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## *SPEECH*

### **“WISE PARENTS DO NOT HESITATE TO LEARN FROM THEIR CHILDREN”: INTERPRETING STATE CONSTITUTIONS IN AN AGE OF GLOBAL JURISPRUDENCE**

THE HONORABLE MARGARET H. MARSHALL\*

*In this speech delivered for the annual William J. Brennan, Jr. Lecture on State Courts and Social Justice, Margaret H. Marshall, Chief Justice of the Supreme Judicial Court of Massachusetts, reflects upon the present need for comparative analysis in state and federal courts. The influence of the United States Constitution can now be seen globally in the widespread practice of guaranteeing individual rights by means of a written constitution enumerating individual rights, the interpretation of which is charged to an independent judiciary. But the influence runs in more than one direction. Chief Justice Marshall explores the global cross-pollination of constitutional jurisprudence. Noting that state constitutions often provide protection of individual freedoms beyond those guaranteed by the federal Constitution, as interpreted by the United States Supreme Court, Chief Justice Marshall suggests that state courts are optimally positioned to incorporate comparative analysis into their jurisprudence. She explores three particular substantive areas—personal autonomy, hate speech, and physical detention—as particularly appropriate for the exercise of comparative analysis involving the decisions of foreign and international constitutional courts.*

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## INTRODUCTION

“[A]n international figure in the law who is almost as well known in London as he is in Washington, D.C.”;<sup>1</sup> that is how Lord Parker, England’s late Lord Chief Justice, described Justice William Brennan. Lord Parker might well have added Canberra, Delhi, Strasbourg, Ottawa, Jerusalem, and Johannesburg to his list, for Justice Brennan was, and remains, a jurist of international renown.<sup>2</sup> I am deeply grateful for the opportunity to speak at an occasion honoring him, not least because his brilliant insights into the promise of state constitutions<sup>3</sup> have immeasurably affected my own work and the work of state judges nationwide.<sup>4</sup>

In a more personal sense, I am indebted to the lasting impact of Justice Brennan’s vision on the constitutional jurisprudence of my birthplace, South Africa. I grew up and was educated in South Africa during the apartheid regime, at a time when any movement toward

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<sup>1</sup> Lord Parker of Waddington, *William Brennan*, in WILLIAM J. BRENNAN, JR.: AN AFFAIR WITH FREEDOM: A COLLECTION OF HIS OPINIONS AND SPEECHES DRAWN FROM HIS FIRST DECADE AS A UNITED STATES SUPREME COURT JUSTICE 349, 349 (Stephen J. Friedman ed., 1967).

<sup>2</sup> For example, Justice Brennan’s majority opinion in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), ruling that under the Constitution, a public official must show that an allegedly libelous statement was made with knowledge of its falsity or with reckless disregard as to its falsity in order to recover damages, has been analyzed by many foreign constitutional courts. *See, e.g.*, *Theophanous v. Herald & Weekly Times, Ltd.* (1994) 182 CLR 104, 105–09 (Austl.); *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 ¶¶ 122–142 (Can.); *Rajagopol v. State of Tamil-Nadu*, A.I.R. 1995 S.C. 264 ¶¶ 12–14, 24 (India); *Reynolds v. Times Newspapers Ltd.*, 3 W.L.R. 1010, 1021, 1030–31, 1040 (H.L. 1999) (U.K.).

<sup>3</sup> See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (“State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”); *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 546–550 (1986) [hereinafter Brennan, *Bill of Rights*] (“[T]he state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by the decisions of the Supreme Court majority.”); William J. Brennan, Jr., *Foreword: Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 11, 11 (1988) (approving of “the increasing reliance by state courts throughout the country upon enforcing the protections for civil rights and liberties provided by their own state constitutions rather than upon those found in the federal Constitution”); William J. Brennan, Jr., *An Invitation to State Courts*, LRRIG., Summer 1987, at 5 (noting that between 1970 and 1984, state courts issued over 250 opinions indicating that their constitutions offered protection to individual rights beyond scope of federal Constitution).

<sup>4</sup> E.g., *Horsemen’s Benevolent & Protective Ass’n v. State Racing Comm’n*, 532 N.E.2d 644, 650 (Mass. 1989) (holding that Article Fourteen of Massachusetts Constitution may provide greater substantive protections against search and seizure for individuals than exist under Fourth Amendment); *Batchelder v. Allied Stores Int’l, Inc.*, 445 N.E.2d 590, 593–95 (Mass. 1983) (holding that Article Nine of Massachusetts Constitution provides greater protection to individuals than exists under First Amendment to solicit on private property signatures for nomination of candidates).

human rights was ruthlessly suppressed. Today, when I look at South Africa's constitutional democracy, when I consider the decisions of its extraordinary new Constitutional Court, I see the unmistakable imprint of Justice Brennan's work.

In a speech delivered in 1987 at Columbia Law School, Justice Brennan expressed hope that, as we enter the twenty-first century, Americans, and judges in particular, would continue to "[adapt] our institutions to the ever-changing conditions of national and international life."<sup>5</sup> Among today's "ever-changing conditions" is a lively, evolving, global conversation about individual rights.<sup>6</sup> How should state judges respond to these developments—or *should* we respond—when interpreting the guarantees of our state's constitution? Although American constitutional law is rich—and always our prime source of authority—in my judgment American judges have much to learn from our "constitutional offspring."<sup>7</sup> "Wise parents," counsels Judge Calabresi, "do not hesitate to learn from their children."<sup>8</sup> To understand why, I turn first to some necessary background.

## I

### DEVELOPING A COMMON LANGUAGE OF FUNDAMENTAL RIGHTS

The word "globalization"<sup>9</sup> is by now a cliché. This buzzword of our new century signals a sweeping move toward interdependence

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<sup>5</sup> William J. Brennan, Jr., *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, 15 NOVA L. REV. 1, 9 (1991).

<sup>6</sup> See generally Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15 (1998) (discussing emerging globalization of constitutional law in field of human rights and reluctance to date of United States Supreme Court to partake in global human-rights dialogue); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999) (discussing United States's resistance to learning and borrowing from constitutional decisions and traditions of other nations); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003) (discussing conceptual shift in domestic courts and international tribunals toward global community of courts committed to using rule of law to resolve disputes); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000) (discussing factors contributing to globalization of human-rights law).

<sup>7</sup> United States v. Then, 563 F.3d 464, 468–69 (2d Cir. 1995) (Calabresi, J., concurring) (citing approach taken by German and Italian constitutional courts to interpretation of vague statutory language in light of changed circumstances).

<sup>8</sup> *Id.* at 469.

<sup>9</sup> The term "globalised quota" first appeared in *The Economist* in 1959, and the word "globalization" first appeared in the 1961 edition of *Webster's Third New International Dictionary*. Compare WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 965 (1961), with WEBSTER'S NEW INTERNATIONAL DICTIONARY 1065 (2d ed. 1959). The terms "globalize" and "globalism" are believed to have been coined in OLIVER L. REISER & BLOWDEN DAVIES, *PLANETARY DEMOCRACY: AN INTRODUCTION TO SCIENTIFIC*

among the world's nations and peoples. No less than business, medicine, or pop culture, individual-rights jurisprudence has gone global: Dialogue among the world's constitutional jurists is now commonplace.

