HOW INTERNATIONAL LAW BECAME A FOUR-LETTER WORD

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It is an honor to be included in the Central District's 50th anniversary celebration, it is of special interest to me that the focus is international law. "Globalization," "international judicial conversation," and "judicial diplomacy" are constant buzz-words in judicial and rule of law circles. Long ago, Justice O'Connor counseled, "international law is no longer a [legal] specialty. . . . [It is] vital if . . . judges are to faithfully discharge their duties."[1] The program today underscores that advice.

We have come to terms with the fact that globalization is here to stay, and the judiciary has no immunity in this regard. For years, globalization was often synonymous with "Americanization."[2] As one British barrister observed, there has been a "vigorous overseas trade in the Bills of Rights."[3] The question now remains whether the American judiciary will move to correct the trade imbalance.

Which brings me to my topic today—how international law became a four-letter word. Admittedly, I chose the title somewhat in jest when I was pressed for a speech title long before I had a speech topic, but it captures the essence of the current debate—namely the role that international norms, foreign precedent, and the experiences of other countries—play in shaping American law.

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1. Sandra Day O'Connor, *Dedication of the Eric E. Hotung International Law Center Building: Keynote Address,* 36 GEO. J. INT'L L. 651, 654 (2005).

2. *See, e.g.*, Robert A. Kagan, *Globalization and Legal Change: The 'Americanization' of European Law?*, 1 REG. & GOVERNANCE 99, 100 (2007).

3. Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1988).

The alluring prospect of internationalization came to my house early. Armed with a degree in international relations, a law degree, and a love of languages and travel, I always imagined I would be an international lawyer, although I had no clear picture of what that entailed—other than exotic travel, good food, and interesting legal issues. I had yet to distinguish between public and private international law. But as luck would have it, when I began private practice, my first federal appeal involved the extraterritorial application of the federal securities laws. Over time, my practice began to take on an international patina, particularly in the international intellectual property arena. When I joined the bench, I was surprised at how many of our cases invoke considerations of international law. Unlike the California Supreme Court justice who quit because there wasn't enough international law on his dockets,[4] the courts in the Ninth Circuit are home to thousands of cases involving both international and foreign law.

I. International Law as a Four-letter Word

Turning then to the debate at hand—how did the lofty principle of international law join the parade of George Carlin's "Seven Dirty Words"?[5] I suggest three reasons: (1) conflating international and foreign law has led to a misunderstanding of what law binds United States courts; (2) a growing fear of foreignness coupled with American Exceptionalism fuels the debate; and (3) conflicting views on the role of judges in a democracy have spawned pointed rhetoric.

In today's remarks, I will expand on these reasons, take you back in time to illustrate why it wasn't always so, illustrate the many important uses of U.S. and foreign law in domestic courts, and then comment briefly on a way forward through legal diplomacy and promoting the rule of law.

International law, in its purest form, means "the law of nations," which since our founding, has been part of U.S. law.[6] The debate over the authority to apply international law to domestic decisions has been extended to include many things: (1) references to the laws of other countries and the decisions of foreign courts, sometimes called comparative law; (2) extraterritoriality, or the extension of U.S. law to

4. Interview by Carole Hicke with Frank C. Newman, Professor of Law, Univ. of Cal. Berkeley, in Berkeley, Cal. (June 18, 1991).

5. George Carlin, *Seven Words You Can Never Say on Television, on* Class Clown (Atlantic Records 1972).

6. U.S. Const. art. I, § 8, cl. 10.

activities occurring overseas; (3) choice-of-law rules and rules that govern cross-border activities; and (4) "transjudicialism,"[7] which I take to mean a more general reference to the laws of other nations and the internalization of international legal norms into the domestic process.

The upshot is that all of these facets become lumped together as "international law," and the next thing you know legislators are claiming that U.S. courts are being infected by foreign law.[8] Collapsing all of these aspects of foreign and international law into a single packet and failing to distinguish between what law is binding and what principles are instructive is both disingenuous and intellectually dishonest.

