to cruel punishment, is the world's business; and when we uphold that right in Missouri, we are engaged in one and the same enterprise with courts upholding similar provisions in other jurisdictions around the world. ***

⁶⁹ Justice O'Connor said something like this in her dissent in Roper v Simmons. Also Scalia at 623-4.

Lecture 3.

LEARNING FROM OTHER COURTS: THE RIGHT WAY, THE WRONG WAY, AND THE LEGAL WAY

1. *President of the Republic v Hugo* 1997 (6) BCLR 708 (S. Africa Constitutional Court).
2. General form of epistemic arguments
3. *The force of numbers: Ernest Young versus Sunstein, Posner and Condorcet [omitted]*
4. What sort of information is available?
5. The right way, the wrong way, and the legal way
6. Legal learning
7. *The common law (Commonwealth) tradition [omitted]*
8. The analogy with scientific consensus
9. Law as reason versus law as will
10. Some concluding evasions

3.1 President of the Republic v Hugo⁷⁰

Some of you may be familiar with President of the Republic v Hugo, a 1997 constitutional case from South Africa.

When Nelson Mandela became President of South Africa, one of the first things he did was issue an order—a sort of pardon or amnesty—freeing all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years. Mr Hugo, who was serving a fifteen year sentence, and who had an eleven year old son whose mother had died, alleged that the President's action violated the interim Constitution of South Africa by discriminating against him unfairly on the ground of sex or gender.

The matter came to the South African Constitutional Court and the court had to decide (1) whether this action of the President's was judicially reviewable, (2) whether it constituted discrimination against Mr. Hugo, and (3) if it did, whether there might be extenuating circumstances that would allow the President's order to stand.

It was an intriguing tangle of issues. Is something akin to a presidential pardon reviewable for failing to conform to some general standard? Can an act of mercy be discriminatory, or unfairly discriminatory if the applicant has no right to it, and if—as is clear in a country where male prisoners outnumber female prisoners by 50 to 1—an insistence that men and women be treated equally in this regard might well lead to no amnesty at all? Given that women usually occupy a subordinate role in South African families, and given that they almost always have primary responsibility for the upbringing of children, can it really be said that a man is discriminated against by a measure seeking to benefit women prisoners in a specifically family context? If the President's order is an infringement of the right to nondiscrimination, is it a justifiable infringement in terms of the provision which, in South Africa (as in the New Zealand case we considered yesterday),

⁷⁰ President of the Republic of South Africa and Another v Hugo 1997 (6) BCLR 708 (Constitutional Court).

allows rights to be limited by laws of general application, provided that such limitation is reasonable and justifiable in a democratic society based upon freedom and equality and does not negate the essential content of the right that is affected? Can an act of amnesty be regarded as a law of general application, and so on?

One of the striking things about the list of issues I have mentioned is that on every one of them, Richard Goldstone, who wrote for the Court, and his fellow judges, some concurring in his decision and some dissenting—on each issue the judges of the South African Constitutional Court referred in detail to the law of other jurisdictions. Their opinions are riddled with references to foreign law. They refer to American, German, Irish, British, and other commonwealth case-law on the judicial reviewability of prerogative actions and the power to pardon, charting a sea-change in world constitutionalism to bring the last of the executive's prerogative powers under the supervision of the rule of law. They refer to Canadian and European authority on the meaning of discrimination and its relation to the value of human dignity, particularly the dignity of groups. (This is how I first came across the case, when I was writing a lecture on dignity and its application to groups for delivery at the University of Cape Town.)⁷¹ And several of the judges who considered the application of the reasonable limitation clause cited Canadian cases as authority for the proposition that the Presidential Order could be regarded as a law of general application.

The outcome was that the Court declined to overturn the President's decree, the majority (seven judges) because although the measure formally discriminated against Mr. Hugo it didn't do so unfairly; the presumption of unfairness was rebutted by the fact that men did not suffer by President's action the loss of any right or legal advantage to which they would otherwise have been entitled. The Court said:

The Presidential Act may have denied them an opportunity it afforded women, but it cannot be said that it fundamentally impaired their rights of dignity or sense of equal worth. The impact upon the relevant fathers, was, therefore, in all the circumstances of the exercise of the Presidential power, not unfair. The respondent, therefore, has no justified complaint under section 8(2) of the interim Constitution.

Three judges thought the decree did constitute unfair discrimination, but one of them argued that, as a general measure, it was nevertheless reasonable and justifiable in an open and democratic society. So in the end there were only two dissenters from the outcome.

⁷¹ "Dignity and Groups," the annual Ben Beinart Memorial Lecture, Cape Town, July 2007. The Court in Hugo said the following about dignity and groups: "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."

The fact that the Court devoted so much attention to foreign law should come as no surprise to anyone familiar with its jurisprudence and its constitutional position. Section 35 of the Interim Constitution, under which Hugo was decided, lays down that

[i]n interpreting the provisions of this Chapter [that is, the Bill of Rights] a court of law ... shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

(That stipulation is continued, too, in the present Constitution (in Article 39).)⁷² You might say that this puts South Africa in a wholly different position from that of our Supreme Court: they are explicitly permitted to cite foreign law, whereas there is no such explicit permission in the US Constitution; and if some US Congressmen had their way, there would be an explicit prohibition. Still it is worth asking what the reasons are that underlie this permission in the South African Constitution and, if we figure out the reasons, it is worth asking whether those reasons have any application in countries like the United States that don't have such an explicit permission.

