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Jeremy Waldron is currently the University Professor and Professor of Law at New York University. His decades of writings about rights, property, constitutionalism, democracy, torture, hate speech, judicial review, and many other topics attests to a career with remarkable breadth and depth. Professor Waldron has advanced liberal theory in relation to law, legal theory, political theory, and historical political philosophy.

In this edition, Professor Claudia Card, the Emma Goldman Professor of Philosophy at the University of Wisconsin–Madison, responds to Waldron’s recent book The Harm of Hate Speech (Harvard University Press, 2012) and analyzes the importance of the concept of a hateful environment. Next, Professor Parry, the Jeffrey Bain Faculty Scholar and professor of law, Lewis & Clark Law School, focuses on Waldron’s treatment of individual rights, and the relationship between law and morality, as found in Waldron’s Dignity, Rank, and Rights (Oxford University Press, 2012), and Torture, Terror, and Trade-Offs: Philosophy for the White House (Oxford University Press, 2012). Professor Kevin Toh, associate professor of philosophy, San Francisco State University, analyzes Waldron’s analysis of the authority of foreign law. In a final essay, Professor Waldron responds to each of these critiques.

The editors thank the commentators and Professor Waldron for their detailed and notable engagement of these topics. This edition is part of a long-standing series of essays honoring and analyzing the writings of influential theorists in legal, social, and political philosophy. For each edition, the editors invite a featured philosopher or legal theorist to respond to several substantive commentaries about some aspect of the featured theorist’s work. The APA Newsletter also publishes symposiums of rising scholars in philosophy and law, as well as the APA proceedings of the Berger Prize, which honors an outstanding essay written in philosophy of law over the preceding two years. The goal of the APA Newsletters in Philosophy and Law is to establish an engaging and lively exchange of ideas that contributes to the profession and is accessible to a broad audience, as befits the unique place of the APA Newsletters.

Evil Environments

Claudia Card
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Recently, in writing an essay on surviving homophobia, I was led to the recognition of another category of evils besides those of evil deeds, institutions or practices, and social structures. That new category is evil environments. Jeremy Waldron’s book The Harm of Hate Speech was an important catalyst in the process of my coming to see that environments can be evil in ways that are not simply reducible to individual deeds, practices, or even social structures. Waldron argues that hate speech can poison a social environment. The poison, it seems to me, has an emotive component that is not captured by, or explicit enough in, the ideas of evil deeds, institutions or practices, or even social structures. Environmental poison, I find, is also put out by certain hate crimes other than words. Recognizing that there are evil environments enables me to understand better the “phobia” in homophobia by orienting me more to the world around us, our environments, than to the psychological worries inside us.

My work on evils is intended, first of all, to distinguish evils from lesser wrongs. I define evils as reasonably foreseeable intolerable harms produced (maintained, aggravated, etc.) by inexcusable wrongs. So understood, evils have two irreducibly distinct basic elements—an agency element (inexcusable wrongs) and a harm element (intolerable harms)—linked by reasonably foreseeable causality. The noun “evils” (plural) is fundamental in my account; I treat adjectival uses of “evil” as derivative. An evil intention, for example (not an evil unless it succeeds), is an inexcusably wrong intention to do reasonably foreseeable intolerable harm; an evil practice (an evil if actualized and not just an idea) is one for which there is no moral defense (is morally inexcusable) and which does reasonably foreseeable intolerable harm. An evil environment encourages, facilitates, and in various ways supports the perpetration of evil deeds and practices. My interest is not in labeling persons or governments. My interest is in identifying the evils of deeds, practices, social structures, and now, environments as well.

Atrocities have been my paradigms of evil because in them the elements of evils are writ large. “Writ large” does not always mean massive. Atrocities are extreme in their cruelty, inhumanity, or degradation. They are often massive in scope. But a single murder can be an atrocity, for example, the 1998 murder of forty-nine-year-old African American James Byrd, Jr. in Jasper, Texas. Three young white men tied him to the bumper of a truck and dragged him down a country road to his
death. His body was found in pieces.¹ Evil environments make atrocities more likely.

That there is no excuse, no moral defense, does not mean there is no reason or explanation. Rather, it means those reasons carry no moral weight. A reason that might carry moral weight for some deeds, or in some contexts, may carry none in others. That someone truly in need would be helped is often a reason that carries moral weight, but not for killing an innocent wealthy person. Evils are morally indefensible.

An evil environment can be sustained by activities that are partly morally defensible. Not all of those implicated in the deed or practice are evil doers. Some evil deeds (issuing certain credible evil threats, for example) can provide a partial moral defense (excuse) for others’ choices that contribute to an evil environment, choices they would otherwise not have made.

Evil environments encompass not just what people do but also what people feel, both rationally and irrationally. Our feelings affect what we are apt to notice, our willingness or unwillingness to take various initiatives, our openness to listening, and so forth. Evil environments invade the sensibilities of their inhabitants, transients, and visitors.

My work on evil environments builds upon Waldron’s account of the harm in hate speech, extending that account to certain hate crimes that, like words, send a social message that lingers. It not only lingers. It reverberates. Waldron’s work on the harm in hate speech is motivated by the (well-placed) sense that in the United States, these harms are not sufficiently appreciated. He does not argue that all things considered, hate speech should be criminalized. His objective, more limited, is to get the reader to appreciate some of the costs (harm) of not doing so. The speech he is concerned about is less the spoken than the written word, such as signs in restaurant windows that say, “Jews and Dogs Prohibited.”⁵ Writings of this sort stay around and become part of an environment, whereas the spoken word is less likely to leave a lasting imprint.⁶ Speech in the form of written and posted announcements can send potentially dangerous messages that undermine an important public good. The endangered public good, in our multi-ethnic, multi-racial, religiously diverse society, is that “sense of security or public good. The endangered public good, in our multi-ethnic, potentially dangerous messages that undermine an important public good.”⁸

There is also, however, the very real phenomenon that Max Scheler called “emotional infection.”⑩ Scheler’s “emotional infection” really is internalization. To avoid the medical model and acknowledge that what is internalized is not always bad, I want to extend Waldron’s account of the harm in hate speech to certain hate crimes as well. Some, even without explicit words, also encourage hatred by the messages they send. They are not merely expressive of the perpetrator’s feelings. Cross-burnings at the homes of African Americans are an example of hate crimes that also “speak” and have been treated as speech.¹² Some hate crimes, like overt hate speech, contribute to creating or maintaining environments in which people who belong to unwelcome groups are not safe. The impact of such crimes lingers. Some crimes are so violent and memorable that decades later, people who were around when they were perpetrated still talk about them. Leaving a murdered gay victim tied to a fence post for all to see surely sends a message.

I have long had an ambivalent response to the term “homophobia.” It is not a strong enough term, also not very apt, for many of the atrocities it has been used to describe. But the term does have the advantage of calling attention to emotion and is in that way apt for indicating that what is at issue is not just a deed or practice but an environment—the feelings, beliefs, and attitudes that underlie and sustain individual deeds and social practices. And so, I have not abandoned the term “homophobia,” despite my continuing ambivalence.

Even murders and murder attempts have been labeled “homophobic.” This usage surely underdescribes, if not misdescribes such hostilities. On my understanding of evils, to justify the belief that queer conduct was an evil, it would be necessary to show that it is inexcusably wrong and does intolerable harm. If such showings are extremely unlikely, we may want to probe beneath the surface to see what could account for such negative judgments and the vehemence with which they are held. Enter the phobia hypothesis. The hypothesis is that irrational fears underlie anti-gay hostility. Hence, the term “homophobia.”

This hypothesis has several problems. First, fears presuppose rather than explain negative judgments; they presuppose judgments that what is feared is dangerous. Second, calling fears phobias medicalizes them, undermining judgments of responsibility. It suggests that homophobes have no more control over their emotional responses to gays and lesbians than agoraphobes have over their fears of open spaces.

The fear that many of us have had to overcome that we might be lesbian or gay is often referred to as “internalized homophobia.” That term is also usually a misnomer. First, although that fear can be real enough, it is probably not internalized. Fear is, of course, internal, but not necessarily imported from without. When “internalized homophobia” names one’s fear of being a pariah, it names a rational, well-grounded fear of others’ hostilities. In a genuinely hostile environment, that fear is not a phobia. It is a sane response, rather than irrational internalizing.

There is also, however, the very real phenomenon that Max Scheler called “emotional infection.”¹³ Scheler’s “emotional infection” really is internalization. To avoid the medical model and acknowledge that what is internalized is not always bad, I
prefer the term "emotional echoing." Like mountain echoes, emotional echoes tend initially to magnify the intensity of what they echo, and they fade gradually with distance from the source. The capacity to echo others' emotional responses is no doubt on the whole a very good and protective thing. It probably has an evolutionary basis. When dangers lurk, there is not always time, or even the capacity, for rational argument. Babies and many other animals seem to echo the emotional responses of those around them. An appreciation of this phenomenon fits well with Waldron's idea that speech can poison an environment. Words are among the conveyers of hostile feelings that may become widely echoed in an environment.

When we internalize others' anti-gay sentiments, what we internalize is first of all hostility, not fear. Fears, of course, may follow and also be internalized. These phenomena suggest a plausible answer to the question regarding the source and intensity of widespread anti-gay hostilities. It is possible to pick up (internalize, echo) the emotional feelings (hatreds or fears, for example) of others in your environment without realizing that you are doing it and without any perception of a cognitive basis for those feelings. It is frightening to ponder the implications of that possibility for poisoning an environment. Because such feelings lack a cognitive basis in their echoes, rational persuasion is not likely to change how they feel, although their awareness of the lack of such a cognitive basis has the potential to change what they believe and do.

I find it more plausible that widespread anti-gay hostilities are due in large part to the environmental poisoning of hostile emotional echoes than that most people who have such sentiments have them as a result of their own irrational beliefs.

It gets worse, however. It is possible to echo others' feelings even when you do realize that this is what you are doing and when you actually reject the cognitive beliefs that would have justified the feeling. Example from my childhood: every summer in our house, a bat would get down from the attic into our living space. When that happened, Mother would wrap towels around her hair and mine and tremble with me against the wall behind a door, digging her nails into my shoulders and saying, "I know this is silly; it is irrational to fear bats; they are probably harmless and scared of us; you shouldn't be afraid of them." I still carry my mother's bat phobia, although I believed her even then when she said the fear was baseless. And so, it must be acknowledged that we can echo hostile feelings, even while we think they are indefensible, just as we can feel guilty if accused, even if we know we are not.

Echoed feelings can also affect the demeanor and conduct of even the echoer who knows (or believes) those feelings are irrational. I avoid bats as much as possible and must remind myself that bats are an important element in the ecosystem. Still, I do not go out of my way to protect them. Likewise, failing to support or even protect lesbians and gays, if not actively excluding them from one's environment, may be an automatic response in those whose anti-gay feelings are echoed and excluding them from one's environment, may be an automatic response to support or even protect lesbians and gays, if not actively excluded.

Perhaps simply because of how they feel, especially if they are not given to critical self-examination.

In such an environment, the default becomes not to inquire into bullying and crimes against members of hated groups, such as questionable deaths that may be murders or other injuries and losses that may not have been accidental. The upshot is that for many young people who belong to defamed groups and justifiably fear becoming social pariahs, suicide becomes an attractive option. Wikipedia has some hair-raising entries with statistics on lesbian and gay suicides. An entry titled "Violence against LGBT People" says violent hate crimes against LGBT people tend to be more brutal than other hate crimes. It quotes a handbook as saying, "an intense rage is present in nearly all homicide cases involving gay male victims" and goes on to say that "it is rare for a victim to be just shot; he is more likely to be stabbed multiple times, mutilated, and strangled." What I find important is not the "more brutal than" (I do not know if that is true) but simply the level of brutality, which is more easily documented.

The entries I found with statistics do not break them down by gender. In the vast majority of articles that I have found on individuals, all the parties were men. And so, in the interests of greater visibility for women, I recently reread two narratives by women who survived murder attempts by men who were unknown to them. One is by Terri Jentz, who was attacked in 1977 in Oregon. The other is by Claudia Brenner, attacked eleven years later in Pennsylvania. Brenner's book Eight Bullets: One Woman's Story of Surviving Anti-Gay Violence tells of her survival and her companion's death at the hands of shooter Stephen Roy Carr, an escaped convict. Jentz's beautifully written narrative, Strange Piece of Paradise, is much longer (over 500 pages) and written after a much longer lapse of time. It tells of how Jentz survived and came to understand the attempted murder of herself and her companion while they slept in a tent on the night of June 22, 1977. In each attack, a white male perpetrator targeted, without warning, vulnerable, unarmed female partners who were engaged in something physically ambitious, not stereotypically feminine, without male assistance or protection and not for the benefit of men. Brenner and her lover Rebecca Wight (who did not survive) were hiking the Appalachian Trail. Jentz and her companion (who did survive) were camped overnight in a small Oregon park near the beginning of what was supposed to be their cross-country bike trip.

The Oregon case never came to trial, and was never officially solved by law enforcement. Fifteen years after the crime, Jentz returned to Oregon and through persistent efforts solved it herself. After interviews and research into legal records and newspaper articles, she identified one Dirk Duran as the perpetrator, a long-time resident of the area near the wayside crime, Jentz returned to Oregon and through persistent efforts solved it herself. After interviews and research into legal records and newspaper articles, she identified one Dirk Duran as the perpetrator, a long-time resident of the area near the wayside park where the crime was committed. By then, Duran could not be prosecuted for the crime because of Oregon’s statute of limitations, which applied to murder attempts although not to murder itself. Had Jentz or her companion died, Duran could have been prosecuted even then. But Shayna Weiss (Jentz's pseudonym for her companion, who prefers not to be named) survived, thanks to quick thinking by Jentz and skillful surgery at a nearby hospital. Weiss never had any memory of the event and did not want to hear about it from anyone.

