

**“DANGEROUS DICTA”: THE DISPOSITION OF U.S.
COURTS TOWARD RECOURSE TO INTERNATIONAL
STANDARDS IN GAY RIGHTS ADJUDICATION**

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Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct.¹

Louis Henkin has observed that the international human rights movement has always been understood by the United States as a means for protecting human rights in countries other than the United States.² This conception may contribute to the reluctance of U.S. courts to embrace the standards of international human rights law. However, the configuration of legal and political considerations that underlie this reluctance is far more complex. This Article examines this reluctance and its foundations in the context of a particular issue—whether individuals have a right to engage in same-sex sexual conduct.

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1. *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

2. LOUIS HENKIN, *THE AGE OF RIGHTS* 74 (1990).

I. *LAWRENCE V. TEXAS*

In *Lawrence v. Texas*, the U.S. Supreme Court struck down a Texas statute that criminalized same-sex sexual conduct.³ The two petitioners in *Lawrence*, both male, had been arrested and convicted under this statute for engaging in a private, consensual sexual act.⁴ Justice Kennedy, writing for the majority, held that the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."⁵ In striking down this statute the Court overruled its prior holding in *Bowers v. Hardwick*⁶ that same-sex sexual conduct was not encompassed by this liberty.⁷

In the course of the opinion, Justice Kennedy referred twice to the case law of the European Court of Human Rights (ECHR)⁸ and made reference generally to the national practice of foreign countries concerning "the right of homosexual adults to engage in intimate, consensual conduct."⁹ Reference to the ECHR judgments could have been employed for a number of different purposes. The Court could have turned to the jurisprudence of the ECHR to seek guidance in interpreting the international obligations of the United States.¹⁰ It could also have referred to these cases in the

3. *Lawrence*, 539 U.S. at 578-79.

4. *Id.* at 563.

5. *Id.* at 578.

6. 478 U.S. 186 (1986).

7. *Lawrence*, 539 U.S. at 578.

8. *Id.* at 573, 576. The ECHR was created by the European Convention on Human Rights and Fundamental Freedoms. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, as amended by Protocol 11, Europ. T.S. No. 155 [hereinafter European Convention on Human Rights].

9. *Lawrence*, 539 U.S. at 576. "Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent." *Id.* (citation omitted).

10. While the United States are not a party to the European Convention on Human Rights, they are a party to the International Covenant on Civil and Political Rights, which closely parallels the European Convention. The provisions in each treaty setting forth right to privacy in particular are very similar. Compare International Covenant on Civil and Political Rights art. 17(1), Dec. 16, 1966, 999 U.N.T.S. 171, 177 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence"), with European Convention on Human Rights, *supra* note 8, art. 8(1) ("Everyone has the right to

context of a comparative law analysis for the purpose of interpreting analogous rights protected under U.S. constitutional law, such as the right to privacy or equal protection of the law. Instead, the Court referred to the ECHR’s jurisprudence in the most timid, innocuous way—merely for the proposition that to the extent the *Bowers* Court relied on values shared with a wider civilization, “it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere.”¹¹

Notwithstanding the mildness with which the Court invoked the practice of the European court, Justice Scalia responded in his dissent with the strong rebuke appearing at the outset of this article: “Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct.”¹² He opined that the *Bowers* Court had “*never* relied on ‘values we share with a wider civilization,’” and that the Court’s discussion of these “foreign views” was “therefore meaningless dicta.”¹³ And not only meaningless, but “[d]angerous dicta . . . since ‘this Court . . . should not impose foreign moods, fads, or fashions on Americans.’”¹⁴

It seems that Justice Scalia was correct, at least regarding the assertion that the Court’s references were made obiter. But was there an alternative? Could the Court have invoked international legal standards in a robust manner? One can only imagine how much more blistering a rebuke it would have received if the majority had acknowledged the legal force of norms generated beyond the four corners of the U.S. Constitution.

