WHEN AND HOW U.S. COURTS SHOULD CITE FOREIGN LAW

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At a recent Ohio State University symposium honoring her fifteen years on the U.S. Supreme Court Justice, Ruth Bader Ginsburg responded to questions submitted by law students.[1] One question asked her about the controversy surrounding courts' citation of foreign law. Justice Ginsburg took a calm view of the matter: "I frankly don't understand all the brouhaha lately from Congress and even from some of my colleagues about referring to foreign law." To demonstrate her point she offered an example:

> And one of the examples that I give of that was a case before the Israeli Supreme Court some years ago; it was called The Ticking Bomb Case. The police think that a suspect they have apprehended knows where and when a bomb is going to go off. Can the police use torture to extract that information? And in an eloquent decision Aharon Barak then the Chief Justice of Israel said, "Torture? Never!" and explains that "We could hand our enemy no greater weapon than to come to look like that enemy in our disregard for human dignity." Now why should I not read that opinion and be affected by its tremendous persuasive value? So that's just one example.[2]

She followed her example with a comparison:

> Our neighbor to the north, Canada . . . is a *very* interesting supreme court, probably cited more widely abroad than the U.S. Supreme Court, I think for one reason: You will not be listened to if you don't listen to others. I've been asked so

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1. A streaming video of Justice Ginsburg's remarks is available on line at http://www.c-spanarchives.org/library/index.php?main_page=product_video_info&products_id=285214-1. Quotations from her comments below will come from a transcript of this streaming video prepared by the author, which, as they pertain to foreign law, appear as an appendix to this essay.

2. *Infra* app. 13–14.

> many times by jurists abroad: "We in our country are inspired by model of the U.S. Supreme Court, and we refer to your decisions, but you never refer to ours. Don't we have anything to contribute?"[3]

Others disagree about the usefulness of foreign law. According to the same *New York Times* article that reported Justice Ginsburg's comments, Chief Justice Roberts responded to a similar question during his nomination hearings by saying, "If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge."[4] Some members of Congress have been less measured; according to the Congressional Record, Senator Cornyn (R-TX) has expressed concern

> [O]ver a trend that some legal scholars and observers say may be developing in our courts—a trend regarding the potential influence of foreign governments and foreign courts in the application and enforcement of U.S. law. If this trend is real, then I fear that, bit by bit, case by case, the American people may be slowly losing control over the meaning of our laws and of our Constitution. If this trend continues, foreign governments may even begin to dictate what our laws and our Constitution mean, and what our policies in America should be.[5]

And in the popular sphere, the rhetoric is even more heated; apparently responding to Justice Ginsburg's Israeli example, a television commentator noted:

> Well, here's an idea for Justice Ginsburg. Perhaps she would like to meet and talk with Saudi Judge Sheikh Kabib al Habib, who has again denied to annul [sic] a marriage between a 48-year-old man and an eight-year-old girl. Justice, I think you should really talk to Judge al-Habib. By the way, the child's father arranged that marriage in order to settle debts, an interesting custom. Perhaps Justice Ginsburg would with like us to bring that custom to the United States.[6]

Justice Ginsburg is right on one big point: there is a lot more heat than light in this small controversy: U.S. courts not only do but often must cite foreign law in circumstances that

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3. *Id.* app. 13–14.

4. Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, Apr. 12, 2009, at A14.

5. 151 CONG. REC. S3124-02 (2005).

6. *Lou Dobbs Tonight* (CNN television broadcast Apr. 13, 2009).

produce no comment—much less a brouhaha. Unfortunately, both the example Justice Ginsburg gave and the motivation she suggested in these two passages are unrepresentative and misleading. In the overwhelming majority of cases where U.S. courts cite foreign legal sources, they do so because such sources are the only relevant authorities. Moreover, when U.S. courts do cite foreign law, they are not doing so because they hope for reciprocal respect from foreign tribunals: they're doing so because they have to. Finally, almost none of these foreign citations involve such controversial decisions as the use of torture. Conversations with educated non-lawyers (and even an occasional legal academic) suggest that misconceptions about this ancient practice are reasonably widespread. So I've imagined what Justice Ginsburg might have said—if she'd not been responding off the cuff to a single question in a series, and if she'd had a half hour instead of a minute and a half.