Indeed, justices of some foreign constitutional courts traverse the world of global jurisprudence with an agility that leaves an American judge breathless. In the 1995 case of *Hill v. Church of Scientology of Toronto*,<sup>10</sup> for example, the Canadian Supreme Court determined that it would not follow the "actual malice" standard of United States constitutional libel law.<sup>11</sup> It reached that determination only after carefully considering American, English, and Australian decisions, the conclusions of the Australian and Irish Law Reform Commissions, and other foreign sources.<sup>12</sup> The Indian Supreme Court has fashioned an important and independent jurisprudence of affirmative action, or "compensatory discrimination."<sup>13</sup> Decisions of the European Court of Human Rights are cited frequently by courts over which that tribunal has no jurisdiction.<sup>14</sup>

At home, our Supreme Court is beginning, just beginning, to pay attention to the decisions of foreign constitutional courts on issues of

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HUMANISM AND APPLIED SEMANTICS (1944). See Brian Opeskin, Australian Constitutional Law in a Global Era, Address at the Conference of the Australian Association of Constitutional Law (Sept. 21, 2001), transcript available at <http://www.alrc.gov.au/events/speeches/BRO/20010921.pdf>.

<sup>10</sup> [1995] 2 S.C.R. at 1130 ¶¶ 122–142 (Can.).

<sup>11</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

<sup>12</sup> [1995] 2 S.C.R. at 1130 ¶¶ 134–136 (Can.).

<sup>13</sup> See Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDozo L. REV. 253, 273–77 (1999) (examining three legal systems that have employed affirmative-action measures to address issues of economic security—United States, European Union, and India—and stating that affirmative action for "disfavored castes" in India is "both older and more extensive than any program ventured in the United States").

<sup>14</sup> E.g., *Leask v. Commonwealth* (1996) 187 CLR 579, 615–16 (Austl.) (Toohey, J.) (citing, inter alia, *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989)); *United States v. Burns*, [2001] 1 S.C.R. 283 ¶ 53 (Can.) (citing *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), concerning extradition to country permitting use of death penalty); *Shum Kwok Sher v. HKSAR*, [2002] 2 HKLRD 793 (Hong Kong Ct. of Final App.), ¶¶ 62–65 *passim* (citing, inter alia, *Hashman & Harrup v. United Kingdom*, 133 Eur. Ct. H.R. (ser. A) (1999), concerning specificity requirement of laws constraining freedom of speech); Ruling of the Constitutional Court of the Republic of Lithuania, No. 3/01, §§ 4–6 (March 24, 2003), available at [http://www.lrkt.lt/doc\\_links/main.htm](http://www.lrkt.lt/doc_links/main.htm) (citing *De Wilde, Ooms & Versyp v. Belgium*, 12 Eur. Ct. H.R. (ser. A) (1970), concerning official restrictions on rights of private correspondence); *Pratt v. Attorney Gen. for Jam.*, A.C. 769 (P.C. 1993) (citing, inter alia, *Republic of Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978), concerning standard of proof of inhuman or degrading punishment); see also *infra* text accompanying notes 15–23.

individual rights. In the recent case of *Lawrence v. Texas*,<sup>15</sup> the Court struck down as a violation of the Fourteenth Amendment a law criminalizing homosexual sodomy. The question presented was one purely of federal constitutional interpretation. Yet the majority opinion cited a 1957 report to the British Parliament and a decision of the European Court of Human Rights to support its conclusion that “the protected right of homosexual adults to engage in intimate, consensual conduct”<sup>16</sup> is “an integral part of human freedom.”<sup>17</sup> The *Lawrence* majority took particular notice of *Dudgeon v. United Kingdom*,<sup>18</sup> a 1981 decision of the European Court of Human Rights that struck down the United Kingdom’s criminal sodomy laws.<sup>19</sup> Some legal scholars critical of the Supreme Court’s 1986 decision in *Bowers v. Hardwick*<sup>20</sup> had faulted the Court for ignoring the import of the *Dudgeon* decision.<sup>21</sup> The *Lawrence* opinion invokes *Dudgeon* as a significant counterbalance to the constitutional claim of stare decisis represented by the *Bowers* case.<sup>22</sup> (To square the circle, I should add that *Dudgeon* itself was influenced by the privacy analysis of *Roe v. Wade*.<sup>23</sup>)

It is particularly striking to me that the majority opinion in *Lawrence* was written by Justice Anthony Kennedy. Justice Kennedy took part in a panel discussion at an American Bar Association meeting in London in July 2000, in which I was also a participant. On that occasion, he objected in terms quite unequivocal, as I recall, to the idea that the judgments of foreign constitutional courts could contribute in any meaningful way to the development of American consti-

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<sup>15</sup> 539 U.S. 558 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), concluding that laws proscribing homosexual conduct violate European Convention on Human Rights).

<sup>16</sup> *Id.* at 576.

<sup>17</sup> *Id.* at 577.

<sup>18</sup> *Id.* at 573.

<sup>19</sup> 45 Eur. Ct. H.R. (ser. A) (1981).

<sup>20</sup> 478 U.S. 186 (1986).

<sup>21</sup> See, e.g., Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 558–61 (1988) (noting that “*Bowers* illustrates . . . the continuing isolation of American constitutional law from international human rights law” despite former’s influence on latter); Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 79–80 (1990) (failure to reference *Dudgeon* “suggests that the present Court’s concern and familiarity with international human rights norms is something less than one might expect”); see also *Lawrence*, 539 U.S. at 576 (“To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere.”).

<sup>22</sup> *Lawrence*, 539 U.S. at 576.

<sup>23</sup> See Anthony Lester, *The American Constitution: Home Thoughts from Abroad*, 49 U. PITTS. L. REV. 769, 772 (1988) (stating that *Roe v. Wade*, 410 U.S. 113 (1973), was “of persuasive importance” in *Dudgeon*).

tutional law. Justice Kennedy's view now seems closer to that of Justice O'Connor, who has challenged American judges and lawyers alike. "No institution of government can afford now to ignore the rest of the world," Justice O'Connor said. "Understanding international law is no longer just a legal specialty; it is a duty."<sup>24</sup>

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<sup>24</sup> Sandra Day O'Connor, Remarks at the Annual Meeting of the American Law Institute (May 15, 2002) (on file with the *New York University Law Review*); see also Sandra Day O'Connor, Remarks at the Ninety-Sixth Annual Meeting of the American Society of International Law, in 96 AM. SOC'Y INT'L. L. PROC. 348, 350 (2002) ("Conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts."); Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, FED. LAW., Sept. 1998, at 20, 21 ("[O]ur ability to borrow ideas from other legal systems . . . is what will enable us to remain progressive, with systems that are able to cope with a rapidly shrinking world.").

