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PUBLIC RIGHTS, GLOBAL PERSPECTIVES, AND COMMON LAW

Martha F. Davis[*]

INTRODUCTION

Public rights litigation has long been associated with constitutional issues. One of the earliest and best known public rights litigators of the twentieth century—the "people's lawyer" Louis Brandeis—filed his eponymous "Brandeis brief" in *Muller v. Oregon*, a 1908 case involving

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the constitutional right to freedom of contract.[1] In the mid-twentieth century, the litigation campaign of the NAACP Legal Defense and Educational Fund, Inc. ("Inc. Fund") to desegregate public education under the Federal Constitution's Equal Protection Clause took its place as the iconic example of public rights litigation.[2] More recent examples of Constitution-based public rights litigation, such as the current litigation campaign for gay marriage, have cited the Inc. Fund's incremental campaign for shifts in constitutional interpretation as a model and inspiration.[3]

In each of these campaigns, the litigators were keenly aware of the global context in which they acted. They communicated this perspective in their briefs, raising the awareness of the judges and the public. Depending on the particular case, this global context might be shared through references to comparative law and practices, or by citations to international laws that embody the collective judgments of many nations. For example, Brandeis's brief for the state in *Muller v. Oregon* supported limitations on women's' work hours to protect their health, and included pages of comparative data describing the labor practices of other nations.[4] Indeed, Part I of the brief specifically addressed legislation both "foreign and American," while Part II considered "[t]he world's experience upon which the legislation limiting the hours of labor for women is based."[5]

In the 1950s, the Inc. Fund's best known case, *Brown v. Board of Education*, was explicitly litigated in the global context of the cold war. Before the U.S. Supreme Court, the U.S. government's *amicus* brief noted that the United States' laws supporting racial segregation isolated it from other peer nations.[6] According to the government, "[t]he existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination . . . raises doubts even

1. Brief for the State of Oregon at 10-15, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605; PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 114 (1984).

2. Mark Tushnet, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1882 (1991); *see also* Craig Green, *Repressing* Erie*'s Myth*, 96 CAL. L. REV. 595, 595 (2008) (identifying *Brown v. Board of Education* as one of three "iconic cases" in American law).

3. *See, e.g.*, EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 168 (2004) ("It is poetic and fitting . . . that May 17, 2004, the day the *Goodridge* decision required that state officials begin the nondiscriminatory issuance of marriage licenses to gay and lesbian couples, marked the fiftieth anniversary of the U.S. Supreme Court's momentous decision in *Brown v. Board of Education* condemning 'separate and unequal' segregation in the nation's schools.").

4. Brief for the State of Oregon, *supra* note 1, at 93-104.

5. *Id.* at 11, 16, 18.

6. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 110-11 (1988).

among friendly nations as to the intensity of our devotion to the democratic faith."[7] Though the Court in *Brown* did not specifically cite the argument, a number of scholars have noted the role that this global context, overtly referenced in the litigation, played in the case's outcome.[8]

In recent cases pressing for gay rights under both state and federal constitutions, litigants have cited both comparative and international law to press their points, including decisions of Canadian and South African courts, the European Court of Justice, and policies of the Netherlands, among other nations.[9] For example, an *amicus* brief filed by the International Human Rights Organizations before the California Court of Appeals in *In re Marriage Cases* argued that "[t]he broad trend in other democratic societies is towards equal treatment of individuals in different-sex and same-sex couples," and provided extensive examples.[10] Similar briefs were filed before the U.S. Supreme Court in *Lawrence v. Texas*, citing both international and foreign law.[11] The Supreme Court's opinion in *Lawrence* cited these contextual global materials in determining that a Texas law barring same sex sodomy was an unconstitutional violation of privacy rights protected by the Constitution's Due Process Clause.[12]

The high public profiles of these litigation campaigns may suggest that public rights litigation is inherently constitutional in nature, and that the importance of global context is strongest in such cases. But the phrase "public rights" is not a defined term of art, and there is no reason that it

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7. Brief for the United States as Amicus Curiae at 6, Brown v. Bd. of Educ., 347 U.S. 483 (1952) (Nos. 1, 2, 3, 4, 5), 1952 WL 82045; *see also* Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, *Brown v. Board of Education* in International Context, Address Before the Univ. of Pretoria Ctr. for Human Rights (Feb. 7, 2006) (transcript available at http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07a-06.html).

8. Dudziak, *supra* note 6, at 62, 109. *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2007).

9. Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947, 963-66, 992-93 (2008) (highlighting the international context within which *Lawrence v. Texas* was decided); Matthew S. Pinix, *The Unconstitutionality of DOMA + INA: How Immigration Law Provides a Forum for Attacking DOMA*, 18 GEO. MASON U. CIV. RTS. L.J. 455, 473, 488 (2008) (discussing Justice Kennedy's willingness to consider the international community's decisions on same-sex rights); Stacey L. Sobel, *The Mythology of a Human Rights Leader: How the United States Has Failed Sexual Minorities at Home and Abroad*, 21 HARV. HUM. RTS. J. 197, 199 (2008) (summarizing domestic policies on same-sex rights in contrast to those abroad).

10. Brief of Law Professors et al. as Amici Curiae in Support of Respondents at 33, *In re* Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006) (Nos. A11049-51, A110463, A110651, A110652).

11. Brief of Mary Robinson et al. as Amici Curiae in Support of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151.

12. *Lawrence*, 539 U.S. at 560, 573.

must be limited solely to individual or collective assertions of rights against the government involving statutory or constitutional protections.[13] Taken literally, "public rights" could simply refer to assertions of rights against governments or private individuals in matters of broad public import that evoke a significant level of public concern and interest. These matters would certainly include so-called private matters with public consequences, such as housing, consumer affairs and family law. As Professor Hugh Collins recently observed:

> Private law delivers on the liberal state's promise to respect the freedom of individuals. Protection of civil liberties through *public law* secures for citizens freedom from the misuse of state force. This public law provides negative freedom for individuals. In contrast, *private law* enables members of the society to use this freedom in constructive ways—to make a home, to earn an income from business activities or a job, and to acquire possessions and enjoy services. . . . Private law constructs a framework of opportunities for individuals in cooperation with others to become authors of their own lives.[14]

Thus, while private matters involve assertions of rights between individuals rather than against the government, as Collins indicates, the adjudication of such private rights will often have a significant public impact on the "positive" freedoms of individuals.[15]

These sorts of private cases with public impacts are often the bread-and-butter of federally funded legal services offices for the poor.[16] Indeed, the

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13. The similar phrase "public law litigation" was coined by Abram Chayes in his important article, *The Role of the Judge in Public Law Litigation*. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (characterizing public law litigation as "the application of regulatory policy" to disputes, and emphasized its statutory or constitutional nature). Subsequent authors have viewed the concept even more narrowly, defining public law litigation as a subset of civil rights litigation. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Litigation Succeeds*, 117 HARV. L. REV. 1015, 1016 (2004). However, the phrase "public rights" has not achieved the same canonical status as "public law litigation."

14. Hugh Collins, *Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization*, 30 DALHOUSIE L.J. 1, 4-5 (2007) (emphasis added); *see also* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 15 (1995) (noting that "the common law and state constitutional law often stand as alternative grounds for individual rights").

15. Collins, *supra* note 14. For an interesting analysis of the role of apartheid in influencing aspects of South Africa's private law, despite the formal divide between constitutional law and common law, see Christopher Roederer, *The Transformation of South African Private Law After Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy*, 37 COLUM. HUM. RTS. L. REV. 447 (2006).

16. Memorandum from Freda K. Fishman, Assoc. Dir. for Pub. Interest Programs, Boston Coll. of Law, Law in the Public Interest: An Overview of Non Profit Organizations,

early social change agenda for legal services lawyers in the 1960s included litigation intended to restructure landlord-tenant relations.[17] Though ostensibly concerned with private housing contracts, as Professor Mary Ann Glendon has recounted, many courts were ready to see "a public law dimension in private litigation" involving tenancies.[18] Then and now, the public nature of the issues is reinforced by the sheer size of the caseload. For example, with almost 10,000 homeless individuals sleeping in shelters in New York City as of the end of 2008, a court ruling either expanding or limiting tenants' rights to "security of tenure" under common law would have a significant public impact, even though the particular case itself arose from a dispute over individual rights and obligations in a private contractual setting.[19] Interestingly, because the American Constitution is primarily concerned with protecting civil, political, and procedural rights, it is in the so-called private litigation context where most basic human needs identified as economic and social rights—rights to housing, rights to work, rights to economic goods—are consistently addressed in the United States.[20]

Under this broader understanding of public rights—encompassing both governmental and individual claims with public impacts—adjudicators may be called on to employ several alternative modes of legal reasoning. In constitutional or statutory litigation, the judge must be guided by the limitations imposed by the democratic process, and is expected to construe rights to strictly conform to the legislature's or the people's intentions. Indeed,

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Legal Services and Public Defenders 2-3, *available at* http://www.bc.edu/schools/law/metaelements/pdf/law_in_public_interest_handout.pdf (last visited Feb. 2, 2009); *see also* LSC: What is LSC?, http://www.lsc.gov/about/lsc.php (last visited Feb. 2, 2009).

17. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 521 (1982) (noting that during this time "'ordinary' residential landlord-tenant cases often became test cases which could be financed, staffed and appealed, even though the amounts actually in controversy might be quite small"). Professor Florence Roisman has recently called for "renewed litigation approach" to this area. Florence W. Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore,* 86 N.C. L. REV. 817, 819 (2008).

18. Glendon, *supra* note 17, at 522 (describing housing litigation in Washington, D.C. courts).

19. *WABC Eyewitness News: NYC Homeless at Record Numbers*, (WABC-NY television broadcast Dec. 23, 2008), *available at* http://abclocal.go.com/wabc/story?section=news/local&id=6569465. *See generally* Roisman, *supra* note 17, at 820-29 (describing importance of security of tenure).

