

FOREIGN LAW AND THE MODERN *IUS GENTIUM*

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I. INTRODUCTION

Is it ever appropriate for American courts to cite or defer to foreign law? The question arose last Term in a bitter dispute among the Justices of the U.S. Supreme Court in *Roper v. Simmons*,¹ the juvenile death penalty case.² One of the frustrating things about *Roper*, however, is that no one on the Court bothered to articulate a general theory of the citation and authority of foreign law.³ Writing for the Court, Justice Kennedy said that it was “proper” to take foreign law into account and that referring to the laws of other countries could be “instructive” for the Court’s interpretation of the Eighth Amendment.⁴ But he did not explain the jurisprudence behind this view.⁵ Nor did the *Roper* dissenters articulate a theory of citation to foreign law that they could squarely refute; they simply denounced the practice.

The theory that is called for is not necessarily a complete jurisprudence. But it has to be complicated enough to answer a host of questions raised by the practice: about the authority accorded foreign law (persuasive versus conclusive), about the areas in which foreign law should and should not be cited (private law, for example, compared to constitutional law), and about which foreign legal systems should be cited (only democracies, for example, or tyrannies as well). The theory has to be broad enough to explain the use of foreign law in all appropriate cases: too many scholars call for a theory that will explain the citation of foreign law only in constitutional cases.⁶ The theory has to

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¹ 125 S. Ct. 1183 (2005).

² The relevant controversy in *Roper* concerned the invocation of international as well as foreign law. This Comment will consider only the latter, though much of my argument is applicable to the former as well.

³ Cf. Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 639 (2005) (“[T]he notion that international and foreign material should be used to interpret the U.S. Constitution . . . is gaining currency. Yet proponents of this practice rarely offer a firm theoretical justification for the practice.”).

⁴ *Roper*, 125 S. Ct. at 1198–1200.

⁵ Justice O’Connor was more forthcoming in her dissent, but her analysis focused specifically on the dignitarian aspects of the Eighth Amendment and is of limited use for other cases in which foreign law is introduced. See *id.* at 1215–16 (O’Connor, J., dissenting).

⁶ See, e.g., Alford, *supra* note 3 (focusing exclusively on constitutional law).

be persuasive enough to dispel the serious misgivings that many Americans have about this practice: why should *American* courts cite anything other than *American* law? Above all, it has to be a theory of *law*. The argument cannot just be that good diplomacy requires us to ingratiate ourselves with the Europeans.⁷ It must explain why American courts are legally permitted (or obliged) to cite to non-American sources and how that practice connects with the status of courts as legal institutions.

An example may help get at the sort of theory I have in mind. When courts cite their own precedents, they do so on the basis of the theory of stare decisis, which provides a platform on which judges can articulate and defend their deference to precedent. It explains why deference is appropriate even for cases in which justice or policy seems to require a different result. It explains why precedent is more important in some cases than in others. And it explains its relation to various sources of law (the difference between stare decisis in common law and in constitutional interpretation, for instance). No doubt the details of stare decisis are controversial.⁸ But even if one disagrees with a judge's conception, it is surely better that he should articulate such a theory than that he simply give the impression that he thinks deferring to precedent is a good idea. We should require nothing less for the citation of foreign law.

In his dissent in *Roper*, Justice Scalia said that the Court's citation of foreign law was unprincipled and opportunistic.⁹ Even this observation, however, does not mean that there cannot be a good theory to support the practice. Using my analogy again, Justice Scalia has sometimes argued that the Court's following and departing from precedent in cases involving individual rights is unprincipled and opportunistic.¹⁰ But it does not follow that he rejects stare decisis or

⁷ See Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1316–18 (2004) (mentioning the foreign policy argument that is sometimes used to justify U.S. courts' reliance on foreign law: citing foreign law will reduce American diplomatic isolation on human rights issues).

⁸ There are several rival conceptions of stare decisis — the Dworkinian theory of law as integrity, see generally RONALD DWORKIN, *LAW'S EMPIRE* (1986); the pragmatic theory of predictability and secure expectations, see generally RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999); and the old idea of the common law "work[ing] itself pure," *Omychund v. Barker*, 1 Atk. 21, 33, 26 Eng. Rep. 15, 23 (Ch. 1744) (argument by the future Lord Mansfield) (emphasis omitted); see also LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 140 (1940).

⁹ See *Roper*, 125 S. Ct. at 1228 & n.9 (Scalia, J., dissenting) ("To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry. . . . Either America's principles are its own, or they follow the world; one cannot have it both ways.").

¹⁰ See *Lawrence v. Texas*, 123 S. Ct. 2472, 2488–91 (2003) (Scalia, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 982, 992–93 (1992) (Scalia, J., dissenting).

that he thinks it is not worth developing a theory of precedent. Similarly, we should not reject the idea of a theory of the citation of foreign law simply because we see foreign law being cited opportunistically; we should reject it only if we think inconsistent and unprincipled citation is inevitable under the auspices of such a theory.

