1-1-1981

The Uses of Human Rights Norms to Inform Constitutional Interpretation

Gordon A. Christenson
University of Cincinnati College of Law, gordon.christenson@uc.edu

THE USES OF HUMAN RIGHTS NORMS TO INFORM CONSTITUTIONAL INTERPRETATION

*Gordon A. Christenson**

Recent federal court of appeals decisions have relied on fundamental human rights norms to inform[1] constitutional interpretation.[2] This comment reviews the reasoning in those cases to identify possible constitutional uses of fundamental human rights norms and to suggest some conceptual framework for their use.[3] The need for such a framework is illustrated by the cases themselves, which seem disparate and disjointed, with no discernable coherent philosophy, though each makes good sense when considered alone.

ESTABLISHING FEDERAL JURISDICTION

The need for a conceptual framework is reflected in the confusion

* Nippert, Professor and Dean, College of Law, University of Cincinnati. I wish to thank Wendy Ellis, fellow, Urban Morgan Institute for Human Rights at the College of Law, for her research assistance in the preparation of this article.

1. The term "inform" is used throughout this article to signify the use of positive sources of international human rights law to aid in the interpretation of constitutional questions involving similar fundamental rights protected under the Bill of Rights. These sources can serve to emphasize the importance of a particular constitutional right. Although such an argument might be made, I do not need to claim that these positive sources of international law are autonomous rules or authorities that limit federal or state power. Rather, these sources show that an argument rooted in one of the first eight amendments, or other constitutional provisions dealing with individual rights, gain importance through a context that claims to be universally recognized.

2. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd 654 F.2d 1382 (10th Cir. 1981).

3. This first attempt at framing valid constitutional guidance through legitimate uses of human rights norms is part of a larger work which will set forth in greater detail a conceptual framework for federal courts in human rights cases. This comment looks at three cases to illustrate that no adequate framework exists and proposes one for use in the future. This framework is, however, only one aspect of a thesis which will suggest that through use of the exercise of federal jurisdiction, the Ninth Amendment, the Privileges and Immunities Clause of the Fourteenth Amendment, the open-ended clauses of the Constitution, and the federal common law, human rights norms can be introduced to inform constitutional interpretation in a limited, craftsmanlike way, even though the United States has ratified few of the international human rights conventions.

"Open-ended provisions" refers to those provisions of the Constitution "that are difficult to read responsibly as anything other than quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it." J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980). Examples are the First, Ninth, Fourteenth Amendments, and the prohibition of cruel and unusual punishment in the Eighth Amendment. *See id.* at 11-41.

of tongues from the commentators spawned by Judge Kaufman's opinion in *Filartiga v. Pena-Irala*.[4] The law review commentators offer an excellent analytical framework,[5] but provide too little creative or conceptual thought, as they either overstate or trivialize the decision. Their attempts to link the decision to the broader context of case law and literature are unhelpful, due either to overly broad ideological verbiage or narrow, hypertechnical analysis.

Human rights advocates claim more than is necessary to help their cause in saying that Judge Kaufman's opinion, from the prestigious Second Circuit Court of Appeals, has established a seminal position for human rights in the domestic courts.[6] They state an aspiration—that the human rights law contained in international covenants, even though not in force in the United States, is now part of federal common law and is thereby enforceable under federal jurisdiction.[7] Because some, but not all of those rights have become part of customary international law and hence part of federal common law, the claim is too broad. At the other pole, some student comments assert that relations between an individual and a state are no affair of international law, and that international law cannot establish a private cause of action.[8] They, too, miss the point.

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4. 630 F.2d 876 (2nd Cir. 1980).

5. *See* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981); Note, *The Alien Tort Statute: International Law as the Rule of Decision*, 49 FORDHAM L. REV. 874 (1981) [hereinafter cited as *Alien Tort Statute*]; 49 CIN. L. REV. 880 (1980); 15 GA. L. REV. 504 (1981); 33 STAN. L. REV. 353 (1981).

6. "What is truly significant about the *Filartiga* decision is the court's acceptance of international human rights law as part of the law of our country, governing the duties of all states and the rights of all people." 1 The Law Group Docket 7 (published by the International Human Rights Law Group (Spring 1981)).

7. "The effect of *Filartiga* is to direct American lawyers and judges to international sources of the rights of litigants." *Id.*

8. International law is a horizontal legal order limited by reciprocal enforcement, while supranational law is a hierarchical, coercive system like that prevalent in a national context. Protection of the human rights of an individual from actions of his government requires a hierarchical, coercive system. Because of the protection of fundamental rights on a worldwide basis would require a supranational enforcement structure, only supranational law can confer such rights. 49 CIN. L. REV., *supra* note 5, at 890-91.

International human rights law is generally only normative; it rarely provides enforcement procedures or rights of action. . . . [Nations] have not agreed to let alleged violations within their borders be tried and punished in the courts of other countries, nor have they agreed to enforcement proceedings initiated by private individuals. . . . [P]rovisions of the law of nations that derive from custom or convention, rather than from treaties, do not create private rights of action unless such rights are part of the custom or convention. 33 STAN. L. REV., *supra* note 5, at 358.

For the viewpoint that international law does confer rights on individuals, *see* Note, *Federal Jurisdiction and the Protection of International Human Rights*, 9 N.Y.U. REV. L. & SOC. CHANGE 199, 214-17 (1979-1980).

