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THIRTEENTH ANNUAL GROTIUS LECTURE SERIES

THE GLOBAL STATUS OF HUMAN RIGHTS*

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I feel very honored to have the opportunity to give the Grotius Lecture at this august forum. I cannot claim to be a legal scholar, with any expertise on international law, and I cannot hide my sense of inadequacy in giving this lecture in the name of one of the pioneering thinkers on law in general and international law in particular. But I take some encouragement from the fact that the great Hugo Grotius showed in his own trail-blazing work a deep interest in linking legal thinking to other disciplines of human thought. He was particularly partial to poetry, as Jean-Jacques Rousseau noted when comparing Grotius' ideas with those of Thomas Hobbes. In his book *Emile*, Rousseau even went on to say, "The truth is that their [Hobbes' and Grotius'] principles are exactly alike. They differ only in their manner of expression. They also differ in method. Hobbes bases himself on sophisms, and Grotius on poets. They have everything else in common."[1]

It can be argued that Grotius had a noticeable passion for linking up different disciplines of human reasoning, as many of his arguments

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1. JEAN-JACQUES ROUSSEAU, EMILE: OR ON EDUCATION 458 (Allan Bloom trans., Basic Books 1979).

make good use of what appears reasonable in common human thought. Indeed, the idea that the sea is a shared territory, which all are free to use—an idea that Grotius discussed in his book *The Free Sea*[2] with powerful appeal to the common understanding of reasonableness—provides a general view of political normativity that is not parasitic on legislated law by one nation or another.

I intend to take that as a point of departure, since the idea of human rights makes a similar appeal to the political normativity of rights that all human beings are supposed to have. That, to be sure, is not Grotius' claim, but there is clearly a strong analogy here. At least one of the concepts of human rights—one which I would like to pursue in this lecture – shares with Grotius' ideas (including the argument for the shared freedom of the sea), the understanding that certain basic entitlements come not from specific national legislation, but from the recognition that these freedoms (to which people in general could be taken to be entitled) come from general appreciation of normativity, rather than any specific territorial legislation.

The global status of human rights can be seen in a similar normative perspective. There are still many issues to sort out in pursuing this line of thought, since it is a complicated claim, which can be resisted in many different ways. To defend that approach we have to address several points of reasoned resistance to the idea of human rights that have been quite powerful in practice, and they demand reasoned examination and scrutiny. To give the idea its due, we have to examine in particular what is entailed by the recognition that some specific claim should count as a human right.

But how should we think about the basis of human rights? What is the nature of the discipline of human rights, which can give the claims of these rights plausibility? These are questions that I want to address in this talk.[3]

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How, then, does the idea of human rights relate to law? It is not surprising that there is a strong temptation to link human rights to law.

2. HUGO GROTIUS, THE FREE SEA (David Armitage ed., Richard Hakluyt trans., Liberty Fund 2004).

3. *See generally* Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315 (2004); AMARTYA SEN, THE IDEA OF JUSTICE (2009).

While the idea of human rights is of comparatively recent origin, the concept of legal rights is old, well established, and widely used. Also, the language of human rights is clearly influenced by legal terminology. Furthermore, those who fight for human rights work often enough to promote fresh legislation in that direction.

Before proceeding further, I must provide a clarification. The rhetoric of human rights is sometimes applied to particular legislation inspired by the idea of human rights. There is clearly no great difficulty in seeing the obvious juridical status of these already legalized entitlements. No matter what they are called ("human rights laws" or whatever), they stand shoulder-to-shoulder with other established legislation. There is nothing particularly complicated about this bit of understanding.