Though it appears from his dissent in *Roper* that Justice Scalia's denunciation of the citation of foreign law proceeds without any appreciation that such citation should be based on a theory, dicta from his recent concurrence in *Sosa v. Alvarez-Machain*¹¹ indicate that he does have in mind a theory of the authority of foreign law (albeit one he wishes to refute). Though the *Roper* Court did not engage with this theory, it merits closer consideration.

Sosa concerned a claim under the Alien Tort Statute¹² (ATS). A physician, kidnapped from Mexico by persons working for the U.S. Drug Enforcement Agency, sued under the ATS for damages arising from his unlawful arrest.¹³ The ATS, first enacted as part of the Judiciary Act of 1789,¹⁴ provides that federal district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations";¹⁵ Alvarez-Machain argued that his kidnapping was just such a violation. The Supreme Court rejected his claim for damages, holding that the Court's 1938 decision in *Erie Railroad Co. v. Tompkins*¹⁶ seriously curtailed the ability of litigants in American courts to generate new causes of action under "the law of nations."¹⁷ The Court in *Sosa* said that the federal courts now have only very limited discretion to recognize new causes of action in this regard, discretion that the Court declined to exercise in the plaintiff's favor.

Justice Scalia, concurring, took a somewhat different approach. He argued that the ATS must be read in the narrow sense that its framers understood it — to refer exclusively to "the accepted practices of nations in their dealings with one another (treatment of ambassadors, immunity of foreign sovereigns from suit, etc.) and with actors on the high seas hostile to all nations and beyond all their territorial jurisdictions (pirates)."¹⁸ Justice Scalia denied that the federal courts had even limited discretion to recognize new grounds of action under the rubric of the law of nations. Then he added this:

¹¹ 124 S. Ct. 2739 (2004).

¹² 28 U.S.C. § 1350 (2000).

¹³ *Sosa*, 124 S. Ct. at 2746–47.

¹⁴ Ch. 20, 1 Stat. 73.

¹⁵ 28 U.S.C. § 1350.

¹⁶ 304 U.S. 64 (1938).

¹⁷ See *Sosa*, 124 S. Ct. at 2761–62.

¹⁸ *Id.* at 2775 (Scalia, J., concurring).

The notion that a law of nations, redefined to mean the consensus of states on any subject, can be used by a private citizen to control a sovereign's treatment of its own citizens within its own territory is a 20th-century invention of internationalist law professors and human-rights advocates. The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty could be judicially nullified because of the disapproving views of foreigners.¹⁹

That last comment looks forward to cases, like *Roper*, that do not involve the ATS, but do involve reference to the sort of global legal consensus underlying the idea of the law of nations. I think Justice Scalia is right in thinking that this is the implicit theory behind the Court's citation of foreign law in cases like *Roper*.

Developing an argument that the citation of foreign law can rest on the idea of the law of nations requires a number of steps. In Part II, I define the law of nations and distinguish it from natural law. Part III contrasts the approaches these two theories take toward the solution of modern legal problems. Part IV examines how the law of nations approach might bear on the juvenile death penalty. In Part V, I show that American jurisprudence is still capable of recognizing the law of nations for the purposes of a case like *Roper*, despite the inhibiting positivism of *Erie*. In this regard, we need to go beyond the stodgy Latin apparatus of *ius gentium* and start thinking directly about legal problems in a way that makes this account of the citation of foreign law appealing. I set out an account of this kind in Part VI. I end, in Part VII, with some brief comments on the relation between this theory and the rather casual invocation of foreign law in cases like *Roper*.

II. THE LAW OF NATIONS (*IUS GENTIUM*)

The law of nations is often used as a synonym for international law. But it once had a broader meaning, comprising something like the common law of mankind, not just on issues between sovereigns but on legal issues generally — on contract, property, crime, and tort. It was a set of principles that had established itself as a sort of consensus among judges, jurists, and lawmakers around the world. This Comment seeks to return the phrase to this broader meaning.

An analogy that I use throughout this Comment is between the law of nations and the established body of scientific findings. Existing science claims neither unanimity among scientists nor infallibility; nevertheless, it 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

¹⁹ *Id.* at 2776 (emphases omitted) (citations omitted).

supplement their own individual research and to provide a basis for its critique and evaluation. Similarly, the law of nations 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.

Terminology is a particular problem in this area. The law of nations is often referred to using terms like “general common law,” “federal common law,” and “customary international law.” There is nothing wrong with these labels. But I shall use the Latin phrase “*ius gentium*” to refer to the law of nations in the more comprehensive sense — a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems. Terms like “federal common law” I regard as functional terms that are used to indicate particular roles that the law of nations may play in the complex structure of American federalism. One of my arguments is that the fact that an appeal to the law of nations is precluded in some contexts does not necessarily make it unavailable in others. Rejecting the idea of general common law, for example, does not show that *ius gentium* may not figure in a case like *Roper* as a legitimate source of legal inspiration.