(Just a comment on that: those involved in the drafting of the Constitution have told me that many of the reasons for including this provision are similar to the arguments I pursued at the end of yesterday's lecture. It was felt important to identify the new South Africa explicitly with the opinions and practices of the rest of the rights-respecting world, and to have no doubt that their country, in its new constitutional order, intended decisively to reverse the alienation from the global consensus on human rights that had disfigured the years of apartheid.)⁷³

(I need hardly add that the Article 39 of the South African Constitution does not show that it is inappropriate to consider "comparable foreign case law" without such a written constitutional permission. Interpretation clauses often are not intended to create anything new, but merely to make explicit—for the purpose of removing any doubt or controversy—principles of interpretation which may well have been applicable all along anyway)

3.2: The general form of epistemic arguments

In my opening lecture on Monday, I mentioned two broad strategies for defending citation of foreign law in constitutional cases. One was the strategy I used in my 2006 Harvard LR piece, emphasizing the epistemic benefits of looking beyond the American world. The idea is that we can learn from what other courts are doing, when they are addressing questions which are the same or substantially similar to

⁷² Article 39. Interpretation of Bill of Rights: (1) When interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law; and may consider foreign law.

⁷³ Conversation with Chaskalson.

the questions we are addressing. The other strategy involved the more elusive idea that there may be some virtue in sheer consistency across the decisions of different courts, in judgments on substantially similar questions, even for courts belonging to different jurisdictions. We explored this second idea—fairness, integrity, treating like cases alike—in yesterdays’ lecture. But it is time now to say something more about the first strategy, the epistemic approach.

The epistemic approach is very common among the American justices who make a practice of citing foreign law. Justice Ginsburg says that “[f]oreign opinions . . . can add to the store of knowledge relevant to the solution of trying questions.”⁷⁴ Justice O’Connor believes “there is much to learn from other distinguished jurists who have given thought to the same difficult issues we face here.”⁷⁵ Justice Breyer talks of “the enormous value in any discipline of trying to learn from the similar experience of others.”⁷⁶ And he tells us that “[t]he practice involves opening your eyes to what is going on elsewhere, taking what you learn for what it is worth, and using it as a point of comparison where doing so will prove helpful.”⁷⁷ Foreign judges evidently believe that they have something to learn from their American counterparts: we saw that yesterday in Hopkinson and we have seen it again this afternoon in Hugo. And so, the American defenders of the practice say, we ought to be humble enough to accept that there might be lessons to learn in the opposite direction as well.

If we leave it like that, however, we haven’t got very much further than the vague idea of continuing judicial education. Like many of you, I go to those resorts and talk to judges, both here and particularly in New Zealand, and I hope the judges learn something from what I say. But I wouldn’t expect them to cite to what I say or to give it any authority. (I have heard I said that one of the main values associated with the citation of foreign law is transparency. Since on any account, our justices are going to learn something from all the foreign junkets they attend, they ought to be upfront with us and actually include a footnote giving due attribution to the source of this or that insight.)⁷⁸ But an opinion is not like a law

⁷⁴ Ruth Bader Ginsburg, Address before South African Constitutional Court (Feb. 7, 2006) (transcript available at <http://www.concourt.gov.za/site/ginsberg.html>). – cited by Sunstein and Posner, in STANFORD LR article, 140.

⁷⁵ Sandra Day O’Connor, Keynote Address at 96th Annual Meeting of the American Society of International Law (Mar. 16, 2002), in 96 AM. SOC’Y INT’L L. PROC. 348, 350

⁷⁶ Stephen Breyer, Keynote Address, 97 ASIL PROC. 265 (2003);

⁷⁷ Breyer in Norman Dorsen, The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer, 3 INTL. J. CONST. L. 519 (2005).

⁷⁸ Vicki C. Jackson, Constitutional Comparisons: Convergence, Resistance, Engagement, 119 HARV. L. REV. 109, 119-20 (2005): “Comparison today is inevitable. It is almost impossible to be a well-informed judge or lawyer now without having impressions of law and governance in countries other than one’s own. [FN52] These impressions, which may influence views of U.S. constitutionalism, could be incorrect or subject to interpretive challenge. Overt references to what judges believe about other countries will often

review article and a citation is not like an acknowledgement to one's friends. A judicial opinion is a formal document. It's a marker of something that had weight in the judge's decision and might appropriately be referred to as having weight also for some future case. I don't quite want to adopt the line of the congressman who spoke to Stephen Breyer about this. Breyer told an audience at NYU that he said to the congressman:

“If I have a difficult case and ... a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something. The congressman replied, “Fine. You are right. Read it. Just don't cite it in your opinion.”⁷⁹

But I do think that citing foreign law is a bigger deal than just a casual acknowledgement, and if it is going to be cited then we need to think carefully about its juridical significance.

So I'd like to offer a slightly less casual version of the epistemic approach. No doubt, we can learn things from lots of different places; the potential sources of insight and understanding are unlimited. We can probably learn something from Harry Potter. But a defense of the use of foreign law ought to be a little more specific—and I think a little more legalistic—about what exactly it is that courts here are supposed to learn from their foreign counterparts. A defense of the use of foreign law ought to be a little more reflective, too, on the relation between this process of learning—if that's what it is—and the underlying philosophy of law and legal reasoning.