But that can hardly be the whole story. For one thing, prior diagnosis of the importance of some rights—unlegislated "human rights"—clearly plays an important part in motivating so-called "human rights legislation." Indeed, a great many acts of legislation and legal conventions (such as the European Convention for the Protection of Human Rights and Fundamental Freedoms[4]) have been inspired by a belief in some pre-existing rights of all human beings. There are important issues about the status and standing of human rights *before* any legislation aimed to give force to those rights actually occurs.[5]

When Christabel Pankhurst asserted in a speech in London in 1911: "we are here to claim our right as women, not only to be free, but to fight for freedom," adding that this is "our right as well as our duty," she communicated a strong normative claim that was not yet legislated into British law. Women did not have the right to vote in Britain in 1911, nor would that right be achieved until 1928, seventeen years after Pankhurst's speech (women would start voting the following year, 1929). The suffragist agitation, of which Christabel Pankhurst was a major leader, and the related discussion on women's normative "right"

4. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

5. There is an analogy here with Grotius' motivational discussion of the freedom of the sea, including his early articulations on the rights of all on the high sea, which came in the context of the Dutch seizure of the Portuguese ship Santa Catarina in 1603. This motivational analysis later led to Grotius' formulation of his theory of international law, and the particular enunciation of THE FREE SEA. *See generally* GROTIUS, *supra* note 2.

to vote, would materially help in the process leading to the actual legislation to give women the same voting rights as men in Britain already had.

Furthermore, we must also examine whether legislation is the only—or even the pre-eminent—route through which accepted human rights can be made effective. This and other pertinent questions must take us well beyond the temptation to confine the use of human rights to the limits of what has already been legislated, no matter what they are called.

However, the relationship between law and human rights does require a closer examination. I shall distinguish between three different types of connections, in particular that human rights are (1) *post-legal*, (2) *proto-legal*, or (3) *ideal-legal*. I would argue that while each of these connections can be contingently important, they fail both individually and jointly to do justice to the nature and use of human rights. We need to see global human rights, I would argue, over a much bigger arena, of which legal motivation, actual legislation, and judicial enforcement form only one part.

More particularly, I would argue that human rights are best seen as normative articulations of social ethics comparable to, yet very different from, utilitarian ethics. Like other ethical tenets, claims of human rights can, of course, be disputed, but the belief that animates the appeal of human rights is that they will survive open, informed, and reasoned scrutiny. Any universality that these claims have is dependent on the opportunity of unobstructed reasoning. [6]

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These questions are not new. Debates on this subject have occurred for more than two hundred years. The American Declaration of Independence took it to be "self-evident" that everyone is "endowed by their Creator with certain inalienable rights," and thirteen years later, in 1789, the French declaration of "the rights of man" asserted that "men are born and remain free and equal in rights." But Jeremy Bentham did not wait long, in his *Anarchical Fallacies*[7] written during 1791-92

6. *See generally* SEN, THE IDEA OF JUSTICE, *supra* note 3 (discussing this issue more fully).

7. Jeremy Bentham, *Anarchical Fallacies; Being an Examination of the Declarations of Rights Issued During the French Revolution (1792)*, *reprinted in* 2

(aimed against the French "rights of man"), to propose the total dismissal of all such claims. Bentham insisted that "*NATURAL RIGHTS* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts."[8] That dichotomy remains very alive today, and despite persistent use of the idea of human rights in worldly affairs, there are many who see the idea of human rights as no more than "bawling upon paper"—to use another of Bentham's mocking portrayals of natural right claims, such as the French "rights of man."

However, if we recognize articulation of human rights as non-legal (or pre-legal) *ethical* claims, social demands linked to the so-called "rights of man" are no more nonsensical than Bentham's own utilitarian pronouncements. Indeed, the analogy between the status of utilitarian propositions and that of articulations of human rights has considerable perspicacity, even though Bentham, the great founder of modern utilitarianism, managed to overlook that connection altogether in his classic hatchet job on natural rights in general and on the "rights of man" in particular. Bentham took the appropriate comparison to be, specifically, between the legal significance of, respectively: (1) declarations of human rights, and (2) actually legislated rights. Not surprisingly, he found the former to be lacking in legal status in the way that the latter clearly had. Bentham's dismissal of human rights came, thus, with amazing simplicity. "*Right*, the substantive *right*, is the child of law: from *real* laws come *real* rights; but from *imaginary* laws, from laws of nature . . . come *imaginary* rights . . . ."[9]