In the history of jurisprudence, *ius gentium* represented the coming together of two ancient ideas. One was the idea of natural law, understood (in the words of Cicero) as “right reason in agreement with nature[,] . . . of universal application, unchanging and everlasting.”²⁰ The other was a more technical jurisprudence that developed in Rome to address the legal interests of foreigners who did not have the benefit of Roman law itself (*ius civile*). As Sir Henry Maine observed, the Romans resorted to the expedient of applying certain rules held to be common to Roman law and the laws of the surrounding non-Roman Italian communities. They called this body of rules “*ius gentium*,” which they understood as law common to all nations (or at least all the nations with substantial numbers of immigrants in Rome).²¹

At its inception, the Romans had no particular respect for *ius gentium*. They did not think of it as capturing the essence of law, but merely as an expedient. Only after it became associated with the Greek idea of natural law did it begin to be regarded as “a great though as yet imperfectly developed model to which all law ought as far as possible to conform.”²²

²⁰ CICERO, THE REPUBLIC, bk. III, § 33, at 211 (Clinton Walker Keyes trans., 1928).

²¹ See HENRY SUMNER MAINE, ANCIENT LAW 49 (photo. reprint 2002) (London, J. Murray, 3d ed. 1866).

²² *Id.* at 52.

Now, natural law also involved the idea of commonality: just as fire burns in Persia as well as in Greece, so murder is wrong in Carthage and in Rome. The difference was that the law of nature posed itself explicitly as an ideal: what did human reason as such say about the basics of human action and relationship, justice and injustice, right and wrong? *Ius gentium*, on the other hand, afforded a more grounded focus of aspiration, looking not just to philosophic reason but to what law had actually achieved in the world.²³ Natural law might have provided the very basic premises of a normative account, but *ius gentium* embodied a set of enduring intermediate principles that one might use as touchstones for real-world legal systems.²⁴ This difference of emphasis between natural law and *ius gentium* led sometimes to differences in content: slavery, which was always thought to be an affront to the law of nature, was plainly an incident of *ius gentium* in ancient times. And the two bodies of law might differ also in their character: *ius gentium* could change and evolve while the law of nature by definition was immutable. These differences were inevitable once natural law was brought down to earth from the lofty heights of purely philosophical speculation and became, so to speak, a brooding omnipresence *on the ground*.

In its early association with natural law, *ius gentium* took on a role similar to that of equity in later jurisprudence — a method of cutting through layers of local technicalities and idiosyncrasies to get at the essence of justice. As such, it came to be seen as an additional body of law that could correct and supplement the *ius civile* on its home ground. So the author of the *Institutes of Justinian* was able to say:

Every community governed by laws and customs uses partly its own law, partly laws common to all mankind. The law which a people makes for its own government belongs exclusively to that state, and is called the civil law [*ius civile*], as being the law of the particular state. But the law which natural reason appoints for all mankind obtains equally among all nations, and is called the law of nations [*ius gentium*], because all nations make use of it.²⁵

If *ius gentium* concerns relations and transactions in what we would regard as domestic law — in torts, crimes, contracts, and

²³ Many natural law-oriented jurists preferred to focus their normative study on *ius gentium*. See RICHARD TUCK, *NATURAL RIGHTS THEORIES* 34 (1979).

²⁴ See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* Pt. I-II, Q. 95, Art. 4, Reply 1, at 298 (R.J. Henle trans., 1993) (“The Law of Nations is indeed in some way natural to man inasmuch as it is rational, since it is derived from the Natural Law by way of a conclusion, which is not very far from the principles.”).

²⁵ J. INST. I.2.1, at 80 (photo. reprint 1997) (Thomas Collett Sanders trans., London, John W. Parker & Son, 2d ed. 1859). For a more detailed investigation of the historical development of *ius gentium*, see Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. PA. J. INT’L ECON. L. 193, 199–222 (2005).

property — how did it become so tightly associated with international law? In its early usage, *ius gentium* often dealt with issues, like the status of ambassadors, that we would regard as international law issues, along with issues concerning merchants, sojourners, and immigrants.²⁶ But as international law began to develop into an independent body of law, legal positivists began to wonder if *ius gentium* was really a separate body of law or if it had all been subsumed under international law. Jeremy Bentham's scrutiny was the most devastating: he said "the law of nations" meant nothing more than international law, defined as "the mutual transactions between sovereigns as such,"²⁷ or it meant the law of private mercantile and maritime transactions, or it meant natural law.²⁸ Of these possible meanings, Bentham did not consider natural law to be law, and he thought mercantile transactions were already covered by municipal law. That left only international law to give meaning to the phrase.²⁹

But the overlap between *ius gentium* and *ius inter gentes* — international law — was never complete. The residual connotations of *ius gentium* allowed it also to capture issues that were not just matters between sovereigns. The distinction between international law and domestic law was much less crisp at the time Bentham was writing (around the time of the founding of the United States) than it was in the middle of the twentieth century,³⁰ and it has become less crisp again with the emergence of human rights law.

