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# “The Experience and Good Thinking Foreign Sources May Convey”: Justice Ginsburg and the Use of Foreign Law

JEREMY WALDRON\*

*This Article is an appreciation of Justice Ruth Bader Ginsburg's defense of the Supreme Court's use of foreign law, particularly her arguments about what our courts can learn from the work that foreign courts have done. The Article extends and develops Justice Ginsburg's account, drawing an analogy between courts learning from one another, and scientists learning from one another in a community of inquiry.*

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\* University Professor, New York University Law School. Some material in this Article is drawn from chapter four of my book, “PARTLY LAWS COMMON TO ALL MANKIND”: FOREIGN LAW IN AMERICAN COURTS (forthcoming Yale University Press 2012).

## I.

In the debate about the citation of foreign law that exploded in 2005 in the wake of the Supreme Court's decision in *Roper v. Simmons*,<sup>1</sup> Justice Ruth Bader Ginsburg has been a distinguished proponent of the view that there can be no objection to a court's referring to the decisions of other courts in the course of its own reasoning and that much is to be gained in the way of insight and learning from close attention to the way in which foreign courts solve problems that are similar or analogous to the problems that we face. "Foreign opinions," she says, "are not authoritative; they set no binding precedent for the U.S. judge. But they can add to the store of knowledge relevant to the solution of trying questions."<sup>2</sup>

True, she acknowledges that the United States has been a leader, not a follower, in the establishment of modern constitutionalism, but she quotes with approval Judge Guido Calabresi's observation that "[w]ise parents do not hesitate to learn from their children."<sup>3</sup> In Justice Ginsburg's view, the learning should go on in both directions. It is, she says, a matter of "comparative dialogue," not just learning from others, but sharing with them.<sup>4</sup> The solutions that we have found for certain legal problems that are analogous to the problems that they face are evidently helpful to them.

Let me offer a mundane example to illustrate that point. Some years ago, a court in New Zealand followed American lines of reasoning in the course of disposing of a case about flag burning.<sup>5</sup> The case was *Hopkinson v Police*, concerning a young man who set fire to a flag on the grounds of the New Zealand Parliament, protesting a visit by the Australian Prime Minister over some concern about Australian participation in the second Iraq war.<sup>6</sup> He was arrested, charged, and convicted under the Flags, Emblems, and Names Protection Act 1981, a

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1. 543 U.S. 551 (2005). But the debate had been simmering in a line of cases concerning the use of foreign law in decisions about the death penalty. *See generally* *Foster v. Florida*, 537 U.S. 990 (2002) (denying certiorari); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Knight v. Florida*, 528 U.S. 990 (1999) (denying certiorari, but debating the role of foreign law in Eighth Amendment jurisprudence); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977).

2. Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind": *The Value of a Comparative Perspective in Constitutional Adjudication*, 26 ST. LOUIS U. PUB. L. REV. 187, 190 (2007).

3. Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind": *The Value of a Comparative Perspective in Constitutional Adjudication*, 99 AM. SOC'Y INT'L L. PROC. 351, 352 (2005). This is a slightly different version of the article cited *supra* note 2. The quote came from Judge Calabresi's opinion in *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995).

4. Ginsburg, *supra* note 2, at 188.

5. *Hopkinson v Police* [2004] 3 NZLR 704 (HC), ¶¶ 50, 66 (citing *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990)).

6. *Id.* ¶ 4.

statute that makes it an offense to destroy the New Zealand flag with the intention of dishonoring it.<sup>7</sup> Mr. Hopkinson appealed his conviction on the ground that burning a flag in protest was not a way of dishonoring the national symbol, at least not under any interpretation of “dishonor” that would avoid conflict with the free speech provisions of the New Zealand Bill of Rights Act 1990 (“NZBORA”).<sup>8</sup>

The New Zealand court followed the order of inquiry laid down in American cases like *Texas v. Johnson*,<sup>9</sup> deciding first whether protection of the flag was a legitimate legislative goal, and only then turning to the inquiry about whether an across-the-board prohibition on flag burning was an appropriately tailored measure to use in pursuit of that goal.<sup>10</sup> The New Zealand judge also cited a New Jersey precedent as persuasive authority for the proposition that “dishonoring” the flag may have, for the purposes of the NZBORA, a limited meaning that does not necessarily comprehend ceremonial burning as a political act.<sup>11</sup>

*Hopkinson* is a case of minor importance, and I very much doubt that it has come to Justice Ginsburg’s attention. But it illustrates in a usefully mundane way the proposition that countries venturing in relatively recent times into rights-based review can and do pay attention to the work of legal systems that have been doing it for centuries. I call the case “usefully mundane” precisely because it is not a momentous decision taken at the apex of a court system but just business as usual in a relatively low-level appeal.<sup>12</sup> This was nothing fancy, just a case before an ordinary working judge. But it did involve the citation of foreign law. Reading it helps us to see that what seems like a big deal in the

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7. *Id.* ¶¶ 1, 13. Section 11 of the Flags, Emblems, and Names Protection Act 1981 states: “Offences involving New Zealand Flag: (1) Every person commits an offence against this Act who . . . (b) in or within view of any public place, uses, displays, destroys, or damages the New Zealand Flag in any manner with the intention of dishonouring it.”

8. *Hopkinson*, 3 NZLR ¶¶ 22–24. New Zealand has a form of very weak judicial review, which requires courts to choose, among available interpretations of offending statutes, those that are most congenial to the letter and the spirit of the NZBORA. Under Section 14 of NZBORA, “[e]veryone has the right to freedom of expression.” Section 6 of the NZBORA directs an interpretation consistent with the Bill of Rights to be preferred “[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms” in the Bill of Rights. New Zealand Bill of Rights Act 1990, pt. 1, § 6.

9. 491 U.S. 397 (1989).

10. *Hopkinson*, 3 NZLR ¶¶ 43–77.

11. *Id.* ¶ 79 (citing *State v. Schlueter*, 23 A.2d 249, 251 (N.J. 1941)).

12. Justice France, who decided *Hopkinson*, is now on the New Zealand Court of Appeal, but the High Court in which she sat in this case is just one step up from the district court where Mr. Hopkinson was initially convicted. (There are two appellate levels above the High Court in New Zealand: the Court of Appeal and the Supreme Court.) *The Role of the Courts*, COURTS OF NEW ZEALAND, <http://www.courtsofnz.govt.nz/about/system/role/overview> (last visited May 1, 2012); *The Judges of the Court of Appeal*, COURTS OF NEW ZEALAND, <http://www.courtsofnz.govt.nz/about/appeal/judges> (last visited May 1, 2012).