20. *See, e.g.*, Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 446 (2008) (noting the absence of social and economic guarantees while arguing in favor of judicial implication of some social and economic rights); Cass Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 90 (Michael Ignatieff, ed., 2005) (exploring chronological, cultural, institutional and realist explanations for the lack of social and economic guarantees in the American Constitution).

these limits on judicial reasoning in constitutional and statutory cases serve as a counter-balance to the perceived counter-majoritarian nature of the federal (and to a lesser extent, the state) judiciary.[21] To be sure, "Herculean" judging may sometimes be necessary to address open questions, but the judicial starting place is firmly grounded in the legislature's language and intent.[22]

Much litigation involving claims between private individuals, however, involves no statutes or legislative intent or public vote, but arises under the common law.[23] In these cases, the starting place is different. There is no limiting statutory or constitutional text providing a direct constraint on judicial approaches. Rather, considering these common law cases, judges engage in traditional common law reasoning, beginning their analysis with an examination of existing precedent.

Without the obvious limitations imposed by statutory or constitutional text, the path of common law reasoning can seem freewheeling, yet it essentially parallels the process of textual interpretation with constraints instead posed by relevant judicial decisions—or "experiences"—of the past. In his 1949 book, *An Introduction to Legal Reasoning*, Edward H. Levi wrote of the common law that "the basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case."[24] Chief Justice Margaret Marshall of the Massachusetts Supreme Judicial Court recently endorsed Oliver Wendell Holmes's famous formulation—"The life of the

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21. *See* Thomas H. Lee, *Countermajoritarian Federalism*, 74 FORDHAM L. REV. 2123 (2006) (explaining Justice Stevens' jurisprudence which has a theme of countermajoritarian federalism). For a critical evaluation of the countermajoritarian position, see Daniel J.H. Greenwood, *Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomic World*, 53 RUTGERS L. REV. 781 (2001).

22. *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083-85 (1975) (noting that a Herculean judge must develop a theory of the Constitution "in the shape of a complex set of principles and policies that justify that scheme of government," that will guide decisions in hard constitutional cases).

23. *The Dictionary of Modern Legal Usage* defines the phrase "common law" as follows: In modern usage, *common law* is contrasted with a number of other terms. First, in denoting the body of judge-made law based on that developed originally in England, *common law* is contrasted by comparative jurists to *civil law*. THE DICTIONARY OF MODERN LEGAL USAGE (1990). Second, "with the development of equity and equitable rights and remedies, *common law* and equitable courts, procedure, rights, remedies, etc., are frequently contrasted, and in this sense *common law* is distinguished from *equity.*" Third, the term is similarly distinguished from ecclesiastical law. Finally, and perhaps most commonly within Anglo American jurisdictions, *common law* is contrasted with *statutory law*. In this Article, I am using the fourth, and in the United States, most common, definition of "common law."

24. EDWARD H. LEVI, INTRODUCTION TO LEGAL REASONING 1 (1949). The first third of Levi's classic tome attempts to untangle the ambiguity of common law by focusing on the evolution of the "inherently dangerous" doctrine. The remainder of the book focuses in equal parts on the legal reasoning behind constitutional and statutory interpretation.

law has not been logic; it has been experience"—as peculiarly relevant to common law courts.[25] Writing from a more contemporary vantage than Holmes or Levi, and incorporating both formulations, Professor David Strauss identified three premises that underlie a common law approach: first, "humility," in the recognition that an individual decision-maker should defer at least some degree to collective wisdom reflected in past decisions in similar circumstances; second, "empiricism," in identifying and crediting what has worked in the past or in related contexts; third, "innovation," allowing room for new ideas, again balanced with due regard for precedents of the past.[26] While Professor Strauss articulates these premises in the context of judicial decision-making, he notes that "the use of something like a common law approach is, of course, not limited to judges. Many other decision makers, both private and governmental, instinctively or self-consciously follow precedent in making decisions."[27] In short, they reason from existing precedents and, by sifting through the full range of legal resolutions available to them within that framework, attempt to reach the right decision.[28]

It follows that, depending on the underlying nature of the matter at issue, either common law reasoning based on precedent or constitutional/statutory interpretation may be appropriate analytical starting places in cases denominated as public rights litigation. On the constitutional side—despite examples of transnational references stretching back to Brandeis and much earlier to the beginnings of the nation—the role of global context in consti-

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25. Margaret H. Marshall, *"Wise Parents Do Not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1642 n.38 (2004) (citing Oliver Wendell Holmes, Jr., THE COMMON LAW 1 (Little, Brown & Co. 1881)).

26. David Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 857-60 (2007); *see also* Henry P. Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 37 (2004) (noting the "evolutionary aspects of common law").

27. Strauss, *supra* note 26, at 858.

28. Within this context, the range of relevant materials may be broad. *Ballentine's Legal Dictionary* notes that "the common law is the system of rules and declarations of principles from which our judicial ideas and legal definitions are derived, and which are continually expanding; the system being capable of growth and development at the hands of judges." *Common Law*, *in* BALLENTINE'S LEGAL DICTIONARY (1969). According to another source:

> [b]ecause common-law decisions deal with everyday situations as they occur, social changes, inventions, and discoveries make it necessary for judges sometimes to look outside reported decisions for guidance in a case of first impression (previously undetermined legal issue). The common law system allows judges to look to other jurisdictions to draw upon past or present judicial experience for analogies to help in making a decision.

Common Law, *in* THE FREE DICTIONARY, http://legadictionary.thefreedictionary.com/Common+Law (last visited Feb. 2, 2009).

tutional analysis has generated significant controversy in recent years and has been much discussed and debated by both scholars and judges.[29] In some instances, entire law review volumes have been dedicated to the topic.[30] However, the role of global context in common law matters has not received similar attention in recent scholarship on the role of international and comparative law in domestic cases.[31] Perhaps this is because common law cases are more likely to be considered by state courts than the federal courts, the latter having a more circumscribed common law jurisdiction.[32] Or perhaps more likely, it is simply that, because of the different

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29. For an overview of the controversy see Diane Marie Amann, *Just Right?: Assessing the Rehnquist Court's Parting Words on Criminal Justice: International Law and Rehnquist Era Reversals*, 94 GEO. L.J. 1319, 1324-30 (2006); Florence Wagman Roisman, *Using International and Foreign Human Rights Law in Public Interest Advocacy*, 18 IND. INT'L & COMP. L. REV. 1, 7-8 (2007) (describing bitter divide in current Supreme Court on use of international opinion when interpreting the constitution). *See generally* Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006) (reviewing current controversies and examining historic uses of international law in constitutional adjudication).

30. *See generally, e.g.*, Symposium, *The New Federalism: Plural Governance in a Decentered World*, 57 EMORY L.J. 1 (2007); Symposium, *International Law and the Constitution: Terms of Engagement*, 77 FORDHAM L. REV. 339 (2008); Symposium, *International Law and the State of the Constitution*, 30 HARV. J.L. & PUB. POL'Y 3 (2006); Symposium, *The Use and Misuse of History in Foreign Relations Law*, 53 ST. LOUIS U. L.J. (2008).

31. *See, e.g.*, Vlad F. Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 UTAH L. REV. 167, 169 (2007) (preemptively explaining that though his article focuses on domestic constitutional interpretation, "nothing in my argument implies that the use of foreign law is or should be limited to the constitutional realm"); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 129 (2005) (asserting that "too many scholars call for a theory that will explain the citation of foreign law only in constitutional cases"). One of the few substantial explorations of the relevance of foreign law to domestic common law adjudication is Shirley S. Abrahamson & Michael Fischer, *All the World's A Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273 (1997). In the article, Chief Justice Abrahamson of the Wisconsin Supreme Court and her co-author explore at length the comparative law relevant to two questions of tort law. First, should the mentally ill or disabled be held liable for their torts; and second, what should constitute informed consent? *See generally id.* The authors argue that if U.S. courts adopt an insular stance, "it is our law that will be deprived of the new ideas and solutions being vetted around the globe." *Id.* at 292. Interestingly, Daniel Farber notes that in some areas of substantive law, the relevance of global law is simply accepted. For example, there has also been no "passionate attack" on transnationalism in admiralty cases. Daniel Farber, *The Supreme Court, the Law of Nations and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335, 1337 (2007).

32. For nearly a century, *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), supported the idea that federal courts considering local disputes were not bound by state court interpretations of common law principles; rather, principles of common law were viewed as superseding any single polity. *Id.* at 18-19. However, in 1938, the U.S. Supreme Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), repudiated this approach, famously holding that "there is no federal general common law." *Id.* at 78. Subsequently, federal courts developed a much narrower concept of federal common law "made," rather than "discovered," by courts and necessary to effectuate a specific group of decisions committed to federal courts. *See* Sosa

nature of the essential task and the reasoning involved, the judicial appreciation of global context and the use of international or foreign citation is less controversial or remarkable in the common law context.[33]

Whatever the case, the intense scholarly, judicial, and legislative focus on the constitutional legitimacy of international and foreign law has tended to eclipse those instances where such citations are uncontroversial. It is worth underscoring then, that global context also matters in purely common law cases, particularly those with significant public impact. Drawing on this simple observation, this Article argues that the future of public rights litigation may look different than the immediate past, as litigants facing constricting federal rights discover—or rediscover—the potential of common law adjudication for social change and the role that global context can play in judicial common law reasoning.[34]

This Article proceeds in two parts. In Part I, I examine three state court common law cases of recent years, reviewing in greater detail the meaning of "public rights litigation" and justifying the place of common law litigation within that category of cases. In Part II, I draw on these case examples and others to examine the role that global context has played, can play, and should play in the adjudication of such ostensibly "private" matters.