3.4: What sort of information is available?

provide helpful transparency.” (In this connection, Professor Jackson cites to Michael Kirby of the High Court of Australia, in his Grotius Lecture at the Annual Meeting of the American Society of International Law: International Law--The Impact on National Constitutions 40 (Mar. 29, 2005) (transcript available at <http://www.asil.org/pdfs/kirbygrotius050401.pdf>). Kirby argued that “the real issue is not whether [international and foreign] sources will inform” decisions, as is inevitable, but whether “judge[s] should disclose--and be ready to debate” their views).

⁷⁹ The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer, 3 INT'L J. CONST. L. 519 (2005). Breyer continued: “I went further. I added, ‘... In some foreign countries, people are struggling to establish institutions that will help them protect democracy and human rights despite earlier undemocratic or oppressive governmental traditions. They want to demonstrate the importance of having independent judges enforce constitutionally protected human rights. The United States Supreme Court has prestige in this area. Foreign courts refer to our decisions. And if we sometimes refer to their decisions, the references may help those struggling institutions. The references show that we read, and are interested in, their reactions to similar legal problems.’ The congressman replied. ‘Fine. You are right. Read their opinions and write them a letter.’ [Laughter.] I thought that I was not making much headway.”

When Justice O'Connor said, in the address I quoted earlier, "there is much to learn from other distinguished jurists who have given thought to the same difficult issues we face here,"⁸⁰ I think she meant that we can learn from the ways in which they have wrestled with difficulties similar to our own, not just that we learn from what they decided. (Her own rather hesitant use of foreign law in Roper may not illustrate this, but still the prospect is worth exploring.)

Now, there are all sorts of things that go into a judicial opinion: concepts, empirical evidence, doctrinal tests, lines of argumentation, rules, principles, the weighing of principles, the citation and weighing of precedents, interpretive strategies, moral values, and so on. What category of knowledge is supposed to be accessible by recourse to foreign law? To use a Foucauldian barbarism, what is the episteme of this epistemic argument?⁸¹

Is it that we can gain empirical insight? I'm not sure. Consider Roper v Simmons again. The decision there was based ultimately on some propositions in social psychology, that young people have an underdeveloped sense of responsibility often resulting in impetuous and ill-considered actions and decisions; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and the character of a juvenile is not as well formed as that of an adult. "These differences," as the court said, "render suspect any conclusion that a juvenile falls among the worst offenders"⁸² (which of course is the conclusion constitutionally required for the application of the death penalty). But again as Ernest Young points out, the Supreme Court of the United States did not need to learn all that from its British or French counterparts; our justices already knew it, because it was set out at the beginning of the Kennedy opinion, long before he got to the issue of foreign law.

In his dissent in Printz v US,⁸³ a federalism case from 1997, Justice Breyer suggested that we can learn something about the effects of law from considering foreign experience:

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own... . But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.

⁸⁰ Sandra Day O'Connor, Keynote Address at the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), in 96 AM. SOC'Y INT'L L. PROC. 348, 350

⁸¹ Foucault reference.

⁸² Roper pp. 569-70.

⁸³ Printz v. United States 521 U.S. 898 (1997).

For example, we go round saying things about the relation between federal structure and liberty. Wouldn't it be worth looking, said Justice Breyer, at foreign experience of alternative federal structures to see what the different consequences for liberty actually are? Sir Basil Markesinis and Jörg Fedtke have offered a similar suggestion in their book Judicial Recourse to Foreign Law.⁸⁴ The chapter entitled "When should such dialogue take place?" has subsections called "When foreign experience ... help[s] disprove locally expressed fears about the consequences of a particular legal solution" and "When the foreign law provides 'additional' evidence that a proposed solution has 'worked' in other systems." I don't recommend the book (it's basically just a list of cases), but the point sounds reasonable—though as Justice Scalia said this sort of evidence is perhaps more relevant to the task of drafting a constitution than to the task of interpreting the constitutional scheme which, on Scalia's originalist account, we are simply stuck with.⁸⁵ Anyway, even if you believe, as I think most of us do, that constitutional interpretation does involve the evaluation of structural alternatives, still we are entitled to ask how this empirical information about social consequences is supposed to be gleaned simply from a survey of foreign law. One would want a sort of political science or an old-fashioned law-and-society analysis, and it's not clear that that—as opposed to some very general Montesquieuvian impression—is what Justice Breyer had in mind.

Let's consider some other possibilities. Are we supposed to learn morally from recourse to foreign law? For example, do the Court in Roper something about the abhorrent nature of the juvenile death penalty? Probably not; the pro's and con's were pretty well known over here, although I guess it is salutary to be reminded of the ferocity with which death penalty is condemned in other jurisdictions. (Also Americans are not generally aware that most other countries adamantly oppose life without parole as an alternative punishment for murder, certainly as an alternative punishment for juveniles. They see that too as a violation of human rights.⁸⁶ There is some learning to be done here, if not about moral truth itself, then about the nature and prevalence of certain moral attitudes which are quite strikingly different from our own.)⁸⁷

⁸⁴ SIR BASIL MARKESINIS AND JÖRG FEDTKE, JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION? (UCL Press, 2006).

⁸⁵ "Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."

⁸⁶ "International human rights law flatly prohibits life without parole for those who commit their crimes before the age of eighteen, a prohibition that is recognized and respected by almost every country in the world." -- <http://hrw.org/reports/2005/us1005/9.htm> .