Ius gentium is still both an inspiration for domestic law and a guiding ideal for a uniform body of transnational law. A quick survey of modern scholarship reveals that experts believe that *ius gentium* affords a useful framework for thinking about such topics as data protection,³¹ antitrust,³² and copyright.³³ And even in strictly domestic cases something like *ius gentium* serves as a basis for solving otherwise intractable problems. Consider the well-known case of *Riggs v.*

²⁶ David J. Bederman, *World Law Transcendent*, 54 EMORY L.J. 53, 62–64 (2005).

²⁷ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 296 & n.x (J.H. Burns & H.L.A. Hart eds., Univ. of London 1970) (1789).

²⁸ See Harold J. Berman, *World Law*, 18 FORDHAM INT'L L.J. 1617, 1617 (1995).

²⁹ See *id.*

³⁰ See Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 45 (2004) ("[A]t the beginning of the Republic, U.S. courts drew no sharp line between international and foreign law, precisely because of the extensive overlap of these two bodies of law.").

³¹ See, e.g., Marsha Cope Huie et al., *The Right to Privacy in Personal Data: The EU Prods the U.S. and Controversy Continues*, 9 TULSA J. COMP. & INT'L L. 391, 402–03 (2002).

³² See, e.g., Friedrich K. Juenger, *The "Extraterritorial" Application of American Antitrust Law and the New Foreign Relations Law Restatement*, 40 WIRTSCHAFT UND WETTBEWERB 602, 612–13 (1990).

³³ See, e.g., Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 475–76 (2000); William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 417–18 (2000).

Palmer,³⁴ in which a man murdered his grandfather and then claimed an inheritance under his grandfather's validly executed will. The court in *Riggs* declared:

[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 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.³⁵

In recent years, Ronald Dworkin has made *Riggs* the leitmotif of an entire jurisprudence, arguing that law comprises deep legal principles as well as rules embodied in texts and precedents.³⁶ But it is worth noting also that the court in *Riggs* referred to these principles in exactly the terms that jurists have used down the ages to refer to the law of nations.

Historians of jurisprudence have spent gallons of ink on the question of whether *ius gentium* was conceived as natural law or positive law.³⁷ The fact is that at various times and for various purposes it has been both, as well as the product of a sort of reflective equilibrium between the two. It was not enough for *ius gentium* to serve only as a basis for philosophical discussion of natural law or only as a barometer of legal consensus. If consensus was to function normatively, it had to be less than complete (so that it guided someone's choices). But incomplete consensus required choices to be made, and those choices would necessarily be guided by a sense of justice.³⁸ That sense of justice would not be idiosyncratic but would itself be informed by the extent, depth, and character of the consensus on the question at hand. This process of back-and-forth, which is well understood in moral philosophy,³⁹ accounts for the dual nature of *ius gentium*.

How courts have invoked *ius gentium* has depended in part on the purposes, traditions, and categories of the particular court using it. In cases involving law between nations, the law of nations is referred to

³⁴ 22 N.E. 188 (N.Y. 1889).

³⁵ *Id.* at 190.

³⁶ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 40 (1977).

³⁷ See Trnavci, *supra* note 25, at 200–02, for a characterization of the debate on this issue. See also H.F. JOLOWICZ & BARRY NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 104–06 (3d ed. 1972); John R. Kroger, *The Philosophical Foundations of Roman Law: Aristotle, the Stoics, and Roman Theories of Natural Law*, 2004 WIS. L. REV. 905, 909–10.

³⁸ Dworkin would consider this process “interpretive.” Cf. DWORKIN, *supra* note 8, at 76–78 (explaining the relation between fit and moral appeal in interpretation).

³⁹ See generally JOHN RAWLS, *A THEORY OF JUSTICE* 48–51 (1971) (establishing and explaining the concept of reflective equilibrium); Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256 (1979) (expanding and elaborating on Rawls's conception).

as “customary international law.”⁴⁰ In private law cases, on the other hand, *ius gentium* is associated with the heritage of the common law,⁴¹ though judges still used the words of Cicero to refer to it as “not the law of a single country only, but of the commercial world. Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtenebit.”⁴² *Riggs* referred to *ius gentium* both as “fundamental maxims of the common law” and as “universal law administered in all civilized countries.”⁴³ As I have already indicated, these labels and the differences between them should not preoccupy us. “General common law” and “customary international law” are not so much separate bodies of law as different ways of referencing one and the same jurisprudential enterprise.

III. CONTRAST WITH MODERN NATURAL LAW ARGUMENTATION

Some scholars have argued that the citation of foreign law in modern American cases is best understood as an application of natural law.⁴⁴ But the connection between natural law and foreign law is unclear. Modern natural law theory validates the posing of direct moral questions about justice and rights. According to modern natural law theory, judges are often required to make moral judgments as part and parcel of identifying the law applicable to their cases.⁴⁵ These judgments are not mere personal preferences. Judges ask questions about justice and rights in a spirit of objectivity; they may get the answers wrong, but they aspire to be right, and they accept that their judgments are answerable to the moral facts. But if this is what natural law adjudication involves, then the citation of foreign law seems mysterious: if the true law is independently discoverable, why would one defer to *other* people’s answers to these moral questions (let alone the answers of Frenchmen or Zimbabweans)? Why not just ask and answer the questions oneself?

