

## NOTE

# A COMPARISON OF COMPARISON: USE OF FOREIGN CASE LAW AS PERSUASIVE AUTHORITY BY THE UNITED STATES SUPREME COURT, THE SUPREME COURT OF CANADA, AND THE HIGH COURT OF AUSTRALIA

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*The greater use of foreign materials by courts and counsel in all countries can, I think, only enhance their effectiveness and sophistication.*

—Canadian Supreme Court Justice Gérard V. La Forest<sup>1</sup>

*[I]t is important to recognize that it is the overwhelming genetic commonality of the human species that stamps upon the discourse of human rights its search for universal principles.*

—Australian High Court Justice Michael Kirby<sup>2</sup>

*We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention . . . that the . . . practices of other countries are relevant.*

—United States Supreme Court<sup>3</sup>

### I. INTRODUCTION

We are living in a global era. Rapidly advancing technology has enabled an information explosion oblivious of national boundaries, changing what we know and how we learn. Many aspects of life and society are affected by such changes, and law is no exception. Scientific and technological advances have presented courts around the world with questions that would be unthinkable in years past, such as whether a frozen embryo is a person, whether DNA is personal property, or how the Internet

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<sup>1</sup> Gérard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 220 (1994).

<sup>2</sup> Michael D. Kirby, *The New Biology and International Sharing: Lessons from the Life and Work of George P. Smith II*, 7 IND. J. GLOBAL LEG. STUD. 425, 434 (2000).

<sup>3</sup> *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989).

should be regulated. Age-old legal issues also continue to be debated, but the difference in this global era is that they are less jurisdiction bound than ever before. With access to information from around the world at their fingertips, courts facing important legal issues can read, assess, and learn from other courts' opinions and discussions of similar problems. Many courts engage in this type of comparative analysis, asserting that their jurisprudence is enlightened and enriched as a result.

By contrast, the world view commonly expressed in the U.S. Supreme Court's jurisprudence does not reflect the same regard for foreign case law. Shirley S. Abrahamson and Michael J. Fisher have stated that "the American bench and bar are rarely reaching beyond our national borders when seeking guidance in resolving domestic legal issues."<sup>4</sup> This is not a recent phenomenon; American courts have always been reluctant to employ foreign decisions other than the historic English cases used to explain common law roots.<sup>5</sup> And the courts are by no means the only ones making such omissions; as Mathias Reimann has pointed out, "In the United States today, [international] comparative law does not play nearly as prominent a role in teaching, scholarship, and practice as one would expect in our allegedly cosmopolitan age."<sup>6</sup> Bruce Ackerman has noted that in a world where technology is making worldwide information available at our fingertips, "the global transformation has not yet had the slightest impact on American constitutional thought. The typical American judge would not think of learning from an opinion by the German or French constitutional court."<sup>7</sup> Instead, foreign law is treated as inherently suspicious.<sup>8</sup> John H. Langbein has commented, "American legal dialogue starts from the premise that no relevant insights are to be found beyond the water's edge."<sup>9</sup> Indeed, the works of the U.S. Supreme Court confirm such observations.

This Note discusses the various ways in which available comparative jurisprudence has been rejected by the U.S. Supreme Court, especially in contrast to the Supreme Court of Canada and the High Court of Australia. I chose these two countries primarily because, like the United States, they originated from British common law roots and have had similar social and economic developments. Also like the United States, these Courts have control over their dockets and can thus choose to address cases that contain important issues facing their countries.<sup>10</sup> Furthermore, the judiciaries in all

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<sup>4</sup> Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 276 (1997).

<sup>5</sup> *Id.* at 276-77.

<sup>6</sup> Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop its Own Agenda*, 46 AM. J. COMP. L. 637, 637 (1998).

<sup>7</sup> Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772 (1997).

<sup>8</sup> Abrahamson & Fischer, *supra* note 4, at 275-76.

<sup>9</sup> John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 547 (1995).

<sup>10</sup> "Judicial freedom to choose cases varies from country to country and from court to court, depending on the extent of legislatively granted docket control. Some courts must decide nearly every case that comes to them; those courts typically become overloaded with routine disputes between private parties and therefore cannot focus on cases they might regard as especially important. Other courts, for instance the United States Supreme Court, enjoy nearly complete control over their dockets

three countries tend to play comparable roles, and in each country judicial power in recent decades has expanded similarly in two ways: by entering into realms traditionally dominated by majoritarian institutions, and by extending court-like procedures into decisionmaking and negotiating arenas not previously characterized by such procedures.<sup>11</sup> All of these commonalities allow sufficient ground to make a useful comparison between the three Courts' uses of foreign case law.

Part II discusses some of the general values of comparative analysis in jurisprudential dialogue and explores some of the justices' academic writings and speeches. Part III demonstrates international comparison in practice. Cases from Canada, Australia, and the United States are discussed, focusing first on standing issues and second on criminal sentencing. Throughout this Note, the question remains: What effects, if any, will result from failing to engage in comparative analysis with similar courts? Although this question remains unanswered regarding the future, the immediate result seems clear: the U.S. is missing out on a growing legal dialogue being created and developed by some of the world's most brilliant legal minds. Not only does America lose the wisdom such dialogue advances, but the opportunity for U.S. contribution and influence is being forfeited as well.

## II. THE DEBATE OVER THE BENEFITS OF COMPARATIVE ANALYSIS

Scholars generally support comparative legal analysis. As P. John Kozyris has said, "Comparative law not only provides alternative solutions to be used in legal reform but also gives us a better understanding of our existing law."<sup>12</sup> Bruce Ackerman has noted:

Places like Germany or Italy or the European Union or India will be passing the fifty-year mark in their experiments with written texts and constitutional courts; France and Spain will soon be experiencing the distinctive challenges of a second full generation of judicial review. Even if all these initiatives run aground over the next decades, they still add up to a formidable fund of experience for comparative investigation.<sup>13</sup>

Science, literature, and other disciplines recognize the value of foreign scholars' research and formulation of new theories. Kozyris has noted that "[a]ny science, theoretical or applied, that would limit itself to one nation would be laughable."<sup>14</sup> Law may not be a science subject to the same discovery of "truth" as is possible in the physical realm;<sup>15</sup> nevertheless, it is

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and, therefore, may choose which issues they will decide." CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 14–15 (1998).

<sup>11</sup> See C. Neil Tate & Torbjörn Vallinder, *Judicialization and the Future of Politics and Policy*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 516–18 (C. Neil Tate & Torbjörn Vallinder eds., 1995).

<sup>12</sup> P. John Kozyris, *Comparative Law for the Twenty-First Century: New Horizons and New Technologies*, 69 *TUL. L. REV.* 165, 167 (1994).

<sup>13</sup> Ackerman, *supra* note 7, at 774–75.

<sup>14</sup> Kozyris, *supra* note 12, at 167.

<sup>15</sup> "Here [in the U.S.], the idea of law as a science has been dead for at least half a century." Reimann, *supra* note 6, at 643.

a universal phenomenon not restricted to particular societies. Those who study and create law, James Gordley has argued, “should no more ignore what [foreign jurists] say than an American physicist should ignore a German or an Italian.”<sup>16</sup>

Adopting a position more receptive to international comparative law in the United States would not be a significant departure from current practices; in a way, American judges and lawyers are already comparativists. The cases and laws of the fifty states provide us with plenty of substantive material to debate. This is the way American law is taught—through fact patterns and cases, arguments and counterarguments, comparisons and contrasts. Kozyris has noted, “We reward students not so much for right answers as for seeing as many angles as possible and for arguing in every plausible policy direction, which necessitates transcending the boundaries of any one jurisdiction.”<sup>17</sup> Thus, American jurists are generally experienced comparativists, yet the use of international comparative analysis is rarely employed.

Perhaps this is because American law has in recent decades been “exported” to much of the rest of the world. Canadian Supreme Court Justice Claire L’Heureux-Dubé has said:

As the bonds of colonialism loosened, the prominence of American jurisprudence grew throughout the world. This is particularly true in the field of constitutionalism and human rights. The very concept of judicial review of legislation in accordance with guaranteed rights originated in the U.S. Supreme Court, in the classic case of *Marbury v. Madison*.<sup>18</sup>

Other countries’ political systems and constitutions have been created with the United States model in mind, and American legal thought has, and continues to, influence foreign jurisprudence.<sup>19</sup> This export of legal thought appears to have established the presumption for many American jurists that the United States is a primary source for legal thought, rather than one of many contributors to global jurisprudential development.