Filartiga did not establish either proposition. Dr. Joel Filartiga and his daughter, both citizens of Paraguay, brought a wrongful death action in federal court for the death of the doctor's son, Joelito.[9] Joelito allegedly was tortured to death at the hands of Paraguay's Inspector General of Police, America Norberto Pena-Irala, in retaliation for his father's political activities.[10] Pena was served personally with process in New York while in federal custody pending his deportation for overstaying his visa.[11]

FEDERAL JURISDICTION DISTINGUISHED FROM RULE OF DECISION

The Second Circuit reversed the district court's dismissal of the action for want of subject matter jurisdiction, finding that Article III of the Constitution authorized the exercise of federal jurisdiction by the Alien Tort Statute.[12] While some confusing parts of the decision need clarification,[13] a careful study of Judge Kaufman's reasoning leads inescapably to the conclusion that he offers a coherent and sound interpretation of the Alien Tort Statute.[14] That statute gives the federal courts original jurisdiction over any civil action for a tort committed "in violation of the law of nations."[15] Stated simply, Judge Kaufman's thesis is that universal customary international law, made part of federal common law, provides the basis for exercising federal jurisdiction through the Alien Tort Statute for civil actions brought by aliens and determined as a preliminary matter on the merits to be violations of international law.[16] Following an extensive review of international human rights documents condemning and prohibiting torture, as well as opinions of noted publicists and other sources of customary international law, the court rightly concluded that official torture violates the law of nations.[17] This conclusion does not require, however, that a federal court must use human rights norms to create a private cause of

9. 630 F.2d at 878.
10. *Id.*
11. *Id.* at 879.
12. *Id.* at 878, 886.
13. For example, the court's analysis may have been clearer had it more closely examined the constitutionality of the Alien Tort Statute, a question distinct from the statutory issue of federal jurisdiction. The court did find a constitutional basis for the statute in the law of nations which have been an integral part of the common law of the United States since the adoption of the Constitution. *Id.* at 885-86.
14. 28 U.S.C. § 1350 (1976) (corresponds to Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 67, 77).
15. The Alien Tort Statute (also referred to as the Alien Tort Claims Act) provides that original district court jurisdiction extends to any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States. *Id.*
16. 630 F.2d at 880, 885, 887. The Alien Tort Statute's "in violation of " language, requiring demonstration on the facts of a violation of international law, is a much higher standard as a threshold test for jurisdiction than the traditionally used "arising under" constitutional language of article III. *See* note 20 *infra*.
17. 630 F.2d at 880-84. As Judge Kaufman stated, international law is determined by

action. The law of nations, as an integral part of federal common law, provides the constitutional basis for exercising federal jurisdiction. If a case is grounded on federal common law, it properly "arises under the laws of the United States" for Article III purposes.[18] Thus, the exercise of federal jurisdiction over the subject matter of this suit between two aliens for a violation of international law—and, hence, federal common law—was constitutional.[19] The determination of whether the tort recognized by federal statute also was an act in violation of international law was not only a constitutional, but also a jurisdictional, question.[20] Crossing this jurisdictional threshhold merely allows the judicial power to be exercised. It does not decide the proper rule of decision.

CHOICE OF LAW: DEFERENCE TO ANOTHER STATE

The second level of significance in *Filartiga* for use of human rights norms involves the issues of the act of state doctrine and choice of law which were raised by the defendant Pena but were not addressed by the court in any detail.[21] A district court would need to face these issues at trial after overcoming any *forum non-conveniens* problems.

The act of state doctrine poses the greatest opportunity for confusion in human rights cases. First espoused by Chief Justice Fuller in *Underhill v. Hernandez*, a case involving the confiscation of property, it declares generally that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[22] Under this doctrine, when domestic courts in the United

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consulting the works of jurists, by the general usage and practice of nations, and by judicial decisions. *Id.* at 880, *citing* United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820); Paquete Habana, 175 U.S. 677 (1900); Lopes v. Reedeirei Richard Schroeder, 225 F. Supp. 292, 295 (E.D. Pa. 1963). *Accord*, Cohen v. Hartman, 490 F. Supp. 517, 518 (S.D. Fla. 1980). *See also*, Statute of the International Court of Justice, *signed* June 26, 1945, art. 38, 59 Stat. 1055, 1060 T.S. No. 993.

18. 630 F.2d at 885-86.

19. *Id.* at 886. A sophisticated analysis of federal interest is necessary to assure that there is a sufficient nexus for the assertion of jurisdiction. *See Alien Tort Statute, supra* note 5, at 876-81; 33 STAN. L. REV., *supra* note 5, at 355-57.

20. A much stricter standard of jurisdiction is required under the "in violation of" language of the Alien Tort Statute than is required under the "arising under" language of article III. *See* Comment, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 U.S.F.L. REV. 105, 108 (1979); *Alien Tort Statute, supra* note 5, at 875 n.9.

21. The Court distinguished the choice of law issue from the jurisdictional question actually before the court and stated that the argument regarding the act of state doctrine was not before the court on appeal. 630 F.2d at 889. The court did comment briefly on each issue. *Id.* at 889-90.

22. Underhill v. Hernandez, 168 U.S. 250, 252 (1897). *Accord*, Ricaud v. American Metal Co., 246 U.S. 304, 308-10 (1918); Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918). Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964), reaffirmed the

States are asked to determine the validity of those acts, they should defer to the Executive.[23] If the deference is mechanical, why should it matter whether the act is to take property or to torture a citizen of the other country?

The defendant in *Filartiga* argued the point: If the torture alleged was an act of the Paraguayan government done within its own territory, the suit should be barred by the act of state doctrine.[24] A viable, analytic framework must reconcile human rights norms with this argument. Otherwise, a civil action for torture is treated no differently than an action based on title to property. A court in the United States is required to give some respect to the public acts of a state committed within its own territory. But how much? Domestic courts must protect the international interest in orderly relations among states, as well as the interest of the international community in protecting individuals from barbaric treatment.

It is beyond dispute that the act of official torture in *Filartiga* is a violation of international law which is universally proscribed and condemned.[25] Here, deference should not come easily. When a lawsuit involves an area of international law enjoying less than universal consensus, however, as in economic and social matters, a presumption of wide deference to the Executive would engender the greatest respect for policies that are diverse.[26] In an area where there is consensus, as in

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doctrine with respect to a foreign government's expropriation of property within its own territory.

23. *See also* a review of the context in Christenson, Book Review, 123 U. PA. L. REV. 1001, 1014 (1975).

24. 630 F.2d at 889.