There is a cynical response to this point. Perhaps judges are embarrassed to make moral pronouncements in their own voice, even under the cover of the objectivity of natural law. Justice Scalia once remarked:

⁴⁰ See, e.g., *The Paquete Habana*, 175 U.S. 677, 707 (1900); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980).

⁴¹ See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842); *Luke v. Lyde*, 2 Burr. 882, 887, 97 Eng. Rep. 614, 617 (K.B. 1759).

⁴² *Swift*, 41 U.S. (16 Pet.) at 19.

⁴³ *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889).

⁴⁴ See, e.g., Alford, *supra* note 3, at 659–73.

⁴⁵ See, for example, Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, for a natural law approach of this kind.

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 do not at all rest . . . upon *logic* or *analysis*, but rest instead upon one's moral sentiments, one's view of natural law, one's philosophy, or one's religion.⁴⁶

Reference to official judgments, whether local or 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. But judges sound more substantial when they talk about "the overwhelming weight of international opinion against the juvenile death penalty."⁴⁷

However, this may be more of a problem for *modern* natural law theory than for the natural law tradition. Natural law jurisprudence never used to be a matter of individuals just inserting their own moral judgments into legal reasoning, any more than natural science was ever just a matter of idiosyncratic observations about energy or gravity. In both instances, the goal was the accumulation of knowledge, not just the validation of individual intuitions. No one in the modern world would take seriously novel claims about energy or gravity that did not refer to the work of the scientific community at large. It is hard for us, however, to imagine something similar for rights or justice, accustomed as we are to the privileges of the individual conscience. Yet this is exactly what *ius gentium* provided — the accumulated wisdom of the world on rights and justice. The knowledge is accumulated not from the musings of philosophers in their attics but from the decisions of judges and lawmakers grappling with real problems. And it was "accumulated" not just in the crude sense of one thing adding to another, but in the sense of overlap, duplication,

⁴⁶ Justice Antonin Scalia, Keynote Address Before the Ninety-Eighth Annual Meeting of the American Society of International Law: Foreign Legal Authority in the Federal Courts (Apr. 2, 2004), in 98 AM. SOC'Y INT'L L. PROC. 305, 308 (2004).

⁴⁷ *Roper*, 125 S. Ct. at 1200. One can see how the difficulty arises. Analytic philosophers have rightly insisted that if moral realism is true, then ordinary first-level moral propositions like "The juvenile death penalty is wrong" are the appropriate vehicle for conveying beliefs about moral reality. One does not need to add any qualifier such as "objectively" to the word "wrong." See, e.g., Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996) (arguing that moral values do exist and cannot be quantified as "objective"). The trouble is, however, that these are also the formulations one would use to express purely personal attitudes if emotivism were true, i.e., if there were no such thing as moral facts or natural law. Cf. Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 158, 164–71 (Robert P. George ed., 1992). So speaking this way is an uncomfortable thing to do in a world where your audience is divided — or even mystified — as to whether there is an objective natural law. Half the audience will think that there are no moral facts and that you are just imposing your own values; the other half (who do believe in moral facts) will be divided between those who agree with you and those who think you have the moral facts wrong!

mutual elaboration, and the checking and rechecking of results that is characteristic of true science. *Ius gentium*, conceived in this way, is no guarantor of truth: a consensus in either the law or the natural sciences can be wrong. In neither field, however, is there a sensible alternative to paying attention to the established body of findings to which others have contributed over the years.

IV. *IUS GENTIUM* AND THE JUVENILE DEATH PENALTY

If the law of nations comprised nothing but customary international law, then it would not be easy to invoke it in an essentially domestic case like *Roper*. But it would not be impossible. Modern international law, preoccupied as it is with human rights, has expanded outward from being purely *ius inter gentes* to looking at the way states treat their subjects in their internal dealings. It is not inconceivable that penal practices might come under international law scrutiny in the same sort of way. But this argument does not need to be made. *Ius gentium* has never been entirely displaced by the law of nations in the narrower sense of international law. The aspirational elements of *ius gentium* may serve as a source of guidance as much in areas of crime and punishment as in transnational contexts.

Does this mean that *ius gentium* is omnipresent? Is there no area of law where people are entitled to rely on their own customs, traditions, and democratic instincts? The question, I think, misunderstands the authority of *ius gentium*. In subject areas where municipal legal systems already have their own applicable law, the function of *ius gentium* is not to preempt that law but to guide its elaboration and development. The real question is whether seeking guidance from *ius gentium* would be inappropriate for any particular areas of law.

Some have speculated that law is essentially relative to local conditions, varying according to climate, geography, or the temper and virtue of a people.⁴⁸ But that does not preclude the application of *ius gentium*. We should still seek guidance from the accumulated legal experience of mankind as to which norms should be sensitive to circumstances, and as to the nature and extent of that variability.