The following sections will examine whether there is any international obligation binding on the United States that would have been relevant to this case, and whether that international norm could have been applied by the Court.

respect for his private and family life, his home and his correspondence.”).

11. *Lawrence*, 539 U.S. at 576. “To the extent *Bowers* [*v. Hardwick*, 478 U.S. 186 (1986)] relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*[], 45 Eur. H.R. Rep. 52 (1981).” *Id.*

12. *Id.* at 598 (Scalia, J., dissenting).

13. *Id.*

14. *Id.* (quoting *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari)).

II. INTERNATIONAL LEGAL PROTECTION FROM DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

A. *Context*

Until very recently, no legal protection on the basis of sexual orientation could be found at the international level. Although the horrors of World War II gave rise to significant advances in the protection of individuals under international law, such protection did not extend to homosexuals. Notwithstanding the mass execution of homosexuals during World War II, there is virtually no mention of this victim group in the judgment of the International Military Tribunal at Nuremberg.¹⁵ Nor did this group find protection in the 1948 U.N. Convention on the Prevention and Punishment of the Crime of Genocide, an instrument drafted on the heels of World War II and designed to protect groups from discriminatory annihilation.¹⁶ The continuing lack of protection for homosexuals as a group likely flowed, at least in part, from the belief that homosexuality is not intrinsic or fundamental to one's identity, but that it is simply a matter of aberrant behavior which could be justifiably repressed.

While international criminal law evolved little during the Cold War, it gained renewed vigor following the establishment of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) in the mid-1990s. Despite the great strides in jurisprudence these institutions made, such developments did little to advance the legal protection of homosexuals. The Rome Statute of the International Criminal Court (ICC), adopted in 1998, and in many ways reflecting the culmination of international developments, fails to make any reference to sexual orientation.¹⁷ Indeed, the term "gender," included as one of the grounds for the crime of persecution, is expressly defined as "the two sexes, male and female, within the context of society."¹⁸ The definition continues, "[t]he term 'gender' does not indicate any meaning different from the above," in an apparent attempt to prevent the

15. *See* United States v. Goering, 6 F.R.D. 69 (1946) (The Nuremberg Trial).

16. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

17. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

18. *Id.* art. 7, para. 3.

interpretation of gender from including sexual orientation.¹⁹ Although the definition of persecution includes the residual phrase "or other grounds that are universally recognized as impermissible under international law,"²⁰ the use of "universal" could prevent the ICC from interpreting this phrase to include sexual orientation given the lack of consensus noted above.

Similarly, international human rights law has been slow to afford protection from discrimination on the basis of sexual orientation. The nondiscrimination provisions of the major human rights treaties make no mention of sexual orientation. Nevertheless, advances have been made through the jurisprudence of international human rights mechanisms. The earliest developments were related to decriminalization of same-sex sexual conduct and were grounded in the right to privacy.

In *Toonen v. Australia*,²¹ the Human Rights Committee, the treaty body charged with monitoring implementation of the International Covenant on Civil and Political Rights (ICCPR), found that the criminalization of same-sex sexual conduct constituted a violation of the complainant's right to privacy under Article 17 of the Covenant.²² However, in that case, the Australian government also expressly sought the Committee's guidance as to whether sexual orientation was a prohibited basis for discrimination within the meaning of Article 26 of the Covenant.²³ The Committee confined itself to noting that in its view "the reference to 'sex' in [the nondiscrimination provisions of the Covenant] is to be taken as including sexual orientation."²⁴ While this did not form part of the Committee's *ratio decidendi* in *Toonen*, its reference to and interpretation of the nondiscrimination provision marked a significant turning point in the protection of homosexual rights at the international level.

Over time, the conceptual framework employed by human rights mechanisms shifted from one grounded in privacy to one based on nondiscrimination, which enabled the extension of this protection into the public sphere. For example, in *Young v.*

19. *Id.*

20. *Id.* art. 7, para. 1(h).

21. Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), available at <http://www1.umn.edu/humanrts/undocs/html/vws488.htm>.