⁸⁷ Cf. Posner on those who cite foreign law "suppose fantastically that the world's judges constitute a single, elite community of wisdom and conscience."-- Posner, Foreword, p. 87.

All this may be worth considering. However, in my view the most interesting understanding of the episteme involved in our courts' use of foreign law is not empirical information, not general public policy, not even moral philosophy (pure or applied). It is rather a specifically *legal episteme*—we stand to gain in terms of our acquisition and our ability to manipulate specifically legal knowledge. That's what I want to focus on for the rest of this lecture.

3.5: The right way, the wrong way, and the legal way.

There's a saying in military circles, when dealing with a problem: there's the right way to deal with it, the wrong way, and the army way. And in public policy circles, it might be said that there is a right way and a wrong way of dealing with problems or at least better and worse ways. In addition there's also the legal way. Lawyers have their own particular approach to the problems that they are called upon to grapple with. It is not primarily empirical, though it leaves room for the insertion of empirical information at various points. Nor is it just moral argument or advocacy. It's a method of analysis—taking an issue apart and reformulating it, step-by-step as a series of tests that apply various nested, interlocking and sometimes competing principles.

Putting it very, very crudely (and probably unfairly), if we are considering how murder by juveniles is punished in the world, I can imagine someone saying, waggishly, “Well, there's the Texas way, the retributive impulse to ‘string ‘em up’ as soon as possible after they reach the age of majority. And there's the Belgian way, which is the impulse to put them for a few months in a motel-like facility with occupational therapy and philosophy classes and then restore them, hopefully rehabilitated, to society. There's the Texas way, there's the Belgian way of dealing with this problem.

And then there's the legal way. It doesn't matter much whether the judge who exemplifies the legal way comes from Belgium or from Texas or from somewhere else, he will quickly disclose his training as a lawyer, and he will be recognizable as such to other lawyers from all over the world. Put this problem of the punishment of adult offenders for crimes committed when they were juveniles in front of him and he will carefully take apart the issue, separating the application of various principles from one another, and laying out in some logical order a series of hard, interlocking and quite abstract questions about the nature of culpability, the use of bright lines (such as an age of majority), the different functions of adult and juvenile courts, the in terrorem effects of being tried as an adult, the purposes of punishment, the rights of victims and their families, the impact of punishment on a young person (particularly in the way it relates individual action to outcomes over the course of a whole life), the connection between the mental element in culpability and the capacity to foresee the long-term impact of punishment, the purpose of having an array of penalties from the least to the most severe, and the nature and safeguards of whatever accompanying

discretion might be vested in a court. He will lay all that out and try to figure a way through this maze of articulated issues.

I think something like this sort of analysis is typical of lawyerly thinking and the lawyer's mentality the world over. And we can recognize someone as a lawyer, as much by his use of this method as by his citation of codes, statutes, and precedents, though normally we would expect to see both. No doubt lawyers from different jurisdictions would work through the issues I have mentioned in a different order, with a different structure; some elements might be omitted; some others included, depending on the particular features of their legal system. They will be guided by the formal elements of their Code or by the doctrines that emerge from the precedents they study. But, one way or another, this is what lawyer's reasoning is like—and it is, as I say, recognizable as such, even at a jurisdictional distance.

I am probably overstating this a little bit. A significant number of law professors and some judges⁸⁸ say that we should abandon any pretense of a distinctive and autonomous method for our profession. They think we should retool ourselves and move to something more like direct public policy advocacy or economic or social analysis. For anyone in this category, what I am saying will be unconvincing. For them, the learning that takes place when American judges consult foreign sources can only be empirical or public policy learning. It can't be anything distinctively legal.

And certainly one would not want to push the line I am taking too far. Though I have in mind specifically legal learning I am not predicating my argument on any wholesale resurrection of doctrinal formalism of (say) a Langdellian kind. If we are summoning up the idea of a legal episteme and imagining judges are taking lessons in it from one another across jurisdictional lines, we must show that that episteme is not just a word-game or an unreal "heaven of concepts,"⁸⁹ that we are not simply (as Felix Cohen once put it) or teaching one another new ways of "trapezing around in [abstract] cycles and epicycles" without coming down to earth on any meaningful grounding.⁹⁰

I actually do think there is substance in what I am calling the lawyerly approach, in this way of unpacking issues that lawyers learn and that they can recognize in one another and help one another with, even when they come from different countries.

What I have called the legal way involves analysis and abstraction; but it's analysis not undertaken for its own sake, or abstraction simply because we are comfortable with airy words. No, the abstract unpacking (analysis) of complex

⁸⁸ Posner.

⁸⁹ Ihering.

⁹⁰ Felix Cohen's article, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809 (1935). See also Jeremy Waldron, "Transcendental Nonsense" And System In The Law 100 COLUM. L. REV. 16 (2000).

problems and then their reconstitution (synthesis) into an orderly series of clear questions—all that has a point. One point is that it helps us pursue issues of consistency and fairness—this hooks up with what we talked about yesterday; the two lines of argument are not wholly independent—so that we abstract away from superficial characteristics and deal with deeper and less obvious similarities or differences between one case and another. We do this because we think issues of fairness are important even when they are not obvious, and when there are multiple issues of fairness it is important that they be dealt with in a systematic way.

