Judicial Globalisation and Perceptions of Disagreement: Two Surveys

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Using data from a 2011 judicial survey that drew responses from the entire New Zealand Supreme Court, I model the Court's practice of transnational argument. The data suggest that whereas foreign law often appears to contribute to the Court's legal conclusions, at times its contribution derives from an associated social reward, and at others is flatly illusory. I argue that these findings, in tandem with those of the larger survey, indicate that the law reports systematically misrepresent all judicial disagreement as legal disagreement, thus lending support to the claim that in controversial cases, the law is indeterminate.

I Introduction

The result of the recent burst of interest in the use of foreign law by domestic judges is a body of inter-court citations studies, typologies of comparison and hypotheses about judicial reasoning. Several broadly comparable theories have emerged. These characterise the use of foreign law as both a cause and reflection of increased peer consciousness amongst apex judges, a common judicial mission of individual/minority protection, and an enhanced sensitivity toward the possibilities of "persuasive authority".[1] Seeking data

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1 These theories take as their starting point H Patrick Glenn's view that persuasive authority is "authority which attracts adherence as opposed to obliging it": H Patrick Glenn "Persuasive Authority" (1987) 32 McGill LJ 261 at 263. See generally, Anne-Marie Slaughter "A Typology of Transjudicial Communication" (1994) 29 U Rich L Rev 99 at 124–125; Vicki C Jackson "Transnational Discourse, Relational Authority, and the US Court: Gender Equality" (2003) 37 Loy LA L Rev 271 at 287–288; and Cristopher McCrudden "A Common Law of Human Rights?: Transnational Judicial

to test this school of thought, Sinéad Ahern and I embarked on a survey study of 10 common law supreme courts ("Judicial Decision-making and Transnational Law").[2]

In this paper, I extract the response of the Supreme Court of New Zealand to that survey to test three specific hypotheses: that foreign law is used by New Zealand judges to reinforce professional status; that it is used to enhance the quality of their legal conclusions; or that it is used to advertise the merit of outcomes in whose determination it has not in fact had an input. I find that the data offer each hypothesis definite support: whereas foreign law often appears to contribute to judges' legal conclusions, its contribution sometimes derives from an associated social reward, and at other times is flatly illusory.

The paper proceeds in four parts. Having defined the subject of our inquiry, namely, the judicial use of *foreign* law, I identify my methodological assumptions. Drawing on the larger survey, I then seek to model the Court's practice of transnational argument. Finally, I revisit the suggestion in "Judicial Decision-making and Transnational Law" that survey responses may cast light on the nature of judicial reasoning. Specifically, I argue that the responses indicate that the law reports systematically misrepresent all judicial disagreement as legal disagreement, thus lending support to the claim that in controversial cases, the law is indeterminate. The surveys fall short, however, of advancing the Hart–Dworkin debate about the scope of legal disagreement and its implications for the theory of law.

II *Foreign* Law?

Transnational legal material arrives in two forms, the norms of public international law, and of other states and other groups of states. The status of these materials appears to be subtly different; judicial reliance on the former can seem more transparently appropriate (or less transparently inappropriate) than reliance on the latter. Christopher McCrudden has sought to capture this contrast by way of a formal distinction between

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Conversations on Constitutional Rights" (2000) 20 OJLS 499 at 503. Comparable views are expressed in Ruti Teitel "Comparative Constitutional Law in a Global Age" (2004) 117 Harv L Rev 2570 at 2593–2594; Craig Scott and Philip Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise" (2000) 16 SAJHR 206 at 217; and Claire L'Heureux-Dubé "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34 Tulsa LJ 15 at 16–17.

2 Brian Flanagan and Sinéad Ahern "Judicial Decision-making and Transnational Law: A Survey of Common Law Supreme Court Judges" (2011) 60 ICLQ 1.

binding and non-binding transnational norms.[3] For our purposes, however, this distinction is inadequate. If the consensus of some set of countries is evidence of the soundness of a legal conclusion, attention to their views is not straightforwardly "discretionary". Moreover, what exactly it is to be "binding" is a large part of the debate on the legitimacy of judicial use of transnational materials.[4] Distinguishing those materials in terms of what is "binding" risks begging the question of what status judges actually attribute to different materials.[5] Conversely, ignoring the apparent difference in status is liable to conflate distinct practices of legal argument.[6] What we need is a property characteristic of the form of comparative argument central to current debates about the legitimacy of the use of foreign law.

Consider a judge's reliance on transnational material to answer a question with respect to which the state's actions convey no intention that reference be made to such material. For instance, in the absence of official Irish action indicating an interest in determining domestic punishment norms by reference to the Eighth Amendment of the United States Constitution or any relevant customary international law, an Irish judge cannot appeal to the apparent intentions of other branches of government when invoking such material. On the other hand, Ireland's ratification of a treaty nominating a particular institution as the authoritative interpreter thereof suggests an intention that Irish law be exposed to the work of that court. An Irish judge's reliance on European Court of Human Rights jurisprudence could thus claim to be in keeping with the state's apparent intentions.