Illustrative of this confusion was a 2004 congressional resolution, titled the "Reaffirmation of American Independence Resolution," known as the Feeney/Goodlatte Resolution.[9] The proposed resolution—albeit nonbinding —declared that judicial determinations regarding the laws of the United States should not be based on foreign law unless such law is: (1) "incorporated into the legislative history" of the statute, or (2) "otherwise informs an understanding of the original meaning" of the U.S. law.[10] This resolution is troublesome for many reasons—it not only contradicts the legal tradition and history of the law of nations in our courts, but also invades the judicial process and separation of powers in directing the courts on how to interpret the law.

This reaction to foreignness, coupled with American exceptionalism, has led to a big scare about the practical implications of international law. The most recent hoopla and fearmongering came in the form of several state legislative efforts to ban the use of Sharia law–at least thirteen states have gone down this path.[11] For example, in Oklahoma, the legislature proposed a ballot initiative—passed by the voters—that prevented Oklahoma courts from considering or using

7. American Justice for American Citizens Act, H.R. 4118, 108th Cong. § 2(5) (2004).

8. *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 4 (2006) (describing Congressional backlash to judicial references to international and foreign sources in constitutional interpretation).

9. H.R. Res. 568, 108th Cong. (2004).

10. *Id.*

11. *See* ALA. CONST. of 1901, amend. 884 (2014); H.B. 88, 27th Leg., 2d Sess. (Alaska 2011); S.B. 97, 88th Gen. Assemb., Reg. Sess., (Ark. 2011); H.B. 2582, 50th Leg., Reg. Sess. (Ariz. 2011); H.B. 171, 2015-2016 Reg. Sess. (Ga. 2015); S.J. Res. 16, 117th Gen. Assemb., Reg. Sess. (Ind. 2011); H.B. 525, 2011 Reg. Sess. (Miss. 2011); TENN. CODE ANN. § 39-13-802 (2016); LA. REV. STAT. ANN. § 9:6001 (2010); H.B. 2087, 2011 Sess. (Kan. 2011); Legis. B. 647, 102d Leg., 1st Sess. (Neb. 2011); S.B. 444, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011); H.B. 911, 2011 Leg., 82d Sess. (Tex. 2011); S.D. CODIFIED LAWS § 19-8-7 (2012).

either Sharia law or international law and banned the courts from "look[ing] to the precepts of other nations or cultures."[12] The Tenth Circuit upheld a preliminary injunction against the legal grounds of religious discrimination.[13] The district court ultimately entered a permanent injunction against the measure.[14]

This case points to the larger tension between looking out and looking in–the failure by our own system to recognize that even domestic courts must deal with foreign law when required, and that deciding cases in a cultural vacuum is no longer realistic.

In the immediate aftermath of World War II the United States was an integral, if not driving force, behind the development of international law.[15] Together with its allies, the United States established the Nuremberg and Tokyo War Crimes Tribunals to prosecute and punish those responsible for war crimes and atrocities.[16] The effort was widely viewed as a profoundly hopeful moment in the history of U.S. engagement with international law.[17]

This optimism quickly gave way to Cold War disillusionment. In the early 1950s, Senator Bricker pushed for the passage of the Bricker Amendment, which would provide: "No treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution, or abridging or prohibiting the free exercise thereof."[18] Proponents of the amendment evinced a fear of foreignness that resonates today: "This amendment is urgently needed for at the present time some *200 treaties* are being drawn up by agencies of the U.N. most of which *are dominated by majorities from countries which do not understand or* are not concerned with the American concepts of human freedom and constitutional government."[19] We hear the same rhetoric today with respect to global engagement, the refugee crisis, and attacks on international institutions.

Finally, turning to the third reason, even if doubters accept that U.S. courts are bound by international law in a pristine sense, the debate continues on whether U.S. courts should look to other courts and

12. H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010).

13. Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).