Others have suggested that law is essentially relative to the peculiarities of local customs.⁴⁹ No doubt there are some areas where the

⁴⁸ The locus classicus is MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748). See *id.*, bk. 14, at 231–45 (“On the laws in their relation to the nature of the climate.”); *id.*, bk. 18, at 285–307 (“On the laws in their relation with the nature of the terrain.”); *id.*, bk. 19, at 308–33 (“On the laws in their relation with the principles forming the general spirit, the mores, and the manners of a nation.”).

⁴⁹ See FREDERICK CHARLES VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* 27 (Abraham Hayward trans., Legal Classics Library 1986) (1828) (noting the “organic connection of law with the being and character of the people,”

lawmakers of a society will stick to their own customs or preferences no matter what the international community thinks. The United States has taken this sort of stand with regard to the death penalty itself.⁵⁰ Even so, there are many contested legal questions about the administration of the death penalty for which *ius gentium*'s guidance is appropriate. The question of whether the Eighth Amendment forbids the juvenile death penalty is a question of this kind. Other societies do not face exactly this question, but they have faced questions about rights, dignity, and death penalty administration that are so close to it that it would be churlish and irrational to ignore the guidance of whatever consensus has been reached among the nations on this point.

Another way of putting the matter is this: We may have simply decided, as a matter of national will, not to rule out the death penalty altogether. But a case can still be made that we should not just *decide* whether it is cruel or unjust to execute adults for crimes committed when they were children. Since it is an open question in our system whether this practice is constitutional, we should look not just for a decision but for a way of figuring out the complex rights and wrongs of the matter, as well as the vexing issues of culpability and responsibility. In addressing this problem, we need all the help we can get. If these issues have been wrestled with in a number of other jurisdictions, then our commitment to the pursuit of justice should lead us to examine the end product of their labors for guidance. So even if the modern death penalty is quintessentially and peculiarly American, the accumulated legal wisdom of mankind, embodied in *ius gentium*, may still have something to offer us.

V. THE CHALLENGE OF *ERIE*

I now want to turn to a different sort of challenge to the theory that I have been considering. In his concurrence in *Sosa*, Justice Scalia referred to the "avulsive change" in our thinking about the law of nations wrought by the decision of the Supreme Court in *Erie*.⁵¹ So here is the challenge: If we accept what *Erie* said about general

and analogizing a people's law to their language); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 411 (2003) ("Legal systems reflect the cultures within which they are situated and thus have unique and highly contingent identities. . . . Given this close connection between law and local culture, foreign law seems to have very little place in judicial reasoning.").

⁵⁰ See, e.g., S. EXEC. DOC. NO. 102-23, at 11-12 (1992) (indicating that despite its ratification of the International Covenant on Civil and Political Rights, "[t]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment").

⁵¹ *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2773, 2775 (2004) (Scalia, J., concurring).

common law, can we still treat *ius gentium* as a resource for courts to use in the general way that I have indicated? And, if we accept what the *Sosa* Court said about the radically attenuated meaning to be given now to “the law of nations,” is there any way in which the law of nations can be invoked outside the ATS context to address the issues that arise in a case like *Roper*?

I think the answer in both cases is “Yes.” It is true that both precedents place severe limits on people’s ability to ground particular claims in the law of nations and on their ability to cite it as conclusive authority in particular contexts. But what gets invoked in a diversity case or what gets considered as the substantive ground of a claim under the ATS does not necessarily determine the status of the law of nations or *ius gentium* in other contexts. As we have seen, *ius gentium* makes its appearance in the legal systems of the world at different places and under different labels, and most of the doctrines licensing or restricting its appearance are context-sensitive. Some recent discussions ignore this important point. Professors Curtis Bradley and Jack Goldsmith, for example, say that “[d]omestic law [has] absorbed the private-law elements of the law of nations,”⁵² implying that everything useful that *ius gentium* did in regard to private law is now done by *domestic* private law. Even if that is true, it neglects the process by which that absorption has taken place and it begs the question of whether it is still taking place. Anyway, Professors Bradley and Goldsmith entirely ignore the critical and suggestive role that *ius gentium* may still play in the domain of domestic law. If we are evaluating domestic doctrine or wrestling with unresolved doctrinal issues, we may look to *ius gentium* as a source of insight. But if we can do that, then its absorption into domestic law so far as its positive law uses are concerned says nothing about its status as a critical resource.

I think the real difficulty with the position I am outlining is that some of the skepticism about *ius gentium* — particularly the skepticism expressed in *Erie* — is not just functional, but ontological. In this regard, the Court in *Erie* seemed to draw on and endorse⁵³ the dogmatic theory of Justice Holmes in his dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*⁵⁴ In *Taxicab*, Justice Holmes spoke of the “subtle fallacy” involved in referring to a body of law as though it could exist apart from the institutional provenance that furnished its authority.⁵⁵ There is no such thing as general common law, Justice Holmes argued; there is just the

⁵² Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 822 (1997).

⁵³ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

⁵⁴ 276 U.S. 518 (1928).