American context is often done quite easily and without fuss in other courts, high and low, around the world.

Perhaps we should say, then, that if courts in other countries are willing to do this and show themselves capable of doing it, we in the United States, in our turn, should not be shy about occasionally seeking enlightenment for our own problem solving from the laws and decisions of other nations.<sup>13</sup> As Justice Ginsburg puts it,

[i]f U.S. experience and decisions can be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so we can learn from others including Canada, South Africa, and most recently the U.K.—now engaged in measuring ordinary laws and executive actions against charters securing basic rights.<sup>14</sup>

After all, as she points out, “[j]udges in the United States are free to consult all manner of commentary—Restatements, Treatises, what law professors or even law students write copiously in law reviews.”<sup>15</sup> If these can be cited, then why not the similarly erudite analysis “contained in an opinion of the Supreme Court of Canada, the Constitutional Court of South Africa, the German Constitutional Court, or the European Court of Human Rights?”<sup>16</sup>

Other Supreme Court Justices have joined Justice Ginsburg in her defense of this practice. Justice Breyer has spoken of “the enormous value in any discipline of trying to learn from the similar experience of others.”<sup>17</sup> The practice of citing foreign law, he says, “involves opening your eyes to what is going on elsewhere, taking what you learn for what it is worth, and using it as a point of comparison where doing so will prove helpful.”<sup>18</sup> Former Justice O’Connor believes that “there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.”<sup>19</sup> She says,

Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day; they offer much from which we can learn and benefit. . . . Our flexibility—our ability to borrow ideas from other legal systems—is what will enable us to remain progressive, with systems that can cope with a rapidly shrinking world.<sup>20</sup>

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13. See Ginsburg, *supra* note 2, at 187.

14. *Id.*

15. *Id.* at 193.

16. *Id.*

17. Stephen Breyer, *Keynote Address*, 97 AM. SOC’Y INT’L L. PROC. 265, 266 (2003).

18. Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 524 (2005).

19. Sandra Day O’Connor, *Keynote Address*, 96 AM. SOC’Y INT’L L. PROC. 348, 350 (2002).

20. SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 234–35 (2003).

## II.

In a comment published in 2005,<sup>21</sup> shortly after the decision in *Roper v. Simmons*, I expressed some concern that we do not yet have anything like a good jurisprudential theory of the citation of foreign law, comparable (say) to the theories that we have for the citation of precedents:<sup>22</sup>

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).<sup>23</sup>

It has to be convincing enough to dispel the serious misgivings that many Americans have about this practice in relation to their national sovereignty and their values of democracy and self-determination.<sup>24</sup> Above all, it has to be a theory of law, a theory that treats the citation of foreign decisions not just as *a rather good idea*, but as something that can be integrated into a coherent jurisprudence.<sup>25</sup>

The practice need not be defended as immune to abuse. In his dissent in *Roper*, Justice Scalia said that the Court's citation of foreign law was unprincipled and opportunistic.<sup>26</sup> But it does not follow that there cannot be a good theory to support such a practice. Using my analogy again, Justice Scalia has sometimes claimed that the Court's following and departing from precedent is unprincipled and opportunistic.<sup>27</sup> But this does not mean he rejects *stare decisis* or 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 judges cite foreign law opportunistically; we should reject it only if we think unprincipled citation is inevitable under the auspices of such a theory.<sup>28</sup>

Justice Ginsburg's comments point us in the direction of one line of theoretical justification.<sup>29</sup> The justification Justice Ginsburg advances

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21. Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 129–31 (2005). The two following paragraphs are drawn from these pages.

22. See, e.g., NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* (2008); MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* (2008).

23. Waldron, *supra* note 21, at 129–30.

24. *Id.*

25. *Id.*

26. *Roper v. Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting); Waldron, *supra* note 21, at 130.

27. See, e.g., *Lawrence v. Texas*, 539 U.S. 538, 586–87 (2003) (Scalia, J., dissenting); see also Waldron, *supra* note 21, at 130–31.

28. Waldron, *supra* note 21, at 131.

29. There are other lines worth exploring, too, such as the idea that in areas of fundamental rights

rests on the idea that our courts can learn from what other courts in other countries are doing when they address questions that are the same or substantially similar to questions we are addressing.

Before I address these issues in depth, I should mention in addition that Justice Ginsburg has also made a start in the rebuttal of some of the more common objections to this practice. Against those who worry about differences in the circumstances—legal, social, and political—in which foreign decisions are made, she says, “Yes, we should approach foreign legal materials with sensitivity to our differences,” but she insists that such sensitivity by itself “should not lead us to abandon the effort to learn what we can from the experience and good thinking foreign sources may convey.”<sup>30</sup> This is surely right: Lawyers relate principles and precedents to differences of circumstance all the time; it is one of the things we are supposed to be good at.<sup>31</sup> We do it for case-by-case reasoning, we do it when we rely on old American precedents for modern constitutional decisions, and constitutional originalists have to do it all the time to bring the sayings of the Founding Fathers into some intelligent relation with circumstances today that are massively different from those of 1787. Justice Ginsburg also addresses the deficiencies and imperfections that may characterize the citation of foreign law at the moment. We must be sensitive to these, she says, and make an effort to correct the imperfections, but again that is no reason to discontinue the practice as opposed to trying to improve it.<sup>32</sup>

Finally, she addresses the objection from democracy, insisting first that it must be answered in the context of the already accepted practice of strong judicial review: We must begin by taking notice of “the fact that the judiciary is an undemocratic institution—at least the federal judiciary

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it is good to have a degree of consistency or integrity throughout the world as well as within particular legal systems. I have elaborated that rather difficult argument elsewhere, and I will not pursue it in the present Article. See Jeremy Waldron, *Treating Like Cases Alike in the World: The Theoretical Basis of the Demand for Legal Unity*, in HIGHEST COURTS AND GLOBALISATION 99 (Sam Muller & Sidney Richards eds., 2010); JEREMY WALDRON, “PARTLY LAWS COMMON TO ALL MANKIND”: FOREIGN LAW IN AMERICAN COURTS, ch. 5 (forthcoming Yale University Press 2012) [hereinafter WALDRON, ALL MANKIND]. This second line of argument is particularly important for thinking about cases where the Court seems to be simply invoking statistics about foreign law—for instance, what proportion of countries have the juvenile death penalty—rather than gleaning insights from particular opinions. For this point, see Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 151–53 (2005), and Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 653, 681 (2009). However, there has been some suggestion in the literature that we can learn even from the sheer numbers, in the spirit of Condorcet’s jury theorem. See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 140–43 (2006) (drawing upon Marquis de Condorcet, *Essay on the Application of Mathematics to the Theory of Decision-Making*, in CONDORCET: SELECTED WRITINGS 33, 48–49 (Keith Michael Baker ed., 1976)).

