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## Shedding the Burden of Sisyphus: International Law and Wrongful Conviction in the United States

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# SHEDDING THE BURDEN OF SISYPHUS: INTERNATIONAL LAW AND WRONGFUL CONVICTION IN THE UNITED STATES

ROBERT SCHEHR\*

**Abstract:** Efforts to address the scourge of wrongful conviction in the United States would benefit from a theoretical framework for applying international law. Mythology has long been acknowledged as perhaps the most effective way to propagate values within a culture and to the external world. A new sort of mythology—one that can seamlessly accommodate local cultural variations—should be mobilized to enforce transcultural values and norms. This conception of mythology calls for the primacy of justice, the abrogation of sovereignty to the extent it precludes justice, and cultural variation within the parameters of human rights. Although the United States was founded on the law of nations and the U.S. Supreme Court has long extended comity to international law, in recent years American jurisprudence—particularly in the Supreme Court—has assumed an isolationist approach. This regrettable development is largely responsible for the systemic failures in the criminal justice system that have allowed wrongful conviction to become the pervasive problem that it is today.

*Brotherhood and otherhood must always exist side by side.*<sup>1</sup>

## INTRODUCTION

Sisyphus is notable in Greek mythology for being compelled to live out eternity unceasingly pushing a boulder the size of a Volkswagen Beetle up a hill, only to have the boulder roll back down again and again. The figure of Sisyphus is a suitable metaphor to describe innocence activists confronting the significant structural changes necessary to avoid and remedy wrongful convictions. The entrenched procedural and cultural obstacles to change in the subcultures of law enforcement officers, state police forensics labs, prosecutors, defense attorneys, and

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<sup>1</sup> JEFFREY C. ALEXANDER, *THE CIVIL SPHERE* 22 (2006).

the judiciary pose a challenge tantamount to a Sisyphean struggle. Is it possible that our Sisyphus, painstakingly making some progress (as with the *Justice For All Act*, and some state legislation)—often only to see it roll back over time—will someday be able realize affirmative change in wrongful convictions?<sup>2</sup> In my view, so long as courts in the United States continue to rely solely on domestic case law and retributive statutes designed to strip the accused of the due process protections, innocence activists will continue to toil with Sisyphus along the same worn path, bearing the same insurmountable weight.

I begin with the premise that, in order for the United States to make the criminal procedure changes necessary to avoid wrongful convictions, innocence activists must adopt a counter-hegemonic narrative based on insights emerging in international law, in particular human rights law and the criminal procedures of transnational bodies. Doing so will require legal practitioners and the judiciary to forego U.S. exceptionalism (and its concomitant claims of threats to sovereignty) and demonstrate a willingness to learn from and, where appropriate, adopt insights culled from transnational jurisprudence and policies.<sup>3</sup> Such a commitment would signify maturation of our legislative and judicial processes.<sup>4</sup> However, when it comes to consideration of international law and human rights, contemporary U.S. courts continue to be shaped by both a deep-seated political, economic, and cultural commitment to exceptionalism and the United States' contemporary status as the world's dominant superpower. In addition to the United States' stubborn aversion to the adoption of key international human rights agreements, some of its Supreme Court justices have shown overt hostility toward consideration of foreign innovations that would advance domestic human rights.<sup>5</sup>

Part I makes the case that international law should be viewed as a global mythology necessary to organize an increasingly interconnected world. Part II advocates the efficacy of international law within the context of transnational civil society. Part III presents a final theoretical

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<sup>2</sup> See, e.g., Justice For All Act of 2004, 42 U.S.C. §§ 10603–10603e, 14163–14163e (2004 & 2007 Supp.).

<sup>3</sup> “U.S. exceptionalism” refers to the belief that the United States is, in some measure, beyond reproach on account of its national origins and unique political institutions. See David P. Forsythe, *The United States and International Criminal Justice*, 24 HUMAN RIGHTS Q. 974, 975 (2002); Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 777 (2001).

<sup>4</sup> See T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 92 (2004).

<sup>5</sup> See Forsythe, *supra* note 3, at 980.

consideration necessary to domestic adoption of international human rights criteria (and other transnational criminal procedure innovations) by introducing the concept of cosmopolitan democracy. The concluding Parts argue that, by adopting the most salient features of international criminal law, the United States will realize the Kantian notion of the Federalism of Free Nations and will come to recognize the common transnational thread that connects all people everywhere: the right to liberty and justice. It is here that the subject of wrongful conviction comes into the scope of our discussion, albeit only in a rudimentary way.<sup>6</sup>

To approach contemporary jurisprudential concerns in the United States from a transnational perspective is not unique. Indeed, for centuries legal scholars have contended that U.S. jurisprudence has much to learn from transnational innovations.<sup>7</sup> My approach is unique, however, in that it suggests that transnational comity is inevitable due to its role as a new global mythology, located within the sociological understanding of civil society and couched in terms of cosmopolitan democracy. The goal is to establish a theoretical framework for applying international law (and the innovations of a transnational body of case law and statutes) to the vexatious problem of wrongful convictions in the United States.

## I. INTERNATIONAL HUMAN RIGHTS AS MYTHOLOGY

International human rights law signifies a grand mythology. Increasing transnational interactions regarding commerce, the environment, and the media will cause a new mythology to emerge and guide international relations. Myths serve the purpose of providing common understanding. They are deep structures that provide a common narrative and speak to a prevailing desire among human beings for ways to

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<sup>6</sup> A more substantive application of international law and practice to the subject of domestic wrongful conviction is forthcoming. My purpose, in this piece, is to establish the theoretical context for the substantive claims to follow in future work.

<sup>7</sup> See, e.g., generally Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995) (discussing the death penalty); Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909 (2005) (discussing the death penalty); Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006) (discussing state constitutions and international human rights); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (discussing transnational jurisprudence); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003) (discussing an international judicial system).

understand themselves in broader and more diverse temporal and spatial contexts. According to Joseph Campbell, myths serve the purpose of “explain[ing] the maturation of the individual from dependency through adulthood, through maturity, and then to exit.”<sup>8</sup> Since myths are typically generated within a specific culture, the idea of applying the language of myth to a cross-cultural context is novel. But given increasing transnational associations and an ever-present liquidity in regard to how subjects come to experience temporal and spatial relationships, it seems appropriate—and, in fact, imperative—that we apply insights generated from mythology to an ever more diverse set of transnational social relationships and geopolitical situations.<sup>9</sup>

I am not making the claim that the law itself is mythology. Rather, the role expectations, rituals, and authority that comprise the law are mythological in orientation. In this context, international human rights law is a manifestation of deeply rooted desires among human beings to generate archetypal modes of proper transnational interaction. International human rights discourse signifies the human desire to navigate temporal and spatial relations in a world where previous, archetypal modes of interaction are increasingly penetrated by a host of transnational practices. In this way, international human rights law allows global actors to interact in a manner conducive to peaceful cohabitation. Because this is a monumental task given the nature and diversity of existing cultures, a grand myth has emerged once again to serve the purpose that culturally specific mythology has always served.

To help clarify the distinction I am attempting to make between parochial mythology and the grander transnational mythology animating human rights jurisprudence, consider U.S. Supreme Court Justice Antonin Scalia’s aversion to domestic adoption of insights generated through international court opinions—whether they be from the International Court of Justice (ICJ), an international human rights organization, or any individual state or combination of states (for example, the European Union). In his dissenting opinions in *Atkins v. Virginia*, *Lawrence v. Texas*, and *Roper v. Simmons*, Justice Scalia argues that domestic jurisprudence should be guided by constitutionalism and fidelity to the

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<sup>8</sup> JOSEPH CAMPBELL WITH BILL MOYERS, THE POWER OF MYTH 41 (1988).

<sup>9</sup> See generally ZYGMUNT BAUMAN, LIQUID MODERNITY (2000). Bauman’s explication of “liquidity” is used as a metaphor to describe contemporary modernity. *Id.* at 2. Most salient for our purposes is Bauman’s suggestion that traditional, more stable institutions, reference groups, patterns, and codes have given way to the “epoch of universal comparison.” *Id.* at 7. The result is a clash of patterns and configurations that challenges traditional coercive powers. See generally *id.*

framers' "original intent."<sup>10</sup> That is, only human rights enumerated in the U.S. Constitution, together with those that have arisen from U.S. case law, should be germane when considering how to decide domestic cases. Stated in the context of mythology, what Justice Scalia articulates is a narrow, culturally-bounded interpretation of myth. For example, Justice Scalia's dissent in *Lawrence v. Texas*, the case in which the Court declared anti-sodomy laws unconstitutional, chides the majority for its reference to changing international opinions regarding homosexual sodomy laws.<sup>11</sup> Scalia writes: "Much less do [constitutional entitlements] spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct."<sup>12</sup> As Justice Scalia would remind the Court, *Bowers v. Hardwick*—the decision overruled by *Lawrence*—had "*never* relied on 'values we share with a wider civilization,'" but was, instead, based upon the supposed deeply held values and traditions of U.S. citizens.<sup>13</sup> Likewise, in *Atkins v. Virginia*, a case in which the Court ruled against the constitutionality of executing the mentally ill, Justice Scalia penned a dissent challenging the majority's suggestion that international opinion—including international human rights treaties regarding execution in general and execution of the mentally ill specifically—may be used to inform U.S. judicial opinions.<sup>14</sup> Scalia intones: "Equally irrelevant are the practices of the 'world community,' whose notions of

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<sup>10</sup> See *Roper v. Simmons*, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting). As normative practice, the American interpretation of constitutionalism can be traced to a letter from the Massachusetts General Court in 1768. Herman Belz, *Constitutionalism*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 190, 191 (Kermit L. Hall et al. eds., 1992). In that letter, the General Court emphasized that, "In all free States the Constitution is fixed; & as the supreme Legislative derives its Power & Authority from the Constitution, it cannot overleap the Bounds of it, without destroying its own foundation." *Id.* Thus, the Constitution served "as the permanent, binding, and paramount political law of the polity." *Id.* at 190. Beginning with Chief Justice John Marshall's ruling in the landmark *Marbury v. Madison* case, Constitutionalism came to refer to the enhancement and near-monopoly of judicial authority over constitutional questions and disputes. *Id.* at 192; see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Chief Justice Marshall's interpretation of the judiciary as the primary vehicle for redressing constitutional injuries dominated until the 1930s, when political uprisings calling for increased social justice ushered in a far greater role for the legislative branch of government. See Belz, *supra*, at 192. According to Belz, the U.S. Supreme Court attempted a return to its previous emphasis on Constitutionalism in the 1980s by once again enhancing the role of the judiciary over matters of public policy. See *generally id.* (explaining constitutionalism).