22. *Id.* ¶¶ 8.2-9.

23. *Id.* ¶ 6.9.

24. *Id.* ¶ 8.7.

Australia,²⁵ the Committee held that differentiation in awarding pension rights between opposite-sex and same-sex couples amounted to unjustifiable discrimination on the basis of the complainant's sex or sexual orientation and thus constituted a violation of Article 26 of the Covenant.²⁶

Similar advances have been made among regional human rights mechanisms,²⁷ particularly in Europe.²⁸ In *Dudgeon v. United Kingdom*, one of the ECHR cases cited by the *Lawrence* Court, the ECHR found that the existence of a law criminalizing same-sex sexual conduct violated the applicant's right to privacy under Article 8 of the European Convention.²⁹ Although the applicant had alleged that this statute also constituted a violation of Article 14 of the Convention, which provides for non-discrimination in the enjoyment of convention rights, the court found it unnecessary to reach this question in light of the clear violation of Article 8.³⁰ The court noted that

[w]here a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court also to examine the case under Article 14, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect

25. Comm. No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003), available at <http://www.unhchr.ch/tbs/doc.nsf> (click on "Search the Database" and enter the document number).

26. *Id.* ¶ 10.4. It should be noted, however, that this case was decided after *Lawrence v. Texas*.

27. As noted above, one of the ways in which the Supreme Court could have invoked the ECHR's case law more robustly would have been to use it as guidance in interpreting similar international obligations binding on the United States. See *supra* Part I. Given the pervasive phenomenon of cross-fertilization among international fora, particularly among human rights fora, it is not uncommon to cite jurisprudence from regional fora as precedent for universal regimes. Regional practice is also particularly useful since the regional institutions, the combined membership of which comprises a large proportion of U.N. member states, tend to be more active, and thus have broader bases of experience within their spheres of competence.

28. Even within the European human rights system, though, the scope of protection from discrimination remains limited. The ECHR ultimately found that France's refusal to authorize the adoption of a child by a single gay man, a decision "based decisively on the latter's avowed homosexuality," was not discriminatory in view of Article 14 of the Convention. *Fretté v. France*, 38 Eur. H.R. Rep. 21, ¶ 43 (2002).

29. 45 Eur. H.R. Rep. 52 (1981).

30. *Id.* ¶¶ 69-70.

of the case.³¹

In later cases, the European Court of Human Rights shifted its focus to Article 14. In *L. and V. v. Austria*, the applicants alleged "that the maintenance in force of Article 209 of the Austrian Criminal Code, which penalised homosexual acts of adult men with consenting adolescents between 14 and 18 years of age, and their convictions under that provision violated their right to respect for their private life and were discriminatory."³² The court held that this law violated Article 14 of the Convention, and thus found it unnecessary "to rule on the question whether there had been a violation of Article 8 taken alone."³³

In any event, whether grounded in the right to privacy or non-discrimination, it was clear long before *Lawrence* was decided that international human rights law, and the ICCPR in particular, prohibited criminalization of same-sex sexual conduct, at least between consenting adults in the privacy of their home.

B. *Relevant Obligations of the United States*

The United States, having signed and ratified the ICCPR, became bound by its provisions when that treaty entered into force for the United States on June 8, 1992.³⁴ In the *Toonen* case, the Human Rights Committee clearly established its view that the mere existence of domestic laws criminalizing same-sex sexual conduct constituted a violation of the ICCPR.³⁵ The following year the

31. *Id.* ¶ 67.

32. *L. and V. v. Austria*, 36 Eur. H.R. Rep. 55 (2003).

33. *Id.* ¶¶ 54-55. While the nature of the applicants' claims could provide an independent basis for the inversion of prioritization as between articles eight and fourteen, it cannot be doubted that the changing social and political climate made it easier for the court to switch from the framework of privacy to that of non-discrimination.