14. Awad v. Ziriax, 966 F. Supp. 2d 1198 (W.D. Okla. 2013).

15. William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 702 (2004).

16. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589.

17. Schabas, *supra* note 15, at 705.

18. S.J. Res. 130, 82d Cong., 98 Cong. Rec. 908 (1952).

19. 99 Cong. Rec. A4024 (1953) (statement of Rep. Pat Sutton).

cultures for persuasive or informational value.[20] To be sure, this query makes for good rhetoric that keeps the debate afloat, especially at the highest levels, such as the many debates between Justice Scalia and Justice Breyer on this subject. This controversy challenges the role of judges in a democracy.

On one side, Justice Breyer embraces looking abroad for guidance, pointing out: "[T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control."[21] He recognizes that "[o]f course, we are interpreting our own Constitution, not those of other nations, . . . [b]ut their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . . ."[22] As evident in his new book, *The Court and the World*, Justice Breyer emphasizes the "interdependence" of the American system.[23]

In contrast, and often in heated language, Justice Scalia said that the debate is interesting but not meaningful. In Justice Scalia, we lost a jurist with strong views in this arena. He wrote: "[W]e *don't* have the same moral and legal framework as the rest of the world, and never have."[24] He went further to say that "foreign materials can *never* be relevant to an interpretation of—to the meaning of—the U.S. Constitution,"[25] and that the "Framers would . . . be *appalled*" that a proposition democratically adopted by the American people "could be judicially nullified because of the disapproving views of foreigners."[26] Also, pulling no punches, Justice Scalia delivered this zinger in his dissent in *Atkins v. Virginia*:[27]

> [T]he Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and

20. *See, e.g.,* David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 BOSTON U. L. REV. 1417, 1417—1424 (2006) (describing debate regarding use and misuse of foreign and international law among judges, legislators and legal scholars).

21. Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting).

22. *Id.* at 977 (referencing THE FEDERALIST No. 20, at 134–38 (James Madison & Alexander Hamilton) (Clinton Rossiter ed., 1961)).

23. STEPHEN BREYER, THE COURT AND THE WORLD 4 (2015).

24. *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 521 (2005).

25. Justice Antonin Scalia, Keynote Address before the American Society of International Law: Foreign Legal Authority in the Federal Courts (Apr. 2, 2004), *in* 98 AM. SOC'Y INT'L L. PROC. 305, 307 (2004).

26. Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., concurring).

27. 536 U.S. 304 (2002).

> respondents to opinion polls. . . . "We must never forget that it is a Constitution for the United States of America that we are expounding."[28]

Justice Scalia was consistently joined by Justice Thomas, who also has the ability to deliver a judicial jab, like this one: "In any event, Justice Breyer has only added another foreign court to his list while still failing to ground support for this theory in any decision by an American court."[29]

The range of views among the Justices are perhaps best expressed in the Court's debate over international norms and references to foreign experiences in the juvenile death penalty case of *Roper v. Simmons*.[30] Justice Kennedy—joined by Justices Stevens, Souter, Ginsburg and Breyer—staked out the majority's view:

> It is proper that we acknowledge the *overwhelming weight of international opinion against* the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. . . . The opinion of the world community, while not controlling our outcome, does provide *respected* and *significant confirmation* for our own conclusions.[31]

Though dissenting because she said there was no evidence of consensus, Justice O'Connor affirmed her view about the role of foreign and international law, one that, over time, would lead her to became one of the Court's most prominent internationalists:

> I disagree with Justice Scalia's contention . . . that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. . . . [T]his Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. . . . At least, the existence of an international consensus of this nature *can serve to confirm the reasonableness of a consonant and genuine American consensus*.[32]

28. *Id*. at 347–48 (Scalia, J., dissenting) (quoting Thompson v. Oklahoma, 487 U.S. 815, 868–69 n.4 (1987) (Scalia, J., dissenting)).

29. Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari) (citing Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari).

30. 543 U.S. 551 (2005).

31. *Id.* at 578 (emphasis added).

32. *Id.* at 604–05 (O'Connor, J., dissenting) (emphasis added) (citations omitted).

Thus, Justice O'Connor agreed with the majority's approach, just not the ultimate conclusion.[33]

Justice Scalia came back in dissent with a crystal clear indictment rejecting the majority's approach:

> Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage. . . . The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke *alien law* when it agrees with *one's own* thinking, and *ignore it otherwise, is not reasoned decision making, but sophistry*.[34]

This statement reflects the oft-repeated criticism of the pick-and-choose approach.

With this backdrop of why international law has been pilloried, it is instructive to turn to history to see that it wasn't always so. While the debate may be contemporary, the long-standing use of international and foreign law is not. In the spirit of Justice Holmes, who said "a page of history is worth a volume of logic,"[35] let's look back.

II. History of the Supreme Court Invoking International Law

From the time of our founding, the Supreme Court has looked to both international law and foreign law. The former as binding authority, and the latter as a useful analytical tool in interpreting the Constitution and deciding contentious cases on issues of tremendous social importance.

From law school, we all remember *Charming Betsey*,[36] and the canon that statutes should be construed so as not to conflict with international law.[37] Indeed, throughout the early years of our republic, the Court turned to international law repeatedly to establish the scope of the federal government's sovereign powers. In the early 1800s, Justice Johnson looked to international law to interpret the phrase "*the power to regulate commerce*" and noted that "[t]he definition and limits of that power are to be sought among the features of international

33. *See id*. at 605-07 (O'Connor, J., dissenting).

34. *Id.* at 622, 627 (Scalia, J., dissenting) (first emphasis in original, second and third added).

35. N.Y. Trust & Co. v. Eisner, 256 U.S. 345, 349 (1921).

36. Murray v. Schooner Charming Betsey, 6 U.S. (2 Cranch) 64 (1804).

37. *Id*. at 118.

law[.] . . . The *law of nations*, regarding man as a social animal[ ] pronounces all commerce legitimate in a state of peace . . . ."[38]

The Court similarly invoked international law in determining that the federal government could exercise eminent domain as a recognized "attribute of sovereignty,"[39] and that, in the immigration context, the "accepted maxim of international law [is] that every sovereign nation has the power, as inherent in sovereignty. . . to forbid the entrance of foreigners within its dominions."[40] Again in *The Prize Cases*[41], in refusing to hold that the Civil War was not a war, the Court explained that "[t]he law of nations . . . contains no such anomalous doctrine as that . . . insurgents . . . are not *enemies* because they are *traitors*."[42]

The Court historically has turned to foreign law and practices — as Justice Breyer did in *Printz* —to "cast an empirical light on the consequences of different solutions to a common legal problem."[43] This was precisely the way Justice Wilson used foreign laws in 1793 in considering whether the State of Georgia was "amenable to the jurisdiction of the Supreme Court."[44] In *Chisholm v. Georgia*, Justice Wilson emphasized that "[a] cause so conspicuous and interesting, should be carefully and accurately viewed from every possible point of sight," including "[b]y the laws and practice of particular States and Kingdoms."[45] In other words, Justice Wilson found foreign law and practice relevant because the issue before the court was "conspicuous and interesting," thus merited consideration through multiple analytical lenses.

This use of foreign law as a source of "empirical light"[46] continued throughout the twentieth century. In 1908, the Court in *Muller v. Oregon*[47] emphasized the relevance of foreign and international law in "examining the constitutional question," of whether maximum hour laws designed to protect female employees violated the constitutional right to freedom of contract.[48] The Court cited statutes and commit-

38. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 227 (1824) (Johnson, J. concurring) (emphasis added).