25. Universal Declaration of Human Rights, art. 5, G.A. Res 217A (III), U.N. Doc. A/810 (1948); Declaration on the Protection of All Persons from Being Subject to Torture, G.A Res. 3452, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/1034 (1975); American Convention on Human Rights, art. 5, *signed* Nov. 22, 1969, OAS T.S. No. 36, OAS O.R. OEA/SER. L/V/II. 23 doc. 21 rev. 6 (1979); International Covenant on Civil and Political Rights, art. 7, *opened for signature* Dec. 19, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, *signed* Nov. 4, 1950, 213 U.N.T.S. 222 (1968).

26. In economic matters, where there is wide diversity among nations,

> the international law questions are transferred to the political and economic level where interests are accommodated by negotiation or market mechanisms. Questions of international law remain, but it is the proper role of the domestic tribunal to defer deciding them. . . . Judicial deference, however, does not always prove the best course. It would not be inconsistent for the domestic courts to refuse to defer when there is a question of fundamental human rights at issue. A wide range of possible cases may present themselves in which a domestic court may be under a duty to prescribe minimum standards to a foreign state for treating an individual within its own jurisdiction. . . .

Christenson, *supra* note 23, at 1016-1017.

> Deference is due in economic matters because of "the confusion of substantive norms in the economic area that exists as a result of the widespread emergence of socialism. Domestic courts are not equipped emotionally or technically to cope

the domain of certain human rights, a narrower deference is necessary, and the foreign state should be held strictly to the human rights standard.[27]

A precursor to this theory, espoused by Professor Falk in 1964, was adopted by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*.[28] Professor Falk's theory[29] is good as far as it goes, but it does not go far enough toward providing guidelines to the courts for decision-making in cases involving illegitimate diversity in the policies of two states departing from universal norms. If the two states are at variance, how does the United States court go about deciding affirmatively to impose a rule of decision at variance with the law of a foreign state?

Professor Lillich similarly advocates an activist role for the United States judiciary in determining international law questions without deference, even in economic matters.[30] His position is consistent and does not seem to distinguish between human rights violations committed

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with this confusion, and tend to invoke norms that correspond with the national preference. . . . Rules of deference are a formal way to confess the untrustworthy quality of a judicial application of substantive norms of international law in areas of legitimate diversity."

R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 75 (1964). For a discussion of the advantages of deference to the Executive, *see id.* at 8-9. A court may also decline jurisdiction due to an inadequate base of federal interest, as did the United States Court of Appeals for the Second Circuit in *Verlinden B.V. v. Central Bank of Nigeria*, 647 F.2d 320, 326 (2d Cir. 1981).

27. [T]he courts should not close their doors where human rights are violated, even if an act of state is in question. The act of state doctrine should be used as an analytic tool, as the line of demarcation between judicial deference to the diverse elements of economic regulation on the one hand, and the protection of fundamental human rights on the other.

Christenson, *supra* note 23, at 1015.

28. 376 U.S. at 428.

29. Professor Falk states:

municipal courts should avoid interference in the domestic affairs of other states when the subject matter of dispute illustrates a legitimate diversity of values on the part of two national societies. In contrast, if the diversity can be said to be illegitimate, as when it exhibits an abuse of universal human rights, then domestic courts fulfill their role by refusing to further the policy of the foreign legal system. In instances of illegitimate diversity, where a genuine universal sentiment exists, then the domestic courts properly act as agents of the international order only if they give maximum effect to such universality.

R. FALK, *supra* note 26, at 72. *See also id.* at 9-10, 18.

30. Commenting on the Supreme Court's decision in *Sabbatino*, Professor Lillich states, "by refusing to clarify and apply the relevant international law standards, the Court actually perpetuates the supposed lack on consenses so damaging to customary international law." Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 33 (1970). He further advocates that the courts "should eschew the extreme deference exhibited by the Supreme Court in *Sabbatino*," and that executive and legislative infringements on the role of the judiciary be eliminated as soon as possible. *Id.* at 49. Lillich's viewpoint eschewing deference is in sharp contrast to Falk's belief that "rules of deference applied by domestic courts advance the development of international law faster than does an indiscriminate insistence upon applying challenged substantive norms in order to determine the validity of the official acts of foreign states." R. FALK, *supra* note 26, at 6-7.

within a state's own territory and national social and economic policies for the promotion of international welfare that might violate the principle of just compensation.[31] He recommends an activist role for the courts in both types of cases. The furor over Mr. Lefever's nomination as Assistant Secretary of State for Human Rights and other events also indicate that a strong segment of the public wants no deference accorded to acts of states that violate human rights. In contrast, the acts of foreign states in economic and social policy are more controversial and would seem to command greater deference in order to maintain orderly relations between nation-states, even where just compensation is owed between governments for expropriations.

In addition to the difference between fundamental human rights and economic or social policies, a second distinction must be made. Compensating individuals whose human rights have been violated[32] differs from imposing sanctions or exerting pressure on a state as punishment for violating human rights.[33] Professor Lillich favors judicial activism in both sanctions and compensation cases.[34] While deference to the Executive, especially in human rights matters, can be unconscionable,[35] deference may arguably be proper in asserting sanctions or pressure on a foreign nation under the wide discretion and flexibility available to the Executive.[36] Human rights norms are among several international interests which must be protected. If the act of state doctrine is not used because a compensable violation of human rights is at issue, the courts must decide what the rule of decision will be.[37] In *Filartiga*, Judge Kaufman separated the issue of compensation from the question of federal jurisdiction (which was the only question he decided), commenting that the choice of law inquiry is much broader; it is primarily concerned with fairness.[38]

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31. *See* Christenson, *supra* note 23, at 1017; R. FALK, *supra* note 26, at 6.

32. *E.g.*, Filartiga v. Pena-Irala, *supra* note 1; Fernandez v. Wilkinson, *supra* note 2.

33. *E.g.*, Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); Diggs v. CAB, 516 F.2d 1248 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 910 (1976); New York Times Co. v. City of New York Comm'n on Human Rights, 79 Misc. 2d 1046, 362 N.Y.S.2d 321 (Sup. Ct. 1974), *aff'd*, 49 A.D. 2d 851, 374 N.Y.S.2d 9 (App. Div. 1974), *aff'd*, 41 N.Y.2d 345, 361 N.E.2d 963, 393 N.Y.S.2d 312 (1977); South African Airways v. New York Div. of Human Rights, 64 Misc. 2d 707, 315 N.Y.S.2d 651 (Sup. Ct. 1970).

34. Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms*, 24 N.Y.L. SCH. L. REV. 153, 172 (1978).

35. For an example of questionable deference to the Executive, *see Haig v. Agee*, 101 S. Ct. 2766 (1981).

36. *See* R. FALK, *supra* note 26, at 8-9. *But see* Reisman, *Foreign Affairs and the Several States: Outline of a Theory for Decision*, 71 AM. SOC'Y INT'L L. PROCS. 182, 188-80 (1977).

37. Professor Henkin explores the relationship between this choice of law question and the act of state doctrine in Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 178 (1967).

38. 630 F.2d at 889.

HUMAN RIGHTS NORMS AND CHOICE OF LAW

One of the ambiguities (presumably conscious) in Judge Kaufman's opinion is the question of whether international law itself may be the norm creating the rule of decision when it is also a base for jurisdiction. The Court left the choice of law determination of whether torture violates Paraguayan law for adjudication on remand to the federal district court.[39] The interest of the international community in the orderly relations between states does not only mean applying human rights standards in domestic adjudication.[40] Respect for the *lex delecti* is a deference to order as well. The role of the domestic court in choice of law matters is to give respect and deference to the law of the place of injury, as well as to international law.[41] A United States domestic court must presume that foreign states will not lightly maintain their domestic laws in conflict with international human rights norms against official torture. When there is ambiguity in the *lex delicti*,[42] a proper interpretation would be to avoid conflict with the human rights norms in choosing the rule of decision. The *lex delicti* should not be displaced by using the human rights law against torture as the rule of decision unless the *lex delicti* so departs from these human rights norms that it would upset the peace of nations to apply it.

Through this examination, we can see the possibility of selecting either the *lex delecti* or international law as the rule of decision for a civil wrong in cases under the Alien Tort Act using choice of law principles compatible with the policy of the forum.[43] When the law of the

39. Judge Kaufman implies that the district court on remand may be required, under the analysis set forth in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), to apply Paraguayan law. That analysis, which considers such factors as place of the wrongful act, allegiance or domicile of the injured, inaccessibility of the foreign forum, and the law of the forum, does appear to indicate Paraguayan law as the rule of the decision. *Id.* at 583-92.

40. Prominent among the factors to be considered in deciding choice of law are the needs of the international system. RESTATEMENT (SECOND) OF CONFLICT OF LAWS 6 (1971). "Choice-of-law rules . . . should seek to further harmonious relations between states. . . ." *Id.*, comment d, at 13.

41. One commentator has concluded that in § 1350 cases, international law should be chosen as the rule of decision in order to protect the international community's interest in upholding international values. 49 FORDHAM L. REV., *supra* note 5, at 885. The note is excellent in its technical argument, but it fails to reconcile that portion with other legitimate interests of the international community, such as the orderly, harmonious relations between states.

42. Although the Constitution and laws of Paraguay prohibit torture, CONSTITUCION PARAGUAYA (Para.) art. 65, it is still carried on by the Ministry of the Interior and the Department of Crimes and Vigilance. *See Amnesty International, Report on Torture* 174-76 (1st ed. 1973); 630 F.2d at 889-90. It has been argued that torture cannot be a violation of international law because the position of nations on torture are contradicted by their deeds. 49 U. CIN. L. REV., *supra* note 5, at 889-90. For a rebuttal of this argument, *see* Blum & Steinhardt, *supra* note 5, at 79-82.

43. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) lists the following as factors to be considered in choice of law decisions: the relevant policies of the forum, the

forum is premised upon respect for fundamental human rights,[44] the reconciliation of the choice of law will rest heavily upon the judgment of whether the law of the foreign state is compatible with both the law of the forum and international human rights law.[45] If it is not compatible, only then would the court face the question of whether an independent private cause of action might emerge through a rule of decision premised upon the human rights norm outlawing torture.[46]

There is only a possibility, then, that international law itself may be used as the norm creating the rule of decision.[47] The part of federal common law incorporating international law, however, is not necessarily a rule of decision.[48] Compatible with both common law tort and constitutional tort,[49] federal common law would support establishing as the rule of decision either the civil law of Paraguay against torture or, possibly, a universal norm of international law analogous to our own constitutional tort standard.[50] Use of a universal norm would interpose

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relevant policies of other interested states, and the basic policies underlying the particular field of law. In Leflar's view, there are important governmental interests, such as human rights and the maintenance of international order, which include considerations that may be relevant to choice of law. These considerations can transcend the individual case and sometimes should override local interests in applying local law. R. LEFLAR, AMERICAN CONFLICTS LAW § 60 (3d ed. 1977).

44. The policy of the United States, the forum in *Filartiga*, of respect for fundamental human rights is evident in our own constitutional litigation and in our recognition of universal norms against torture, piracy, and the slave trade. *See* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (Tent. Draft No. 2, 1981). *See also* the Comment and Reporter's Notes for § 404.

45. "If under accepted choice of law principles the foreign law should govern, the court could still refuse to apply that law if it were found to be contrary to the public policy of the forum." Henkin, *supra* note 37, at 178. One commentator has suggested that this principle could be used to apply Paraguayan law as it is written, rather than as it is enforced. *See* 33 STAN. L. REV., *supra* note 5, at 362-63.

46. For a discussion of whether international human rights law can create a private cause of action, *see* 33 STAN. L. REV., *supra* note 5, at 358-59. *See also* authorities cited *supra* note 8.

47. For the view that international law should be the rule of decision in 28 U.S.C. § 1350 cases, *see Alien Tort Statute, supra* note 5, at 881-89. Professor Lillich advocates a strong role for the judiciary in clarifying and applying international law, free of legislative and executive infringements, and has been critical of the courts' reluctance to assume this responsibility. *See* Lillich, *supra* note 30, *passim*.