By his own admission, Carr targeted Brenner and Wight on the basis of their sexuality. He was stalking Brenner and Wight on the Appalachian Trail and had watched them make love. In broad daylight, he fired several bullets into Brenner (including her neck and face), which, miraculously, did not kill her, and two bullets into Wight’s back, which proved fatal. Wight’s quick thinking enabled Brenner to do what was necessary to
get herself to the nearest road and flag down help. All attempts to save Wight, who could not get up, were futile; doctors said nothing could have saved her. But law enforcement got right on the case and apprehended Carr, who was then tried, found guilty of a hate crime, and sentenced to prison in Pennsylvania.

In contrast, no one was ever charged in the Oregon attempt. The explanation preferred by law enforcement years later was miscommunication among enforcement agencies. Another hypothesis, unearthed by Jentz, was that for law enforcement, Duran was a valuable source of information on local drug dealers, too valuable to send to prison. But what most stays with me, and what most struck Jentz, is that person after person whom she interviewed said “everyone knew” it was Duran. Everyone knew, and yet no one came forward. For fifteen years.

Why didn’t they? Did they not fear that others might be attacked, if no one were held accountable? Normally, one would expect such a violent assault to provoke fears of repetition, especially if a local person were suspected, and that such fears would elicit community cooperation in identifying the perpetrator, rather than community silence. But if it were widely believed that the targets of the crime were “only” members of a group or groups toward which hostility echoed through the community, there might be no such fears. An evil environment could contribute to explaining that otherwise puzzling community silence.

The crime was so violent and shocking that it seems to have left an indelible memory in the surrounding community, as Jentz found when she interviewed people fifteen years later who lived in the area at the time of the crime. The perpetrator had deliberately driven his truck over the tent in which Jentz and Weiss were sleeping. He even stopped the truck for a while on top of Jentz’s body, breaking many of her bones and leaving tire prints on her flesh, before moving it off. He then got out of the truck with an ax and, after chasing and striking Weiss, who cried out, he came back and attacked Jentz also with his ax, breaking one of her arms and inflicting other injuries. Weiss had tried unsuccessfully to flee, but he caught her and wounded her seriously in the head, exposing part of her brain. She was blind for a time after the surgery that saved her life, and she never regained enough sight to be able to drive a car, although she went on to become a practicing physician.

Homophobic hate crimes do not necessarily produce or even issue from a homophobic environment. But they can. These cases exemplify contrasting environments in that regard, one hostile, the other more positively responsive. Carr may have come from a homophobic environment in Florida, where he had escaped from prison. If so, he found himself in a very different environment in Pennsylvania, one not about to let him get away with murdering members of an unpopular group. In contrast, the part of Oregon where Duran assaulted Jentz and Weiss in 1977 was an evil environment. Duran had a history of violence for which the community had not held him accountable. Much of his violence was against women who talked back or were in other ways perceived to violate feminine norms. Weiss talked back when she tried to flee, which seemed to anger him more. Jentz did not move but used a calm tone, telling him to take anything but just to leave them. Remarkably, he then fled, taking only his truck and his ax.

In the past, although I have favored hate speech regulation (and fought a losing battle for it on my campus), I have opposed penalty enhancement for hate crimes. 21 Regarding penalty enhancement, I was not persuaded that hatred of individuals on account of their group membership (religious, racial, national, etc.) was more reprehensible than some other hatreds, such as that of a spouse who batters a partner or the hatred exhibited by Ted Kaczinski, the Unabomber, whose target group for receiving his lethal packages (apparently, developers of high technology) is named in no hate crime legislation. Nor did it seem to me that one could say on the basis of its motivation how much harm a crime does. The most nearly convincing argument I had found favoring penalty enhancement was that offered in a law journal by Alon Harel and Gideon Parchemovsky that what is at issue is a matter of fairness in the distribution of protection to members of vulnerable groups. 22 They assumed that typical hate crimes are committed by members of a more powerful or privileged group against members of a less powerful or less privileged group. The more vulnerable group needs additional protection, which penalty enhancement offers, or is meant to offer. That seemed to me a more plausible argument than arguments that hate crimes were more reprehensible or more harmful than otherwise comparable crimes.

However, in reality, members of vulnerable groups are apt to be just as vulnerable, if not more vulnerable, to crimes committed against them by other members of the same group (vulnerable, that is, to horizontal hostility) or by members of other groups that are also relatively vulnerable. Recall who suffered from the riots that broke out after the Rodney King verdict in Simi Valley, California, in 1992. It was a white jury that brought in the verdict acquitting the officers who had beaten King while he lay unarmored on the ground. But it was Korean American neighborhoods, not white neighborhoods, that were trashed by enraged African Americans. And so, there is another fairness issue: How fair is it to enhance the penalties of those who are already especially vulnerable, who have already suffered a long history of oppression, who have been, in effect, already “punished” more than enough? Fairness arguments cut both ways.

After reading Waldron’s analysis of the harm in hate speech and putting together his analysis of lingering hate speech with Jentz’s narrative of the unsolved brutal crime that still reverberated through the environment in which it was committed, I have had to rethink my critique of penalty enhancement for hate crimes. I had not taken into account the harms that Waldron identifies in hate speech. I had not taken into account the legitimation (“normalization”) and recruitment factors and their undermining of the public good of security in our person as each of us “goes about his or her business.” Or that tacit announcement to others “out there,” who may share the hostile sentiments, that they are not alone and the pragmatic implication that together those who share such sentiments might be able to translate their sentiments into effect action to exclude members of the hated group or groups. Although Waldron does not apply his analysis to hate crimes, I think his analysis does apply to crimes like that perpetrated against Jentz and Weiss. Like hate speech, such a crime without normal follow-up contributes to “something like an environmental threat to social peace, a sort of slow-acting poison, accumulating here and there, word by word, so that eventually it becomes harder and less natural even for good-hearted members of the society to play their part in maintaining this public good.” 23 The environment of 1977 in that part of Oregon, which had tolerated not only the crime against Jentz and Weiss but also widely known domestic violence, was one in which “even the good-hearted members” of society did not “play their part in maintaining” the public good of basic security and respect. Such an environment was poisoned not just “word by word” but “act by act” with no accountability. Acts, and omissions, too, can send intended and foreseeable messages that serve to recruit like-minded others. Jentz’s persistence in exposing and, in her book, publicizing unpleasant truths sends a potentially powerful counter-message that should have been sent years before by law enforcement.
Although I was not thinking about a possible connection with hate crime and penalty enhancement, I used the recruitment argument myself a couple of years ago when Bradley Smith, the notorious Holocaust debater, ran an ad in my campus’s student newspaper. The newspaper editorial staff did not like the ad but was unable to see how they could justly refuse to publish it. I argued then, in a class I was teaching on moral philosophy and the Holocaust, that the issue was not really the marketplace of ideas in which everyone is searching for the truth but, rather, speech that functions to recruit antisemites. That function distinguishes hate speech of the sort that Waldron is concerned about from other unwarranted expressions of equally intense hatreds.

The same, I now argue, is true with regard to many hate crimes. The Unabomber was not dangerous as a recruiter (he got no visible or worrisome uptake). Domestic batterers are not recruiters. Horizontal crimes within a vulnerable group are not recruitment tools. But racists and those who hate on the basis of ethnicity, religion, gender, nationality, or sexuality are not just expressing their sentiments and harming immediate victims. They are putting out messages that pollute the environment, undermining the basic security of everyone in the hated groups, and recruiting like-minded others. As Waldron puts it, they are undermining a public good. Recall the Wikipedia entry mentioned earlier noting that anti-gay hate crimes are often very brutal. They are much more brutal than would be necessary to send a message simply to the victim. It is as though they were meant to leave an enduring impact on the environment, to signify to others, not present at the scene of the crime but who may share relevant sentiments, that they are not alone and that together they may be able to rid society of perverts, at least force them into hiding. Such crimes send a message to potential victims as well, members of vulnerable groups, that they may be next. The resulting basic sense of insecurity and fear of intolerable harm among potential victims can lead to their moral paralysis, or worse, to complicity in maintaining the very environment that endangers them, by trying to “pass” as something other than what they are, which easily requires betraying others. The only likely fear on the part of perpetrators is the fear of getting caught. The result in the case of anti-gay hate crimes is an evil environment permeated by credible threats of harm to anyone who is or might be perceived as lesbian or gay or as supportive of lesbians and gays. Credible, pervasive threats of harm are themselves harms. The environment in Nazi Germany between 1933 and 1945 was an evil environment. So was the environment in the twentieth-century United States in areas where the Ku Klux Klan was active.

Jentz found the local culture deeply complicit in the failure of law enforcement even to regard Duran as a suspect. The prevailing attitude was hostile toward women without visible male protection, as though they were “asking for it.” It would probably not be difficult to identify many words and pictures that functioned there as misogynous and homophobic pollutants.

I hope Waldron’s book, The Harm in Hate Speech, will be widely read in the United States. It has been enormously helpful to me in thinking about evil environments.

Notes
2. Hereafter, I omit the “other” in using the term “hate crime,” since in the United States, unlike in a number of European countries, hate speech is not criminalized but is deemed protected under the First Amendment to the U.S. Constitution. When I use the term “hate crime,” it can be assumed not to include hate speech. Waldron, who means to persuade a U.S. audience that the harms of hate speech deserve to be taken seriously, follows that usage as well. Ultimately, however, I want to call attention to the fact that some hate crimes also “speak.”
4. For an account of this crime and the aftermath, see Temple-Raston, A Death in Texas.
5. Waldron, The Harm in Hate Speech, 2.
6. Ibid., 37.
7. Ibid., 4.
8. Ibid.
9. Ibid., 2-3.
10. Ibid., 35.
11. On ratification, see Kutz, “Causeless Complicity,” 293.
16. The same point probably applies to much of what is called “internalized anti-Semitism,” “internalized racism,” and “internalized sexism.”
17. Waldron, The Harm in Hate Speech, 4.
18. Many Wikipedia sites also have bibliographies with references to formal studies.
19. http://en.wikipedia.org/wiki/Violence_against_LGBT_people. That description of murdered gay men reminds me of some descriptions of Lynchings of black men in the United States during the first half of the twentieth century and of testimonies of death camp survivors who witnessed the torture of others who were then murdered.
20. Jentz finds the crime she survived misogynous but does not overtly identify as homophobic. Without using the words “gay” or “lesbian,” she writes of the crush she had on her companion, and in the acknowledgements at the end of her book thanks her partner, Donna Deitch, known to many of us as director of the lesbian film Desert Hearts, based on Jane Rule’s 1964 first novel, Desert of the Heart.
24. Bradley Smith is former director of the Institute for Historical Review and founder of the Committee for Open Debate on the Holocaust.

Bibliography
Grounding Rights: Some Questions for Jeremy Waldron

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Jeremy Waldron has written widely and deeply on topics associated with liberal theory, including its relationship to law and legal theory. From that wealth of material, I will focus on his treatment of individual rights in his most recent work, including two books: *Dignity, Rank, and Rights*, and *Torture, Terror, and Trade-Offs: Philosophy for the White House*. More specifically, I will discuss his position on moral foundations of rights, the relationship of violence to law, and the relevance to his work of the critical legal studies movement. I will also consider his approach to religious belief.

My goal is to suggest connections among arguments in Professor Waldron’s recent work and to pose questions about the combination and implications of those arguments. Among other things, I consider the extent to which Waldron’s various discussions of rights form an integrated structure, and whether that structure holds up. Throughout, I write as a lawyer, not as a philosopher, theorist, or historian. No doubt this perspective risks misunderstanding on my part; I hope it supports an assessment of Waldron’s work that is both sympathetic and critical.

**Rights: Structure and Substance**

In *Dignity, Rank, and Rights*, Waldron rejects the primacy of moral or metaphysical approaches to human dignity and looks instead to law. Dignity, he suggests, is a matter of legal status, and the modern approach to human dignity expresses the universalization of “a high-ranking status, comparable to a rank of nobility—only a rank assigned now to every human person, equally without discrimination: dignity as nobility for the common man” (22). This legal approach, moreover, buttresses the link between dignity and human rights. Dignity, the high and equal status of all persons, is “the ground of rights, the content of certain rights, and perhaps even the form and structure of rights” (14). But, it is not the foundation of rights. Waldron specifically doubts “the claim that rights derive from any single foundation, be it dignity, equality, autonomy, or . . . security” (17). Still, dignity-as-status is “foundation-ish” (21), and “it works in the foundations, complementing whatever else is working there” (143).

In his introduction to *Dignity, Rank, and Rights*, Meir Dan-Cohen observes that Waldron’s approach is “first and foremost a view that universal and equal dignity is better anchored in evolving social practice than in Kantian metaphysics” (5). Although Dan-Cohen finds this position attractive, he goes on to worry about the necessary contingency of anchoring dignity—and perhaps also rights—in social practices that could change over time. Dan-Cohen ought to worry, but I don’t think it is fair to name Waldron as the source of a concern that partakes less of liberal theory and more of the modern condition. The question of contingency, though, provides a good springboard for raising several further issues.

First, the idea of dignity derived from rank seems to operate in part as a structural idea. It helps explain where rights come from and how they function. But it is also substantive, even if not necessarily foundational, because it supports a baseline right to equal respect. In *Torture, Terror, and Trade-Offs*, Waldron goes into greater detail about the ground level substantive commitments of modern liberal legalism. Writing about torture, he demonstrates that there is “a pragmatic case for upholding the rule against torture as a legal absolute, even if we cannot make a case in purely philosophical terms for a moral absolute” (221). Keeping the focus on law, he argues that the pragmatic case against torture has an additional component: the anti-torture rule is not just a very good idea; it also has something to do with “the spirit of our law” (222). More specifically, it is an “archetype,” by which he means:

> the idea of a rule or positive law provision that operates not just on its own account, and does not stand simply in a cumulative relation to other provisions, but that also operates in a way that expresses or epitomizes the spirit of a whole structured area of doctrine, and does so vividly, effectively, publicly, establishing the significance of that area for the entire legal enterprise. (228)

Waldron suggests several other archetypes, but his main focus is torture. He argues that the anti-torture rule, as an archetype, is “vividly emblematic of our determination to sever the link between law and brutality, between law and terror, and between law and the enterprise of trying to break a person’s will” (233). Both here and in *Dignity, Rank, and Rights*, Waldron does not deny that law uses force, but he insists that the archetype grounds the idea “that law can be forceful without compromising the dignity of those it constrains and punishes” (234). Indeed, at its broadest articulation, the anti-torture norm undergirds the rule of law itself (250–52). Nonetheless, I do not understand Waldron to be arguing that this or any archetype provides a test for what counts as a valid law. To the contrary, he admits that “[i]t is no question but that [torture] could be introduced into our law, directly by legislation, or indirectly by so narrowing a definition that torture was being authorized de jure in all but name” (223).