39. Miss. & Rum River Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).

40. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

41. 67 U.S. (2 Black) 635 (1863).

42. *Id*. at 670.

43. Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J. dissenting).

44. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 453 (1793) (opinion of Wilson, J.).

45. *Id*. (emphasis omitted).

46. *Printz*, 521 U.S. at 977 (Breyer, J. dissenting).

47. 208 U.S. 412 (1908).

48. *Id.* at 419.

tee reports from Great Britain, France, Switzerland, Austria, Holland, Italy, and Germany noting they were not "*technically speaking authorities*" and did not discuss "the constitutional question presented."[49] Nevertheless, the Court stressed that "when a question of fact is debated and debatable, . . . a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."[50]

Almost 100 years later, Justice Ginsburg echoed this approach of citing foreign norms and reports in *Grutter v. Bollinger*,[51] a university affirmative action case. Referencing the International Convention on the Elimination of All Forms of Racial Discrimination,[52] she wrote that "[t]he Court's observation that race-conscious programs 'must have a logical end point' . . . accords with the international understanding of the office of affirmative action."[53] The more recent controversy on international and foreign law seems iconoclastic and at odds with 200 years of jurisprudential history.

III. Real Life—International Law in U.S. Courts

Even if a strong historical base is not enough to quell the chorus of international law as a four-letter word, two things have changed the calculus: increased globalization and the Internet. Their impact means that international and foreign law will be increasingly important in our courts, and no amount of name calling will blunt their consequences.

When the concept of globalization first entered the lexicon, it typically described the export of American culture, market capitalism, and corporations around the world.[54] Today, globalization entails a far more reciprocal enterprise. In 2015, the U.S. census reported $2.3 trillion in foreign exports and $2.8 trillion in imports.[55] The U.S. also participates in the global economy through treaties on everything

49. *Id.* at 419-20, 419 n.1 (emphasis added).

50. *Id.* at 420-21.

51. 539 U.S. 306 (2003).

52. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195.

53. *Grutter*, 539 U.S. at 343 (Ginsburg, J. concurring) (citation omitted).

54. Thomas L. Friedman, The Lexus and the Olive Tree 40-41 (2000).

55. U.S. Census Bureau, U.S. Trade in Goods and Services - Balance of Payments (BOP) Basis (2016), https://www.census.gov/foreign-trade/statistics/historical/gands.pdf.

from trade,[56] to child protection,[57] tax,[58] terrorism,[59] and intellectual property.[60]

As people, goods, ideas, art, pollution, violence, and investments flow across borders (either physically or electronically), courts around the world are key players in what Anne-Marie Slaughter, a former State Department official, called "judicial globalization."[61] She described this as a "diverse and messy process of judicial interaction across, above and below borders, exchanging ideas and cooperating in cases involving national as much as international law."[62] American judges today confront judicial globalization on a daily basis, as it has become an inevitable element of resolving cases, which—like many other aspects of our society—do not always fit tidily within national borders.

Perhaps even more than globalization, the Internet is a game changer. The interconnectedness spawned by the Internet exponentially multiplies the impact of globalization. The Internet is a platform for political and civic speech, commercial transactions, debates about human rights and state power, cultural sharing, and ubiquitous friends and frenemies. To say the Internet is ubiquitous understates its reach. With more than 3 billion users worldwide, the Internet knows no borders.[63] So, in many respects, the lid comes off the traditional principles of territorial jurisdiction, national privacy laws, and legal autonomy based on geographical boundaries in the physical world. Every day federal courts are dealing with international law issues, and most of these cases are resolved without controversy. Where there is controversy, it is often dissatisfaction with the outcome, rather than the method.

At the end of the Second World War, Justice Jackson, who served as the prosecutor at Nuremberg, presciently observed that:

56. *E.g.*, United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

57. *E.g.*, Convention on the Rights of the Child, May 25, 2000, T.I.A.S. No. 13,095, 2171 U.N.T.S. 227.