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3 Christopher McCrudden "Judicial Comparativism and Human Rights" in Esin Örücü and David Nelken (eds) *Comparative Law: A Handbook* (Hart Publishing, Oxford, 2007) 371 at 379.

4 See Jackson, above n 1, at 302–318; Mark Tushnet "When is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-US Law" (2006) 90 Minn L Rev 1275 at 1284–1286; and Mayo Moran "Authority, Influence, and Persuasion: *Baker*, Charter Values and the Puzzle of Method" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart, Oxford, 2004) 389.

5 For speculation at odds with McCrudden's distinction, see, for example, Reem Bahdi "Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts" (2002) 34 Geo Wash Intl L Rev 555 at 588: "The failure to distinguish between international and comparative law stems from the fact that judges look to these sources for their persuasive value and not out of a misguided conviction that the norms in question are binding."; and Karen Knop "Here and There: International Law in Domestic Courts" (2000) 32 NYUJ Intl Law & Pol 501 at 525: "Whatever its limitations, a key insight of the transjudicial model of international law in domestic courts is the blurring of international law into comparative law."

6 Compare Eric A Posner and Cass R Sunstein "The Law of Other States" (2006) 59 Stan L Rev 131 at 137, n 30.

The state's intentions may similarly distinguish the uses of transnational material in the determination of the domestic implications of treaties. For instance, where a state enters into a treaty regulating air traffic, we may assume that an important part of its reasons for doing so is the belief that there is an advantage to regulating air traffic in the same manner as other nations, even where that manner is not intrinsically better than all others. Generalising, we can say that where joining a treaty holds economy of scale or coordination incentives, decisions tending to bring domestic law into line with that of other parties can be thought to follow from the state's ostensible intentions in joining it.[7] Conversely, where a treaty holds no evident economy of scale or coordination incentive, judicial reliance on the interpretations given to it by other parties would not clearly so follow.[8] Treaties concerning individual rights would appear to fall predominantly into the latter category.

We appear to have located a property characteristic of the most contentious form of reliance on transnational material: the absence of an intention on the part of the state that the legal question be resolved by reference to the material in question. For our purposes then, a judge uses "foreign law" where the state's actions fail to convey the intention that the question be answered with reference to the material employed. Thus, our focus is on judicial regard to the (domestic and international) laws of other nations in the process of determining the application of a domestic or treaty norm on individual rights.

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7 Recall the attention of the European Court of Justice to attributing such qualities to the European Economic Community Treaty in its foundational *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 decision: "The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. … [It is also designed] to secure uniform interpretation of the Treaty by national courts and tribunals". Joseph Weiler, explaining the positive reception of the ECJ's constitutional jurisprudence among national judiciaries, observes that it seemed to them, "to reflect a plausible reading of the purposes of the treaty to which member states had solemnly adhered." Joseph Weiler "A Quiet Revolution: The European Court of Justice and its Interlocutors" (1994) 26 Comparative Political Studies 510 at 521.

8 Compare Ulrich Drobnig "The Use of Comparative Law by Courts" in Ulrich Drobnig and Sjef van Erp (eds) *The Use of Comparative Law by Courts: XIVth International Congress of Comparative Law* (Kluwer Law International, The Hague, 1999) 3 at 6 (distinguishing between the "voluntariness" of judicial recourse to non-domestic material in the interpretation of international agreements for which uniformity is desirable and recourse to such material where uniformity is not a concern).

III Method

The role of a member of the South African Constitutional Court appears to have much in common with that of his Irish and Australian counterparts. The coincidence of a culture of judicial independence, conflicts with electorally legitimated actors, a broadly common law tradition, and the privilege of finality, seems to generate a distinctive professional role. Seeking to help explain the use of transnational legal argument by those occupying that role, Ahern and I surveyed the judges of the British House of Lords, the Caribbean Court of Justice, the High Court of Australia, the Constitutional Court of South Africa, and the Supreme Courts of Ireland, India, Israel, Canada, New Zealand and the United States.

Work on design of the questionnaire began in October 2005 and included exploratory meetings with two British Law Lords. The decision to proceed with a questionnaire involving structured and unstructured elements was taken with a view to maximising the depth and comparability of the elicited data. Providing the opportunity for judges to express their views on the nature of the questions posed also promised a greater response rate. Including "follow-ons", the final survey contained a total of 25 questions. They appeared in a combination of multi-check, exclusive check, open-ended and simple ranking formats. In the first week of December 2005, letters were sent to the memberships of the surveyed courts. Over the course of the next three months, 43 responses were received.

With a few clear exceptions, the apex judges of all democratic jurisdictions operating within a broadly common law tradition under conditions of judicial independence were surveyed (103 judges in total). Accordingly, assuming the suggested professional role, our survey is a reasonable snapshot of the views of those occupying it. Assuming further that we can learn about judicial reasoning from judicial descriptions, the survey provides a basis for testing hypotheses.[9] Overall, we found that the conception of apex judges citing foreign law as a source of persuasive authority is of limited application. Citational opportunism and the aspiration to membership of an emerging international judicial "guild" appear to be equally important motivations.

