"Partly Laws Common to All Mankind"

Foreign Law in American Courts

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For Ronald Dworkin

Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur

[All peoples who are ruled by laws and customs use partly their own laws and partly laws common to all mankind to govern themselves].

—JUSTINIAN, *Institutes*, bk. 1, chap. 2.

Acknowledgments

This book is a much-expanded version of the Storrs Lectures I delivered at Yale Law School in October 2007. The original lectures can be viewed on video at http: //www.law.yale.edu/news/5408.htm. I am most grateful to Harold Koh, who was then Dean at Yale, for the invitation to present these lectures and for his hospitality. I am grateful also to Marianne Dietz for making all the arrangements in connection with the lectures. And for the three days of discussion in New Haven, I want pass on my thanks to Bruce Ackerman, Seyla Benhabib, Jules Coleman, Owen Fiss, Dieter Grimm, Paul Kahn, Dan Markovits, Matthew Palmer, Robert Post, Judith Resnik, Nicole Roughan, Jed Rubenfeld, Reva Siegel, and Matthew Smith.

I began thinking about the issues I discuss in this book in 2005, when controversy erupted over the Supreme Court's reference to foreign law in *Roper v. Simmons.* The editors of the *Harvard Law Review* invited me, along with Vicki Jackson and Ernest Young, to contribute comments on this issue to a review of the Court's term of 2004. When I received that invitation I happened to be engaged in a two-person reading group with my friend Victor Austin, theologian-in-residence at Saint Thomas Episcopal Church in New York. Victor and I were reading Richard Tuck's book *Natural Rights Theories: Their Origin and Development* (1980), and we had reached the part where Tuck was discussing the reluctance of Renaissance humanists to engage in pure natural law theory, preferring instead the more grounded discourse of the law of nations, *ius gentium.* Ius gentium was not identified at the time with what we today would call international law but was regarded as the experiential wisdom of the world on the main topics that humans in society needed law to address. I said to the Harvard editors, "I think this business of citing foreign law is really all about the idea of ius gentium." They said, "No kidding. Why don't you write about that for the *Law Review*?" I did. The result, an essay called

"Foreign Law and the Modern Ius Gentium," was published in the *Harvard Law Review* in November 2005.

I knew then that there was much more to be said on this issue, so I welcomed the opportunity to devote the Storrs Lectures to this topic a year or so later. But even three lectures were not enough. There is much more to say—and the many objections arising from the essay and the lectures needed to be carefully answered. Alex Larson and Michael O'Malley at Yale University Press persuaded me to expand the book that was supposed to be devoted to the lectures and to take the space I needed to deal with these issues. I think it has expanded far beyond what they envisaged. It has certainly taken much longer to write than it should have, and I am grateful to Michael and Alex and the Press for their patience.

I presented additional material on the citation of foreign law (specifically related to the argument in chapter 5 of this book) at the inaugural lecture for my University Professorship—"Treating Like Cases Alike in the World"—at New York University in 2008. Some of that material I also presented at a conference in 2008 entitled "The Changing Role of Highest Courts," organized by the Hague Institute of International Law. Another paper, entitled "Rights and the Citation of Foreign Law," was presented at a workshop called "Rescuing Human Rights" at King's College, London, in March 2009. It represents the first half of chapter 6 of this book, and it appears also in its own right in the collection *Rescuing Human Rights* (2011), edited by Tom Campbell. The second half of chapter 6, on textualism and foreign law, is a revision of a paper I presented at a Summer Faculty Workshop at NYU in 2008. On all of these occasions I was the lucky recipient of useful comments and criticisms from various people, and I am grateful to them all.

I am grateful especially to those with whom I have discussed these themes during the five years it has taken me to arrive where I am today, in this book. They include Laurie Ackermann, Jim Allan, Alex Aleinikoff, Roger Alford, Philip Alston, José Alvarez, Victor Austin, Aharon Barak, Rachel Barcow, Dan Beller, Tom Campbell, Arthur Chaskalson, Sarah Cleveland, Dennis Davis, Norman Dorsen, Sian Elias, John Ferejohn, Andrew Geddes, David Golove, Moshe Halbertal, Rick Hills, Kirstin Howard, Robert Howse, Grant Huscroft, Sam Issacharoff, Kenneth Keith, Benedict Kingsbury, Mattias Kumm, Robin Lovin, Campbell McLachlan, Liam Murphy, Gerald Neuman, Rick Pildes, Ricky Revesz, Antonin Scalia, Clarence Thomas, Andrew Tipping, Neil Walker, and Joseph Weiler.