I. PUBLIC RIGHTS LITIGATION AND THE COMMON LAW

In this Part, I set out the facts of three recent common law cases involving disputes between individuals to examine the "public rights" implicated by this ostensibly private litigation. The cases were all decided by state courts. The cases involved, respectively, the implied warranty of habitability under landlord-tenant law, wrongful termination of employment, and risk allocation in the tort of intentional misrepresentation.

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v. Alvarez-Machain, 542 U.S. 692, 740-41 (2004) (Scalia, J., concurring) (discussing development of federal common law). While these developments had a significant impact on federal adjudication, the state court tradition of common law reasoning was preserved. *See, e.g.*, Margaret H. Marshall, *"Wise Parents Do not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1642 (2004) (noting that as compared to federal courts, "state court judges work actively in the open tradition of the common law").

33. Daniel Farber, for example, assumes that reference to foreign jurisdictions in tort cases and other common law matters is routine. Farber, *supra* note 31, at 1365 ("Just as common law courts look beyond their own borders when faced with difficult issues of tort or contract law, so the federal courts should do so in the constitutional realm.").

34. Martha Davis, *Human Rights in the Trenches: Using International Human Rights Law in "Everyday" Legal Aid Cases*, 41 CLEARINGHOUSE REV. 414 (2007); Roisman, *supra* note 29, at 4 (pointing out that domestic courts have been considering foreign human rights law principles).

A. Second-hand Smoke and the Implied Warranty of Habitability: *Poyck v. Bryant*

Poyck v. Bryant,[35] decided by the New York City Civil Court, concerned an issue of constructive eviction. Mr. Poyck, the landlord, brought an action against Bryant, his tenant, for unpaid rent after Bryant precipitously vacated the apartment in question. Bryant responded to the suit by offering a defense of constructive eviction due to second-hand smoke emanating from his neighbor's apartment.[36] According to the facts laid out in the court's decision, when new neighbors moved in and began smoking in the adjacent hallway, Bryant and his wife tried to seal their apartment from the smoke—they purchased air filters and modified the doors—but their efforts were insufficient and despite their pleas, the landlord did nothing to assist them or to curtail the smoke. In court, the landlord moved to dismiss the tenants' defense and sought summary judgment, arguing that the landlord "cannot be held responsible for the actions of third parties beyond his control,"[37] i.e., the neighbors' actions in smoking in the hallway and in their own apartment.

The court approached this as a case of first impression, noting that "there appears to be no reported cases dealing with second-hand smoke in the context of implied warranty of habitability."[38] Having found no exact match, however, the court looked for analogous principles. According to the court,

> [w]ith multiple neighbors living beside each other comes basic duties and responsibilities. There is a duty to protect each other's right to privacy and a responsibility not to invade a neighbor's privacy. The unwanted invasion of privacy comes in many guises such as noise, smells, odors, fumes, dust, water and even secondhand smoke.[39]

Also analogizing from prior cases involving third-party nuisances, the court further held that smoking is no different, and observed that "[t]he courts have continuously held that the implied warranty of habitability can apply to conditions beyond a landlord's control."[40] Informing the court's decision was the fact that "the United States Surgeon General, the New York State Legislature, and the City of New York City Council declared that there is a substantial body of scientific research that breathing second-

35. 80 N.Y.S. 2d 774 (Civ. Ct. 2006).
36. *Id.* at 778-69.
37. *Id.* at 779.
38. *Id.* at 776.
39. *Id.*
40. *Id.* at 779.

hand smoke poses a significant health hazard."[41] Determining that there were triable issues of fact, the court denied the landlord's motions and set the case for trial.[42]

The rights at issue in *Poyck*—the right to a habitable apartment and the right to live free of nuisances—were certainly private and individual. Individual circumstances also played a role in exacerbating the problems. The decision notes, for example, that Bryant's wife was recovering from her second cancer surgery and was therefore especially susceptible to health hazards arising from secondary smoke.[43] Further, the Bryants' goal in raising these defenses was presumably to avoid paying additional rent on an apartment that they deemed uninhabitable—a financial benefit that would inure solely to them. There is no indication that they or their counsel were motivated by a desire to make new law for New York City tenants by extending smoking restrictions to private residences.

But the court's ultimate conclusion that the landlord had an affirmative responsibility to take reasonable steps to address the second hand smoke problem has broad public implications. New York State has a strong anti-smoking law, the Clean Indoor Air Act, enacted in 2003.[44] Led by smoking opponent Mayor Bloomberg, the climate for smokers has gotten even more hostile in recent years, with New York City imposing an additional tax on cigarettes beyond existing state and federal taxes.[45] However, the state and municipal laws and regulations are limited to so-called "public accommodations" such as restaurants, bars, stores, and other public settings. No formal state or municipal statute or regulation currently reaches smoking behavior in private homes.

Yet, particularly given the public restrictions in New York, private homes are where most indoor smoking occurs. As of 2006, it was estimated that over one million smokers resided in New York City.[46] The common law rule articulated in *Poyck* that governs smoking in rental accommodations will affect many of these individuals—about two-thirds of

41. *Id.* at 777 (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., A REPORT OF THE SURGEON GENERAL, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING (1986); *see also* N.Y. PUB. HEALTH LAW § 1399-n(1) (McKinney 2003); NEW YORK, N.Y., ADMINISTRATIVE CODE § 17-501(1) (2002).

42. *Id.* at 780.

43. *Id.* at 778.

44. Clean Indoor Air Act, 2003 N.Y. Sess. Laws §1399-n (McKinney).

45. Michael Cooper, *Cigarettes Up to $7 a Pack with New Tax*, N.Y. TIMES, July 1, 2002, at B1.

46. Press Release, N.Y.C. Dep't Health & Mental Hygiene, New York City Smoking Rate Has Declined Almost 20% since 2002 (June 21, 2007), *available at* http://www.nyc.gov/html/doh/html/pr2007/pr050-07.shtml.

New York City residents are renters.[47] These numbers underscore the broad public import of the court's construction of the common law of constructive eviction and the warranty of habitability to encompass second-hand smoke, and of the conclusion that the landlord has an affirmative obligation to intervene to curtail unwanted smoking by third-party tenants.[48]

B. Violence Against Women and Public Policy: *Apessos v. Memorial Press Group*

Generally, issues of violence against women arise in state courts under the rubric of common law. Efforts to create a federal cause of action challenging gender-motivated violence against women through the Civil Rights Remedy of the Violence Against Women Act were struck down by the U.S. Supreme Court in 2000 as beyond Congress's scope of authority.[49] As a factual matter, gender-based violence is sometimes a component of a Title VII claim or of a claim under 42 U.S.C. § 1983,[50] but these statutes were not crafted with violence against women in mind, and such claims are sometimes hard to fit into the strictures of those statutes. Some state statutes are available to provide redress for gender-motivated violence.[51] But just as often, if not more often, violence against women is addressed through state courts adjudicating in their common law capacity. *Apessos v. Memorial Press Group* is such a case.

From 1999 through mid-2000, Sophia Apessos was a newspaper reporter for the Memorial Press Group ("MPG") in Massachusetts. Throughout the year, she suffered verbal and physical abuse at the hands of her husband, Gilbert Hernandez.[52] Finally, after a particularly serious beating in July 2000, Apessos called the police. Hernandez was arrested and charged with assault and battery. Over the weekend following the arrest, Apessos participated in the court proceedings necessary to obtain a temporary abuse

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47. Sam Roberts, *In a City Known for Its Renters, a Record Number Now Own Their Homes*, N.Y. TIMES, May 27, 2007, at 1.

48. *See also* Posting of Lucas Ferrera to City Room, http://cityroom.blogs.nytimes.com/2008/01/31/answers-about-tenantlandlord-issues-part-5/ (Jan. 31, 2008, 15:39 EST) ("A day doesn't pass without someone complaining about second-hand smoke in the housing context.").

49. United States v. Morrison, 529 U.S. 598 (2000); Julie Goldscheid, United States v Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109 (2000).

50. *See, e.g.*, Castle Rock, Colo. v. Gonzales, 545 US 748 (2005) (seeking remedy for failure to enforce an order of protection under 42 U.S.C. § 1983).

51. Gender Violence Act, 740 ILL COMP. STATUTES 82/1 (2004); Gender-Motivated Violence Protection Act, NEW YORK, N.Y., ADMINISTRATIVE CODE §8-901-907 (2000).

52. Apessos v. Memorial Press Group, 15 Mass. L. Rptr. 322, No. 01-1474-A, 220 WL 31324115 (Super. Ct. 2002).

prevention order, but her presence was also required in court on Monday and she needed additional time at home after the court date in order to get the locks to her home changed. She informed her MPG supervisor that she would be at work the next day, on Tuesday. But when she returned to work on Tuesday, she was immediately terminated by MPG's human resources director. In her lawsuit, Apessos claimed wrongful termination, arguing that "her absence was the effect and proximate cause of her termination."[53]

Under Massachusetts common law, an at-will employee such as Apessos can make out a tort claim of wrongful termination only if the reason for the termination is "in violation of a public policy . . . embodied in a specific provision of law such as a constitutional clause or statute."[54] Apessos claimed that her termination was triggered by her absence from work to attend to judicial proceedings, to assist the police in the presentation of evidence, and to attend to other security needs arising from domestic violence. The question, as the court articulated it, was whether "these activities, in whole or in part, embody a public policy sufficiently recognized by specific provisions of law so as to protect Ms. Apessos' [sic] from termination for their pursuit."[55]

As the court noted, the assertion that Massachusetts public policy specifically protected these activities was a novel claim. Surveying other cases, the court found that Massachusetts judges had identified actionable public policy interests when, for example, a termination was precipitated by an employee's insistence upon compliance with safety regulations at a hospital or an employee's actions in reporting to the employer the criminal conduct of another employee.[56]

Without an exact precedent to draw on, the court examined the statutes and policies applicable to Apessos's circumstance. It concluded that a public policy to support both access to the courts and cooperation with the police was sufficiently articulated in both the Massachusetts Constitution and the statutes to support Apessos's claim.[57] In addition, the court noted in passing the underlying nature of the issues for which Apessos sought redress in court—both her need to be free of violence and her need to continue to support herself by working. According to the court:

> [o]ne other obvious and compelling theme is present. The public policy interests here are primal, not complex: the protection of a victim from physical and emotional violence; and the victim's livelihood. The preser-

53. *Id.* at 322.
54. *Id.* at 323.
55. *Id.* at 324.
56. *Id.* at 323.
57. *Id.* at 324.