⁵⁵ *Id.* at 532–33 (Holmes, J., dissenting).

common law of a particular jurisdiction. Law does not float free in a way that transcends the political sources of its authority:

If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found.⁵⁶

Justice Holmes applied this reasoning to the idea of general common law, which was cited by the nineteenth-century Court as “[n]on . . . alia lex Romæ, alia Athenis, . . . sed . . . apud omnes gentes.”⁵⁷ A body of law, said Justice Holmes, cannot just *be*. Law “in the sense in which courts speak of it today does not exist without some definite authority behind it,” and the definite authority must be that of a particular state.⁵⁸ In this sense the endorsement of Justice Holmes’s view in *Erie* is said to have lent to legal positivism the authority of the Supreme Court.⁵⁹ And if that position is now authoritative, then it seems there is simply nothing for courts to look to under the heading “*ius gentium*.” Like “the law of Middle Earth,” the phrase denotes something imaginary, something that does not exist.

There are, however, a number of reasons for rejecting this line of argument. First, *Erie*’s endorsement of Justice Holmes’s theoretical observations is dicta; it was not necessary for the decision in *Erie*, which is better understood as a case about the role of federal courts than as a case about the concept of law.⁶⁰ Second, the particular version of positivism embodied in Justice Holmes’s dicta — the crude sovereignty-centered positivism of John Austin⁶¹ — is now almost universally rejected among positivists, and the forms of positivism that have replaced it by no means support Justice Holmes’s dogmatic rejection of general common law.⁶² In any case, positivism’s general credentials are suspect today,⁶³ and among the theories that look to supplant positivism are some that place front and center principles of the

⁵⁶ *Id.* at 533.

⁵⁷ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842); *see supra* p. 137.

⁵⁸ *Taxicab*, 276 U.S. at 533.

⁵⁹ *See* Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523, 539 (2004).

⁶⁰ *See* Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 492 (2002).

⁶¹ *See generally* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (photo. reprint 2000) (1832).

⁶² *See* H.L.A. HART, *THE CONCEPT OF LAW* 50–78 (2d ed. 1994); Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 694–700 (1998).

⁶³ *See, e.g.*, Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1677–78 (2002) (reviewing JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001)).

sort that *Riggs* associated with “universal law administered in all civilized countries.”⁶⁴

Even if by some chance a dictum in *Erie* quoting a dissent in *Taxicab*, drawing on a discredited jurisprudence, were to be regarded as authoritative on what law is, it would still not preclude an appeal to *ius gentium* as something that judges might appropriately consider in solving legal problems. For in this critical natural law role, it is not necessary that *ius gentium* be understood positivistically; it need only be seen as a source of normative insight grounded in the positive law of various countries and relevant to the solution of legal problems in this country. In this sense the whole *Erie/Taxicab* apparatus is irrelevant to the sort of role that — on my account — *ius gentium* plays in *Roper*.

VI. LEGAL PROBLEMS AND LEGAL SCIENCE

We do not live in an age in which uttering magic words like “*ius gentium*” is sufficient to license the practice of basing American legal conclusions on non-American legal premises. Invoking the law of nations may confer some jurisprudential respectability. But we also need to consider directly what reasons there are for taking this line of thought seriously at the beginning of the twenty-first century.

I have invoked the image of science and of scientific problem-solving several times to illustrate how a foreign law consensus may be relevant to U.S. legal decisionmaking. Let me now set out this analogy in full. 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.

⁶⁴ See DWORKIN, *supra* note 36, at 23–39.

Of course it is ultimately our decision: “[I]t is a Constitution for the United States of America that we are expounding.”⁶⁵ But that does not preclude turning to the legal consensus of civilized nations for assistance any more than the American origin of an epidemic precludes Americans’ turning to foreign scientists for guidance. It is possible that geographic or cultural peculiarities may distinguish the American experience with the epidemic from experience elsewhere. Still, we would not want to respond arbitrarily to local peculiarities; we should respond on a scientific basis to ascertain which peculiarities should be taken into account and how.

I have emphasized the point that referring to *ius gentium* treats the problems that arise in our courts as though they were questions for legal science. It does not simply look to “foreign moods, fads, or fashions.”⁶⁶ It relies instead on 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. But to ignore foreign solutions, or to refrain from attending to them because they are foreign, betokens not just an objectionable parochialism, but an obtuseness as to the nature of the problems we face.

Under the theory of foreign law citation that I have been outlining, the appeal to foreign law is not a piecemeal practice — as though our courts were taking some inspiration from Britain, some other inspiration from France, and so on. Some defenses of the citation of foreign law take this approach, as though it were a casual matter of getting a little bit of help here and a little bit of help there.⁶⁷ A lot of criticisms of the practice presuppose this approach too. Critics react as though the Supreme Court had cited British law forgetting that the United States declared its independence from Britain 230 years ago,⁶⁸ or as though we had deferred to Zimbabwean law forgetting about

⁶⁵ *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting).

⁶⁶ *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari) (“[T]his Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”).

⁶⁷ See MARY ANN GLENDON, *RIGHTS TALK* 146–59 (1991); Justice Stephen Breyer, Keynote Address Before the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4, 2003), in 97 *AM. SOC’Y INT’L L. PROC.* 265, 266 (2003) (mentioning “the enormous value in any discipline of trying to learn from the similar experience of others”).