48. Filartiga v. Pena-Irala, 630 F.2d at 887, where Judge Kaufman states his belief that it was sufficient in that case to construe the Alien Tort Statute "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."

49. *See* 42 U.S.C. § 1983 (1976).

50. Professors von Mehren and Trautman have advocated that when the law of a single jurisdiction is inadequate, the court should fashion a law which represents a "normal substantive-law rule . . . widely shared in the legal world to which the concerned jurisdictions (including the forum) belong." Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 LAW & CONTEMP. PROB. 105, 105 (Spring 1977). This theory is discussed in *Alien Tort Statute, supra* note 5, at 886-87. *See generally*, von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974). An approach such as that advo-

international law between two aliens, one of whom acted under the color of authority of a foreign state, if, once personal jurisdiction is properly exercised, the civil wrong also might be adjudicated in some other forum under a universal rule of decision.[51]

A universal rule of decision, premised upon the human rights norm outlawing torture,[52] might well be read into the tort standard itself and be incorporated into substantive federal common law[53] through the jurisdictional statute.[54] It is far from clear that the Alien Tort Statute itself did not create a separate cause of action.[55] By construing the statute to create a federal remedy for tort whenever a violation of international law involves a universally recognized wrong, the need for a choice of law subsides except to give respect to similar *lex delecti*, provided they meet the standard of the universal norm.[56] We

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cated by Trautman and von Mehren was criticized in Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 193 n.35 (1933).

51. "A state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps terrorism, even where none of the bases of jurisdiction indicated in § 402 is present." RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404, *supra* note 44. *See also* the Comments and Reporter's Notes following § 404, discussing the expansion of the class of offenses which customary law may come to accept as subject to universal jurisdiction.

52. This universal rule of decision is reminiscent of the doctrine of *hostes humani generis* prominent in the 18th and 19th centuries. In *Filartiga*, Judge Kaufman refers to this doctrine in his statement, "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis (sic) humani generis*, an enemy of all mankind." 630 F.2d at 890. For a discussion of this doctrine and its resurgence in modern human rights law, *see* Blum & Steinhardt, *supra* note 5, at 60-62, 68.

53. The practical effect of this choice is, in some cases, to impose liability on a defendant when the domestic law of the country that would be chosen under traditional territorial based theories would not find him liable. Nevertheless, it is not unfair to hold individuals to international standards of conduct. Because conduct that is determined to be in violation of international law is universally condemned, individuals should reasonably expect to be held accountable for egregious conduct that violates the norm.

Alien Tort Statute, supra note 5, at 888-89.

54. The jurisdictional statute in *Filartiga* is 28 U.S.C. § 1350. For a discussion of the possibility noted earlier in the text, *see* Blum & Steinhardt, *supra* note 5, at 98-102.

55. Although Judge Kaufman did not construe the Alien Tort Statute as granting new rights to aliens (*see* note 48 *supra*) he did admit that such a construction is possible, *citing* Lincoln Mills v. Textile Workers, 353 U.S. 448 (1957). Filartiga v. Pena-Irala, 630 F.2d at 887; *see also* Blum & Steinhardt, *supra* note 5, at 98-102. *But see* Dreyfuss v. von Finck, 534 F.2d 24, 28 (2d Cir. 1975), *cert. denied*, 429 U.S. 835 (1976). "[Sections 1331 and 1350] do not create a cause of action for a plaintiff seeking recovery under a treaty;" Comment, 37 WASH. & LEE L. REV. 1263, 1264 (1980) ("Section 1350 does not create a federal cause of action").

56. We could revive the good old quarrel between the dualists and monists in international law. For an examination of the differences in these views, *see* O'CONNELL, INTERNATIONAL LAW 37-42 (1970). Oppenheim espouses the dualist's view in L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 37-38 (1955). For the monist's outlook, *see* H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 553-54 (W. Tucker ed. 1966). For discussions of the relationship between international law and domestic law in the United States, *see* D. O'Connell, *id.* at 61-65; Dickinson, *The Law of Nations as Part of the National Law of the United States* (pts. 1-2), 101 U. PA. L. REV. 26, 792 (1952-1953); *see* Lillich, *supra* note 30, at

do not address here the more troublesome doctrine of *forum non-conveniens*, although, as a non-constitutional matter, human rights norms might also inform the court when to decline jurisdiction when no other forum is available.

CONSTITUTIONAL STATUS OF "PERSONS" AND "DUE PROCESS"

In *Fernandez v. Wilkinson*,[57] we see another constitutional use of international law in the evolution of the meaning of "persons" protected under the Due Process Clause of the Fifth and, presumably, the Fourteenth Amendments.[58] In *Fernandez*, the district court found itself confronted with the "arbitrary detention" in a federal maximum security prison of a Cuban refugee for whom "the machinery of domestic law utterly fails to operate to assure protection."[59] The refugee, who arrived on the "freedom flotilla" in June 1980, had been determined excludable by immigration officials, but his deportation proved impossible due to Cuba's refusal to readmit any of the refugees.[60] No statutory or regulatory procedures, other than parole, existed with regard to excludable aliens who were not immediately deportable.[61] Temporary detention of such aliens is sanctioned by statute and court decision.[62] A refugee, seeking a writ of habeas corpus, could not look to the Constitution for protection due to a revered fiction that keeps aliens, excludable but present in United States territory, from being included in the class of persons accorded constitutional protection.[63]

12-18. On the one side, the dualists would use the human rights norm outlawing torture only as a base of universal jurisdiction to prescribe domestic remedies for civil wrongs in violation of the norm. On the other side, the monists would select and apply the precise primary rule for decision either under municipal law or by using the universal international law norm that initially formed the base for exercising jurisdiction in the first place.

57. 505 F. Supp. at 787.

58. "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

59. 505 F. Supp. at 795.

60. *Id.* at 788-89.

61. *Id.* at 792.

62. *Id.* at 791.