I think that the method of analysis and abstraction is also important from the point of view of justice.⁹¹ When we take a messy and complex situation and try to unravel the separate lines of principle that are involved, we are pulling threads and following leads that involve identifying and separating of the reasons that the law associates with justice, that is, with what tends towards the just rather than unjust disposition of cases like this. I don't mean that the law that governs this process and gives us these categories is always just. But it presents itself as aiming at justice, and it presents the methodology that it commands as a way of being maximally responsive to various considerations that it treats as key to the justice of the matter.

The two points connect up with one another. When we say that it is important to treat like cases alike, we don't just mean any old similarities, we mean the similarities that seem important or have seemed important to the law in regard to the just disposition of cases like this. And so our alertness to relevant similarities and differences is governed by principles of justice, and focused on what real individuals might have at stake in the issue, which justice requires us to be take into account. It's not consistency for its own sake we are looking for. We want cases disposed of consistently, because we want to be fair to the individuals involved; it is their stakes in the matter that command our attention, and it is the issues of justice that are entangled in their legal positions that our analytic lawyerly method is trying to unravel.

I said a little while ago that a significant number of legal scholars in America are claiming less and less interest in traditional legal analysis, and that they see themselves as approaching problems more directly in policy or economic terms. I hope that this is just anti-formalism, and that it does not amount to an aversion to fine-grained consideration of issues of individual justice. But I fear sometimes it does amount to that. It is certainly no accident that those who want to give up on traditional legal method are the same people as those who say we should concentrate on aggregate efficiency and leave justice in every field to the uncertain mercies of the tax-and-transfer system. In my view, the influence of that combination of attitudes in our law schools—abandoning legal method so that we

⁹¹ This next bit is taken from Jeremy Waldron Does Law Promise Justice? GEORGIA STATE UNIVERSITY LAW REVIEW 759 (2001), 778-9.

can sideline issues of justice—is an abomination. But that’s a topic for another lecture.

3.6: Legal learning

I have been talking perhaps too abstractly about abstraction and analysis. But I hope the cases I have used over the last two couple of days—Hopkinson v Police yesterday (that’s the New Zealand flag-burning case)⁹² and President of the Republic of South Africa v Hugo will help to illustrate what I mean. In both instances, foreign judges were able to make progress in their analysis of difficult legal problems by drawing upon some of the categories of Commonwealth and American law. Taking her lead from Texas v Johnson, Justice Ellen France of New Zealand figured out how to proceed step-by-step through the apparent conflict between a flag-burning statute and a free speech provision. She was able to follow the Texas case in distinguishing the question of whether protecting the flag was a legitimate objective from the question of whether the means chosen to do so were reasonable. The issues were much more tangled in Hugo, which is why I introduced it today. The judges on the South African Constitutional Court wanted to be sure that they dealt justly with all the nuances of fairness and unfairness, and discrimination and equality, in the President’s Action, not to mention the structural issue of the reviewability of prerogative actions. Foreign law was cited, again and again, in these judgements for the clues that it offered for ways to should proceed through and figure out these complicated issues, the order in which they should be addressed, and the kind of multi-factor tests that should be applied.⁹³

Hugo and Hopkinson involve other countries learning from American law, and that’s as it should be. We have developed a good and complicated body of jurisprudence on all these issues. I read somewhere (I think it was an observation by Jack Goldsmith), that it is harder to make the case in reverse—that Americans have anything substantial to learn from their foreign counterparts. We have evolved a complex and articulate body of rights-jurisprudence, which in most of its features is the envy of the world. We are much better off making that available to other legal systems in our own straightforwardly American judicial opinions than in contaminating it with cruder impulses of liberal European jurisprudence. You can take that line if you like. I’m not sure that’s altogether an intelligent line to take. It seems to me that parts of our constitutional law are a mess and could use some outside assistance. But anyway I care more about the broader philosophical issues—the ramifications in general jurisprudence of one society citing to another’s law. As Sunstein and Posner put it: “The question whether one

⁹² Hopkinson v Police [2004] 3 NZLR 704.

⁹³ Justice Albie Sachs of the South African Constitutional Court (in a different case, in a passage cited by Anne-Marie Slaughter): “I draw on statements by certain United States Supreme Court Justices ... because their dicta articulate in an elegant and helpful manner [church-state related] problems which face any modern court.”—*S. v. Lawrence*, 1997 (4) S.A. 1176, 1223 (CC) (Sachs, J.), cited by Slaughter at 200.

state should consult the law of other states is large and interesting—much larger and more interesting than the question whether the U.S. Supreme Court, ... should construe the U.S. Constitution with reference to the constitutional rulings of other high courts.”⁹⁴

3.8: An analogy with science

In my 2005 Harvard piece, I used as an analogy the consensus that is shared among members of the scientific community. I have long been intrigued by what you might call “the cosmopolitanism of scientists”⁹⁵—the way scientists talk about what “we” know or what we think we have established, where the “we” doesn’t just mean the scientist concerned and friends and colleagues in his laboratory, but the whole community of scientists, the world over, understood collectively. We think the Big Bang happened some ten or twenty billion years ago, but there are one or two inconsistencies in the theory and one of two observational anomalies that we haven’t figured out. We have a pretty good account of what causes AIDS, and how to mitigate its progress, but we don’t have anything in the way of a vaccine. The “we” always refers to the consensus of the community of scientists in the world—scientists who read the same literature, are aware of one another’s findings, check and recheck one another’s results, and grapple with problems in roughly the same terms. It’s a wonderful notion, not least because it involves a cosmopolitan concept of community, a civilization-wide connection among humans working together.⁹⁶

There is the community of scientists and there is their consensus for the time being on which theories are valid, which explanations adequate, which empirical results are reliable, which theoretical constructs are useful, what the current state of play is. No doubt the consensus is loose; certainly it is continually evolving; but every scientist the world over thinks in terms of this consensus and the community that sustains it. (On a slightly less encouraging note, it is what Thomas Kuhn had in mind when he talked about the hegemony in science of particular paradigms.)