It is easy to see that Bentham's rejection of the idea of natural "rights of man" depends substantially on the rhetoric of the privileged use of the term of "rights," seeing it in its specifically legal interpretation. However, insofar as human rights are taken to be significant ethical claims, the fact that they do not necessarily have legal or institutional force, at least not yet, is obvious enough, but altogether irrelevant. The appropriate comparison is, surely, between: (1) a utility-based ethics (championed by Bentham himself), which sees fundamental ethical importance in utilities but none in human rights, and (2) an ethics that makes room for the normative significance of human rights (as the

Volumes THE WORKS OF JEREMY BENTHAM (John Bowring ed., Edinburgh, William Tait 1843).

8. *Id.* at 501.

9. *Id.* at 523.

advocates of "rights of man" did), linked with the basic importance of human freedoms (and, related to that, of the corresponding social responsibilities).

Just as utilitarian ethical reasoning takes the form of insisting that utilities of the relevant persons must be taken into account in deciding what should be done, the human rights approach demands that the importance of the freedoms, incorporated as human rights, must be given normative recognition. In fact, even as Bentham was busy writing down his dismissal of "rights of man" in 1791-92, the reach and range of ethical interpretations of rights were being powerfully explored in Thomas Paine's *Rights of Man*, and in Mary Wollstonecraft's *A Vindication of the Rights of Woman: with Strictures on Political and Moral Subjects*, both published during 1791-92 (though neither work seemed to arouse Bentham's curiosity).[10]

If human rights are not just post-legal, what about the possibility that they are proto-legal? In fact, however, an ethical understanding of human rights goes not only against seeing them as legal demands (and against taking them to be, as in Bentham's view, legal *pretensions*); but it also differs from a law-centered approach to human rights which sees them as if they are basically *grounds* for law, and almost "laws in waiting." Ethical and legal rights do, of course, have motivational connections. In a rightly celebrated essay *ARE THERE ANY NATURAL RIGHTS?* Herbert Hart, one of the leading experts on jurisprudence in the twentieth century, has argued that people "speak of their moral rights mainly when advocating their incorporation in a legal system."[11] Whereas Bentham saw rights as a "child of law," Hart's view takes the form, in effect, of seeing some natural rights as *parents* of law: they motivate and inspire specific legislation.

There is an interesting question of territorial variations in the identification of human rights that can co-exist with the shared global status of the idea of human rights. The claim of human rights need not

10. Thomas Paine, *The Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution*, *in* THE RIGHTS OF MAN PART I (Woodstock Books 1992 (1791); Thomas Paine, *Rights of Man Part the Second Combining Principle and Practice* (1792), *reprinted in* RIGHTS OF MAN, COMMONSENSE AND OTHER POLITICAL WRITINGS 192 (Mark Philip ed., Oxford Univ. Press 1995); MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN (Alfred A. Knopf 1992) (1792).

11. H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 177 (1955).

take the form that this is ideally legislated into the statute book everywhere as this is a "natural right," since the appropriateness of legislation may strongly depend on contingent social circumstance—the demand need not have much to do with what calls for legislation in some imagined "state of nature." For example, if some residents are excluded from being covered by social security or from having a state-sponsored medical insurance that others, in similar circumstances, already have in the existing institutional structure, the moral and political demand in contention has to be seen in the specific context of the institutional arrangements that exist in that society, from which some are unjustifiably excluded. The issue of discrimination given the existing national arrangements is also directly involved, for example, in Christabel Pankhurst's demand that women too should have voting rights since men already had such rights. As John Tasioulas argued in an illuminating essay called *THE MORAL REALITY OF HUMAN RIGHTS*, "human rights enjoy a temporally constrained form of universality, so that the question of which human rights exist can only be answered within some specific historical context."[12]

Herbert Hart was not, in fact, arguing that the ground for something to be legislated into a statute book is that it is in some pre-existing sense a "natural right," but rather that "advocating their incorporation in a legal system" can be the content of something being seen as a "natural right" or a "moral right."[13] Hart argues that the *meaning* of "rights" in the moral sense includes this interpretation of the word. The precise *ground* for such advocacy is a separate issue from the existence of such a moral claim.

