

2002

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Citation: 46 St. Louis U. L.J. 345 2002



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INTERNATIONAL LAW AS FUNDAMENTAL JUSTICE: JAMES BROWN SCOTT, HAROLD HONGJU KOH, AND THE AMERICAN UNIVERSALIST TRADITION OF INTERNATIONAL LAW

MARK WESTON JANIS*

INTERNATIONAL LAW AS FUNDAMENTAL JUSTICE

I am delighted to have an opportunity to respond to Harold Hongju Koh's excellent Childress Lecture of October 3, 2001, at the Saint Louis University School of Law.¹ It has been my great pleasure to know Harold since we were young lawyers in the 1970's, and most especially during the 1996-97 academic year when we were together on the Law Faculty at Oxford. Now, as always, my first and soundest instinct is to associate myself fully with Harold. I embrace his commitment to human rights at home and abroad, and applaud his dream for the globalization of freedom.

Great American lawyers like Harold have been concerned with what we now know as international law even before 1789,² the momentous year that marked not only the entry into force of the U.S. Constitution, George Washington's first administration, the French Revolution and, perhaps a little less dramatically, the denomination and delineation of *international law*, a new term created by the fertile imagination of that Oxford graduate and utilitarian philosopher, Jeremy Bentham.³ Harold's commitment to a globalization of freedom belongs, I believe, to a very important part of our international law tradition that I sometimes call American *universalism*, though it might also be more controversially denoted *naturalism*.⁴ Whatever the nomenclature, this tradition notably includes the nineteenth century American advocates of an

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1. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 (2002).

2. See *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784).

3. M.W. Janis, *Jeremy Bentham and the Fashioning of "International Law,"* 78 AM. J. INT'L L. 405, 405 (1984).

4. I have been styled, perhaps rightly, a "neonaturalist." See James J. Friedberg, *Janis: An Introduction to International Law*, 22 N.Y.U. J. INT'L L. & POL. 319, 320 (1990) (book review).

international court—David Low Dodge, Noah Worcester, William Ladd and Elihu Burritt—whose efforts saw fruition in Woodrow Wilson’s World Court.⁵

Lately, thumbing through James Brown Scott’s 1922 *Cases on International Law*,⁶ it struck me that the preface to this influential casebook might not only serve as a useful illustration of what I mean by the American universalist tradition in international law, but also highlight Harold’s own commitment to high principle. The preface to Scott’s *Cases* looks back on the style and substance of the first century and a half of America’s acquaintance with international law, looks forward to developments that took place in the American perception and practice of international law in the next tumultuous eight decades and, of course, reflects the sentiments of an influential member of the American legal profession in the early 1920’s, a time when we were recuperating from the military, political, economic and legal exhaustions of World War I and the Peace of Versailles.

What shines forth from the preface to Scott’s *Cases* is a commitment to international law as a form of fundamental law. Scott sees it as universal justice, common to all civilized nations that can be molded but not destroyed by the particular practices of states. Scott’s commitment to international law as fundamental justice ties his work to the great nineteenth century American universalist tradition of international law, distinguishes it from the sterile positivism and strident policy science that came to characterize so much of American international law thinking in the middle and later twentieth century, and links it to the emerging recommitment of modern American lawyers like Harold Hongju Koh to international law as a universal law, rather than as a mere politics of preference or a shallow reckoning of state consent.

Let me proceed by illuminating two basic presumptions about international law that are shared by Harold and Scott and, I think, by other American universalists. First, is a belief that international law is real law because it is practiced as such by judges and lawyers, making international law just as “real” as municipal law. Second, is a belief that international law is, at its foundation, the same for all peoples; that there are elements of a universal civilization shared by all humanity no matter what their discrete histories or societies.

JUDGES, LAWYERS, AND “REAL” INTERNATIONAL LAW

It is, I think, no accident that both Harold Hongju Koh and James Brown Scott are casebook authors. The focus here, of course, is on Harold’s *Childress*

5. Mark W. Janis, *Protestants, Progress and Peace: Enthusiasm for an International Court in Early Nineteenth-Century America*, in RELIGION AND INTERNATIONAL LAW 191-206 (Mark W. Janis & Carolyn Evans eds., 1999) [hereinafter *Protestants, Progress and Peace*].

6. CASES ON INTERNATIONAL LAW: PRINCIPALLY SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS (James Brown Scott ed., 1922) [hereinafter Scott].