30. Ginsburg, *supra* note 2, at 190.

31. I argue this at length in WALDRON, ALL MANKIND, *supra* note 29, ch. 7.

32. Ginsburg, *supra* note 2, at 190.

is—we're appointed, not elected, and we're there for life."<sup>33</sup> She emphasizes that foreign law is never cited as binding, and she asks whether, once that point is accepted, "looking at a decision by Aharon Barak, Chief Justice of the Israeli Supreme Court, is any less democratic than reading a law review piece by a U.S. law professor."<sup>34</sup>

It is worth distinguishing whatever controversies we have about the democratic character of judicial review from our controversies about the materials that are appropriately cited to interpret constitutional provisions and bills of rights. Even if we had only weak judicial review, of (say) the British model, we would still have to argue about the place of precedent, legal scholarship, and foreign sources in our understanding of the relevant provisions.<sup>35</sup>

However, I want to focus on the main line of argument: the epistemic argument based on gaining knowledge from looking abroad.<sup>36</sup> Justice Ginsburg has pointed us in a fruitful direction. But is it possible to flesh out the account of what sort of learning is involved and how exactly, for the purposes of a legal theory or a theory of judicial reasoning, this learning is supposed to take place? I guess someone might ask whether we actually need a whole theory. Justice Ginsburg's account is offered in terms of "comparative side glances"<sup>37</sup> rather than anything grand like a juridical epistemology. But in fact her observations indicate a number of ways in which the learning-from-others argument might be elaborated.

Thus, for example, she refers to foreign law as "a pool of potential and useful information,"<sup>38</sup> and we surely want our judicial opinions here to be well-informed. She implies that foreign law can furnish us with possible solutions to the legal problems that we face, when our own menu of solutions looks a little meager:

Other courts are now grappling with problems similar to problems we confront. Right now, most urgently, the balance between liberty and security occupies our attention. Would it not be instructive to look at how the Supreme Court of Israel, for example, has dealt with terrorist cases similar to those now coming before our courts?<sup>39</sup>

She suggests also that reference to foreign law may function sometimes as a means to test "understanding of one's own traditions and

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33. Ruth Bader Ginsburg, *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 *CONN. L. REV.* 1033, 1041 (2004).

34. *Id.*

35. I have pursued this line of argument in Jeremy Waldron, *Rights and the Citation of Foreign Law*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* 410 (Tom Campbell et al. eds., 2011) and in WALDRON, *ALL MANKIND*, *supra* note 29, ch. 6.

36. Ginsburg, *supra* note 33, at 1040.

37. Ginsburg, *supra* note 2, at 192.

38. *Id.* at 190 (quoting Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 *HARV. J.L. & PUB. POL'Y* 431, 439 (2004)).

39. Ginsburg, *supra* note 33, at 1041.



possibilities by examining them in the [reflected light cast by other legal systems].”<sup>40</sup> Such tests may sometimes be negatively as well as affirmatively suggestive.<sup>41</sup> And at one point she cites the words of Patricia Wald, saying that reference “to decisions rendered abroad,” may provide us with indications of “common denominators of basic fairness governing relationships between the governors and the governed.”<sup>42</sup> These are all highly suggestive remarks. But they are compactly expressed, and I hope I will not be read as overinterpreting them if I try to expand upon these observations in the context of this argument about learning from others.

### III.

Let us begin with Justice Ginsburg’s idea of “a pool of potential and useful information.”<sup>43</sup> Information about what? All sorts of things go into a judicial opinion: concepts, insights, empirical evidence, doctrinal tests, lines of argumentation, rules, principles, the weighing of principles, the citation and weighing of precedents, interpretive strategies, moral values, and so on. What category of knowledge is supposed to be in this pool of potential and useful information, made accessible to us by recourse to foreign law?

Is it that we can gain empirical insight? Consider *Roper v. Simmons*, the juvenile death penalty case.<sup>44</sup> The decision was based in large part on certain propositions in social psychology, to the effect that young people have an underdeveloped sense of responsibility, often resulting in impetuous and ill-considered actions and decisions; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and the character of a juvenile is not as well formed as that of an adult.<sup>45</sup> “These differences,” as the Court said, “render suspect any conclusion that a juvenile falls among the worst offenders” (which of course is the conclusion constitutionally required for the application of the death penalty).<sup>46</sup> But as Ernest Young points out, the Supreme Court of the United States did not need to learn all that from its foreign counterparts; our Justices already knew it, because it was set out at the beginning of Justice Kennedy’s opinion for the Court, long before he got to the issue of foreign law.<sup>47</sup>

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40. Ginsburg, *supra* note 2, at 191–92 (quoting Vicki C. Jackson, Comment, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 114 (2005)).

41. See Ginsburg, *supra* note 3, at 354.

42. *Id.* (citing Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL’Y 431, 439 (2004)).

43. Ginsburg, *supra* note 2, at 190.

44. 543 U.S. 551 (2005).

45. *Id.* at 569–70.

46. *Id.* at 570.

47. See Young, *supra* note 29, at 148–49.

Sometimes, however, the empirical material that is needed for responsible decisionmaking is not available locally. In *Washington v. Glucksberg*, Chief Justice Rehnquist drew heavily on Dutch experience with a scheme of legalized euthanasia to establish a good sense of the regulatory challenges that would surround the practice and to argue against simply blundering into this area with judicial fiat.<sup>48</sup> And Justice Ginsburg has suggested that we can become acquainted with some truths of political science, relevant to our Constitution, from the experience of other countries with similar structures (and sometimes from their experience with dissimilar structures).<sup>49</sup> As an example, she mentions Vicki Jackson's discussion of Justice Robert Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>50</sup> citing, as it did, the experience of other Western countries with emergency powers arrangements of various kinds.<sup>51</sup>

In her discussion of Vicki Jackson's work, Justice Ginsburg mentions also the negative value that information derived from foreign sources may have.<sup>52</sup> Foreign experience with some constitutional arrangement might help to refute or cast doubt upon commonly accepted claims in the United States about what the consequences of such arrangements might be. It is sometimes hard to break out of locally established mindsets, and reference to foreign law, if undertaken carefully, can help us do this. As Laurie Ackerman, formerly of the South African Constitutional Court, once explained,

one can easily become trapped into a sort of tunnel vision, from which it is difficult to escape, or to see other or lateral answers. . . . It is in this context that foreign law can play a particularly valuable role. It may be that, when one commences the enquiry into foreign law one is psychologically hoping to find confirmation for one's hypotheses, but if one remains alive to falsifying possibilities, the foreign law can be of particular value.<sup>53</sup>

This is particularly important to help us move beyond the narrow language of "confirmation" in Justice Kennedy's account of the use of

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48. 521 U.S. 702, 710 n.8, 730, 732, 734–35 (1997).