There *is* a debate about U.S. courts citing foreign legal sources. A very small part of this debate is entirely legitimate—and I'll return to that. But first, let's be clear that there are many circumstances—accounting for the overwhelming majority of citations to foreign law—when a judge, sworn to uphold the Constitution, would be in dereliction of duty if he or she did *not* cite foreign legal sources.

Start with the easiest cases. In recent decades the Supreme Court, often in opinions written by Justices associated with a conservative wing of the Court, has vindicated parties' contractual power to manipulate the procedural rules under which their cases are decided.[7] One such manipulation—found in large numbers of international contracts—is a choice of law clause, in which the parties stipulate that the law of Britain, or Mexico, or Italy will apply to any disputes arising under the agreement. U.S. courts regularly hear and decide such cases—applying the law of the nation designated in the clause.[8] As you read these words, there are half a dozen U.S. courts that are assiduously citing foreign law, at the command of the U.S. Supreme Court or of similar mandates from their state supreme courts. They are doing so because the litigants have a choice of

7. *See, e.g.*, M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (insisting on the enforcement of a choice of forum clause that deprived U.S. courts of jurisdiction and relocating the litigation in Great Britain).

8. *E.g.*, Milonovich v. Costa Crociere, S.p.A., 954 F.2d 763 (D.C. Cir. 1992) (applying Italian law in accordance with choice of law clause contained in 13-page cruise ticket booklet).

law clause and governing U.S. law says to respect that choice, and to respect it, the courts have to cite and discuss foreign law. That's not always easy or well done, a point to which I'll return, but it is a duty of a court under existing U.S. law.

A closely related second category comprises those cases where there's no choice of law clause but an ancient if sometimes indeterminate body of law (called "conflict of laws")[9] dictates that the correct law to apply is foreign. So if on a trip to Austria to attend some opera (answering a different question at the symposium, Justice Ginsburg briefly discussed her favorite operas), she were injured in an auto accident involving her fellow Justice and opera buff, Antonin Scalia, and if, back in Washington D.C., she brought suit against Justice Scalia to recover for her injuries, it's likely that a court would conclude that Austrian tort law applied to the case.[10] And again, the U.S. court would be duty bound to cite and discuss Austrian statutes, treatises, and the like. Such a practice would be entirely uncontroversial; there is even a Federal Rule of Civil Procedure laying out the path by which litigants raise such issues of foreign law.[11]

A third kind of case—still in the uncontroversial category—arises when either a treaty or a statute explicitly refers to foreign law. One such statute—the Alien Tort Act—famously but mysteriously gives federal courts jurisdiction "of any civil action by an alien, for a tort only, committed in violation of the law of nations."[12] Interpreting this statute has been difficult for the courts, but almost everyone[13] who has looked at it has thought that to apply the statute a U.S. judge *has to* decide what acts do in fact violate "the law of nations."[14] That phrase has been taken to refer not to the law of a single nation, but to the consensus reached by every (or almost every) nation even in the absence of

9. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS: INTERSTATE AND INTERNATIONAL CONFLICT OF LAWS § 10 (1971). For an overview of the conflict of laws, see also LEA BRILMAYER, CONFLICT OF LAWS (1995); FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE (2005).

10. *E.g.*, Pancotto v. Sociedade de Safaris de Mozam., S.A.R.L., 422 F. Supp. 405 (N.D. Ill. 1976) (applying Mozambique law to claim for personal injuries negligently inflicted during safari).

11. FED. R. CIV. P. 44.

12. 28 U.S.C. § 1350 (2006).

13. Justice Ginsburg's friend and occasional opera companion Justice Scalia is an exception here. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 739 (2004) (Scalia, J. concurring) (relying on precedent that eliminated the "general federal common law" on which the Alien Tort Act rested (citing Erie R. Co. v. Tompkins, 304 U.S. 64 (1938))).