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Finally, I want to mention two special people: Carol Sanger, whose presence and companionship mean the world to me and whose encouragement was indispensable to the completion of this book in the late summer of 2010; and Ronald Dworkin, my mentor at Oxford in the late 1970s and early 1980s and now my colleague at NYU. I have discussed the themes presented in this book with Dworkin on a number of occasions. But, more important than any discussion, his jurisprudence pervades this book: it has dispelled some of the cobwebs of old-fashioned positivism, it has made room for color and complexity in legal philosophy, and it has opened up many of the paths I have taken. For all that, I am most grateful, and I dedicate this book to him, with affection and respect.

Cases

In this book I refer to cases mostly by the names of the parties involved (for example, *Roper v. Simmons*) and sometimes by the first party's name alone (*Roper*). Full citations are given in the endnotes in each chapter only on the first occasion on which a case is mentioned.

Australia

Jones v. Dunkel (1959) 101 CLR 298.
Wright v. Wright [1948] CLR 191

Canada

Reference re s. 94(2) of Motor Vehicle Act (British Columbia) [1985] 2 S.C.R. 486
R. v. Rahey [1987] 1 S.C.R. 588.
R. v. Smith [1987] 1 S.C.R. 1045

European Court of Human Rights

Ocalan v. Turkey (2005) 41 E.H.R.R 45
Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A), 439 (1989)

Hong Kong

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

New Zealand

Commissioner of Inland Revenue v. Duncan [2007] 2 NZLR 369
Hopkinson v. Police [2004] 3 NZLR 704
Jaggar v. QBE Insurance International [2007] 2 NZLR 336
R. v. Bain [2010] 1 NZLR 1
R. v. Williams [2009] 2 NZLR 750
Secretary for Justice (N.Z. Central Authority) v. HJ [2007] 2 NZLR 289
Taunoa v. Attorney-General [2008] 1 NZLR 429
Young v. Police [2007] 2 NZLR 382

Privy Council (Commonwealth)

Pratt v. Attorney General of Jamaica [1994] 2 A.C. 1

South Africa

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S v. Makwanyane and Another, 1995 (6) BCLR 665
S v. Williams and Others, 1995 (7) BCLR 861 (CC)

United Kingdom

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Cannon v. Cannon [2005] 1 WLR 32
Donoghue v. Stevenson [1932] AC 562
EB (Ethiopia) v. Home Secretary [2009] Q.B. 1
Fairchild v. Glenhaven [2002] 1 A.C. 32
Hadley v. Baxendale (1854) 9 Exch 341
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Mogadara v. Holt, 1 Show. K. B. 317; 89 Eng. Rep. 597 (K.B. 1691)
R. (on the application of Purdy) v. DPP [2010] 1 A.C. 345
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R. v. Davis [2008] 1 A.C. 1128
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Winter v. Inland Revenue Commissioners [1963] AC 235
Wise (Underwriting Agency) Ltd. v. Grupo Provincial SA [2004] 2 Lloyds Law Rep. 483.

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Aldana v. Del Monte Fresh Produce, 416 F3d. 1242 C.A. 11 (Fla., 2005)
Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 192 (1995)
Atkins v. Virginia, 536 U.S. 304 (2002)
Barker v. Wingo, 407 U.S. 514 (1972)
Beers v. Arkansas, 61 U.S. 527 (1857)
Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928)
Bowers v. Hardwick, 478 U.S. 186 (1986)
Coker v. Georgia, 433 U.S. 584 (1977)
Dred Scott v. Sandford, 60 U.S. 393 (1856)
Enmund v. Florida, 458 U.S. 782 (1982)
Exxon Mobil Corp. v. Allapattah Services, 545 U.S. 546 (2005)
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)
Filártiga v. Peña-Irala, 630 F.2d 876 C.A. 2 (1980)
Foster v. Florida, 537 U.S. 990 (2002)
Furnes v. Reeves, 362 F3d 702 (2004)
Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99 (1945)
IIT v. Vencap, Ltd., 519 F. 2d 1001, 1015 C.A. 2 (1975)
Kadic v. Karadzic, 70 F.3d 232 C.A. 2 (N.Y., 1995)

United States: State Cases

Zimbabwe

Abbreviations

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
NZBORA	New Zealand Bill of Rights Act