> vation of a livelihood should serve to reduce domestic dependence and its concomitant vulnerability to abuse. The two are connected. A victim should not have to seek physical safety at the cost of her employment.[58]

As the above quote makes clear, in gleaning the existence of a Massachusetts public policy supporting access to the courts and cooperation with police in cases of domestic violence, the court referred not only to existing statutes and case law but also broader social policy goals that were not explicitly delineated in the state statutes. While the court's opinion does not reference it directly, this contextual approach—recognizing the connections between violence and employment—was likely informed by the extensive briefing that the court received on these issues from the NOW Legal Defense and Education Fund, which represented Apessos.[59]

Again, simply because of the numbers of individuals who face similar choices between enduring intimate violence and seeking police intervention, with likely interference with their work schedules as they pursue their rights, this litigation is properly viewed as "public rights litigation." According to the National Coalition Against Domestic Violence, "more than 33,000 women and children were served by community-based domestic violence programs in Massachusetts in 2005."[60] Many of these victims have connections to the workforce. According to statistics compiled by Legal Momentum, 44% of employed adults "have personally experienced the effects of domestic violence in their workplaces."[61] Further, using data from a large random household survey of women in a low-income neighborhood, Susan Lloyd has written about the devastating effect that violence can have on women's' employment, particularly depressing victims' occupational status.[62] Clearly, litigation such as *Apessos* confirms and responds to the public impact of this problem by conferring additional claims in the context of the common law tort of wrongful termination constitutes "public rights litigation."

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58. *Id.*

59. *See* Marie Tessier, *More States Give Abuse Victims Right to Time Off*, WOMEN'S E-NEWS, Jan. 16., 2005, http://www.womensenews.org/article.cfm/dyn/aid/2147/context/archive. I was vice president and legal director of the NOW Legal Defense and Education Fund at the time this litigation was filed.

60. NAT'L. COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE FACTS: MASSACHUSETTS 1 (2007), *available at* http://www.ncadv.org/files/Massachusetts.pdf.

61. LEGAL MOMENTUM, UNDERSTANDING THE EFFECTS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING ON HOUSING AND THE WORKPLACE 2 (2009), *available at* http://www.legalmomentum.org/assets/pdfs/statistics.pdf.

62. Susan Lloyd, *The Effects of Domestic Violence on Women's Employment*, 19 LAW & POL'Y 139 (1997), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/119152529/PDFSTART.

C. Tort Claims for Intentional Misrepresentation in Real Estate Transactions: *Below v. Norton*

The economic downturn and associated foreclosure crisis has stimulated wider public interest (and more litigation) in areas involving consumers and real estate. A number of recently reported cases involve unconscionable contracts between banks or other financial institutions and low-income home owners struggling to stay in their homes.[63] In many instances, common law doctrines govern claims available to purchasers and owners in such situations.

In *Below v. Norton*, the Wisconsin Supreme Court addressed the question of whether the "economic loss doctrine" ("ELD") bars common law claims for intentional misrepresentation that occur in the context of residential real estate transactions."[64] First recognized by the New Jersey Supreme Court in 1965,[65] the ELD is generally defined as a "judicially created doctrine that provides commercial purchasers of goods cannot recover damages that are solely economic losses from manufacturers of those goods under 'tort' theory."[66] The ELD's purpose, according to many decisions, is to "preserve the distinction between contract and tort."[67] The U.S. Supreme Court has explained that the doctrine rests on the assumption that commercial entities will adequately protect their interests through contract, without resort of the reallocation of risk accomplished through the tort system.[68] Nevertheless, some recent lower court decisions have gone farther and barred causes of action for common law fraud and misrepresentation in contexts that involve individual consumers, not sophisticated commercial entities.[69]

Below v. Norton involved a real estate transaction between an individual and a family. Shannon Below purchased a house from the Nortons on Milwaukee, Wisconsin's south side in 2004. As part of the sale, the Nor-

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63. *See, e.g.*, Andrews v. Chevy Chase Bank, 545 F.3d 570 (7th Cir. 2008) (holding that mortgage crisis litigation could not be pursued on a class action basis under the Truth In Lending Act); Bank of New York Trust Co., NA v. Gbeh, No. CV0750024955, 2008 WL 713613 (Conn. Super. Ct. Feb. 26, 2008); Mortgage Elec. Registration Sys. v. Abner, 260 S.W.3d 351 (Ky. Ct. App., 2008); LaSalle Bank v. Shearon, 850 N.Y.S.2d 871 (N.Y. App. Div. 2008); Swayne v. Beebles Invests., Inc., 81 N.E.2d 1216 (Ohio Ct. App. 2008).

64. 751 N.W.2d 351, 354 (Wis. 2008).

65. Santor v. A & M Karagheusian, 207 A.2d 305, 310-11 (N.J. 1965).

66. Steven Tourek et al., *Bucking the "Trend": The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation*, 84 IOWA L. REV. 875, 875 (1999).

67. *Below*, 751 N.W.2d at 358 (citing cases).

68. Saratoga Fishing Co. v. J.M. Martinac & Co., 520 U.S. 875, 879-80 (1997).

69. Tourek, *supra* note 66, at 905-10.

tons represented that they were not aware of any problems with the house's plumbing aside from a minor problem with the bathtub's drain handle. However, when Below moved in after the closing, she discovered that the sewer line running between the house and the street was broken.[70]

Below sued the Nortons a few weeks later. Among other things, she alleged a claim for intentional misrepresentation. In essence, Below asserted, "the Nortons knew of the defect with the sewer line before the house's sale, and misrepresented their knowledge to induce [her] to purchase the house."[71] Because she relied on this representation and completed the purchase, she suffered economic loss.[72] Below also asserted contract claims in an amended complaint, but the lower court refused to accept the amended complaint as properly filed or served. Below did not appeal this decision and was precluded from pursuing her contract claims.[73]

Both the circuit court and the court of appeals dismissed Below's intentional misrepresentation claim, determining that it was precluded by the ELD. On appeal, the Wisconsin Supreme Court looked at a variety of sources to uphold the lower courts, a conclusion that was endorsed by a majority of justices. Justice Bradley filed a spirited dissent, joined by Chief Justice Abrahamson and Justice Butler.

The majority refused to make a doctrinal distinction between commercial real estate, which had been the subject of prior decisions, and the residential or noncommercial real estate at issue in Below's case, instead holding that the ELD bars common law claims for intentional misrepresentation regardless of this distinction. The majority first examined applicable precedents. According to the court, the existing Wisconsin case law "leads us to the result that we reach in the present case"[74]; in prior cases, the majority observed, the court had applied the ELD to bar both negligent and strict liability claims arising from a variety of consumer purchases.

The court then examined whether the underlying assumption that Below could protect herself through contractual provisions was warranted. The majority noted that along with the property condition report, Below received a notice that she might want to obtain professional advice or arrange for an independent inspection. Without knowing whether Below obtained such a second opinion, the court observed that had she succeeded in perfecting her contract claims, "Below might normally have been in a position

70. *Below*, 751 N.W.2d at 355.
71. *Id.*
72. *See id.*
73. *See id.*
74. *Id.* at 358.

to pursue a breach of contract claim against the Nortons" based on the erroneous statement.[75]

The dissenters, led by Justice Bradley, began their opinion by squarely noting the public nature of this case. According to these justices, "this is a case that can affect every single person who purchases a home in Wisconsin. For many citizens of this state, buying a home will be one of the most important purchases that they will make in their lifetime."[76] Stressing the entirely judge-made nature of the ELD, the dissenters also chastised the majority for giving Wisconsin "the dubious distinction of being the only state in the entire country to have expanded this judicially created doctrine in such a fashion."[77] Following a thoroughgoing review of the same cases cited by the majority, the dissent concluded that neither Wisconsin legislation nor case law compelled the application of the ELD in this circumstance.

The dissenters also examined the public policy implications of the doctrine articulated by the majority. According to the dissent, "[b]arring the tort claims of defrauded homebuyers is bad public policy. It is anathema to the public's interest in truth-telling in matters of commerce."[78] Indeed, in an *amicus* brief filed with the court, the Wisconsin Realtors Association warned that "the application of the economic loss doctrine here is bad for the Wisconsin real estate market and bad for Wisconsin consumers."[79] According to the Realtors, "[p]roviding homebuyers with accurate and complete information and promoting an environment of trust and honesty are essential for fair and informed real estate contracts."[80]

Finally, the dissenters note the majority's effort to downplay the broad consequences of its decision by citing the unique facts of Below's case (where her contractual claims were precluded by a failure to properly file and serve an amended complaint), and suggesting that others would not face this issue. But according to the dissenting opinion, citing several ex-

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75. *Id.* at 361.

76. *Id.* at 362.