Justice O'Connor is not alone among her colleagues on the Supreme Court in publicly advocating for greater attention to foreign law by United States lawyers and judges. See William H. Rehnquist, *Constitutional Courts—Comparative Remarks, in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) ("Now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."); Stephen G. Breyer, Remarks at the Ninety-Seventh Annual Meeting of the American Society of International Law, in 97 AM. SOC'Y INT'L. L. PROC. 265 (2003) (citing relation of foreign law to work of United States Supreme Court on domestic legal questions, matters of institutional organization, and public international law); Ruth Bader Ginsburg, *Affirmative Action as a Human Rights Dialogue*, BROOKINGS REV., Winter 2000, at 2, 3 (arguing that comparative analysis of affirmative-action jurisprudence would benefit United States Supreme Court); Ginsburg & Merritt, *supra* note 13, at 282 ("Comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights."). But see generally Antonin Scalia, *Commentary*, 40 ST. LOUIS U. L.J. 1119 (1996) (arguing that "international norms" should not control adjudication of domestic issues in United States courts).

The Justices also have discussed and sometimes debated the merits of a comparative approach to constitutional questions in a number of recent cases. See, for example, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Ginsburg, J., concurring), in which Justice Ginsburg referenced "the international understanding" concerning the duration of affirmative action plans, and *Washington v. Glucksburg*, 521 U.S. 702, 718 n.16 (1997), in which Chief Justice Rehnquist, writing for a majority that included Justice Scalia, provided as relevant background a lengthy footnote concerning foreign court decisions on the constitutionality of bans on assisted suicide. See also *Foster v. Florida*, 537 U.S. 990, 990 n.\* (2002) (denial of petition for cert.) (Thomas, J., concurring in denial of certiorari) (criticizing Justice Breyer for citing to Canadian case in his dissent and for seeking to "impose foreign moods, fads, or fashions on Americans"); *Glucksburg*, 521 U.S. at 785-87 (Souter, J., concurring) (discussing Dutch experience with physician-assisted suicide laws). In *Atkins v. Virginia*, 536 U.S. 304 (2002), Justice Stevens, writing for the majority, noted that executing the mentally retarded is a practice that has been "overwhelmingly disapproved" by the "world community," a fact that, in his view, supports the conclusion that such executions violate the Eighth Amendment to the United States Constitution, *id.* at 316 n.21. Justice Rehnquist, in dissent, responded that the views of other countries regarding the punishment of their citizens "simply are not relevant" as evidence of a national consensus on whether the mentally retarded may be executed. *Id.* at 324-25 (Rehnquist, J., dissenting). Justice Scalia stated in his dissenting opinion in *Atkins* that the majority's appeal to "members of the so-called 'world community'" was deserving of the "Prize for the Court's Most Feeble Effort

Why all this global cross-pollination concerning individual rights, and why now? Advances in information technology of course play a part. The decisions of constitutional courts worldwide are only a mouse click away. But in my view, the key factor giving rise to global interest in individual rights is the growing recognition that every person—*every* person—is endowed with fundamental rights that no government can extinguish. Coupled with this understanding is a development I consider to be one of the most striking and profound in world politics over the last several decades: the emerging consensus in the world’s democracies that a written charter of rights, enforced by an independent judiciary, is central to the protection of personal liberty.<sup>25</sup>

When I speak here of an “independent judiciary,” I do not refer to a judicial system in which judges may be unbiased and incorruptible but are nevertheless subject to the supremacy of parliament. Judicial independence, in the constitutional sense in which I use it, is something different. It means a system of government in which judges have the power to say “no”—“no” to legislators, “no” to governors, “no” even to presidents—when the needs of the political moment clash with constitutional guarantees. Constitutional democracy in this form has emerged as the chosen structure of government at the end of the twentieth century.<sup>26</sup> In Slovenia, South Africa, India, Canada, Hungary, Germany, and elsewhere, constitutional democracy has taken root.

I take great pride that the idea of an independent judiciary in the constitutional sense I have just described was the “mighty invention”<sup>27</sup>

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to fabricate ‘national consensus.’” *Id.* at 347 (Scalia, J., dissenting). For another exchange about the merits of a comparative constitutional approach, compare Scalia’s majority opinion in *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997), with Justice Breyer’s dissenting opinion in the same case, *id.* at 976.

<sup>25</sup> See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERTISHMENT OF POLITICAL DISCOURSE 160 (1991). Glendon notes:

In the active period of constitution-making that followed World War II (over half of all existing constitutions were adopted since the mid-1970s), the features of American constitutionalism that have attracted the most interest are the enumeration of rights and the establishment of an independent judiciary empowered to back them up.

*Id.*

<sup>26</sup> See Lester, *supra* note 21, at 541 (“Currently, there is a vigorous overseas trade in the [American] Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law.”); Anne-Marie Slaughter, *Judicial Globalization*, *supra* note 6, at 1117 (noting emergence since end of Cold War “of many fledgling democracies with new constitutional courts seeking to emulate their more established counterparts”).

<sup>27</sup> The phrase is taken from an address by Justice Benjamin Kaplan on the occasion of the 300th Anniversary of the Supreme Judicial Court. Benjamin Kaplan, *Introduction to*

of John Adams in the Massachusetts Constitution adopted in 1780. A “mighty invention”? And so it was. The Massachusetts Constitution is the oldest written constitution in the United States and perhaps the oldest written constitution in the world still being enforced. It is the structural model for our federal Constitution. From the adoption of the Massachusetts Constitution in 1780 until well into the twentieth century, no country but ours followed what I describe for these purposes as the United States model, or the John Adams model. By that I mean a government with a wholly separate, coequal branch of government, an independent judiciary empowered to enforce a written charter of individual rights.

Let me pause here to emphasize the point. For nearly two hundred years, the United States stood, constitutionally speaking, in splendid isolation. Yes, we shared a common language of the common law with other English-speaking nations. Yes, our legislative law-making branch mirrored, for example, the United Kingdom’s bicameral House of Lords and House of Commons. But our tripartite system of government was unique, and so, in consequence, was our constitutional jurisprudence. On momentous questions concerning the fundamental rights guaranteed by our state and federal constitutions, we had little to learn from courts like Britain’s, in which the word of Parliament was supreme. A British attorney general, I was told, once commented that Britain’s Official Secrets Act made it a crime to disclose without authorization the number of cups of tea consumed each day in the Ministry of Agriculture.<sup>28</sup> There was no First Amendment to say nay.

But over the past two decades, our isolation has given way. Now every newly independent, and many older, democracies around the world have adopted the idea of a written charter of rights enforced by independent judges.<sup>29</sup> Even Britain, that great bastion of parliamentary sovereignty, undertook in 2000 to give the provisions of the European Convention on Human Rights the full force of law in domestic courts.<sup>30</sup>

The sudden, dramatic groundswell of support for the Adams model is, in large measure, a reaction to the genocidal wars of the last

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THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692–1992, at 4 (Russell K. Osgood ed., 1992).

<sup>28</sup> See also INT'L ADVISORY COMM'N OF THE COMMONWEALTH HUMAN RIGHTS INITIATIVE, OPEN SESAME: LOOKING FOR THE RIGHT TO INFORMATION IN THE COMMONWEALTH 11 (2003) (attributing similar story to former Chief Justice Gubbay of Zimbabwe), available at [http://www.humanrightsinitiative.org/publications/chogm/chogm\\_2003/chogm%202003%20report.pdf](http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/chogm%202003%20report.pdf).