There can be little doubt that the idea of moral rights can serve—and has often served in practice—as the basis of new legislation. It has frequently been utilized in this way, and this is indeed an important *use* of human rights. That, for example, is precisely the way the diagnosis of inalienable rights was invoked in the American Declaration of Independence and reflected in the subsequent U.S. legislation (including the Amendments), a route that has been well-trodden in the legislative history of many countries in the world, perhaps most

12. John Tasioulas, *The Moral Reality of Human Rights*, *in* FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR? 75, 76 (Thomas Pogge ed., 2007).

13. *See generally* Hart, *supra* note 13.

famously in the invitation of new legislation in the United Nations' Universal Declaration of Human Rights in 1948 (pioneered by Eleanor Roosevelt). Providing inspiration for legislation is certainly *one* way in which the ethical force of human rights have been constructively deployed.

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To acknowledge that such a connection exists is not the same thing as taking the relevance of human rights to lie *exclusively* in their playing an inspirational or justificatory role for actual legislation. It is important to see that the idea of human rights can be, and is actually, used in several other ways. It is easy to appreciate that if human rights are seen as powerful moral claims—indeed as "moral rights" (to use Hart's phrase)—then surely we have reason for some catholicity in considering different avenues for promoting these claims. Thus, the ways and means of advancing the ethics of human rights need not be confined only to making new laws. For example, social monitoring and other activist support provided by such organizations as Human Rights Watch, Amnesty International, OXFAM, Médecins sans Frontières, Save the Children, Red Cross, or Action Aid (to consider many different types of NGOs) can themselves help to advance the effective reach of acknowledged human rights. In many contexts, legislation may not, in fact, be at all involved. Public exposure and condemnation can have a huge role in preventing violations of what are widely acknowledged to be moral rights of others.

Legislation can, of course, often be an effective way of promoting or protecting the freedoms underlying human rights. Many actual laws have been enacted by individual states, or by associations of states, which gave legal force to certain rights seen as basic human rights. The point is not so much whether the legislative route can make the social ethics of human rights more effective. It certainly can do this in many cases. The point, rather, is that there are other routes as well, which help to make the ethics of human rights more influential and effective.

I have argued so far against seeing human rights only as consequences of appropriate legislation, or only as motivation for making such legislation. But what about the view, which has sometimes been aired, that human rights are best seen as *ideals* for legislation? This raises an interesting question about the appropriate

reach of the legislative route. Would it be reasonable to claim that if a human right is seen as important, then it must be ideal to legislate it into a precisely specified legal right?

I resist this proposal. For some rights, the ideal route may not be legislation, but something else, such as recognition or agitation, or even public discussion and education, with the hope to changing the behavior of those who contribute to the violation of human rights. For example, recognizing and defending a wife's moral right to be consulted in family decisions, even in a traditionally sexist society, may well be extremely important.[14] And yet it seems entirely plausible that coercive legislation, with the imprisoning or fining of husbands for ignoring the views of their wives, may be much too blunt a way of ensuring that husbands consult their wives in family decisions. Because of the importance of communication, advocacy, exposure, and informed public discussion, human rights can have influence *without* necessarily depending on coercive legal rules. For example, Mary Wollstonecraft explored many different types of social change through which what she called "the vindication of the rights of woman" could be advanced.[15] That eighteenth-century insight remains relevant today.