IV Modelling the Use of Foreign Law

Consistently with the larger survey, the New Zealand data establish that foreign judges form a significant professional reference group for New Zealand judges: each noted that they felt "a sense of high professional

9 For a defence of this assumption see Flanagan and Ahern, above n 2, at 7–9.

esteem for Supreme Court judges from other jurisdictions" (Q 3), with all but one attributing this esteem to their possession of "equivalent professional responsibilities".[10] All but one agreed that they make indirect use of their legal knowledge of other countries in their judgments on rights (Q 8) and that they hold supreme court judges from other jurisdictions in greater professional esteem than their domestic subordinates (Q 3B). Likewise, most said that personal contacts with foreign supreme court judges contributed to their analysis of domestic rights (Q 14) and that of five different speeches on rights that they would prioritise attendance at that given by the foreign judge (Q 16). With respect to Questions 3B, 14 and 16, we found that New Zealand judges gave slightly greater priority to foreign judges than judges generally.[11]

The esteem in which foreign judges are held is reflected in the attitude toward the citation of foreign law. Thus, asked about the frequency with which they refer to the law of other national jurisdictions in their judgments on rights, all judges characterised themselves as regular users. Similarly, asked about the frequency with which they use comparative material in justifying their legal conclusions on rights, all but one answered "regularly". New Zealand esteem for foreign judges is also reflected in the importance attributed to international human rights law, with four judges placing it ahead of the "domestic constitution" as the tool "most useful for identifying the protection to be given to rights asserted in your court" (Q 4). Again, in each case, we found that New Zealand judges displayed a relatively greater receptiveness to transnational material than judges generally.

In "Judicial Decision-making and Transnational Law", we considered three prominent hypotheses about the use of foreign law in the interpretation of individual rights. First, that it is used to reinforce professional status;[12]

10 All six members of the 2005 New Zealand Supreme Court (Elias CJ; Tipping, McGrath, Blanchard, Gault and Keith JJ) responded, the first three of whom remain on the Court. In order to report the responses of the New Zealand Court in isolation it was necessary to secure the permission of the participating New Zealand judges. I wrote to the New Zealand participants in early October 2011 and promptly received their consent.

11 See Flanagan and Ahern, above n 2, at 13–15.

12 See Anne-Marie Slaughter *A New World Order* (Princeton University Press, Princeton, 2004) at 101, observing of inter-supreme court citation that "the psychological impact is considerable, leading judges to feel part of a larger judicial community"; Bahdi, above n 5, at 595: "Increasingly, judges want to belong not simply to a domestic community of judges but also to an international juridical community. Greater interaction between judges in both real and virtual space both reflects and promotes this judicial desire to belong to a transnational community of their peers."; and Ernest A Young "Foreign Law and the Denominator Problem" (2005) 119 Harv L Rev 148 at 157: "Interactions between legal elites on a global scale make it increasingly likely that the views of lawyers and jurists abroad will form part of the reference set for our own Justices as they formulate their own moral views."

second, that it is used to enhance legal conclusions;[13] and third, that it is used opportunistically to indicate the merit of outcomes in whose determination it has not in fact had an input.[14] The hypotheses appear mutually exclusive, in the sense that they will explain exclusively rather than jointly a *given* use of foreign law. In testing them with respect to the New Zealand Court's use of foreign law, we are assisted by correlations revealed in the larger survey. Consider the hypothesis that judges are seeking to be rewarded with professional approval or acceptance from their counterparts elsewhere.

In the larger survey, we found a statistically significant correlation between the prioritisation of attendance at a *foreign* judge's speech on rights and the justificatory citation of foreign law (Qs 6 & 16).[15] In "Judicial Decision-making and Transnational Law", we assumed that a desire to use foreign law to enhance one's legal conclusions would lead one to seek out the views of a foreign judge. Accordingly, we treated the finding as "consistent with" rather than "positively supporting" the social reward hypothesis.[16] In hindsight, however, there seems no reason to expect attendance at a speech on rights by a foreign counterpart over one by a local/foreign academic or a domestic subordinate. If one is interested in increasing one's appreciation of foreign judicial perspectives on rights it makes sense to attend that speech, but why prioritise the foreign judicial perspective on rights in the first place? The collective New Zealand prioritisation of the foreign judge's speech would thus seem to support the theory that New Zealand judges cite foreign law for social reward. We also identified a statistically significant correlation between the expression of a greater sense of professional esteem for foreign judges and the characterisation of international human rights law as the tool most useful for resolving rights questions (Qs 3B & 4).[17] We speculated that international human rights law may be seen by some as providing a socially

13 See Jeremy Waldron 'Foreign Law and the Modern Ius Gentium' (2005) 119 Harv L Rev 129 at 146 "[F]or those who see legal decision as a matter of reasoning one's way through problems, my account [of it as a matter of patient analysis, the untangling of issues, the ascertaining of just resolutions, and the learning and cooperation that is characteristic of a scientific approach] may help to explain why courts turn naturally to foreign law."

14 See *Roper v Simmons* 543 US 551 (2005) at 627 per Scalia J dissenting: "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."; and Pradyumna K Tripathi "Foreign Precedents and Constitutional Law" (1957) 57 Colum L Rev 319 at 346, who argues that the reasons directing the choice of foreign precedents "seem to possess no compelling force of their own; … any or all of them could be conveniently ignored altogether; and, of course, any of them could be cited in support of a decision where it happens to suit".