49. Ginsburg, *supra* note 3, at 354–55.

50. 343 U.S. 579, 634 (1952).

51. Justice Ginsburg discusses congressional testimony given by Vicki Jackson on this matter. See Ginsburg, *supra* note 3, at 354–55; Ginsburg, *supra* note 2, at 192–93; see also Vicki C. Jackson, *Constitutional Law and Transnational Comparisons: The Youngstown Decision and American Exceptionalism*, 30 HARV. J.L. & PUB. POL'Y 191, 199–200 (2006).

52. Ginsburg, *supra* note 3, at 354; Ginsburg, *supra* note 2, at 192.

53. Laurie W.H. Ackermann, *Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke*, 80 TUL. L. REV. 169, 185 (2005). There are similar suggestions, too, in SIR BASIL MARKESINIS & JÖRG FEDTKE, *JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION?* 127, 135 (2006), in subheadings such as "When foreign experience . . . help[s] disprove locally expressed fears about the consequences of a particular legal solution" and "When the foreign law provides 'additional' evidence that a proposed solution has 'worked' in other systems."

foreign law in *Roper*.<sup>54</sup> It is an old Popperian insight that looking for possible refutations is epistemically much more respectable in empirical inquiry, and more productive, too, than just looking smugly for possible confirmations.<sup>55</sup>

#### IV.

Besides empirical information and analysis, what else can be learned from the reasoning in a foreign decision? Are we supposed to be able to glean some new moral insight from a foreign precedent? For example, did the Court in *Roper* learn something about the abhorrent nature of the juvenile death penalty from its survey of its abolition the world over? Probably not. The pros and cons were pretty well-known in the United States already, although it is salutary to be reminded of the ferocity with which the death penalty is condemned in other jurisdictions. It is also worth ascertaining the moral view that other legal systems take of some options which seem obvious to us. For example, in the juvenile death penalty debate, I find that many Americans believe that life imprisonment without parole is a humane alternative punishment. Few are aware that other countries adamantly oppose life without parole as an alternative punishment for murder, certainly as an alternative punishment for juveniles. They see that, too, as a violation of human rights.<sup>56</sup> So there is some learning to be done here, if not about moral truth itself, then about the nature and prevalence of certain moral attitudes that are quite strikingly different from our own and about the significance of the disparity. The argument is not that we should simply “fall into line” with a global consensus on this matter. But awareness of difference is nevertheless the beginning of wisdom, if only because it provides an occasion for a deeper consideration of what were previously firm, but largely thoughtless, convictions.<sup>57</sup> This must be in large part what Justice Ginsburg means when she talks about enhancing one’s “understanding of one’s own traditions and possibilities by examining them in the [reflected light cast by other legal systems].”<sup>58</sup>

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

55. KARL POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 36 (1962).

56. See DIRK VAN ZYL SMIT, *TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW* (2002).

57. Justice Breyer’s writing about European doctrines of “the death row syndrome” in his dissents (from denials of certiorari) in *Knight v. Florida*, 528 U.S. 990, 996 (1999), and *Foster v. Florida*, 537 U.S. 990, 992 (2002), may also fall into this category.

58. Ginsburg, *supra* note 2, at 191–92 (internal quotation marks omitted).

## V.

In my view, the most interesting understanding of the epistemology involved in our courts' use of foreign law is not empirical information, not general public policy, and not even moral philosophy (pure or applied). It is rather a specifically *legal* epistemology: We stand to gain in terms of our ability to conduct and engage in legal analysis. I mentioned above Justice Ginsburg's observation that American judges are free to consult and to cite in their opinions "all manner of commentary—Restatements, Treatises, what law professors or even law students write copiously in law reviews."<sup>59</sup> When they refer to these sources, judges do so not for information or moral insight necessarily, but for suggested pathways of analysis through difficult legal problems.

Lawyers and judges have a particular way of approaching problems. If you put an issue before a lawyer—such as the juvenile death penalty—she will (if she has time) carefully take the issue apart, separating the application of various principles from one another, and laying out in some logical order a series of hard, interlocking, and quite abstract questions about the nature of culpability, the use of bright lines (such as an age of majority), the different functions of adult and juvenile courts, the *in terrorem* effects of being tried as an adult, the purposes of punishment, the rights of victims and their families, the impact of punishment on a young person (particularly in the way it relates individual action to outcomes over the course of a whole life), the connection between the mental element in culpability and the capacity to foresee the long-term impact of punishment, the purpose of having an array of penalties from the least to the most severe, and the nature and safeguards of whatever accompanying discretion might be vested in a court. A lawyer will lay all of that out and try to figure a way through the maze of these articulated issues. That is also what we legal scholars do in (the best of) our law review articles and that, too, is what is done in doctrinal treatises and restatements (not just in criminal law and constitutional law, but in areas of private law also).

Something like this sort of analysis is typical of lawyerly thinking and mentality the world over. We recognize someone as a lawyer as much by her use of this method as by her citation of codes, statutes, and precedents, though normally we would expect to see both. No doubt, in my example, lawyers from different jurisdictions would work through the issues I have mentioned in a different order, with a different structure. Some elements might be omitted, some others included, depending on the particular features of their legal system. They will be guided by the formal elements of their code or by the doctrines that emerge from the

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59. *Id.* at 193.

precedents they study. But, one way or another, this is what lawyers' reasoning is like.