58. *E.g.*, Agreement on State and Local Taxation of Foreign Employees of Public International Organizations, Apr. 21, 1992, T.I.A.S. No. 12,135.

59. *E.g.*, International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S. No. 13,075, 2178 U.N.T.S. 197.

60. *E.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994).

61. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1104 (2000).

62. *Id.*

63. INT'L TELECOMM. UNION, FACTS & FIGURES 2015 1 (2015), http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2015.pdf.

> It [would be] futile to think, as extreme nationalists do, that we can have an international law that is always working on our side. . . . We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage.[64]

Federal courts routinely and without controversy adjudicate both individual rights arising under treaties, such as immigration cases concerning requests for asylum and relief under the Convention Against Torture[65] or, in entirely different areas, disputes over child custody or intellectual property claims. We also hear transnational commercial disputes requiring the application of international and foreign laws, including forum non-conveniens, enforcement of foreign arbitral awards, the extraterritorial applicability of antitrust and intellectual property statutes, questions of foreign sovereign immunity, and issues of comity. In the criminal arena, extradition and international terrorism and drug conspiracies are a routine part of the docket. The Central District of California is exhibit A in international law, as you heard from Judge King this morning.[66] What I describe is not an atypical docket.

Similarly, the federal courts continue to employ comparative analysis of foreign and international law as a lens through which to view complicated and novel questions under our law. For example, in *Garcia v. Google, Inc.*,[67] the Ninth Circuit en banc considered whether an actress could force YouTube to remove her five-second performance in a video deriding the Prophet Mohammed.[68] We observed that the actress ultimately wanted to vindicate through copyright law a right to be forgotten that does not (yet) exist in the United States.[69] In contrast, the Court of Justice of the European Union recently affirmed the right to be forgotten, and determined that this right required Google to consider individual requests to remove personal information from its search engine.[70]

64. AMERICAN SOCIETY OF INTERNATIONAL LAW, "A DECENT RESPECT TO THE OPINIONS OF MANKIND. . .": SELECTED SPEECHES BY JUSTICES OF THE U.S. SUPREME COURT ON FOREIGN INTERNATIONAL LAW 40 (Christopher Borgen ed., 2007).

65. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

66. *See* Susan Westerberg Prager & Hon. George H. King, *Opening Remarks*, 23 Sw. J. INT'L L. 1 (2017).

67. 786 F.3d 733 (9th Cir. 2015) (en banc).

68. *Id.* at 736–37.

69. *Id.* at 745.

70. Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, ¶¶ 92–99 (May13, 2014), http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=261015.

The rhetoric surrounding the use of foreign and international law in some more politicized cases speaks to the fear that, by invoking foreign and international law, judges can impose their personal ideologies on the public. The Supreme Court's debates over the death penalty, the criminalization of homosexuality, and gay marriage are prime examples.[71] Examples from the United States District Court for the Central District of California include cases brought by survivors of the Armenian genocide to recover lost assets.[72]

The Ninth Circuit is no stranger to this controversy, as you heard earlier with respect to *Sosa v. Alvarez-Machain*.[73] Although the Supreme Court ultimately reversed the Ninth Circuit in that case, the Court confirmed that foreign nationals could sue for human rights violations in United States courts under the Alien Tort Statute[74] if such acts violate customary international law.[75] Unfortunately, the Court determined that kidnapping, arbitrarily detaining, and transporting Alvarez-Machain from Mexico to the United States was not such a violation.[76] But the case was important in affirming that, although the Alien Tort Statute is jurisdictional in nature, it "is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[77] Importantly, the Court underscored the "discretionary judgment" of the lower federal courts and the evolutionary nature of norms of customary international law, stating that, in recognizing "actionable international norms, . . . the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[78]

Another example of the importance of transnationalism came in the Nazi memorabilia case, *Yahoo! Inc. v. La Ligue Contre Le Racisme Et l'Antisemitisme*,[79] which illustrates the cultural and jurisdic-

71. *See*, *e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that the Eighth Amendment to the U.S. Constitution did not permit a state to punish the crime of rape of a child with the death penalty); Lawrence v. Texas, 539 U.S. 558 (2003) (overturning the sodomy law in Texas and legalizing same-sex sexual activity); Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution guarantees the same-sex couples' right to marry).