Importantly, Waldron also insists that there is nothing “natural or given” about an archetype”: “it is something we create, albeit sometimes implicitly” (226–27). Yet for precisely that reason, because they represent a kind of deep summary of contingent human norms, archetypes change, although not as dynamically as more typical legal rules. Although changes in the status and content of archetypes presumably are inevitable, Waldron does not use neutral language when he discusses the possibility that the early 2000s debate over torture could change the anti-torture archetype. Instead, he talks of “undermining” and “corruption,” which suggests a need to defend and preserve the archetype in roughly the form that he has defined or identified (242–47).

Throughout his discussion, Waldron stresses that he is talking about background principles and policies that, although they “operate more like moral considerations[,] are distinctly legal, being emergent features of actually existing legal systems and varying from country to country in a way that moral considerations do not” (226). But the implicit claim that the anti-torture norm is just about right in its current form suggests a different approach. I think it is possible to interpret archetypes as more than an improved or inclusive version of positive law. They partake of the “spirit of our law,” and it strikes me that this spirit must itself be a special tier of background principle, certainly more than an agglomeration of legal rules or of history, yet also something more than legal rules that draw upon moral principles but also vary from them. The same is true, I think, for at least some of the archetypes, particularly the ban on torture.


Given the language of Waldron’s discussion of torture and of the possibility of changes in the anti-torture archetype, in which disgust and outrage leap off the pages, I don’t think he really wants to limit the force of that archetype or to suggest that it might vary from place to place. He frames his analysis as a legal argument, but legal language does not contain it. What allows Waldron to be an opponent of torture, and to construct compelling legal arguments against it, I suspect, is not law. It is a commitment to something that is not wholly legal, although the extent to which it is outside law is not clear. These are waters that Waldron knows far better than I, and I’d much rather hear more from him than to start trying to shoehorn his position into the various boxes associated with positivism, anti-positivism, or natural law. Whatever his position may be, I have trouble accepting the archetype as simply, purely, or even primarily a legal principle. Waldron is clear, I think, in rejecting the possibility that an archetype might be primarily a moral commitment. Still, I can’t help suspecting that, whatever its legal status, the archetype comes to law from some kind of moral reasoning or commitment.

One response might be that the archetype represents a threshold between law and morality. Defining this kind of threshold with precision is difficult, but natural law might do the job. Thus, I also would like to know more about how the archetype links to Waldron’s conception of natural law as something that, if it exists at all, must take the form of “forceful norms requiring or prohibiting certain things, distinct from mere ‘forceful norms’ that comprise it?” Is there natural law, and if so, are the archetypes the kind of “forceful norms” that comprise it?

All of this also returns us to Waldron’s argument in *Dignity, Rank, and Rights*. How does his analysis in that book blend with his analysis in *Torture, Terror, and Trade-Offs*? If the two books fit together, then the commitment to human dignity seems as well to be an archetype, and archetypes appear to be the “foundation-ish” things that give spirit to legal rights and legal rules. But if I am correct that archetypes are necessarily—even if not completely—moral commitments, and if, as I suggest, they come to law from moral commitments, does that mean the commitment to dignity is primarily moral, after all?

### Sketching a Critical Response to Dignity and Rights

Waldron does not spend time in his recent work dealing with criticisms of rights discourse, and he is sometimes impatient with objections derived from critical approaches to law. For example, he has described as “dogmatic” scholars who stress the violence of law. In *Torture, Terror, and Trade-Offs*, he dismisses the violence claim in the course of arguing that liberal legalism entails a substantive commitment to the non-violence archetype (232–34). In *Dignity, Rank, and Rights*, he says a bit more about coercion and the failures of legal and political institutions, although he suggests that emphasizing these failures is “cynical” or “fatuous” (66). He maintains, for example, that it is precisely because “law is coercive and its currency is life and death, freedom and incarceration, that its persuasive commitment to dignity is so momentous” (63).

He expands his specific examples, as well, adding the due process commitment to giving every person a hearing, the fact that law relies as much as possible on voluntary compliance, and the decline, especially in Europe, of “dehumanizing forms of punishment.” And, he describes and admits the massive failures of the U.S. and other legal systems actually to respect people’s dignity in practice (61–65). Waldron’s basic point is simple and perhaps also uncontentious as far as it goes: “A legal system is a normative order [that] commits itself publicly to certain rules and standards,” and those public commitments provide “a pretty straightforward basis” for identifying when things have gone wrong, “without necessarily licensing the cynical conclusion that these were not its standards after all” (65–66).

I don’t think it is cynical to maintain, however, that there is a tipping point at which actions and results undermine or give the lie to public commitments and, further, that it is not difficult to reach the tipping point when the public commitments are not as robust or expansive as they may at first appear. How robust, then, is the commitment to human dignity? As an historical matter, the formal commitment to dignity in the United States has coexisted with practices that are directly at odds with it. True, ideas of dignity have helped undermine some of those practices, such as slavery and subordination based on race and sex, but others persist (including the ones that Waldron mentions).

So, too, the actual rules for deciding legal disputes often differ significantly from the popular understanding of those rules. Thus, while there may be a general public commitment to human dignity, it may not do as much actual legal work as one would first imagine. Even if one puts to one side the largely unconvincing analysis of the Office of Legal Counsel’s “torture memos,” the responsible practice of law is replete with exceptions, balancing tests, deference to government officials, the ability to distinguish prior cases, and wildly diverging approaches to textual sources. The commitment to dignity is certainly in play in all of this, but it suffers from many exceptions, gets balanced against other interests, goes unremedied with distressing frequency, and sometimes finds itself interpreted to the periphery.

Legal proceedings themselves, while they provide a formal opportunity to be heard, don’t evidence an overriding concern with dignity. The essentially assembly line processing of plea bargains in urban courthouses, which results in jail sentences for disproportionate numbers of poor and/or minority defendants, is the most obvious example. Just as significant, though, is the fact that most Americans lack the means to participate meaningfully in adversarial civil proceedings. Their interaction with law in non-criminal matters is usually as consumers bound to these principles.

Not all of this supports the claim that law is necessarily violent (for example, the last example, of government violence, is arguably the thing that law strives to control), but it does work against the idea that law is centrally concerned with human dignity. I agree with Waldron that there is plenty of formal law on which to ground criticisms of these phenomena, and normative commitments to dignity and against such things as torture play a role in the actual practice of law. What I question is what I take to be his claim that contemporary law and the legal practice that produces it are, in fact, pervasively committed to these principles.

Perhaps the difference between our perspectives is not a fundamental divide but simply a matter of emphasis. Waldron stresses the conceptual commitment; I stress the failure in practice. Each position has a core that the other must admit, even if everything else remains at issue. Perhaps, too, historical perspective allows the claim that, for all the failures of the present day, one must at least recognize how far we have come towards the goal. Further, “[o]ur practices sometimes convey a sort of promise and, as in moral life, it would be a mistake to think that the only way to spot a real promise is to see what undertakings are actually carried out” (66). This is, I think, the liberal answer. At the risk of being fatuous, I doubt that it provides an adequate answer to the persistent violence and unfairness of law in practice.
Consider, first, the promise of dignity. For Waldron, the promise of dignity is a goal towards which to struggle, for the purpose of achieving it. But promises entail waiting, and the risk is that the future of justice, freedom, or equality always remains on the horizon. If so, then the unobtainable goal may end up functioning, perhaps even primarily functioning, to legitimize the everyday practices that fall short of justice. In his discussion of liberalism and empire, for example, Uday Mehta contends that in the nineteenth century, “virtually every liberal justification of empire is anchored in the patience needed to serve and realize a future. And that future is invariably expressed through the notion of progress.”

What are the chances that the same thing is true of dignity once it leaves Waldron’s hands?

The critical legal studies attack on rights might also provide a useful perspective on Waldron’s idea of dignity as equal rank that grounds “a furious sense of one’s rights and a willingness to stand up for them as part of what it means to stand up for what is best and most important in oneself.” Robin West has recently argued strongly and at length for the validity of the CLS critique, which she summarizes as the claim that such things as free speech and the norm against discrimination are “complicit in the massive unjust subordination of entire peoples that is effectuated by liberal legal discourse.” “[T]hey alienate us from each other and ourselves, they legitimate massively unjust hierarchies that burden subordinated peoples with a false belief in the necessity as well as justice of their subordination, and they imprison all of us in various doctrinal and ideological straightjackets.”

As does Mehta, West insists that seen in context, liberal rights function in predictably pernicious ways, despite their ostensible promise. The targets of the critique implicitly include the ideas, such as equal dignity, that support liberal rights. More pointedly, I assume West would take strong issue with the idea that standing up for liberal rights is “part of what it means to stand up for what is best and most important in oneself.”

My goal, though, is not to assert a conflict between Waldron the theorist of liberal rights and West the proponent of the CLS critique. For his part, Waldron has expressed sympathy with some arguments and political goals that are associated with CLS, even as he has criticized others, and even though he says little about CLS in his recent work on rights. Particularly worth noting is that, while West criticizes the negative quality of liberal rights (West 123–24), Waldron has argued for a broader conception of rights, as with his claim that negative rights generate “waves of duties” that undermine “any simple division between negative and positive rights” (Liberal Rights 212–13).

I also do not want to attack Waldron for being a liberal theorist and not a critic. Liberalism may deserve special criticism for the promises that it makes. Still, although liberalism and liberal rights may not be liberating in some objective sense, the claims that law serves power and fails to achieve justice apply to more than liberalism. They are also inevitable products of human beings interacting, whatever the ideological structures that shape those interactions. Nor is liberalism merely a tool for creating a hegemonic false consciousness. Once one is in a liberal system, rights claims do not always “insulate[] the private power into which the state cannot intrude and that is in fact more destructive” (West 148). Not only is it possible for rights-holders to win against public power, but the discourse of rights—for example the anti-discrimination norm in equal protection law—can support limits on private rights as well. True, those victories legitimate the liberal system, but they can also improve aspects of people’s lives within that system. That is to say, while I, too, join in the rights critique, I recognize that “rights claims are useful tools for people living in modern states.”

More to the point, once again I wonder what Waldron has to say about all of this. By focusing on dignity as initially, and arguably even primarily, an issue of law, he has made room for an aspect of the CLS critique: that rights are not natural and instead represent policy decisions to a significant degree (some of greater weight or momentousness than others). That is to say, while the CLS critique does not take very seriously the claim of a real commitment to human dignity as a basis for rights, it does accord with Waldron’s position that archetypes, dignity, and the rights that flow from them are contingent human creations. Both Waldron and West think that these human creations, if defined and used properly, can add up to a rule of law that has positive value, even as they may differ on what that rule of law should look like. They differ, too, on the question whether there is some more natural form of freedom or transcendence outside the constraints of liberal rights. West’s deployment of the false consciousness claim indicates a belief that something better is possible. Waldron’s answer to that question is the topic of the final section.

Do We Need Anything More?

In Dignity, Rank, and Rights, and in the long torture chapter of Torture, Terror, and Trade-Offs, Waldron is a liberal theorist working with social constructs. The grounding for his arguments has an explicitly pragmatic quality. At the risk of caricature, the argument seems roughly the following: whether or not archetypes or a commitment to dignity are true in some foundational moral sense, we ought to act as if they are, because the likely results will be much better if we do. But the as-if approach plainly leaves law vulnerable to departures from those commitments based on balancing rights against risks and harms. Vulnerability need not translate into resignation, however, as Waldron’s writing on torture indicates. Similarly, Jeremy Wisnewski makes the best case he can for an absolute ban on torture, but he also recognizes that his arguments “won’t likely convince anyone who is not already leaning toward the inviolability of dignity.”

But rather than throw up his hands, he argues that the case against torture must be made over and over again, using all of the tools at one’s disposal, and with particular focus on individual experience, risk, and suffering.

Initially, then, Waldron stands with Wisnewski. Rights rest on strong reasoning, compelling pragmatic arguments, and commitment, but there is nothing deeper, nothing more foundationally compelling. Dan-Cohen’s worry remains. But it turns out that Waldron has more to say. In his 2002 book, God, Locke, and Equality, he expressed skepticism about the possibility of grounding a theory of equality in purely secular terms. A religious foundation, he suggested, might also be necessary.

At this point, Waldron runs into John Rawls’s influential claim that “in discussing constitutional essentials and matters of justice we are not to appeal to comprehensive religious and philosophical doctrines.” I will not detail Waldron’s arguments about the legitimacy of religious believers grounding their political arguments in, and appealing directly to, their religious beliefs in a liberal system. He convincingly establishes that anyone involved in political debate—whether or not religious—can and perhaps should “call it as he sees it and make the utmost effort to convey both the depth and the detail of his position to others while straining at the same time as hard as he can to apprehend the depth and the detail of the positions others are putting forward.” Waldron himself has begun to do exactly this by exploring and developing the extent to which Christian ideas could be relevant to political theory and political debate.

Torture, Terror, and Trade-Offs includes a chapter with the title “What Can Christian Teaching Add to the Debate About Torture?” which suggests ways in which Christian concepts
and teaching might bolster the case against torture. In “The Image of God: Rights, Reason, and Order,” Waldron explores the rich possibilities for human rights theory of the idea that human beings were formed in the image of God, including the possibility that it supports “religious foundations for human rights.”21 And in “A Religious View of the Foundations of International Law,” he considers the extent to which there is a Christian approach to international law, which could, among other things, foster a deeper commitment to international law generally.