<sup>29</sup> See Rehnquist, *supra* note 24.

<sup>30</sup> Human Rights Act, 1998, c. 42 (Eng.).

century. Israel's Chief Justice Aharon Barak is an acute observer of this development. In the past, many democracies believed that the "self-restraint of the majority," in his words, would preserve the delicate balance between majority rule and respect for basic values.<sup>31</sup> But the twentieth century, he said, "shattered this approach."<sup>32</sup> Today, "[t]he concept [that] 'It is not done' needs to receive the formal expression that 'It is forbidden,'"<sup>33</sup> he said. In a constitutional democracy, the task of saying "it is forbidden," must be entrusted to "an independent institution, not subject to the mercies of the majority or the minority . . . . [I]t must be the courts."<sup>34</sup> More and more of the world's peoples and governments agree.

## II STATE CONSTITUTIONS ON A GLOBAL STAGE

The story is told that once at Valley Forge, General George Washington amassed his ragtag troops on the field and asked each man to pledge allegiance to the United States. One soldier resolutely refused. When pressed to explain himself, he answered, "I owe allegiance to the State of New Jersey."

As state court judges, we know that we owe our allegiance to both the state and the federal constitutions. We are less accustomed to seeing ourselves as part of the wider world. It is unfair, I think, to ascribe our reluctance to look at foreign constitutional law to provincialism or lack of respect. A state constitution is the product of the democratic aspirations of people united by a highly localized culture and history. Fiscal concerns and the press of dealing with ninety-five percent of our nation's litigation may restrict a state court judge's time and resources.<sup>35</sup> Yet in many ways, state judges are uniquely positioned to take advantage of the significant potential of comparative constitutional law. First, our federal system has, in Chief Justice Shirley Abrahamson's words, "made seasoned comparatists of all of us."<sup>36</sup> As a state court judge, I have frequent occasion to look to the constitutional law of fifty other American jurisdictions, even though other states' interpretations of their constitutions have no preceden-

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<sup>31</sup> Aharon Barak, *Democracy in Our Times*, Remarks at the Hebrew University 4 (June 7, 1998) (on file with the *New York University Law Review*).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 5.

<sup>35</sup> See Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1069 (1998) (examining historic role of state courts in federal system).

<sup>36</sup> Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 285 (1997).

tial weight for Massachusetts. They do, however, provide guidance, perspective, inspiration, reassurance, or cautionary tales. How odd, then, when one stops to think of it: A novel issue of constitutional law will send us, our clerks, and counsel to the library to uncover any possible United States source of authority—including the note of a second-year law student. But in our search for a useful legal framework, we ignore the opinion of a prominent constitutional jurist abroad that may be directly on point.

Second, state court judges work actively in the open tradition of the common law. *Erie Railroad Co. v. Tompkins*<sup>37</sup> removed much of the traditional common-law role from the federal courts, but what Holmes described as expounding from experience is the quintessential role of a state court judge.<sup>38</sup>

Third, in contrast to our federal Constitution, many state constitutions contain “positive liberty” clauses.<sup>39</sup> Like the federal Constitution, state constitutions, of course, protect individuals from unlawful government action. But they also have provisions concerning a particular benefit. For example, in Massachusetts,<sup>40</sup> New Hampshire,<sup>41</sup> and New York,<sup>42</sup> state constitutional provisions concerning access to public education have resulted in complex litigation

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<sup>37</sup> 304 U.S. 64 (1938).

<sup>38</sup> OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown & Co. 1990) (1881) (“The life of the law has not been logic; it has been experience.”).

<sup>39</sup> See Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503 (1988) (“Negative liberty refers to absence of restraint against doing as one wants, while positive liberty implies action governed by reasons or laws that one gives to oneself.”); see also Ruth Bader Ginsburg, *An Overview of Court Review for Constitutionality in the United States*, 57 LA. L. REV. 1019, 1026 (1997) (“Our courts, through judicial review, are accustomed to telling government what it may not do; they are not, by tradition or staffing, well-equipped to map out elaborate programs detailing what the government must do.”).

<sup>40</sup> Part II, chapter 5, section 2 of the Massachusetts Constitution provides, in part:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns . . . .

MASS. CONST. pt. 2, cl. 5, § 2.

<sup>41</sup> Article 83 of the New Hampshire Constitution provides, in part:

Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools . . . .

N.H. CONST. pt. 2, art. 83.

that implicates a host of issues—constitutional, statutory, and common law.<sup>43</sup>

As charters of “positive liberty,” some state constitutions may bear close affinity to the new constitutions of other democracies. Here is one example among many: Article 23 of the Canadian Charter of Rights and Freedoms contains guarantees not only concerning access to primary and secondary education, but also the right to receive that education in either English or French.<sup>44</sup> In interpreting constitutional claims concerning bilingual education here, we may have much to learn from looking beyond our national borders to a country where such jurisprudence already is being developed.

No doubt there are many areas of American state constitutional law that are so robust and well developed, so self-contained, that in most cases they are unlikely to benefit from consideration of foreign sources. For example, Massachusetts constitutional law in the areas of search and seizure, separation of powers, takings, and jury instructions is as extensive and well wrought as any. But other emerging issues seem to call for the broadest comparative analysis. In those circumstances, there is much room for fruitful transnational inquiry.

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<sup>42</sup> Article 11, section 1 of the New York Constitution provides: “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. CONST. art. XI, § 1.

<sup>43</sup> See, e.g., McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997); Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003); Paynter v. State, 797 N.E.2d 1225 (N.Y. 2003).

<sup>44</sup> The Canadian Charter of Rights and Freedoms provides:

- (1) Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.
- (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
- (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and (b) includes, where the number of children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 23.

### III

#### APPLICATION OF THE COMPARATIVE APPROACH

In last year's Brennan Lecture, Vermont Supreme Court Chief Justice Jeffrey Amestoy discussed the complexities of judging in what he called a "post-human era."<sup>45</sup> In the post-human world, he said, advances in biotechnology, artificial intelligence, and other manipulations of nature often force a state court judge "to define what is most essentially human."<sup>46</sup>

We do inhabit a post-human world. We also inhabit a post-September 11 world. One can hardly overstate the relevance of these two developments to the law of individual liberty. As to the first, the basic classifications on which our ideas of individual rights depend—life, death, property—these ancient legal and empirical certainties are certain no more. One example: There is hardly a more established body of law than the law of intestacy. Yet recently, my court was asked to decide whether children conceived from a decedent's frozen sperm were his "issue" for purposes of our law of intestate succession.<sup>47</sup>

As to the second, many now wonder whether the traditional balance struck in American courts between individual freedom and national security is being recalibrated.<sup>48</sup> In the immediate aftermath of September 11, 2001, Americans reported in large numbers that they were willing to sacrifice their civil liberties if such changes would lead to greater national security.<sup>49</sup> Ideas that had long since seemed discredited—profiling, increased government surveillance of everyday life, unlimited detention, denial of access to counsel—suddenly have gained new currency. Complex questions of national security and personal rights will not be confined to the federal courts. State courts are not only, as Justice Brennan said, "coequal guardians of civil rights and liberties."<sup>50</sup> They are the arenas in which most American litigation concerning fundamental human rights and freedoms takes

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<sup>45</sup> Jeffrey L. Amestoy, *Uncommon Humanity: Reflections on Judging in a Post-Human Era*, 78 N.Y.U. L. REV. 1581, 1583 (2003).