Other countries, however, embrace the availability of foreign court opinions and use them to supplement and refine their own legal decisionmaking. As technology makes the dissemination of information increasingly more efficient, courts around the world, through their judgements and opinions, are engaging in a discourse about important legal issues. Justice L’Heureux-Dubé has discussed this emerging practice:

[T]he development of human rights jurisprudence, in particular, is increasingly becoming a dialogue. Judges look to a *broad* spectrum of sources in the law of human rights when deciding how to interpret their

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<sup>16</sup> James Gordley, *Is Comparative Law a Distinct Discipline?*, 46 AM. J. COMP. L. 607, 611 (1998).

<sup>17</sup> Kozyris, *supra* note 12, at 168. See also Abrahamson & Fischer, *supra* note 4, at 285–86.

<sup>18</sup> Claire L’Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L. J. 15, 18 (1998).

<sup>19</sup> See *id.* See also Ackerman, *supra* note 7, at 772; Abrahamson & Fischer, *supra* note 4, at 278–79; Kozyris, *supra* note 12, at 170; Sandra Day O’Connor, *The Life of the Law: Principles of Logic and Experience From the United States*, 1996 WIS. L. REV. 1, 2 (1996); La Forest, *supra* note 1, at 212–13.

constitutions and deal with new problems. To a greater and greater extent, they are *mutually* reading and discussing each others' jurisprudence.<sup>20</sup>

The United States, however, is not participating in this global legal dialogue. Rather, the Court has asserted that because it is a servant of the American people, other countries' treatment of legal issues is not necessarily relevant in the United States. Justice Antonin Scalia, for example, in an article responding to assertions that U.S. courts should be mindful of international norms of human rights,<sup>21</sup> addressed the value of foreign and international decisions in such matters.<sup>22</sup> "International law has its place in our courts," Justice Scalia wrote, "but it is not [a] privileged place . . . ."<sup>23</sup> He asserted that even when the United States resorts to "a 'shocking' violation of international law, [it is] not our concern" as long as domestic laws are not violated.<sup>24</sup> Justice Scalia went on to note:

It is true that in a very few instances in the less-distant past, the United States Supreme Court has looked to international "human rights" norms in determining whether certain forms of punishment violated our Eighth Amendment, which proscribes "cruel and unusual punishments." But this approach, however, even within its limited scope of application, was short-lived and has now been retired.<sup>25</sup>

He quoted an 1812 Supreme Court opinion in which Chief Justice John Marshall reasoned that allowing any restrictions from outside our borders would compromise the sovereignty of the nation, and continued:

I stand in the tradition of John Marshall. I welcome international conferences . . . in which the judges of various countries may exchange useful insights and information, and, by association with their colleagues in the law, may strengthen their sense of dignity and independence. But, in the last analysis, we judges of the American democracies are servants of *our* peoples . . . . We are not some international priesthood empowered to impose upon our free and independent citizens supranational values . . . . If "international norms" had controlled our forefathers, democracy would never have been born here in the Americas.<sup>26</sup>

The Supreme Court's decisions and reasoning often reflect this sentiment. References to other countries' practices occasionally arise in the Court's jurisprudence, but they are generally not regarded as persuasive authority. For example, in *Printz v. United States*, Justice Scalia's majority opinion specifically rejects the suggestion that comparison contributes to constitutional interpretation: "Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We

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<sup>20</sup> L'Heureux Dubé, *supra* note 18, at 21.

<sup>21</sup> See Edward D. Re, *Program V: International Judicial Tribunals and the Courts of the Americas: A Comment With Emphasis on Human Rights Law*, 40 ST. LOUIS U. L.J. 1091 (1996).

<sup>22</sup> Antonin Scalia, *Program V: Commentary*, 40 ST. LOUIS U. L.J. 1119, 1119 (1996).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1120.

<sup>25</sup> *Id.* at 1121.

<sup>26</sup> *Id.* at 1122 (emphasis added).

think such comparative analysis inappropriate to the task of interpreting a constitution . . . .”<sup>27</sup>

Justice Thomas recently echoed this sentiment in a concurring opinion denying certiorari for a case considering whether extremely long delays before executions constitute cruel and unusual punishment: “[W]ere there any . . . support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.”<sup>28</sup> Justice Breyer used these courts’ decisions in his dissent to support his view that this question was worthy of review. Justice Thomas makes clear, however, that it is exclusively American jurisprudential thought that guides legal decisionmaking in the U.S.

National history and precedent are indeed important to the continuing development of legal thought in any country. To put the potential uses of comparative jurisprudence into perspective, however, it is important to remember that comparison is not based on the idea that the world’s courts are filled with activist judges debating some sort of global common law rather than addressing domestic issues.<sup>29</sup> Comparative law can be based on the theories and reasoning that serve as the foundation for all similar legal systems, and therefore can be valid when addressing either domestic or international issues. Perhaps this concept has been obscured by a lack of clear focus or purpose in comparative law in United States academia.<sup>30</sup> But in practice, comparative law can be used for almost anything that is based on legal reasoning: textual interpretation, preservation of judicial resources, human rights, privacy, etc.

Interpretive issues offer an example. When U.S. Supreme Court Justice Antonin Scalia said that “comparative analysis [is] inappropriate to the task of interpreting a constitution,”<sup>31</sup> he may have been right; discussing the interpretation of a specific clause of another country’s constitution may contribute little to the analysis of a specific clause in our own Constitution. The actual interpretation, however, is not always the issue. The reasoning and purpose for employing the method of interpretation used are often what matters. Canadian and Australian justices have criticized the United States Courts’ use of originalism—not because it results in an incorrect interpretation of *our* Constitution, but rather because it is a less-than-

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<sup>27</sup> 521 U.S. 898, 921 n.11 (1997).

<sup>28</sup> *Knight v. Florida*, 528 U.S. 990, 990 (Thomas, J., concurring) (denying certiorari).

<sup>29</sup> It may be important to distinguish the difference between the discussion of other courts’ treatment of international issues and the discussion of foreign treatment of similar domestic issues. The former concerns laws that affect various countries’ courts (for example, international positions on human rights), while the latter concerns domestic laws but the same general problems or issues. Both are probably necessary to remain at the forefront of jurisprudential discourse, and the two can affect each other by influencing the decision making process in light of one another. For the purposes of this Note I do not make a strong distinction between the two, although my discussion revolves mostly around domestic issues.

<sup>30</sup> See, e.g., Nora V. Demleitner, *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, 46 AM. J. COMP. L. 647 (1998); Kozyris, *supra* note 12; Langbein, *supra* note 9; Reimann, *supra* note 6.

<sup>31</sup> *Printz*, 521 U.S. at 921 n.11.

optimal way of interpreting *any* constitution.<sup>32</sup> Justice L'Heureux-Dubé has commented that "there is generally less debate [outside the United States] over the question of whether the intent of the framers of a constitution is what should govern its interpretation."<sup>33</sup> Citing an Australian High Court case involving interpretive issues,<sup>34</sup> Justice L'Heureux-Dubé pointed out that "it is generally accepted . . . that a judge's role is to determine the appropriate *current* meaning of the words of a Constitution."<sup>35</sup> Thus, not only can the specific intent of the framers alienate other countries from an opinion, but the methodology can as well.

Justice Michael Kirby of Australia's High Court has also criticized American courts' advocacy of originalism. He asks whether "United States judges, . . . when ascertaining the meaning of their *Constitution*, engage in a quaint ritual of ancestor worship[.]"<sup>36</sup> He continues:

Are our American colleagues so mesmerised by the awe in which they hold the revolutionary founders of the republic who wrote their *Constitution* . . . that they feel obligated to construe the text, 220 years later, by ascertaining the intentions of those great men at the time they wrote it, however inapt those intentions might be to contemporary circumstances? . . . Is the task rather like having a remote ancestor who came over on the *Mayflower* . . . and asking him or her the meaning of a political document that governs the affairs of the nation in the space age?<sup>37</sup>

Such an interpretation can hinder the process of legal reasoning and the influential value of an opinion. Justice Kirby argues, "Resort to formulae such as 'original intent,' 'plain meaning,' 'evolutionary originalism,' and 'connotation and denotation' may sometimes disguise rather than clarify the real reasons why one choice is preferred in a particular case and another is rejected."<sup>38</sup> Thus, a focus on originalism can make an opinion unusable to other countries' courts.