<sup>11</sup> *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

<sup>12</sup> *Id.*

<sup>13</sup> See *id.* (citing *Bowers v. Hardwick*, 478 U.S. 186, 193–94 (1986)).

<sup>14</sup> See *Atkins*, 536 U.S. at 347–48 (Scalia, J., dissenting).

justice are (thankfully) not always those of our people.”<sup>15</sup> Quoting his dissent in *Thompson v. Oklahoma*, Justice Scalia returns to a myopic constitutionalism when he argues that:

We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.<sup>16</sup>

Justice Scalia reserves his most spirited invective for his dissent in *Roper v. Simmons*, the case which effectively banned the execution of juveniles.<sup>17</sup> He begins with an indictment of the majority’s subordination of the “original meaning of the Eighth Amendment” to “evolving standards of decency.”<sup>18</sup> Criticizing the majority for acting as the “sole arbiter of our Nation’s moral standards,” Scalia continues by decrying the Court’s references to “the views of foreign courts and legislatures.”<sup>19</sup>

Justice Scalia’s remarks in *Lawrence*, *Atkins*, and *Roper* are certainly not unique among Supreme Court justices, but they do serve as contemporary examples of a strong emphasis on originalism and its concomitant aversion to the ideas, opinions, and jurisprudential influences of people living beyond U.S. borders. The tendency for some Supreme Court justices to dismiss international court opinions as “irrelevant” to

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<sup>15</sup> *Id.* I agree with Justice Scalia that international variation regarding our “notions of justice” is an important aspect of our cultural identity and should be respected. He errs, however, in his thorough dismissal of insights arising from international law and practice. When he exclaims, “Equally irrelevant are the practices of the ‘world community,’” Justice Scalia adopts a parochial, intellectually dishonest, and, in my view, ideological position. *Id.* The practices of the world community have been of interest to the political, economic, and legal communities in the United States since its founding, a point that I will address in greater detail. What Justice Scalia either fails to recognize, or cannot allow himself to recognize out of concern for ideological consistency, is that it is neither necessary nor desirable for U.S. judges and politicians to adopt the practices of the international community entirely and indiscriminately. Rather, what benefits all nations is a recognition of international norms of justice and human rights that simultaneously preserves cultural uniqueness. This idea will be more fully explored in the body of the text as part of my discussion of cosmopolitanism.

<sup>16</sup> *Id.* at 348 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868–69, n.4 (1988) (Scalia, J., dissenting)).

<sup>17</sup> See *Roper*, 543 U.S. at 616 (Scalia, J., dissenting).

<sup>18</sup> *Id.* at 608 (quoting *Thompson*, 487 U.S. at 561).

<sup>19</sup> *Id.* He concludes his opening salvo by writing: “Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.” *Id.*

deliberations over domestic disputes can be viewed as a manifestation of a time-honored dualism intended to marginalize outsiders. As far back as 1948–49, when the United Nations first adopted its Declaration of Human Rights, country-specific narratives seeking to define “democracy” differently than the master narratives generated by Western democratic states (Great Britain, France, and the United States) were discounted, marginalized, and delegitimated.<sup>20</sup> Desperate to understand how to implement the newly created Declaration of Human Rights, the United Nations Educational, Scientific and Cultural Organization (UNESCO) Committee of Experts, in May 1949, distributed an international survey to philosophers and social scientists soliciting their understanding of “democracy” and its relation to international human rights discourse. What the Committee soon came to realize was that the manipulation of “value-loaded words with unstable cognitive connotations is a powerful tool of *attitude influencing and control*.”<sup>21</sup> The Committee found that the concept of “democracy” was prone to manipulation by powerful nations often having it as their “*deceitful motive*” to advance a certain political agenda.<sup>22</sup>

In a related way, Daniel Levin contends that originalist positions offer

the possibility of an immediate and authentic encounter with the past tied to a critique of modernism as both antidemocratic and inauthentic. Originalism portrays the federal period as a special moment of civic unity, whose virtues have been preserved by the larger public, but have been eroded among elites by modernity.<sup>23</sup>

So it is that Justice Scalia attempts—through binary juxtaposition of his own originalist interpretation of the Constitution with others’ “inferior” contemporary transnational claims to human rights—to marginalize and delegitimate doctrinal developments from abroad.

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<sup>20</sup> See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

<sup>21</sup> Arne Naess & Stein Rokkan, *Analytical Survey of Agreements and Disagreements, in DEMOCRACY IN A WORLD OF TENSIONS* 463 (Richard McKeon & Stein Rokkan eds., 1951), available at <http://unesdoc.unesco.org/images/0013/001335/133513eo.pdf>.

<sup>22</sup> *Id.* at 464. According to Henri Lefebvre, a French respondent to the survey, “middle-class politicians mislead the people by trying to let their bourgeois democracy pass for the ideal democracy—be it from unconscious prejudice or from a deliberate, cynical determination to bamboozle.” *Id.* at 464–65.

<sup>23</sup> Daniel Levin, *Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory*, 29 *LAW & SOC. INQUIRY* 105, 105 (2004).



Certainly one could contend that, because the colonies (and later the federation of states) constituted a relatively homogenous grouping, a more insular and exceptionalist conception of myth may have seized the imagination of the framers. But, neither the framers nor the early Supreme Court held such a myopic view of the principles that informed the drafting and initial interpretation of the Constitution. Both the framers and the early Supreme Court made frequent references to international law and human rights, and thus in no way did either intend for the Constitution to be strictly interpreted as an intractable and essentialistic charter incapable of responding to changing times and circumstances. Neither did they ignore the “evolving standards of decency” articulated in numerous foreign court opinions throughout the eighteenth and nineteenth centuries.<sup>24</sup> Indeed, such standards were cited by the Supreme Court when it was found useful to do so.<sup>25</sup>

Transnational social relationships and the procurement of peaceful cohabitation of diverse peoples require a new mythology that transcends localized or national culture. While this new mythology will still be infused with cultural variations in the character and flavor of its stories, it also—as a matter of necessity, reason, and sound policy—will slowly incorporate narratives that speak to transnational matters of significance. The reason for situating a discussion of international human rights law and its applicability to domestic wrongful conviction within this context is to generate understanding of the significance of international human rights discourse for the continued evolution of criminal law and criminal procedure in the United States. By recourse to mythology, I can more effectively contend that positions taken in opposition to adherence to international law by U.S. courts—at least when made on grounds of constitutionalism and “original intent”—are seriously flawed. No longer can any country blamelessly exempt itself from participation in the grander human rights discourse that began to emerge in the middle of the twentieth century.<sup>26</sup> Domestic attempts to do so promote a parochialism that will position Americans at the opposite pole of a growing transnational mythology that promotes universal peace and well-being.

When I teach students about federalism, I make a point to emphasize that any physical lines of demarcation existing between the states

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<sup>24</sup> See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (stating that courts should interpret the Eighth Amendment in accordance with “evolving standards of decency that mark the progress of a maturing society”).

<sup>25</sup> See *infra* text accompanying notes 134–167.

<sup>26</sup> A movement that, notably, was initiated in part by the United States.

are artificial. To make this point, I explain to them how I felt the first time I flew in an airplane and noticed that, when I peered through my window to the earth thousands of miles below me, the cartographical lines with which I was so familiar were not really there. Of course, my students laugh at how simplistic the example is. But, insofar as it pertains to how humans come to know their place in the world, the point is far more complex. This same analogy can be drawn when considering transnational geopolitical distinctions. Beautiful, almost spiritual, satellite images of Earth depict stunningly clear oceans, clouds, and terra firma constituted by flatlands and mountains. There are no lines to demarcate nation-state boundaries. Those boundaries, thought to be so important to our sense of national pride, are but artificial products of conquest and political negotiation. In contrast to the striated space constituting geographic boundaries, there is only smooth and continuous space.<sup>27</sup> Recognizing this physically unfettered multidimensionality radically alters one's sense of the neatly demarcated, but seriously flawed, parochialism that pervades contemporary domestic jurisprudence.

Nothing makes this point more salient than the ubiquitous power of the Internet and satellite telecommunications. With media of this sort, information scatters in endless multi-directional bursts without obstruction, not needing to stop at border checkpoints. A person no longer need be living in the Middle East to receive news, reported in Arabic, from places like Iraq, Iran, or Pakistan—one need only tune in to Al Jazeera. Fans of European, Asian, or Latin American football need not be located in any of these places to watch the games, but rather can view them on television, often live and beamed from satellites hovering far above the Earth. Furthermore, consider decisions made by governments or corporations that, despite initially appearing to have only domestic impact, produce effects that reach far beyond national borders.<sup>28</sup> Take, for example, how decisions made by corporations to emit air and water pollution can affect the quality of the air and drinking water in communities thousands of miles away. Monetary decisions made by a small group of brokers and financiers living in the United States, China, or Japan can stimulate reverberations, both positive and

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<sup>27</sup> See GILLES DELEUZE & FÉLIX GUATTARI, *A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA* 474 (Brian Massumi trans., 1987).

<sup>28</sup> David Held, *Democracy and the New International Order*, in *COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER* 99–101 (Daniele Archibugi & David Held eds., 1995).

negative, in countries around the globe.<sup>29</sup> Although these decisions are made by actors working within national boundaries, the effects of their decisions are felt globally. The point is that myths and ideas are no longer strictly bounded, as they once were, by geographical demarcations. In short, we no longer live lives of geographic separation and we must, therefore, construct a new global mythology capable of generating broad understanding of transnational actors, their actions, and the effect on our global community. To more fully address the evolution of shared political, economic, and cultural experiences, I now move to a discussion of transnational civil society.

## II. TRANSNATIONAL CIVIL SOCIETY

Like mythology, articulation of the concept "civil society" is typically geographically bounded.<sup>30</sup> Conceptually nestled between the realm of politics and economics, civil society is the location of voluntary associations, social movements, and public groupings organized around lifeworld issues.<sup>31</sup> Once organized, actors coalescing in civil society can have a significant influence on institutions in the "international, national, regional, local, and subcultural arenas."<sup>32</sup> Proposing the idea of a transnational civil society—or a "world civil society," as Gordon Christenson would have it—requires both a dramatic reconceptualization of civil society and a willingness to blur the artificial boundaries of sovereignty.<sup>33</sup> As with civil society as it is normally conceived, transnational civil society involves combinations of actors in voluntary associations. But transnational civil society sheds cultural parochialism and exceptionalism, and suggests that transnational actors should disregard traditional state boundaries when necessary to confront matters of transnational public concern. Still, even transnational actors must rely on their own national legal systems to protect basic rights.<sup>34</sup> To that end, "[c]ooperation is expected from all governments and international regimes to ensure these background rights. Neither human dignity nor

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<sup>29</sup> See *id.* at 99.

<sup>30</sup> See JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* 2 (1992).