15 Flanagan and Ahern, above n 2, at 15.

16 At 18–19.

17 At 19.

rewarding opportunity to engage in the interpretation of common legal instruments. Accordingly, the application of the social reward hypothesis to the New Zealand Court also appears to be supported by the large proportion of New Zealand judges who describe international human rights law as the tool most useful for resolving rights questions.[18] As against this hypothesis, however, the response to Question 9 reveals little concern for peer approval:

> Which, if any, of the following considerations might justify the citation of comparative material in the interpretation of domestic rights? (Please rate in order of importance) 8 = highest.
>
> (a) The gains to your state's international standing from a visible judicial engagement with foreign ideas and attitudes.
> (b) It provides an additional source of impartial guidance (such as precedent), thus facilitating objectivity in judicial interpretation.
> (c) It provides an additional factual source, thus enabling the court to make more accurate predictions as to the effects of challenged laws and rights.
> (d) It provides an additional source of legal authority, thus increasing the chances that a legal authority can be found to match what you already believe to be the best result from a policy perspective.
> (e) It assists the work of establishing enlightened approaches to rights in emerging democracies.
> (f) The importance of upholding comity between judges internationally.
> (g) It demonstrates that the judicial review of legislation for compatibility with rights also happens in other respectable democracies.
> (h) Other — please specify.

Thirty per cent of respondents to the larger survey ranked (b) the most important consideration justifying the citation of comparative material; eight respondents (20 per cent) ranked (d) the most important; five (12.5 per cent) ranked (e) most important; while the rest received negligible attention. A similar distribution is apparent in the New Zealand responses. The most important consideration justifying citation of comparative material for New Zealand judges was its status as a "source of impartial guidance" (half the Court). Two judges specified (d) as most important, with another rating it second most important. Conversely, the considerations most closely related to comparison for professional approval namely, comparison for the sake of comity between international judges ((f)) or for gains to one's state's

18 The sole judge who did not indicate greater esteem for foreign judges than domestic subordinates was one of the two who did not characterise international human rights as the most important tool for determining litigants' rights.

international standing from visible judicial engagement with foreign ideas and attitudes ((a)), received negligible attention.[19]

Consider now the hypothesis that judges look to foreign law to enhance their legal conclusions. The hypothesis is supported by the indication by all but one New Zealand judge that they make indirect use of their legal knowledge of other countries: without citation, no other reward seems liable to accrue.[20] Whereas such usage appears in tension with the principle that the legal reasons for judgment must be cited, one New Zealand judge, noting his use of "the democratic elements in great US decisions" with "little express acknowledgement" compared this practice to his attention, both as advocate and as judge, to the writings of a prominent twentieth century legal theorist. For this judge at least, it may be that, just like philosophical writings or artistic expression, foreign court opinions may contribute to forming a legal conclusion not by any persuasive *authority*, but purely by their actual persuasiveness. Where an idea contributes purely on foot of its persuasiveness, its source does not count in favour of the conclusion reached, and, hence, requires no acknowledgement on the principle that legal reasons for judgment are to be cited.

Equally, the hypothesis is consistent with the fact that, like their peers internationally, most New Zealand judges say their approach to comparison is affected by a concern that they may not fully appreciate the legal and factual context surrounding material from other jurisdictions (Q 13).[21] As against it, however, there is the failure of two New Zealand judges to indicate adherence to general criteria in assessing a jurisdiction's comparability (Q 10),[22] and the Court's less than emphatic selection of "impartial guidance" as the most important justification for the citation of comparative material (Q 9).

Finally, there is the hypothesis that foreign judges and legal systems are a faux reference group; that they are used to advertise the merit of decisions

19 Similarly, in response to Question 12 only one New Zealand judge included "The international community" as part of their judgments' typical audience. In keeping with the general trend, all New Zealand judges included "The parties to the dispute" and most included the "Agencies/Organs of the State".

20 See Judith Resnik "Law as affiliation: 'Foreign' law, democratic federalism, and the sovereigntism of the nation-state" (2008) 6 ICON 33 at 46 (judges are learning from each other through "silent dialogues").

21 See Hugh Collins "Methods and Aims of Comparative Contract Law" (1991) 11 Oxford J Legal Stud 396 at 397–398 (illustrating the difficulties presented by the potential interdependence of different elements of a foreign legal system); and Adrienne Stone "Comparativism in Constitutional Interpretation" [2009] NZ L Rev 45 at 63 (raising this concern in the constitutional context).

22 Responses ranged from specifying no particular jurisdictional criteria (two judges) to specifying that a jurisdiction may be democratic (four judges) to insisting that it must also fall within the common law tradition (two judges).

in whose determination they in fact had no input. This is supported by the response to Q 9, for which a third of the Court stated that the most important reason for resort to comparative material is that it increases the chances that a legal authority can be found to match what one already believes to be the best result from a policy perspective ((d)). Seeking legal authorities to match what one already believes to be the best policy is conceptually distinct from searching for citations as "sales puff" for what one anyway believes to be the only legally correct decision. It is also distinct from reaching a policy decision by way of foreign examples; the decision is *already* made.