63. The fiction excluding these particular aliens from constitutional protection is an old one, resting on status. One's rights under the old Roman law of persons also depended directly on one's status. And while, since that time, we have moved considerably from "status" to "contract," a noticeable revival of functional status has occurred to resolve various problems through the use of legal fictions. Consider for example, the use of status of consumers qua consumers, members of a class in a products liability suit; or one's "status" as a member of a protected minority or group being excluded from certain benefits by majoritarian legislation. The fiction is based on the premise that excludable aliens have not been admitted into the United States and therefore are not technically within its jurisdiction. This fiction which is the functional equivalent of treating aliens as non-persons, may be overcome by using human rights norms to interpret the word "person" in the Fifth and Fourteenth Amendments. *See* notes 64-66 *infra* and accompanying text.

The precise argument must be narrow and should not suggest that all preventive detention should be barred. Even under human rights norms, some detention of excludable aliens

EXCLUDABLE ALIENS AS PERSONS UNDER FIFTH AMENDMENT

Like *Filartiga*, the significance of *Fernandez* lies also at several levels. The first level artfully uses human rights law to accord protection to a narrow group of persons who has not been protected by the Fifth Amendment because, fictionally, they are non-persons.[64] The language of the Fifth Amendment says that "no person" may be denied due process; it does not say "no citizen or legally admitted alien." Universal recognition of all human beings as persons to be protected from abuse provides a narrow base to fill a gap in United States constitutional law without the need to challenge directly the validity of relatively recent Supreme Court decisions.[65] Furthermore, the concept of human dignity inherent in human rights norms buttresses a more inclusive definition of "person." Using such a concept, the district court used an expanded definition to inform a constitutional interpretation, rather than challenge the relevance of prior Supreme Court decisions and risk being overturned for failure to follow court discipline and supervision.

The Tenth Circuit Court of Appeals recently affirmed this decision, illustrating the wisdom of the district court's approach.[66] The interesting aspect of this narrow use of international law for constitutional interpretation is that it would have been quite unnecessary to find and apply human rights law had the Supreme Court given proper meaning to "persons" under the Fifth Amendment. In future cases, the gap-filling use of human rights norms may provide lower

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is permissible. Detention should be prohibited only when it is not related to a compelling interest in protecting the public. The detention must not be arbitrary or unreasonably long in relation to the time needed to determine what should be done with the alien. The human rights norm provides a way in which balances can be drawn; however, its use must not be overstated.

The district court traces the history of the fiction that excludable aliens are not entitled to constitutional protection through the federal case law at 505 F. Supp. at 790. The principle has been upheld in Fiallo v. Bell, 430 U.S. 787 (1977); Mathews v. Diaz, 426 U.S. 67 (1976); Kleindienst v. Mandel, 408 U.S. 753 (1972); Shaughnessy v. United States *ex rel* Mezei, 345 U.S. 206 (1953); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Knauff v. Shaughnessy, 338 U.S. 537 (1950).

64. The Court in *Fernandez* was "unwilling to initiate the corrosion of this venerable legal doctrine by holding that the force of the fiction diminishes" as the time which an excluded alien is detained increases. 505 F. Supp. at 790. Such a holding was unnecessary because the court found that [o]ur review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law. Therefore, even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remedial as a violation of international law.
505 F. Supp. at 798. The sources of customary international law reviewed by the court are listed in note 68 *infra*.

65. *See* cases *supra* note 63.

66. 654 F.2d 1382.

federal courts a tool to displace obsolete Supreme Court decisions on the status of some aliens as non-persons.

ARBITRARY DETENTION STANDARDS FOR UNPROTECTED PERSONS

The second level of the *Fernandez* decision is the substantive use of human rights law in defining a standard against arbitrary detention for a group of persons otherwise unprotected by the Fifth Amendment.[67] As in *Filartiga*, the district court looked to positive sources as evidence of a fundamental human right to be free from arbitrary detention.[68] The court did not have to invoke "natural law" to fill this narrow gap in protection because it went no further than required to find and apply a particular norm.[69] Yet, such a leap into natural law would be required if we were to infer from such a limited application of this source of law that the entire corpus of human rights norms is thereby directly incorporated into United States constitutonal law, as some human rights advocates have insisted.[70] That the court did not make

67. Following its review of the sources of customary international law, the district court held the following:

> the indeterminate detention of petitioner in a maximum security federal prison under conditions providing less freedom than that granted to ordinary inmates constitutes arbitrary detention and is a violation of customary international law; and that the continuation of such detention is an abuse of discretion on the part of the Attorney General and his delegates.

505 F. Supp. at 800.

68. The district court, *citing Filartiga*, stated that "[p]rinciples of customary international law may be discerned from an overview of express international conventions, the teachings of legal scholars, the general custom and practice of nations and relevant judicial decisions." 505 F. Supp. at 798. The *Fernandez* court's review of the sources of customary international law included the United Nations Charter, *signed* June 26, 1945, 59 Stat. 1031, T.S. No 993; the Universal Declaration of Human Rights, G.A. Res. 217A (III), 3 U.N. GAOR, U.N. Doc. A/810 (1948), and the views of legal scholars that the Universal Declaration, through its wide acceptance, has become binding customary law; the American Convention on Human Rights, *signed* Nov. 22, 1969, OAS T.S. No. 36, OAS O.R. OEA/Ser. L/V/II.23 doc. 21 rev. 6 (1979), O.R. OEA/Ser. A/16; The Convention for the Protection of Human Rights and Fundamental Freedoms, *signed* Nov. 4, 1950, 213 U.N.T.S. 222 (1968); the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967) (The court cited these last three documents as "indicative of the customs and usages of civilized nations." 505 F. Supp. at 797.) The court also quoted Congressman Donald M. Frasier and Patricia M. Derian, former Assistant Secretary of State for Human Rights and Humanitarian Affairs, as members of the Congress and Executive Department who have recognized an international legal right to freedom from arbitrary detention. *Id.* at 797-98. Furthermore, the district court, citing France *ex rel.* Madame Julien Chevreau, stated that "[t]ribunals enforcing international law have also recognized arbitrary detention as giving rise to a legal claim." 505 F. Supp. at 798.