Lecture, not his fine casebook,⁷ but even in his lecture Harold's ties to practical lawyering are notable. In his lecture, Harold mentioned how he began his international legal career doing "private international law," much of it transactional. Even when he "shifted" his "theoretical and academic focus" to international human rights law, it was "particularly through a human rights clinic that my [Yale] students and I formed to bring domestic lawsuits on behalf of human rights abuses."⁸ Despite Harold's protests,⁹ how deeply ensconced in an "ivory tower" was he really when he was suing the U.S. government for alleged human rights violations vis-à-vis Haitian and Cuban refugees? I submit that Harold's perception of international law in the Childress Lecture and elsewhere is of a law just as real worldly as any other lawyer-oriented discipline. Before going deeper into Harold's lecture, take a look at Scott.

Scott's *Cases* begins with a prefatory note about the American Casebook Series, then newly published by West Publishing Company in St. Paul, Minnesota. Here the General Editor, William R. Vance, explains that the case method has recently become the predominant method of law school instruction, citing two reports prepared under the auspices of the U.S. Bureau of Education. The first, in 1893, dealt with "the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—[which] were described and commented upon, but without indication of preference."¹⁰ However, in its second report, in 1914, the U.S. Bureau of Education concluded not only that teaching by cases was "the best available material for use practically everywhere," but that the "case method is to-day the principal method of instruction in the great majority of the schools of this country."¹¹ Vance lists thirty-two available West casebooks written by professors from thirteen law schools; Chicago leads the pack with seven; Yale is next with five.¹² Scott was himself the General Editor of the series when it commenced in 1908.¹³ As a professor at the University of Illinois, he published his first international law casebook with the Boston Book Company in 1902; it was later republished with West in 1906.¹⁴ This earlier casebook

7. HENRY J. STEINER, ET AL., *TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT* (4th ed. 1994). I happily admit to a casebook of my own, MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW: CASES AND COMMENTARY* (1997).

8. Koh, *supra* note 1, at 296.

9. *Id.*

10. William R. Vance, *Preface: The American Casebook Series*, to Scott, *supra* note 6, at v.

11. *Id.*

12. *Id.* at vii-ix.

13. *Id.* at v.

14. When it was re-published in 1906, before the inauguration of the American Casebook Series, Scott had moved from Illinois to Georgetown. JAMES BROWN SCOTT, *CASES ON INTERNATIONAL LAW: SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS* (1906).

began as “a revision of the late Dr. Snow’s Cases and Opinions on International Law, published in 1893,” but “[t]he changes made in the course of revision were, however, so many and so radical that it seemed advisable to the publisher to issue it as an independent work, and it so appears.”¹⁵

The casebook context was, I think, crucial to Scott, significantly contributing to his emphasis on the judge as the principal justifier of international law as real law. Scott’s 1922 “Author’s Preface” begins:

The idea underlying this volume is that international law is part of the English common law; that as such it passed with the English colonists to America; that when, in consequence of a successful rebellion, they were admitted to the family of nations, the new republic recognized international law as completely as international law recognized the new republic. Municipal law it was in England; municipal law it remained and is in the United States. No opinion is expressed on the vexed question whether it is law in the abstract; our courts, state and federal, take judicial cognizance of its existence, and in appropriate cases enforce it, so that for the American student or practitioner it is domestic or municipal law.¹⁶

Scott argues that since English and American courts enforce international law, and have repeatedly done so over the past two centuries, there must be, and, in fact, there is, a mass of judicial decision on the subject. Moreover, there should be the same reason for respecting precedent in this as in any other branch of the law. In suits involving a question of international law, a case on point is ordinarily cited and followed, unless overruled or distinguished from the case under consideration. So, judicial decisions are an important and indispensable source of authority in international law:

It is the judgment that is authoritative, although the obiter dictum of a distinguished judge is entitled to respect. The opinion of a text-book writer is valuable; but, like the dictum, it is not in itself law. It is at best a statement of the underlying principle of the law or a digest or summary of cases on the subject with which the text-book deals. The opinions of diplomats likewise carry great weight; but the diplomatist does not and cannot consider the question at issue with the impartiality of a judge, for he is influenced by the interests of his country.¹⁷

Scott’s argument is addressed not only to law teachers and students, but also to the legal profession in general. Why bother to answer the question whether international law is “law in the abstract”? Everyone knows municipal law is “law,” and since international law is found and applied by English and

15. *Id.* at v. Scott dedicated his 1922 edition to Snow: “Inscribed to the Memory of FREEMAN SNOW Instructor of International Law in Harvard University who taught me to love the law of nations, and, in doing so, to love him.” Scott, *supra* note 6, at iii.