<sup>31</sup> See generally JÜRGEN HABERMAS, 2 *THE THEORY OF COMMUNICATIVE ACTION: LIFE-WORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy trans., Beacon Press 1984) (1981).

<sup>32</sup> Gordon A. Christenson, *Federal Courts and World Civil Society*, 6 *J. TRANSNAT'L L. & POL'Y* 405, 411 (1997) (quoting JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 373 (William Rehg trans., MIT Press 1996) (1992)).

<sup>33</sup> See Christenson, *supra* note 32, at 412 (introducing the concept of "world civil society").

<sup>34</sup> See *id.* at 414.

voluntary transactions or investments can thrive in world civil society without credible and legitimate international and national legal systems.”<sup>35</sup> Thus there is a recursive relationship between national and international legal institutions, on the one hand, and on the other, transnational actors in civil society invested in the work of advancing human rights.

In his recent work, Jeffrey Alexander attempts to clarify and reclaim the long debated and oft-misunderstood concept of civil society in order to accentuate its relevance to the promotion and realization of justice:<sup>36</sup>

Justice depends on solidarity, on the feeling of being connected to others, of being part of something larger than ourselves, a whole that imposes obligations and allows us to share convictions, feelings and cognitions, gives us a chance for meaningful participation, and respects our individual personalities even while giving us the feeling that we are all in the same boat.<sup>37</sup>

Through his emphasis on the necessity of acknowledging certain universalisms while simultaneously valuing local uniqueness, Alexander engages his reader in a balancing act that generates justice by defining an Archimedean vantage point from which to consider both the universal and the unique.<sup>38</sup> Through the analysis of civil society, Alexander seeks to accentuate “the we-ness of a national, regional, or international community, the feeling of connectedness to ‘every member’ of that community, that transcends particular commitments, narrow loyalties, and sectional interests.”<sup>39</sup> In this view, Alexander is joined by Kwame Anthony Appiah, who recently cited a similar position held by Adam Smith, the eighteenth-century philosopher of capitalism.<sup>40</sup> Smith, according to Appiah, while struggling to understand why human beings can be moved to action in the service of strangers, concluded that this impulse has little to do with vague notions of benevolence.<sup>41</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> See generally ALEXANDER, *supra* note 1.

<sup>37</sup> *Id.* at 13.

<sup>38</sup> See generally *id.*

<sup>39</sup> *Id.* at 43.

<sup>40</sup> See KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* 156–57 (2006).

<sup>41</sup> See *id.* (citing ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 157 (Knud Haakonssen ed., Cambridge University Press 2002) (1759)). Smith instead intuited that: “It is a stronger power, a more forcible motive, which exerts itself upon such occasions. It is

But, as Alexander admits, while the notion of justice is ubiquitous in philosophy and social science (and jurisprudence, too, of course), it nonetheless remains a terribly difficult concept to define and, perhaps, an even more difficult one to realize. Alexander argues that “[m]odernity is fundamentally multiple and ambiguous.”<sup>42</sup> Here, he joins the likes of Zygmunt Bauman, who stresses the liquidity of modern political, economic, and cultural relations.<sup>43</sup> What this conveys is the perennial confluence of the fixed and the chaotic—or, as Alexander suggests, the transcendent and the particular—as each affects our local, regional, national, and international relations. At the local level, where cultural capital combines with ever-changing external stimuli, people rely on their storehouse of *mêtis*, “a wide array of practical skills and acquired intelligence in responding to a constantly changing natural and human environment.”<sup>44</sup>

In the context of the synergistic relationship between the “transcendent and the particular,” the concepts of *mêtis* and *techne* provide a useful way to relate the influence of international human rights law to the domestic adoption of it. While a body of agreed-upon human rights principles has emerged, it has done so only through wrenching negotiation among United Nations member-states over the meaning of concepts like democracy, justice, and equality. In applying these principles, the member-states have, alarmingly, misplaced emphasis on *mêtis*. It is *techne* which “‘came into being when from many notions gained from experience’” and represents “a universal judgment about a group of similar things . . . .”<sup>45</sup> And although *techne* is defined as a set of *universal* rules and principles, it is precisely that universality which may expose it to numerous local variations.<sup>46</sup> Consequently, when the United States—or any other country—adopts international human rights standards, these standards are always interpreted within the context of a *mêtis* specific to the United States.

The implementation of a global human rights discourse requires both *mêtis* and *techne*. In place of the artificial distinctions that all

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reason, principle, conscience, the inhabitant of the breast, the man within, the great judge and arbiter of our conduct.” *Id.* at 157 (quoting SMITH, *supra*, at 157).

<sup>42</sup> ALEXANDER, *supra* note 1, at 22.

<sup>43</sup> See generally BAUMAN, *supra* note 9.

<sup>44</sup> JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 313 (1998). *Mêtis* is in constant interplay with *techne*, the tightly structured and rule-bounded principles and propositions that characterize universal order. *Id.* at 319–20.

<sup>45</sup> *Id.* at 320 (citation omitted).

<sup>46</sup> See *id.*

cultures make on the basis of such things as race, ethnicity, class, religion, and national origin, justice requires the global privileging of “reason, principle,” and “conscience” through realization of morality in the application of law.<sup>47</sup> This is not to say, however, that the implementation of a human rights discourse should only appeal to reason. In recognition of the thickness of culture, it is necessary for advocates of a universal human rights discourse to recognize the role of emotion in the effective transnational administration of justice.<sup>48</sup> Catherine Lane West-Newman challenges the conventional Occidental reduction of human rights to pure reason by exploring the heterogeneous transnational manifestations of justice based on complicated and culturally bounded expressions of emotion. Specifically, West-Newman argues for a culturally specific analysis of the ways in which “emotions connect with law.”<sup>49</sup> The challenge is to effectively administer a transnational human rights discourse that privileges cultural capital (*mêtis*) but simultaneously imposes an agreed upon body of law necessary to protect human dignity (*techne*).

Theoretical articulations of transnational civil society emphasize a universal commitment to a notion of justice that constructs a narrative that encourages a political culture “more tolerant of individual differences and more compatible with the pluralization of interests.”<sup>50</sup> The idea is to promote a common narrative that enhances one’s understanding of transnational norms and cultural codes, thereby enabling a fuller understanding of otherness. Readers of my earlier work may cringe at my acknowledgment of the existence of universals in any shape or form, but it is clear that, while they may be mediated, negotiated, and exhibit local flavor, universal codes of behavior do exist.<sup>51</sup> This is largely because human beings have been interacting in meaningful ways through trade, cohabitation, and cross-cultural communication for millenia. When people communicate across cultural bounda-

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<sup>47</sup> APPIAH, *supra* note 40, at 157 (quoting SMITH, *supra* note 42, at 157).

<sup>48</sup> See Catherine Lane West-Newman, *Feeling for Justice? Rights, Law, and Cultural Contexts*, 30 LAW & SOC. INQUIRY 305, 330 (2005).

<sup>49</sup> *Id.* at 306.

<sup>50</sup> ALEXANDER, *supra* note 1, at 46.

<sup>51</sup> See, e.g., generally BRUCE A. ARRIGO, DRAGAN MILOVANOVIC, & ROBERT CARL SCHEHR, *THE FRENCH CONNECTION IN CRIMINOLOGY* (2005); Bruce Arrigo, Dragan Milovanovic, & Robert Carl Schehr, *The French Connection: Implications for Law, Crime and Social Justice*, 24 HUMAN. AND SOC’Y, 162 (2000); Robert Carl Schehr, *Conventional Risk Discourse and the Proliferation of Fear* 16 CRIM. JUST. POL’Y REV. 38 (2005); Robert Carl Schehr, *From Restoration to Transformation: Victim-Offender Mediation as Transformative Justice*, 18 MEDIATION Q. 151 (2001); Robert C. Schehr & Dragan Milovanovic, *Conflict Mediation and the Postmodern: Chaos, Catastrophe, and Psychoanalytic Semiotics*, 26 SOC. JUST. 208 (1999).

ries they do so by discussing those issues that matter most to them.<sup>52</sup> Thus, while those of us in the United States may not have much interest in or knowledge about the ritualistic habits displayed in African tribal ceremonies, both U.S. citizens and Africans care deeply about justice, fairness, and respect.

Unfortunately, claiming residence in a community, region, or nation by definition requires making clear in-group and out-group distinctions.<sup>53</sup> These distinctions are often based on parochial notions of exceptionalism, local superiority, and consequent exclusion of the other. But is it necessary for members of any nation to marginalize and delegitimize the other in order to retain their sense of cultural identity? It is not. When people learn to see the other not as an abstract and disembodied signifier, but instead as a real human being with shared interests in a quality of life not dissimilar from their own, it is possible to generate the meaningful associations that enable us to understand and learn from others.

I do not claim that all cultural and biological predispositions to suspicion of the other will vanish. To make such a claim would require the utopian presumption that there can be both universal clarity of understanding and a shared motivation for understanding that, while praiseworthy, is, for political, economic, and cultural reasons, largely impossible. There are good reasons—culturally and even biologically grounded ones—for remaining suspicious of those with whom we are unfamiliar. Suspicion of what is potentially dangerous is a vital element of species survival. In his book about the origins of non-normative and harmful behavior, naturalist Lyall Watson writes that species have one desire—to survive.<sup>54</sup> Genes in all species survive by a simple set of three commands: “be nasty to outsiders, be nice to insiders[,] and cheat where possible.”<sup>55</sup> According to Watson, the further we are removed from our direct biological descendants, the less involvement we desire to have with “the other,” especially in important matters of life and death.<sup>56</sup> Stated crudely, ‘I’ll risk further propagation of my bloodline

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<sup>52</sup> See APPIAH, *supra* note 40, at 96–97. For example, people across the globe share a common interest in “music, poetry, dance, marriage, funerals; values resembling courtesy, hospitality, sexual modesty, generosity, reciprocity, the resolution of social conflict; concepts such as good and evil and right and wrong, past, present, and future.” *Id.*

<sup>53</sup> See generally GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* (Kurt H. Wolff ed. & trans., 1950).

<sup>54</sup> See generally LYALL WATSON, *DARK NATURE: A NATURAL HISTORY OF EVIL* (1997).

<sup>55</sup> *Id.* at 54, 56, 65.

<sup>56</sup> See *id.* at 52–53 (calculating the genetic benefits of the chimpanzee’s apparently altruistic behavior).

only for those who already share my DNA.' For example, mothers or fathers will, without thinking, place themselves in harm's way to protect their children. Children will do the same for each other, and for their parents. But as we move further away from shared DNA to the next level of association, as between a spouse or a lifelong friend, say, it becomes less probable that one would jeopardize his or her own life or genetic reproduction without first pausing a moment to consider it. Hesitation to extend intimacy to strangers, who may pose danger to oneself or one's family, arises in part from a biological predisposition to protect those most like oneself. But, for Watson, relationships are both biologically *and* culturally determined.<sup>57</sup> Considering what we know about cultural filtering mechanisms used to protect indigenous practices, there is a strong argument in favor of thoughtful skepticism regarding those whom we do not know or understand.