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I turn now to the questions regarding the form and basis of normativity that underlies human rights and their global status, without any existing legislation, or even without there being a corresponding claim of what should be ideally legislated. A pronouncement of human rights is an assertion of the importance of the corresponding freedoms that are identified and privileged in the formulation of the rights in question. For example, the human right of not being tortured springs from the importance of freedom from torture for all. This goes with the affirmation of the need for others to consider what they can reasonably do to secure the freedom from torture for all. For a would-be torturer, the demand is obviously quite straightforward, to refrain and desist. The demand takes the clear form of what Immanuel Kant called a "perfect duty."[16] However, for others too (that is, those other than the

14. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM 189-203 (2000).

15. *See, e.g.*, WOLLSTONECRAFT, *supra* note 12.

16. *See* IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 58, 130 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1997) (1788).

would-be torturers) there are responsibilities, even though they are less specific and come in the general form of "imperfect obligations" (to invoke another Kantian concept). Imperfect obligations are the general duties of anyone in a position to help to consider what he or she can reasonably do in the matter involved. The perfectly specified demand not to torture anyone is supplemented by the more general—and less exactly specified—requirement to consider the ways and means through which torture can be prevented and then to decide what, if anything, one should reasonably do in any particular case.

It is important to emphasize that the recognition of human rights is not an insistence that everyone everywhere must rise to help prevent every violation of every human right no matter where it occurs. It is, rather, an acknowledgement that if one is in a plausible position to do something effective in preventing the violation of such a right, then one does have an obligation to consider doing just that. It is still possible that other obligations or non-obligational concerns may overwhelm the reason for the particular action in question, but that reason cannot be simply brushed away as being "none of one's business." Imperfect obligations must not be confused with no obligations at all.

It is useful to illustrate, with a concrete example, the distinction between different kinds of obligations—an illustration that I have discussed more fully in *The Idea of Justice*.[17] Consider a real-life case that occurred in Queens, New York in 1964, when a woman, Kitty Genovese, was fatally assaulted in full view of others watching the event from their apartments, who did nothing to help her.[18] It is plausible to argue that three terrible things happened here, which are distinct but interrelated:

(1) Genovese's freedom, and right, not to be assaulted was violated (clearly the primary nastiness in this case was that Kitty Genovese was murdered);

(2) the murderer violated the immunity that anyone should have against assault and killing (a violation of a "perfect obligation"); and

(3) the others who did nothing whatsoever to help the victim also transgressed their general, and "imperfect," obligation to help which

17. *See* SEN, THE IDEA OF JUSTICE, *supra* note 4, at 372-79.

18. *See* Martin Gansburg, *37 Who Saw Murder Didn't Call the Police*, N.Y. TIMES, Mar. 27, 1964, at 1.

they could reasonably be expected to provide.

These distinct failings bring out a complex pattern of rights-duties correspondence in a reasoned ethics.

Imperfect obligations, along with the inescapable ambiguities involved in that idea, can be avoided only if the rest of humanity (other than those directly involved) are exempted from any responsibility to try to do what they reasonably can to help. While that kind of general immunity—from having to do anything for others—might seem reasonable enough as far as *legal* requirements are concerned, the case for such impunity in the *ethical* domain would be hard to justify. As it happens, however, in the laws of some countries, there is even a legal demand, which can hardly have extreme precision, for providing reasonable help to third parties. For example, in France there is provision for "criminal liability of omissions" in the failure to provide reasonable help to others suffering from particular types of transgressions. Not surprisingly ambiguities in the application of such laws have proved to be quite large and have been the subject of considerable legal disputation.[19] The ambiguity of duties of this type, whether in ethics or in law, would be difficult to avoid if third-party obligations of others in general are given some room, and this cannot be avoided for an adequate theory of human rights.