As I said, I think there is an analogy to be drawn between the law of nations and the established body of scientific findings. I said that existing science claims neither unanimity among scientists nor infallibility; but that nevertheless, the consensus I have described stands as a repository of enormous value to individual researchers as they go about their work, and it is unthinkable that any of them would try to proceed without drawing on that repository to supplement their own

⁹⁴ Sunstein and Posner, Response—On Learning from Others, 59 STAN. L. REV. 1309 (2007).

⁹⁵ See Jeremy Waldron, Minority Cultures and the Cosmopolitan Alternative, 25 U. MICH. J.L. REFORM 751 (1991-1992) at 778.

⁹⁶ See e.g. . Robert Gascoigne, The Historical Demography of the Scientific Community, 1450-1900 *Social Studies of Science* 22 (1992), pp. 545-573; Scientific Community: Formulations and Critique of a Sociological Motif Struan Jacobs *The British Journal of Sociology* 38 (1987), pp. 266-276

individual research and to provide a basis for its critique and evaluation. Similarly, I wanted to suggest, the law of nations—conceived as a sort of consensual clearing-house for the sort of ideas, distinctions, and lines of argument I have been referring to—is available to lawmakers and judges as an established body of legal insight, reminding them that their particular problem has been confronted before and that they, like scientists, should try to think it through in the company of those who have already dealt with it. Justice Thomas has been heard to complain about American law being put at the mercy of “foreign moods, fads, or fashions.”⁹⁷ The analogy that I am using takes that concern seriously and looks for something more settled than that. Ius gentium embodies the idea that solutions to certain kinds of problems in the law might get established in the way that scientific theories are established. They do not get established as infallible, they change over the years, and there are always outliers who refuse to accept them — some cranky, some whose reluctance leads eventually to progress.

In Hugo, in Hopkinson and in Riggs v Palmer, courts faced difficult and (for them) unprecedented problems. Consider how we would expect our public health authorities to deal with a new disease or epidemic appearing within our borders. It would be ridiculous to say that because this problem had arisen in the United States, we should look only to American science to solve it. On the contrary, we would want to look abroad to see what scientific conclusions and strategies had emerged, had been tested, and had been mutually validated in the public health practices of other countries. We can think of citation to foreign law in Roper in the same way. The relation between the juvenile death penalty and the values embodied in the Eighth Amendment is a difficult problem for us. The dignitarian issues and the tangled issues of culpability and responsibility are hard to think through. By paying attention to what other jurists have done with this relation or similar relations, we treat it as a problem to be solved in part by attending to the established deliverances of legal science — the enterprise, which many legal systems share, of grappling with, untangling, and resolving the rival rights and claims that come together in issues of this kind.

I don’t want the science analogy to be misunderstood. By invoking the scientific community and its consensus, I am certainly not intending to advocate a consensus theory of truth. On the contrary, the scientific community’s consensus for the time being is always understood to be fallible, and to be judged in the last analysis by criteria of external truth. (Some philosophical skeptics may quibble with that; but all I want to stress is that my position is not built on that sort of skepticism. I’m an objectivist about the world that the scientists are trying to describe and explain. And it’s precisely because they are trying to describe and explain a theory- and mind-independent world, that the whole business of checking and endeavoring to duplicate one another’s experimental results is so

⁹⁷ “[T]his Court should not impose foreign moods, fads, or fashions on Americans.” Foster v. Florida, 537 U.S. 990, n. (2002) THOMAS J., concurring.

important.)⁹⁸ The consensus and the community I have in mind then comprise not just an accumulation of authorities but a “dense network of checking and rechecking results, experimental duplication, credentialing, mutual elaboration, and building on one another's work.” Neither of these communities offers any guarantees so far as the overall aim of the enterprise is concerned: truth in the case of science, justice or right in the case of law. A consensus in either field can be wrong. Still, in neither field is there a sensible alternative to paying attention to the established body of findings to which others have contributed over the years.

Nor, on the other hand, am I trying to assimilate legal method to the experimental methods of science. (About as far as I would want to go with that is to join the suggestion by Justice Laurie Ackermann recently retired from the South African Constitutional Court that judges understand the importance of Karl Popper's and Albert Einstein's admonition that “the formulation of a problem is often more essential than its solution, which may be merely a matter of mathematical or experimental skill.”⁹⁹

At some stage in a judge's reasoning process ...the judge will come to a preliminary conclusion or hypothesis as to what the result should be and why. I suggest that the best way to test such preliminary conclusion is to attempt rigorously to falsify it. However, my experience—both of myself and other lawyers—has been that ... one can easily become trapped into a sort of tunnel vision, from which it is difficult to escape, or to see other or lateral answers. ...One often ends up rehearsing the same line of reasoning or ... trying to find additional authority for the provisional conclusions one has already reached. It is in this context that foreign law can play a particularly valuable role. It may be that, when one commences the enquiry into foreign law one is psychologically hoping to find confirmation for one's hypotheses, but if one remains alive to falsifying possibilities, the foreign law can be of particular value. In any event, foreign law may stimulate, in Einstein's words, “creative imagination” by “rais[ing] new