Reservations against approaching the transcultural other can be explained on both biological and cultural grounds and are perfectly consistent, in both the short and long term, with protecting oneself, one's family, and one's culture. So how can this skepticism be overcome so that human beings can reposition themselves in ways that enrich their shared humanity? From the perspective of hermeneutics, deep understanding of the other means overcoming misunderstanding.<sup>58</sup>

To the extent that we are able to be understood, and our will is adopted as the prevailing view, we do not experience the "eddies of misunderstanding."<sup>59</sup> On the other hand, when confronted with in-

<sup>57</sup> See *id.* at 257–59 (noting culture's effect on animal behaviors).

<sup>58</sup> The study of hermeneutics commenced in the eighteenth-century with the work of Friedrich Ast (1778–1841). Consequent to the rise of Modernism, Ast's primary concern was about ways to gain deep understanding of art, poetry, literature, and scholarship (*verständnis* versus *missverständnis*, or understanding versus misunderstanding). Later, Schleiermacher argued that understanding could only come from knowledge of the universal human experience; specifically, knowledge of daily living and lived experience. Most important, the purpose of hermeneutics was to move us to a place of cross-cultural understanding. Other founding voices of hermeneutics include Hans-Georg Gadamer and Martin Heidegger. See generally HANS-GEORG GADAMER, *PHILOSOPHICAL HERMENEUTICS* (David E. Linge ed. & trans., 1976) and MARTIN HEIDEGGER, *BEING AND TIME* (John Macquarrie & Edward Robinson trans., 1962). For a thoughtful and concise overview of the contributions to the study of hermeneutics see ZYGMUNT BAUMAN, *HERMENEUTICS AND SOCIAL SCIENCE* (1978).

<sup>59</sup> BAUMAN, *supra* note 58, at 17. Consider Schopenhauer's explication of pain and happiness:

Just as a brook forms no eddy so long as it meets no obstructions, so human nature, as well as animal, is such that we do not really notice and perceive all that goes on in accordance with our will. If we were to notice it, then the reason for this would inevitably be that it did not go according to our will, but



comprehension, we are forced to consider the problem of understanding. For Bauman, “[i]ncomprehension is a state which calls for an effort to make the uncertain certain, the unpredictable predictable, the opaque transparent.”<sup>60</sup> To fully understand is to embrace the autonomy of the other and, whether enthusiastically or not, to endow the subject “with authority in the negotiation which follows.”<sup>61</sup> Humility, as one encounters misunderstanding arising from incomprehension, is of the utmost importance because it is likely that such misunderstanding is due to the partiality of the intellect.<sup>62</sup>

Our warehouse of stored knowledge about the world around us provides us with the context necessary to gain understanding and to effectively interact with it. But our past is also a limitation, in that we are constituted by a limited array of interactions which sometimes can function to exaggerate differences and thereby construct obstacles (eddies) to our ability of fully knowing the other. Meaning can only come from experiencing the world firsthand through meaningful interactions with the other. But how is that to be accomplished? The answer is through dialogue.<sup>63</sup> In the context of this essay, the urgency of dialogical interactions speaks to the need for juridic actors in the United States to engage in dialogical relations as a way to come to a

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must have met with some obstacle. On the other hand, everything that obstructs, crosses, or opposes our will, and thus everything unpleasant and painful, is felt by us immediately at once and very plainly. . . . On this rests the negative nature of well-being and happiness, as opposed to the positive nature of pain . . . .

*Id.* at 194 (citation omitted).

<sup>60</sup> *Id.* at 195.

<sup>61</sup> *Id.* at 203.

<sup>62</sup> *See id.* at 225. As Bauman explains:

It is neither the complexity of the universe, nor its notorious amenability to contradictory interpretations, which in this case defies the power of intellect. It is the partiality of intellect itself, its tendency to see some of the things rather than others . . . . Any intellect, however powerful, sets about its work loaded with its own past; this past is simultaneously its liability and its asset.

*Id.* (citation omitted).

<sup>63</sup> In this context I am speaking of dialogue to mean “a willingness to enter conversation about ideas, taking a position in openness that can still be altered given additional information; a commitment to keep relationships affirming, even as disagreements over theory occur; and a willingness to ask value questions about information application.” *See* RONALD C. ARNETT, *DIALOGIC EDUCATION* 10–11 (1992) (summarizing Rob Anderson’s explication of presence, unanticipated consequences, otherness, vulnerability, mutual implication, temporal flow, and authenticity). In short, dialogical interaction means “reaching out to the other in an authentic fashion, willing to try to meet and follow the unpredictable consequences of exchange.” *Id.* at 11.

more comprehensive understanding of who *we* are, while enhancing our understanding of those from different cultures. Dialogue includes thoughtful engagement with both human beings and texts. As it is relevant to our interests here, that engagement means sincere interaction with transnational legal practitioners and legislators, as well as critical deconstruction and analysis of juridic texts. Probing the meaning of foreign statutes and case law is consistent with Sidorkin's First and Second Discourses.<sup>64</sup> The First Discourse signifies the authority of the text, a master narrative that establishes common ground upon which dialogue can function to generate a common perception of the text.<sup>65</sup> The Second Discourse provides for "speaking out" about the text.<sup>66</sup> This is an organic process that opens up the Master Narrative for deconstruction and reinterpretation and that will never generate a singular truth. Rather, through the process of engaging the text, a transmogrified form consistent with local interests, a new interpretation befitting local needs, will be achieved. For our purposes, a shared introduction to transnational jurisprudence gives way to dialogical deconstruction of the merits of that jurisprudence.

Dialogical intercourse is necessary for human beings to realize their humanity. To be truly human is to acknowledge the essence of the other. Without that acknowledgement, "I" cannot exist. Said differently, "failure to affirm the being of the other brings myself into non-being."<sup>67</sup> For Martin Buber, "all real living is meeting."<sup>68</sup> When communication breaks down we are prone to view the other with distrust and misunderstanding. We overly value our own opinions, and devalue those held by our adversaries.<sup>69</sup> Polarization of discourse generates

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<sup>64</sup> See generally ALEXANDER M. SIDORKIN, *BEYOND DISCOURSE: EDUCATION, THE SELF, AND DIALOGUE* (1999).

<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> *Id.* at 12.

<sup>68</sup> *Id.* at 11 (citation omitted).

<sup>69</sup> See RONALD C. ARNETT, *COMMUNICATION AND COMMUNITY: IMPLICATIONS OF MARTIN BAUBER'S DIALOGUE* 15 (1986). Consider Martin Buber's remarks:

Man is more than ever inclined to see his own principle in its original purity and the opposing one in its present deterioration, especially if the forces of propaganda confirm his instincts in order to make better use of them. . . . He is convinced that his side is in order, the other side fundamentally out of order, that he is concerned with the recognition and realization of the right, his opponent with the masking of his selfish interest. Expressed in modern terminology, he believes that he has ideas, his opponent only ideologies. This obsession feeds the mistrust that incites the two camps.

misunderstanding. Alternatively, a discourse that is relationship-centered moves us closer to dialogical communication, and requires a commitment on all sides to empathize with the other to come nearer to understanding. One way to accomplish this is to attain a healthy interest in the folkways and mores of those different from us, and to ask questions of them. By asking questions in the spirit of a dialogical community we come closer to understanding, and we demonstrate a sincere commitment to enhanced awareness. In the space that exists between questioner and listener, and interpretation of foundational texts, emerges the dialogical moment. Through our ability to open up to others we begin to know ourselves more fully.<sup>70</sup> Through meaningfully shared discourse a process of true awakening unfolds for each interlocutor because each plays the role of questioner and listener. This dialogical process is what moves us nearer to our shared humanity.

A true dialogic community would be a place where “partners must cooperate to establish a mutual world in which they may or may not agree. What is important is how partners must coordinate to establish meaning between themselves.”<sup>71</sup> Guilar suggests that Gadamer’s hermeneutic community is similar to Dewey’s “organic community”—like Dewey, who emphasized praxis as the way to true knowledge, Gadamer contends that “dialogic conversations about concrete actions and reflections upon them [take] place within a context of historic truths also open to inquiry.”<sup>72</sup> Most important for Gadamer is the idea that inter-

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<sup>70</sup> The notion that we cannot know ourselves without interaction with the other has a long history in philosophy and sociology that gained prominence in the 1930s. *See, e.g., generally* CHARLES HORTON COOLEY, *HUMAN NATURE AND SOCIAL ORDER* (1922); JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* (1944); ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); GEORGE HERBERT MEAD, *THE MIND, SELF, AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* (Charles W. Morris ed., 1967); W.I. THOMAS, *W.I. THOMAS ON SOCIAL ORGANIZATION AND SOCIAL PERSONALITY: SELECTED PAPERS* (Morris Janowitz ed., 1966). Dewey’s pragmatism emphasized the importance of interaction with the objective world to gain true knowledge. *See generally* DEWEY, *supra*. For Mead, there can be no self without the other to interact with. *See generally* MEAD, *supra*. Without someone to respond to our public self (what Mead referred to as “Me”) we can have no sense of the “I”—whether we are smart, funny, sad, supportive, or anything else. *Id.* In short, we have no feedback with which to determine who we are. The primary emphasis for all symbolic interactionists is that human beings are perpetually engaged in a process of interaction with the external world of objects and people, and that through this interaction—and our processing of and reaction to it—we evolve our sense of who we are.

<sup>71</sup> Joshua D. Guilar, *Intersubjectivity and Dialogic Instruction*, in *RADICAL PEDAGOGY* (2006), [http://radicalpedagogy.icaap.org/content/issue8\\_1/guilar.html](http://radicalpedagogy.icaap.org/content/issue8_1/guilar.html) (citation omitted).

<sup>72</sup> *Id.*

pretation of dialogical moments is open-ended.<sup>73</sup> There is no attempt to establish truth once and for all.<sup>74</sup>

The most important lesson for us to draw from the body of literature addressing hermeneutics and dialogue is the potential for transnational understanding. Despite our differences, which will always be present, a process exists to allow for real discovery and growth. Through our earnest engagement with the other as listeners and questioners, we humanize the other in a way that validates them and ourselves. We learn from them, and they from us. From a dialectical perspective, dismissing the jurisprudential practices and decisions emanating from international courts of law only limits *our own* ability to grow, just as our refusal to engage in dialogue with transnational courts limits their ability to grow. Absent dialogue, we remain enshrouded in polarizing discourse. The result is a far too parochial and, thus, stunted jurisprudence.