The benefit of comparison applies not only to interpretation, but to a wide range of legal issues. The arguments behind the doctrines that govern decisionmaking are limited neither to a single set of domestic rules nor a single set of global ones; rather, they have shaped legal reasoning in many different countries and often with different results. This not only offers the benefits of comparative theory, but also presents real-life examples of how such theories may play out in practice. Furthermore, it should be stressed that comparison does not automatically lead to acceptance of the alternate view. As discussed below, courts often use comparative law to clarify positions they are rejecting, allowing a more exact understanding of their ultimate conclusions. In other words, comparison is useful not only for arguments, but for counterarguments as well. Ultimately, the world's courts

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<sup>32</sup> See Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U. L. REV. 1 (2000); L'Heureux-Dubé, *supra* note 18, at 32–35.

<sup>33</sup> L'Heureux-Dubé, *supra* note 18, at 33.

<sup>34</sup> *Theophanous v. Herald & Weekly Times Ltd.* [1994] 182 C.L.R. 104.

<sup>35</sup> L'Heureux-Dubé, *supra* note 18, at 34 (emphasis added).

<sup>36</sup> Kirby, *supra* note 32, at 1.

<sup>37</sup> *Id.* (internal quotes and citation omitted).

<sup>38</sup> *Id.* at 13.

include brilliant jurists dealing with many of the same issues as the United States; their thoughtful reasoning and opinions are too valuable to be ignored.

In contrast to the United States, Canada's Supreme Court greatly values other courts' opinions and reasoning. Canadian Supreme Court Justice Gérard V. La Forest, for example, writes that Canadians use foreign legal materials because they "are genuinely interested in the comparative approach, in learning how other traditions have dealt with the problems with which we are wrestling. This sort of legal cosmopolitanism is a valuable source of enrichment and greater sophistication."<sup>39</sup> In general, Justice La Forest promotes the use of foreign legal materials:

[T]he use of foreign material affords another source, another tool for the construction of better judgements. Recourse to such materials is, of course, not needed in every case, but from time to time a look outward may reveal refreshing perspectives. The greater use of foreign materials by courts and counsel in all countries can, I think, only enhance their effectiveness and sophistication. In this era of increasing global interdependence . . . it seems normal that there should be increased sharing in and among our law and lawyers as well.<sup>40</sup>

Justice L'Heureux-Dubé also emphasizes the value of using international materials to address difficult legal issues:

Judging at the turn of the millenium is undergoing fundamental changes. Among these is the fact that consideration of foreign decisions is becoming standard practice for more and more courts throughout the world. . . . No longer is it appropriate to speak of the impact or influence of certain courts on other countries, but rather of the place of all courts in the global dialogue on human rights and other common legal questions.<sup>41</sup>

Refraining from engaging in this dialogue, she argues, can result in increased isolation, diminished worldwide influence, and encouragement of the view that a country's decisions are not internationally relevant.<sup>42</sup>

Legal isolation can be significant in a world in which political borders matter less and less. Justice Kirby writes, "[I]t is important to recognize that it is the overwhelming genetic commonality of the human species that stamps upon the discourse of human rights its search for universal principles."<sup>43</sup> He is aware that certain areas of law "present quandaries which are common to societies at roughly the same stage of economic and social development."<sup>44</sup> Of course, "[t]here are dangers in assuming that a solution considered right for one country will be automatically appropriate for another."<sup>45</sup> Nevertheless, comparative law offers many benefits, Justice Kirby argues, even when legal systems differ: "To bridge the gap between

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<sup>39</sup> La Forest, *supra* note 1, at 217.

<sup>40</sup> *Id.* at 220.

<sup>41</sup> L'Heureux-Dubé, *supra* note 18, at 40.

<sup>42</sup> *Id.* at 37.

<sup>43</sup> Kirby, *supra* note 2, at 434.

<sup>44</sup> Michael D. Kirby, *International Commentaries: A Patient's Right of Access to Medical Records*, 12 J. CONTEMP. HEALTH L. & POL'Y 93, 93 (1995).

<sup>45</sup> *Id.*

[the civil law and common law traditions] requires a subtlety of mind, a command of language and a willingness to learn, which is all too often absent from the discipline of law.”<sup>46</sup>

Canadian Chief Justice Beverly McLachlin also acknowledges the increasingly global nature of legal issues. In a discussion of criminal law, she noted, “As we enter the 21st century, it is increasingly apparent that [a] traditional view of criminal law is no longer entirely adequate. . . . [C]rime is becoming an international affair, transcending national borders.”<sup>47</sup> Thus, an important factor is “the emergence of international norms of minimum standards of state behaviour,”<sup>48</sup> and the only way to properly deal with such issues is to create more global uniformity in the way governments deal with important legal problems.

Canadian Justice Michel Bastarache also acknowledges the blurring of lines between jurisdictions and between national and international law: “The conception of international law as concerning exclusively state actors has become a fiction as the subject matter and sheer quantity of international regulation has expanded and as issues arising from that regulation become increasingly pressing and unavoidable.”<sup>49</sup> As a result, the nature of law is changing: “There can be little doubt that over time, at some point in the future—whether it be now or in a hundred years—many more customary international norms will come to be recognised in a diversity of fields never previously imagined.”<sup>50</sup> The call for global legal dialogue is growing.

Although Justices Scalia and Thomas have rejected the use of international comparison in the U.S., it seems that some of the other justices are increasingly aware of the possible contributions foreign material can offer. While not readily apparent in Court opinions, this shift has been reflected in their academic work. Justice Stephen Breyer, for example, suggests that:

comparative study of substantive constitutional law (“free speech” law, for example) is important, [but] such substantive law is not the only kind worth serious examination. One must look . . . at the comparative aspect of the structural, or governance-related, characteristics of constitutional courts.

The foreign environment in which such questions arise is not always quite so “foreign” as one might think.<sup>51</sup>

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<sup>46</sup> *Id.* at 94.

<sup>47</sup> Beverley McLachlin, *Criminal Law: Towards an International Legal Order*, 29 HONG KONG L.J. 448, 448 (1999).

<sup>48</sup> *Id.*

<sup>49</sup> Michel Bastarache, *The Challenge of the Law in the New Millenium*, 25 MANITOBA L.J. 411, 413 (1998).

<sup>50</sup> *Id.* at 414.

<sup>51</sup> Stephen Breyer, *Constitutionalism, Privatization, and Globalization: Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045, 1060 (2000). Justice Breyer has also cited foreign authorities in many court opinions, although such citations are not generally well-received by other members of the Court. See, e.g., *Printz v. United States*, discussed *infra* at note 27 and accompanying text.

Justice Ruth Bader Ginsburg has also employed comparative analysis in her extrajudicial writings when discussing issues such as court review for constitutionality, court justices writing separate opinions, and affirmative action.<sup>52</sup> These works, however, do not discuss the value, either positive or negative, of using foreign legal precedent, although they may “contain[] strong clues as to her inclusive perspective.”<sup>53</sup> Justice Sandra Day O’Connor has been more explicit, saying that “[i]n the next century, we are going to want to draw upon judgments from other jurisdictions. . . . We are going to be more inclined to look at the decisions of (the) European court—and perhaps use them and cite them.”<sup>54</sup>

These remarks may indicate that the U.S. Supreme Court is on its way to broadening the scope of its analysis to include international reasoning and standards, but this is not yet reflected in court opinions. The following Part describes and compares the ways in which the Supreme Court of Canada, the High Court of Australia, and the U.S. Supreme Court have used comparative analysis in their reasoning and decisions.

### III. COMPARATIVE ANALYSIS IN PRACTICE

International comparison seems useful in theory, but the true test is whether it actually works in practice. For Canada and Australia it has worked well, and the following discussion demonstrates how these Courts have used foreign case law in developing their own jurisprudence. Two areas of law are discussed: standing and criminal sentencing. Both of these issues have provoked much discussion and are subject to two of the most fundamental theories underlying any legal system: the role of the judiciary and basic conceptions of justice.

#### A. STANDING

Standing is significant in all three countries because who may sue and what claims may be presented are always important questions. Each of these jurisdictions are concerned about standing policies such as limited judicial resources, the role of the court and the scope of its powers, and whether the judiciary is the proper arena in which to address generalized grievances against the government. In the United States this issue has revolved mostly around Article III of the Constitution; the Canadian and Australian Courts have discussed Article III and the U.S. Supreme Court’s analysis of it in cases addressing the proper role for their courts.

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<sup>52</sup> See Ruth Bader Ginsburg, *An Overview of Court Review for Constitutionality in the United States*, 57 LA. L. REV. 1019 (1997); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999).

<sup>53</sup> Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 430 (2000).

<sup>54</sup> Press Release, New York University, European Court Members and Four U.S. Supreme Justices to Discuss Current European and U.S. Constitutional Issues, at [http://www.nyu.edu/publicaffairs/newsreleases/b\\_EUROP.shtml](http://www.nyu.edu/publicaffairs/newsreleases/b_EUROP.shtml) (Mar. 27, 2000).