72. *E.g.*, Deirmenjian v. Deutsche Bank, A. G., 526 F. Supp. 2d 1068 (C.D. Cal. 2007).

73. 542 U.S. 692 (2004).

74. 28 U.S.C. § 1350 (2012).

75. *Sosa*, 542 U.S. at 724-25.

76. *Id.* at 735–38.

77. *Id.* at 724.

78. *Id.* at 726, 729.

79. 433 F.3d 1199 (9th Cir. 2006) (en banc).

tional complexities of law in the internet age. La Ligue, a French organization, sued in Paris claiming that Yahoo!'s sale of Nazi memorabilia on its auction site violated French prohibitions on the sale of items that incite racism.[80] The French court entered an injunction, spawning litigation on both sides of the pond.[81] Both French and U.S. courts were forced to grapple with novel issues of Internet jurisdiction and competing values of free speech versus responding to anti-Semitism.[82] The case is a perfect example of how the Internet transcends national boundaries and how human rights norms intersect with commercial activity.

So like it or not—and I think we love it—judges and lawyers in this district are at the forefront of international law in domestic courts.

IV. Looking Forward

In closing, let me offer a few comments moving forward; the root of much of the brouhaha about international law stems, in my view, from misunderstanding and a lack of familiarity. The case of *Republic of Bolivia v. Philip Morris Cos.*[83] is illustrative. There, the court for the Southern District of Texas lampooned its own capacity "to address the complex and sophisticated issues of international law and foreign relations presented by this case," noting that, there isn't even a Bolivian restaurant anywhere near here! . . . While the Court does not . . . profess to understand all of the political subtleties of the geographical transmogrifications ongoing in Eastern Europe, the Court is virtually certain that Bolivia is not within the four counties over which this Court presides, even though the words Bolivia and Brazoria are a lot alike and caused some real, initial confusion until the Court conferred with its law clerks.[84]

Education and discourse can go a long way in dispelling the many myths and raising awareness. This conference is a wonderful example of a major contribution to education in the international arena. I want to give a shout out to the American Society of International Law's Judicial Advisory Board. In 2000, the Society asked Justice O'Connor to put together a judicial board to think about ways in which the bench could become more knowledgeable in this arena. Justice Ginsburg now chairs the board. I have been fortunate to be a part of the

80. *See id.* at 1202-03.
81. *Id.* at 1203–05.
82. *See id*. at 1205-11, 1220-24.
83. 39 F. Supp. 2d 1008 (S.D. Tex. 1999).
84. *Id.* at 1009–10.

group since its founding, along with representatives from each federal circuit court and key state supreme courts.

This project led to the *Benchbook on International Law*,[85] which is a fabulous primer on international law and the issues judges deal with day-to-day. It is available online and will soon be reprinted in hard copy.

But judicial scholarship goes beyond the bench to judicial diplomacy. The panel this morning highlighted the range of judicial involvement overseas. I have the privilege of serving as Chair of the Board of American Bar Association's Rule of Law Initiative,[86] or ROLI, as we say. ROLI began after the fall of the former Soviet Union when a small group of U.S. lawyers and judges were asked to help the new republics draft constitutions and set up court systems.[87] From that initiative in Central Europe, ROLI has grown tremendously. We now work in over 50 countries and have more than 500 staff and volunteers.[88]

The role of American judges and lawyers as legal diplomats has had an important impact in many ways. Key to the ABA programs is our partnership with local players, developing sustainable programs that will live long beyond ROLI's program assistance.[89] And, though we use many American volunteers, we reach out to both local and international volunteers, who are assisted by rule of law professionals. Our perspective is global, not U.S.-centric. ROLI's work is wide-ranging and includes: establishing a program training Turkish lawyers to assist Syrian refugees in Turkey;[90] ongoing trial training with lawyers and judges in Mexico to support the transition of Mexico's criminal

85. AM. SOC'Y OF INT'L LAW, BENCHBOOK ON INTERNATIONAL LAW (Diane Marie Amann ed., 2014), https://www.asil.org/benchbook/complete.