As we continue to interact in increasingly transcultural contexts, we must generate myths necessary to open ourselves to “the other” in meaningful ways.<sup>75</sup> In short, what I am calling for are those “human sunrises” that Alice Walker recognizes to signify the common thread of human striving for justice, equity, value, and joy. We are not disembodied signifiers, but rather human beings with shared interests in a certain quality of life.

But, the skeptic may ask, if we are open to being influenced in significant and thoughtful ways through reasoned consideration of alternate modes of living, and if we then become *too* cosmopolitan in our open engagement with other cultures, does it not become possible that we will risk losing aspects of our own culture that we value? Probably

<sup>73</sup> See Fred R. Dallmayr, *Dialogue or Disjunction Borders or Horizons?: Gadamer and Habermas Revisited*, 76 CHI.-KENT L. REV. 825, 833 (2000). See generally GADAMER, *supra* note 58.

<sup>74</sup> See generally GADAMER, *supra* note, 58.

<sup>75</sup> In a recent commencement address delivered to Naropa University, Alice Walker offered a fair summation of the point I am attempting to make here:

When it is all too much, when the news is so bad mediation itself feels useless, and a single life feels too small a stone to offer on the altar of peace, find a human sunrise. Find those people who are committed to changing our scary reality. Human sunrises are happening all over the earth, at every moment. People gathering, people working to change the intolerable, people coming in their robes and sandals or in their rags and bare feet, and they are singing, or not, and they are chanting, or not. But they are working to bring peace, light, compassion to the infinitely frightening downhill slide of human life.

Alice Walker, Commencement Address at Naropa Univ. (May 12, 2007), in Alan Finder, *With Iraq War as a Backdrop, Speakers Reflect on the Future*, N.Y. TIMES, June 10, 2007, § 1, at 34.

not. Countless historical examples demonstrate how cultures have been able to absorb, embrace, and thrive amidst an influx of transcultural influences. To adopt a universal human rights discourse and the procedures necessary to document abuses would signify a commitment to a certain standard of dignity agreed to by people across the planet.<sup>76</sup> But it would not mean that all international human rights agreements must be adopted by each participating state in the same ways. Consider, for example, the attempt of Islamic women in Palestine to reinterpret Islam consistent with international human rights campaigns against gender discrimination. According to Sally Engle Merry, who attended the conference on women in Gaza, “[Islamic women] did not ask for gender equality nor did they reject Islam.”<sup>77</sup> Instead, these women sought specific protections that would afford them greater choice and public safety.<sup>78</sup> They attempted to graft international human rights protections upon pre-existing cultural practices.

The United States itself is perhaps the paramount example. Consider the numerous and familiar ways in which the United States continues to thrive with a strong national identity, all the while its people and institutions appropriate transnational ideas and products. American culture signifies a confluence of multi-cultural influences that includes contributions from peoples migrating from all points on the globe, not to mention those who were present prior to colonization.<sup>79</sup> The very fact that we are a federation of states makes this point clearly. During the months preceding the Constitutional Convention in 1787, the framers were beset by disagreements among colonial representatives over ways to preserve jurisdictional uniqueness.<sup>80</sup> And despite the homogenization of laws across the United States brought about by passage of the Fourteenth Amendment, one cannot deny the nation’s history and continued championing of spirited efforts to retain local autonomy.<sup>81</sup>

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<sup>76</sup> Sally Engle Merry, *Constructing a Global Law—Violence Against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 943 (2003) (stating that “[t]he process of ratification, preparing reports, and presenting and discussing reports fosters new cultural understandings of gender and violence”).

<sup>77</sup> *Id.* at 944–45.

<sup>78</sup> *Id.* at 944.

<sup>79</sup> See generally CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS (2005) (discussing American history before colonization).

<sup>80</sup> See generally THEODORE DRAPER, A STRUGGLE FOR POWER: THE AMERICAN REVOLUTION (1996); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS (1999).

<sup>81</sup> The Fourteenth Amendment, ratified in 1868, requires that: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due proc-

Leonard Levy recounts the extraordinary balancing act maintained by James Madison, the author of the Bill of Rights, up to its passage in 1791.<sup>82</sup> Amendments to the U.S. Constitution were necessary to maintain the fragile accord between the Federalists and the Anti-federalists, the latter of which feared the creation of a strong centralized government.<sup>83</sup> But where did the rights sought to be protected from a strong national authority originate? Many of the rights articulated in the Bill of Rights can be traced back to English common law and the Magna Carta.<sup>84</sup> According to Levy, the “Magna Carta had come to mean indictment by grand jury, trial by jury, and a cluster of related rights of the criminally accused . . . .”<sup>85</sup> Consider as well the importance of habeas corpus, a storied writ that appears to predate even the Magna Carta.<sup>86</sup> The rights of the accused flowing from the Magna Carta and the writ of habeas corpus were adopted by the colonists and then reinterpreted and expanded to complement the other freedoms articulated in the U.S. Bill of Rights.<sup>87</sup> Thus, from the founding of the United States, its judges and legislators have freely borrowed from the laws and procedures of foreign nations—especially England—and have modified them to suit the perceived needs of a newly democratic state. This process is a clear example of fluidity as it is realized through *mêtis*.<sup>88</sup>

More contemporary examples can be found in the identity movement of the 1980s, which demonstrated that Americans are strident protectors of (and effusive participants in) their real or imagined ethnic heritage.<sup>89</sup> Irish-Americans, German-Americans, Mexican-Americans, Chinese-Americans—the list goes on and on—lay claim to a portion of the composite identity of American people as a whole. We happily, of-

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ess of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

<sup>82</sup> See LEVY, *supra* note 80, at 32–37.

<sup>83</sup> See *id.* at 32.

<sup>84</sup> See, e.g., *id.* at 231 (tracing the Eighth Amendment’s origins to the Magna Carta).

<sup>85</sup> *Id.* at 2.

<sup>86</sup> See *id.* at 44.

<sup>87</sup> See LEVY, *supra* note 80, at 65.

<sup>88</sup> Since the framers were themselves English, this is admittedly a bit of a stretch. My point is that, from the time of the nation’s founding, judges, legislators, and scholars agreed upon a principle of recognizing the law of nations. Moreover, the framers appropriated what they viewed as the strengths of common law, but interpreted this “borrowed” law to suit culturally specific political, economic, and cultural needs.

<sup>89</sup> The practice of actively participating in the creation of an invented reality—one that may reflect shards of a person’s ethnic history, but which is created to serve a family narrative—is referred to by Hobsbawm and Ranger as “mythistory,” or the invention of tradition. See Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1 (Eric Hobsbawm & Terence Ranger eds., 1983).

ten greedily, receive into our own culture foreign art, literature, film, music, sports, food, automobiles, motorcycles, and clothing, to name just a few popular imports. Our universities flourish with international scholars who provide our students and communities a limited but invaluable insight into life elsewhere.

That said, do we alter our sense of what it means to be American by consuming these cultural imports? Or, does this consumption enhance our sense of identity by making us better able to discern the meaning of these imported influences by way of juxtaposition to our American-ness? I suggest that the answer to each question is affirmative. By making our cultural filters more porous and permitting the influences of other cultures to penetrate our consciousness, we cause ourselves to change, if ever so slightly, in a way that opens us up to new experiences and new ways to appreciate difference. I perceive this to be a good thing—a cosmopolitan thing—and a clear manifestation of liquid modernity. Similarly, by being open to new ideas and ways of being, the definition of American-ness itself changes to include a more cosmopolitan sensibility. It becomes normal for us to accept without a second thought that international food, music, literature, cars, ideas, and the like are simply a part of the pastiche that constitutes American-ness. It is in this way that we in the United States can skate freely on smooth space without ever relinquishing our sense of being Americans.

Whatever one considers a unique U.S. identity to be, it has—as with other strong national identities tied to claimed cultural capital—proven to be extraordinarily resilient to dramatic alteration. No matter what international influences are consumed by nation-states with a strong sense of national identity, people are generally going to *prefer* home-grown versions when they are available.<sup>90</sup> The French, for example, may enthusiastically embrace American television programming, but are more likely to enjoy French programming, when it exists, because it is their own.<sup>91</sup> The point is that people around the globe tend to be especially critical consumers of transnational imports. They are not, as some would have us believe, empty vessels easily swayed by transcultural influences. Instead, as generations of spectator studies have confirmed, complex interactions and filtering processes take place between consumers and images and ideas.<sup>92</sup> Our socialization as part of local, regional, and national associations provides context for critical

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<sup>90</sup> See APPIAH, *supra* note 40, at 108.

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., CAROL J. CLOVER, MEN, WOMEN, AND CHAIN SAWS (1992); LINDA WILLIAMS, HARD CORE: POWER, PLEASURE, AND THE “FRENZY OF THE VISIBLE” (1990).

consideration of non-native ideas and behaviors. To presume, as Justice Scalia appears to, that there is some entrenched, essentialistic American-ness that serves as a nodal point for determination of jurisprudential decisions belies both U.S. history and a reasoned understanding of the perpetual interplay of transcultural artifacts with U.S. political, economic, and cultural experiences.

### III. COSMOPOLITAN DEMOCRACY

To further contextualize the location and privileging of international human rights law as a necessary consideration in domestic wrongful conviction jurisprudence, it is important that we understand the principles of cosmopolitan democracy and, more specifically, the way in which cosmopolitan democracy has emerged over the course of the last century to confront more conventional articulations of the nation-state centered on theories of democracy.

Cosmopolitan democracy refers to the application of democratic principles across nation-state boundaries in an effort to impart people everywhere with greater participation in and real authority regarding the decisions that directly affect their lives. Following Held, "The term *cosmopolitan* is used to indicate a model of political organization which citizens, wherever they are located in the world, have a voice, input and political representation in international affairs, in parallel with and independently of their own governments."<sup>93</sup>

Historically, the primary author associated with the idea of cosmopolitan democracy is Immanuel Kant. Kant's essay, "Perpetual Peace: A Philosophical Essay," originally published in 1795, lays the foundation for a "Federation of Free States."<sup>94</sup> His aspiration, in this essay, was to further global peace through the avoidance of war.<sup>95</sup> According to Kant, a perpetual state of war-making could only be averted through the adoption of laws respecting republicanism (liberty) across interna-

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<sup>93</sup> Daniele Archibugi & David Held, Introduction to COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER, *supra* note 28, at 13.

<sup>94</sup> See generally IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY (M. Campbell Smith trans., 1917) (1795), available at [http://oll.libertyfund.org/files/357/0075\\_Bk.pdf](http://oll.libertyfund.org/files/357/0075_Bk.pdf). This position is most forcefully presented in the "Second Definitive Article of Perpetual Peace": "The law of nations shall be founded on a federation of free states." See *id.* at 128.