The Canadian Supreme Court, for example, addressed issues of standing in *Canadian Council of Churches v. Canada*.<sup>55</sup> The question in this case was whether the Canadian Council of Churches had standing to challenge portions of the *Immigration Act, 1976* as violating the Canadian Charter of Rights and Freedoms.<sup>56</sup> The Canadian Supreme Court expressed awareness that standing had been a difficult issue in other countries:

It may be illuminating to consider by way of comparison the position taken in other common law jurisdictions on this issue of standing. The highest Courts of the United Kingdom, Australia, and the United States have struggled with the problem. They have all recognized the need to balance the access of public interest groups to the Courts against the need to conserve scarce judicial resources.<sup>57</sup>

Because standing is such a jurisdiction-specific issue, it can be difficult to even compare cases; each country may base its standing requirements on very specific texts. In this case, however, the Canadian Supreme Court looked beyond jurisdictional differences to the broader implications: every country needs to strike a balance between limited judicial resources and sufficient access to the courts. Almost any jurisdiction faces similar concerns about breadth of standing: to what extent case-specific facts must be developed, whether courts must only resolve actual disputes rather than issue advisory opinions, whether standing should be narrowed to limit the volume of cases brought to courts, what types of remedies should be available, whether access to courts should be a legitimate means of ensuring government compliance with law, etc. These are not nation-specific issues; they are universal.

The Canadian Supreme Court discussed the standing rules in several countries, starting with the United Kingdom, where “[t]raditionally only the Attorney General of the United Kingdom had standing to litigate matters for the protection of public rights.”<sup>58</sup> The Court noted that three exceptions to this rule have evolved which allow another party to bring a public rights claim: when individual private rights are simultaneously affected, when the individual has suffered special damage from the alleged violation of the public right, or when a local authority considers such action necessary to protect or promote the interests of its citizens.<sup>59</sup> Furthermore, the Court acknowledged that cases involving standing in the United Kingdom might not be particularly helpful: “Recent cases have turned upon the wording of

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<sup>55</sup> *Cdn. Council of Churches*, [1992] 1 S.C.R. 236 (Can.).

<sup>56</sup> *Id.* at 237. The Council of Churches, a federal corporation, coordinated the work of various churches aimed at the protection and resettlement of refugees. Certain amendments to the Immigration Act, 1976 came into force on January 1, 1989, and changed procedures for determining who qualified as a convention refugee. The Council brought suit the first business day the law was in effect, charging that the amendments violated the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights. The Attorney General of Canada moved to strike the claim for lack of standing and failure to demonstrate a cause of action. *Id.* at 236–37.

<sup>57</sup> *Id.* at 243.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

particular statutory provisions and as a result they are of limited assistance in consideration of the issue in Canada.”<sup>60</sup>

The Canadian Supreme Court then discussed Australia’s standing rules, including a report by the Australian Law Reform Commission that suggested three alternative solutions for Australia’s rules of standing: an “open door policy,” which would allow any person to bring any public claim; the “United States method,” which would allow the courts to screen plaintiffs as part of the case; and “preliminary screening,” which would allow courts to screen proposed plaintiffs before the case began.<sup>61</sup> Although the Canadian Supreme Court stated that the Commission recommended an open-door approach, it also noted that the report neither discussed legislative reforms nor addressed debates about the proper role of the court.<sup>62</sup>

The Court went on to discuss Australia’s actual policy on standing, as articulated by the High Court. The Canadian Court’s assessment included an Australian High Court case<sup>63</sup> in which Canada’s approach to standing was mentioned: “Mason J. observed that the Canadian approach as expressed in *Thorson v. Attorney General of Canada*<sup>64</sup> was directly contradicted in Australia by case [law] . . . .”<sup>65</sup> The Canadian Court rejected Australia’s standing policies, stating, “[D]espite the report and the recommendation of the Australian Law Reform Commission, the position taken in that country on the issue of granting status is far more restrictive than it is in Canada.”<sup>66</sup>

The Canadian Supreme Court also discussed precedent in the United States, citing case law interpreting Article III of the U.S. Constitution.<sup>67</sup> In 1992, when *Canadian Council of Churches* was decided, the leading American case was *Valley Forge Christian College v. Americans United for Separation of Church and State*.<sup>68</sup> Standing, according to the U.S. Supreme Court, required a showing that the injury was personal, that it was traceable to the challenged action, and that it was likely to be redressed by a favorable decision.<sup>69</sup> The Canadian Court noted that Justice Rehnquist had added the caveat that the U.S. Court would continue to reject all claims based on “the [asserted] right, possessed by every citizen, to require that the Government be administered according to law.”<sup>70</sup> As discussed below, the Canadian Court specifically rejected this position.

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<sup>60</sup> *Id.* at 244.

<sup>61</sup> *Id.* at 245.

<sup>62</sup> *Id.*

<sup>63</sup> *Australian Conservation Found. v. Commonwealth of Austl.* [1980] 146 C.L.R. 493 (Austl.); this case is discussed *infra* at note 84 and accompanying text.

<sup>64</sup> [1975] 1 S.C.R. 138 (Can.).

<sup>65</sup> *Cdn. Council of Churches*, [1992] 1 S.C.R. at 246.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 246–48.

<sup>68</sup> 454 U.S. 464 (1982).

<sup>69</sup> *Id.*

<sup>70</sup> *Cdn. Council of Churches*, [1992] 1 S.C.R. at 248 (quoting *Valley Forge Christian Coll.*, 454 U.S. at 482–83).

The Canadian Supreme Court then mentioned scholarly assessment of the United States' standing doctrine:

[Lawrence] Tribe has referred to the position taken by the Supreme Court of the United States as "one of the most criticized aspects of constitutional law." However, he carefully noted that the court's position was a legitimate approach to standing based upon a coherent view of the role of the courts.<sup>71</sup>

Thus, as it had with Australia, the Supreme Court of Canada examined the policy in the United States not only from the view of the U.S. Supreme Court, but from a nonjudicial vantage point as well.

The Canadian Supreme Court next addressed the issue of standing in Canada, ultimately rejecting all three foreign positions it articulated. The Court refused to adopt the types of restrictions placed upon standing in the United States and Australia:

The Charter enshrines the rights and freedoms of Canadians. It is the courts which have the jurisdiction to preserve and to enforce those Charter rights. This is achieved, in part, by ensuring that legislation does not infringe the provisions of the Charter. By its terms, the Charter indicates that a generous and liberal approach should be taken to the issue of standing. If that were not done, Charter rights might be unenforced and Charter freedoms shackled. The Constitution Act, 1982 does not of course affect the discretion courts possess to grant standing to public litigants. What it does is entrench the fundamental right of the public to government in accordance with the law.<sup>72</sup>

The Court did not base its decision on a specific text, but rather decided what general principles it should apply to its relatively new Charter of Rights and Freedoms. This is the type of issue that benefits from the use of comparison.

The foreign cases in this instance were not used to legitimate the Canadian Supreme Court's position nor to reaffirm the importance of the issue, but rather were viewed as alternative positions to be considered. It is telling that the Court did not simply ignore foreign precedent because it was not favorable to its conclusion. Instead, it discussed different approaches before articulating its own. In this way, the Court was able to use the history and wisdom of other countries to clarify what types of restrictions would be unacceptable under the Canadian Charter. The Court recognized that this particular issue had been considered elsewhere and that it could benefit from the wisdom and mistakes of other countries.

The High Court of Australia recently showed a similar recognition of foreign standing concerns in *Truth About Motorways Party Ltd. v. Macquarie Infrastructure Investment Management Ltd.*<sup>73</sup> This case concerned the validity of a federal law that conferred standing upon the applicant who, the respondent argued, did not have a sufficient interest in

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<sup>71</sup> *Id.* (quoting AMERICAN CONSTITUTIONAL LAW 110 (2d ed., 1988)).

<sup>72</sup> *Id.* at 250.