Contents

CHAPTER ONE

Simply the Law

1. *Roper v. Simmons*

It seems to be the law that adults cannot be executed for crimes they committed when they were children. The law where? Certainly it is now the law in the United States, assuming that *Roper v. Simmons*, decided in 2005, holds as a precedent.[1] In that case the Supreme Court overturned the death sentence a jury had imposed on a young man, Christopher Simmons, for the brutal murder of a woman whose house he had broken into, a murder committed a few months before his eighteenth birthday.[2] And, as far as we know, it is the law in every other country in the world as well. These days most countries do not have the death penalty at all, for any class of offender. But in those that do, like Japan and Jamaica, adults cannot be executed for crimes they committed when they were children. In 2000 there were a small number of countries in which that wasn't the law: in Yemen and Pakistan, for example, adults could be executed for crimes they committed as children. But that has ceased to be the case, and in those countries too it is now unlawful to execute adults for crimes they committed before they were eighteen.

When the Supreme Court was deciding *Roper v. Simmons* a number of justices made reference to the facts I have just mentioned, including Justice Anthony Kennedy, who wrote for the Court. They thought these facts were relevant to the decision they had to make—a decision about which the justices disagreed among themselves, in a familiar split of 5–4. Here is what Justice Kennedy said:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in 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. . . . [I]t is fair to say that the

> United States now stands alone in a world that has turned its face against the juvenile death penalty. . . . It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.[3]

But how could what the law happened to be in Japan or in Saudi Arabia or in any other country that retains the death penalty, but not for crimes committed in childhood, be relevant to an American decision about what the Eighth Amendment (forbidding cruel and unusual punishment) permits a state, Missouri in this case, to do? Those countries decided this difficult issue one way; but it remained an open question in the United States when *Roper* came before the Supreme Court in 2004. No doubt an international consensus on this issue should give American legislators pause when the question of the juvenile death penalty comes before them. When legislators decide what the law ought to be, which is what legislators do, it makes perfect sense for them to consider what the law is in other jurisdictions, other countries, and what their experience with those legal arrangements has been. Not that our legislators ever do that, but never mind. Yet the Supreme Court was supposed to be deciding the case on the basis of what the law *was*, not on the basis of what it ought to be.

Justice Kennedy made a big show of saying that the foreign law on these matters was not *determinative* for American judges. The consensus on the juvenile death penalty among other nations in the world "does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility."[4] Yet, he said, the position of the majority of justices on what the law requires on this matter "finds confirmation in 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. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[5] So the same question arises: how can a consensus among non-American lawmakers offer "confirmation" for a controversial position—one held by five justices of the U.S. Supreme Court and denied by four—on what American law requires? Again, it is not a matter of a foreign consensus supporting a normative conclusion as to what American law ought to be, or foreign advocacy adding to the weight of American advocacy concerning law reform in the United States. The claim seems to be about positive law on both sides of the equation. Justice Kennedy seems to be saying that factual or positive-law propositions about what the law is elsewhere—the "stark reality" of law elsewhere in the world—is capable of supporting, of

providing "respected and significant confirmation" for, factual propositions about the law that the U.S. Supreme Court is bound to apply to determine the fate of young Christopher Simmons in Missouri.

To many Americans it seems obvious that such a position is wrong. To them it seems clear that American courts should use American law and only American law when they decide constitutional cases in the United States. This is not just a matter of pride, though many people who take this view are rightly proud of their constitutional heritage. But whether the U.S. Constitution is good, bad, or indifferent, it stands to reason, they think, that each country should use its own laws to decide its own cases. Sen. Jon Kyl said something to this effect in the confirmation hearings for Judge John Roberts, held a few months after the decision in *Roper,* when Roberts was nominated to be Chief Justice of the United States: "Our Constitution was drafted by the Nation's Founders, ratified by the States, and amended repeatedly through our constitutional processes that involve both Federal and State legislators. It is an America[n] Constitution, not a European or an African or an Asian one, and its meaning, it seems to me, by definition, cannot be determined by reference to foreign law."[6] And Roberts seemed to agree with him.

2. "Laws Common to All Mankind"

My purpose in this book is to dispute that position. I shall argue that sometimes it *is* appropriate for our courts to make use of foreign legal materials. To support that argument I want to set out an understanding of law that is not so tightly bound to particular societies as the "obvious" position seems to presuppose.

Actually it is not hard to make the case that citation to foreign law is sometimes sensible, often helpful, and in rare cases indispensable to rational judicial decision making. (I will argue this in chapters 4 and 5.) But I want to go further. I want to argue that convergent currents of foreign statutes, foreign constitutional provisions, and foreign precedents sometimes add up to a body of law that has its own claim on us: the law of nations, or *ius gentium,* which applies to us simply as law, not as the law of any particular jurisdiction.