14. 542 U.S. at 714–15.

a treaty.[15] Two of the agreed-on examples include taking a diplomat hostage and acts of piracy on the high seas: both violate "the law of nations." But, almost everyone agrees, the only way to give content to that phrase is to survey the law of nations to establish whether there is a consensus and, if so, whether it includes the act on which the plaintiff is basing her suit. Not too long ago the U.S. Supreme Court found that it did *not* violate the law of nations for U.S. Drug Enforcement agents to kidnap from Mexico, and return to the U.S. for trial, a physician accused of conspiring with drug lords to torture a U.S. officer.[16] A similar reference appears in the Foreign Sovereign Immunity Act[17], part of which abrogates sovereign immunity for a nation that has taken the property of a U.S. citizen "in violation of international law."[18] Again, to prevail against the expropriating defendant, the plaintiff has to show not that the complained-of act would have been a taking under U.S. law but that there is a broad international consensus about the illegality of a taking under the circumstances of the case.[19] To reiterate the point: to do that, any responsible court has to cite and discuss foreign law to demonstrate such a consensus.

So far there's virtually no debate about the propriety of a federal or state judge citing foreign law; that law indisputably governs the case at hand, and courts all over the United States recognize their duty to find out what it is and apply it. The state of that law may be unclear, but judges are obliged to try to discern it just as they would a similarly relevant part of domestic law.

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15. *Id.* at 725 ("We think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world").

16. *Id.* at 738.

> Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise. It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.

17. 28 U.S.C. § 1330 (2006); 28 U.S.C. §§ 1602–11 (2006).

18. 28 U.S.C. § 1605(a)(3) (2006).

19. *See, e.g.*, Siderman De Blake v. Republic of Arg., 965 F.2d 699, 711 (9th Cir. 1992) ("describ[ing] three requisites under international law for a valid taking," in course of opinion finding the conditions had not been satisfied in the case at hand (quoting West v. Multibanco Comermex, S.A., 807 F.2d 820, 831–32 (9th Cir. 1987))).

Let's get closer to the area where there's a legitimate disagreement. Even that disagreement is considerably narrower than one might gather from the comments. When should a U.S. court cite or look to foreign law in interpreting a U.S. statute or the Constitution? Chief Justice Roberts, in his confirmation-hearing statement, seems to reject it as a breach of doctrines of political accountability.[20] His statement, which might seem undebatable, may in fact be a bit broader than Chief Justice Roberts really means, and may imply more than he actually said.

As even the deepest skeptics about citation of foreign law recognize, the U.S. Constitution is *full* of references to foreign law, so full that one cannot make sense out of many of its provisions without foreign law. [21] As Justice Scalia has pithily acknowledged, "[T]he reality is that I use foreign law more than anyone on the Court. But it's all old English law."[22] Though no one debates this proposition, we've become so used to one brand of "foreign" law that we think it's domestic; it's so common that we call it "common law." Consider just Article I, section 9, which in the course of a few sentences defines Congressional power over "habeas corpus," "bill[s] of attainder," and "letters of marque and reprisal." These references, all of which would have been well understood at the time of ratification and which would continue to be so understood today, all refer to *foreign* law. Not only these but many of the provisions of the Bill of Rights, with its references to unreasonable searches, the right to jury trial at common law, and more—all assume a deep background in foreign law. The law in question, of course, is that of Great Britain, with which the United States had fought a long war to gain their independence. But when the new nation wanted to establish its government, it often did so by describing familiar laws and practices that the Founders wished either to preserve (like right of trial by jury) or to reject (like bills of attainder).

Both sorts of law were indisputably foreign, but a U.S. court faced with a bill of attainder claim (a bill heavily taxing bonuses paid to executives at TARP-aided firms was recently attacked on

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20. *See supra* text accompanying note 4.