<sup>73</sup> [2000] 200 C.L.R. 591 (Austl.).

the subject matter of the proceedings.<sup>74</sup> The two provisions of Chapter III of the Australian Constitution at issue in this case were Section 76 (ii), which “empowers the Parliament to make laws conferring original jurisdiction on the High Court in any matter arising under any laws made by the Parliament,” and Section 77, which “enables the same jurisdiction to be conferred on another federal court.”<sup>75</sup> In its analysis of this issue, the High Court compared these provisions with Article III of the United States Constitution, which confines the judicial power to certain “cases” and “controversies.”<sup>76</sup> The respondent’s argument was that the term “matter” in the Australian Constitution should be interpreted as the terms “cases” and “controversies” have been in the United States and, using United States

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<sup>74</sup> The federal law at issue was the Trade Practices Act of 1974 which, in Part V, §52, provides that a corporation shall not engage in misleading or deceptive conduct. *Id.* at 600. The applicant, claiming the respondent gave misleading information to investors regarding the volume of traffic on a proposed toll road, brought suit pursuant to Part VI, §80 of the Act, which provides that a federal court may provide injunctive relief for a violation of Part V of the Act if the Australian Competition and Consumer Commission “or any other person” satisfies the court that such relief is appropriate. *Id.*

<sup>75</sup> *Id.* at 602 (Gleeson C.J. & McHugh, J.). Specifically, Chapter III provides:

75. In all matters—

- (i) Arising under any treaty:
- (ii) Affecting consuls or other representatives of other countries:
- (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
- (iv) Between States, or between residents of different States, or between a State and a resident of another State:
- (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

- (i) Arising under this Constitution, or involving its interpretation:
- (ii) Arising under any laws made by the Parliament:

....

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws—

- (i) Defining the jurisdiction of any federal court other than the High Court:

....

AUSTL. CONST. ch. III, §§ 75–77.

<sup>76</sup> Specifically, Article III provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their authority;—to all Cases affecting Ambassadors, other Public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2.

case law as authority, the Court should conclude that there was no justiciable “matter” to be heard in the case. Thus, whether the case was outside of the High Court’s jurisdiction turned upon the proper interpretation of these provisions of their Constitution.

The High Court respected the respondent’s argument based on foreign precedent and agreed that the issue could be similar in both countries. Justice Kirby wrote, “Because of the parallels between Ch III of the Australian Constitution and Art III of the United States Constitution, it is certainly appropriate to consider developments in the United States concerning the latter.”<sup>77</sup> Justice Gummow also acknowledged this potential parallel, stating that the “similarity between the grant in respect of ‘all Cases, in Law and Equity, arising under . . . the Laws of the United States’ [in Article III of the United States Constitution] and the text of s 76(ii) [of the Australian Constitution] will be readily apparent.”<sup>78</sup> The Court pointed out, however, that differences in the systems of government in Australia and the United States, as well as the language of the constitutions, render United States precedent inapplicable. Justice Gummow noted that the United States’ “irreducible constitutional minimum” of standing as articulated in *Lujan v. Defenders of Wildlife*<sup>79</sup> could not be supported by Chapter III of Australia’s Constitution: “[A]n examination with respect to the state of affairs in Australia in 1900 [when Australia’s Constitution was written] would not support any analogous formulation with respect to Ch III.”<sup>80</sup> Furthermore, United States case law did not support the analogy between the two constitutions: “[T]he foundation of much of the reasoning of the majority in the decision [in] *Lujan v. Defenders of Wildlife* rests upon the separation of powers between the legislature, executive and the judiciary in the United States. This model of governance has no application to Australia.”<sup>81</sup>

In addition, the High Court noted that “the decision and reasoning of the majority in *Lujan* (and like cases) has been the subject of strongly expressed dissent within the Supreme Court of the United States and scholarly criticism.”<sup>82</sup> The High Court continued, “Within the tests applicable to proceedings in federal courts in Australia there is no real risk of a ‘matter’ which would warrant the description of a mere vindication of the ‘value interests of concerned bystanders’ or ‘college debating forums.’”<sup>83</sup> Thus the High Court employed analysis in this issue similar to that of the Canadian Court by relying not only on its own interpretation of the United States precedent, but also using extrajudicial resources to expand its understanding and/or explanation of the foreign doctrine.

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<sup>77</sup> *Truth About Motorways*, [2000] 200 C.L.R. at 656 (Kirby, J.).

<sup>78</sup> *Id.* at 633.

<sup>79</sup> 504 U.S. 555 (1992).

<sup>80</sup> *Truth About Motorways*, [2000] 200 C.L.R. at 634.

<sup>81</sup> *Id.* at 657.

<sup>82</sup> *Id.* at 657–58 (citing Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 193 (1992); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 421–30 (1997)).

<sup>83</sup> *Id.* (citing *In re Judiciary and Navigation Acts* [1921] 29 C.L.R. 257; *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. at 473).

The U.S. Supreme Court has also dealt with standing issues in recent years, but has not employed comparative analysis despite the fact that the issues in U.S. cases have often closely paralleled foreign cases. In Australia, for example, standing was discussed in the context of general environmental protection in the 1980 case *Australian Conservation Foundation v. The Commonwealth*,<sup>84</sup> which was cited in *Canadian Council of Churches*.<sup>85</sup> The Australian case involved an environmental group's challenge to governmental approval of a proposed resort/tourist area that was to be built on privately and publicly owned land; the main issue was whether the Foundation had standing to bring such a challenge.<sup>86</sup> In its opinion the High Court discussed some of the major underlying theories upon which standing rests, such as the proper role of the courts, judicial resources, redressability, and level of specificity.<sup>87</sup>

A major issue was the extent to which a person must be injured to sustain a claim. The High Court affirmed that generalized claims equally affecting all citizens are not acceptable: "[I]t has long been settled doctrine that . . . a plaintiff must show some personal interest which is adversely affected, and not merely the same concern as all private citizens."<sup>88</sup> To allow all citizens to challenge governmental decisions would open the judicial floodgates to anyone who considers himself a "concerned bystander."<sup>89</sup> Furthermore, a court must be able to redress an injury in order to sustain a claim; otherwise, there is no real purpose to the proceedings.<sup>90</sup> The proper governmental role of the judiciary also factored into this analysis, and the High Court deferred to the legislature:

If the present state of the law in Australia is to be changed, it is preeminently a case for legislation, preceded by careful consideration and report, so that any need for relaxation in the requirements for locus standi may be fully explored and the limits for desirable relaxation precisely defined.<sup>91</sup>

The High Court also discussed whether standing should be addressed as a threshold issue or whether the merits should be considered at the same time, concluding that while this call is discretionary, in this case it was proper to decide it as a threshold matter.<sup>92</sup> Throughout the case, the leading standing cases from the U.S. Supreme Court were discussed and analyzed.

Since *Australian Conservation Foundation* was decided, the U.S. Supreme Court has ruled on several environmentally based standing claims that seem to parallel the Australian case, yet foreign decisions have not been discussed. In 1992, the Court decided *Lujan v. Defenders of Wildlife*, addressing whether an organization dedicated to environmental causes had standing to legally challenge government policy regarding the application

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<sup>84</sup> [1980] 146 C.L.R. 493.

<sup>85</sup> See *supra* note 55 and accompanying text.

<sup>86</sup> *Australian Conservation Found.*, [1980] 146 C.L.R. 493.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 506 (Aickin J.).

<sup>89</sup> *Id.* at 540 (Stephen J.).

<sup>90</sup> *Id.* at 511 (Aickin J.).

<sup>91</sup> *Id.* at 540 (Stephen J.).

<sup>92</sup> *Id.* at 546 (Stephen J.).

of the Endangered Species Act<sup>93</sup> to U.S. activities in foreign countries.<sup>94</sup> The Court stated that the issue could not be settled simply by looking at a provision of the Act which contained a clear “citizen suit” provision that allowed “any person” to commence a civil suit to enjoin violations of the Act. Instead, the Court applied the three-part “irreducible constitutional minimum of standing” test, requiring the plaintiffs to have (a) suffered an injury in fact that (b) was caused by the governmental policy, and (c) would likely be redressed by a favorable decision.<sup>95</sup> These factors are all considered and discussed in *Australian Conservation Foundation*, yet the U.S. Supreme Court did not mention the foreign case. The court rejected the plaintiffs’ standing to sue, concluding that the plaintiffs’ injuries had not been sufficiently established.

In a 1998 case, *Steel Co. v. Citizens for a Better Environment*, the U.S. Supreme Court addressed whether an association of individuals interested in environmental protection had standing to sue a manufacturing company that had failed to comply with a federal law requiring certain types of companies to disclose hazardous and toxic chemical information.<sup>96</sup> The Court discussed the section of the law that allowed any individual to sue a company for failing to comply if the Environmental Protection Agency was not actively pursuing enforcement. The Court described standing to sue as “part of the common understanding of what it takes to make a justiciable case.”<sup>97</sup> Although there seems to be a common understanding of what makes a justiciable case among countries, the U.S. Supreme Court did not mention any foreign decisions. Again the Court denied standing despite the language of the statute, concluding that the injury claimed was not sufficiently redressable by the Court.