86. *ABA Rule of Law Initiative*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/advocacy/rule_of_law.html (last visited Sept. 3, 2016).

87. *Rule of Law Initiative: Our Origins & Principles*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/advocacy/rule_of_law/about/origin_principles.html (last visited Sept. 3, 2016); *American Bar Association Central European and Eurasian Law Initiative (CEELI)*, MILLER & CHEVALIER, http://www.millerchevalier.com/Quotes/AmericanBarAssociationCentral European and Eurasian Law Initiative CEELI (last visited Sept. 3, 2016).

88. *Rule of Law Initiative: Our Origins & Principles*, *supra* note 87.

89. *Id.*

90. *Rule of Law Initiative: Turkish Lawyers Trained to Provide Legal Aid and Counseling to Syrian Refugees*, AMERICAN BAR ASSOCIATION (Apr. 2015), http://www.americanbar.org/advocacy/rule_of_law/where_we_work/middle_east/syria/news/news-syria-legal-aid-counseling-for-refugees-0415.html.

justice system from an inquisitorial to an accusatorial model;[91] working with the judiciary in Bahrain on comparative sentencing practices;[92] mentoring lawyers in Kosovo;[93] working with lawyers in Southeast Asia on strategies to challenge Internet restrictions;[94] training judges in Egypt on judicial ethics;[95] empowering women lawyers in the fight against impunity in the Democratic Republic of Congo;[96] and conducting trainings in Southeast Asia to emphasize the intersection of human rights and corruption, with a focus on human trafficking and arbitrary detention.[97] The list goes on as ROLI endeavors to promote justice, economic opportunity and human dignity through the rule of law.

We live in a delicate international balance where isolationism and fear of foreignness are not practical choices. Globalization underscores the importance of international law and need for strengthening international cooperation, not abdication. Sticking our head in the sand is no way forward. I don't want to sound like Pollyanna, but engagement with international law and international organizations in a positive sense is the better course. To be sure, dealing with states that do not share our values and goals and recognizing the shortcomings in international law is a challenge. But it is a challenge perfectly suited to us in the legal community.

International law provides a foundation for the rule of law, a platform for resolving disputes, and hope for a better, even if imperfect, world. Learning about foreign courts and their approaches to resolving the challenges facing our modern global society can only make us better decision-makers and advocates at home.

This is March Madness week with hoards descending on Las Vegas to view the festivities. Unlike that city's slogan, "what happens in Vegas, stays in Vegas," it is not so with international law. What happens abroad matters at home. Join me in a campaign to turn international and foreign law into something positive and constructive—a different four-letter word—HOPE.

91. ABA RULE OF LAW INITIATIVE, PROGRAM HANDBOOK 95-96 (2016), http://www.americanbar.org/content/dam/aba/directories/roli/misc/aba-roli-2016-program-book.authcheckdam.pdf.

92. *Id.* at 100.

93. *Id.* at 64–65.

94. *E.g.*, *Rule of Law Initiative: Philippine Lawyers Attend Training on Internet Freedom*, AMERICAN BAR ASSOCIATION (June 2015), http://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/philippines/news/news-philippines-training-on-internet-freedom-0615.html.

95. ABA RULE OF LAW INITIATIVE, *s*upra note 91, at 102.

96. *Id.* at 26-27, 30, 32.

97. *Id.* at 46.