21. *E.g.*, Roper v. Simmons, 543 U.S. 551, 626 (2005) (Scalia, J., dissenting) ("It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English *law* and legal thought.").

22. Antonin Scalia, Keynote Address at the American Enterprise Institute Conference: Outsourcing of American Law (Feb. 21, 2006) (video available at http://www.aei.org/event/1256; unofficial transcript created by a Scalia fan blog, Ninoville, is available at http://www.joink.com/homes/users/ninoville/aei2-21-06.asp).

the floor of Congress as a bill of attainder)[23] would be bound by duty to examine the British practice of such bills. True, a House of Lords decision from the eighteenth century would not be dispositive, but it would surely be entirely appropriate, even though "no president accountable to the people" appointed the law lords. In the early nineteenth century there was a brief-lived debate about the propriety of citing British decisions in U.S. courts.[24] That argument had some features of our contemporary debate. Those who opposed the use of common law precedents pointed out that those decisions were a) of a foreign sovereign, and b) even worse, of a recently rejected foreign despot[25] and therefore subverted everything for which the new nation stood. These opponents lost because—as everyone quickly discovered—it was hard to make sense out of domestic law unless one took account of the foreign law in which it had, until very recently, been embedded. As Lawrence Friedman put it, "In hindsight, the common law . . . was as little threatened as the English language."[26] And, again, such citation of "foreign" decisions continues to be uncontroversial.

So what *are* the controversial cases? Even here, there may be less than meets the eye. Suppose a court confronts a case in which the question is the scope of the Commerce Clause or whether a statute falls within the ambit of the Necessary & Proper Clause of Article I. If the justices wrote an opinion resting on German precedents interpreting analogous provisions in the German Grundgesetz, people might rightly think they had taken leave of their senses. Surely the only relevant body of understandings are—depending on one's taste in constitutional interpretation—the text of the Constitution, the Framers' writings and similar contemporary debate, the two hundred years of precedents from U.S. courts, and perhaps changes in popular understandings of the Constitution. But even this proposition might be subject to exceptions. The post-war Japanese constitution was famously modeled on that of the United States—even in places, some have argued, where it didn't

23. *See* Carl Hulse & David M. Herszenhorn, *AIG and Wall St. Confront Upsurge of Populist Fury*, N.Y. TIMES, Mar. 20, 2009, at A1.

24. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 94 (1973) ("When the [Revolutionary] war ended, debates over law continued. The king of England and his government had been successfully overthrown. Should the king's law also be overthrown. . . . The first generation seriously argued the question.").

25. *Id.* (quoting an eighteenth century pamphleteer: "Can the monarchical and aristocratical institutions of England, be consistent with . . . republican principles?").

26. *Id.* at 95.

fit the Japanese situation very well.[27] Suppose the question was a case of first impression for a U.S. court but that—one thinks this unlikely but surely possible—the Japanese Supreme Court had heard and decided a very closely analogous question.[28] Yes, it's true that no U.S. President appointed the Japanese judges and no U.S. Senate confirmed them. And no one thinks that the decision of the Japanese court would be dispositive. But would it really be irresponsible for a U.S. judge, seeking to understand the meaning of the U.S. Constitution, to seek counsel from a court interpreting the same clause in a sister democracy? I think not, though I also think that any such citation would have to be deeply contextualized—a point discussed below.

Now to the very small area of legitimate debate. Before exploring that small area, recall how many citations of foreign law are quite unremarkable; that is important to bear in mind, if only so we can discuss the debatable ones. In some recent cases, one or another justice, interpreting a provision of the Bill of Rights has cited to foreign practices. Which nations still execute minors?[29] Which condemn interrogation practices as "torture"? The Israeli decision to which Justice Ginsburg referred falls into this category. Some have condemned these practices as illegitimate; I take Chief Justice Roberts to be saying something like this. Certainly Justice Scalia has: "More fundamentally, however, 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."[30]

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27. *See* Percy R. Luney, Jr., *Foreword*, 53 LAW & CONTEMP. PROBS. 1, 2 (1990) (describing the contemporary Japanese constitution as "a document imposed by the Supreme Commander of the Allied Powers . . . that included rather alien concepts").