In a 2000 case, *Friends of the Earth v. Laidlaw Environmental Services*, the U.S. Court again addressed the issue of standing in the face of a citizen-suit provision of a federal law.<sup>98</sup> In this case, the Clean Water Act conferred standing on any person “adversely affected” by noncompliance with the Act.<sup>99</sup> The Court assessed an environmental group’s standing according to established precedent, again not mentioning any non-U.S. cases. Unlike the first two examples, however, the Court found that the plaintiffs met the standing requirements.<sup>100</sup>

In these three cases the U.S. Court chose to address standing despite clear legislation conferring access to the courts upon the plaintiffs. Because these issues were outside the scope of the legislation, and thus not textual in nature, alternate viewpoints on exactly the same issue could be instructive. In *Australian Conservation Foundation*, the High Court

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<sup>93</sup> 16 U.S.C. §1536(a)(2) (1973).

<sup>94</sup> 504 U.S. 555 (1992).

<sup>95</sup> *Id.* at 560–61.

<sup>96</sup> 523 U.S. 83 (1998). The law at issue was the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. §11046(a)(1).

<sup>97</sup> *Id.* at 102.

<sup>98</sup> 528 U.S. 167 (2000).

<sup>99</sup> 33 U.S.C. §§1365(a),(g).

<sup>100</sup> *Laidlaw Envtl. Servs.*, 528 U.S. at 180–88.

discussed not only United States precedent, but also the theoretical underpinnings of standing doctrines. In any of these U.S. cases, the Court could have explored a broader view of standing and its relevance to court systems in general, thus benefiting from Australia's and Canada's wisdom and experience with different standing doctrines. Certainly, it is conceivable that the U.S. Supreme Court may not have wanted to cite *Australian Conservation Foundation* because of the legislative deference the High Court employed, nor *Canadian Council of Churches* because of the broad standing adopted in that case; neither of these would fit with the U.S. Supreme Court's conclusions. Yet the Court could have discussed common theoretical understandings about the need for standing limitations articulated by the High Court to augment the arguments' validity and, if necessary, pointed out that Article III of the U.S. Constitution requires different conclusions. Additionally, the Court could have examined the actual effects of the standing doctrines in Canada and Australia to demonstrate how various theories play out in practice.

By contrast, the standing cases in Australia and Canada seem to demonstrate the essence of global legal dialogue. Although brief, the Canadian Supreme Court's discussion of Australia's standing judgements is indicative of the legal dialogue that can occur between courts. Not only did Canada's Supreme Court discuss Australian High Court judgments and proposals for reform, but it also mentioned the High Court's treatment of a Canadian case that the Canadian Supreme Court itself had cited as precedent. The ability to discuss not only other courts' opinions, but also other courts' treatment of domestic precedent provides an excellent example of the possibilities involved in global legal dialogue. Moreover, the willingness of the Australian High Court and the Canadian Supreme Court to address the decisions and reasoning employed in foreign case law indicates that foreign opinions are seen as a valid source for persuasive authority. They are not treated as inapplicable and irrelevant, but as thoughtful, reasoned arguments worthy of examination.

## B. CRIMINAL SENTENCING

A second area of law that has given rise to significant international discussion is criminal sentencing. Rights of the accused are fundamental to all systems of justice, and the protections provided by jury trials have been respected for centuries. These values are reflected in the text of the constitutions of the United States, Australia, and Canada. In the United States, these issues were recently addressed in the landmark decision of *Apprendi v. New Jersey*, in which the Court ruled, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>101</sup> This has been called "one of the most important U.S. Supreme Court decisions in years," and has formed the basis

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<sup>101</sup> 530 U.S. 466, 490 (2000).

of many lower court decisions.<sup>102</sup> The reaction to *Apprendi* has been “immediate and dramatic,” and although “every lawyer who practices criminal law and every judge who hears criminal cases must deal with *Apprendi* on a regular basis,”<sup>103</sup> it might surprise them to know that strikingly similar issues were addressed by the Supreme Court of Canada and Australia’s High Court in the 1980s. In *Apprendi* and the series of cases leading up to it, however, modern foreign cases have not been cited.

The defendant/appellant in the case was Charles Apprendi, who had fired several bullets into the home of an African-American family which had recently moved into a previously all-white neighborhood. When he was questioned by police, Apprendi admitted that the shooting was racially motivated, but later retracted this statement. After Apprendi pled guilty to several firearms charges, the trial judge sentenced him to twelve years imprisonment, an enhanced sentence based on a New Jersey hate crime statute that resulted in a sentence two years longer than the maximum for the specific offenses charged. The issue before the Supreme Court was whether Apprendi had the constitutional right to have a jury find beyond a reasonable doubt that racial bias was a motivation for the crime, rather than have that determination made by the sentencing judge by a preponderance of the evidence. Thus, an important question was whether racial bias was an element of the crime or a sentencing factor: because elements have to be proven to a jury, but sentencing factors do not.

A similar question was presented to the Australian High Court in 1985 in *Kingswell v. The Queen*.<sup>104</sup> Kingswell was convicted by a jury for conspiring to import narcotics and was sentenced by the trial judge to eleven years’ imprisonment.<sup>105</sup> The law provided for several ranges of penalties based on the quantity of narcotics involved, the least of which provided for a maximum of two years and the greatest carried a maximum of twenty-five years.<sup>106</sup> Kingswell argued that because the quantity of heroin that subjected him to a higher penalty was not treated as a separate offense and submitted to a jury, his constitutional right to a jury trial was violated.<sup>107</sup> Here, as in *Apprendi*, an important issue was whether quantity should be treated as a separate element of the crime or as a sentencing factor.

The High Court began by interpreting the text of the law, which allows “the Court” to determine the proper sentence. The High Court concluded that this phrase means the sentencing judge or magistrate, not a jury.<sup>108</sup> The Court then went on to determine whether such a scheme offended Section

<sup>102</sup> Erwin Chemerinsky, *A Dramatic Change in Sentencing Practices (Apprendi v. New Jersey)*, TRIAL, Nov. 2000, at 102.

<sup>103</sup> *Id.*

<sup>104</sup> [1985] 159 C.L.R. 264 (Austl.).

<sup>105</sup> *Id.* at 265.

<sup>106</sup> See Customs Act 1901–1973, § 233B (Austl.) and Customs Amendment Act 1979, § 235 (Austl.) (changing the sentences to the levels the Court discusses in *Kingswell*).

<sup>107</sup> The right to a trial by jury is in Section 80 of the Australian Constitution, which reads: “The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed . . . .”

<sup>108</sup> *Kingswell*, [1985] 159 C.L.R. at 274, 282 (Mason, J., concurring).

80 of the Australian Constitution, which confers a right to a jury trial similar to that of the Sixth Amendment in the United States Constitution.<sup>109</sup> The High Court stressed that it is the legislature's duty to define elements of offenses:

Putting aside, for the moment, s. 80 of the Constitution, there is no fundamental law that declares what the definition of an offence shall contain or that requires the Parliament to include in the definition of an offence any circumstance whose existence renders the offender liable to a maximum punishment greater than that which might have been imposed if the circumstance did not exist. The existence of a particular circumstance may increase the range of punishment available, but yet not alter the nature of the offence, if that is the will of the Parliament.<sup>110</sup>

The majority discussed the decisions of several Australian states, the law in New Zealand, and a Canadian case, all of which made the distinction between aggravating factors that change a lesser offense into a greater one, as opposed to aggravating factors that merely increase the sentence for the same crime.<sup>111</sup> In this case, because the offense did not change, and because the quantity of heroin was not disputed at trial, the majority concluded that "[i]t is quite impossible to suggest that any miscarriage of justice occurred."<sup>112</sup>

Justice Brennan, disagreed with the majority's conclusion: "If an offence were identified for the purpose of s. 80 only by reference to those elements which a jury might find to exist, the guarantee given by s. 80 would be nugatory."<sup>113</sup> In his opinion, crimes that carry different sentencing ranges are separate offenses, and each is subject to Section 80.<sup>114</sup> He stated:

If the Parliament creates what are distinct offences for the purpose of s. 80, the Parliament cannot divide the offences into elements to be tried by the jury and elements to be tried by the judge and, by calling the former elements the 'offence', cast aside the constraints of the Constitution as to the mode of trial of the latter elements.<sup>115</sup>

Justice Deane agreed with Justice Brennan's dissenting view. "The guarantee of s. 80 of the Constitution was not the mere expression of some casual preference for one form of criminal trial. It reflected a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases."<sup>116</sup> Justice Deane gave a thorough history of juries and indictments, noting that by 1215, English criminal law dictated that criminal suspects had a right to "lawful judgement of his

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<sup>109</sup> See *supra* note 107 for the text of Section 80. The Sixth Amendment to the U.S. Constitution reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI.