<sup>95</sup> See *id.* Kant's work should be re-read as a contemporary moral lesson for those advocating imperialism. One of his more prescient insights, restated in the United States by President Dwight D. Eisenhower (and more recently by former Nixon Asianist Chalmers Johnson) was that it is not only war-making that threatens democratic states with dissolution, but also the perpetual preparation for war (The Perpetual Peace). See generally CHALMERS JOHNSON, NEMESIS: THE LAST DAYS OF THE AMERICAN REPUBLIC (2006).



tional borders, from which an “federation of nations” would arise.<sup>96</sup> The logic of Kant’s theory speaks to the heart of republicanism: namely, that there can be no actual global democracy until all states adhere to reasoned participation in *foedus pacificum* (covenant of peace).<sup>97</sup> This federation would not be ruled by a centralized world government, but would instead operate through the principles of liberty and the application of public laws.<sup>98</sup> Once a group of people organized as a state commits to the rule of a form of law predicated on a pure republican commitment to liberty, other nation-states will be inspired to attach themselves to that beginning state, thereby creating an ever-expanding democratic nexus.<sup>99</sup>

Kant’s notion of a Federalism of Free States is evocative, to me, of a Mandelbrot Set. Mandelbrot Sets, named for mathematician Benoit Mandelbrot, are generated using fractal geometry.<sup>100</sup> An infinite set of related quadratic equations defines which numbers belong to a given Mandelbrot Set.<sup>101</sup> If one solves these iterative equations and plots the result each time, the image that begins to emerge has self-similar sub-components that nonetheless exhibit unique local variations.<sup>102</sup> To illustrate this point, a shaded plot depicting part of a Mandelbrot Set is reproduced below. The image portrays a center, or nodal point, with an endless array of associated or linked approximations of that nodal point affixed to it. The possibility of visualizing Kant’s theory of a Federalism of Free States through the lens of Mandelbrot Sets appears in the primacy of the core (which represents, by analogy, the establishment of a republican ethic of liberty) and the endless array of near-copies (representing sympathetic nation-states), each one created by the same fundamental values that make up the core, but with local (fractal) variations.

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<sup>96</sup> See KANT, *supra* note 94, at 128–29, 134.

<sup>97</sup> See *id.* at 134.

<sup>98</sup> See *id.*

<sup>99</sup> See *id.* at 134–35.

<sup>100</sup> See David Dewey, Introduction to the Mandelbrot Set (Sept. 4, 2002), <http://www.ddewey.net/mandelbrot>.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

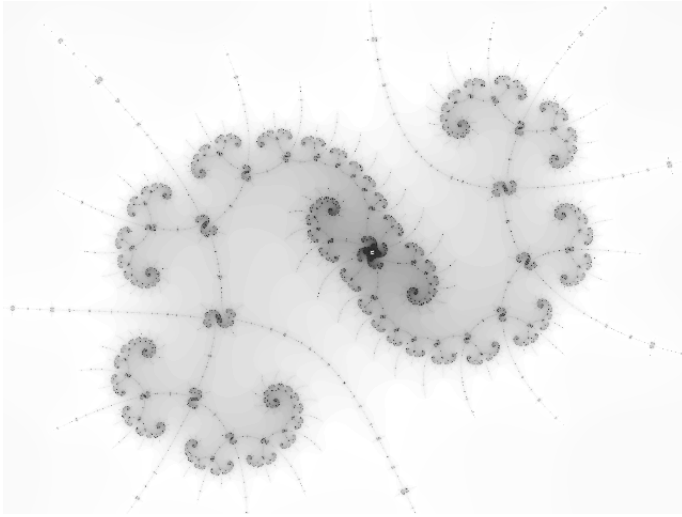


Figure 1: Detail of a Mandelbrot Set

Thus, when one views a Mandelbrot Set from afar, one tends to see what appears to be an integrated whole.<sup>103</sup> But, upon closer examination, one begins to notice considerable variation at the periphery.<sup>104</sup>

When nation-states begin to attach themselves to each other through their shared commitment to liberty, they establish a *de facto* union premised on the law of nations. It was Kant's belief that this process of fractal reconstitution could, in theory, be never-ending so long as the nation-states remained committed to replicating the values of liberty.<sup>105</sup> In practice, this meant that any traveler visiting any nation-state should expect to be afforded a certain set of "rights" necessary for interpersonal peace. This does not mean that the traveler should necessarily be granted the same rights as citizens of the state. Rather, the traveler would have a right to a kind of "hospitality" (which would include, most fundamentally, the right of "entering into social intercourse"), the exact parameters of which could be codified in public law.<sup>106</sup> Over time, application of this public law to non-citizens would generate what Kant referred to as a "cosmopolitical constitution."<sup>107</sup> It is here, in his "Third Definitive Article," that Kant appears to have

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<sup>103</sup> See *id.*

<sup>104</sup> See Dewey, *supra* note 100.

<sup>105</sup> KANT, *supra* note 94, at 137–39.

<sup>106</sup> *Id.* at 139.

<sup>107</sup> *Id.*

birthed the idea of cosmopolitan democracy.<sup>108</sup> Through references to the social intercourse of peoples across the globe—from the East Indies to the Americas, from China to Japan—Kant comes to the contemporary realization that the globe is far smaller than it once was, and is in desperate need of a new system of generating common discourse to preserve peaceful relations.<sup>109</sup>

Kant's vision of a global proliferation of republican states, infused with a body of international public law to serve the discursive interests of global peace and well-being, constitutes the foundation of contemporary cosmopolitan theory and suggests a framework for global implementation of human rights law and procedures.<sup>110</sup> Kant's influence can clearly be read in S. James Anaya's definition of international law: "International law is a universe of authoritative norms and procedures—today linked to international institutions—that are in some measure controlling across jurisdictional boundaries."<sup>111</sup> For Supreme Court Justice Sandra Day O'Connor, the federalism inspired by Kant describes

the proper relationship between domestic courts and transitional tribunals . . . "the federalism of free nations," to use a phrase of the philosopher Immanuel Kant. Just as our domestic laws develop through a free exchange of ideas among state and federal courts, so too should international law evolve through a dialogue between national courts and transnational tribunals and through the interdependent effect of their judgments.<sup>112</sup>

Philosopher John Rawls establishes a similar mechanism for the defense of human rights through his articulation of "justice as fairness"

<sup>108</sup> *Id.* at 137, 139.

<sup>109</sup> *See id.* at 140–41. Kant explains:

The intercourse, more or less close, which has been everywhere steadily increasing between the nations of the earth, has now extended so enormously that a violation of right in one part of the world is felt all over it. Hence the idea of a cosmopolitan right is no fantastical, high-flown notion of right, but a complement of the unwritten code of law—constitutional as well as international law—necessary for the public rights of mankind in general and thus for the realisation of perpetual peace.

*Id.* at 142.

<sup>110</sup> *See generally* KANT, *supra* note 94.

<sup>111</sup> S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 4 (2nd ed. 2004).

<sup>112</sup> Sandra Day O'Connor, *Federalism of Free Nations*, in *INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS* 13, 17–18 (Thomas M. Franck & Gregory H. Fox eds., 1996)); *see also* Christenson, *supra* note 32, at 423.

and his derivation of the “law of peoples.”<sup>113</sup> Rawls’s “law of peoples” encompasses all people everywhere and provides the foundation necessary to promote fairness.<sup>114</sup> The basic principles constituting the law of peoples are justice, the normative “right,” and the common good. These principles establish the ideal against which both interstate and intrastate activity is to be assessed. The law of peoples differs from international law, however, in that the latter is a formal (not theoretical) system of positive law, albeit one largely bereft of enforcement mechanisms.

As it relates to Kant’s notion of a federalism of free states, Rawls makes it clear that the law of peoples, if enacted, would challenge conventional notions of sovereignty because nation-states would become compelled to adhere to basic human rights principles.<sup>115</sup> Challenging conventional notions of state sovereignty is consistent with cosmopolitan democracy, and Rawls emphatically contends that a state does not have the “right to do as it likes with people within its own borders.”<sup>116</sup> Conceptually, a law of peoples—a law that protects all people everywhere from intrastate and interstate transgressions—delegitimizes conventional thinking about the authority of governments and the distribution of control within nation-state boundaries. According to Rawls, “[w]e must reformulate the powers of sovereignty in light of a reasonable law of peoples and get rid of the right to war and the right to internal autonomy . . . .”<sup>117</sup> To be perfectly clear, Rawls’s interest is making certain that all people have “basic rights and liberties and opportunities; fundamental freedoms and claims of the general good; and measures assuring for all citizens adequate all-purpose means to make effective use of their freedoms.”<sup>118</sup>

What I find most compelling in Rawls’s account of a law of peoples is his clear condemnation of states that violate the human rights of its own people.<sup>119</sup> Rawls makes a strong case for adherence to rulings of the World Court regarding human rights violations taking place in the United States or elsewhere, and provides a strong rationale for the U.S.

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<sup>113</sup> See John Rawls, *The Law of Peoples*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993*, at 48 (Stephen Shute & Susan Hurley eds. 1993).

<sup>114</sup> See *id.* at 82.

<sup>115</sup> See *id.* at 69.

<sup>116</sup> See *id.* at 48.

<sup>117</sup> *Id.* at 49.

<sup>118</sup> Rawls, *supra* note 113, at 51.

<sup>119</sup> See *id.* at 56. In fact, Rawls emphasizes this point by stating, “nor can a people protest their condemnation by the world society when their domestic institutions violate the human rights of certain minorities living among them.” *Id.*

Supreme Court to consider international human rights law when deciding domestic cases involving clear human rights components. And, while Rawls's enumerated list of human rights largely mirrors those protected by the U.S. Constitution and its Amendments, his emphasis is on these rights as components of the law of peoples. Like constitutional rights, rights arising from the law of peoples establish the limits of sovereign authority. These two kinds of rights are distinct, however, in that the former, by their very nature, must apply universally and without regard to one's location or citizenship status.

So what should be done when states refuse to acknowledge the law of peoples? Rawls refers to such states as non-compliant, "outlaw regimes."<sup>120</sup> There are numerous examples of non-compliant regimes that have historically been characterized as evil, and which would in no way yield to conscience or international pressure to adopt human rights principles.<sup>121</sup> But what about countries like the United States, England, France, or Spain? These are democratic states that spurn and resent any suggestion of being associated with non-compliant or outlaw status. But—despite both their aversion to being so designated and their rhetorical commitment to the fundamental principles of law and human rights—these states signify "outlaw" regimes, in Rawls's calculus, because they have historically engaged in imperial global missions seeking to dominate geopolitical relations. An international institution like the United Nations, argues Rawls, is necessary to keep outlaw nations in check, and to promote the law of peoples.