28. Article 13 of the Constitution of Japan provides that the people's "right to life, liberty, and the pursuit of happiness shall . . . be the supreme consideration in legislation and in other governmental affairs." Kenpo, art. 13; *see also* Hoashi v. Japan, 12 Minshu 1969 (Sup. Ct., Sep. 10, 1958), *translated in* JOHN M. MAKI, COURT AND CONSTITUTION: SELECTED SUPREME COURT DECISIONS, 1948–60 121 (1964) (Tanaka, J. concurring) ("We enjoy countless rights and freedoms in our daily lives. These, however, are not known by particular names. They constitute a part of general freedom or the right of the pursuit of happiness"). Occasionally U.S. courts have faced contentions that "life, liberty, and the pursuit of happiness" are constitutionally cognizable claims. *See* Edwards v. United States, 249 F.R.D. 25, 28 n.1 (D. Conn. 2008) (finding that litigants allegation that the prohibition of prayer to God in public schools has led to destructive teaching violates the Declaration of Independence fails to state a cognizable cause of action); Coffey v. United States, 939 F. Supp. 185, 190 (E.D.N.Y. 1996) (stating that the "Declaration of Independence does not grant rights that may be pursued through the judicial system").

29. That was the issue at stake in *Roper v. Simmons*, in which Justice Scalia dissented in part on the majority's reliance on foreign practices. Roper v. Simmons, 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting).

30. *Id.* at 624.

Maybe the Chief Justice and Justice Scalia are right, but a lot depends on exactly what they mean. The "unusual" part of "cruel and unusual" has an inescapably empirical content. Something is unusual if it doesn't happen very much; if it happens a lot, it's usual. What's the universe of reference in which a court has to decide whether a punishment is "unusual?" It might be the United States and only the United States; and it wouldn't be illogical so to conclude. But the appropriate constitutional reference might be broader. Suppose a state were to establish a particular form of juvenile rehabilitation that was pioneering[31] in the United States, because the state in question had adapted its model from that used in several European countries. Let's further imagine that someone might think the punishment was cruel—perhaps because it involved a mild form of behavior modification.[32] Would a U.S. judge—would Chief Justice Roberts or Justice Scalia—feel bound to strike down the new punishment because it was heretofore unknown in the United States? Or would they feel that they could appropriately cite to practices and law in the various nations that had pioneered this new treatment modality? I don't know the answer to that question. What I do know is that the U.S. legal system regularly encounters cases in which a conscientious judge, never suspected of "internationalist" leanings, would be obliged to look to the content of foreign law and in some cases to treat it as controlling. That's because U.S. law is simply chock full of reference and allusions to foreign law, some of it very old, some of it quite recent.

Often hidden in the sometimes fiery but often unilluminating dialogue about foreign law is a difficult problem—a problem that sounds less in national sovereignty and American values than in judicial craft. Often the problem with foreign law is not enough rather than too much. Justice Scalia has captured this problem with a recycled quip about the Court "look[ing] over the heads of the crowd [to] pick out its friends."[33]

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31. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

32. *See* Gillis v. Lischer, 468 F.3d 488 (7th Cir. 2006) (vacating summary judgment against prisoner claiming behavior modification program violated the Eighth Amendment).

33. *Roper*, 543 U.S. at 617 (Scalia, J., dissenting). As Justice Scalia acknowledged, he was borrowing the phrase from Judge Harold Leventhal, who described the selective use of legislative history as "the equivalent of entering a crowed cocktail party and looking over the heads of the guests for one's friends". Conroy v. Aniskoff, 507 U.S. 511,

Justice Scalia has a point, though the point has an implication he might not favor—that the solution to "the foreign law problem" will sometimes be not less but more such citations.