A lawyer, when she confronts a problem, tries to anatomize it, uncover its underlying structure and the order in which the issues entangled in the problem are best addressed. In this she is encouraged by the lawmakers to whose activity she is necessarily responding. For example, a lawyer's mode of analysis matches what statute drafters do when they are writing legislation to address a difficult problem. Legislators don't just simply say, "Do this" or "Don't do that." They identify an array of considerations under which conduct, described in a certain way or having certain characteristics (mental, physical, and circumstantial), is to be regarded as prohibited or obligatory. Having laid down a rule in that complex form, legislators might also identify certain exceptions, which might also be complex in character. Then the statute will stipulate consequences that are attached to the prohibited activity (with these characteristics, in these conditions, and absent these exceptions), consequences that will have a procedural as well as a substantive aspect. In these ways, a provision of positive law provides a template for analyzing a messy situation. The idea is that each element of statutory complexity corresponds to some important piece of the behavioral or situational jigsaw, so that analyzing a real-world problem in the way the statutory template indicates is not just a way of falling into line with the law; it is also a way of guaranteeing that the things identified and ordered in the analysis are important elements and dealt with in the structure in an appropriate order of priority. As I say, this is apparent in complex statutory provisions, but it is apparent also in common law doctrine and in the tests and elaborations that courts, responding to their own estimations of what is important, add to the statutory language to make it capable of dealing adequately with situations that, whether the drafters foresaw it or not, have to be dealt with under the auspices of the statutory analysis.

In some circles all this is controversial. Some jurists suggest we should abandon any pretense of any distinctive and autonomous analytic method for our profession.<sup>60</sup> They think we should retool ourselves and move to something more like direct public policy advocacy or economic or social analysis.<sup>61</sup> For anyone in this category, what I am saying will be unconvincing. For them, the learning that takes place when American judges consult foreign sources can be only empirical or public policy learning. It cannot be anything distinctively legal. Certainly, one would not want to push the line I am taking too far. Though I have in mind specifically legal learning, I am not predicating my argument here on any

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60. *See, e.g.*, RICHARD A. POSNER, *OVERCOMING LAW* 387-405 (1995).

61. *Id.*

wholesale resurrection of doctrinal formalism of a Langdellian kind.<sup>62</sup> If we are summoning up the idea of a distinctly legal epistemology or a distinctively legal mode of analysis and if we are imagining judges taking lessons in it from one another across jurisdictional lines, we must show that this episteme is not simply a word game or an unreal “heaven of concepts,”<sup>63</sup> that we are not just teaching one another new ways of “trapezing around in [abstract] cycles and epicycles” without coming down to earth on any meaningful grounding.<sup>64</sup>

I actually do think there is substance—quite important substance—in what I am calling the lawyerly approach, in this way of analyzing and unpacking issues that lawyers learn and that they can recognize in one another and help one another with, even when they come from different countries. What I have called legal epistemology involves analysis and abstraction, but it is not analysis undertaken for its own sake or abstraction just because we are comfortable with high-flown words. The abstract analysis, the unpacking or disentangling of complex problems, and then their reconstitution into an orderly series of clear questions—all of this has a point. It helps us pursue concerns about consistency and fairness, so that we abstract away from superficial characteristics and deal with deeper and less obvious similarities or differences between one case and another. We do this because we think issues of fairness are important even when they are not obvious, and when there are multiple issues of fairness it is important that they be dealt with in a systematic way. A passage that Justice Ginsburg cites from Patricia Wald is important here. Judge Wald suggested that reference to “decisions rendered abroad” may provide us with indications of “common denominators of basic fairness governing relationships between the governors and the governed.”<sup>65</sup>

In other words, the lawyer’s method of analysis and abstraction is important from the point of view of justice. When we take a messy and complex situation and try to unravel the separate lines of principle that are involved, we are pulling threads and following leads that involve the clear identification of the reasons law associates with justice. Clear analysis and explicit identification of issues is a way of being scrupulous

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62. For helpful characterizations of the formalism of the late nineteenth century Harvard law professor Christopher Columbus Langdell—from which I am trying to distance myself here—see Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); see also Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607 (1999). For a modern version of that sort of formalism, see Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

63. Cf. H.L.A. Hart, *Jhering’s Heaven of Concepts and Modern Analytical Jurisprudence*, in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 265 (1983).

64. Cf. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814 (1935).

65. *Ginsburg*, supra note 3, at 354 (quoting Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL’Y 431, 439 (2004)).

in our attention to the reasons that law associates with the just rather than unjust disposition of cases like the one we are considering. I don't mean that the law that gives us these categories is always just. But it presents itself as aiming at justice, and it presents the methodology it commands as a way of being maximally responsive in a systematic way to the considerations it defines as key to the justice of the matter.<sup>66</sup>

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

## VI.

What I have just said is important also for understanding foreign courts' use of U.S. constitutional law. In a variety of areas, American law has distinguished itself by developing orderly and fair pathways of analysis through difficult and serious issues of legal doctrine. I mentioned already the use made of U.S. First Amendment analysis by a New Zealand court in the case of *Hopkinson*.<sup>67</sup> It may be helpful to provide another example—this one from South Africa.

When Nelson Mandela became President in 1994, one of the first things he did was issue an order for pardon or amnesty freeing all mothers in prison with minor children under the age of twelve years.<sup>68</sup>

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66. See H.L.A. HART, *THE CONCEPT OF LAW* 157-66 (1994).

67. See *supra* text accompanying notes 5-11.

68. The order stated:

In terms of section 82(1)(k) of the Constitution of the Republic of South Africa, 1993 . . . I hereby grant special remission of the remainder of their sentences to . . . all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years . . . . Provided that no special remission of sentence will be granted for any of the following offences or any attempt, soliciting or conspiracy to commit such an offence: murder; culpable homicide; robbery with aggravating circumstances; assault with intent to do grievous bodily harm; child abuse; rape; any other crimes of a sexual nature; and trading in or cultivating dependence producing substances.

Presidential Act 17 (1994), cited in *President of the Republic of South Africa v. Hugo* 1997 (6) BCLR 708 (CC) ¶ 2 n.3.