Echoing Rawls's emphasis on the power of international law to direct rogue state violators of human rights into patterns of behavior more consistent with international opinion are S. James Anaya and Sally Engle Merry.<sup>122</sup> Anaya's work focuses on ways international human rights law can be used to embarrass, marginalize, and otherwise shame a non-compliant state into more humane treatment of its people.<sup>123</sup> Thus, for Anaya, state sovereignty is not absolute.<sup>124</sup> In the indigenous rights arena, states infamously ignore treaties, statutes, and case law designed to protect indigenous people and their resources. International law and procedures designed to promote human rights

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<sup>120</sup> *Id.* at 72.

<sup>121</sup> See generally Agnes Heller, *The Limits to Natural Law and the Paradox of Evil*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, *supra* note 113, at 149, 155 (labeling the Nazi regime as evil).

<sup>122</sup> See generally ANAYA, *supra* note 111; Engle Merry, *supra* note 76, at 941.

<sup>123</sup> See ANAYA, *supra* note 111, at 217–19.

<sup>124</sup> See *id.* at 52.

serve as a counterweight to domestic obstacles to recognition of indigenous sovereignty claims.<sup>125</sup> Once established by international oversight bodies, complaint procedures designed to amplify violations of human rights serve to shame governments into compliance with international norms.<sup>126</sup> This is an effective check of state power, argues Anaya, because states want to avoid being viewed as “violators of human rights in the eyes of the world community.”<sup>127</sup> It is Anaya’s belief that international law, despite once serving as an instrument of colonization, may now be seen as an avenue to support the demands of indigenous people.<sup>128</sup>

Engle Merry argues, consistent with West-Newman’s concern for careful understanding of culturally significant interpretations of justice and emotion, that advances in international human rights must “build[] on national and local cultural practices and religious beliefs . . . .”<sup>129</sup> Culture must be viewed as liquid, not static, in the sense that it is perennially changing in response to internal and external stimuli. And, like Anaya, Engle Merry views the adoption of international human rights procedures and the subsequent documentation of rights violations as vital mechanisms for the expression of desirable behavior.<sup>130</sup> These mechanisms are effective, argues Engle Merry, because they

exert moral pressure on recalcitrant countries. . . . These policy statements have the legitimacy of international procedures [because] they define problems and frame social issues in the language of human rights and freedom from discrimination and gender equality, [and] they provide a language of argument that resonates with the values of a secular global modernity.<sup>131</sup>

So, while there is no enforcement mechanism that can *compel* “outlaw” states to behave in accordance with international human rights standards, condemnation of a state by the international community, and legitimization of standards of conduct through published documents,

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<sup>125</sup> See *id.* at 152.

<sup>126</sup> See *id.* at 248.

<sup>127</sup> *Id.* at 153.

<sup>128</sup> See generally ANAYA, *supra* note 111 (explaining how international law should increase the political representation of indigenous people).

<sup>129</sup> Engle Merry, *supra* note 76, at 947.

<sup>130</sup> See *id.* at 968.

<sup>131</sup> *Id.*

incline outlaw states toward behaving in accordance with the expectations of the global community.

Finally, written in the spirit of cosmopolitan democracy, and consistent with Rawls's conceptualization of a law of peoples, Steven Lukes characterizes contemporary struggles between nation-states as a political, economic, and cultural battle among utilitarians, communitarians, proletarians, egalitarians, and libertarians.<sup>132</sup> Recognizing the diversity existing across the globe with regard to the philosophical and ideological underpinnings of nation-states, Lukes argues for agreement over human rights as a way to establish an "egalitarian plateau."<sup>133</sup> This egalitarian plateau constitutes a short list of human rights protections that includes "basic civil and political rights, the rule of law, freedom of expression and association, equality of opportunity, and the right to some basic level of material well-being."<sup>134</sup> It is these rights that will provide the foundation for settling transnational disputes, because by adopting the discourse of human rights conceived as an egalitarian plateau each nation-state will be compelled to filter domestic and international behavior through a human rights lens. In short, it is through acknowledgement of cosmopolitan democracy that Lukes proposes establishing a master narrative capable of administering transnational justice.

#### IV. CAN WE CITE TO INTERNATIONAL LAW?

The framers of the U.S. Constitution extended comity to international law. In the Declaration of Independence, Thomas Jefferson emphasizes the need to maintain a "decent respect to the Opinions of Mankind."<sup>135</sup> Federalist Paper 63 makes specific reference to our need to be open to insights gleaned from other nations:

An attention to the judgment of other nations is important to every government. . . . [I]ndependently of the merits of any particular . . . measure, it is desirable . . . that it should appear to other nations as the offspring of a wise and honorable policy . . . [and] in doubtful cases, particularly where the national councils may be warped by . . . passion or momentary interest,

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<sup>132</sup> See generally Steven Lukes, *Five Fables About Human Rights*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, *supra* note 113, at 19. Of course, this same struggle could take place between each of these represented positions within the same state.

<sup>133</sup> See *id.* at 39.

<sup>134</sup> See *id.*

<sup>135</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

the presumed or known opinion of the impartial world may be the best guide that can be followed.<sup>136</sup>

The Supremacy Clause makes it clear that every state must abide by the terms of treaties entered into by the federal government.<sup>137</sup>

Louis Henkin posits two possible sources of domestic law.<sup>138</sup> First, he argues that the law of nations became “our law” in 1776, appearing as part of English common law.<sup>139</sup> Next, he suggests the origins of domestic law and reference to a law of nations was a simple matter of becoming a sovereign state.<sup>140</sup> Once established, the United States was forced into recognition of the law of nations, particularly with regard to treaties, and the Supremacy Clause established the requirement that these laws be followed by the states.<sup>141</sup> Recognition of the new status of the United States appeared in the case of *Chisholm v. Georgia* (1793), where Chief Justice Jay argued that “the United States had, by taking a place among the nations of the earth, become amenable to the law of nations . . . .”<sup>142</sup> As far back as the sixteenth and seventeenth centuries, there was no distinction drawn between international law and domestic law. International law, such as it was, was considered binding on all people.<sup>143</sup> Over time, and with the ascent of Britain as an empire, inter-

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<sup>136</sup> Vicki Jackson, *Yes Please, I'd Love to Talk with You*, LEGAL AFF., July–Aug. 2004, at 43, 44 (quoting THE FEDERALIST No. 63 (James Madison)).

<sup>137</sup> See U.S. CONST. art. VI, cl. 2. The Supremacy Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be *the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

*Id.* (emphasis added).

<sup>138</sup> See generally Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

<sup>139</sup> *Id.* at 1555–56.

<sup>140</sup> See *id.* at 1556.

<sup>141</sup> See *id.*

<sup>142</sup> 2 U.S. (2 Dall.) 419, 473 (1793); see Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 39 (1994).

<sup>143</sup> Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1088 (2002). According to Koh, Blackstone “described the law of nations as ‘a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world . . . to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.’” *Id.* (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES \*66). Of course, Blackstone’s reference to the law of nations being limited to the “civilized inhabitants of the world” framed the law of nations in such a



national law became consolidated into English common law and in that manner was adopted by the American colonies.<sup>144</sup> Until 1789, then, most “state” or colonial law was international law.<sup>145</sup> Thus, while there is no expressly stated requirement of domestic adherence to the law of nations in either the Constitution or Bill of Rights, international law was nonetheless established through the auspices of the common law.

But it may be that the most significant influence on U.S. courts with regard to the law of nations are the longstanding internationally agreed-upon principles of *jus cogens* (“compelling law”) and *jus gentium* (“law of nations”).<sup>146</sup> Both *jus cogens* and *jus gentium* provide for the acknowledgement of a mandatory corpus of international law.<sup>147</sup> Customary international law refers to another conception of the law of nations, this time as a body of law generated from the international community of states and based on past practices.<sup>148</sup> Selected “customs are accepted as legal requirements or obligatory rules of conduct; practices that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.”<sup>149</sup> While not a treaty, and thus not binding via the Supremacy Clause, customary international law can be used by the courts as a reservoir of legal opinion grounded in the community of nations. T. Alexander Aleinikoff supports his proposal for a *tertium quid* founded on customary international law by pointing to the Supreme Court’s reference to the law of nations in *The Paquete Habana* case.<sup>150</sup> There, the Court states that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”<sup>151</sup> Aleinikoff contends that because domestic law was based on common law, and therefore indirectly on conventional transnational norms, the states were intended to be bound by certain well-established principles reflected in international law.<sup>152</sup> Here, Aleinifoff is joined by Harold Koh, who argues that in the realm

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way as to marginalize those deemed “uncivilized,” and thereby to excuse the continued degradation of slaves, women, and ethnic minorities, particularly American Indians. *See id.*

<sup>144</sup> *See* Henkin, *supra* note 138, at 1557.

<sup>145</sup> *Id.*

<sup>146</sup> BLACK’S LAW DICTIONARY 876, 877 (8th ed. 2004).

<sup>147</sup> *See id.*

<sup>148</sup> *See id.* at 835.

<sup>149</sup> BLACK’S LAW DICTIONARY 318 (7th ed. 2000).

<sup>150</sup> *See* *The Paquete Habana*, 175 U.S. 677 (1900); Aleinikoff, *supra* note 4, at 97–98.

<sup>151</sup> *See* Aleinikoff, *supra* note 4, at 98 (quoting *The Paquete Habana*, 175 U.S. at 700).

<sup>152</sup> *See* Aleinikoff, *supra* note 4, at 99.

of cross-cultural public law litigation, litigants often blend domestic and international law to create a *tertium quid* based on “transnational law.”<sup>153</sup> Litigants invoking transnational law often argue that some transnational norm has been violated. This is a useful strategy, even when there can be no internationally enforced judgment against a defendant, because rulings in favor of litigants in transnational cases provide powerful political leverage for application in other arenas.