To illustrate the point consider two instances, one drawn from Justice Ginsberg's example of the Israeli case, and one from a Supreme Court decision, *Roper v. Simmons*,[34] concerning the constitutionality of executing those whose capital crimes were committed when they were less than 18 years old.

Take first Justice Ginsberg's example—the "ticking bomb" case in which Chief Justice Barak rejects torture as a tactic because, as Justice Ginsburg quotes him, "We could hand our enemy no greater weapon than to come to look like that enemy in our disregard for human dignity."[35] Justice Ginsburg is surely right when she poses the rhetorical question, "Now why should I not read that opinion and be affected by its tremendous persuasive value?" But notice two things about this example. First, it's entirely and transparently self-contained. The moral force of Justice Barak's argument is captured entirely in a single, pithy sentence. Moreover, little depends on the circumstance that the sentence was part of a decision because its point is universal—unmoored from any particular legal system. It is an appeal to a general moral principle more than to the case instantiating that principle. True, one might attach some extra weight to the circumstance that Justice Barak persuaded his judicial colleagues to sign on to the point, and perhaps even more that it was uttered by a court in a society that has for decades been beleaguered by enemies willing to resort to extreme tactics. But, I suggest, the citation stands on its own as a potentially persuasive argument—but no more persuasive than would be the same statement made in a journal article. This

519 (1993).

34. *Roper*, 543 U.S. at 551.

35. The actual opinion is, one is sorry to say, less pithy:

> [A] reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever. There is a prohibition on the use of 'brutal or inhuman means' in the course of an investigation. Human dignity also includes the dignity of the suspect being interrogated. This conclusion is in accord with international treaties, to which Israel is a signatory, which prohibit the use of torture, 'cruel, inhuman treatment' and 'degrading treatment.' These prohibitions are 'absolute.'

HCJ 5100/94, Pub. Comm. Against Torture v. Israel [1999] IsrSC 53 (4), *translated in* TORTURE: A COLLECTION 165 (Sanford Levinson, ed., 2004). Justice Landau made a statement, cited by the Court, that comes closer to Justice Ginsberg's paraphrase: "The interrogation practices of the police in a given regime are indicative of a regime's very character." *Id.*

argument happens to occur in a foreign case, but its persuasiveness has nothing to do with its origins.

Contrast with this example the part of the majority opinion in *Roper v. Simmons* in which Justice Kennedy reviews the status of juvenile executions. I use *Roper* as an example because I am sympathetic with the Court's outcome; for me, only its methodology is at stake. In *Roper*, Justice Kennedy's opinion for the Court devotes five paragraphs to a treatment of foreign systems' stances on the question at hand. Foreign law is relevant to the disproportionality branch of the Eighth Amendment analysis on which the case turns: "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".[36] The opinion for the majority demonstrates this contention by noting that all but two U.N. members states have ratified Article 37 of the United Nations Convention on the Rights of the Child;[37] that of the seven countries other than the U.S. who had actually executed juveniles since 1990, each had either abolished or abjured the practice; and that the United Kingdom, on whose declaration of rights the Eighth Amendment was based, had abolished juvenile execution decades before it abolished the death penalty altogether.[38]

This is not enough of a good thing. Let us sidestep the question of whether one should ever look to international law or practice for the content of a U.S. constitutional norm.[39] *If* one is going to appeal to foreign law, the appeal has to be effective. Effective use of foreign law requires that it be treated as respectfully as state law—surveyed carefully and contextualized rather than mentioned in passing references. Justice Kennedy doesn't think he can mention in passing that many states have abolished capital punishment for juveniles; instead he devotes most of the opinion to this proposition, and for good measure attaches an appendix with charts showing in several different ways the changing fortunes of juvenile execution.

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36. *Roper*, 543 U.S. at 575.

37. United Nations Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1469–70.

38. *Roper*, 543 U.S. at 575.