16. Scott, *supra* note 6, at xi.

17. *Id.*

American courts (they “take judicial cognizance of its existence”), so international law must be just as “real” a law as domestic law. Scott’s justification of international law as “real” law depends largely on its recognition as such by the courts and he repays the compliment by himself deferring to the judges. “It is the judgment that is authoritative” as opposed not only to obiter dicta but also to the opinions of text-books writers and diplomats. There is nothing here in Scott about the need for state consent as the source of international law. Scott’s focus on the courts as the source of authority in international law echoes the long-standing Anglo-American deference to judicial authority found in Coke and Marshall.

Not only do Scott’s opening words justify international law as law and elevate judicial decision as an authoritative source of international law, but they come full circle to Vance’s prefatory note, validating the whole casebook method of legal instruction. Modern professors might sometimes welcome the case method because it helps teach students to “think like lawyers,” but Scott and Vance applaud the case method because it most scientifically finds the exact rules of law, quite an antithetical proposition.

Harold, too, is instinctively drawn to lawyers and judges as the principal validators of international law. The first part of Harold’s lecture, “Bureaucratic Lessons” explores how a real lawyer, like Harold, discovers an Alice-in-Wonderland, topsy-turvy world where a lawyer must find and play by new rules, if one is to succeed:

[A]s lawyers, we are accustomed to the relatively orderly world of law and litigation, which is based—as intense as it may be—on a knowable and identifiable structure and sequence of events. The workload comes with courtroom deadlines, page limits and scheduled arguments. But if conducting litigation is like climbing a ladder, making foreign policy is more like driving the roundabout near the Coliseum in Rome. One feels that there are no rules; no norms; people are free-lancing from every direction; and you never know when or from where the next problem will come.¹⁸

Harold does find rules (or at least guidelines) amidst the chaos. He identifies three: First, it is harder than it looks (so work hard); Second, do not forget your agenda (you are still an advocate); Third, preserve your priorities (fight for your principles).¹⁹ I submit that the spirit of Harold’s paper is that of legal argument. He pleads for certain human rights principles that he believes the United States ought to uphold. Harold remains, albeit in a different and murkier “court,” a litigating American lawyer. Turning to two of Harold’s principles, see their notable similarities to Scott.

The first is “Telling the Truth.” Harold writes: “As a lawyer, I acknowledged that the unvarnished truth may sometimes be hard to determine,

18. Koh, *supra* note 1, at 297.

19. *Id.*

and even harder to hear.”²⁰ The United States must tell the truth not only about the human rights records of foreign countries, it must tell the truth about the United States: “Although we are justifiably proud of our domestic human rights record, we have not yet fully internalized human rights norms into our domestic law.”²¹ Note the lawyerly tone here. A solution to the problem of not telling the truth is the internalization of international human rights norms into municipal law. Harold, like Scott, believes that American lawyer ought to be regularly able to rely on the rules of international law in American courts.

The second is “Justice.” Note Harold’s continuing emphasis on formal legal solutions. He supports domestic and international truth and reconciliation commissions, the ad hoc criminal tribunals for the former Yugoslavia and Rwanda, the 1998 Rome Treaty’s International Criminal Court, domestic international criminal prosecutions such as that of Pinochet, “hybrid” domestic/international forms of international criminal tribunals in Cambodia, Sierra Leone and East Timor, and U.S.-style universal jurisdiction prosecutions of aliens in domestic courts *à la Filartiga* and *Kadic*.²² International justice for Harold here is all about judges and lawyers. Again, the parallel to Scott is plain. Let us return to Scott before coming back to another of Harold’s principles.

INTERNATIONAL LAW AS COMMON AND UNIVERSAL LAW

After arguing that international law is “real” law because it is found and applied as such by “real” judges and lawyers, Scott more fully explores the Anglo-American legal tradition that maintains that international law is part of the common law. He bases his argument on Lord Mansfield, Sir William Blackstone, Alexander Hamilton and the *Paquete Habana*.²³ Lord Mansfield, in *Triquet v. Bath* (1764), reported that it was Lord Chancellor Talbot’s “clear opinion” in *Barbuit’s Case* “that the law of nations, in its full extent, was part of the law of England,” a position that Lord Mansfield confirmed in *Heathfield v. Chilton* (1767).²⁴ In 1765, Blackstone published a like belief—“the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land”—in the fourth volume of his hugely influential *Commentaries*.²⁵

20. *Id.* at 307.

21. *Id.* at 311.

22. *Id.* at 312-15.

23. Scott, *supra* note 6, at xii-xiii.

24. *Id.* at xii (citing *Triquet v. Bath*, [1764] 3 Burr. 1478, 1482; *Buvot v. Barbuit* [1737] Cas temp Ld Talb 281; *Heathfield v. Chilton*, [1767] 4 Burr. 2016).