Perhaps suspecting that its wording admits of more than one interpretation, or that judges cannot be expected to be able to clearly distinguish the notions of law and policy, critics have expressed scepticism about the foregoing interpretation of Q 9.[23] Care was taken, however, that option (d) would portray the selection of comparative material as subsequent to the judge's decision on the result, itself made on non-legal grounds. The order of decision with respect to result and citation is expressed by the inclusion of the term "already". Likewise, the contrast between legal and non-legal reasoning is uncontroversially expressed in terms of decisions taken "from a policy perspective". Accordingly, it seems reasonable to conclude that, literally speaking, (d) expresses neither ambiguity between legal and non-legal reasoning nor between a judgment's basis and its presentation. Second, we should be wary of attributing to judges any difficulty in distinguishing the notions of law and policy. Such difficulty has been attributed by scholars in response to what they regard as the sincere but often erroneous judicial belief that a decision was legally entailed: "Unconscious preconceptions … are the key to reconciling the attitudinal literature with what judges think they are doing".[24] It seems incautious for the theorist who distinguishes legal from non-legal considerations to deny judges' ability to do likewise.[25]

23 Elaine Mak "Why do Dutch and UK Judges Cite Foreign Law?" (2011) 70 CLJ 420 at 421–422 (noting "drawbacks … as regards the reliability of conclusions drawn about the significance … of specific answers given").

24 See Richard A Posner *How Judges Think* (Harvard University Press, Cambridge (Mass), 2008) at 107. The attitudinal research to which Judge Posner is referring — the "law and courts" field of American political science — has found strong correlations between Justices' political affiliations and their votes on various questions. See similarly Maris Köpcke Tinturé "Law Does Things Differently" (2010) 55 Am J Juris 201 at 215: "([H]igher) judges face constraints that the rest of us do not, and these constraints combine to increase both the operation of unconscious influences on decisions and the desire by the decision-maker to appear (even to oneself) as having chosen the uniquely correct or the better option".

25 Posner, above n 24, at 94 (distinguishing "cases to which the orthodox legal materials do … speak clearly" and "the open area, where judges are legislators").

In addition to finding support in the response to Q 9, the hypothesis that foreign law is cited opportunistically by New Zealand judges is consistent with the results of a recent citation study. It has been reported that, of the 75 reported cases in which the New Zealand Court referred to overseas rights-based decisions from 1990 to April 2006, only:[26]

> 28 of them include[d] a reference to an overseas case that did *not* support the New Zealand court's eventual conclusion … [a]nd that figure overstates things to the extent that in some cases only one of the multiple [concurring] judgments [relying on foreign law] made such a reference.

Finally, the hypothesis is consistent with the admittedly sparse empirical work on other common law supreme courts.[27]

Taken as a whole, the data do not decisively favour any of the three examined hypotheses. Each has definite support. Thus, in line with the larger survey, we find that whereas foreign law often appears to contribute to New Zealand judges' conclusions on rights, its contribution may sometimes derive from an associated social reward, and at other times may be flatly illusory.

V Saving the Appearance of Judicial Disagreement

A legal disagreement is a disagreement over a proposition's legal validity which admits of a fact of the matter. Hartian legal positivism, the theory that a legal system's "ultimate criteria of legal validity … must be effectively accepted as common public standards of official behaviour"[28] is famously criticised by Ronald Dworkin as failing to account for the scope of legal disagreement.[29] Dworkin argues that a legal disagreement may admit of a fact

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26 James Allan, Grant Huscroft and Nessa Lynch "The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?" (2007) 11 Otago LR 433 at 440. It was suggested to me that considerations of courtesy might inhibit the Court from explicitly noting its divergence from other supreme courts. But this would be an ad hoc explanation: our test for courtesy-driven inhibition would be met whenever a divergence failed to be noted.

27 See Bijon Roy "An Empirical Survey of Foreign Jurisprudence and International Instruments in *Charter* Litigation" (2004) 62 UT Fac L Rev 99 (as discussed in Flanagan and Ahern, above n 2, at 23–24); and Alan Paterson *The Law Lords* (Macmillan Press, London, 1982) at 19: "[T]he Law Lords have experienced little or no difficulty in rejecting or ignoring the consensus of these other countries [those typically cited] when they prefer to retain their own line".

28 HLA Hart *The Concept of Law* (2nd ed, Oxford University Press, London, 1994) at 116.

29 Now travelling under the title, "the semantic sting", the objection made its debut in Ronald Dworkin "Social Rules and Legal Theory" (1972) 81 Yale LJ 855.

of the matter which is not determined by an agreed criterion of legal validity. Debate has focused on whether controversial appellate cases involve such disagreement. If so, then, contrary to Hart, legal validity is not determined by agreed criteria.