39. Some might argue that no foreign source should ever be cited except when required.

Not so for the foreign references. As a result, the discussion of foreign law is weaker than that of domestic law. As Justice Scalia has suggested in another context, one should subtract from the denominator in the UN Convention those nations that have abolished capital punishment for *all* cases; it's politically costless for such a nation to ratify Article 37, forbidding juvenile executions, because the polity in question has already decided not to execute anyone.[40] Justice Scalia is likely also correct in noting that a fuller consideration of this matter would note that some nations maintain a *mandatory* death penalty for some crimes; and that one might examine more closely the actual practices of some nations that claim to have abolished the death penalty for juveniles.[41] None of these points is in principle unanswerable. Moreover, none of them arises because the law involved is foreign: the objections are those involving analysis and craft, not any special feature of foreign law. But their answers call for deeper, more nuanced exploration of foreign law when a court thinks it relevant—as the majority does in *Roper*—to the content of such multi-national norms as capital punishment.

International law, if it is to be used, should be used well—not as an ornament or afterthought. As a passing example that carries its own persuasiveness—the Israeli torture example—a single citation is fine. But if one wants to make claims about international consensus, that requires more and better exploration. In that exploration context matters. Moreover, context matters just as much in the small, unremarkable uses of foreign law as it does in the big, controversial ones.

To demonstrate the point, consider an unremarkable case, one in which all would agree that foreign law governed. In 1973, Rosemary Pancotto took an adventurous vacation—a hunting safari in Mozambique, which then had just emerged from Portuguese colonial rule. The trip turned out to be more

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40. *See* Antonin Scalia, Keynote Address at the American Enterprise Institute Conference: Outsourcing of American Law (Feb. 21, 2006)

> In a 1988 case, Thompson v. Oklahoma, the court noted that 'other nations that share our Anglo-American heritage, and by the leading members of the Western European community' oppose the death penalty for a person less than sixteen years old when the crime was committed. I must also interject that those countries also opposed the death penalty when the person was more than sixteen years old, but nevermind.

(citing Thompson v. Oklahoma, 487 U.S. 815 (1988)) (transcript available at http://www.aei.org/event/1256; emphasis added).

41. *Roper*, 543 U.S. at 623.

adventurous than Ms. Pancotto had hoped, for she was injured when a swamp buggy operated by a tour employee struck her. Back in Illinois, she sued the Mozambican tour operator.[42] The court hearing that case had to decide what law applied. It made an odd determination: that Mozambican law might apply to the question of liability, but that the Mozambican limitation on damages (capping liability at US$6,600) did not apply.[43] That determination gave the plaintiff the advantage of what looked like favorable standard for liability ("liability... imposed without regard to fault"[44]) but an uncapped limit on damages. Surely this is a failure to consider the context of foreign law.[45] In context, capped damages appear linked to a regime of liability without fault, in the same way some workers' compensation regimes operate.[46] The same necessity for contextualization applies to large constitutional questions. Earlier I hypothesized that a U.S. court might justifiably cite a provision of the Japanese constitution.[47] If it did so, however, it might be important to note that Japan has a parliamentary rather than a presidential system—and that its constitutional wisdom about separation of powers might accordingly be more limited than on a feature shared by both systems.

Finally, the point is simple: "good" citation of foreign law will have the same characteristics as good citation of domestic law; they will be complete, careful, and contextualized. Hit-and-run citations are bad whether they use foreign or domestic sources. Thus stated, the point becomes commonplace. But given the occasionally hysterical rhetoric surrounding discussion of foreign law, lowering the volume of the discussion to the commonplace may be a useful contribution.

Thus much of what I wish Judge Ginsburg might have said—even at the risk of having her audience nod off. Now to the thing I wish she hadn't said. Her statement that the Canadian Supreme Court might be more widely cited than the U.S.

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42. Pancotto v. Sociedade de Safaris de Mozam., S.A.R.L., 422 F. Supp. 405 (N.D. Ill. 1976).

43. *Id.* The opinion does not reach a firm conclusion about whether Illinois or Mozambican law would apply, asking for additional briefing on that question.

44. *Id.* at 408.