69. *See* R. FALK, *supra* note 26, at 1. *But see* Comment, 37 WASH. & LEE L. REV. 1263, 1269-79 (1980) suggesting that recent developments in the human rights field indicate that natural law theory still has some validity.

For a discussion of the competing directions of natural law and legal positivism, *see* L. FULLER, THE LAW IN QUEST OF ITSELF (1940). For a modern theory of natural law, *see* J. FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

70. *See, e.g.*, 1 The Law Group Docket 7, *supra* note 6.

such a leap considerably strengthens the growth of fundamental human rights recognition. This pattern of growth through particular interpretation of discrete rights is new neither to the common law tradition nor to its civil law counterpart. It is remarkably similar to the preference in Bill of Rights litigation for considering each fundamental right separately and rejecting Justice Black's theory of wholesale incorporation of the first eight amendments into the Fourteenth.[71] One at a time, fundamental rights have developed through constitutional adjudication.[72] These have been made directly applicable to state action by careful judicial craftsmanship in the use of one or more of the open-ended provisions limiting the majoritarian power of all government.[73] The remarkable explosion of individual rights and liberties through case law is preferable and more sure through acquiescence than wholesale incorporation of an abstract code.

EQUAL PROTECTION

An opportunity for further use of human rights norms to inform constitutional interpretation is presented in *Doe v. Plyler*, now before the Supreme Court.[74] By statute, Texas declined to provide financial aid for the education of alien children unable to document the legality of their presence.[75] A local school district implemented this statute by charging undocumented alien children $1,000 annual tuition.[76] The policy and the Texas statute were challenged by a group of these

71. Justice Black's most famous exposition of his incorporationist theory was in his dissent in *Adamson v. California*, 332 U.S. 46, 68 (1947), wherein he states that "the original purpose of the Fourteenth Amendment [was] to extend to all the people of the nation the complete protection of the Bill of Rights." *Id.* at 89. This theory was rejected by the majority in *Adamson*: "The due process clause of the Fourteenth Amendment does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in *Palko v. Connecticut*." *Id.* at 53. *Palko* held that only those provisions of the Bill of Rights which were "implicit in the concept of ordered liberty" became valid against the states through the Fourteenth Amendment. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). In *Palko*, federal double jeopardy standards were held not applicable to the states. *Id.* at 328. This was overruled in *Benton v. Maryland*, 395 U.S. 784, 793-94 (1969).

For commentary and discussion of the incorporation debate, *see* J. ELY, *supra* note 3 at 24-8; G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 476-501 (10th ed. 1980); W. LOCKHART, Y. KAMISAR & J. CHOPER, THE AMERICAN CONSTITUTION: CASES-COMMENTS-QUESTIONS 505-33 (3d ed. 1970); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 567-69 (1978). The historical background of the Fourteenth Amendment and an anti-incorporationist viewpoint are set forth in Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

72. *See generally*, Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

73. *See supra*, note 3.

74. *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980), *cert. granted*, 101 S. Ct. 2044 (1981).

75. 628 F.2d at 449-50.

76. *Id.* at 450.

children.[77]

The Fifth Circuit Court of Appeals found that the application of the statute to undocumented alien children was a violation of the Equal Protection Clause of the Fourteenth Amendment.[78] While the Supreme Court has never squarely addressed the question of whether the guarantee of equal protection extends to illegal aliens, dicta in cases like *Wong Wing v. United States*[79] indicate that it does. The Court of Appeals recognized that illegal aliens are "persons" within the jurisdiction of the state in which they reside and, therefore, are covered by the language of the Fourteenth Amendment.[80]

In *Plyler*, as in *Fernandez*, individuals had been denied constitutional protection by reason of their status set forth in a statutory classification.[81] Human rights advocates h?ve sought recognition of a right of free access to public education for all children, by invoking positive sources of human rights law.[82] These claims unnecessarily go beyond what is essential to inform the guarantee of equal protection. While no Supreme Court decision has ever recognized a constitutional right to education,[83] once a state decides to provide free public education, it may not lightly exclude some children from the privilege.[84] When children are denied education by states based solely on their status as illegal aliens, I would argue that human rights provisions binding upon states require strict scrutiny of this discriminatory classifications. This argument seems stronger than to insist that recognition of an autonomous human rights norm, not previously recognized in United States constitutional law, limits state action. I have no doubt that such a norm should and does constitute a limitation on state action in a proper case, if the strict scrutiny standard of equal protection should fail.

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77. *Id.*

78. *Id.* This comment, limited to the constitutional uses of human rights norms, does not address the foreign affairs preemption argument presented to the court. *See id.* at 451-54. Though the argument may be valid, the stronger argument for individual rights is made via the Fourteenth Amendment, discussed below.

79. Wong Wing v. United States, 163 U.S. 228, 238 (1896).

80. 628 F.2d at 455.

81. *Id.* at 454.

82. The following international instruments recognize a right to education: Universal Declaration of Human Rights, art. 26(1), G.A. Res. 217A (III), U.N. Doc. A/810 (1948); International Covenant on Economic, Social and Cultural Rights, art. 13(1), entered into force Jan. 3, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967); International Convention on the Elimination of All Forms of Racial Discrimination in Education, arts. 3(e) 4; Declaration of the Rights of the Child, principle 7.

83. *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). In *Rodriguez*, the majority did not consider access to education to be a fundamental interest requiring strict scrutiny.

84. It should be remembered that the statute in *Plyler* denies free public education, a primary value, to the *children* of persons who illegally entered the country, an act for which the parents, not the children, are responsible. *See* 628 F.2d at 457.

Discriminatory classifications based on race, sex, and legal alienage trigger strict, or at least heightened, scrutiny. The class of excludable aliens may also require a heightened scrutiny above rational basis. The question in *Plyler* is whether classification schemes for discriminatory treatment of the children of illegal aliens require a more substantial or compelling governmental interest than normally would pass muster under standards of deference to state action.