Throughout, Waldron’s analysis is careful. Thus, he does not argue that Christian doctrine translates easily into legal doctrine. Indeed, he details the extent to which arguments based in belief are exactly that: arguments; not simple assertions of rules. Further, in “A Religious View of the Foundations of International Law” and “What is Natural Law Like,” Waldron stresses the extent to which law is always a human product that necessarily reflects its background principles imperfectly. Contingency does not go away, and perhaps it even becomes more stark through juxtaposition with the divine. For Waldron, in sum, religion plays a minor role in generating specific content of rules. Further, in “A Religious View of the Foundations of International Law,” he considers the extent to which there is a Christian approach to international law, which could, among other things, foster a deeper commitment to international law generally.

My description suggests an overarching structure to these writings on law and religion, but that structure is not explicit in them. It would be worth learning more from Waldron about how this set of writings fits with his other writings on politics and political theory that at least on their surface do not seem concerned with matters of belief.23 In his book on Locke, Waldron disputed that Locke’s political theory and religious writings were two unrelated projects. For Waldron’s own writing, the two projects are clearly related—but as with Locke, it is not clear whether he is taking the additional step of developing a comprehensive theory of political and religious engagement. It remains an open question, for example, whether archetypes have any religious content.

All of this sets up my final queries. I have noted the extent to which Waldron’s writing on law apparently disclaims transcendent foundations—so much so that he generates concern about the stability of the whole rights enterprise. But it is also clear that Waldron finds at least a partial foundation for his liberal views in his religious beliefs. In Dignity, Rank, and Rights, he suggests there is no single foundation for rights—but do religious ideas such as the image of God provide only one of several roughly equal foundations, or do they do deeper work to ground archetypes and other substantive commitments in a way that is different from the grounding that “dignity, equality, autonomy, or . . . security” provide? Or, perhaps, as his argument about Locke suggests, religious ideas provide the foundation for these other foundation-ish ideas. If any of this is true, is Waldron still a liberal theorist in the contemporary sense of the term?24

Finally, I wonder whether it is easier to adopt a contingent view of legal rights if one already has a deeper and more significant set of beliefs elsewhere. Put somewhat differently, can Waldron’s more secular writings stand on their own? Or are his recent and more explicitly religious writings necessary, whether or not he invokes them specifically, because they determine the scope of his otherwise secular work? Have they dissuaded him, for example, from recognizing an urgent need to develop stronger secular foundations (assuming that is possible)?

I am skeptical that Waldron’s secular and religious writings can be kept apart, or even that they are meaningfully distinct. To claim that they are distinct would also suggest that Waldron gave less than everything to some portion of his work. Writing this essay has shown me how unlikely that is. Waldron does not hold back—and a good thing, too, for the result is a broad and rich body of work that may not create foundations but which certainly “works in the foundations, complementing whatever else is working there.” The resulting edifices may not be impregnable, but they are sturdy, and that may be the best that human reason can do.

Notes


2. Waldron’s discussion of background principles and policies draws explicitly from the work of Ronald Dworkin even if he does not adopt all that Dworkin sought to achieve with that idea. In addition to Waldron’s discussion in Torture, Terror, and Trade-Offs at 226, see also Dignity, Rank, and Rights at 15, and Jeremy Waldron, Did Dworkin Ever Answer the Crits?, in Scott Hershovitz ed., Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin (New York: Oxford University Press, 2006), 155, 157–61.


5. I don’t mean to suggest that Waldron is drawing a sharp line between moral and legal analysis, for he states that his analysis moves “back and forth between the legal context and moral analysis.” But he takes care to “insist that it is wise not to begin over in moral philosophy, particularly modern moral philosophy” (DRR 134). Perhaps it is obvious that I am using the word “moral” to refer to more than moral philosophy, for what I hope is a good reason.


Legal Relativism and Ius Gentium

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We feel an affinity with a certain thinker because we agree with him; or because he shows us what we were already thinking; or because he shows us in a more articulate form what we were already thinking; or because he shows us what we were on the point of thinking; or what we would sooner or later have thought; or what we would have thought much later if we hadn’t read it now; or what we would have been likely to think but never would have thought if we hadn’t read it now; or what we would have liked to think but never would have thought if we hadn’t read it now.

— Lydia Davis

1. Introduction

Consider the following possible exchanges on the telephone between Frank who lives in San Francisco, California, and Lois who lives in London, England:

(1) F: There are even prime numbers greater than 10,000.
L: There is no even prime number greater than 10,000.

(2) F: The universe is expanding.
L: The universe is shrinking.

(3) F: Institution of chattel slavery could be morally justified in some circumstances.
L: Institution of chattel slavery could never be morally justified.

(4) F: A belief in the hypothesis that best explains the available data is warranted.
L: A belief in the hypothesis that best explains the available data is not warranted.

(5) F: It was sunny and clear all day today.
L: It was cloudy and rainy all day today.

(6) F: Drivers are legally required to drive on the right side of the road.
L: Drivers are legally required to drive on the left side of the road.

There is a very significant difference between exchanges (1)–(4) on the one hand, and exchanges (5)–(6) on the other. Exchanges (1)–(4) are naturally interpreted as genuine disagreements, whereas (5)–(6) are not. That is because each of (1)–(4) involves conflicting opinions about a common subject matter, whereas each of (5) and (6) involves only apparently conflicting opinions because the opinions are not about any common subject matter.

In (5), Frank is speaking about the weather in San Francisco, while Lois is speaking about the weather in London. And in (6), Frank is speaking about the law in the United Kingdom, while Lois is speaking about the law in the United States. We may go so far as to say that our thoughts and utterances about the weather and the law usually do not have what could be called “the objective purport” that our thoughts and utterances about mathematical, scientific, moral, and epistemological matters do. The former are implicitly or explicitly indexed to particular locations and times, whereas the latter are not.
There are some wrinkles to be ironed out in drawing the contrast that I am drawing. It may be pointed out that even some scientific, moral, and epistemological judgments may be indexed in the way that weather and legal judgments appear to be. In fact, weather judgments could be deemed scientific judgments that are so indexed. Some moral judgments—e.g., about the extent to which one ought to contribute to charities—may similarly be indexed to local conditions. And even some epistemological judgments—e.g., about on which research programs to place one’s epistemic bets—may be locality-sensitive in a similar way. Nevertheless, when it comes to fundamental scientific, moral, and epistemological judgments—i.e., judgments by which we describe the fundamental facts or assert the contents of the fundamental norms of these domains—our judgments carry the objective purport. Any locality-sensitivity that our low- and intermediate-level judgments in each of these domains display seems to be a consequence of the single set of fundamental facts or norms combined with the variability in the local facts that the fundamental facts and norms make relevant. That does not appear to be the case with our legal judgments. Even our fundamental legal judgments seem to be locality-indexed.

Or so it seems on first glance. What is intriguing about Jeremy Waldron’s arguments in his *Partly Laws Common to Mankind* (2012) is that they seem to throw into doubt the easy relativism that we implicitly attribute to law. If Waldron is right, then legal relativism that is suggested by considerations of the sort I outlined above, and which stands in stark contrast to the objectivism or absolutism that most of us associate with mathematics, science, morality, and epistemology, should be reconsidered and qualified. Waldron advocates what could be called “the doctrine of ius gentium,” according to which, roughly, courts sitting in one country must give some weight in their legal deliberations to some principles that have been accepted or adopted by the legal systems of many other countries. He says:

> [C]onvergent currents of foreign statutes, foreign constitutional provisions, and foreign precedents sometimes add up to a body of law that has its own claim on us: the law of nations, or *ius gentium*, which applies to us simply as law, not as the law of any particular jurisdiction. (p. 3)

Waldron likens the doctrine of ius gentium to the doctrine of stare decisis in common law jurisdictions (22–23, 177). And as the legal authority of the doctrine of stare decisis is undisputed despite controversies about some of its details, Waldron’s point is that the legal authority of the doctrine of ius gentium should be recognized even before its details have been worked out. By speaking of “legal authority" here, and throughout the rest of this paper, I do not have in mind the theoretically thick conception of authority that Joseph Raz and his followers employ (e.g., Raz 1985), according to which a standard has authority only if it implies exclusionary and content-independent reasons. Like Waldron (2012, 59–62), I am talking merely about a standard that implies reasons or constraints, or in this case legal reasons or constraints, of any character.3

Waldron, of course, is not speaking entirely in isolation or without precedent. He observes that judges in many countries, including his native New Zealand, frequently appeal to legal principles around which have developed consensuses among the legal systems of many countries. And this practice has a distinguished lineage, which can be traced to the principles that Ancient Roman jurists developed and used to regulate relations with and among non-citizens living in their midst. The term “ius gentium” comes to us from those Roman jurists who distinguished such principles from “ius civile” that governed relations among Roman citizens. Even in the United States, where overt appeals to foreign laws are far less frequent and more controversial than in other countries, the Supreme Court in two very significant recent cases—*Lawrence v. Texas* (2002), in which the Court struck down Texas’s anti-sodomy law, and *Roper v. Simmons* (2004), in which the Court set aside Missouri’s imposition of the death penalty on a juvenile—reached its decisions partly based on legal consensuses among foreign legal systems. Both *Lawrence* and *Roper* have elicited strenuous criticisms—not merely from jingoistic politicians bemoaning the supposed threats to American sovereignty, but also from serious legal scholars including Justice Antonin Scalia, who dissented in both cases, and Richard Posner. Waldron’s arguments are in part reactions to these criticisms.

The fact that someone of Waldron’s powers and stature has taken up the cause of ius gentium, which appears to many an attractive and sensible doctrine, is a cause for celebration. But I am unsure as to how persuasive Waldron’s arguments in *Partly Laws Common to Mankind* are. There is a lack of clarity about exactly what thesis or doctrine that Waldron is arguing for, and a consequent lack of clarity about what kinds of arguments would be needed to vindicate the doctrine. And although, as I have already said, we should not demand a thoroughly worked out version of the doctrine of ius gentium before we recognize its legal authority, the particular ways in which Waldron’s thesis is unclear gives rise to some worries that Waldron may be guilty of equivocations at crucial junctures in his arguments. I take the opportunity of my contribution to this symposium to press Waldron to clarify his position and to fill in, what appear to me to be, significant gaps in his arguments.

2. Waldron’s Initial Specifications

In a very helpful second chapter of his book, Waldron provides several clarifications of what exactly he is advocating. By arguing that ius gentium, or “the law of nations,” should be given weight in American judges’ legal deliberations, Waldron is not talking about the set of rules or principles of public international law, or “ius inter gentes,” that regulate relations among sovereign nations. Instead, he has in mind the rules or principles that govern private individuals’ relations with each other and with their governments. Waldron also does not have in mind a set of moral principles that, according to natural law theorists, constrain the contents of the laws of all genuine or non-defective legal systems, and that hence can be seen as partly constitutive of such legal systems. In other words, ius gentium is not “ius natural.” He sums up as follows:

> The ius gentium, on my conception, is a body of positive law regulating relations within states particularly between citizen and government but also sometimes between private individuals. Its distinguishing feature is its commonality: the law of nations represents a sort of overlap between the positive laws of particular states, something they have in common. The idea is that it has a claim on us by virtue of that commonality. (28)

Speaking of Roper, Waldron asks: “In virtue of what is the principle about the juvenile death penalty law for us?” (49). Continuing, he asks more generally: “So what makes ius gentium law and how does it acquire its authority?” And by “authority” here, Waldron means legal authority (59). He opines that this is a question that jurisprudence needs to answer (23). The last sentence of the passage quoted at the end of the preceding paragraph provides an initial answer. It is in virtue of the commonality of the principles of ius gentium that they are law for us. But that is hardly a satisfactory full answer. We need to ask the following question: In virtue of what does the
fact that some principle is commonly accepted by many legal systems make that principle a law for us? We can put the point in the following way. The initial answer tells us that something like the following is the case:

\[(IG) \text{ If a principle were commonly accepted as law by many legal systems around the world, and } \] then it would have legal authority for courts in the United States.

Given that the commonality by itself may not be a sufficient condition for a principle’s legal authority, a blank is provided where some additional conditions could be inserted. Waldron seems to be arguing that something like its gentium (IG) is the case. Now, the question is as follows: In virtue of what is (IG) the case? It is to this question, I take it, that Waldron thinks that a jurisprudential answer can and should be provided. What Waldron seems to promise then, and what we expect, is a jurisprudential argument to show how the fact that some principle is commonly accepted by many legal systems around the world (along possibly with some additional conditions) makes it the case that that principle is a law for us.

If I understand his arguments, however, what Waldron actually delivers, or at least makes progress in delivering, is not (IG) but some weaker or different theses. Waldron’s neglect to disambiguate some superficially similar theses, and his endeavors to respond to certain prominent positions and arguments in the literature, sidetrack him from addressing squarely the issue that he sets out to address in the initial pages of his book. In the following three sections, I shall delineate some theses that are superficially similar to (IG) and that Waldron ends up arguing for, and show why such arguments fall short of substantiating (IG). I will end by tentatively exploring a couple of alternative avenues of accomplishing pretty much what Waldron invokes (IG) to accomplish.

3. Principles of Fundamental Rights

There has been an intermittently intense debate among legal philosophers about the possibility of moral principles being parts of legal systems, and what such a possibility (or the lack thereof) indicates about the nature of law. Ronald Dworkin (1967; 1986) initiated this debate, like much else in legal philosophy of the last four decades, by arguing that legal positivist conceptions of law cannot account for the inclusion of moral principles in legal systems. While some legal positivists (e.g., Waluchow 1994; Kramer 2004) have responded by arguing that legal positivism is quite compatible with the inclusion of moral principles, some others, led by Joseph Raz, have argued that moral principles cannot be parts of legal systems but that legal positivism is undiminished by this alleged fact. But even those in the latter group recognize that certain moral principles have legal authority in the jurisdictions the laws of which refer and give legal effects to those very moral principles. According to Raz (2004, 193–195), what are thus “apparently” incorporated are analogous to corporate regulations or foreign laws that are given legal effects by domestic laws—i.e., they have legal authority, but should not be deemed laws of the relevant jurisdiction. In sum, all sides in this debate agree that moral principles can carry legal authority in legal systems.