John Hugo, being a man, was not eligible for the amnesty, although he met its other conditions: He was serving a fifteen year sentence and he had an eleven-year-old son whose mother had died.<sup>69</sup> So Hugo sued, complaining that the President's action violated the constitutional prohibition on discrimination, disqualifying him from amnesty, as it did, on the ground of sex or gender.<sup>70</sup>

The South African Constitutional Court had to decide (1) whether this action of the President's was judicially reviewable, (2) whether it constituted discrimination against Mr. Hugo, and (3) if it did, whether there might be extenuating circumstances that would allow the President's order to stand.<sup>71</sup> The case posed an intriguing tangle of issues. Is something akin to a presidential pardon reviewable for failing to conform to some general standard like nondiscrimination? Can an act of mercy be discriminatory, or unfairly discriminatory, if the applicant has no right to it, and if—as is clear in a country where male prisoners outnumber female prisoners by fifty to one—an insistence that men and women be treated equally in this regard might well lead to no amnesty at all? Given that women usually occupy a subordinate role in South African families, and given that they almost always have primary responsibility for the upbringing of children, can it really be said that a man is discriminated against by a measure seeking to benefit women prisoners in a specifically family context?<sup>72</sup> If the President's order is an infringement of the right to nondiscrimination, is it a justifiable infringement in terms of the provision that, in the South African Constitution (as in the bills of rights of many countries the world over), permits rights to be limited by laws of general application, provided such limitation is reasonable and justifiable in a free and democratic society?<sup>73</sup> Can an act of amnesty be regarded as a law of general application, and so on?

One of the striking things about the list of issues I have mentioned is that on every one of them, Richard Goldstone, who wrote for the Constitutional Court, and his fellow judges (some concurring in his decision and some dissenting) referred in detail to the law of other jurisdictions. They refer to American, German, Irish, Israeli, English, and other Commonwealth case law on the judicial reviewability of prerogative actions and the power to pardon, charting a sea change in

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69. *See Hugo* 1997 (6) BCLR ¶ 1.

70. *Id.* ¶ 3.

71. *Id.* ¶¶ 4–5, 9.

72. *Id.* ¶¶ 37–38.

73. “The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation—(a) shall be permissible only to the extent that it is—(i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality.” S. AFR. (INTERIM) CONST., 1993, § 33(1). This provision of the Interim Constitution of 1993, which was in force at the time, is now replaced by Article 36 (1) of the 1996 final version of the Constitution.



constitutionalism around the world that has brought executive prerogative powers under the supervision of the rule of law.<sup>74</sup> There is extensive discussion of the American position on the presidential power to pardon, including controversies among American judges about the analogies and differences between the presidency and the position of the English monarch so far as prerogative power is concerned.<sup>75</sup> The judges refer to Canadian authority on the meaning of discrimination and its relation to the value of human dignity, particularly the dignity of groups.<sup>76</sup> And several of the judges who considered the application of the reasonable limitation clause cited Canadian cases as authority for the proposition that, despite appearances, the presidential order could be regarded as a law of general application.<sup>77</sup> Reading all of the opinions, one gets a sense of the judges using foreign law to get their bearings among a tangle of issues—exploring the options and following pathways pioneered by other courts—to consider various possible models of analysis.

For what it is worth, the outcome was that the court declined to overturn the President's decree.<sup>78</sup> The majority (seven judges) reasoned that although the measure formally discriminated against Mr. Hugo it did not do so unfairly; the presumption of unfairness was rebutted by the fact that men did not suffer by the President's action the loss of any right or legal advantage to which they otherwise would have been entitled.<sup>79</sup> The court said, "The Presidential Act may have denied them an opportunity it afforded women, but it cannot be said that it fundamentally impaired their rights of dignity or sense of equal worth."<sup>80</sup> Three judges thought the decree did constitute unfair discrimination, but one of them argued that, as a general measure, it was nevertheless reasonable and justifiable in an open and democratic society.<sup>81</sup> So in the end there were only two dissenters from the outcome.

The fact that the South African Constitutional Court devoted so much attention to foreign law should come as no surprise to anyone familiar with its jurisprudence and its constitutional position. Section 35 of the Interim Constitution, under which *Hugo* was decided, lays out that "[i]n interpreting the provisions of this Chapter [Fundamental Rights] a court of law shall . . . where applicable, have regard to public international law applicable to the protection of the rights entrenched in

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74. See, e.g., *Hugo* 1997 (6) BCLR ¶¶ 18–27.

75. *Id.* ¶ 24.

76. *Id.* ¶ 41.

77. *Id.* ¶¶ 100–01.

78. *Id.* ¶¶ 50–53.

79. *Id.* ¶ 47.

80. *Id.*

81. See *id.* ¶ 89.

this Chapter, and may have regard to comparable foreign case law.”<sup>82</sup> That stipulation is continued, too, in the present Constitution in Article 39.<sup>83</sup> One might say that this puts South Africa in a wholly different position from that of the U.S. Supreme Court: They are explicitly permitted to cite foreign law, whereas there is no such explicit permission in the U.S. Constitution, and if some Congressmen had their way, there would be an explicit prohibition. Still, it is worth asking what reasons underlie this permission in the South African Constitution and whether those reasons have any application in countries like the United States that do not have such an explicit permission.

## VII.

Let me take all of this one step further with an analogy. I have long been intrigued by what one might call “the cosmopolitanism of scientists”—the way scientists talk about what we know or what we think we have established, where the “we” doesn’t mean just the scientist concerned and friends and colleagues in his laboratory, but the whole community of scientists, the world over, understood collectively.<sup>84</sup> We think the Big Bang happened some ten or twenty billion years ago, but there are one or two inconsistencies in the theory and some observational anomalies that we have not figured out. We have a pretty good account of what causes AIDS and how to mitigate its progress, but we do not have anything yet in the way of a vaccine. The term “we” always refers to the consensus of the community of scientists in the world—scientists who read the same literature, who are aware of one another’s findings, who check and recheck one another’s results, and who grapple with research problems in roughly the same terms. It is a wonderful notion, not least because it involves a cosmopolitan concept of community, a civilization-wide connection among humans working together.<sup>85</sup>

It is not just a matter of a common method. The “we”-locutions that I mention are often used to convey a sense of current scientific consensus on various issues. They purport to represent the current state of scientific knowledge shared and accredited by laboratories and authorities around the world. So there is the community of scientists and there is their consensus for the time being on which theories are valid, which

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82. S. AFR. (INTERIM) CONST., 1993 § 35(1).

83. S. AFR. CONST., 1996 § 39(1) (“When interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law; and . . . may consider foreign law.”).