77. *Id.* at 363; *see, e.g.*, Cargill Inc. v. Boag Cold Storage Warehouse, 71 F.3d 545, 550 (6th Cir. 1995) (per Michigan law, ELD only applies to the sale of goods); Ramos v. Hoyle, Slip Copy, No. 08-21809-CIV, 2008 WL 5381821, at *2 (S.D. Fla. Dec. 19, 2008) (limiting ELD doctrine to instances of equal bargaining power); Floor Craft Floor Covering v. Parma Cmty. Gen. Hosp. Ass'n, 560 N.E.2d 206, 212 (Ohio 1990) (refusing to extend ELD to include services and other intangibles); Orion Refining Corp. v. UOP, 259 S.W.3d 749, 776 (Tex. App. 2007) (refusing to allow pure economic loss tort claims even when relief is precluded by contract per Illinois law); Stieneke v. Russi, 190 P.3d 60, 67-68 (Wash. App. 2008) (restricting ELD remedies to those contractually agreed upon).

78. *Below*, 751 N.W.2d at 367.

79. *Id.* at 363.

80. *Id.* at 369.

emplary cases, there will be many instances where the defrauded buyer has no remedy in contract. For example, contract claims are subject to a six-year statute of limitations that accrues at the time of breach. In contrast, tort claims accrue when the injury is discovered. The majority's ruling, the dissenters opine, would often have the effect of barring suits by homeowners who only belatedly discover sellers' misrepresentations concerning structural defects. Under the majority's rule, these individuals might find themselves remediless.

Like the *Poyck* and *Apessos* cases cited earlier, the Wisconsin Supreme Court's majority and dissenting decisions in *Below* demonstrate the very public nature of some common law cases that arise in a private, transactional context. As the dissent points out, the majority's opinion shaping the common law contours of the ELD will have a great impact on individuals far beyond those immediately involved in this transaction. Not surprisingly, a number of organizations with broad public agendas participated as *amici* in the *Below* case, including the Wisconsin Realtor Association ("WRA"), the University of Wisconsin Consumer Law Litigation Clinic, the AARP, the Consumer Justice Law Center, Legal Action of Wisconsin, the Legal Aid Society of Milwaukee, and the Wisconsin Academy of Trial Lawyers.[81] Debbi Conrad, Director of Legal Affairs for the WRA and author of the WRA's amicus brief, later elaborated on the position of Wisconsin consumers after this ruling. She observed that, far from hammering out fine-tuned contracts with the sellers,

> [h]ome buyers, with the assistance of real estate agents, typically write up their purchase contracts on the offer to purchase forms approved by the Department of Regulation and Licensing, not attorney-drafted contracts customized to the specific property, transaction and potential risks. Buyers fall "in love" with the home of their dreams and, by and large, do not think or behave like sophisticated professionals negotiating a business deal—and they do not enjoy UCC protections.[82]

The *Below* decision also demonstrates again the typical trajectory of courts' common law reasoning. Both the majority and dissent analyze past experiences embodied in precedent—with the dissenters looking both within and outside Wisconsin—and both groups of justices make empirical assessments based on the likelihood that buyers will be able to adequately avoid undue risk. While the dissenters go farther in urging a more innovative spirit in applying (or rather, rejecting) the judge-made ELD, both the

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81. *Id.* at 353.

82. Debbi Conrad, *Residential Real Estate Practice After* Below v. Norton, WIS. REAL EST. MAG., Aug. 2008, *available at* http://news.wra.org/story.asp?a=963.

majority and dissent also openly justify their approach to filling existing gaps in this law by references to public policy goals.

In sum, each of these three common law cases, decided by state courts, address important issues of public import in the context of private disputes. These cases, and many others like them, challenge the common assumption that "public litigation" is necessarily constitutional in nature. At the same time, however, the public import of these cases suggests that the wise judges should frame their decision-making more explicitly within a larger context of legal and public policy developments. The next Part addresses this issue.

II. GLOBAL CONTEXT IN COMMON LAW CASES

Common law reasoning inherently calls on courts to explore relevant precedents and appropriately presented empirical evidence, with attentiveness to public policy impacts and the flexibility to adjust results when necessary to avoid miscarriages of justice. When operating outside of the strictures of legislative interpretation, without the controlling texts of statutes or constitutions, courts must employ these alternative tools to reach decisions that are fair, reasonable, and defensible under our legal system.

In this Part, I argue that global context—as variously gleaned from comparative case law, international law, and empirical data—is an additional consideration pertinent in many common law cases and consistent with common law approaches. First, I note that this is nothing new and in fact, is a very old practice; comparative and international sources have long been cited by courts as they develop common law jurisprudence. Second, I examine the useful role that global context might play in the decisions of the three cases described above, *Poyck*, *Apessos* and *Below*. Third, I examine the challenges facing judges and litigators who broaden their frame in this way when addressing common law claims.

A. The Porous Borders of Common Law

As legal historian David Siepp recently observed, English common law has demonstrated openness to global contexts over many centuries. According to Professor Siepp:

> English lawyers and judges referred to canon law or civil law in over two hundred cases between the years 1300 and 1600, . . . English judges sometimes brought expert doctors of canon and civil law into their com-

> mon law courts, and sometimes went out to confer with the canonists and civilians and reported back.[83]

These English lawyers and judges understood, however, the difference between binding precedent and persuasive authority. Again according to Professor Siepp,

> English common lawyers never merged or confused canon law or civil law with their own law, but neither were they hostile to it or ignorant of it. English common lawyers and judges knew, compared, and spoke of 'their law' (lour ley in the law French of the day) in its similarity to and difference from 'our law' (nostre ley), and knew when each was to be applied. After 1600, English law borrowed more frequently and more heavily from Roman and canon law sources, particularly in the rulings of Chief Justice Holt and Lord Mansfield.[84]

This "un-blindered" approach to common law reasoning persisted in the new American colonies and later, the United States. Richard Helmholtz has written extensively concerning the founders approach to natural law as a sort of universal common law, and the founders' reliance on a range of foreign sources to ground their conception of law in the new world.[85] Legal historian Daniel Farber recently endorsed this assessment, arguing that it coincidentally undermines recent claims that reliance on foreign sources in constitutional litigation is new and dangerous.[86]

Throughout U.S. history, common law reliance on foreign and international law in cases involving private parties has been consistent and accepted, if not always frequent. Particularly since the Supreme Court's 1938 decision in *Erie v. Tompkins* holding that federal courts must look to state court decisions in applying general common law, this common law tradition has been carried on principally by state court judges.[87] Surveying Wisconsin cases decided between 1942–1995, Chief Justice Abrahamson found "thirty-nine citations to English cases spread across thirty-four decisions."[88] A more recent search of the LEXIS state court file for the term "New Zealand" yielded seven U.S. state court cases that cited New Zealand decisions in the context of a substantive discussion of a common law prin-

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83. David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417, 1436 (2006).

84. *Id.* at 1436-37.

85. Richard H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. PA. J. CONST. L. 401, 416-17 (2007).

86. *See* Farber, *supra* note 31, at 1347.

87. For discussion of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and its implications for common law reasoning in the United States, see *supra* note 32.

88. Abrahamson & Fischer, *supra* note 31, at 276.

ciple pending before the decision-making court.[89] These cases spanned almost a century of jurisprudence. If LEXIS's state court case file were truly complete, the numbers would likely have been higher.[90] As it was, these diverse cases demonstrated common law courts surveying transnational law alongside domestic precedents in order to sharpen their reasoning and to examine the global implications and contexts of their own decision-making. One such example was *Yellowstone Sheep Co. v. Diamond Dot Live Stock Co.*, where the court examined relevant New Zealand law concerning the meaning of "old ewes" in resolving a dispute over a delivery of sheep.[91] More recently, in a case with broad public policy implications, the Texas Court of Appeals cited a New Zealand case as it considered a private suit challenging the status of a male-to-female transsexual as a man's "surviving spouse."[92]

These examples, as well as those cited by Chief Justice Abrahamson and co-author Michael Fisher, all involve domestic references to foreign law, comprising the decisions of other national courts. In the absence of state actors, international law—treaties and covenants adopted by multiple nations which generally impose obligations on participating nation states—may seem irrelevant to private litigation. But when international law and foreign law are used for persuasive purposes, these differences fall away. International norms embody the laws of nations. These norms may be cited to demonstrate the degree of consensus on certain principles—thus lending the particular propositions somewhat more weight than would a lengthy string cite to the laws and judicial decisions of various foreign jurisdictions. Further, international law may be referenced in private litigation for pur-

89. Tucker v. Mobile Infirmary Ass'n, 68 So. 4, 6-7 (Ala. 1915); Eliason v. Wilborn, 335 Ill. 352, 361 (1924); Hoffman v. Schroeder, 186 N.E.2d 381, 388-89 (Ill. App. Ct. 1962); Metro v. Amway Asia Pac. Ltd., No. 258902, 2006 WL 2035510, at *4 (Mich. App. Ct. July 20, 2006); Proprietary Ass'n v. Bd. of Pharmacy, 106 A.2d 272, 276-77 (N.J. 1954); Littleton v. Prange, 9 S.W.3d 223, 229 (Tex. Ct. App. 1999); Yellowstone Sheep Co. v. Diamond Dot Live Stock Co., 297 P. 1107, 1112 (Wyo. 1931).

90. Particularly for lower court cases, LEXIS files typically include reported cases only back a century or so. LEXIS coverage varies drastically between states and courts. In order to determine coverage, a user must select "source information" for each state database. LexisNexis InfoPro, Keeping Current, http://law.lexisnexis.com/infopro/Keeping-Current/LexisNexis-Information-Professional-Update-Newslet///Take-A-Tour/Quick-.-Can-You-Find-It-at-lexiscom-Ask-the-LexisNexis-Directory-of-Online-Services/archive4-2008 (last visited May 12, 2009). For example, Massachusetts superior court decisions are only available from 1993, while lower court California decisions are searchable as far back as 1905.