As my introductory discussion indicates, we, or most of us anyway, think that our moral judgments are marked by what could be called an “objective purport,” and that consequently our moral discussion has a common subject matter. In these respects, our moral judgments are different from our legal judgments, as we commonly conceive these two kinds of judgments. The objective purport of moral judgments, and the fact that the laws of our legal system give legal effects to moral principles, imply that there is a certain weakened version of (IG) that would be quite obvious and uncontroversial. If the principle referred to in the antecedent of (IG) were a moral principle that is given legal effect by both our legal system and the legal systems of many other countries, then any difference in the versions of that moral principle that our courts and foreign courts accept would amount to a moral disagreement between the two sets of courts. The principle in question could be a prohibition of “cruel” criminal punishment. In effect, there would be a common subject matter—e.g., what courts as cruel—about which the courts of different countries can have a genuine, rather than a merely apparent, disagreement.

Of course, the fact that many believe that some moral principle, or a particular interpretation of it, is true or correct does not make it so. Nor does such a fact of consensus guarantee its truth or correctness, as Waldron rightly observes at one point (117-18); a many as well as a few can be mistaken. But in moral matters, as in many others, it seems, the fact of widespread consensus that is at variance with one’s own position is something that should be given some weight in one’s doxastic life. If I initially believe that a dinner bill including a 20 percent tip comes out to $300, whereas five others in the dinner party believe that it comes out to $360, then I would have reasons to reduce my confidence in my initial belief. Similarly, if I initially believe that it is permissible for one to put one’s aging and declining parent in a nursing home, whereas many of my friends whose reasoning powers and moral characters I respect think otherwise, then I have good reasons to reconsider my initial belief.

Given these considerations, there would clearly be cases in which American courts should give some weight to the principles that are commonly accepted by legal systems of many other countries. But the thesis that these considerations support is not exactly (IG), but instead something like the following:

\[(ME) \text{ If a moral principle were a law both of the United States and of many countries around the world, a particular version of that moral principle were commonly accepted as law by the legal systems of many other countries, and } \] then that version of the moral principle would have epistemic authority for courts in the United States in their determinations of the relevant law.

(ME) differs from (IG) in two significant respects. First, in (ME), the scope of the thesis is limited to moral principles. Not any principle that has elicited common acceptance by many foreign legal systems is owed weight in the American courts’ deliberations. If the relevant principle were not a moral principle, then any variation in the versions that are accepted would not be troublesome, and could be considered reflective of acceptances by different legal systems of different principles. The limitation in scope is designed to ensure a common subject matter among lawyers and judges in different legal systems. Second, in (ME), the kind of authority that commonality induces is not legal authority, but epistemic authority. It is not the case that the fact that many foreign legal systems have converged upon a particular version of a moral principle makes that version a law in the United States. Rather, such a convergence generates epistemic reasons for American judges to reduce their confidence in their acceptances of a different version of the same principle, and to consider seriously the version accepted by many other legal systems, lest the common version be the better or more accurate version of the relevant moral principle.

The path to substantiating (ME) is relatively clear and straightforward, whereas the path to substantiating (IG) is less
clear and seemingly fraught with difficulties. Waldron appears implicitly to recognize this, as at key junctures in his arguments, what he ends up actually arguing for is (ME), instead of (IG). The example that carries much of the dialectical weight in his arguments is Roper, in which the Supreme Court, partly based on foreign laws, outlawed impositions of the death penalty on juveniles. This and many other cases that Waldron discusses concern matters of fundamental moral rights. Still, in the initial chapters of his book, Waldron speaks in general terms, and he does not seem to limit the doctrine of ius gentium to only moral principles. Things are quite different in chapters four and five of his book, which form the heart of Waldron’s arguments for the doctrine of ius gentium. In chapter four, Waldron argues that a consensus among many legal systems around a principle generates authority for that principle because such a consensus represents a repository of wisdom in the world that we have reasons to learn from. He at one point goes so far as to liken legal consensuses among legal systems to scientific consensuses among scientists (100–108). This line of thinking, however, if it is construed as aimed at substantiating (IG), is question-begging. There is no problem in thinking of different scientists as investigating a single subject matter—namely, the natural world, or the laws of nature that govern it—and that is why we can conceive them as learning from each other. But Waldron has not established that lawyers and judges in different legal systems are investigating a single subject matter. That is the crucial difference that my initial examples of (2) and (6) were meant to illustrate. And unless we can think of lawyers and judges in different legal systems as investigating a single subject matter, it does not make sense to think of them as learning from each other. That would be like Frank learning about the weather in San Francisco by consulting Lois who is looking out the window from her London flat. Waldron brings up an objection by James Allan (2008) very much along this line. Waldron responds thus:

Often the best way of understanding what law requires in complicated cases involving fundamental rights is something like a just solution or a solution that is workable and right. That is usually the best way of understanding familiar provisions that lay down and limit fundamental rights. True, local legal provisions frame those aims in particular ways; but often the framing is broad and abstract and . . . quite similar from system to system. (106)

This reply works when the scope of the doctrine is limited to the principles governing fundamental rights, but is unavailable when other kinds of principles are involved. And in much of chapter five, which argues that there are pragmatic and moral reasons to further transnational legal harmony or integrity, Waldron similarly concentrates on laws dealing with fundamental rights. This restriction of the scope of the arguments to the principles dealing with fundamental rights ensures that lawyers and judges working in different legal system share a common subject matter, but it also undercuts Waldron’s announced goal (pp. 6, 9, 15-16) of challenging, by way of ius gentium, the usual assumption of legal relativism.

Furthermore, even when the arguments are so restricted to the principles dealing with fundamental rights, what Waldron’s arguments make progress on is in showing that consensuses about them have epistemic authority, and not legal authority as (IG) would require. In moral as well as in scientific and many other matters, the fact that many others share a belief on an issue that differs from one’s own belief on the same issue does not amount to or constitute the common belief being true or correct; instead, at best, it amounts to a reason to reassess one’s confidence in one’s own belief. Of course, in law, or at least in the law of common law jurisdictions, the fact that many courts in one jurisdiction have reached a particular legal position bolsters the legality, and not just the credibility or epistemic warrant, of that position in that jurisdiction. But that is a consequence of a substantive legal norm—namely, the doctrine of stare decisis—that works within single jurisdictions. Waldron’s argument cannot rely on the assumption of an analogous legal doctrine that works transnationally, since that is the very issue that is in contention. In chapter five of his book, Waldron relies heavily on the moral norm of consistency, or what Dworkin calls “integrity”—in the sense of treating like cases alike—to argue for the doctrine of ius gentium. And perhaps it could be argued that this moral norm works much like the legal doctrine of stare decisis in implying that the fact of commonality enhances the morality, and not just the credibility, of the commonly held position. I will be arguing against this line of thinking, as well as its supposed relevance to the legality of the commonly held position, in section five below.

In sum, what Waldron can claim to have made progress in substantiating appears to be something like (ME), rather than (IG). Perhaps that is serviceable enough for Waldron’s campaign to justify courts’ practice of referring to and relying on foreign laws in their legal deliberations. Practical implications of (IG) and (ME) are likely to overlap in significant ways. But it certainly falls short of the more ambitious goal that Waldron initially announces.  

4. Patterns of Inference

Our first-order epistemological judgments, much like our moral judgments, and unlike our legal judgments as these last are usually conceived, are marked by an objective purport. And like discussants of moral matters, discussants of epistemological matters assume that they share a common subject matter. Accordingly, in my introductory discussion, I grouped exchanges (3) and (4) together, and contrasted them with (6). And for reasons quite analogous to the ones I outlined in the preceding section, the fact that many others accept a particular epistemic norm, or employ a particular inference pattern, gives one reasons to reconsider and reassess one’s own norm or inference pattern that differs and conflicts with the majority position. In other words, something like the following variation on (IG) seems quite plausible:

(EE) If a pattern of inference were commonly employed by many legal systems around the world, and _________, then it would have epistemic authority for courts in the United States in their determinations of the correct inference patterns to employ.

In fact, given the considerations that ground this thesis, there is really no reason to restrict it to inference patterns commonly employed by legal systems. Scientists, mathematicians, engineers, and even philosophers have at least as much epistemic respectability as legislators, judges, and lawyers; and consequently, what they commonly employ should carry at least as much epistemic weight. A compelling similar case could be made for a more general or liberal version of (ME), or for conceiving that thesis as a consequent of a more general epistemic norm.

Early in chapter four of his book, Waldron broaches the very issue that I am now discussing. He says:

Judges, in short, can learn from their foreign counterparts. If we leave it there, however, we haven’t got very much further than the vague idea of continuing legal education. No doubt judges can learn things from lots of places; the potential sources
of insight and understanding are unlimited. They can probably learn something from Harry Potter. (84)

He then confronts Posner’s complaint that what is objectionable about the doctrine of ius gentium is not learning from abroad, but attributing legal authority to foreign laws. As far as I can see, Waldron never responds to this objection satisfactorily. As I have argued in the preceding section, much of the time, he argues for (ME), which is a thesis about epistemic authority. According to (ME), the fact that many subscribe to some version of a moral principle has an epistemic bearing, but not a moral or legal bearing. What has moral and legal authority is the correct version of the relevant moral principle that the fact of commonality is supposed to facilitate epistemic access to. And at some other key junctures, what Waldron ends up arguing for is (EE), another thesis about epistemic authority, rather than (IG). And according to (EE), the fact of commonality is supposed to facilitate access to the correct epistemic norms or inference patterns. Nothing in (EE) speaks to legal authority.

Later in chapter four of his book, Waldron rightly asks, “What category of knowledge is supposed to be accessible by recourse to foreign law?” (89). He provides his answer a few pages later:

[T]he most interesting understanding of the episteme involved in our courts’ use of foreign law is not empirical information, not general public policy, not even moral philosophy (pure or applied). It is, rather, a specifically legal episteme: we stand to gain in terms of our acquisition and manipulation of specifically legal knowledge, knowledge of legal analysis. (93)

Notice here what Waldron does not say. He does not say that what American courts are supposed to learn are substantive legal principles or doctrines; he says that they are supposed to learn “legal analysis.” In subsequent discussion, Waldron strongly suggests that there are distinctively legal ways of analyzing and solving problems (93–100). If he means that there are epistemic norms or inference patterns that are distinctive of law, then that is a questionable view. Legal reasoning is reasoning applied to legal materials; it is not a reasoning that is distinctive in any other ways. And nothing in Waldron’s various descriptions of legal reasoning—e.g., as the method of “analysis and abstraction,” as he puts it at one point (96)—singles out any other way in which legal reasoning or legal “method of analysis” is any different. Let me put the point in the following way. Imagine a lawyer-epistemologist of superhuman powers—call her “Gottfriede”—who has deployed her powers to construct both a system of substantive legal norms that make up the law of her jurisdiction, and a system of epistemic norms that we ought to accept.17 The latter system would include the norms of both deductive and inductive inference; would include norms governing various sources of evidence such as perception, memory, and testimony; and would be subject-neutral in the sense that these norms would be applicable regardless of the subject matter. Now, would Gottfriede have anything to learn from foreign legal systems other than some non-legal information of a priori or a posteriori varieties? I doubt it. Perhaps it may be complained that my line of reasoning is question-begging because I have assumed that Gottfriede could construct a system of legal norms for the law of her jurisdiction without learning from foreign laws. But my points are that Waldron has not made the case that there is a common legal subject matter among lawyers of different jurisdictions, and that methods of legal analysis cannot constitute such a legal subject matter because there is no distinct method of legal analysis. Any epistemological learning is learning of a subject-neutral material.18 What Waldron manages to argue for then seems to be (EE).

In some passages, Waldron asserts that what judges in different legal systems can learn from each other are problem-solving skills (98–100). What these passages suggest is that by “methods of analysis,” what Waldron may mean is not so much epistemic norms or patterns of inference, but instead practical know-how in implementing substantive legal norms. Waldron sometimes betrays an inclination to think that practical problem-solving is something that is better addressed by legislators and constitutional drafters than by judges.19 But a plausible conception of the role of judges would portray them as not only applying laws created by legislators and constitutional drafters, but also as legitimately devising legal norms or doctrines to implement pre-existing laws.20 Perhaps then the subject matter that judges and lawyers of different countries can be seen as investigating together is a set of means, legal means, to implement legal norms that the legal systems of different countries have in common.

I believe that this is a compelling line of thinking, and that it probably yields a variation on (ME) that comes much closer to (IG) than (ME) itself. Perhaps it could be formulated as follows:

(LE) If a principle were a law both of the United States and of many other countries around the world, particular subordinate legal norms or doctrines meant to implement the principle were commonly accepted as law by the legal systems of many other countries, and ________, then those subordinate legal norms or doctrines would have epistemic authority for courts in the United States in their determinations of the relevant law.

The scope of (LE), unlike that of (ME), is not limited to moral principles. When I was discussing (ME) in section three above, I argued or asserted that any difference in the versions of a non-moral principle that are accepted by different legal systems could be deemed reflective of their acceptances of different principles. And that is why the scope of (ME) was limited to moral principles in order to ensure a common subject matter for those in different jurisdictions who espoused different versions of the relevant principle. In formulating (LE), I am assuming that there are bound to be cases in which there is little doubt that different legal systems accept in common a single principle, whether moral or non-moral, but in which legal systems differ with respect to the subordinate legal norms or doctrines that are meant to implement that principle. There is a distinction between conceiving a subordinate legal norm as an implication of a higher-order legal principle and conceiving it as an implementing norm.21 The latter conception involves thinking that the higher-order principle underdetermines the contents of the implementing norms. If what legal systems differ with each other about is the implementing norms, and not about the higher-order principle that is in need of implementation, then there is a common subject matter between the legal systems. This allows for the unrestricted scope of (LE). But even with (LE), what gets enhanced by the fact of commonality is not legality of the commonly accepted position, but that position’s epistemic credentials as a way to access the legal doctrines that would best implement the relevant higher-order legal principle and whatever other desiderata that judges deem relevant. I find (LE) quite plausible. In fact, it is the closest thing to (IG) for which I can discern a compelling case.