Even though recognitions of human rights (with their associated claims and obligations) are ethical affirmations, they need not, by themselves, deliver a complete blueprint for evaluative assessment. An agreement on human rights does involve a firm commitment to give reasonable consideration to the duties that follow from that ethical endorsement. But even with agreement on these affirmations, there can still be serious debates, particularly in the case of imperfect obligations, on (i) how the attention that is owed to human rights should be best paid, (ii) how the different types of human rights should be weighed against each other, given the limits of one's time and opportunity, (iii) how the claims of human rights should be consolidated with other evaluative concerns that may also deserve ethical attention, and so on.

19. On this see Andrew Ashworth and Eva Steiner, *Criminal Omissions and Public Duties: The French Experience*, 10 LEGAL STUD. 153, 158 (1990), and Glanville Williams, *Criminal Omissions: The Conventional View*, 107 L.Q. REV. 86, 91-93 (1991).

A theory of human rights can leave room for further discussions, disputations, and arguments. The approach of open public reasoning, which is central to the understanding of human rights, can definitively settle some disputes about coverage and content, but may have to leave other possibilities unsettled, at least tentatively. The admissibility of a domain of continued dispute—and this, in my judgment, is a very important issue—is no embarrassment to a theory of human rights, for that is the nature of the subject matter we are dealing with. As Aristotle argued in the *Nicomachean Ethics*, we have ""to look for precision in each class of things just so far as the nature of the subject admits.". . . ."[20]

In practical applications of human rights, such debates are, of course, quite common and entirely customary, particularly among human rights activists. What is being argued here is that the possibility of such debates—without losing the basic recognition of the importance and the global status of human rights—is not only a feature of what can be called "human rights *practice*," but are actually part of the general *discipline* of human rights (rather than being a defect of that discipline). Variability of this kind within the normative discipline of human rights is not only not an embarrassment, it is much like other ambiguities that are standardly present in all general theories of substantive ethics. Indeed, a similar diversity can be found within utility-centered ethics, even though typically this feature of the large ethical discipline tends to receive little or no recognition (it certainly received little discussion from Jeremy Bentham himself).

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I turn, finally, to the intellectual basis of human rights. What lies behind the normative basis of human rights? How should we judge whether and why to take them seriously? Any general plausibility that these ethical claims, or denials thereof, have on this theory is dependent on their survival and flourishing when they encounter unobstructed discussion and scrutiny, along with adequately wide informational availability. The connection between public reasoning and the formulation and use of human rights is extremely important. The soundness of the normativity of a claim for a human right would be

20. ARISTOTLE, THE NICOMACHEAN ETHICS at 3 (William David Ross trans., Oxford University Press 1998).

seriously undermined if it were possible to show that they are unlikely to survive open public scrutiny. However, the case for human rights cannot be discarded simply by pointing to the fact that in politically and socially repressive regimes, which do not allow open public discussion, many of these human rights are not taken seriously at all. Open critical scrutiny—actual or imagined—is as essential for the dismissal of a normative claim as it is for the defense of that claim.

So this, broadly outlined, is the theory of global human rights that I am trying present here, and which I have discussed more fully in *The Idea of Justice*.[21] I should mention, before I end, that in presenting this view I go part of the way with John Rawls, but not the whole way. Rawls has argued powerfully that the objectivity of ethical and political claims must be ultimately dependent on their survivability in unobstructed discussion.[22] That is a point of agreement. What I would like to resist, however, is Rawls' inclination, particularly in his later works, to limit such public confrontation within the boundaries of each particular nation (or each "people," as Rawls calls this regional collectivity), for determining what would be just, at least in domestic affairs.[23] We can demand, on the contrary, that the discussion has to include, if only to avoid local prejudices, views also from what Adam Smith called in his *Theory of Moral Sentiments*, "a certain distance."[24]

The role of open public reasoning, allowing global entry, in the understanding and recognition of human rights links closely with Adam Smith's approach to jurisprudence. Smith was very concerned about avoiding the biases of closeness and ethical myopia. Rather than trying to cater only to the dominant views of ruling groups, Smith saw the need to bring in perspectives from other groups, sects, and classes. This was, for him, a principal way of transcending, among other barriers, the limitations of class-based thinking—Smith was at least as firm on that subject as Marx would later be—but Smith also used it to assert the necessity of seeking global argumentative encounters, actual or visualized, in checking the plausibility of normative claims.