25. *Id.*

So, too, with Alexander Hamilton, who in 1795, affirmatively answered the question:

“Does this customary law of nations, as established in Europe, bind the United States?”

...

“1. The United States, when a member of the British Empire, were in this capacity a party to that law, and not having dissented from it, when they became independent, they are to be considered as having continued a party to it.”

“2. The common law of England, which was and is in force in each of these states, adopts the law of nations, the positive equally with the natural, as a part of itself.”²⁶

Hamilton’s position has been confirmed in the practice of the U.S. courts:

For did not Mr. Justice Gray say, only a few years ago, in delivering the opinion of the court in the case of *The Paquete Habana*, decided in 1899, and in language which is a paraphrase, if it cannot be considered as a direct quotation from Sir William Blackstone, that “international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”²⁷

For Scott, the step from international law as common law to international law as fundamental law is a quick one. He makes the transition in the context of the experience of the Great War:

International law seems to have stood fairly well the strain of war. It is no doubt true that the belligerent practices of nations have not squared with their peaceful professions. Nevertheless the law of nations emerges from the World War as a system with foundations unimpaired, although the structure bears outward marks of violence and unsightly scars, which only time can cover.²⁸

Scott provides a lengthy excerpt from William Edward Hall, who predicted in 1889 not only a “next great war” in which the rules of international law will be severely violated, but also that “it is a matter of experience that times in which international law has been seriously disregarded have been followed by periods in which the European conscience has done penance by putting itself under straiter obligations than those which it before acknowledged.”²⁹

Scott is firm in maintaining that international law is a form of universal justice:

26. *Id.* at xii-xiii (citing letters of Camillus).

27. *Id.* at xiii (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

28. Scott, *supra* note 6, at xiii.

29. *Id.* at xiv.

Whether we admit it with open eyes, or ostrich-like bury our heads in the sand, there is such a thing as justice, independent of the State, above it and beyond it, although the formulation of its principles may change according to time, place, and circumstances. This is not the language of mere theory, or of idle speculation. It is apparently the view of the Supreme Court of the United States. As late as 1880, that august tribunal, "speaking of the universal law of reason, justice, and conscience, of which the law of nations is necessarily a part," quoted with approval, the language of Cicero: "Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is, and in all time will be, eternally and immutably the same."

From this opinion, delivered by Mr. Justice Swayne, on behalf of the court, in the case of *Wilson v. McNamee* . . . there was no recorded expression of dissent on the part of any of its members.³⁰

For Scott, fast are the ties that bind the universal law and the common law:

The facts of the case may be new, the rule of law may seem to be new, and the decision is necessarily so; but the principle of justice which the rule of law announces is old. "For out of the old field must come the new corn," as Sir Edward Coke says in his report of Calvin's Case³¹

Since there is "such a thing as justice, independent of the State, above it and beyond it,"³² it should be no surprise that, respecting the law of nations, Scott dismisses the idea that international rules are merely based on state consent:

From this justice nations must derive their rules of law. And this is so, although they may affect to consider themselves the source instead of the agent whereby the principles of justice, expressed and made visible in rules of law, enter the minds and the thoughts of men before they pervade the practice of nations.³³

Although Scott mostly confines his *Cases* "to the English-thinking world," he "devoutly" wishes "that members of the profession in foreign countries examine the decisions of their own courts, the awards of mixed commissions and sentences of arbitral tribunals in whose cases their respective countries have special interest, and produce collections of cases"³⁴ He notes, "[i]f our friends in other parts of the world take kindly to [this] suggestion . . . [i]nternational law could then be taught quite generally from cases"³⁵ Scott recognizes that foreign cases "are conditioned in form by local procedure and in substance by local law[, but though] [t]he stream is indeed everywhere

30. *Id.* at xiv (citing *Wilson v. McNamee*, 102 U.S. 572, 574, 26 L.Ed. 234 (1880)).

31. *Id.* at xv (citing Calvin's Case, [1608] 7 Co. Rep. 1a.).

32. *Id.* at xiv.

33. Scott, *supra* note 6, at xv.

34. *Id.* at xvi.

35. *Id.*

colored by the soil through which it reaches the sea . . . the sea itself is international.”³⁶

Much the same sort of universalism pervades Harold’s lecture. Partly, of course, it is the unspoken assumption that his enunciated human rights values are, as a matter of course, general and should be shared by all humanity. But there is an explicit universalism, too, though by no means as outspoken as Scott’s. Take, for example, Harold’s signature expression: the “globalization of freedom.” It is, as he says, “the expansion of global freedom from fewer than twenty-five democracies worldwide only thirty years ago, to some 120 today.”³⁷ It is clear that Harold views this not only as a natural and perhaps unstoppable development, but also as quite a good thing.