Unfortunately, however, although, as I pointed out above, some of Waldron’s discussion points us in the direction of (LE), I do not think that he is entitled to it. This is because of Waldron’s commitment to a Dworkian conception of the nature of law. That commitment has the implication of significantly shifting Waldron’s arguments so that they lead us to certain variations...
on (ME), instead of to (LE). This is unfortunate given (LE)’s greater plausibility and its closer proximity to (IG). I will discuss Waldron’s Dworkinian commitment in the next section before returning to (LE) in section six.

5. Legality and Morality
The arguments in Partly Laws Common to Mankind are plainly indebted to Dworkin’s seminal jurisprudential works. Quotable early in the book, Waldron announces that Dworkin provides “the best set of tools for understanding the norms that ius gentium comprises” (35). Waldron (62-65) construes the norms that make up ius gentium as principles in the sense that Dworkin (1967) made famous when he distinguished principles from rules. Dworkin relied on cases like Roper v. Palmer (1889), the New York case in which it was decided that a grandson who poisoned his grandfather could not inherit the grandfather’s estate despite a valid will clearly designating him as the inheritor, to argue that the law of a jurisdiction includes certain unwritten principles, such as the one relied upon by the Rigger court—viz., that no wrongdoer shall benefit from his wrongdoing—as well as explicitly recognized rules. And Waldron’s (2012, 67) stated goal is to extend this line of reasoning to cover the principles that are commonly accepted by foreign legal systems.

Waldron’s extension of the Dworkinian rationale, however, is not plain sailing, and I shall point out some of the obstacles below. But let us for the moment assume that it succeeds. I am unsure that Waldron should welcome the result. According to Dworkin, the principles that are legal are to be distinguished from those that are not by the fact that the former are supposed to be parts of a set of principles—what Dworkin calls “the soundest theory of law”—that provides the best moral justification of the explicit part of the law (1972, 66-67). If we transpose this line of thinking to the issue of ius gentium, as Waldron intends, and if we think of (LE) as articulating that doctrine, then we must think of the implementing norms and doctrines that (LE) mentions, or at least the principle that they implement, as being a part of the soundest theory of law. In other words, either the implementing norms and doctrines or the implemented principle, or both, must be members of a set of principles that together morally justify the explicit parts of the laws of many countries, including the law of the United States. In other words, the stretch of Waldron’s argument that I outlined at the end of the preceding section, pitched in the Dworkinian key, amounts to an argument for something like (ME), rather than (LE). What Waldron seems to be arguing for could be summed up as the following variation on both (ME) and (LE):

(\text{ME}') 

If a moral principle were a law both of the United States and of many other countries around the world, particular subordinate legal norms or doctrines meant to implement the moral principle were commonly accepted as law by the legal systems of many other countries, and \text{...}, then those subordinate legal norms or doctrines would have epistemic authority for courts in the United States in their determinations of the relevant law.

Unlike (ME), which talks about versions of moral principles, (\text{ME}') talks about implementing norms or doctrines of moral principles. With (ME), it would not be the case that every implementing norm and doctrine or every implemented principle would have to be morally justifying. Some give would be provided by the fact that it is a whole set of principles, rather than each principle or norm belonging to the set, that is supposed to provide the needed moral justification. But still, limits would be imposed by the fact that the whole set is supposed to provide a moral justification, and that is enough to direct Waldron’s thinking to (ME') instead of (LE).

Perhaps Waldron would not resist the shift from (LE) to (ME'). In fact, (ME') seems to afford courts a “principled” way (if the reader will excuse the unintended pun) to discriminate among the principles and doctrines that are commonly accepted by foreign legal systems. Morally attractive principles and doctrines would carry legal weight whereas morally unattractive ones would not, and the charge of “cherry-picking” that critics of ius gentium have made, and about which Waldron worries at length (chapter seven), would be effectively deflected. But there are two large sets of problems. The first has to do with the implausibility of Dworkin’s theory of law. This is obviously no place to argue this point at length, so let me just quickly sum up my qualms and move on. According to Dworkin, it is only when a community’s explicit law is justifiable by morally correct principles that the community could be thought to have genuine laws that impose genuine legal obligations and confer genuine legal rights. This would mean that if a community’s explicit laws were morally bad enough, then there would not be genuine laws in that community. Some, like H.L.A. Hart (1966/82, 150; 1987, 40–42), have taken this as a reductio of Dworkin’s theory of law, and Dworkin himself has struggled to minimize the damage caused by this implication. In my opinion, Dworkin’s later line of reasoning on this issue (1986, 111–13; 1987, 20) is, to borrow an accusation that Dworkin (1988, 160) himself has lodged against a legal theory, too full of epicycles to be persuasive. Waldron himself may not see this later line of reasoning as damning as I do. But the point is that he does not need to assume all this baggage that comes with adopting a Dworkinian conception of the nature of law. He can drop that strand of his argument, and argue straight for (LE) rather than (ME').

The grounds for my recommendation are strengthened once we consider the obstacles that Waldron faces in extending the Dworkinian rationale to the principles that supposedly make up ius gentium. And here we come to the second of the two sets of problems that I mentioned above. Dworkin’s early arguments for seeing principles as integral parts of the law relied on a combination of phenomenological and explanatory considerations. Upon reading cases like Rigger, many of us think that the cases were rightly decided as a matter of law, and that the results could not be explained except by thinking of the relevant principles as having legal authority. Waldron has no analogous set of legal decisions on which to rely. Roper, which bears much dialectical weight in his arguments, furnishes at best only equivocal help. As evidenced by widespread criticism of the Roper court’s reliance on foreign law, we do not have here the phenomenological support of the sort that Dworkin derived from Rigger and its ilk. And contrary to Waldron’s view that the explanation by way of ius gentium is the best explanation of the Roper court’s reasoning and its decision (2012, 4, 6–9), the Court’s opinion indicates that the reference to foreign law was an eminently dispensable part of its reasoning. In fact, Roper’s disallowance of capital punishments of juveniles could be explained, with at least as much plausibility, as an implication of the conjunction of the following three considerations: (i) the nature of law, or of prescriptions more generally, that requires addressees of legal prescriptions to be capable of grasping and acting on the contents of those prescriptions; (ii) the empirical data, which the Roper court cited, that indicates that juveniles are incapable of fully grasping and acting on reasons; and (iii) the especially harsh and irrevocable nature of the death penalty. This reasoning can be buttressed further by the emerging consensus among U.S. states to disallow capital punishments of juveniles, on which the Roper court also explicitly relied. All of this indicates that the case for establishing the legality of
the principles of ius gentium is much weaker than the case for establishing the legality of the principles like “No wrongdoer shall benefit from his wrongdoing.”

In the preface to Law’s Empire (1986, viii), Dworkin remarks that he is switching his attention from phenomenological considerations to interpretive considerations, but that at bottom these are same considerations. If we switch our own attention to the kinds of considerations that Dworkin relied on in Law’s Empire, then the difficulty of Waldron’s case for the legality of the principles of ius gentium becomes even more pronounced. Dworkin’s case for law as integrity relied heavily on the fact that people in one jurisdiction who subscribe to different and conflicting fundamental legal norms can take themselves as having genuine legal disagreements, or disagreements about what the law of their jurisdiction is, as opposed to disagreements about what the law should be, with each other. Dworkin argued (especially chapters 1, 6) that this fact, and further related fact that we consider “checkerboard” laws as undermining or diminishing the legality of a community’s system of norms are best explained by positing integrity as a norm constitutive of legal systems. As my introductory discussion indicates, however, we do not consider two people asserting contents of the laws of two different jurisdictions as having a genuine legal disagreement.27 In fact, the gist of Dworkin’s criticism of what he took to be Hart’s legal theory is that Hart’s theory has the implication of portraying people with conflicting fundamental rights, may be realized or implemented in different communities in a variety of different ways.31 Second, even if we assume arguendo that any disparity across communities is morally objectionable or problematic, that assumption does not have the implication of enhancing the morality of a majority position any more than the morality of a lone outlier position. (ME') is a much more plausible thesis than (MM). And if my preceding arguments against Dworkin’s conception of the nature of law are on the right track, then we do not have good grounds for thinking that some moral justifiability is constitutive of legality, and consequently the scope of (ME') should be loosened to yield (LE).

6. Implementing Legal Doctrines
As indicated by my alternative explanation of the decision in Roper, offered in the preceding section, some of the legal and constitutional conclusions that we would get from applications of ius gentium could also be inferred from the nature of law or legal prescriptions. It could be argued with some plausibility that the nature of legal prescriptions, or of deontic prescriptions more generally, is such that only persons with certain capacities could be deemed fitting addressees of such prescriptions, and further that only such persons could be fit objects of any punishments for any failure to comply with the prescriptions. Insofar as some people (presumably) fall short of possessing those capacities, they would not be fitting addressees of the relevant prescriptions, and moreover would be inappropriate objects of punishment for failing to comply. With this metaphysical line of reasoning, we could justify, for example, the following: decisions to disallow punishments of juveniles, mentally ill, etc.; and decisions to exclude certain forms of punishment that would implicate a view of criminal offenders as less than moral equals. Related lines of reasoning could be applied to justify certain norms governing commercial transactions and other matters implicating justice.32 These are the very kinds of conclusions that Waldron seeks to justify by invoking consensuses among legal systems of many countries (4-5). But finding the just-sketched metaphysical line of reasoning persuasive, we may go on to point out that we could explain the consensuses existing among many legal systems on these issues as arising from their cognizing or grasping, in varying degrees, the nature of legal prescriptions. We could then treat certain consensuses among many foreign legal systems as enabling us to gain epistemic access to the nature of legal prescriptions that have the legal implications of the sort that I have just mentioned.

I believe that such a metaphysical line of reasoning would be well worth pursuing further. But it is not the only option in justifying the judicial practice of giving weight to consensuses among many legal systems. Even if there were no metaphysical fact that grounds the kinds of first-order legal implications I have mentioned, commitments to certain principles or norms may be attributed to many legal systems, including that of the United States, on alternative bases. For example, as Hart has argued in many of the articles collected in his Punishment and Responsibility (1968, e.g., 23, 44, 181-82), criminal legal regimes throughout the world, and throughout much of history, have displayed a commitment to enabling people to choose and plan their ways of life. This commitment could be thought constitutive of legal systems or criminal legal regimes in general, but it could also be deemed a contingent feature of most legal systems or criminal legal regimes. And it may be argued that this norm has implications for what kinds of conditions of defendants are to be treated as excusing conditions for the purpose of criminal defenses. And if a marked consensus about a particular defense of excuse were to prevail among legal systems of many countries, that fact would be worthy of significant epistemic weight in the deliberation of judges sitting in a jurisdiction in which the same defense is controversial. What we have here is an example of how (LE) would work. The commonly accepted norm that I have discussed in this paragraph is a morally attractive one, but there need not be a requirement that such a norm be morally attractive or justifiable. If the norm that many legal systems are committed to were morally indifferent or even pernicious, (LE) would operate in a way that lends credibility to that norm. In this way, (LE) would be different from (ME), and would be contrary to the Dworkinian line of thinking that Waldron seems to favor. As far as I can see, (LE) seems to come closer to (IG) than any other variations on (IG) that we can muster plausible arguments for.

In sum, Waldron’s arguments seem to fall quite a bit short of substantiating (IG) itself. But his arguments suggest lines of reasoning that would make progress on substantiating some
closely related theses. Among them is (LE), and that thesis would do much to justify the kinds of judicial practices and legal conclusions that (IG) would have justified.33

Notes
1. Scanlon (1982) says at one point: “If it is important for us to have some duty of a given kind (some duty of fidelity to agreements, or some duty of mutual aid) of which there are many morally acceptable forms, then one of these forms needs to be established by convention. In a setting in which one of these forms is conventionally established, acts disallowed by it will be wrong. . . . For given the need for such conventions, one thing that could not be generally agreed to would be a set of principles allowing one to disregard conventionally established (and morally acceptable) definitions of important duties” (pp. 133-34).

2. Similarly, the correctness of the epistemic norm of testimony—something along the lines of “Believe what others tell me, and tell others what I believe”—appears sensitive to local practices. The norm should not be accepted if one is living in a community of dissemblers. I owe this example to Fred Schmitt.

3. For the reasons that Enoch (2011) has recently elaborated, the talk of legal “authority,” and worse yet of legal “normativity,” which is quite prevalent in the contemporary legal philosophical literature, is misleading and apt to confuse. See registrations of my own qualms about such locutions and about the mistakes that such locutions usually presuppose in Toh, “Hart’s Expressivism and His Benthamite Project,” 77; Toh, “The Predication Thesis,” 331 and n.1. What is at issue in Waldron’s book and in this paper is the legality of the principles that are commonly accepted by many legal systems—that is, whether they are laws or not, whether or not they generate legal reasons—and not something that needs to be conceived as “normative” or “authoritative” or “reason-generating” in a full, committed, unmodified, or unscripted sense. Despite these qualms, I shall stick to the terminology of “authority” in this paper in order to facilitate exposition and discussion of Waldron’s views without having constantly to insert qualifications.

4. As Waldron points out (31), in recent times, the distinction between the law of nations and international law has become less clear than before because of the rise of the human rights law as a part of international law.

5. A couple more remarks about the way that (IG) is formulated above. First, what Waldron is discussing is a doctrine that applies to courts in both the United States and countries other than the United States. I have formulated (IG) as one specifically about U.S. courts merely for convenience. First, what Waldron is discussing is a doctrine that applies to courts in both the United States and countries other than the United States. I have formulated (IG) as one specifically about U.S. courts merely for convenience. Second, I have put (IG) in the subjective mood to indicate that it applies not merely to those principles that enjoy common acceptance now, but also that it would be applicable to those that elicit common acceptance in the future.

6. A helpful and elegant summary of this debate is provided in Waldron, “Law.”


8. It is a significant fact that an avowed moral relativist like Gilbert Harman feels the pressure to qualify and amend his basic position about the nature of morality when he considers the issue of fundamental moral disagreements. See Harman and Thomson, Moral Relativism and Moral Objectivity, ch. 3; cf. MacFarlane, “Relativism and Disagreement,” 29-30.