In "Judicial Decision-making and Transnational Law", we suggested that our survey data could be used to assess the prevalence of legal disagreement in appellate cases, and, hence, the strength of Dworkin's objection to Hartian positivism. I now think this suggestion was overstated. A finding that Dworkin exaggerates the volume of legal disagreement is no defence to his objection. If so much as a single legal disagreement admits of a fact of the matter which is not determined by an agreed criterion, it follows that legal validity is not determined by agreed criteria. So long as Dworkin identifies a single instance of such disagreement, his objection succeeds.[30]

A solution to the Dworkin–Hart debate is not going to be found through surveys of judges. That is not to say, however, that survey evidence on the nature of judicial disagreement has *no* bearing on legal theory. It bears directly on the question of the extent of legal determinacy, that is, of the proportion of legal questions with determinate answers. Formally, judicial reasoning is always cast in legal terms. On the evidence of official judicial opinion, therefore, the law is invariably determinate.[31] To the extent that confidential judicial surveys contradict the evidence of formal judicial opinion, the thesis that the law is indeterminate no longer has the disadvantage of failing to save the appearance that judges perceive it otherwise. Accordingly, judicial surveys can help establish the plausibility of the "indeterminacy" thesis, the claim that judicial disagreement is never legal in nature.[32]

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30 I pursue an alternative defence of Hartian positivism in Flanagan *Criterial Concepts of Legal Validity: The Objection from Disagreement* (Oxford Studies in the Philosophy of Law, 2012) (forthcoming).

31 Ronald Dworkin *Law's Empire* (Harvard University Press, Cambridge (Mass), 1986) at 90: "The old plain-fact picture … told us not to take the opinions judges write in hard cases at face value; the new picture [of jurisprudence] has the signal merit of allowing us once again to believe what our judges say"; David O Brink "Legal Interpretation, Objectivity, and Morality" in Brian Leiter (ed) *Objectivity in Law and Morals* (Cambridge University Press, Cambridge, 2001) 12 at 48: "[I]nterpreters typically act as if hard cases have a best [legal] interpretation"; Ken Kress "The Interpretive Turn" (1989) 97 Ethics 834 at 859: "Dworkin's most powerful descriptive criticisms of conventionalism focus on the phenomenology of judging in hard cases"; and Joseph Raz "Two Views of the Nature of the Theory of Law: A Partial Comparison" in Jules Coleman (ed) *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford University Press, New York, 2001) 1 at 34, n 46: "[Judges] believe that their decisions always represent the state of the law at a time just prior to their decision".

32 The claim is defended by a range of contemporary theorists: Mark V Tushnet "Defending the Indeterminacy Thesis" in Brian Bix (ed) *Analyzing Law: New Essays in Legal Theory*

The indeterminacy thesis is stated in general terms so that it may form part of an explanation of the nature of legal reasoning. So stated, both surveys under discussion are representative of judges whose disagreements are characterised as non-legal but who produce formal reasoning cast in legal terms. By contradicting the evidence of judges' formal reasoning, a survey may indicate that they believe that they engage in *legal* disagreement less frequently than had hitherto appeared.[33]

The next issue is whether the surveys actually shed light on judicial reasoning. We must consider whether the respondents' descriptions of their reasoning process are liable to be biased by the prospect of professional, academic, or popular (dis)approval. That is the major evidential hazard posed by formal judicial reasoning: a legal basis will aid a judge's justificatory task; especially in the case of disagreement with colleagues who are themselves appealing to legal authority on behalf of the alternative.[34] The advantage of surveys promising confidentiality is that they do not identify the respondent or, typically, any particular decision that they have made. Nevertheless, the concern remains that judicial responses are liable to be biased:[35]

> [Judges] may endorse the plain-fact picture as a piece of formal jurisprudence when asked in properly grave tones what law is. But in less guarded moments they tell a different and more romantic story.

Dworkin's concern is that, should they be asked overtly jurisprudential questions, judges are liable to indicate conformity with prevailing academic expectations of legal indeterminacy in appellate cases.[36] In contrast, some

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(Oxford University Press, New York, 1998) 223; Brian Leiter "Explaining Theoretical Disagreement" (2009) 76 U Chi L Rev 1215; and Dennis Patterson "Methodology and Theoretical Disagreement" in Ulla Neergaard, Ruth Nielsen and Lynn Roseberry (eds) *European Legal Method: Paradoxes and Revitalisation* (Djoef Publishing, 2011) 130.

33 See Dworkin, above n 31, at 39: "[T]here is no positive evidence of any kind that when … judges seem to be disagreeing about the law they are really keeping their fingers crossed".

34 Compare Dworkin, above n 31, at 37: "[W]hy should lawyers and judges pretend to theoretical disagreement in cases like these?"

35 Dworkin, above n 31, at 10. See further Ronald Dworkin "Pragmatism, Right Answers, and True Banality" in Michael Brint and William Weaver (eds) *Pragmatism in Law and Society* (Westview Press, Boulder, 1991) 359 at 365: "They [critics] think I must be saying not just that there are right answers in some ordinary way, as an *unselfconscious* lawyer might say that" (emphasis added); and the discussion in Paterson, above n 27, at 194–195 citing Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge (Mass), 1977) at 352.