One method of approaching this question is to examine the right being abridged by the discriminatory classification. Human rights norms indicate the consensus of civilized nations that education and nondiscrimination are important values. A discriminatory classification that burdens a fundamental value recognized by these international norms should be enough, under well established principles of equal protection, to trigger heightened scrutiny of that classification.

Professor Covey Oliver has argued that human rights advocates sometimes overstate or, more precisely, fail to shape their arguments with sufficient skill to guard against losing ground if an appellate court can easily dismiss the argument. I disagree with his conclusion if it counsels timidity in the face of Bricker Amendment-type retaliation, even though I agree with his tactical point. The use of human rights norms to support constitutional claims can be crafted with better skill. Rather than using human rights norms as an independent or alternative basis for a claim of denial of fundamental rights, those same norms should be used in a lawyer-like manner to interpret existing constitutional standards. In equal protection claims, then, a brief might argue why stricter scrutiny should prevail under constitutional theory when discriminatory classifications also intrude on fundamental human rights of illegal aliens. This argument is less vulnerable to attack than one which claims, in the alternative, that a discriminatory law must fall because it violates a treaty standard which is not clearly self-executing or it violates a customary international law when it is questionable whether that international norm is part of federal common law. Presenting a vulnerable, alternative ground to the highest court is the same as inviting the Court to reject it, especially when it is not necessary to a decision. Using human rights norms for the purpose of buttressing a standard of constitutional scrutiny, more strict than it otherwise might be, is better promotion, ultimately, of human rights than the martyrdom incurred when the arguments outlined above are presented. Moreover, now that the United States Department of Justice has recently, and wrongly, changed its position from challenging the Texas statute as discriminatory of the children of illegal aliens to

one of neutrality, it becomes even more important for private groups to persuasively urge the application of a higher standard of scrutiny.

CONCLUSION

The use of human rights norms in *Filartiga* and *Fernandez*, and their potential use in *Plyler*, may indicate the beginning of intersticial growth in constitutional interpretation using human rights norms. We need an adequate framework to aid federal judges in deciding how to use international sources of basic norms for interpreting constitutional rights. Without such a framework, any growth is likely to be erratic and uninformed. Moreover, human rights advocates who argue that human rights are part of customary international law will be ignored by those who believe that international human rights norms have no place in our jurisprudence until the United States accepts binding obligations by ratifying the human rights conventions. This brief comment offers the following criteria in moving toward an adequate framework:

1) Fundamental human rights norms can be used when they are established by the traditional sources of customary international law to form a constitutional nexus for exercising federal jurisdiction in cases where otherwise the constitutional basis for exercising jurisdiction might not be sufficient.

2) In choice of law questions involving foreign law, fundamental human rights norms should be used as the standard for determining whether to use the law of the other country, thereby giving it comity and respect, or when the *lex delecti* derogates too greatly from the standards of the forum, to create a new norm based on the international human rights standard.

3) In cases of a gap in constitutional protections for aliens or others, such as in standards prohibiting arbitrary detention, fundamental human rights norms as established by traditional sources of customary international law may be used to help fill the lacunae with substantive principles. For instance, in cases where domestic law might classify present but excludable aliens as, in effect, "non-persons," fundamental human rights norms should inform the meaning of "persons" protected under the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments.

4) In determining what standard of review the judiciary should apply to legislation which classifies unprotected aliens or other persons in a seemingly discriminatory manner, fundamental human rights norms established by traditional sources of customary international law should be used to support a heightened or strict standard of scrutiny.

Use of criteria, such as those briefly outlined above, will aid the new process of using human rights norms to inform interstitial growth in constitutional law.

The process of innovation in a discipline—be it scientific, technological, or economic—is one of rejuvenation from outside, beginning with new growth at the narrowest point; it is nucleation and displacement. The process exemplifies the idea that valid change occurs mainly from the outside—as in the use of dissent—and that displacement occurs not grandly but interstitially, beginning with incorporation of only the most fundamental human rights norms in the most narrow crevices. Even that great positivist, Hans Kelsen, recognized that when gaps in positive law exist, judges should have discretion to use universal principles as guides to decision, and thereby judge-made law might come into existence as a new positive law source.[85]

The human rights lawyer of the future will be a new brand of warrior: a highly skilled advocate and artist, locating these gaps and crevices and creating a legal construct so persuasive that, fueled by the denial of justice, the implantation of ideas in the interstice will grow and rejuvenate the spirit of the law from within its very core. The enormously creative craft of judicial interpretation can more safely and

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85. If there is no norm of conventional or customary international law imposing upon the state (or another subject of international law) the obligation to behave in a certain way, the subject is under international law legally free to behave as it pleases; and by a decision to this effect existing international law is applied to the case. But this decision, though logically possible, may be morally or politically not satisfactory. Only in this sense are there "gaps" in the international as in any legal order.

> The assumption that the law-applying organs are authorized to fill such gaps, by applying to the particular case norms other than those of existing conventional or customary international law, implies that the law-applying organs have the power to create new law for a concrete case if they consider the application of existing law as unsatisfactory. From the point of view of legal positivism, such a law-creating power must be based on a rule of positive international law. . . . The rule authorizing the law-applying organs not to apply existing law but to create a new law in case the application of existing law is, though logically possible, morally or politically unsatisfactory, confers an extraordinary lawmaking power upon the law-applying organs. It is doubtful whether the writers who adhere to the traditional doctrine of "gaps in international law" are aware of the consequence of this doctrine when they maintain the existence of rules of general international law conferring upon the states and agencies competent to apply international law the power to fill the gaps. . . . It is from this point of view that the provision of Article 38 of the Statute of the International Court of Justice is to be understood: that the Court "whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply" not only conventional and customary international law but also "the general principles of law recognized by civilized nations."

H. KELSEN, *supra* note 56, at 438-40. *See also* H. KELSEN, PURE THEORY OF LAW 353-55 (Knight trans. 1967); H. KELSEN, GENERAL THEORY OF LAW AND STATE 145-49 (A. Wedberg trans. 1961).

surely show the way for the vast revolution now upon us than endless political action and debate.