⁶⁸ Thus Congressman Ted Poe of Texas reminded us of all the patriots who “spilled their blood . . . to sever ties with England forever. . . . Now, justices in this land of America . . . use British court decisions . . . in interpreting our Constitution. What the British could not accomplish by force, our Supreme Court has surrendered to them voluntarily.” 151 *CONG. REC.* H3105 (daily ed. May 10, 2005) (statement of Rep. Poe).

President Mugabe's human rights record.⁶⁹ Such piecemeal citation would be easy to discredit. Now it might be thought that if it is not all right to cite any particular foreign law or precedent, then it is not all right to cite any consensus or accumulation of foreign authorities. But that way of thinking commits the fallacy of composition. On the analogy I have been using, what characterizes a consensus in biology or epidemiology is not just that it is an accumulation of authorities, but that it represents a dense network of checking and rechecking results, experimental duplication, credentialing, mutual elaboration, and building on one another's work. Likewise, *ius gentium* is more than the sum of its parts, and, as a dense and mutually reinforced consensus, it may have a pertinence to our law that its individual constituents do not have. This fact means that *ius gentium* may not be "foreign" in the objectionable sense in which the constituent elements of it are foreign.⁷⁰

In the public health analogy, we would certainly expect our scientists to look only to findings we had reason to trust; they would not look to the work of suspect or disreputable laboratories. Similarly, a *ius gentium* inquiry may restrict itself to consensus among "civilized" or "freedom-loving" countries.⁷¹ As I said earlier, discerning the normatively relevant consensus is a matter of reflective equilibrium between the positive law experience and our sense of the right premises with which to approach this problem. Since *ius gentium* is not a purely descriptive consensus, an appeal to it need not be indiscriminate as to the quality of the laws on which it draws. Maybe we should not give weight to courts in Zimbabwe or the Sudan. By analogy we might not expect our public health officials to look to North Korea for guidance in their response to a possible avian flu epidemic.

I do not expect any of this to convince those who see law as purely a matter of will.⁷² 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 logic of a

⁶⁹ See *Knight v. Florida*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting from denial of certiorari) (citing the Supreme Court of Zimbabwe).

⁷⁰ Cf. Daniel R. Coquillette, *Ideology and Incorporation III: Reason Regulated — The Post-Restoration English Civilians, 1653–1735*, 67 B.U. L. REV. 289, 294 (1987) ("By Roman law definition, *ius gentium* was not 'foreign' law because it was an inherent part of the law of all, or most, countries.")

⁷¹ *Reynolds v. United States*, 98 U.S. 145 (1879), presents a remarkable instance of an appeal to a very restricted consensus. See *id.* at 164 ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.")

⁷² See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11 (1959) (cautioning that "[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").

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. For you it is just a matter of will, and the question is “Whose will should prevail?” And you will see in the citation of foreign law nothing much more than “the subjective views of five Members of this Court and like-minded foreigners.”⁷³ I have presented law in a different light, as essentially a problem-solving enterprise. And I am sure that if the invocation of foreign law is to be defended, then it has to be on grounds like this.

VII. CONCLUSION

My aim in this Comment has been to present a theory of the citation of foreign law, not a justification of the actual use that American courts have made of foreign law. What troubled me at the outset of this Comment was that the Supreme Court in *Roper* failed to articulate any general ideas or standards by which its use of foreign law might be evaluated. For reasons I have indicated, a pure theory of natural law does not fit the bill, but a theory articulated in terms of *ius gentium* does.

I am under no illusion, however, that the practice of the Supreme Court in *Roper* and in other cases⁷⁴ actually answers to the characterization I have given. Practice often falls short of theory — particularly when the practitioners have not shown much awareness of the theory in question! And there are all sorts of pitfalls and temptations associated with a theory as loose as this. No crisp or precise litmus test defines the sort of international consensus that makes up *ius gentium* on any particular subject. It is, as we have seen, a matter of interpretation, and so there is always the prospect that a judge will invoke this theory opportunistically, picking and choosing the consensus he relies on, to reinforce conclusions that he wanted to reach anyway. For those who see law as a matter of will, this sort of theory is at best just an opportunity for haphazard legitimation. But for those who do see legal decision as a matter of reasoning one’s way through problems, my account may help to explain why courts turn naturally to foreign law. The real contrast between those who oppose and those who defend the use of foreign law in American legal reasoning is *not* that jurists in the first group are parochial and the second cosmopolitan. It is rather this contrast between law as will and law as reason. Those who approach the law as a matter of will do not see any reason why expressions of will elsewhere in the world should affect our expressions

⁷³ *Roper*, 125 S. Ct. at 1217 (Scalia, J., dissenting).

⁷⁴ See *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003); *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (plurality opinion).

of will in America. But those who see law as a matter of reason may well be willing to approach it in a scientific spirit that relies not just on our own reasoning but on some rational relation between what we are wrestling with and what others have figured out.