91. *Yellowstone Sheep Co.*, 297 P. at 1112.

92. *Littleton*, 9 S.W.3d at 229. The court's determination in *Littleton* that the transsexual remained a man for purposes of inheritance has been very controversial. Indeed, even a relatively conservative state such as Kansas has refused to give "full faith and credit" to the decision. *In re* Estate of Gardiner, 22 P.3d 1086, 1108 (Kan. App. 2001).

poses of illumination and persuasion rather than to demonstrate any specific obligation of a private entity to the international community. For example, if a domestic court were entertaining a contract suit brought by workers against a small private employer who failed to provide field workers with access to drinking water, the international community's recognition of a human right to water might have persuasive relevance as the court construes the contract.[93] More dramatically, if the charge against the employer were that it treated the workers as slaves, the international community's strong and consistent condemnation of slavery would be pertinent as the domestic court framed the issues.[94] Indeed, slavery–along with genocide, war crimes, crimes against humanity, and torture–is among the international human rights violations for which individual and state actors may be held responsible by international tribunals.[95]

When international law is pertinent, common law courts have not limited their citations to comparative law examples. For example, in *Humphers v. First Interstate Bank*,[96] the Oregon Supreme Court referenced the Universal Declaration of Human Rights and the European Convention on Human Rights in the context of examining the scope of privacy rights in a tort case.[97] In *Grimes v. Kennedy Krieger Institute*, the Maryland Supreme Court relied extensively on the Nuremburg Code in examining the rights of parents and children participating in research studies.[98]

Further, in some instances, just as in *Brown v. Board of Education*, international norms are cited by litigators in their briefs to the court in common law cases, yet not mentioned in the ultimate decision. For example, in *Hyman v. Jewish Chronic Disease Hospital*,[99] the counsel to a hospital director sought access to patient records to determine if unethical experiments were being conducted at the facility. The court concluded that such inspection should be permitted, with care taken to protect patients' privacy. In reporting the decision, the official law reports summarized counsel's argument, including his point that inspection should be permitted because of the persuasive power of international human rights norms:

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93. OSHA regulates employers of more than 11 employees. Small farms are often unregulated. NAT'L CTR. FOR FARMWORKER HEALTH, FACTS ABOUT FARMWORKERS 2 (2003), *available at* http://www.ncfh.org/docs/fs-Facts%20about%20Farmworkers.pdf.

94. Ramos v. Hoyle, No. 08-21809-CIV, 2008 WL 5381821, at *5 (S.D. Fla. Dec. 19, 2008); *see, e.g.*, ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (Grainne deBurca ed., 2006).

95. CLAPHAM, *supra* note 94, at 29.

96. 696 P.2d 527 (Or. 1984).

97. *Id.* at 531 n.7.

98. 782 A.2d 807, passim (Md. 2001).

99. 15 N.Y.2d 317 (1965).

> [t]he human rights of the captive human "guinea pigs" used as pawns in the unethical cancer experiments are proclaimed and protected by international agreement and declaration and suchinternational covenants cannot be superseded by any city or State.[100]

Interestingly, and perhaps not surprisingly, given the nature of state court adjudication, the approach demonstrated in these domestic cases is analogous to the indirect horizontal application of constitutional rights ascribed to in many common law countries, where a domestic bill of rights such as the Constitution applies to private litigation "inasmuch as it influences a court's interpretation and development of the common law."[101]

B. Global Context in Three Illustrative Contemporary Cases

How might international or comparative law have been useful to common law decision-makers as they resolved *Poyck*, *Apessos* and *Below*, the three cases discussed above? Recall that in each instance, existing precedent was not squarely on point, and the judges were called on to base their decisions on an examination of the values represented by existing precedent, the application of empirical information, and an exercise of judicial wisdom.

In *Poyck*, the decision-maker might have been aided by global contextual information, such as the knowledge of the worldwide efforts to fight against cigarette smoking. The court cites the U.S. Surgeon General's report on smoking, but recognition of the issue goes far beyond U.S. borders. In 2004, the international Framework Convention on Tobacco Control was negotiated under the auspices of the World Health Organization, "in response to the globalization of the tobacco epidemic."[102] The Preamble to the Convention specifically notes "the concern of the international community about the devastating worldwide health, social, economic and environmental consequences of tobacco consumption *and exposure to tobacco smoke*."[103] Indeed, not only does smoking constitute a widespread threat to global public health, but scholars have recently begun identifying second-

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100. *Id.* at 320.

101. Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U.C. DAVIS J. INT'L L. & POL'Y 331, 397 (2006); *see also* Steven Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 391 (2003) (noting the significant indirect effect of constitutional provisions on private actors).

102. World Health Org., *Foreword* to Framework Convention on Tobacco Control, Feb. 27, 2005, (2003), *available at* http://whqlibdoc.who.int/publications/2003/9241591013.pdf. The convention currently has more than 161 state parties.

103. *Id.* at 1 (emphasis added).

hand smoke as a human rights violation in itself.[104] An understanding of this global legal context is certainly relevant as the court evaluates the open question of whether second hand smoke should be deemed to violate a warranty of habitability.

Similarly, given the absence of direct precedent within the jurisdiction, state court judges might routinely survey other jurisdictions for relevant cases. At the time *Poyck* was decided, there were only two reported cases on the impact of second-hand smoke on a tenancy—a municipal court case also from New York state decided a few months earlier, but apparently overlooked by the *Poyck* court; and a Massachusetts decision.[105] Augmenting these two domestic cases, however, is a decision issued by the Ontario Court of Justice, *Manhattan House v. Ziegler*.[106] In facts remarkably similar to *Poyck*, Mr. and Mrs. Padur experienced second-hand smoke in their apartment due to their neighbors' smoking. The smoke aggravated Mrs. Padur's asthma and the Padurs' efforts to seal their apartment were unsuccessful. The landlord took no action despite their complaints. Suggesting that the landlord should have evicted the offending tenants, the judge awarded the Padurs an abatement of their rent.[107] This Canadian case, confirming the wisdom of the New York court's eventual approach in *Poyck*, would certainly be helpful to a court in evaluating the soundness of its own decision.

The facts of *Apessos* are also susceptible to a global analysis that could inform a decision-maker operating in a common law framework. The specific question in *Apessos* was whether the plaintiff's termination from her employment violated the state's public policy. Here, rather than look to the laws of individual nations, the international community has articulated a strong concern about the impacts of violence against women that could in-

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104. *See, e.g.*, Melissa E. Crow, *Smokescreens and State Responsibility: Using Human Rights Strategies to Promote Global Tobacco Control*, 29 YALE J. INT'L L. 209 (2004); Rangita de Silva de Alwis, Human Rights Based Approaches to Controlling Tobacco, Presentation at The 13th World Conference on Tobacco or Health (July 14, 2006), *available at* http://fcatc.org/docs/sessions/cop2/briefings/cop2litigation-tc_humanrights-rangita_desilva.pdf.

105. *See generally* Donnelley v. Cohasset Hous. Auth., 16 Mass. L. Rep. 318, No. 0100933, 2003 WL 21246199 (Super. Ct. 2003); Duntley v. Barr, 805 N.Y.S.2d 503 (City Ct. 2005). More recently, two other relevant cases have been reported. An Alaska Supreme Court case, *DeNardo v. Corneloup*, 163 P.3d 956, 957 (Alaska 2007), diverges from the other decisions in this area to reject a tenant's claim for a rent abatement arising from second hand smoke. On the other hand, *Birke v. Oakwood Worldwide*, 87 Cal. Rptr. 2d 602, 604-05 (Ct. App. 2009), follows the prevailing trend toward upholding such claims by tenants.

106. Manhattan House v. Ziegler, [1997] 28 O.T.C. 294 (Can.).

107. *See id.*

form the public policy of Massachusetts. For example, the United Nations has indicated that the basic international human rights recognized in the United Nations Charter and the Universal Declaration of Human Rights encompass the right of women and children to be free from domestic violence.[108] Moreover, three widely-ratified international human rights treaties recognize the right to state protection from and remedies for domestic violence: the International Covenant on Civil and Political Rights ("ICCPR") (ratified by 152 states), the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") (ratified by 177 states),[109] and the Convention on the Rights of the Child ("CRC") (ratified by 192 states).[110] This strong international stand on the obligation of states to adopt affirmative measures to combat and remedy domestic violence provides considerable support for the *Apessos* court's conclusion that individuals subjected to domestic violence should be protected from termination from employment when they must miss work briefly to cooperate with the police or to protect their safety.

Finally, the *Below* case raises—perhaps more than the other cases—the question of whether common law courts sitting in the United States should be alert for elements of a "general common law" that cuts across those jurisdictions that share the common law approach to adjudication. This notion of shared values regarding liability, risk, and so on, reflected in common law jurisprudence, was certainly a hallmark of an earlier time in U.S. law, and it promoted considerably more cross-jurisdictional dialogue.[111] Chief Justice Abrahamson confirmed as much when she selected two volumes of nineteenth-century Wisconsin cases at random. In a period cover-

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108. The 1948 Universal Declaration of Human Rights states that "all are equal before the law and are entitled without any discrimination to equal protection of the law," and "everyone has the right to an effective [domestic] remedy . . . for acts violating the fundamental rights granted [ ] by the constitution or by law." Universal Declaration of Human Rights, G.A. Res. 217A, arts. 7-8, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

109. *See generally* Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), G.A. Res. 34/180, U.N. Doc. A/34/46 (Dec. 18, 1979). The United States has signed but not ratified CEDAW. *See* OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (2004) [hereinafter STATUS OF RATIFICATIONS], *available at* http://www.unhchr.ch/pdf/report.pdf. As a signatory to CEDAW, the United States "is obliged to refrain from acts which would defeat [its] object and purpose." *See* Vienna Convention on the Law of Treaties, art. 18, U.N. Doc. A/Conf. 39/27 (May 23, 1969).