36 See also Stephen Guest "Objectivity and Value: Legal Arguments and the Fallibility of Judges" in Michael Freeman and Ross Harrison (eds) *Law and Philosophy* (Oxford

theorists worry that judges will tend to refrain from expressing a sincere description of their reasoning process for fear of being thought to reach decisions that are *not* legally entailed:[37]

> [S]ocial desirability effects, and flat-out lying, would mar any such analysis. Judicial nominees who can state under oath before the entire nation that they had never thought about *Roe v. Wade* can hardly be fruitful candidates for traditional survey measures.

The fact that judicial surveys on decision-making are impugned for exerting pressure on their subjects to express both adherence to and disavowal of the same thesis does not necessarily mean that no pressure is exerted; perhaps different audiences are at work. What it does make less likely, though, is that there is very much pressure one way or the other. In any case, two factors combine to mitigate any pressure that might exist. First, in promising not to analyse the data court by court, the larger survey offered uniquely broad protection for candid answering. Second, the only answer option explicitly conceding non-legal reasoning (Q9 (d)) concerned the justification for citation of a particular source of law, that is, foreign law, rather than the evaluation of a general legal theory.

Analysing the respective survey data, we found that significant minorities of judges cite foreign law to justify policy-based legal decisions or follow it to reinforce their professional status. The surveys suggest that, where foreign law is in the frame, judges may not always, or perhaps even mostly, be arguing over the law as it is, but over what it should be. That implies, in turn, that notwithstanding the reasoning entered in the law reports, judges may not perceive their disagreements as legal in character. Moreover, the cases in which foreign law is in the frame are those of which the judicial perception of merely legal disagreement jars most with the indeterminacy thesis. Citation studies show that the more foreign law judicially cited in an appellate case the greater the disagreement over the result, a correlation which, given our findings about the use of foreign law, suggests that the

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University Press, Oxford, 2007) 76 at 90, n 19: "Are the highest appellate courts … [a] place where the different statements of law are not correctable … ? It seems unlikely, not least because of the way lawyers, and the courts themselves, *unphilosophically* speak" (emphasis added).

37 Jeffrey A Segal and Harold J Spaeth "The Authors Respond" (1994) 4(1) Law and Courts 10 at 12. Similarly, Lee Epstein and Gary King "The Rules of Inference" (2002) 69 U Chi L Rev 1 at 93–94.

law reports systematically misrepresent all judicial disagreement as legal disagreement.[38]

By contradicting the evidence of judges' formal reasoning, the surveys indicate that judges believe that they engage in legal disagreement less frequently than had hitherto appeared. They therefore help to secure the indeterminacy thesis from the criticism that it fails to account for the appearance of judicial disagreement to those engaged in it.

VI Appendix

Dear Judicial Participant,

You are very welcome to our Study in Comparative Legal Method.

You have successfully reached your online questionnaire webpage. Here you will find simple instructions on how to complete the form below. Many thanks for your goodwill towards the project, it is much appreciated.

Please read the word "rights" to mean human and/or civil rights. You may well feel that your answers to certain questions depend on factors other than those mentioned. Do not let this deter you from answering the questions as only limited conclusions are to be drawn from them. Moreover, feel free to note any such factors or additional comments in the comments box below each question.

Bear in mind that your participation in this study is entirely confidential — no references whatsoever will be made either to specific participants or their courts. All information will be wiped as soon as the data is collated.[†]

And finally, please remember to click the **SAVE** button at the bottom. You can return later to complete unfinished areas.

38 See CL Ostberg, Matthew E Wetstein and Craig R Ducat "Attitudes, Precedents and Cultural Change: Explaining the Citations of Foreign Precedents by the Supreme Court of Canada" (2001) 34 CJPS 377 at 396: "Citations to other than Canadian precedents grow as the number of concurring or dissenting opinions in a given case escalates." See similarly Shannon Ishiyama Smithey "A Tool, Not a Master: The Use of Foreign Case Law in Canada and South Africa" (2001) 34 Comparative Political Studies 1188 at 1200, 1202–1203; and Steven G Calabresi and Stephanie Dotson Zimdahl "The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision" (2005) 47 Wm & Mary L Rev 743 at 755: "[T]he [United States Supreme] Court has tended to cite foreign law in some of [what the authors regard as] its most problematic opinions".

Question 1
In those parts of your judgments which relate to rights, to what extent do you refer to the law in other national jurisdictions?

- Regularly
- Occasionally
- Rarely
- Never

Question 2
If you use law from other national jurisdictions in relation to rights is it primarily as a source of

- Different methods of legal reasoning OR
- Information on moral attitudes OR
- Information on the consequences of a particular decision
- Other — please specify

Question 3
Do you feel a sense of high professional esteem for Supreme Court judges from other jurisdictions?

- Yes
- To some extent
- Not particularly

[Those who answered "yes" or "to some extent" were asked] Question 3A
Does this sense of professional esteem derive from

(a) Having equivalent professional responsibilities
(b) Attendance at international judicial conferences
(c) Participation in international judicial education programmes and bodies such as the Commonwealth Judicial Education Institute
(d) Bilateral visits and contacts with members of foreign judiciaries
(e) Other reason — please specify

[And] Question 3B:
Is this sense of professional esteem greater than that which you feel towards subordinate judges in your own jurisdiction?