34. See UNITED NATIONS, MULTILATERAL TREATY FRAMEWORK: AN INVITATION TO UNIVERSAL PARTICIPATION FOCUS 2005: RESPONDING TO GLOBAL CHALLENGES 9-10 (2005).

35. Mr. Toonen had not been prosecuted—the mere fact that the law was in force constituted a violation. See *Toonen v. Australia*, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, ¶ 8.2 (1994), available at <http://www1.umn.edu/humanrts/undocs/html/vws488.htm> ("In so far as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy', and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws. The Committee considers that sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code 'interfere' with the author's privacy, even if these provisions have not been enforced for a decade.").

Committee included among its “principal subjects of concern” in relation to U.S. compliance with the ICCPR, “the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination.”³⁶

While the Committee is not strictly speaking a judicial body, and its views are not technically binding, its interpretation of the Covenant is generally recognized as authoritative.³⁷ Thus, there is at least a strong argument that the criminal prosecution at issue in the *Lawrence* case was incompatible with the international obligations of the United States under the ICCPR.³⁸

Nonetheless, the Supreme Court in *Lawrence* made no reference to any international norm binding the United States. To understand why, consideration must be given to the disposition of

36. This concern was stated in the context of its Concluding Observations rendered in response to the Initial Report of the United States detailing its compliance with the Covenant, submitted under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee, United States of America, U.N. Doc. CCPR/C/79/Add.50, A/50/40, ¶ 287 (1995).

37. While the United States have filed a declaration recognizing the Article 41 competence of the Human Rights Committee to receive complaints from other States Parties, see 138 CONG. REC. 6, 8071 (1992), they have not become a party to the First Optional Protocol to the ICCPR, UNITED NATIONS, *supra* note 34, at 13, and thus does not recognize the competence of the Committee to receive complaints from individuals alleging violations of the Covenant. See Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 302 (explaining that the First Optional Protocol to the ICCPR establishes the competence of the Committee to receive communications from individuals claiming to be victims of violations of the Covenant). Nonetheless, the United States are a party to the ICCPR, the Committee’s constitutive instrument, which implicitly recognizes the authority of the Committee to interpret the Covenant. UNITED NATIONS, *supra* note 34, at 9-10. The Committee’s authority to interpret the Covenant is also widely supported in the practice of the Committee as well as among the state parties to the ICCPR.

38. It could also be argued that there is an emerging norm of customary international law providing some protection against discrimination on the basis of sexual orientation. However, such an argument would be unlikely to prevail given the wide disparities in state practice. The legal position of homosexuals varies significantly from country to country—from constitutionally entrenched freedom from discrimination on the basis of sexual orientation to laws that make homosexual acts punishable by death. Even among countries where all individuals are guaranteed a standard of humane treatment, controversies remain over whether homosexuals should be protected as such. One example is the continuing debate in the United States over hate crimes legislation and the inclusion of sexual orientation as a ground for that kind of criminal charge.

the United States toward the reception of international law within the municipal (i.e. domestic) sphere.

III. THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND U.S. LAW

International law generally does not dictate how international obligations are to be implemented within the domestic sphere. In the absence of a specific obligation to alter some facet of a state's internal legal framework,³⁹ it is usually up to each state to determine how to give effect to its international obligations. That being the case, there is no established international legal standard governing how international law is to be received in the municipal sphere. As a result, there is a great variety among states in the degree of penetration of international law into the domestic legal system.

That great variety of configurations falls along a spectrum from monism to dualism. A monist state would be one that envisions international law as part of the domestic legal order. In essence, there is but one legal system into which international law flows freely. In contrast, dualist states would regard the international and municipal legal systems as two discreet spheres, such that international law cannot penetrate into the municipal sphere in the absence of some act of the relevant national authorities expressly transforming those norms into domestic law. In monist systems, international law is generally accorded a normative status hierarchically superior to that of statutory domestic law.⁴⁰ In a dualist system, once transformed into domestic law, the formerly international norms would have the same status as other domestic laws.