110. Convention on the Rights of the Child, G.A. Res. 44/25 annex, U.N. Doc. A/44/49 (Nov. 20, 1989). Only the United States and Somalia have signed but not ratified this Convention. *See* STATUS OF RATIFICATIONS, *supra* note 109.

111. Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 135-36 (2005).

ing less than a year, she found thirty-nine citations in the nineteenth-century cases, the same number that appeared in her fifty-four year survey from 1942–1996.[112]

Like those earlier cases that drew regularly on comparative common law approaches, the central issue in *Below*, whether the ELD should extend to noncommercial transactions, is a basic question in the development of tort law. The dissenters in *Below* point out that the great majority of U.S. states have concluded that such transactions are not within the scope of the judge-made ELD, which was intended to avoid multiple and duplicative claims arising from commercial contractual misrepresentations. A common law judge who explored the matter further would find that the rest of the common law world is in accord with this general conclusion. Throughout the commonwealth, the ELD (called "relational economic loss" in these foreign courts) appears to have been limited to precluding tort recovery in commercial transactions, recognizing the need to provide adequate remedies to contracting parties outside of the commercial context who are more likely to have uneven bargaining power.[113] Further, English courts have only adopted a narrow version of the ELD even in commercial settings and continue to permit imposition of liability in negligence cases.[114]

These comparative examples are certainly not binding on domestic courts. But the examples do raise questions about the Wisconsin court's approach. Is it truly as protective of consumers as it purports to be, or will there be many people in Below's situation? If the underlying goal of this judge-made doctrine is to avoid conflation of tort and contract, how is that line maintained in jurisdictions that have not extended the ELD to non-commercial transaction? As Chief Justice Abrahamson and her co-author observed:

> [i]f you look at the American law . . . in isolation from the rest of the world, you do not hear or ask these questions . . . . [W]hen courts from around the world have written well-reasoned and provocative opinions in support of a position at odds with our familiar American views, we would do well to read carefully and take notes. At the very least, we American judges should write our decisions with a conscious awareness that deci-

112. Abrahamson & Fischer, *supra* note 31, at 277 n.13.

113. *See, e.g.*, Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210 (Can.); Pembina (Country) Water Res. Dist. v. Manitoba [2008] 2008 F.C. 1390 (Can.); Air Nova v. Messier-Dowty Ltd., [2000] 128 O.A.C. 11 (Can.); Fraser v. Westminster Can. Ltd., [2003] 215 N.S.R.2d 377 (Can.); Brooks v. Can. Pac. Ry., [2007] 298 Sask. R. 64 (Can.); Hoffman v. Monsanto Can. Inc., [2005] 264 Sask. R. 1 (Can.).

114. Noriko Kawawa, *Comparative Studies on the Law of Tort Relating to Liability for Injury Caused by Information in Traditional and in Electronic Form: England and the United States*, 12 ALB. L.J. SCI. & TECH. 493, 509, 522 (2002).

> sions from abroad, if considered, might complicate and challenge our analyses.[115]

In light of the great weight of both domestic and global judicial authority supporting a more circumscribed application of the ELD, the *Below* dissenters seem correct that a domestic court deviating from this path has a heightened obligation to thoroughly justify its reasoning and conclusions, testing them against contrary authority.

International law, as opposed to foreign citation, might also be of interest in the *Below* case as a court considers whether to extend the ELD to residential real estate transactions. The nature of the underlying property at issue in a case may matter to the analysis, and the right to adequate housing is a widely recognized human right, articulated in the Universal Declaration of Human Rights as well as the International Covenant on Economic, Social and Cultural Rights.[116] These provisions are not binding on the United States, which has not ratified the ICESCR, and they have only indirect application to the private litigants involved in a tort suit. But the ELD has been fashioned by judges—who are state actors themselves continually responding to perceived injustices in the prior existing law—which gives human rights law a heightened relevance in this context. In some circumstances, an individual who has been precluded from recovery under Wisconsin's broad ELD and whose contractual claims are barred may be effectively denied access to adequate housing by operation of the judge-made law, arguably a human rights violation. At least one scholar has observed that this circumstance undermines the rationale for the ELD's application, since "[t]he negative effect of limited liability on . . . human rights victims differs significantly from its effects on contractual parties, such as creditors" who are in a position to negotiate for contract terms that reduce the costs that they incur as a result of limited liability.[117]

C. Challenges for Judges and Litigators

As this Article demonstrates, domestic common law adjudication has long encompassed international and comparative law. In recent decades, however, that global consciousness has often been casual and sporadic,

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115. Abrahamson & Fischer, *supra* note 31, at 284-85.

116. Universal Declaration of Human Rights, *supra* note 108, art. 25; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 11.1, U.N. Doc. A/6316 (Dec. 16. 1966).

117. Joseph Kiarie Mwuara, *Corporate Human Rights Norms and the Clog of Limited Liability Within Corporate Groups: Towards an International Convention* 8 (Oct. 2008) (Human Rights Program at Harvard Law School, Working Paper), *available at* http://www.law.harvard.edu/programs/hrp/Mwaura_Working_Paper.pdf.

rather than deliberate and focused.[118] A return to a more intentional global perspective in common law adjudication will pose challenges for both judges and advocates. Three challenges are particularly acute and frequently raised during judicial and practitioner training that touches on this material.

First, how can judges and lawyers gain facility with relevant international and comparative material? This challenge might once have seemed insurmountable, but today, international and foreign legal materials are readily available to everyone who has computer access. The most widely used online legal libraries, LEXIS and Westlaw, may require a subscription fee, but many materials are available without fee directly from the websites of foreign courts or through law school library websites.[119]

Just having access to the materials is not enough, however, if the litigator or judge does not have enough background information to use them properly. For example, a litigator may not know the legal status of an international treaty or, in dealing with comparative law, a judge may not appreciate the hierarchical status of the Privy Council. For this dilemma, help is on the way, and already available to many judges and advocates. The American Society for International Law ("ASIL") offers several on-line tools, including a research guide and searchable database of international law materials.[120] An increasing number of institutions are developing training programs to aid judges who want to gain familiarity with these materials. The Aspen Institute holds periodic sessions on international law and domestic adjudication.[121] The Brandeis International Center for Ethics, Justice and Public Life has convened federal and state court judges, along with their international counterparts, to discuss their common challenges, including domestic incorporation of international and comparative norms.[122] Local judicial programs are also cropping up, often drawing on resources from local law schools.[123] Similar training and educational programs are available to practitioners.[124]

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118. *See supra* Part III(A).

119. KYLE COURTNEY, NORTHEASTERN UNIV. SCH. OF LAW INFO. & LIBRARY SERVS., FACULTY GUIDE TO LAW LIBRARY SERVICES (2006), *available at* http://www.slaw.neu.edu/library/fachbkmar06.pdf.

120. ASIL electronic resources, http://www.asil.org/electronic-resources.cfm (last visited May 14, 2009).

121. *See* The Aspen Institute, http://www.aspeninstitute.org/site/c.huLWJeMRKpH/b.612043/k.8BEB/Justice_and_Society_Program.htm (last visited Apr. 11, 2009).

122. *See* News Release, Int'l Ctr. for Ethics, Justice & Pub. Life, Colloquium Examines International Law and Domestic Courts, Nov. 12, 2009, http://www.brandeis.edu/ethics/news/2008/2008.Nov.12.html.

123. *See* Program on Human Rights and the Global Economy, Northeastern School of Law, http://www.northeastern.edu/law/academics/institutes/phrge/index.html (last visited

It is worth noting that in the longer term, these basic questions of education and training may fall by the wayside. Across the country, law school curricula are being reshaped to take account of the growth in globalization, with international and comparative law increasingly incorporated into first year courses.[125] In the upper level curriculum, international and comparative offerings are also growing, and international human rights clinics are increasingly becoming a law school staple.[126] The next generation of law graduates will likely be quite familiar with these materials and adept at using them for advocacy or as a resource for adjudication.

Second, once judges find pertinent resource material, how can they and lawyers ascertain which judicial decisions or other sources of law are most pertinent to their task, and which should be given the most decisional weight? This question has been raised with regularity in the context of the debate concerning constitutional adjudication and international/foreign law, and it is also pertinent in the context of common law adjudication. The answer to this question builds directly on the role of analogy and precedent in common law reasoning: one should start by examining cases from legal systems that share historical, jurisprudential, or constitutional roots with the United States. It is these cases that, as Daniel Farber cogently and simply states, "are most likely to be relevant."[127] Farber cites the opinions of the Canadian Supreme Court, the European Court of Human Rights, the European Court of Justice, the German Constitutional Court, and the Israeli Supreme Court as deserving consideration.[128] Depending on the issue pend-

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Feb. 7, 2009); *see also* Center for International Human Rights, Northwestern University School of Law, http://www.law.northwestern.edu/humanrights/ (last visited Feb. 7, 2009).

124. *See* The American Society of International Law Programs Overview, http://www.asil.org/overview.cfm (last visited Feb. 7, 2009); Columbia Law School: Advanced Legal Education Programs (CLE), http://www.law.columbia.edu/center_program/cle (last visited Feb. 7, 2009); Trina Grillo Retreat – Society of American Law Teachers, http://www.saltlaw.org/trina-grillo-retreat (last visited Feb. 7, 2009).