<sup>46</sup> *Id.* (quoting Baker v. State, 744 A.2d 864, 889 (Vt. 1999)).

<sup>47</sup> Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002).

<sup>48</sup> Professor Harold Hongju Koh has stated that "we must acknowledge that September 11 is a tragedy potentially momentous enough to reshape the very architecture of the domestic and international legal system that developed in the wake of World War II." Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 23–24 (2002).

<sup>49</sup> A poll taken by the *Washington Post* shortly after September 11, 2001 found that "[o]ne sacrifice Americans said they are willing to make is in their civil liberties." David Milbank & Richard Morin, *Public Is Unyielding in War Against Terror*, WASH. POST, Sept. 29, 2001, at A1.

<sup>50</sup> Brennan, *Bill of Rights*, *supra* note 3, at 548.

place.<sup>51</sup> High-profile cases in the federal courts may garner the headlines, but much of the articulation of the day-to-day balance between personal freedom and public safety is left to the state courts. It was a Massachusetts state judge who was asked to determine whether, during an “orange alert,” state police were permitted under the state and federal constitutions to stop every motorist driving on a road circling a reservoir, regardless of whether police had reason to suspect any particular driver of wrongdoing.<sup>52</sup> When, a few days after September 11, 2001, an Arab-American family was awarded zero damages in their motor-vehicle accident case in which liability was uncontested, it was a Pennsylvania state judge who was asked to determine whether the jury’s verdict was tainted by ethnic prejudice.<sup>53</sup> State courts often are a proving ground from which national consensus emerges, and state courts will play a pivotal role in defining the limits of permissible government intrusion into personal life in a nation haunted by terrorism.

To suggest how consideration of foreign constitutional law might help us work through the issues confronting us in this post-human, post-September 11 world, I will explore three areas of substantive law. The first concerns the right of personal autonomy, particularly where there is little or no domestic law for guidance. That is the easy case for resort to a comparative approach. The second example—the “intermediate” case—concerns the regulation of hate speech, an area in which foreign constitutional law is veering away from established American jurisprudence. Finally, I shall consider a “hard” case, the issue of physical detention. In this area, American jurisprudence, although well developed, lacks the nuance of some foreign constitutional law.

#### A. Personal Autonomy

One result of the Supreme Court’s law of individual privacy in the wake of *Roe v. Wade*<sup>54</sup> has been a robust global discourse about what the *Lawrence* Court identified as “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery

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<sup>51</sup> See Peters, *supra* note 35, at 1069.

<sup>52</sup> Commonwealth v. Carkhuff, 804 N.E.2d 317 (Mass. 2004).

<sup>53</sup> Tabchi v. Duchodni, 56 Pa. D. & C.4th 238, 256 (C.P. 2002) (setting aside jury verdict on grounds of “passion, partiality, prejudice or corruption” in violation of Arab-American plaintiffs’ due process right to fair and impartial jury), *aff’d*, 821 A.2d 143 (Pa. Super. Ct. 2003).

<sup>54</sup> 410 U.S. 113 (1973).

of human life.’’<sup>55</sup> I would call it ‘‘the right to be who you are.’’ It raises questions at every stage of the life cycle.

In the last few years alone, my court has been asked to decide: whether a pre-birth birth certificate may be issued in the names of a married couple where their genetic child was being carried by a gestational carrier;<sup>56</sup> whether a fetus may maintain a negligence action against its mother;<sup>57</sup> whether persons of the same sex may be prevented from marrying;<sup>58</sup> whether and in what circumstances an adult may be considered a child’s de facto parent;<sup>59</sup> whether surrogate parenting agreements are enforceable;<sup>60</sup> and whether a man who had voluntarily acknowledged paternity under our paternity statute could be held to the legal obligations of a father once DNA testing proved, five years after that acknowledgment, that he was not the child’s biological father.<sup>61</sup> Directly or indirectly, all of these cases have constitutional facets of uncertain dimensions. The only certainty is that more questions will come, and that, in our country, they generally will come to the state courts.

One Massachusetts case will illustrate how resort to the decisions of foreign courts might help a state court judge think through a novel issue of personal autonomy. The case was *A.Z. v. B.Z.*—it concerned the enforcement of a consent form signed by an in vitro fertilization clinic, a husband, and his wife.<sup>62</sup> The form stated, among other things, that if the couple ‘‘separated,’’ the wife would obtain possession of the couple’s clinically frozen pre-embryos, which she could then implant to have a child.<sup>63</sup> The question was whether the consent form was a contract that bound the husband, now divorced from his wife, to sire a child against his wishes.

The justices quickly determined that there were only two relevant American appellate cases, one decided by the Tennessee Supreme Court<sup>64</sup> and the other by New York’s highest court.<sup>65</sup> Both cases

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<sup>55</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>56</sup> *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133 (Mass. 2001).

<sup>57</sup> *Remy v. MacDonald*, 801 N.E.2d 260 (Mass. 2004).

<sup>58</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>59</sup> *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *Youmans v. Ramos*, 711 N.E.2d 165 (Mass. 1999).

<sup>60</sup> *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998).

<sup>61</sup> *Paternity of Cheryl*, 746 N.E.2d 488 (Mass. 2001).

<sup>62</sup> 725 N.E.2d 1051 (Mass. 2000).

<sup>63</sup> *Id.* at 1054.

<sup>64</sup> *Id.* at 1055 (discussing *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied sub nom. Stowe v. Davis*, 507 U.S. 911 (1993)).

<sup>65</sup> *Id.* at 1056 (discussing *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998)).

presented circumstances somewhat different from ours.<sup>66</sup> With little American law to guide us, I asked my law clerks to look for any relevant cases decided by foreign courts—Canada, Australia, and Britain in particular. We found none. Then my attention was drawn to *Nahmani v. Nahmani*,<sup>67</sup> a 1996 decision of the Israeli Supreme Court. *Nahmani* raised the precise issue. It provided me with a rich trove of normative and analytical premises with which to work through my own position on the question before us.

*Nahmani* relied in part on the abortion and contraception decisions of the United States Supreme Court.<sup>68</sup> Our decision in *A.Z. v. B.Z.* in turn was considered recently in a case in the Family Division of the England and Wales High Court concerning the same issue.<sup>69</sup> The road from the United States Supreme Court to the Israeli Supreme Court to the Massachusetts Supreme Judicial Court to the Family Division of the England and Wales High Court is but one example of how human rights are defined, redefined, and refined again by the process of judicial cross fertilization.