The U.S. legal system appears *prima facie* to be more monist than dualist. The Constitution declares that treaties made under the authority of the United States, together with the Constitution and federal law, "shall be the supreme Law of the Land."⁴¹ The

39. For example, some treaties expressly require states to enact domestic legislation criminalizing certain conduct. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5, Dec. 10, 1984, 1465 U.N.T.S. 85.

40. *See, e.g.*, GW. ch. 5, § 2, art. 94 (Neth.). This article of Netherlands' Constitution accords treaty rules a higher status than domestic legislation. Thus, courts may exercise judicial review of Dutch legislation by testing it against Netherlands' treaty obligations.

41. U.S. CONST. art. VI, cl. 2.

U.S. legal system appears equally amenable to customary international law. As the Supreme Court in *The Paquete Habana* case famously proclaimed, “International 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.”⁴² The practice of courts, however, has diverged significantly from this fairly monist conception.

Notwithstanding the status of treaty law as “supreme Law of the Land,” it is rarely applied in U.S. courts. One reason for this is that the courts have developed a doctrine of self-execution, whereby a treaty is to be regarded as “equivalent to an act of the legislature” only when “it operates of itself without the aid of any legislative provision.”⁴³ Such a self-executing treaty would not require any additional legislative act to render it applicable as part of U.S. law. However, “when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”⁴⁴

This doctrine of self-execution has been invoked to deny domestic legal effect to numerous treaties, in particular those of a human rights or humanitarian character.⁴⁵ This doctrine would also likely bar application of the ICCPR in U.S. courts. When expressing its consent to be bound by the ICCPR, the U.S. government made a declaration to the effect that “the provisions of Articles 1 through 27 of the Covenant are not self-executing.”⁴⁶

Even when a treaty provision is not self-executing, however, this does not mean that it is legally irrelevant to litigation in U.S. courts. According to the “Charming Betsy” rule, “an act of Congress ought never to be construed to violate the law of nations

42. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

43. *Foster v. Neilson*, 27 U.S. 253, 254 (1829).

44. *Id.*

45. *See, e.g.*, *Hamdan v. Rumsfeld*, 415 F.3d 33, 38-40 (D.C. Cir. 2005) (discussing how the Geneva Convention of 1949 did not give enemy combatants any judicially enforceable rights).

46. 138 CONG. REC. 6, 8071 (1992). At the same time this declaration was made, the U.S. government also noted its understanding that “distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status—as those terms are used in Article 2, paragraph 1 and Article 26—[are] permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.” *Id.*

if any other possible construction remains."⁴⁷ While its terms limit the rule's application to construction of federal statutory law, an argument could be made that it should apply to the interpretation of U.S. law as a whole, including the Constitution.⁴⁸

The status of customary international law as comprising part of U.S. law was recently reaffirmed by the Supreme Court in *Sosa v. Alvarez-Machain*,⁴⁹ a case involving application of the Alien Tort Statute (ATS).⁵⁰ Writing for the majority, Justice Souter recalled that "[f]or two centuries we have affirmed that the domestic law of

47. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1808).

48. The rule has traditionally been applied as a canon of statutory construction ascribing to Congress a presumed intent to legislate consistent with the international obligations of the United States. *E.g.*, *Maria v. McElroy*, 68 F. Supp. 2d 206, 231 (E.D.N.Y. 1999). This traditional formulation of the rule would preclude application in a case such as *Lawrence* for several reasons. First, the rule is applied to avoid potential conflicts between international law and U.S. law. The constitutional provisions relevant to the *Lawrence* case do not conflict with international law. The fact that those constitutional provisions have not been interpreted as broadly as the protections provided by the ICCPR does not of itself create a conflict. The legal provision in *Lawrence* that is in conflict with the ICCPR is a state statute. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003), *declared unconstitutional* by *Lawrence v. Texas*, 539 U.S. 558 (2003). As that statute expressly conflicts with the ICCPR, there is no construction that would harmonize the two. *See supra* Part I. Second, if the rule is understood as creating a presumption regarding legislative intent, it would seem inapplicable to international obligations arising after the relevant domestic law was adopted. One cannot argue that the drafters of the Constitution did not intend to fall afoul of an international obligation that would not arise until almost two centuries later.