10. This example is adapted from Christensen, “Epistemology of Disagreement: The Good News,” 193.

11. Recently, there has been a lively epistemological debate about how one should modify one’s belief when one encounters another person who is just as well-informed and just as capable in his reasoning powers—i.e., an “epistemic peer,” as such a person is called in the literature—who disagrees. A helpful overview is provided in Christensen, “Disagreement as Evidence: The Epistemology of Controversy.” Some philosophers have argued for “conciliationism,” according to which one must reduce one’s confidence in one’s belief, whereas others have argued for “steadfastness,” according to which one should stick to one’s guns, so to speak. See, e.g., Christensen, “Epistemology of Disagreement,” and Van Inwagen, “It Is Wrong, Everywhere, Always, and for Anyone, to Believe Anything upon Insufficient Evidence,” respectively. I am assuming that the kind of cases I am discussing in the text call for conciliationist responses.

12. (ME) is labeled as such to mark these two differences from (IG).

13. To be sure, the indications are not unambiguous. Waldron says at one point near the very beginning:

“These laws common to all mankind pop up in all sorts of places. We notice them, for example, in a shared sense of what is sometimes called natural justice (the rudiments of procedural due process), in many of the fundamental principles of contract and commercial law in the idea of proportionality in criminal and constitutional law, in the basic elements of what we call the rule of law, in the law of self-defense, and in a broad global consensus about what a country’s constitution ought to be like. (p. 5)

Perhaps all of the relevant principles in these various areas of law could be deemed moral principles. And some of Waldron’s initial statements of his thesis are qualified with tags—e.g., “in specific areas of law” (p. 4), “on issues of the kind we are considering” (p. 60)—that seem to limit, however indistinctly, the scope of the thesis. But in the initial chapters, Waldron never explicitly limits the scope of the doctrine of its gentium to moral principles.

14. Allan asserts that Waldron’s arguments fail because law does not deal with “the underlying, mind-independent reality of our external causal world” (“Jeremy Waldron and the Philosopher’s Stone,” 146), quoted in Waldron, “Partly Laws Common to All Mankind”; Foreign Law in American Courts, 106. These words seem to be prompted specifically by Waldron’s law-science analogy. But strictly speaking, what we need in order to make sense of treating consensuses as reason-generating is some common subject matter, and not necessarily one that is mind-independent, external, and/or causal. Consensuses on mathematical, humor, color, moral, or even philosophical issues may do. Of course, some philosophers conceive discourses about some of these matters as dealing with mind-independent, external, and causal facts.

15. Based on the overlapping considerations of legal and semantic holisms, some may doubt even (ME). They may argue that because the moral principles incorporated in or otherwise referred to by various legal systems are embedded in different networks of legal norms that different legal systems respectively constitute, they take on different contents and have different implications. It would follow, for example, that the principle against cruel punishments and the principle mandating equal protection in the U.S. Constitution are different from similar-looking principles in other constitutions. Justice Scalia relied on a diachronic version of this line of thinking when he argued in the famous (or infamous) footnote 6 of the majority opinion in Michael H. v. Gerald D. (1989) that what is alleged to be a fundamental right protected by the Fourteenth Amendment must be defined at the most specific level at which our societal traditions can be seen as protecting or not protecting the right. I believe that such lines of thinking can be effectively resisted, but doing so would require delving into the issues of reference and other modal properties of our moral and legal judgments.
See, e.g., Boyd, “How to Be a Moral Realist”; Horgan and Timmons, “New Wave Moral Realism Meets Moral Twin Earth”; Jackson, From Metaphysics to Ethics: A Defense of Conceptual Analysis; Gibbard, Thinking How To Lie, ch. 6; Perry, “Textualism and the Discovery of Rights.” These issues in turn are, or at least can be in some philosophers’ ways of working them out, tightly bound up with the issue of moral and legal metaphysics that Waldron deems unimportant and without practical consequence. See Waldron, “The Irrelevance of Moral Objectivity”; Waldron, “Partly Laus Common to All Mankind”: Foreign Law in American Courts, 107, 243 n.92. The foregoing considerations indicate that Waldron may be a bit too hasty in so opining. Waldron’s position here seems at least partly prompted by Dworkin’s dismissive attitude towards metaethical matters. See, e.g., Dworkin, Law’s Empire, 78–85; Dworkin, “Objectivity and Truth: You’d Believe It.” I question some of Dworkin’s thinking on metaethical matters in Toh, Jurisprudential Theories and First-Order Legal Judgments,” § 4.

16. Any resemblance between my Gottfriede and Gottfried Leibniz is purely accidental.

17. See, e.g., Goldman, Epistemology and Cognition, ch. 4; and Field, “Epistemology without Metaphysics,” for conceptions of first-order epistemological theories as forming normative systems. For forceful arguments for a conception of first-order epistemology as a normative discipline analogously to normative ethics, see also Kim, “What Is ‘Naturalized Epistemology’?”

18. Waldron actually considers an objection like mine when he discusses Posner’s complaint that any learning that judges can get from foreign sources can only be empirical or public policy learning. (“Partly Laus Common to All Mankind”: Foreign Law in American Courts, 95–96). But in responding to this objection, Waldron gets sidetracked by his desire to resist any commitment to legal formalism or conceptualism that Posner seems to have been criticizing. This is not the only place where Waldron’s discussion seems to me to miss or bypass the central issues because of his concern to address some salient positions or debates in the literature. I will point to another instance in the next section. In fact, contrary to what Posner has said, there is no reason to think that any learning that takes place should be of an a posteriori variety. We can learn, for example, mathematical or logical facts as well as empirical facts by way of testimony, as the restaurant bill example in Section 3 illustrates.

19. Compare his discussions on pp. 86 and 92.

20. This is a point that many American constitutional theorists of different camps have come to accept in recent years. See, e.g., Whittington, “The New Originalism”; and Berman, “Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementing Space.”

21. Aquinas makes this very distinction. See Aquinas, Summa Theologiae I-II, q. 95, aa. 2, 4. For example, people who believe that capital punishment is cruel and hence disallowed by the Eight Amendment do not think of the “No capital punishment”-norm as a mere implementer of the Eighth Amendment principle against cruel and unusual punishment.

22. Dworkin is in fact the dedicatee of Waldron’s book.

23. This is a terminological choice that I sought to respect in my formulations of the different theses in this paper, but I am not sure that it makes any theoretical difference.

24. In fact, as Waldron points out, Judge Earl, writing for the Riggs majority, stated that the common law principles like the one that he employed in that case had “their foundation in universal law administered in all civilized countries.” Riggs, pp. 511–12, quoted in Waldron, “Partly Laus Common to All Mankind”: Foreign Law in American Courts, 66.

25. Even if we were to overlook this-at-the-line—implication of Dworkin’s theory of law, there is a problem enough in what that theory requires judges to do when their community’s explicit law is of mixed or ambiguous moral character. Even when morally dubious aspects clearly dominate a community’s explicit law relevant to a particular legal issue, Dworkinian judges would seek out morally correct principles that fit and justify the aspects of that explicit law that are justifiable, instead of settling on a set of morally incorrect standards that would much better fit and justify the relevant explicit law. This implication of Dworkin’s conception of legal adjudication, I believe, clearly diverges from our considered judgments about what judges legally ought to conclude in the cases of the sort that I am discussing, a divergence that are put into sharp relief in Dworkin’s review of Cover (1975). Cover’s book chronicles the story of judges sitting in the Northern states who had to decide antebellum cases involving the Fugitive Slave Acts. Almost without exception, despite their very strong moral objections to what the Fugitive Slave Acts required of them, these judges decided to return the runaway slaves caught in the Northern states to their masters in the South. In his review, Dworkin (1975) puzzles over these cases, and eventually concludes that the judges behaved as they did because they made the mistake of overlooking a plausible legal theory—namely, one like his own—that would have enabled them to be true to both their moral convictions and their legal scruples. This is less than compelling, and is especially troublesome for Dworkin given that the central part of his case for his legal theory is that it better describes or explains how judges actually decide legal cases like Riggs than what he understands as Hart’s theory. Dworkin himself seems to have been unsatisfied with this reasoning as indicated by his later discussion of the same issue, which I am about to discuss in the text.

26. Legal theorists as different as Aquinas and John Austin could be read as recognizing something like this nature of legal prescriptions. Aquinas, Summa Theologiae I-II, q. 90, aa. 1, 4; Austin The Province of Jurisprudence Determined, 18. See also Darwall, The British Moralists and the Internal “Ought”: 1640–1740, for an illuminating and wide-ranging discussion of the different ways in which the British moralists of the seventeenth and eighteenth centuries sought to explain the ways in which people could be motivated to act according to their moral obligations, and the different conceptions of how the notion of obligation presupposes the various conceptions of people’s capacities to be motivated.

27. If my example of traffic laws in (6) seems too trivial to do the work here, think of another apparent disagreement between Frank and Lois about libel on which there is a significant difference between the laws of the United States and those of the United Kingdom.

28. My reasons for thinking that this is an inaccurate—and in view of its widespread influence, quite unfortunate—interpretation of Hart’s legal theory, along with some objections to Dworkin’s thinking, additional to the ones I have already articulated in the text, are outlined in Toh, Jurisprudential Theories and First-Order Legal Judgments.” Waldron seems to subscribe to the common and in my view inaccurate conception of Hart’s theory. Waldron, “Partly Laus Common to All Mankind”: Foreign Law in American Courts, 54-55. And I believe that this goes a long way in explaining his resort to the Dworkinian machinery to argue for the doctrine of ius gentium. I believe that a perfectly straightforward and Hartian case could be made for (LE).

29. Waldron clearly recognizes the distinction and distance between legal and moral authorities. At one point, he says: Can ius gentium operate in the way law is supposed to operate, normatively or prescriptively, telling us or telling courts what ought to be done? I don’t mean what morally ought to be done. I am referring to law’s own inherent normativity, the fact that what it says is what something is to be done. (p. 59).

And as he notes in an endnote, he has been consistently and forcefully arguing that the doctrine of judicial review lacks “political legitimacy (in a normative sense)” while recognizing its current legality (p. 247 n.5). Time to time,
however, perhaps induced by the Dworkinian approach he favors, Waldron seems insufficiently attentive to the distinction. For example, at one point in chapter 3, after summing up the upshots of his arguments in the forthcoming chapters 4-5, Waldron confronts the objection that what all his arguments substanilizes is the moral authority of the principles of ius gentium. He says:

At this point we are likely to hear the objection that although my account has explained why a consensus in the world can have some normative force, it has not explained how a consensus in the world can have the particular normative force that law is supposed to have. All I have explained—or all I have promised to explain in the next two chapters—is how it might be a rather good idea to take notice of a legal consensus in the world, and that this being-a-rather-good-idea might be a permanent feature of the consensus in question. Surely the normative force of law has to be more than that. (pp. 60-61)

Unfortunately, Waldron does not squarely address this objection. He immediately remarks that those who raise this objection are likely subscribers to the Razian conception of legal authority, according to which to be authoritative is to generate exclusionary and content-independent reasons. He rightly observes that this conception of authority is not a non-optional one and is inaccurate of the kind of authority we often attribute to laws (pp. 61, 65). But the Razian worry is orthogonal to the central issue. After all, both moral norms and legal norms can be authoritative in the full Razian sense and in other thinner senses. And by endeavoring to address the Razian worry, Waldron has been sidetracked from the central issue raised by the above objection that he himself has articulated so nicely. He has not explained how it is that his arguments amount to a brief for the legality, rather than the morality, of the principles of its gentium.

30. I must also own that my own intuitions do not quite line up with Waldron’s when it comes to the plausibility of the norm of transnational integrity or consistency as a moral norm. For example, Waldron thinks that the mere fact that refugees in a single refugee camp are disparately treated because different aid organizations are taking care of different sets of refugees amounts to a moral problem (p. 131). I do not share this sense.

31. As I pointed out in the second paragraph of the introductory section. This is the position accepted even by those moral philosophers who are as little given to moral skepticism or deflationism as Thomas Aquinas and T.M. Scanlon. See Aquinas, Summa Theologicae I-II, q. 95, a. 2; Scanlon, “Contractualism and Utilitarianism,” 133-34.

32. Recently, some philosophers have richly elaborated the conception of fitting addressees that deontic prescriptions could be seen as presupposing, and have brought out what they deem implicit “bipolar” or “second-personal” nature of such prescriptions. See, e.g., Thompson, “What Is It to Wrong Someone? A Puzzle about Justice”; Darwall, The Second-Personal Standpoint. These elaborations are meant to have the kinds of implications that I am discussing in the text.

33. I thank the editors, Christopher Griffin and Steven Scalet, for inviting me to contribute, and for their work in putting together the symposium. I presented an earlier version of this paper at a workshop on human rights at University of Palermo in Sicily in May 2013. I benefited from probing and friendly questions from the audience on that occasion, especially those of Bruno Celano and Giorgio Pino. Pino also kindly went out of his way to do some philological research to identify the correct Roman spelling of the term “ius gentium,” thereby saving me from an earlier mistake.

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An Appreciative Response

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The papers by Claudia Card, John Parry, and Kevin Toh have offered me the compliment of paying close attention to my work, in several areas. I am most grateful for this and for the opportunity that this symposium provides to rethink some of the things I have said and some of the arguments I have developed in the light of their criticisms. I write about many things in legal theory, political theory, and in historical political philosophy, and my three interlocutors have dealt with different aspects of my work—Claudia Card mostly on hate speech, John Parry on my thoughts about law and morality both in my writings on dignity and in the work I have done on the prohibition of torture, and Kevin Toh in my arguments about the authority of foreign law. There is some continuity between one of the themes of Professor Parry’s discussion of legal and moral principles and Professor Toh’s attempt to find a plausible Dworkinian interpretation of my book Partly Laws Common to All Mankind, so there will be some overlap between them. Mostly though, I shall have to respond to these three pieces separately. I begin with Professor Card’s moving and much appreciated thoughts about my work on hate speech.