84. Cf. Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 778 (1992).

85. See, e.g., Robert Gascoigne, *The Historical Demography of the Scientific Community, 1450–1900*, 22 SOC. STUD. SCI. 545 (1992); see also Struan Jacobs, *Scientific Community: Formulations and Critique of a Sociological Motif*, 38 BRIT. J. SOC. 266 (1987).

explanations are adequate, which empirical results are reliable, which theoretical constructs are useful, and what the current state of play is. No doubt the consensus is loose—certainly it is continually evolving—but every scientist the world over thinks in terms of this consensus (and the community that sustains it) and treats it, if not as the last word on the issues it addresses, certainly as the prescriptive starting point. An existing scientific consensus does not claim either unanimity among scientists or 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 supplement their own individual research and to provide a basis for its critique and evaluation. “Where the global community reaches a relatively strong consensus on a particular question, that consensus [has] a strong claim to respect as a[n] . . . agreed disciplinary benchmark that deserves adherence unless a participant in the community can persuade others that the particular starting point is flawed or inapplicable.”<sup>86</sup> No one in the modern world would take seriously a novel claim about energy, gravity, or galaxies that did not refer to the work of the scientific community at large. If one wants to challenge the existing consensus as a scientist, one necessarily works out from the inside of it, at every stage submitting one’s results and the inferences drawn from them to be checked and evaluated by one’s peers.

There is a useful and illuminating analogy between the role played by consensus and community in science and the role played by consensus and global legal community in law.<sup>87</sup> Scientific consensus is available as a resource and as a prescriptive starting point for individual scientific endeavor. And similarly, modes of legal analysis are available to lawmakers and judges in each individual country as derived from a global heritage of legal insight, reminding them, in Justice Ginsburg’s words, that there is a “store of knowledge relevant to the solution of trying questions,”<sup>88</sup> 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 had to grapple with it. The analogy is no doubt imperfect—like all analogies, it is not supposed to convey an impression of *equivalence*—and I will address some objections to it below.

First, let me elaborate its implications for the use of foreign law. My analogy is between scientific and legal analysis and the role played by global consensus in each. But consider for a moment a more direct—less

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86. Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947, 957 (2008).

87. This was one of the main themes in Waldron, *supra* note 21, at 132, 138, 143.

88. Ginsburg, *supra* note 2, at 190.

analogical—relation between policymaking and the global scientific consensus.

Consider how we might expect our public health authorities to deal with a new disease or epidemic appearing within our borders, which we had never confronted before but which had afflicted other countries. 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, as if to say, “We must never forget that this is an *American* epidemic we are fighting.” On the contrary, we would want to look abroad to see what scientific conclusions and strategies had emerged, what had been tested, and what possible solutions had been validated in the public health practices of other countries (and in their relations with one another). Of course, the choice of any strategy or proposed solution would be in the end a matter for us. Our scientists would have to take responsibility for their recommendations and our policymakers for their decisions. But it would be culpable folly for either group to turn their back on other countries’ experience and accumulated expertise.

Even if they were convinced that American conditions were different, with the disease mutating and responding differently to our particular environment, still they would want to ensure that they responded rationally to those differences, identifying conditions that called for an approach unlike those tried in other countries and having some detailed sense of how to measure and respond proportionately to the differentiating factors. So even there, we would want to pay attention to the world’s experience with such differences as the disease had faced beyond our shores, in order to ensure that we were taking a rational approach to the differences it exhibited among us.

That is a matter of policy, but it also helps us think through this business of legal analysis. Justice Ginsburg mentioned the new problems posed in the war against terrorism.<sup>89</sup> But the point applies to legal problems generally. When we face a novel legal question in the United States—say a question about the possible implementation of a regime permitting euthanasia—we need to consider the experience that other legal systems have had with this problem. Most countries that consider anything like legalized euthanasia want to maintain a prohibition on certain forms of encouraging and assisting suicide, and they want to hedge their assisted suicide regime against abuses and forms of coercive pressure that might be put upon ailing individuals. They want to do all that, but they do not want unduly to encumber end-of-life decisions by individuals who otherwise face the prolonged process of dying in circumstances of pain and degradation, and they want to do all of this in a way that accords the greatest respect to individual autonomy and

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89. Ginsburg, *supra* note 33, at 1041.

dignity (mindful of the fact that each of those values points in several different directions in this problem). The countries of the world are at different stages in working thorough this tangle of issues.<sup>90</sup> Some of the knowledge about how to think all of this through that is available in the world is available primarily in the experience of one or two particular countries; that is why Chief Justice Rehnquist drew extensively on the experience of the Netherlands in his opinion in *Washington v. Glucksberg*.<sup>91</sup> Other broad conclusions have emerged or are emerging as a matter of consensus among those that have experimented with various permissive regimes: Certain forms of regulation have been found to work, while others have proved less reliable, so far as protecting vulnerable individuals is concerned.<sup>92</sup> It makes no sense to try to work through the legal dimensions of this problem in ignorance of both the individual and accumulated experience of other countries. And I mean not just experience about what works and what does not, but experience with the legal analysis of this problem: looking to forms of analysis that others have pioneered that open the prospect of our being able to identify and attend methodically to the issues and values that matter in this tangle. That is the prospect that consensus and juridical community hold out in the world, and we would be fools not to avail ourselves of it.

Of course, conditions may be different here. Maybe wealth-maximizing Americans are more likely to pressure their elderly relatives to die. Still, the world has experience of responding to different conditions, and we would do well to avail ourselves of that experience to ensure that we are not responding arbitrarily or irrationally to local peculiarities. It is true, too, that any legal analysis we undertake must in the first instance respect the constitutional dimensions of these problems. The federal structure of the United States is a prime example: Is this to be decided at a federal level or left up to the states? But even on that point, it is possible that there is something to be learned from other countries about how to analyze the bearing of federal structure on a problem such as this—just as we think there is something we can teach the world from our experience of addressing the federal dimension of the abortion issue. And, fortunately, our Constitution is sufficiently capacious in the values it invokes, and in that respect sufficiently like other bills and charters of rights, so that even while we work within its provisions, we still find ourselves having to grapple with the same tangle

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90. Raphael Cohen-Almagor, *Euthanasia and Physician-Assisted Suicide in the Democratic World: A Legal Overview*, 16 N.Y. INT'L L. REV. 1 (2003).

91. 521 U.S. 702, 730, 732, 734–35 (1997).

92. See, e.g., André Janssen, *The New Regulation of Voluntary Euthanasia and Medically Assisted Suicide in the Netherlands*, 16 INT'L J.L. POL'Y & FAM. 260 (2002).

of autonomy-related, dignity-related, and protective issues that other countries have to grapple with.