Nonetheless, strong arguments support the application of the rule in cases such as *Lawrence*, even though this would involve a conception of the rule that takes it beyond these traditional parameters. First, in order for the rule to be applied sensibly, it must acknowledge that the provisions of domestic law do not exist in isolation from each other. Together they form a legal system generated and subsisting within a broader constitutional framework. Viewed in this context, the rule is most naturally and most coherently applied to U.S. law as a whole. Thus, a more coherent understanding of the rule would hold that U.S. law should not be construed to violate international law if any other possible construction remains. Second, there is no reason why the rule should be limited to a presumption regarding congressional intent. Indeed its original formulation in *Murray* does not confine its application to the realm of intent. Even if it remains confined to presumed intent, it could well be argued that this intent should apply prospectively to encompass later-in-time international obligations, particularly in light of the prospective nature of a constitutional instrument. Thus, it may be presumed that the founders intended that the United States comply with its international obligations and that the Constitution was drafted accordingly.

49. 542 U.S. 692, 712-24 (2004).

50. 28 U.S.C. § 1350 (2000). The ATS of course may not be invoked by U.S. citizens. *Sosa* is referred to here simply to illustrate the disposition of U.S. courts toward the reception of international human rights law generally.

the United States recognizes the law of nations,” citing, among other cases, *The Paquete Habana*.⁵¹ The Court expressly recognized this to be the case with respect to international norms “intended to protect individuals.”⁵² At the same time, however, the Court set a fairly high bar for recognizing new causes of action derived from international law and actionable on the basis of the ATCA’s jurisdictional grant, and cited numerous reasons why federal courts should be hesitant to do so.⁵³ This corresponds with the general reluctance among U.S. courts to apply international law, as the courts themselves have noted.⁵⁴

The reasons for this reluctance are many and, in part, self-perpetuating. One reason is simply that U.S. law schools do not regard international law as central to legal education and, as a result, most American lawyers have no exposure to international law.⁵⁵ Thus, the bar is unable to educate the judiciary on the extent to which international law forms part of the applicable law in any given case.⁵⁶ And the perceived reluctance of U.S. courts to consider international law is logically a factor in the relegation of international law classes to the periphery in American legal education.

Some have speculated that the increasing dualistic tendencies of the U.S. legal system correspond to its increasing hegemonic status. The originally more monist framework of a young United States was developed at a time when the United States were new subjects of international law, a time when the norms of

51. *Sosa*, 542 U.S. at 729.

52. *Id.* at 730. Further, in finding customary international law to have the status of federal common law, the Court brought customary law within the Supremacy Clause of the Constitution. *See id.* at 745 n.* (Scalia, J., concurring) (“The Court’s approach places the law of nations on a federal-law footing unknown to the First Congress. At the time of the ATS’s enactment, the law of nations, being part of general common law, was *not* supreme federal law that could displace state law. By contrast, a judicially created federal rule based on international norms *would be* supreme federal law.”) (citation omitted).

53. *See id.* at 732-38.

54. *Kane v. Winn*, 319 F. Supp. 2d 162, 201 (D. Mass. 2004) (“In particular, American courts have often been reluctant to apply customary international law, in spite of binding Supreme Court precedent.”).

55. *See* Claudio Grossman, *Building the World Community: Challenges to Legal Education and the WCL Experience*, 17 AM. U. INT’L L. REV. 815, 824-26 (2002) (noting international law’s relative unimportance in contemporary legal education).

56. Indeed, the Petitioners in *Lawrence* made no reference to international law in their Supreme Court brief. *See* Brief for Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152352.

international law dovetailed well with the short and longer time interests of the fledgling republic. However, a strong international legal order may be perceived to bring fewer advantages as states become more powerful. That the rule of law as applied to the king is in the king's interest is not readily apparent, particularly when the king's election cycles are of relatively short duration.