### B. Hate Speech

No other country in the world, including those with generally very protective “bills of rights,” has as expansive a view of speech as we do in the United States. Under the First Amendment, speech is protected even when it is, in the words of Justice Holmes, speech that “we loathe and believe to be fraught with death.”<sup>70</sup> The dissents of Justices Holmes<sup>71</sup> and Brandeis<sup>72</sup> urging freedom for hostile speech are now central to our reading of the First Amendment. As the Supreme Court said in 1968, a state may forbid advocacy of the use of

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<sup>66</sup> *Id.* at 1055–56.

<sup>67</sup> C.A. 5587/93 *Nahmani v. Nahmani*, 49(1) P.D. 485, *rev'd en banc*, A.H. 2401/95 *Nahmani v. Nahmani*, 50(4) P.D. 661. For an English-language summary and analysis of the case, see Janie Chen, Note, *The Right to Her Embryos: An Analysis of Nahmani v. Nahmani and Its Impact on Israeli In Vitro Fertilization Law*, 7 CARDODO J. INT'L & COMP. L. 325 (1999).

<sup>68</sup> *Nahmani*, 49(1) P.D. 485; *see also* Chen, *supra* note 67, at 343.

<sup>69</sup> *Evans v. Healthcare Ltd.*, 4 All E.R. 903, ¶¶ 313–314 (Fam. 2003) (Eng.).

<sup>70</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”).

<sup>71</sup> See, e.g., *Gitlow v. New York*, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); *Abrams*, 250 U.S. at 624–31 (Holmes, J., dissenting). Justice Holmes was joined in these dissents by Justice Brandeis.

<sup>72</sup> See, e.g., *Pierce v. United States*, 252 U.S. 239, 253–73 (1920) (Brandeis, J., dissenting); *Schaefer v. United States*, 251 U.S. 466, 482–95 (1920) (Brandeis, J., dissenting). Justice Brandeis was joined in these dissents by Justice Holmes.

force or violence only where the speech aims to incite or produce "imminent lawless action and is likely to incite or produce such action."<sup>73</sup> The German Constitution forbids advocacy of Nazi doctrine or the wearing of Nazi paraphernalia.<sup>74</sup> In Skokie, Illinois, American Nazis were free to march.<sup>75</sup> In South Africa, speech that incites racial hatred is marked out by the Constitution as unprotected;<sup>76</sup> here, it seldom may be punished criminally.<sup>77</sup>

The First Amendment was the product of the eighteenth-century Enlightenment. The South African and German Constitutions were forged in the twentieth century. The horrors of the last century persuaded the drafters of these younger constitutions that hate-mongering speech, broadcast over and over again, can be its own form of violence, on a scale our Founders hardly could have imagined. Were those modern drafters wrong? Should the Germans have ignored their terrible recent history? The South Africans the crimes of apartheid? I do not think so.

In the aftermath of large-scale terror attacks within our borders, some prominent First Amendment scholars have begun to suggest that our established approach to regulating hate speech may be seriously flawed. First Amendment scholar Dean Rodney Smolla said recently, "Our experience should tell us that what we thought was abstract ten years ago may not be so abstract anymore."<sup>78</sup> Even Floyd Abrams, one of our country's most distinguished First Amendment absolutists, is reported to have said that September 11 may have taught us to pay more attention to the context in which words are

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<sup>73</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1968) (per curiam).

<sup>74</sup> Article 21(2) of the Grundgesetz (Constitution of the Federal Republic of Germany) outlaws political parties that, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basis of order or to endanger the State. GRUNDGESETZ [GG] art. 21(2) (F.R.G.). Title III, sections 84 through 86(a) of the Penal Code of the Federal Republic of Germany specifically criminalizes membership in the former National Socialist (Nazi) party or the dissemination, production, or use of Nazi slogans, insignia, and propaganda. §§ 84–86(a) StGB.

<sup>75</sup> See *Nat'l Socialist Party v. Skokie*, 432 U.S. 43 (1977).

<sup>76</sup> Section 16 of the South African Constitution provides:

(1) Everyone has the right to freedom of expression, which includes: a. freedom of the press and other media; b. freedom to receive or impart information or ideas; c. freedom of artistic creativity; and d. academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to: a. propaganda for war; b. incitement of imminent violence; or c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

S. AFR. CONST. § 16.

<sup>77</sup> See *Brandenburg*, 395 U.S. at 447.

<sup>78</sup> Adam Liptak, *Hate Speech and the American Way*, N.Y. TIMES, Jan. 11, 2004, § 4 (Week in Review), at 3.

spoken than we thought permissible previously.<sup>79</sup> The recent United States Supreme Court decision in *Virginia v. Black* held that, consistent with the First Amendment, a state may ban cross burning when the “intent” is to “intimidate,”<sup>80</sup> a result that took some by surprise. Should it have?

If now is a time to think again about our hate-speech jurisprudence in light of recent experience, we might look to Canada. In a 1990 case, *Regina v. Keegstra*, the Canadian Supreme Court determined the constitutionality of a statute prohibiting “the willful promotion of hatred, other than in private conversation, towards any section of the public distinguished by colour, race, religion or ethnic origin.”<sup>81</sup> Keegstra, a high school teacher, was criminally convicted for making remarks to his students that attributed vile characteristics—and most of the world’s evils—to Jews.<sup>82</sup> Canada has a constitutional guarantee of freedom of expression,<sup>83</sup> but it makes that right “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>84</sup> Chief Justice Brian Dickson, who wrote the *Keegstra* opinion, included an extensive, erudite survey of relevant American constitutional law.<sup>85</sup> He concluded that where America led, Canada would not follow.<sup>86</sup> The American approach, he said, failed to acknowledge the real, twofold harm that hate speech

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<sup>79</sup> *Id.*

<sup>80</sup> 538 U.S. 343, 344 (2003) (“The First Amendment permits Virginia to outlaw cross burning with the intent to intimidate because cross burning is a particularly virulent form of intimidation.”).

<sup>81</sup> [1990] 3 S.C.R. 697, 713 (Can.) (referring to R.S.C., ch. C-46, § 319(2) (1985 (Can.)).

<sup>82</sup> *Id.* at 713–14.

<sup>83</sup> Part I, section 2(b) of the Canadian Charter of Rights and Freedoms in the Canadian Constitution, states: “Everyone has the following fundamental freedoms: [F]reedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b).

<sup>84</sup> *Id.* § 1.

<sup>85</sup> See *Keegstra*, [1990] 3 S.C.R. at 738–44.