We have already explored the first and second of Harold’s four principles, “telling the truth” and “justice,” let us now turn to a third: “inside-outside engagement, with governments and the private sector.”³⁸ Here Harold returns to one of the oldest strategies of the American universalist tradition in international law: the enthusiastic propagation of international legal rules and process. Something like Scott’s gentle prodding above, but more like the evangelical international law mission of an American like Elihu Burritt who brought the goals of the American peace movement to nineteenth century Europe,³⁹ Harold seeks to convert others to human rights principles and practice. He outlines a strategy for America. We should focus on what he calls “norm-internalization” so that other “nations come to incorporate international law concepts into their domestic law and practice.”⁴⁰ Those that can promote such norm-internalization are “various agents of internalization— which include other nation-states, transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, issue linkages and interpretative communities . . .”⁴¹ Moreover, Harold stresses that inside-outside norm-internalization should also promote “human rights engagement with the private sector” emphasizing “that corporate social responsibility . . . is not just good, but also good for business . . .”⁴² Harold notes: “In short, coupled with government-to-government engagement, U.S. government engagement with the global marketplace can be a potent way to promote global human rights.”⁴³

36. *Id.* at xvii.

37. Koh, *supra* note 1, at 330.

38. *Id.* at 316.

39. Janis, *Protestants, Progress and Peace*, *supra* note 5, at 201-06.

40. Koh, *supra* note 1, at 316.

41. *Id.* There might be just a little too much New Haven Lasswellian-speak here, but most ordinary folk will still follow the concepts.

42. *Id.* at 320.

43. *Id.*

It is a testimony to Harold's deep-seated commitment to the globalization of freedom, that his response to the September 11 terrorist attacks on the World Trade Center and the Pentagon is framed in terms of holding fast and true to his enunciated principles. Again, there is the universalist perception: "We must think of it [not "as a clash of civilizations," but] as a battle between the post-Cold War 'Free World' against the network of Global Terrorists . . ." ⁴⁴ This is language reminiscent of Scott's quotation from Hall forecasting the Great War: "Some hates, moreover, will crave for satisfaction; much envy and greed will be at work But there can be very little doubt that, if the next war is unscrupulously waged, it also will be followed by a reaction towards increased stringency of law." ⁴⁵

Harold laments, but understands antiglobalization sentiment: it "grows out of a disturbing, but understandable fear that globalization is widening the gap between the haves and the have-nots, is threatening local culture and autonomy, and is imposing western values on the world in the name of universal values." ⁴⁶ Harold's answer, again, is that of the lawyer: "[W]e must contest and defeat bin Laden's arguments in the court of public opinion [W]e must persuade the have-nots that we share their concern about finding better ways to live our common future than in a state of indefinite violence and war." ⁴⁷ And there is more missionary zeal: "[W]e must send our young people overseas not just to fight, but to work with other young people in countries around the world to drain the breeding grounds of anti-Western terror." ⁴⁸

UNIVERSALISM: AN AMERICAN VISION OF INTERNATIONAL LAW

There are, of course, many competing American visions of international law. Universalism is only one of several perceptions of the discipline that we have held over the centuries. Not everyone, of course, favors the American universalist tradition. George Kennan is probably its most famous critic. ⁴⁹ This wonderful diplomat and diplomatic historian sees "the most serious fault of our past policy formulation to lie in something that I might call the legalistic-moralistic approach to international problems." ⁵⁰ But I, for one, am still drawn to it.

This is not the place for a full-fledged defense of the universalism of the Scotts and the Kohs, but I would draw your attention to some of universalism's attractive features. First, for me, is universalism's sympathy for all men and

44. *Id.* at 331.

45. Scott, *supra* note 6, at xiv.

46. Koh, *supra* note 1, at 334.

47. *Id.*

48. *Id.* at 334-35.

49. See GEORGE F. KENNAN, AMERICAN DIPLOMACY: 1900-1950, at 79-89 (1951).

50. *Id.* at 82.

women as our brothers and sisters. This is, I think, one of the aspects of universalism that ties it most tightly to one of our best traits as Americans: our tolerance for diversity. Second, I would identify universalism's belief in progress, or at least in better times ahead. This, too, links universalism to another admirable American characteristic: our optimism for the future, an optimism that includes a willingness to solve problems. I believe that the universalist way is a good way, though not the only way, to live life as an international lawyer. I warmly commend to you James Brown Scott and Harold Hongju Koh.