125. *See, e.g.*, Press Release, Harvard Law Sch., HLS Faculty Unanimously Approves First-Year Curricular Reform (Oct. 6, 2006), *available at* http://www.law.harvard.edu/news/2006/10/06_curriculum.php. New York University School of Law offers an elective course in international law during the first year of law school. *See* NYU Law – Academics: Areas of Focus, http://www.law.nyu.edu/academics/areaoffocus/international/index.html (last visited Apr. 16, 2007). For a discussion of international law in the first-year writing course, see Diane Penneys Edelman, *It Began at Brooklyn: Expanding Boundaries for First-Year Law Students by Internationalizing the Legal Writing Curriculum*, 27 BROOK. J. INT'L L. 415 (2002).

126. Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 505-06 (2003).

127. Farber, *supra* note 31, at 1361-62; *see also* Rex D. Glensy, *Which Countries Count?:* Lawrence v. Texas *and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 401-40 (2005) (setting out a framework for selection of foreign authority).

128. Farber, *supra* note 31, at 1362.

ing before the domestic adjudicator, many might add the South African Constitutional Court or the Colombian Constitutional Court to this list, given their leadership in adjudication involving human rights norms.[129]

Within this sturdy analytical framework, however, it is ultimately a matter of judicial discretion, aided by the good faith briefing of counsel, to ascertain what weight these materials should be given. Those who are mistrustful of judicial integrity or who object to any hint of judicial lawmaking as a political matter may cry that this power will be abused. There is absolutely no evidence anywhere, however, that any U.S. judge has made the legal error of treating a foreign decision as binding precedent.[130] As for international law, there is a legitimate debate as to when some aspects of the law of nations, such as customary international law, may be directly binding on local judges.[131] Yet very few, if any, judges have issued rulings that rely on international law to justify a move to abandon or ignore domestic precedent. Rather, judges routinely examine these materials for their persuasive value and cite them to bolster conclusions that are well-supported by domestic law.[132] Further, if a judge were to make an error, the result would be no different than what happens when the judge errs in her interpretation of domestic law—the parties may move for reargument, appeal, or seek redress through other means such as legislative relief.

For those judges and litigators who are sincerely grappling with the weight to be given to various types of foreign cases and international materials, a very useful resource is "I-Lex," a public online database compiling the international law citations of U.S. courts in a searchable format.[133] This resource allows judges to examine relevant precedents and to assess exactly how prior judges dealt with these materials. While I-Lex is unfortunately limited to federal jurisdictions, the Opportunity Agenda has compiled an

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129. For an extensive discussion of South Africa's comparative jurisprudence, see Sir Basil Markesinis & Jorg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11 (2005). For a discussion on Colombia's Constitutional Court, see Alicia Ely Yamin & Oscar Parra Vera, *The Role of Courts in Defining Health Policy: The Case of the Colombian Constitutional Court* (Human Rights Program at Harvard Law School Working Paper), *available at* http://www.law.harvard.edu/programs/hrp/documents/Yamin_Parra_working_paper.pdf.

130. *See* Melissa Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 634 (2007); *see also* Mark Tushnet, *When Is Knowing Less Better than Knowing More?*, 90 MINN. L. REV. 1275, 1276 (stating that "I know of no one who believes that it is appropriate to use non-U.S. Law as a precedent").

131. JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (1996); Harold Koh et al., *Why Obey International Law? Managing Conflicts with Municipal Law*, 97 AM. SOC'Y INT'L. L. PROC. 325 (2003).

132. Waters, *supra* note 130, at 688 fig.2.

133. I-Lex, The Legal Research System for Int'l Law in US Courts, http://ilex.asil.org/ (last visited Feb. 7, 2009).

extensive state-by-state guide to decisions that cite international and comparative material, and that can provide models for how that material has been treated by domestic courts.[134] Quite a number of scholars have also written on this topic.[135]

A third challenge to using transnational law in domestic common law advocacy is one that confronts advocates who are interested in the long-term progressive development of both domestic and international law. In particular, to the extent that advocacy invokes international human rights norms, advocates may be concerned about diluting the moral power of human rights claims, squandering its force on issues that are not critical human needs.[136] As the critique might be applied to the *Poyck* case, for example, one would argue that using human rights concepts to attack tenants' exposure to second hand smoke in New York City is completely disproportionate to the harm involved; human rights arguments should be reserved for issues more central to human welfare, such as homelessness, food, water and torture.[137]

This critique may be particularly salient in developed countries like the United States, where some argue that human rights are simply irrelevant—that these are concepts really meant to be applied to the practices of devel-

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134. THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN STATE COURTS (2008), *available at* http://opportunityagenda.org/files/field_file/State%20Courts%20and%20Human%20Rights%20(2008%20Edition)_0_0.pdf.

135. *See, e.g.*, Paul Dubinksy, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L. L. 301 (2008) (discussing the interstate-international procedural equivalence); Farber, *supra* note 31, at 1362 (discussing "how to use foreign law"); Andrew Long, *International Consensus and U.S. Climate Change Litigation*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 177 (2008) (highlighting the incorporation of foreign environmental laws through litigation in the face of federal inaction); Janella Ragwen, *The Propriety of Independently Referencing International Law*, 40 LOY. L.A. L. REV. 1407 (2007) (discussing judicial reliance on international norms in some areas and adamant refusal to consider such in others); Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAS)*, 50 ARIZ. L. REV. 709 (2008) (discussing the recent effect of translocal groups on our traditional view of federalism, particularly in the local application of international norms).

136. As Philip Alston has described it, "the characterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness and universal validity." Philip Alston, *Making Space for New Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 3 (1988).

137. The Opportunity Agenda's research shows that a sizable percentage of Americans do not accept that adequate housing or freedom from extreme poverty should be considered human rights. *See* OPPORTUNITY AGENDA, HUMAN RIGHTS IN THE U.S.: OPINION RESEARCH WITH ADVOCATES, JOURNALISTS AND THE GENERAL PUBLIC 14 (2007) (only 52% agreed that extreme poverty was a human rights issue, and 51% agreed that lack of adequate housing raised human rights concerns).

oping countries somewhere far away.[138] But this critique should not carry the day. While scholars have rigorously questioned whether the practice of creating *new* human rights to respond to every human need can be defended,[139] the *Poyck* case does not fall into that category. In *Poyck*, the underlying right at issue is the well-recognized right to adequate housing, including habitability.[140] One might still argue that second-hand smoke has only a marginal impact on the habitability of housing that is otherwise sound. But if human rights principles are limited only to those instances where human life is threatened, not where it is merely diminished, the universality of human rights is undermined.[141] Advocates must always make individual strategic decisions as they pursue litigation in these areas, and may choose to save relevant human rights arguments for more dramatic fact situations in order to introduce human rights principles to domestic courts in the most strategically favorable setting. But a blanket rule that reserves human rights arguments only for the most outrageous, dire, and life-threatening injustices simply serves to make human rights irrelevant to most of those in the developed world and significantly limits the scope of such rights. Far from diluting human rights, it may actually undermine the general value and reach of these norms.[142]

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138. Martha F. Davis, *International Human Rights from the Ground Up: The Potential for Subnational, Human Rights-Based Reproductive Health Advocacy in the United States*, *in* WHERE HUMAN RIGHTS BEGIN 255 (Ellen Chesler & Wendy Chavkin eds., 2003) (quoting Judge Sean Dunphy).

139. *See, e.g.*, Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 615-16 (1984) (setting out possible criteria for evaluating new human rights).

140. Maria Foscarinis & Eric Tars, *Housing Rights and Wrongs: The United States and the Right to Housing*, *in* CYNTHIA SOOHOO ET AL., BRINGING HUMAN RIGHTS HOME: PORTRAITS OF THE MOVEMENT 153 (2008).

141. *See, e.g.*, The Universal Declaration of Human Rights, *supra* note 108, pmbl. ("[T]his Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.").

142. *See, e.g.*, Katherine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113, 114 (2008).

CONCLUSION

The Future of Public Rights Litigation

This Article sets out the case that common law adjudication involving such claims as contractual breaches, wrongful termination, and tort can be, and often are, public rights litigation. Many common law decisions have significant impacts in the community, and—because of the nature of precedent—become quickly embedded in the law where they contribute to the outcomes of future cases as well. Common law cases are a particularly important aspect of public rights litigation because of the paucity of constitutional protections for economic and social rights. In the absence of constitutional protections for such rights, rigorous enforcement of common law claims addressing housing, work, and marketplace transactions can go at least part way to filling that gap. Further, as federal courts cut back on the scope of available statutory remedies, common law litigation may continue to offer relief to litigants.[143]

This Article has also argued that in litigating and adjudicating these common law claims, recognition of global context is at least as important as it is when constitutional claims are at stake. Indeed, in common law cases, such an approach has been generally well-accepted for centuries, if somewhat less frequent in recent decades.

From the judicial perspective, inquiry into global context has historically contributed to judges' ability to reach sound conclusions in cases where domestic precedent does not provide for the resolution of the matter. In such cases, international and comparative materials do not substitute for binding precedent, they do not dictate results, but they provide additional relevant materials, examples and perspectives for thoughtful judges who are called on to consider open questions in the common law tradition.

From the perspective of public interest litigators working in the common law, references to global context may be useful for many of the same reasons. A soundly-reasoned opinion from a peer foreign court that has grappled with the same issues may provide important confirmation of the workability of an otherwise "novel" approach urged by counsel. Similarly, references to international law may help open a domestic court's eyes to the global significance of a seemingly private, domestic issue, and its relationship to larger issues of human rights and human dignity.

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143. On the dismantling of civil rights laws and cutbacks in remedies, see DENISE MORGAN ET AL., AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE (2005).

Such inquiries into relevant foreign and international law are part of our common law heritage. The recent tempest concerning citation of international and comparative law in domestic constitutional cases should not obscure the continued relevance and utility of such global perspectives in the wide variety of common law contexts that affect so many areas of our day-to-day lives.