One of Smith's illustrations of parochial values that needed

21. SEN, THE IDEA OF JUSTICE, *supra* note 4.

22. *See* JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press rev. ed. 1999); JOHN RAWLS, POLITICAL LIBERALISM (1993) .

23. *See* JOHN RAWLS, THE LAW OF PEOPLES (Harvard Univ. Press 1999).

24. *See* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 128 (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759).

confrontation with views from elsewhere refers to the tendency of all political commentators in ancient Greece, including sophisticated Athenians, to regard infanticide as perfectly acceptable social behavior. Smith pointed out that even Plato and Aristotle did not depart from expressing approval of this extraordinary practice which "[u]ninterrupted custom had by this time so thoroughly authorized . . ." in ancient Greece.[25]

The significance of distant perspectives has clear relevance not only to easily recognized nasty practices, such as the stoning of adulterous women under the Taliban rule in Afghanistan, but also to some current debates in the United States, including in the U.S. Supreme Court, as I have discussed in my book *The Idea of Justice*[26], in dealing, for example, with arguments about the acceptability and the field of applicability of capital punishment. What is relevant here is Smith's insistence that "the eyes of the rest of mankind" must be invoked to understand whether "a punishment appears equitable."[27] The necessity of this arises, Smith argued, for the avoidance of bias related to either individual or sectional interest, or local parochialism:

> We can never survey our own sentiments and motives, we can never form any judgment concerning them; unless we remove ourselves, as it were, from our own natural station, and endeavour to view them as at a certain distance from us. But we can do this in no other way than by endeavouring to view them with the eyes of other people, or as other people are likely to view them.[28]

I end with what may appear to be a silly question. Rousseau expressed the view, as I quoted earlier, that "Hobbes bases himself on sophisms, and Grotius on poets. They have everything else in common."[29] Was Rousseau right to claim that there is such a congruence in the principles advocated by Thomas Hobbes and Hugo

25. *Id.* at 246.

26. SEN, THE IDEA OF JUSTICE, *supra* NOTE 4, at 404-06.

27. ADAM SMITH, LECTURES ON JURISPRUDENCE 104 (R. L. Meek et al. eds., OXFORD UNIV. Clarendon Press 1978) (1762-63); Sen, The Idea of Justice, *supra* note 4, AT 405.

28. The Smithian perspective on moral reasoning is further examined in SMITH, THE THEORY OF MORAL SENTIMENTS, *supra* note 25, at 128. The Smithian perspective on moral reasoning is pursued in my paper Amartya Sen, *Open and Closed Impartiality*, 99 J. PHIL. 445, 451 (2002).

29. ROUSSEAU, *supra* note 1, at 458.

Grotius? One difference seems to be this: Hobbes confined his justificatory discussion to what happens within the borders of a sovereign state. Indeed, that became the solid basis of the social contract approach to the theory of justice, of which John Rawls' powerful theory, with many sophistications that Hobbes had not considered, is a direct descendent.

Grotius' inclination seems to me to be different. He was looking for reasoning that could, at least in its basic appeal, transcend the local boundaries of a state. In this sense, I can claim to be more in line with Grotius than with Hobbes. This diagnosis is not particularly relevant for the plausibility of the argument I am trying to present here—my justification is Smithian rather than Grotiusian—but it is interesting for me to note that there is a similarity here with the great Grotius' ideas, at least up to a point. And that similarity, even if it ultimately proves to be illusory, seems to me to be a good note on which to end this Grotius lecture.