Another significant factor is the tendency of U.S. courts to conflate international law with foreign law. For Justice Scalia, the distinction between these two types of law is not particularly meaningful in cases before U.S. courts. In his *Sosa* dissent, he remarked,

[w]e Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law⁵⁷

For Scalia, there is no legally relevant distinction between foreign law and customary international law⁵⁸ since neither has been adopted as U.S. law through the normal U.S. legislative process.⁵⁹

Nonetheless, the legal distinction between these two types of law is clear. While international law binds the United States, foreign law does not. While customary law is applicable as part of U.S. law, foreign law is not.

That is not to say, however, that the practice of other states may not still be of relevance to cases being adjudicated in U.S. courts. As noted above, courts may have recourse to foreign law in undertaking a comparative law analysis. This type of analysis could

57. *Sosa*, 542 U.S. at 750 (Scalia, J., dissenting).

58. *See id.* ("The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty could be judicially nullified because of the disapproving views of foreigners.") (citation omitted).

59. *See id.* (discussing the election of representatives and how the Congress and president create U.S. law). This is compounded by Scalia's perception of international human rights law in particular as something of a lesser species of international law. "The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates." *Id.* at 749-50.

be employed to aid in interpreting a provision in a treaty to which the United States are also a party, or even to interpret analogous provisions in domestic law.

Reference to foreign law could also be made in the context of determining whether there exists a relevant norm of customary international law, the practice of states being one element in the establishment of customary norms. In this context, what is being determined is a binding norm. However, it would not be the foreign law that would form part of the applicable law. It would be the customary norm that was evidenced in part by the practice of foreign states.

As noted above, the *Lawrence* Court invoked the case law of the ECHR in modest terms.⁶⁰ In so doing, it essentially reduced the Court's jurisprudence to mere foreign practice—in the words of Justice Scalia, “meaningless dicta.” By failing to tie that practice back to international obligations binding on the United States, for example, by invoking the ICCPR, the majority in a sense bolstered the legitimacy of Justice Scalia's dissent.

But to qualify that dicta as “meaningless” may be an overstatement.⁶¹ And to qualify it as “dangerous” simply begs the question: dangerous to whom?

As noted in the introduction, another factor is the perception that the U.S. legal system is superior to the international legal system. Thus, where their spheres of regulation overlap, international law should be ignored. This would apply *a fortiori* in the sphere of constitutional rights.⁶²

60. See *supra* note 8 and accompanying text.

61. The U.S. Supreme Court has evinced a willingness to refer to legal developments beyond American borders in a number of recent cases. In *Roper v. Simmons*, for example, the majority referred to both foreign and international law in surmising that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” 125 S. Ct. 1183, 1200 (2005). Similarly, in her dissent in that case, Justice O'Connor acknowledged that “this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries,” and that “the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.” *Id.* at 1215-16 (O'Connor, J., dissenting). While these references invoke international authority in the most feeble of terms, they at least indicate a renewed openness toward such authority.

62. It must be recalled, however, that international human rights law sets a minimum standard of protection; it would not require a State to eliminate or reduce any greater protection of individual rights that may be afforded under its domestic law.

In contrast to the world of 1948, the year when the Universal Declaration of Human Rights was adopted by the United Nations General Assembly, many more countries today have legally entrenched rights comparable to those afforded by the U.S. Constitution. In light of this fact and in the context of increasing security measures adopted by the U.S. government, it may be argued that there has been a relative erosion in the degree to which human rights protection in the United States exceeds that of other states. Indeed, it may be that those within the power of the United States, and especially those who may not be entitled to the full protection of the U.S. Constitution, are now in greater need of international legal protection of their rights. From the perspective of these individuals, greater recourse to international legal standards by U.S. courts would be anything but dangerous.