<sup>86</sup> After discussing the absence of a “balancing” provision in the United States Constitution equivalent to the balancing provision of section 1 of the Canadian Charter of Rights and Freedoms, Chief Justice Dickson wrote:

Of course, American experience should never be rejected simply because the *Charter* contains a balancing provision, for it is well known that American courts have fashioned compromises between conflicting interests despite what appears to be the absolute guarantee of constitutional rights. Where [section] 1 operates to accentuate a uniquely Canadian vision of a free and democratic society, however, we must not hesitate to depart from the path taken by the United States. Far from requiring a less solicitous protection of *Charter* rights and freedoms, such independence of vision protects these rights and freedoms in a different way . . . . [I]n my view the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the

might provoke: first, injury to the target's sense of self-worth and equal membership in the community, and, second, injury to the very idea of an inclusive and tolerant community.<sup>87</sup> Surely the Canadian perspective, coming from a society so close to ours in values and history, might prove useful to American judges as we ponder the regulation of speech that we now understand may, indeed, kill.<sup>88</sup> Consideration of the work of other courts with a differently inflected jurisprudence might allow us to unearth our deep-seated but often unstated assumptions, to expose our legal and normative constructs to the penetrating light of fresh scrutiny, and to examine our analyses and conclusions against a broader background of possibilities. Such acute reevaluation, wherever it leads, can only make our jurisprudence stronger.

### C. Physical Detention and National Security Post-September 11

The issue of physical detention presents a more complicated case for transnational constitutional inquiry. Ironically, that may be because the American view of "cruel and unusual"<sup>89</sup> detention has been limited by our political history. Most Americans do not have the experience of having lived under a government that systematically employs extreme forms of detention against its enemies, real or perceived. By "extreme forms of detention" I include detention whose effect may be to break a detainee's spirit as much as his body.<sup>90</sup> Our analysis of the command against cruel and unusual punishment has focused almost exclusively on discreet acts of the government's alleged "deliberate indifference"<sup>91</sup> toward inmate health or safety.

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view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression.

*Id.* at 743.

<sup>87</sup> *Id.* at 746–47.

<sup>88</sup> For a comparison of Canadian and American approaches to the regulation of hate speech, see Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 Wis. L. Rev. 1425 (1994).

<sup>89</sup> See, e.g., U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); MASS. CONST. art. XXVI ("No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.").

<sup>90</sup> These remarks were delivered before allegations surfaced concerning the widespread abuse of suspected terrorists at detention facilities in Guantanamo Bay and Abu Ghraib prison in Iraq.

<sup>91</sup> In *Farmer v. Brennan*, the United States Supreme Court clarified the "deliberate indifference" standard for finding prison conditions violative of the Eighth Amendment:

We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or

But what about detention that effectively kills the detainee's soul? Or what shall we make of the argument circulating in some academic and legal circles that a kind of "national security exemption" to the Eighth Amendment justifies the use of non-lethal torture in some circumstances?<sup>92</sup>

Here I shall interject a personal anecdote. As a university student in Johannesburg, I was keenly aware that my status as a white woman gave me infinitely more privileges than those available to black South Africans. Yet I understood that neither my skin color nor my gender, nor the fact that I was abiding by the laws, immunized me from arrest and imprisonment by the apartheid regime. Such, in fact, was the fate of many of my friends and teachers. I believed that if the government decided to imprison me, I would not be subjected to the brutal physical torture meted out to black South African women and men. But I could be held in complete isolation, unable to consult with counsel, unable to talk with anybody for days or months on end, unable to ascertain the nature of the charges against me or how long I would be held. I could be subjected to enforced sleeplessness and other psychological pressures. The constant terror of detention with which I lived in South Africa left me acutely aware of the many ways to systematically dehumanize a human being.

American judges have had little occasion to develop a textured, detailed jurisprudence that would guide us in answering the difficult question of how best to prevent systematic dehumanization in times of national crisis. But that may change. Our government has declared many "wars"—against terrorism, against illegal drug use, against crime in general, and against illegal immigration. However appropriate, necessary, or commendable, those "wars" have resulted in the prolonged detention of a large number of people. Children as young as seven are committed to administrative detention for months while

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safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference . . . . But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

511 U.S. 825, 837–38 (1994).

<sup>92</sup> For example, Professor Alan M. Dershowitz recently has argued in a number of publications "for some kind of legal structure that promotes visibility and accountability through a 'torture warrant.'" Alan M. Dershowitz, *Torture Without Visibility and Accountability Is Worse Than with It*, 6 U. PA. J. CONST. L. 326, 326 (2003); see also Seth F. Kreimer, *Too Close to the Rack and Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 282 (2002) (summarizing Professor Dershowitz's position on use of torture in "ticking bomb" cases).

they await deportation.<sup>93</sup> Non-Americans suspected of terrorism have been held incommunicado indefinitely in Guantanamo.<sup>94</sup> Two million prisoners inhabit our penal institutions,<sup>95</sup> "the highest per capita rate of incarceration of any industrialized democracy."<sup>96</sup> Many prisoners are serving lengthy mandatory sentences for non-violent drug offenses.<sup>97</sup> An overwhelming number of them—nearly half of America's almost two million inmates—are black;<sup>98</sup> based on constant 2001 incarceration rates, about one in three young black men is likely to go to prison during his lifetime.<sup>99</sup> And consider some of the conditions in which thousands of prisoners nationwide serve their time. In one maximum security unit in the western part of the country, prisoners are isolated from almost all human contact for all but an hour and a half per day. They are electronically monitored every hour of every day, fed through a slit in the cell door, shackled and strip-searched each day before being permitted to exercise in a yard with no equipment, and denied the ability to participate in rehabilitation or work programs.<sup>100</sup> Another prison unit in the South has been described by Human Rights Watch as almost completely devoid of sensory, social, or intellectual stimulation; religious instruction is available only through television tapes, and inmates sometimes must

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<sup>93</sup> Eric Schmitt, *I.N.S. Both Jailer and Parent to a Child Without a Nation*, N.Y. TIMES, June 24, 2001, at A1.

<sup>94</sup> See AMNESTY INTERNATIONAL, REPORT 2003: USA (2003) ("During the year [2002], starting in January, the USA transferred more than 600 foreign nationals to the US naval base in Guantanamo Bay, Cuba, where they were held without charge or trial or access to the courts, lawyers or relatives."), at <http://web.amnesty.org/report2003/usa-summary-eng>; see also Hamdi v. Rumsfeld, 124 S. Ct. 981 (2004) (mem.) (challenging indefinite detention of American citizen without charges as alleged "enemy combatant"); Rumsfeld v. Padilla, 124 S. Ct. 1353 (2004) (mem.) (same).

<sup>95</sup> PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2002, at 2 (2003) (noting that 2,033,331 prisoners were being held in federal or state prisons or local jails on December 31, 2002), at <http://www.ojp.usdoj.gov/bjs/prisons.htm>.

<sup>96</sup> Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK U. L. REV. 681, 690 (1997).

<sup>97</sup> *Id.* at 690–92 & 691 n.30.

<sup>98</sup> HARRISON & BECK, *supra* note 95, at 9 (reporting that, at end of 2002, black inmates represented an estimated forty-five percent of inmates with sentences of more than one year).

<sup>99</sup> THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 8 (2003), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>.