<sup>110</sup> *Kingswell*, [1985] 159 C.L.R. at 276.

<sup>111</sup> *Id.* at 277-81.

<sup>112</sup> *Id.* at 281.

<sup>113</sup> *Id.* at 293 (Brennan, J., concurring).

<sup>114</sup> *Id.* at 293.

<sup>115</sup> *Id.* at 294-95.

<sup>116</sup> *Id.* at 298 (Deane, J., concurring).

equals.”<sup>117</sup> He included a discussion of British settlements around the world, including Australia, the United States, and Wales, where the assurance of trial by jury has been established and protected.<sup>118</sup> After quoting the American Supreme Court case *Duncan v. Louisiana*, he discussed the practical importance of juries as they apply to all similar criminal law systems.<sup>119</sup> Based upon both history and modern practices, Justice Deane concluded that “the words of the fundamental law which [s. 80] embodies must, in accordance with settled principles of constitutional interpretation, be given their full force and effect.”<sup>120</sup> Justice Deane argued that because the definition of a crime should determine the extent to which one is subjected to punishment, the factors which resulted in increased sentences must be treated as elements subject to the guarantee of Section 80.<sup>121</sup>

Two years after *Kingswell*, Canada’s Supreme Court dealt with a similar issue in *R. v. Lyons*.<sup>122</sup> Canada’s criminal code allowed a sentencing judge to determine whether a habitual criminal was a “dangerous offender,” and if so, sentence the criminal to an indeterminate period in prison.<sup>123</sup> The issue was whether this violated the Canadian Charter of Rights and Freedoms, including Section 11, which guarantees the right to a jury trial.<sup>124</sup> Lyons, like Apprendi, had plead guilty to four charges, and during sentencing discovered that the Crown planned to bring a dangerous offender application before the court to have him sentenced indeterminately.<sup>125</sup> Based upon medical and psychological evidence showing Lyons to be sociopathic, indifferent to the lives of others, and capable of understanding the law yet irresponsive to it, the judge ruled that Lyons was a dangerous offender and sentenced him for an indeterminate period of time.<sup>126</sup>

“The key issue, for s. 11 purposes,” Justice La Forest wrote for the majority, “is whether the Crown application to declare the offender a dangerous offender is equivalent to ‘charging’ the offender with ‘an offence.’”<sup>127</sup> The Court affirmed that being a dangerous offender is not a crime in and of itself, and thus the declaration of dangerousness is simply part of the sentencing process.<sup>128</sup> This, however, did not end the Court’s

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<sup>117</sup> *Id.* at 298–99.

<sup>118</sup> *Id.* at 300–01.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 319.

<sup>121</sup> *Id.* at 320–22.

<sup>122</sup> [1987] 2 S.C.R. 309 (Can.).

<sup>123</sup> See Criminal Code, R.S.C., c. C-34, Part XXI, §§ 687–695 (1970).

<sup>124</sup> The right to a jury trial is found in Section 11(f) of the Charter of Rights and Freedoms, which reads: “Any person charged with an offence has the right . . . to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.” The law was also challenged as offending Section 7, which guarantees the right not to be deprived of liberty except “in accordance with the fundamental principles of justice”; Section 9, which guarantees the right not to be arbitrarily detained or imprisoned; and Section 12, which guarantees protection from cruel or unusual punishment.

<sup>125</sup> *Lyons*, [1987] 2 S.C.R. at 318–19.

<sup>126</sup> *Id.* at 319–20.

<sup>127</sup> *Id.* at 350.

<sup>128</sup> See *id.*

analysis and did not mean that a jury determination was not required; merely because it was a sentencing factor did not mean it was “in accordance with the fundamental principles of justice,” a guarantee in Section 7 of the Charter.<sup>129</sup> To properly analyze the issue, the Court reasoned, “the focus must be on the functional nature of the proceeding and on its potential impact on the liberty of the individual.”<sup>130</sup>

The Canadian Supreme Court turned to American case law from the U.S. Supreme Court and lower courts to illustrate the possible parameters of the debate, using cases that dealt primarily with the use of hearsay evidence at sentencing hearings.<sup>131</sup> The Court included a cite to *Duncan v. Louisiana*, just as the Australian Court had in *Kingswell* and as the *Apprendi* Court would thirteen years later.<sup>132</sup> Although the Canadian Supreme Court did not fully adopt the American view, it recognized the value of comparison:

Quite apart from the specific conclusions of the American courts . . . I would adopt the functional reasons given by those courts for viewing the ‘labelling’ hearing to be the kind of hearing that attracts a high level of procedural protection for the offender. . . . Nevertheless, I would conclude that it is not required, as a constitutional matter, that the determination of dangerousness be made by a jury.<sup>133</sup>

Noting that procedural safeguards follow the determination of dangerousness, including a right to judicial review of the offender’s status every three years, the Canadian Supreme Court concluded that a jury trial to determine whether one was a dangerous offender was not constitutionally necessary.

Justice Lamer disagreed: “In my view, a person against whom an application [for a dangerous offender determination] is brought is a ‘person charged with an offence’ under s. 11 of the Charter and is entitled to the particular guarantees set out in s. 11.”<sup>134</sup> In Justice Lamer’s opinion, the fact that a penalty could be imposed based upon such a determination meant that it was an offense, not just a sentencing factor, and that the defendant was entitled to a jury trial.

The dissenting arguments of Justice Deane in Australia and Justice Lamer in Canada were echoed by the U.S. Supreme Court in *Apprendi*, but they were not discussed. In the majority opinion, Justice Stevens wrote:

New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to

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<sup>129</sup> *Id.* at 320.

<sup>130</sup> *Id.* at 354.

<sup>131</sup> *Id.* at 354–60.

<sup>132</sup> *Id.* at 358.

<sup>133</sup> *Id.* at 360–61.

<sup>134</sup> *Id.* at 373 (Lamar, J., dissenting in part).

protect *Apprendi* from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment.<sup>135</sup>

The Court could have used Justice Deane's or Justice Lamer's reasoning to support its point of view—they argued similar issues based on the same basic fundamental notions of justice. The issues had been reasoned out by intelligent, educated people, and they had been constructed against the powerful reasoning of the majorities of the two Courts. Nevertheless, foreign law went unmentioned by the U.S. Supreme Court. Indeed, Justice Thomas, in his lengthy concurrence, wrote, "I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment."<sup>136</sup>

There is such a historical basis in modern history—in similar systems *outside* of the United States.<sup>137</sup> Justice Thomas also remarked, "In fact, it is fair to say that *McMillan* began a revolution in the law regarding the definition of 'crime.'"<sup>138</sup> *McMillan v. Pennsylvania*, the case in which the U.S. Supreme Court first analyzed certain facts as "sentencing factors" as opposed to elements, was decided in 1986, a year after *Kingswell* was decided in Australia.<sup>139</sup> Consideration of these foreign opinions may have helped clarify these issues, even if only to reject them in favor of United States precedent.

The recognition of foreign opinions could have supplied the Court with powerful information; the dissents in the foreign cases paralleled the majority's arguments in *Apprendi*. For example, the majority pointed out that "the historical foundation for our recognition of these principles extends down centuries into the common law."<sup>140</sup> Justice Deane's lengthy history of English common law dating from 1215 and its evolution in Australia, the United States, and Wales could have been useful to support this position. The only history discussed in *Apprendi* is that of the U.S. and its various states; no mention is made of other countries that have developed from the same common law origins.

Other aspects of the *Apprendi* opinions are supportable by the dissents in *Kingswell* and *Lyons*. For example, Justice Thomas defined "elements" of a crime by their impact on punishment:

[A] "crime" includes every fact that is by law a basis for imposing or increasing punishment. . . . One need only to look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a

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<sup>135</sup> *Apprendi*, 530 U.S. 466, 476 (1999).

<sup>136</sup> *Id.* at 521 (Thomas, J., concurring).

<sup>137</sup> The dissenting opinions in *Apprendi* dispute Justice Thomas's arguments that history and precedent, even within the U.S., support the majority's conclusion. See *id.* at 525, 566 (O'Connor, J., dissenting, and Breyer, J., dissenting).

<sup>138</sup> *Id.* at 518.

<sup>139</sup> 477 U.S. 79 (1986). At issue in this case was a Pennsylvania statute that imposed a mandatory minimum sentence if a judge found, by a preponderance of the evidence, that the defendant used a firearm during the course of one of the specified felonies. *Id.* at 81. The Court ruled that the sentencing scheme was permissible, partly because it did not subject the defendant to punishment beyond what would otherwise be the maximum allowable sentence. *Id.* at 87–88.