So there is the analogy. A scientist does not think of pursuing research on gravity, energy, or galaxies without reference to the existing work of the scientific community. She relies on and begins from the scientific consensus of established and verified results. And the same is true for law. We do not try to solve these problems as though the world had never grappled with them before. We pay attention to what other jurists have done with the issue we face. We treat it as a problem to be solved by paying attention to the established deliverances of legal science—the experience, which many legal systems share, of grappling with, untangling, analyzing, and resolving rival rights and claims, principles and values that come together in issues of this kind. The idea of this common body of legal knowledge 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.”<sup>93</sup> It relies instead on the idea that solutions to certain kinds of problems in the law might be established in the way that scientific theories are established. They are not established as infallible, they change over the years, and there are always outliers who refuse to accept them—some cranky, and 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.

I do not claim an equivalence between law and science;<sup>94</sup> my analogy is oriented specifically to the role that global community and consensus play in each of two otherwise quite different enterprises. For of course there are very considerable differences between the scientific epistemology and the epistemology of law. The point is that in each case, in science and also in law, there is a shared methodology underwritten by some sort of global community. It is community on that scale that enables scientists from one country to talk to one another, to share a sense of common enterprise, and to recognize and assist one another with their common methodology. And I believe it is something analogous that enables lawyers, jurists, and judges from one country to share a sense of common enterprise with lawyers, jurists, and judges from another country.

Nor am I advocating a consensus theory of truth for either law or science. The scientific community’s consensus for the time being is always understood to be fallible, and it is judged in the last analysis by

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93. *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.”).

94. Cf. Roger P. Alford, *Free Speech and the Case for Constitutional Exceptionalism*, 106 MICH. L. REV. 1071, 1085 (2008).

criteria of external truth. (Some philosophical skeptics may quibble with that, but my position is not built on that sort of skepticism.) And it is precisely because they are trying to describe and explain a theory- and mind-independent world that the whole business of checking and rechecking and endeavoring to duplicate one another's experimental results is so important. Engagement with community and attention to consensus are like mandatory heuristics relative to the pursuit of truth. In science they are not the point of the exercise, but they are indispensable to it. The consensus and community that I have in mind, then, comprise not just an accumulation of authorities but a dense network of checking and rechecking results, experimental duplication, credentialing, mutual elaboration, and building on one another's work. Neither of these communities offers any guarantees so far as the overall aim of the enterprise is concerned: truth in the case of science, justice or right in the case of law. A consensus in either field can be wrong. Still, in neither field is there a sensible alternative to paying attention to the established body of findings to which others have contributed over the years.

James Allan has argued that my analogy with science "suggests that the legal consensus of [foreign] judges somehow sits atop a body of mind-independent . . . truths, as it does in the scientific realm."<sup>95</sup> And that, he thinks, makes no sense at all. Judges are not trying to access mind-independent truth in their deliberations in the way that scientists are, and even if they were, there *is* no mind-independent truth, corresponding to their assertions about justice or right, for them to access.<sup>96</sup> On that basis Allan thinks my analogy is entirely inappropriate.

But one does not have to be a believer in the philosophy of objective right answers in law to accept the analogy I am offering. Whether one is a philosophical objectivist or not, one likely will proceed in argument and analysis as though it mattered to deal competently and in an orderly and consistent fashion with issues of rightness and justice. That is why the observation that Justice Ginsburg quoted from Patricia Wald is so important. We care about the fairness and consistency of our decisionmaking and because of that, we have reason to look to what Judge Wald called "common denominators of basic fairness governing relationships between the governors and the governed" in the analyses that we deploy.<sup>97</sup> And when we consider that we are not the first to care

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95. James Allan, *Jeremy Waldron and the Philosopher's Stone*, 45 SAN DIEGO L. REV. 133, 141 (2008).

96. *Id.* at 146 ("Waldron's attempt to harness for the realm of law the same sense of solid, objective, timeless knowledge that exists . . . in the realm of the natural sciences is *not* successful. If American judges ought to . . . consider . . . the consensus of opinion of foreign judges, it cannot be because that consensus represents what it does in the natural sciences, namely the currently existing best understanding by us limited, biological humans of the underlying, mind-independent reality of our external causal world.").

97. Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*,

about legal analysis for this reason in a given legal context, we will want to look at how other responsible reasoners have worked their way fairly and consistently through the issues that we have to address. Maybe someone who thinks of law and judicial decisionmaking as just a matter of will, a matter of arbitrary fiat, will struggle to see the point of this. But anyone who cares about legal *reasoning* will want to be less abrupt and better informed than that.

Of course we know that people disagree about the first principles of justice and rightness and that they may bring different conceptions of these values to any particular exercise in legal analysis. In theory, then, a conservative judge approaching (say) assisted suicide or the juvenile death penalty will approach those problems with different sentiments and perhaps with a different sense of what counts as an adequate analysis compared with a liberal judge. If the conservative were to engage in an inquiry into foreign law he might use the products of his inquiry in a different way than would his liberal counterpart. That is not to say that the two of them might not both learn something from that inquiry, though it may not be the same thing. But it is also perfectly possible that they may both benefit in the same way from paying attention to decisions elsewhere in the world. For the propositions that they are grappling with need not be the ultimate *loci* of their moral or ideological disagreements. Often what legal analysis focuses on is the bearing on a tangled situation of *intermediate principles* that may well be shared by those who disagree about ultimate values. They may be shared either because these intermediate principles represent a sort of plateau of moral common sense, or they may be shared because the two opposed judges are required by the law to address a common question—say, about the cruelty of a given punishment (even if only one of them thinks in his heart that cruelty is a bad thing in a punishment) or about equal protection (even if one of them is, at base, not an egalitarian). The two of them may still think themselves bound to analyze the bearing of one—or several—of these principles on a tangled legal problem, and they may both welcome and profit from the assistance that a global consensus provides in indicating what counts as a respectable and disciplined way to conduct such analysis.

### VIII.

In this Article, I have taken various observations and insights from Justice Ginsburg's consideration of the practice of citing foreign law, and I have tried to elaborate, in my own terms, the points that she has made and to explore some of the directions in which she has pointed us. I hope I have not been guilty of putting words into her mouth. Most of the

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27 HARV. J.L. & PUB. POL'Y 431, 442 (2004).



comments here are mine, and of course I take responsibility for whatever fallacies and exaggerations they may involve. But I offer it to her nevertheless in the spirit of the best tribute that can be paid to a thinker in jurisprudence (in fact, in any intellectual endeavor). The thing to do is not just to echo or repeat another's views, but to build on them—to pick up the ball that has been passed and run with it for a little while. We need, as I have said, much more in the way of reflection and theory on this matter of the citation and use of foreign law. Justice Ginsburg's observations are a beginning, and this Article is a pursuit of that beginning.