⁹⁸ But what's the equivalent then of objective truth in the legal case? I don't want this analogy to be misunderstood as a way of bringing natural law back into the picture. See James Allen's article: “What Waldron nowhere provides in Foreign Law, and what I think simply cannot be provided, is any reason for any of us to believe that law is analogous to science in so far as what it is that underlies and supports a consensus of opinion in the two realms. More specifically, when American judges are pondering ‘whether the Eighth Amendment forbids the juvenile death penalty’, and they look overseas and happen to note a consensus of legal opinion amongst, say, western European and Canadian judges on that question, Waldron's analogy suggests that the legal consensus of those overseas judges somehow sits atop a body of mind-independent, imposed-on-humans truths (as it does in the scientific realm).”

⁹⁹ ALBERT EINSTEIN & LEOPOLD INFELD, *THE EVOLUTION OF PHYSICS* 95 (1938), cited by Laurie W.H. Ackermann, Constitutional Comparativism In South Africa: A Response To Sir Basil Markesinis And Jörg Fedtke, 80 *TUL. L. REV.* 169 (2005). Ackermann also cited Popper's view about the formulation of problems as an essential stage of scientific method, *ibid*, at 184-5 (citing KARL POPPER, *ALL LIFE IS PROBLEM SOLVING* 14 (Patrick Camiller trans., Routledge, 1999)). I am grateful to Justice Ackermann for a conversation in Cape Town on this topic.

questions, new possibilities ... regard[ing] old problems from a new angle.” In this context, I should like to acknowledge my own great indebtedness to the American example and to American constitutional and human rights scholarship.¹⁰⁰

I find this attitude more attractive than the view of Justice Kennedy, which seems to look to foreign authority only for “confirmation” of his own liberal impulses.¹⁰¹

So I don’t deny the very considerable differences between the episteme of science and the episteme of law. The point is that in each case, there’s a shared methodology underwritten by some sort of cosmopolitan community. It’s community on that scale that enables scientists from one country to talk to one another, to share a sense of common enterprise, and to recognize and assist one another with their common methodology. And I believe it is something analogous that enables lawyers, jurists and judges from one country to share a sense of common enterprise and community with one another. (To go right back to the beginning of these lectures, I believe it was this sort of sense of community that enabled Portia’s Dr. Balthazar in The Merchant of Venice to be received into a Venetian court, as someone who would help decide a Venetian case, even though she came from Rome.)

3.10: Law as reason versus law as will or as ethos

One thing the scientific analogy is dependent upon is a view of law as, in large measure a matter of reason, not a matter of will. As Herbert Wechsler wrote in his “Neutral Principles” essay: “[t]hose who perceive in law only the element of fiat ... will not join gladly in the search for standards of the kind I have in mind.”¹⁰² If you think that legal problems are ultimately solved in a simple Alexandrian fashion — just cutting through the Gordian knot with a determination to privilege *this* value or to promote *that* policy — then you will be uninterested in the exigencies of a jurisprudence that talks about patient analysis, the untangling of issues, the ascertaining of just resolutions, and the learning and cooperation that is characteristic of a scientific approach. Approaching law as a matter of fiat, you will not see any reason why expressions of will elsewhere in the world should affect our expressions of will in America. For you, the question is “Whose will should prevail?” And you will see in the citation of foreign law nothing much more than Justice Scalia saw: “the subjective views of five Members of this Court and like-minded foreigners.”¹⁰³

¹⁰⁰ Ackermann, *op. cit.*, p. 185.

¹⁰¹ Roper v Simmons, 543 U.S. 551, 578 (2005): “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”

¹⁰² Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 11 (1959).

¹⁰³ Roper, 125 S. Ct. at 1217 (Scalia, J., dissenting).

I have tried to present law in a different light, as essentially a problem-solving enterprise. Even in the areas where law is governed entirely by democratic decision, I don't see it as a matter of will. I don't believe in a unitary will of the people, and I don't even think that voting should be construed as a mere expression of will. What I think is that in these areas, when there is reasonable disagreement about what the law should be, democratic legitimacy requires that each person has a right to have respect accorded to his or her reason and to have equal weight assigned to his or her reasoned conclusion.¹⁰⁴ But it's still reason that we are talking about in the context of democratic decision-making. (Even common people can reason, individually and together.) And reason will not refuse assistance, when it turns out that others have been wrestling with what we too are trying to figure out.

Some have expressed surprise that I think this is true of the Constitution, of all things. Law may be a matter of reason, they say, but surely the constitution is the domain of will and historical contingency of the identity that "we, the people" decided to shape for ourselves.¹⁰⁵ I'm not sure that I accept that point even about the structural constitution: it seems to me that we reasoned our way to the constitutional structures we treasure (with a lot of help from foreigners). I certainly don't accept the point so far as the rights-jurisprudence of the constitution is concerned. There, as I said yesterday, it is not only possible but necessary to see our Bill of Rights as an attempt to get at the fundamental human rights that people are supposed to have anyway, and thus to answer more or less the same question that other countries are asking when they wonder what should be put into their fundamental charters of rights.