Fifteen hundred years ago Roman jurists had the idea that each country complemented the law it made for itself with its observance of norms it shared with all or most other civilized countries. That idea is conveyed in the motto I use for this book: *Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur* (All peoples who

are ruled by laws and customs use partly their own laws and partly laws common to all mankind to govern themselves). It is a quotation from Gaius, writing in the second century C.E., and it was embodied in the opening chapters of Justinian's *Institutes* when they were published three and a half centuries later.[7] Gaius identified these "laws common to all mankind" with what he called the ius gentium. As we shall see in chapter 2, this meaning of ius gentium, or the law of nations, has survived down the ages to the present, even though the phrase is also sometimes used to refer to international law. Gaius's idea helps us see governance by law as in part a shared or common enterprise in human civilization, not just the idiosyncratic traditions of particular nations. Countries learn from each other and copy each others' laws, grafting legal conceptions from one system on to another. And it is important that countries be of one mind on many issues, not just for pragmatic reasons of comity in law enforcement, but also for reasons of integrity and fairness. I shall argue that these reasons are sometimes so powerful in specific areas of law that they are best presented in the form of the relevant legal propositions' having a claim on us as law—not the law of any particular country, but law in the world.

The best sense I can make of what happened in *Roper v. Simmons* is that the principle that was recognized and applied in that case—namely, the principle that adults are not to be executed for crimes they committed when they were children—was treated as part of this body of law common to all mankind. The same can be said about several other principles connected with the death penalty. It is law in the world that children are not to be executed, a principle much less controversial than the execution of adults for crimes they committed when they were children; neither are mentally ill convicts who are incapable of understanding what is happening at the time of their execution. It is the law also that pregnant women are not to be executed, at least not until they have given birth.[8] These principles seem to be well established in the world, though in some instances the United States came late to their recognition.[9] There is a similar consensus about methods of execution: they should be orderly, dignified, and, as far as possible, painless. The almost universal revulsion that greeted the recent prospect of a woman being stoned to death in Iran for adultery is evidence of this.[10] Jurists in Europe tell me that we are heading toward a situation in which the death penalty in any shape or form is rejected by the legal systems of the world. I don't think we are there yet, but in certain parts of the world—certainly in Europe itself, for example—something like that position is established.

Ius gentium is not just about the death penalty, though principles regulating that practice have been prominent in the American debate because it

is one of the areas where American legal exceptionalism gives rise to the most critical—and the most defensive—reactions. These laws common to all mankind pop up in all sorts of places. We notice them, for example, in a shared sense of what is sometimes called natural justice (the rudiments of procedural due process), in many of the fundamental principles of contract and commercial law, in the idea of proportionality in criminal and constitutional law, in the basic elements of what we call the rule of law, in the law of self-defense, and in a broad global consensus about what a country's constitution ought to be like.

The issue is not about global uniformity. The position propounded in that quotation from the *Institutes* is that although countries are governed partly by laws they share with the rest of humankind, they are still also partly governed by laws that are strictly their own. But one mustn't assume that the most important legal principles are the idiosyncratic ones. I believe jurisprudence has left behind the doctrine, which flourished briefly in the nineteenth century, that legal ideas were the outgrowth of the national character of particular peoples and, like their culture and their language, were distinctive, unique, and valuable in their peculiarity.[11] To a large extent, we treat law more like science—as a global enterprise of which we partake—than like a national costume or some aspect of the culture we would put on show to establish our distinctiveness.

There are all sorts of areas where a stranger, coming to the laws of a foreign land, will come with a reasonable expectation that the main principles of law will be the same the world over even though there may be differences in detail. The stranger will expect that there will be no punishment without trial; that anyone accused of a crime or delict will have the right to explain himself to an impartial tribunal and call witnesses if necessary; that contracts are enforceable, though the detailed conditions of enforceability may vary; that, harm for harm, conduct which is intentional will be penalized more heavily than conduct which is merely careless, though certain forms of carelessness will attract legal sanction; that children are treated differently at law than adults; that there will be provision for the conveyancing of property; and so on. These are all very broad legal ideas, and some of them I have described with a degree of abstraction that makes them seem anodyne and unlikely to be helpful in the settlement of any specific legal dispute. But as the book goes on, I will cite other examples—besides the principle in *Roper v. Simmons*—in which elements of ius gentium play an important role in the resolution of difficult cases.

For the purposes of introduction I am trying to make this discussion seem obvious. But of course it is not obvious. What I defend here is a difficult