45. In fairness, the federal court was sitting in diversity jurisdiction and thus bound to apply the conflicts principles it thought that Illinois was likely to apply. *See* Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). It may well have been correct to predict that Illinois would perform the same uncontextualized analysis.

46. A point defendant had tried to make by submitting an affidavit stating that defendant had no liability insurance.

47. *See supra* text at note 28.

Supreme Court may be accurate. But it unfortunately implies that a judge's choosing to cite foreign law depends significantly on a justice's views about how important foreign judicial "respect" is. That's misleading because it's descriptively inaccurate—wildly inaccurate. In the overwhelming majority of instances a U.S. judge cites foreign law because she has to, not because she's hoping for reciprocal international respect. And in most of the instances in which she isn't compelled to, the judge very likely has reasons that, again, have nothing to do with the hope that foreign judges and lawyers will respect U.S. jurisprudence. The judge does so because she or he believes that foreign law has something valuable, perhaps necessary, to say about the outcome of the case.

To return to my starting point: I'm making far too much out of Justice Ginsburg's brief response to a single question she'd not seen in advance. But the question dealt with an issue about which I've had a number of conversations with intelligent, well-meaning non-lawyers who are equally confused by statements like that of Chief Justice Roberts and Senator Cornyn—implying that citation of foreign law comes near to political subversion—and that of Justice Ginsburg—suggesting that citation of foreign law is a bid for international popularity. Neither Justice intended to convey those meanings. But some of their public statements might increase public misunderstandings, so one is sorry about any missed chance to clarify.

APPENDIX

Justice Ginsburg's complete comments on foreign law, which appear on the streaming video starting at 54:58, as transcribed by the author:

"Learning about another system opens your eyes to your own system, and I appreciated the way our system works ever so much more when I could see it in a comparative light. You also learn to be more flexible. . . .

"I frankly don't understand all the brouhaha lately in Congress and even from some of my colleagues about referring to foreign law. John Marshall did it. There is perhaps a misunderstanding that when you refer to, say, a decision of the Law Lords, or of the Supreme of Israel, or of the Constitutional Court of South Africa that you are using those as binding precedent. Well of course they're not binding precedent; they're not *our* law. But there are so many systems with whom we share common values, and issues, similar issues come up. Why shouldn't we look to the wisdom of a judge from abroad with at least as much ease as we would read a law review article written by a professor?

"And one of the examples that I give of that was a case before the Israeli Supreme Court some years ago; it was called The Ticking Bomb Case. The police think that a suspect they have apprehended knows where and when a bomb is going to go off. Can the police use torture to extract that information? And in an eloquent decision Aharon Barak then the Chief Justice of Israel said, 'Torture? Never!' and explains that 'We could hand our enemy no greater weapon than to come to look like that enemy in our disregard for human dignity.' Now why should I not read that opinion and be affected by its tremendous persuasive value? So that's just one example.

"Our neighbor to the north, Canada, wasn't in the business of judicial review for constitutionality until 1982, when they got their Charter of Rights and Freedoms. And now that is a *very* interesting supreme court, probably cited more widely abroad than the U.S. Supreme Court, I think for one reason: You will not be listened to if you don't listen to others. I've been asked so many times by jurists abroad: we in our country are inspired by model of the U.S. Supreme Court, and we refer to your decisions, but you never refer to ours. Don't we have anything to contribute?

"For so many years the United States was the only country engaged in judicial review for constitutionality. Most systems had an idea like Mark's: that a court shouldn't mess with those fundamental values but leave them to Parliament –the courts should stay out of those things. We are the people's representatives and we should decide those questions. What happened in Europe was the Holocaust, and people came to see that popularly elected representatives could not always be trusted to preserve the system's most basic values. So many countries decided that they would install a constitutional court as one check against return to that kind of government. And so there are now many courts in the world doing review for constitutionality. And they are looking to each other, not for binding authority, but to see how other good minds have dealt with this problem.

"I think that this is a passing phase, that we will go back to where we were in the early nineteenth century, when there was no question that it was appropriate to refer to decisions of other tribunals."