10. Conclusion

I said on Monday that the controversy about the citation of foreign law has been so great that bills have been introduced into Congress to outlaw this practice. The Constitutional Restoration Bill, in its current Senate version, says that

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, ... policy [or] judicial decision ... of [a] foreign state or international organization ..., other than English ... common law up to the time of the adoption of the Constitution of the United States.¹⁰⁶

¹⁰⁴ So I reject the view held by Roger Berkowitz, Democratic Legitimacy and the Scientific Foundation of Modern Law, 8 THEORETICAL INQUIRIES L. 91 (2007), that a concern for democratic legitimacy is necessarily an embrace of legal voluntarism.

¹⁰⁵ See Vlad F. Perju, The Puzzling Parameters of the Foreign Law Debate 2007 UTAH L. REV. 167 (2007): "History plays a crucial role in understanding constitutional identity. Waldron's emphasis on the problem-solving nature of law and science prevents him from giving history its due."

¹⁰⁶ Also: American Justice for American Citizens Act

I find it intriguing that the most vociferous opponent of the use of foreign legal authority on the Supreme Court—Justice Antonin Scalia [remember he said in his dissent in Roper v. Simmons: “the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.’] — Scalia has reacted negatively to this legislative proposal.

"I don't think it's any of your business," Scalia said before a lunch meeting of the National Italian American Foundation that included many members of Congress of Italian descent. "I'll be darned if I think it's up to Congress to tell us how to rule." Scalia added, "Let us make our little mistakes, just as we let you make yours."¹⁰⁷

Justice Scalia once said the following about what he called “the bothersome application of ‘political pressure’ against the Court” (I think it was in his dissent in Planned Parenthood v Casey,

the American people are not fools. As long as ... the people thought ... that we Justices were doing essentially lawyers' work up here – reading text and discerning our society's traditional understanding of that text – the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality, our process of constitutional adjudication consists primarily of making value judgments ... then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school – maybe better.¹⁰⁸

“As long as ... the people thought ... that we ... were doing essentially lawyers' work up here.” Whatever you think of Justice Scalia (and I think very highly of him), the contrast between lawyers’ work and the indulgence of value preferences is obviously important one.¹⁰⁹ What I have tried to do in these lectures is to

¹⁰⁷ <http://www.law.com/jsp/article.jsp?id=1147943135671>

¹⁰⁸ Planned Parenthood of S.E. Pennsylvania v Casey, 505 U.S. 833 (1992), at 1000-1. (Scalia J, dissenting).

¹⁰⁹ Scalia has tried to represent the citation of foreign law as just a cover for value preferences, saying that even the most liberal judges are embarrassed to make moral pronouncements in their own voice, even under the cover of the objectivity of natural law. He said:

It’s pretty hard to put together a respectable number of pages setting forth (as a legal opinion is supposed to do) *analytical* reasons for newly imposed constitutional prescriptions or prohibitions that ...rest [only on] one’s moral sentiments, one’s view of natural law, one’s philosophy, or one’s religion

represent the citation of foreign law as exactly what Scalia called “lawyers’ work.” Though no doubt it is used opportunistically, at its best the citation of foreign law, the accessing of what I have called the body of principles and doctrines that are comprised in the *ius gentium*, is a way of fulfilling the deeper obligation of lawyers and judges to the ideal of legality, to the Rule of Law, and the principle that we are a nation under laws, not men.

The motto from Justinian said that “every people subject to the rule of law, uses partly its own law, partly laws common to all mankind.” I have pursued three ways of thinking about that, in terms of traditional concepts lawyers work:

1. First, every people subject to the rule of law, goes deep into its own law and deep into the heritage of law generally to find what we call principles that can inform, moderate and sustain the surface-level rules that we enforce. That was the lesson of Riggs v Palmer.

2. Secondly, every people subject to the rule of law, keeps faith—for the sake of fairness and consistency—not just with its own judgements and precedents, but with the judgements and precedents of other courts when these can be seen as part of a common and reciprocal enterprise. That was the argument from integrity yesterday.

3. And then thirdly today, every people subject to the rule of law, has access not only to its doctrinal pathways through difficult legal issues, but to the doctrines and pathways of analysis that have been found enduringly useful throughout the legal world generally in untangling conundrums and striking the balances that every legal system has to confront.

As I said, at the end of yesterday’s lecture, the arguments I have given by no means establish a cast-iron case for the existence and the authority of the ius gentium—this notional repository of principle, analogy and technique that is made available to lawyers the world over on the basis of having been tested in the positive experience of many particular legal systems. But I hope nevertheless that it is suggestive of some deeper and more substantial ways of thinking about the foreign law controversy and that it opens up a numbers ways in which analytic jurisprudence, properly informed by a sense of the history of our tradecraft, may have a useful bearing on this most challenging issue.

[Justice Antonin Scalia, Keynote Address (Apr. 2, 2004), in 98 AM. SOC’Y INT’L L. PROC. 305, 308 (2004).] Reference to some sort of official judgments, even if it is foreign, helps rescue judges from a feeling of intellectual nakedness. Just asserting that it is objectively wrong to execute individuals for crimes committed when they were children might be viewed as an expression of subjective sentiment rather than an insight into moral fact. Judges sound more substantial when they talk about “the overwhelming weight of international opinion against the juvenile death penalty.” (*Roper*, 125 S. Ct. at 1200.)