<sup>100</sup> See Holly Boyer, *Home Sweet Hell: An Analysis of the Eighth Amendment's 'Cruel and Unusual Punishment' Clause as Applied to Supermax Prisons*, 32 SW. U. L. REV. 317, 329–30 (2003) (describing conditions at California's Pelican Bay State Prison Security Housing Unit); see also Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995) (finding housing of certain mentally ill inmates in Pelican Bay Security Housing Unit to constitute cruel and unusual punishment in violation of inmates' Eighth Amendment rights).

shower in front of prison staff of the opposite sex.<sup>101</sup> My former colleague on the Supreme Judicial Court, Professor Charles Fried, among others, has written that life in some American prisons "is too often a terrifying and degrading experience endured by prisoners for unimaginably long periods of time."<sup>102</sup> Organized gang rape and other forms of systematic and violent sexual coercion among prisoners may be ignored entirely by correctional authorities.<sup>103</sup>

And now, even an American citizen suspected of a connection with terrorism may be held for extended periods in harsh conditions without any prospect of trial, although the Supreme Court has recently concluded that an American detained as an "enemy combatant" has the right to counsel and to challenge his classification before a neutral tribunal.<sup>104</sup> What should we make of claims challenging the government in any of these circumstances? Many see our criminal justice systems as extraordinarily enlightened. Does that conviction prevent many of us from entertaining even the possibility that some detainees and inmates who have been convicted of criminal behavior might be subjected to dehumanizing treatment?

Once again I refer to Justice Brennan. In a speech at Hebrew University in Jerusalem in 1987, he discussed how United States courts might develop a jurisprudence of civil liberties in times of threats to national welfare and security.<sup>105</sup> The speech is eerily prescient. Justice Brennan began by observing that American courts have no "tradition of, or detailed theoretical basis for, sustaining civil liberties against particularized security concerns."<sup>106</sup> For that reason, he said, American judges generally fail to react with their normal judicial skepticism to government justifications on grounds of national security.<sup>107</sup> What are the consequences, in Justice Brennan's view, of a judge's suspension of that skepticism? Judges will be prone to give undue weight to the government's "public safety" justifications that

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<sup>101</sup> HUMAN RIGHTS WATCH, HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES: RED ONION STATE PRISON (Apr. 1999), at <http://hrw.org/reports/1999/redonion/>.

<sup>102</sup> Fried, *supra* note 96, at 683.

<sup>103</sup> *Id.* at 685–87.

<sup>104</sup> Hamdi v. Rumsfeld, 124 S. Ct. 981 (2004) (mem.); Rumsfeld v. Padilla, 124 S. Ct. 1353 (2004) (mem.).

<sup>105</sup> Associate Justice William J. Brennan, Jr., The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises, Address at the Law School of Hebrew University (Dec. 22, 1987), transcript available at [http://www.brennancenter.org/resources/downloads/nation\\_security\\_brennan.pdf](http://www.brennancenter.org/resources/downloads/nation_security_brennan.pdf).

<sup>106</sup> *Id.* at 1.

<sup>107</sup> *Id.* at 1, 5–6.

later turn out to be overblown or untrue.<sup>108</sup> And the courts unwittingly will have expanded the permissible boundaries of government interference into everyone's personal rights, national crisis or not.<sup>109</sup>

I draw two lessons from Justice Brennan's cautionary remarks. First, courts must insist on government accountability as vigorously in times of national distress as in times of peace. Generalities such as "terrorist threat," "war on drugs," "an explosion of gang activity," or other claims of public menace are not mantras; they do not render irrelevant the requirements of due process and transparency in government. This is particularly true where we are confronted with the State's treatment of those whom we most fear or despise. Second, threats to a nation's well-being do not justify conditions of confinement where at least one result is to crush the human spirit. The central command of the rule of law is to respect the dignity of *all* persons.

But how should American judges decide these difficult cases? A democracy under constant threat will have developed a detailed jurisprudence for protecting fundamental rights in times of crisis, and we can look to such democracies for guidance. One example: Since its founding in 1948, Israel has faced constant threats to its survival. Yet in the 1999 case of *Public Committee Against Torture*,<sup>110</sup> the Israeli Supreme Court concluded that many of the modes of detention and interrogation that the State had used against alleged terrorists could not be justified on grounds of national security. The court said it would not simply accept a government statement that national security was threatened; the government had to show, convincingly, exactly how it was threatened. Would protecting the rights of alleged terrorists leave Israel's democracy more vulnerable to terror? Chief Justice Barak, writing for the majority, addressed this point:

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<sup>108</sup> *Id.* at 2 (noting that "even decisionmakers [in the United States] who are suspicious of asserted security claims lack the expertise and familiarity necessary to discern confidently the true security risk from the overstated one").

<sup>109</sup> Justice Brennan further notes:

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to liberty are frightful to contemplate. For as distressing as the war time curtailment of civil liberties has been even under leaders like Lincoln, a more pervasive and permanent tyranny could have been established had the country ceded its civil liberties to someone willing to seize upon the opportunity to establish an authoritarian regime.

*Id.* at 6–7 (citation omitted).

<sup>110</sup> H.C. 5100/94, Public Comm. Against Torture v. Israel, 53(4) P.D. 817, ¶ 38.

A democracy must sometimes fight with one hand tied behind its back. Even so, democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.<sup>111</sup>

We now have urgent need to develop an approach to the protection of individual rights in times of sustained national crisis, an approach that is adequate to our solemn duty to uphold the rule of law. Might American state and federal judges not benefit from looking to foreign courts that have had greater occasion to consider these issues?

*Keegstra*, the Canadian case, and *Public Committee Against Torture*, the Israeli case, are instructive contrasts with each other, as well as with their American counterparts. In *Keegstra*, the Canadian Supreme Court took a context-sensitive, flexible approach to the constitutional regulation of hate speech,<sup>112</sup> in contrast to our more absolutist approach. In *Public Committee Against Torture*, the Supreme Court of Israel concluded that it is the duty of judges to examine the facts even in a terrorist context,<sup>113</sup> in contrast to the usually highly deferential American judicial views. If nothing else, these decisions demonstrate that pressing issues of fundamental rights can be seen very differently by countries that share a common language of respect for the dignity of persons. In the worldwide judicial marketplace of ideas, it is probable that over time each nation's unique contributions will influence and refine the thinking of other nations in the forward-moving process of democracy.

### CONCLUSION

It is often said that the great strength of the English language is its protean capacity to absorb influences from almost any source, as it adapts to the changing needs of its speakers. State constitutions have a similar capacity. State jurists are well aware that, to keep our constitutions vital, we must ensure that the law is stable but never stands still.<sup>114</sup> The question today is not whether state court judges should consider the work of foreign constitutional courts when we interpret our state's constitution. The question is whether we can afford not to. As state jurists, might we not begin to demand of ourselves and of the members of the bar who appear before us a transnational look at

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<sup>111</sup> *Id.* ¶ 39.

<sup>112</sup> *Regina v. Keegstra*, [1990] 3 S.C.R. 697, 743 (Can.).

<sup>113</sup> *Public Comm. Against Torture*, 53(4) P.D., ¶¶ 22–23.

<sup>114</sup> ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (1923) (“Law must be stable and yet it cannot stand still.”).

novel issues of individual rights? Participating in the global conversation about human liberty will keep our courts a vital part of the local community we serve and of the world community into which we and our constituents are now so tightly woven. Our constitutional offspring have much to tell us. We would be wise to listen.