The Supreme Court has found guiding principles in the “law of nations” even when deciding conflicts that have emerged in wholly domestic contexts. Court references to international law were often driven by the emphasis on “evolving standards of decency” in Eighth Amendment jurisprudence. In *Trop v. Dulles* (1958), the Court considered whether the death penalty violated the Eighth Amendment’s prohibition of cruel and unusual punishment by reference to international norms of “dignity, civilized standards, humanity and decency.”<sup>154</sup> Similarly, in *Enmund v. Florida* (1982), the Court cited the abolition of the felony-murder rule in England and India, its restriction in Canada, and its absence from continental Europe.<sup>155</sup> Justice Blackmun argued that “international law can and should inform the interpretation of various clauses of the Constitution, notably the Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishment.”<sup>156</sup>

Numerous decisions emerging from the Supreme Court early in the nineteenth century make this point. In *Marbury v. Madison* (1803), Chief Justice John Marshall established the Supreme Court as the ultimate authority where interpretation of federal law is concerned.<sup>157</sup> Significantly, however, Justice Marshall never suggested that the judiciary should consider only domestic law.<sup>158</sup> The Supreme Court rulings in a number of cases while not always reaching the correct result, demonstrated the Court’s avowed commitment to comity with inter-

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<sup>153</sup> See generally Koh, *supra* note 143. For the purposes of this paper, I will join Professor Koh in citing Judge Phillip Jessup’s definition of “transnational law.” According to Jessup, transnational law is “all law which regulates actions or events that transcend national frontiers,” including “both public and private international law . . . [plus] other rules which do not wholly fit into such standard categories.” See *id.* at 1088, n.9 (quoting PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956)).

<sup>154</sup> Koh, *supra* note 143, at 1096 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)); see 356 U.S. 86 (1958).

<sup>155</sup> Koh, *supra* note 143, at 1096; see 458 U.S. 782 (1982).

<sup>156</sup> Blackmun, *supra* note 142, at 45.

<sup>157</sup> See 5 U.S. (1 Cranch) 137 (1803).

<sup>158</sup> See *id.*

national law.<sup>159</sup> In *Murray v. The Charming Betsy*, Chief Justice Marshall wrote that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>160</sup> *Charming Betsy* thus famously establishes the presumption “that courts, in interpreting statutes, should assume that Congress sought to adopt legislation consistent with international law.”<sup>161</sup> In *Schooner Exchange v. McFaddon*, the Court declined to accept jurisdiction over a ship belonging to the nation of France, notwithstanding that it was docked in U.S. territory.<sup>162</sup> In *Thirty Hogsheads of Sugar v. Boyle*, the Court stated that “[t]he decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect.”<sup>163</sup> The Court consulted international law in *Worcester v. Georgia* to discern the limits of Indian tribal authority.<sup>164</sup> In *Prigg v. Pennsylvania*, where the Court invalidated a Pennsylvania statute making it a crime for a master to apprehend one of his slaves within that State, the Court acknowledged that, while international law itself would not compel return of fugitive slaves against the policy of a sovereign state, the Constitution had abrogated that particular tenet of the law of nations as to the states.<sup>165</sup> Both sides of the Court in the infamous *Dred Scott* case cited international law when deciding the question of whether blacks were to be considered “citizens” of the United States.<sup>166</sup> Finally, in *Fong Yue Ting v. United States*, the Court invoked international law in support of its conclusion that a nation may attach conditions to the admission of foreigners into its territories.<sup>167</sup> In each of these cases, the Supreme Court pointed to trends in international law to support its ruling.<sup>168</sup>

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<sup>159</sup> *Fong Yue Ting v. United States* 149 U.S. 698 (1893); *Dred Scott v. Sandford* 60 U.S. (19 How.) 393 (1856); *Prigg v. Pennsylvania* 41 U.S. (16 Pet.) 539 (1842); *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832); *Thirty Hogshead of Sugar v. Boyle* 13 U.S. (9 Cranch) 191 (1815); *The Schooner Exchange v. McFaddon* 11 U.S. (7 Cranch) 116 (1812); *Murray v. The Charming Betsy* 6 U.S. (2 Cranch) 64 (1804).

<sup>160</sup> 6 U.S. (2 Cranch) at 81.

<sup>161</sup> Aleinikoff, *supra* note 4, at 99; *see* 6 U.S. (2 Cranch) at 81.

<sup>162</sup> *See* 11 U.S. (7 Cranch) 116.

<sup>163</sup> 13 U.S. (9 Cranch) at 198.

<sup>164</sup> *See* 31 U.S. (6 Pet.) at 515.

<sup>165</sup> *See* 41 U.S. (16 Pet.) at 611.

<sup>166</sup> *Compare* 60 U.S. (19 How.) at 465 (1856) (Nelson, J., concurring), *with* 41 U.S. (16 Pet.) at 594 (Curtis, J., dissenting).

<sup>167</sup> *See* 149 U.S. at 705.

<sup>168</sup> Among the most notable twentieth-century cases are *Miranda v. Arizona* (1966), *Stanford v. Kentucky* (1989), *Grutter v. Bollinger* (2003), *Washington v. Glucksberg* (1997), *McIntyre v. Ohio Elections Commission* (1995), *Atkins v. Virginia* (2002), *Lawrence v. Texas* (2003), and *Roper v. Simmons* (2005).

## V. WRONGFUL CONVICTION IN THE UNITED STATES

On April 23, 2007, Jerry Miller became the two-hundredth DNA exoneree in the United States.<sup>169</sup> Miller spent twenty-five years in an Illinois prison after being convicted of a crime he did not commit.<sup>170</sup> And while, for innocence activists at least, each exoneration in the United States generates a momentary pause of satisfaction, the magnitude of the problem of wrongful conviction dominates our professional thoughts and actions. There is no way to know how many wrongfully convicted people there are in the United States, but we do know that the more we scratch, the more we find. But why?

In many respects, the United States has taken the lead with regard to scholarship examining the primary causes of wrongful convictions. This is perhaps due to the fact that, among Occidental nations, the United States has the largest prison population and is, therefore, more likely to generate errors leading to unsound verdicts.<sup>171</sup> Certainly there can be little doubt that the increased frequency of crimes for which convicted felons face prison time or the death penalty has caused an increase in the number of wrongful convictions.<sup>172</sup> Wrongful convictions have far more to do, however, with the way crimes are investigated and processed through the criminal justice system.

Largely through *post mortem* review in cases where exonerations have been confirmed through DNA testing, legal and social science scholars have identified six leading causes of wrongful conviction: (1) police and prosecutorial misconduct; (2) false eyewitness identification; (3) false confessions; (4) junk science; (5) jailhouse informants; and (6) indigent defense. To that list can be added a host of additional

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<sup>169</sup> Darryl Fears, *Exonerations Change How Justice System Builds a Prosecution*, WASH. POST, May 3, 2007, at A3.

<sup>170</sup> *Id.*

<sup>171</sup> See U.S. Dep't of Justice, Bureau of Justice Statistics Prison Statistics (Sept. 27, 2007), <http://www.ojp.usdoj.gov/bjs/prisons.htm>. According to the U.S. Bureau of Justice's Prison Statistics Summary, by June of 2005 there were 2,186,230 individuals held in federal and state prisons and jails, or 488 prison inmates per 100,000 population. This presented an increase of 2.6% from 2004. *Id.*

<sup>172</sup> The Violent Crime Control and Law Enforcement Act of 1994 extended the death penalty to cover about sixty offenses. 18 U.S.C. §§ 3591–3598 (2004 & 2007 Supp.). According to Liebman et al., one of the reasons stated for the significant number of reversible errors found in capital cases across the United States was the frequency with which capital convictions were sought. JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995*, at 51 (2000), available at <http://www.thejusticeproject.org/press/reports/pdfs/Error-Rates-in-Capital-Cases-1973-1995.pdf>. Simple probability analysis would indicate that, by increasing the frequency of capital sentences, society also increases the likelihood of there being additional erroneous executions.

structural- and process-related causes.<sup>173</sup> These include: (1) police interrogation tactics (not necessarily misconduct, but police training in Reid School tactics designed to generate confessions); (2) plea bargaining; (3) pretrial discovery; (4) jury perceptions of defendant guilt based on the fact that they are defendants in a trial; (5) the Direct Connection Doctrine (making it difficult for defendants to introduce evidence of a third party suspect); (6) admissibility of eyewitness identification; (7) factual guilt determinations on appeal; (8) “harmless” error; and (9) the expansive application of the felony murder rule.<sup>174</sup> In short, we now have considerable evidence to support arguments that the causes of wrongful convictions appear at specific points during crime scene investigation and the legal processes that follow.

In response to a growing body of scholarship addressing the causes and potential remedies for wrongful conviction, legal and social science scholars have put forth an impressive set of recommendations to minimize the likelihood of errors occurring during case investigations, at trial, and on appeal. Federal recognition of the need to improve each aspect of case processing occurred with passage of the *Justice For All Act* in 2004.<sup>175</sup> In addition, many states have enacted measures to either review case processing standards or institute changes in case processing.<sup>176</sup> Still, the actual implementation of proposed changes has been slow in coming. The reasons for reluctance to implement changes to both structure and process include lack of political will; entrenched practices in institutional cultures; self-interested career preservation; racial, ethnic, and class prejudice; ignorance; and flagrant disregard of the ethical commitments sworn officers and those who work under them have to the presumption of innocence and the preservation of constitutionally guaranteed civil liberties.

If innocence scholars and activists adopt a counter-hegemonic narrative based on international human rights, and incorporate the best practices culled from transnational experience, external pressure may be brought to bear on those criminal justice institutions in dire need of reform. Juxtaposition with the transnational experience, that is to say, may serve to shame and humiliate those who have been derelict

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<sup>173</sup> See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 353.

<sup>174</sup> See generally Rudolph J. Gerber, *On Dispensing Injustice*, 43 ARIZ. L. REV. 135 (2001).

<sup>175</sup> Justice For All Act of 2004, 42 U.S.C. §§ 10603–10603e; 14163–14163e (2004 & 2007 Supp.).

<sup>176</sup> See generally Jon B. Gould, *After Further Review: A New Wave of Innocence Commissions*, 88 JUDICATURE 126 (2004).

in their responsibilities to ensure safe convictions, and may thereby generate a far more critical analysis of U.S. institutions and procedures.

### CONCLUSION

In this essay I have endeavored to establish the theoretical foundation for U.S. adoption of international human rights standards and transnational insights pertaining to criminal law and criminal procedure. I have argued that a new global mythology based on human rights and capable of explaining the increasingly complex interrelatedness of human beings across the planet is necessary to promote human dignity. I have also argued that this process can only be understood by carefully acknowledging the perennial interplay of *mêtis* and *techne* within global civil society, and by adopting a theoretical commitment to cosmopolitan democracy. By doing so, we become positioned to realize Kant's Federation of Free Nations.

I have argued throughout that the obstacles to eradication of the primary causes of wrongful conviction are entrenched in professional subcultures, and procedural bars established by case law and statute. I also argued that, in order for innocence activists to shed their Sisyphian load, we must generate a counter-hegemonic narrative based on insights drawn from international law.

The practical result of this research is its application to domestic jurisprudence regarding the prevention and remedying of wrongful convictions. Such a project includes a detailed analysis of transnational criminal procedure. In this way, I am able to provide both the theoretical and empirical impetus for meaningful alteration of our domestic jurisprudence, each in the Kantian and Rawlsian spirit of a law of peoples.