- Greater sense of professional esteem for supreme court judges abroad
- Equal sense of professional esteem for supreme court judges abroad
- Lower sense of professional esteem for supreme court judges abroad

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[†]All questionnaire pages were deleted from the Balliol College server in June 2006.

Question 4 [all participants]
Which tool do you consider most useful for identifying the protection to be given to rights asserted in your court?

- The domestic constitution
- International human rights law
- Moral thinking on human nature
- Religion
- Another means — please specify

Question 5
How often do you attend international judicial conferences?

- Regularly
- Occasionally
- Rarely
- Never

Question 5A
If you believe such conferences are worthwhile is it because they are a helpful source of information

(a) On different methods of legal reasoning
(b) On the moral viewpoints prevailing elsewhere
(c) On the consequences of adopting particular legal rules
(d) Other — please specify

Question 6
Do you use comparative material in justifying your legal conclusions on rights?

- Regularly
- Occasionally
- Rarely
- Never

Question 7
Do you think that comparative material provides a greater range of citations than domestic law?

- Yes
- To some extent
- Not particularly
- No
- Don't know

Question 8
Do you make indirect use of your legal knowledge of other countries in your judgments on rights?

- Yes
- To some extent
- Not particularly
- No
- Don't know

Question 8A
How would you explain this usage?

Question 9
Which, if any, of the following considerations might justify the citation of comparative material in the interpretation of domestic rights? (Please rate in order of importance) 8 = highest.

(a) The gains to your state's international standing from a visible judicial engagement with foreign ideas and attitudes.
(b) It provides an additional source of impartial guidance (such as precedent), thus facilitating objectivity in judicial interpretation.
(c) It provides an additional factual source, thus enabling the court to make more accurate predictions as to the effects of challenged laws and rights.
(d) It provides an additional source of legal authority, thus increasing the chances that a legal authority can be found to match what you already believe to be the best result from a policy perspective.
(e) It assists the work of establishing enlightened approaches to rights in emerging democracies.
(f) The importance of upholding comity between judges internationally.
(g) It demonstrates that the judicial review of legislation for compatibility with rights also happens in other respectable democracies.
(h) Other — please specify.

Question 10
Which traits must other jurisdictions possess to justify their citation in a judgment about domestic rights? Please mark as many as appropriate.

(a) None in particular
(b) They must be democratic
(c) They must be a "common law" jurisdiction
(d) They must speak the same language
(e) They must have close historical links (such as a colonial association etc)
(f) Other — please specify

Question 10A
If your answer would differ depending on whether you were using comparative material for guidance on extra-jurisdictional legal reasoning methods, extra-jurisdictional moral perspectives or extra-jurisdictional factual experience, please indicate how.

Question 11
Do you think that there is a conflict between the citation of comparative material in domestic rights' judgments and democratic principles?

- Yes
- To some extent
- Not particularly
- No
- Don't know

Question 12
Who is your judgments' typical audience comprised of?

(a) The parties to the dispute
(b) Respected judges
(c) Agencies/Organs of the State
(d) Subsequent generations
(e) The international community, broadly conceived
(f) God
(g) Other — please specify

Question 12A
Are you responsive to this audience's attitude towards the use of comparative material?

- Yes
- To some extent
- Not particularly
- No

Question 13
Is your approach to comparison affected by a concern that you may not fully appreciate the legal and factual context surrounding material from other jurisdictions?

- Yes
- To some extent
- Not particularly
- No
- Don't know

Question 14
Have personal contacts (outside of conferences) with judges of other jurisdictions contributed to your analysis of domestic rights?

- Yes
- To some extent
- Not particularly
- No
- Don't know

Question 15

"The constitutional protection of a country's rights is best resolved by reference to national sources alone"

- Strongly agree with statement
- Agree with statement
- Disagree with statement
- Strongly disagree with statement
- Don't know

Question 16
If, at a conference, you had to decide between attending five different speeches on rights without knowing what topics the speeches would address, which would you choose? Please rate in order of priority. 5 = highest

(a) The speech by the subordinate domestic judge
(b) The speech by a member of your own court
(c) The speech by a supreme court judge from abroad
(d) The speech by a domestic academic
(e) The speech by an academic from abroad

Question 17
If, delivering a conference paper on rights, you had to choose between an audience comprised entirely of one kind of attendee, which kind would you choose? Please rate in order of priority. 5 = highest.

(a) An audience of subordinate domestic judges
(b) An audience of past and present members of your own court
(c) An audience of supreme court judges from abroad
(d) An audience of domestic academics
(e) An audience of academics from abroad

Question 18
Do you consider your country's constitution to be "living" in the sense that succeeding generations should be able to draw new or revised meanings therefrom?

- Yes
- To some extent
- Not particularly
- No
- Don't know

Question 19
What is the main reason behind your use of domestic precedents?

- To indicate that you are taking a course that has been endorsed by respected professionals
- To help confirm whether your particular conclusion is on the right track
- To promote a sense of predictability of legal outcome
- As a source of ideas as to how best to resolve the case at hand
- To free up judicial resources by reducing the need for in depth consideration of the case at hand
- Other — please specify

Participant Comments (optional):