<sup>140</sup> *Apprendi*, 530 U.S. at 477.

given set of facts. Each fact necessary for that entitlement is an element.<sup>141</sup>

Australia's Justice Brennan gave a similar definition in *Kingswell*:

[A]n offender's liability to punishment depends on the facts which are determined by a plea or verdict of guilty. What is a criminal offence? A criminal offence can be identified only in terms of its factual ingredients, or elements, and the criminal penalty which the combination of elements attracts.<sup>142</sup>

Canada's Justice Lamer's definition of a crime also focused on punishment:

Generally speaking, a person is "charged with an offence" under s. 11 if and as of the moment that a formal allegation is made against him which, if found to be true, will give a judge jurisdiction to impose a criminal or penal sanction against him.<sup>143</sup>

That these definitions are based on the same fundamental ideas of what a crime should be is indicative of the similarity of the three Courts' arguments. And, although each was based on a different text, the common law principles are so similar that the minor constitutional differences are irrelevant.

The dissenters in *Apprendi* also could have benefited from the Canadian and Australian cases; their positions paralleled those of the majorities in the other two countries. This could be persuasive in and of itself—the fact that some of the world's leading jurists had reached the same conclusions could have encouraged the majority to rethink their positions. More specifically, the majorities of these high courts had already developed reasoning and arguments based on the same principles that the *Apprendi* dissenters were promoting. For example, Justice O'Connor wrote in her dissent, "Indeed, it is remarkable that the Court cannot identify a *single instance*, in the over 200 years since the ratification of the Bill of Rights, that our Court has applied, as a constitutional requirement, the rule it announces today."<sup>144</sup> This argument—that such protections are not constitutionally required—could have been more persuasive had it mentioned that foreign courts with guarantees almost identical to those in our Bill of Rights had come to the same conclusion. The majority in *Lyons*, for example, found that a jury trial for sentencing enhancements was not constitutionally mandated: "[Section] 7 of the *Charter* entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined."<sup>145</sup> Australia's *Kingswell* majority came to a similar conclusion: "To understand s. 80 as requiring the Parliament to include in the definition of any offence any factual ingredient which would have the effect of increasing the maximum punishment to which the offender would be liable would serve no useful

<sup>141</sup> *Id.* at 501 (Thomas, J., concurring).

<sup>142</sup> *Kingswell*, [1985] 159 C.L.R. 264, 292 (Austl.) (Brennan, J., concurring).

<sup>143</sup> *Lyons*, [1987] 2 S.C.R. 309, 373 (Can.) (Lamer, J., dissenting in part).

<sup>144</sup> *Apprendi*, 530 U.S. at 525 (O'Connor, J., dissenting).

<sup>145</sup> *Lyons*, [1987] 2 S.C.R. at 362.

constitutional purpose . . . .”<sup>146</sup> However, the arguments by the two foreign Courts were not discussed.

It can be argued that the Supreme Court need not discuss the decisions of other high courts because it cannot be bound by foreign decisions. In *Apprendi*, however, Justice Thomas spent page after page supporting his arguments by discussing state court decisions which, although indicative of American practices, are also not binding on the Supreme Court. Another interesting use of nonbinding authority in a number of cases is the Court’s reliance on amicus curiae briefs which often provide technical information, include arguments or authorities not included in parties’ briefs, and are cited in opinions.<sup>147</sup> Importantly, amicus briefs have been shown to have an effect on the Supreme Court’s decisionmaking.<sup>148</sup> These briefs are accepted from many different disciplines, including history, sociology, psychology, law, and science, demonstrating the Court’s willingness to look beyond traditional legal authority for assistance in decisionmaking. The Brandeis brief in *Muller v. Oregon*<sup>149</sup> and the social science data relied upon in *Brown v. Board of Education*<sup>150</sup> are prime examples: the Court attributed much of its reasoning to the amici in these cases, despite the fact that the briefs are in no way binding authority. It seems logical that the decisions and opinions in foreign cases that address similar legal issues from a judicial perspective would be at least as important and persuasive as briefs filed by what Justice Scalia has called “self-interested organization[s].”<sup>151</sup>

It should be noted that the U.S. Supreme Court does not *always* reject foreign references. For example, in the assisted suicide case *Washington v. Glucksberg* the Court discussed current issues about euthanasia in Canada, New Zealand, Australia, Britain, and Colombia.<sup>152</sup> Much of their information, however, came not from court discussions on these issues (there were only two court cases cited), but from newspaper articles. This type of cursory discussion of other countries’ laws, which the Court placed in a footnote, arguably cannot be considered in-depth comparative law on the same grounds as Canada’s and Australia’s use of comparison.

An interesting discussion of foreign practices by the U.S. Supreme Court appeared in *Stanford v. Kentucky*.<sup>153</sup> The issue in this case was whether the imposition of capital punishment of juvenile offenders was

<sup>146</sup> *Kingswell*, [1985] 159 C.L.R. at 277.

<sup>147</sup> See Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 745 (2000).

<sup>148</sup> Stephanie Tai, *Friendly Science: Medical, Scientific, and Technical Amici Before the Supreme Court*, 78 WASH. U. L.Q. 789, 794–95 (2000).

<sup>149</sup> 208 U.S. 412 (1908).

<sup>150</sup> 347 U.S. 483 (1954). Interestingly, in *Brown* and other desegregation cases the federal government filed amicus briefs urging the Court to consider the importance of its decisions in an international context, which the Court did. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 90–114 (2000). The Court’s written opinion in *Brown*, however, “[c]haracteristically . . . ignored this international context [in] its decision.” Davis, *supra* note 53, at 427.

<sup>151</sup> *Jaffee v. Redmond*, 518 U.S. 1, 36 (1996) (Scalia, J., dissenting).

<sup>152</sup> 521 U.S. 702, 718 n.16 (1997).

<sup>153</sup> 492 U.S. 361 (1989).

cruel and unusual punishment prohibited by the Eighth Amendment.<sup>154</sup> The majority, in a footnote, again rejected the dissent's use of foreign standards:

We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of the petitioners and their various *amici* (accepted by the dissent) that the sentencing practices of other countries are relevant. . . . [T]he practices of other nations . . . cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among *our* people.<sup>155</sup>

Although this is the type of rejection of comparison often seen in the U.S. Supreme Court, a more unique use of comparison is that of the dissent. Justice Brennan's dissenting opinion discussed the practices of other countries, noting that nearly all Western European nations have either abolished or seriously limited the use of the death penalty. He noted that only eight executions of juveniles had been carried out in the previous decade, including three in the U.S. "The other five executions were carried out in Pakistan, Bangladesh, Rwanda, and Barbados."<sup>156</sup> The world view embodied in this analysis seems to reflect the sentiment "we don't want to be like *them*"—almost as if the dissent could shame the majority into taking its position. It does not include a discussion of other countries' reasons for abolishing or limiting the death penalty, nor cases in which these decisions have been reached. Thus, the mere existence of the prohibition in other countries was used to persuade, rather than rely on the purposes and reasons such practices are banned elsewhere.

#### IV. CONCLUSION

As the world becomes increasingly globalized and information technology brings nations together in more sophisticated ways, we are faced with opportunities to learn from other countries' reasoning, wisdom, and mistakes. There are many nations facing similar legal questions that involve the theories that underlie legal systems, such as rights of the accused and the role of juries, or access to the courts and the authority of the judiciary. These types of issues are not bound by different texts; they involve universal principles of justice. Justices in Canada and Australia promote the use of foreign case law as persuasive authority in addressing such legal concerns, using other countries' cases both to defend arguments and to refute them, and to clarify a position through comparison and contrast. But, such practices are often rejected by U.S. justices, despite the fact that comparison has proven to be workable in practice, and that it need not be stifled by minor textual differences. Learning from other countries' experiences can only enhance and clarify what is best within our own legal system; ignoring the decisions and opinions from around the world is turning our backs on a valuable jurisprudential resource. The result is that we, as a country, miss out on the wisdom and experience of nations with

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<sup>154</sup> *Id.* at 361–62.

<sup>155</sup> *Id.* at 369 n.1 (third emphasis is added) (citations omitted).

<sup>156</sup> *Id.* at 389 (Brennan, J., dissenting) (citation omitted).

systems, concerns, and rights similar to our own. Also, by ignoring foreign and international jurisprudence, not only do we fail to reap the rewards of it, but we miss out on the opportunity to help shape and influence legal development. Comparison is essential to stay at the forefront of legal thought internationally, to continue to develop the United States' domestic jurisprudence, and to maintain our system as one of the best in the world.