Claudia Card’s nuanced understanding of my argument in The Harm in Hate Speech is most welcome. And I have learned a great deal from her account of the costs of hate crimes as well as hate speech, from her analysis of “homophobia,” and from her argument about the importance of the interactive emotional dimension of these harms.

Let me begin with the distinction between hate speech and hate crime. Hate speech is speech calculated to stir up hatred in the community against the members of a vulnerable group. A hate crime is an ordinary crime like assault which is considered to be aggravated by the character of the hateful motivation that brought it about; if the motivation for the assault (on the part of the assailant) was hatred of the members of some specified group, then that motivation counts as an aggravating factor, which may lead to a considerable greater sentence. (These are imprecise definitions, by legal standards, but they will do for present purposes.)

I had thought—and I said this in the book—that the reasons for (and against) hate crime legislation and the reasons for (and against) hate speech legislation were separate. Card has convinced me that there is considerable overlap. This is not only because some criminal actions may have an expressive function, like cross-burning, but also because hate crimes (and fear of hate crimes) are part of the syndrome of the hatred that hate speech is also calculated to elicit. A community is poisoned by hate speech not only because such speech incites or foreshadows discrimination, for example, and not only because it prepares the way for such discrimination by defaming or dehumanizing the members of the target group, but also because it intimates and contributes to an atmosphere where violence against persons of a particular race, ethnicity, religion, or sexual orientation is seen to be a real prospect. That violence will normally have the character of hate crime. Now, the hateful motivations that aggravate ordinary crimes in the case of hate crimes do not come out of nowhere. Their currency, their social reality, is part of the poisoning of the social environment that hate speech contributes to. Card’s work on “evil environments” as well as “evil actions” and “evil” itself is a powerful contribution to our understanding of this.

Also, Card has convinced me that it may be too simple to say that hate speech legislation is or ought to be unconcerned with the psychological state that motivates the offending speech (as opposed to the social or psychological states that the offending speech tends to cause.) Though she rightly resists the suggestion (implicit in terms like “homophobia”) that various forms of hatred are best understood in quasi-medical terms, she is interested in the pathological relation that may exist between one person’s hatred or hostility and another’s. The causal efficacy of hate speech in poisoning a social environment may have a lot to do with the way in which one person’s expressed emotional state evokes another’s, or the way in which the second person’s mental state echoes the first. The impact of hate speech in other words is not just the communication of an offensive message—though it is usually that as well. As Card puts it, it involves an emotional echoing that may “affect the demeanour and conduct of even the echoer who knows (or believes) those feelings are irrational.” This explains why the most common non-legal response to hate speech—namely, that there should be more speech, speech back in the opposite direction refuting the claims that the hate speech has given voice to—is seldom an effective antidote to its toxic effect.

In some meditative reflections on her own views both for and against penalty enhancement for hate crimes, Card talks helpfully about the way in which hate crimes, as they are usually understood, might also have an expressive function and causal
effects which are similar to the functions and effects for which hate speech is punished (in the jurisdictions, like Canada, the United Kingdom, New Zealand, etc., where it is punished). The effect of hate speech on the social environment is often not just to undermine the dignity and security of members of the targeted group, but also to reassure other haters that they are not alone and to make it harder for ordinary good-hearted people to play their part in maintaining an inclusive and supportive social environment. Hate crimes do all this as well—only, the atmosphere that they create is a more lethal one and the lurid brutality that often characterizes these crimes is designed to draw attention to and—so to speak—to publish and flaunt the hatred that these actions manifest.

For all these points and for the rethinking, on my part, of hate crimes that her heartfelt reflections on “evil environments” have prompted, I am most grateful to Professor Card.

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Professor Parry expresses some doubts about a point I have made both in Torture, Terror, and Trade-offs and in Dignity, Ranks, and Rights, that it is sometimes wiser to begin our reflections on social values and principles in the context of the law, by considering what judges, legislators, and constitution-framers have done about some problem or phenomenon, rather than in the context of what philosophers refer to as morality. An understanding of the law affords us a good starting point for our normative thinking. Without wanting to sell short the business of moral thinking, I have always suspected that moralists and moral philosophers have as much to learn from the law as lawyers, judges, and legislators have to learn from strictly moral arguments.

I did say in Torture, Terror, and Trade-offs that I was daunted by the problem of trying to find a strictly moral argument in favor of an absolute prohibition on torture. And I have the greatest admiration for those who have sought to develop non-legal arguments about torture’s wrongness. However, I thought that nevertheless it was worth paying attention also to the variety of ways in which a prohibition on torture seemed to be entrenched into constitutional law, international human rights law, and international humanitarian law. It is worth paying attention to the law, not just because this might give us ideas for moral arguments to convince colleagues in moral philosophy, but also because the various forms of entrenchment and unconditional-ness that these legal forms exhibit might widen our sense of what the desired conclusion of an absolutist moral argument should look like. Law often teaches us that there are many more different kinds of normative position available for possible enforcement than the few skeletal modalities—forbidden, permitted, required, and perhaps also valued—that moral philosophy deals in. And there are many more ways of embedding a normative position in the law so that it is protected by the various costs of altering it than the simple adding of an Hohfeldian disability to a requirement. Also, legal systems exhibit forms of systematicity that are different from and arguably richer than those that characterize moral systems concocted by moral philosophers.

I thought it was worth exploring all of this as well as whatever other work was being done on the simpler question of whether torture was right or wrong and, if it was wrong, how seriously wrong it was. It led me to some interesting conclusions, which Parry explores, most notably the idea of the legal prohibition on torture being a sort of “archetype” in certain bodies of law.

I make no apology for this as a second-best to the development of a purely moral argument. It is, I think, much more important that we understand the prospects for making legal norms against torture resilient to change than the prospects for a purely moral argument against torture. Apart from anything else, if morality is relevant here at all, it is going to be mainly as the morality that supports law and legal change (or legal conservation). It won’t be doing much work on its own. Philosophers sometimes ask each other: “Would you torture X in a ticking bomb situation?” And sometimes they even come up with personal answers: “Yes, I would torture X (or not torture X) because . . .” and there then follows a moral argument that has convinced the person giving the answer. But in the real world, torture is seldom posed as a question of individual moral decision: even those agents of the state who resist the demands that detainees be subject to torture do so under the auspices of certain legal provisions that shelter, house, shape, and inform their conscientious convictions about the subject. The object of moral argument, therefore, is (mostly) law. Even when one is embarking on torture as an act of legal disobedience, because one thinks that the moral danger to one’s society justifies infringing the moral prohibition, one still thinks and acts in an environment shaped and dominated by legal structures (e.g., structures of excuse and justification, in the technical sense).

None of this means that morality is irrelevant. One may still want to know whether there are moral reasons for taking advantage of legal structures and legal possibilities, for being solicitous of legal forms, or for voting for (or against) politicians who are promising to change them. But the moral arguments that are relevant here are unlikely to be arguments framed in the simple deontic language of right and wrong; they will have to be moral arguments oriented in their form and in their possible conclusions to a broader and more complicated repertoire of possible legal outcomes.

I thought something like this was also important for my discussion of human dignity. Dignity, I have argued, is better understood as a status than as a value (or as an attribute of value). Philosophers work with a (fairly crude) notion of moral status—something close to moral considerability—if they work with status at all. But as a well-worked out idea, status is located firmly in the legal realm and both the problems that it gives rise to and the possibilities that it opens up are best understood in the first instance in their legal habitat. So, for example, the criticism that dignity, as a status word, adds little or nothing to what we already know morally can usefully be understood, in the first instance, in the context of John Austin’s claim that status term are just abbreviations; and the proper response to this critique can be understood in terms of the rival account given by Bentham which presents status terms in a dynamic light, united by some “underlying idea” or purpose. I have found these rather recondite legal issues helpful in generating a more complex account of what it would be for human dignity to be a term referring to a moral status, and—as Professor Parry notes—what this might mean for our understanding of the relation between human dignity and human rights.

Professor Parry has three points to make about all this. In the first place, he is worried that the starting point that legal systems provide is too contingent to be of much use for normative argument. After all, we should consider that there might not have been an entrenched legal prohibition on torture. Some legal systems, uncomfortably close to us in time and space, have used it as a procedural form. If one had wanted to oppose the use of torture in legal proceedings in (say) eighteenth-century Italy or Spain, what resources might there have been to mobilize? There wouldn’t have been the legal resources that we were able to mobilize against the Bush administration’s use of torture nine or ten years ago. Cesare Beccaria and others who argued against torture had to make
use of moral arguments—proto-utilitarian arguments, in fact—because legal arguments (or even legal starting points for moral arguments) were not available.

A sensible response to this would say that we begin from where we are and we make the best of it. Our legal arrangements are part of where we are and it is appropriate to try make the best of that, whatever other thinking we do. I guess moral thinking enables us to imagine an array of possibilities other than those that the law has (contingently) given us, but there is such a thing as legal imagination too, which proceeds (hopefully or critical) from a given legal base. Parry says kindly that legal language fails to contain the power of my commitments, inasmuch as “disgust and outrage leap off the pages” of even my supposedly positivist prose. He is right to hint that I understand law in terms of principles, values and possibilities, not just in terms of static and self-contained black-letter doctrines, and that this enables me to see law as a vehicle for what in other circumstances might seem like moral argument. But I do not think that this turns legal argument into just a surrogate for moral argument, not even via a natural-law bridging. It rather attests to the normative, indeed the critical force of legal forms and ideas—something that has long been implicit in the rule-of-law tradition, operating parallel to or separate from the idea of natural law.

So much for law’s aspirational character. I also want to say something about morality, on this point of contingency. When we compare arguments rooted in law with arguments rooted in morality, the latter may appear to rest so much on the happenstance of enactment or the setting of a precedent. But we need to remember the contingent character of moral argumentation, too. Moral discourse may aim high, but like legal discourse it also has its feet on earth. The soaring spirit of moral argument—which aims to transcend the merely given—does not inoculate moral argument against the contingencies of starting points, received traditions, ways of arguing that happen to be currently reputable, and so on. Some moral methodologies make a virtue of this, like reflective equilibrium with its explicit orientation to considered judgments that happen to be currently accepted. But even when it is not explicit, moral argumentation is undoubtedly affected by the whims and contingencies of intellectual fads and fashion. It purports not to be, but such purporting is no guarantee of transcendent success.

A second point that Parry makes about legal starting points concerns the reproach that is often made about law not living up to its own standards. Law may be committed on paper to human dignity, but that does not mean that human dignity is always or necessarily vindicated by legal means. As a normative enterprise, law makes a promise, and the promise does not inoculate moral argument against the contingencies of starting points, received traditions, ways of arguing that happen to be currently reputable, and so on. Some moral methodologies make a virtue of this, like reflective equilibrium with its explicit orientation to considered judgments that happen to be currently accepted. But even when it is not explicit, moral argumentation is undoubtedly affected by the whims and contingencies of intellectual fads and fashion. It purports not to be, but such purporting is no guarantee of transcendent success.

I have nothing to say in response to this, except to concede the point and to doubt whether there are other quicker, more compelling, and more trustworthy means of bringing a community’s values to bear on the fraught circumstances of that same community’s betrayal of them. This is endemic in all normative work and unless Parry can show—what he says some of the critical legal scholars have sought to show—that law and legal forms actually make matters worse, I shall stick with a legal framework for my normative arguments. I don’t want to minimize or disparage the concerns about contingency and betrayal that Parry has raised. My defensive responses here are mainly intended to explain why I persevere with law, legal rights, and the rule of law rather than moving to more direct expressions of moral indignation.

This brings me to a third point. Professor Parry notices that in some of my writings on these matters I have drawn on the resources of Christian faith. There is a chapter on Christian concerns about torture in Torture, Terror, and Trade-offs, and I have written a little on the relation between human dignity and the image of God. Are these ideas supposed to somehow bolster the force of legal arguments which are otherwise subject to distressing contingency and the vicissitudes of a society’s fidelity to law? Parry thinks I once hinted as much in a discussion of the limitations of a purely secular argument for basic equality in my book on the political philosophy of John Locke. He wonders whether it might be “easier to adopt a contingent view of legal rights if one already has a deeper and more significant set of beliefs elsewhere.” I am not sure about this. On the one hand, religious arguments are themselves just as contingent as legal arguments and moral arguments: they too take off from the surface of the earth and follow the contours of intellectual fads and fashions. True, they are about something timeless and compelling, but the same might be said for purely moral arguments. My invocation of religious arguments—such as it is—is mainly for the content that they can add to a case I happen to want to make (about equality, dignity, torture, or whatever), a case that would be incomplete without them. But I do not think that that allays the concerns that Parry has expressed relating the happenstance of the arguments—of whatever kind—that right now it seems sensible to put forward.

Kevin Toh has done me a great service in his penetrating critique of the argument I tried to make in Partly Laws Common to All Mankind to the effect that certain principles or doctrines originating in one legal system may have legal authority in another legal system. Actually, that is not quite the way to put it: the suggestion I made is that certain legal principles or strands of legal doctrine which have currency among many members of a certain set of legal systems may, on that basis, acquire legal authority in another legal system that belongs to that set even though that other legal system is not one of the ones in which the principle or strand of doctrine originated. And even that formulation doesn’t quite get at the argument I want to make: I would also want to pin down a couple of other things. I would want to say that the relevant sort of legal authority acquired by the principle or strand of doctrine in question is what lawyers call “persuasive” authority; and I would want to say, too, that the proposition I am putting forward usually holds only if the relevant set comprises legal systems that are already committed to a broad array of similar policies, purposes, principles, and values (a commitment that may be evinced by the sharing of texts, derivation from a common heritage, or adherence to certain explicit normative commitments such as human rights covenants or conventions).

As this last paragraph indicates, it is not easy to articulate a suggestion like this in the form of an exact verbal formula. Professor Toh thinks this is a sign of equivocation: “There is a lack of clarity about exactly what thesis or doctrine….” Waldron is arguing for, and consequent lack of clarity about what kinds of arguments would be needed to vindicate the doctrine.” He offers me a number of possibilities, including these two—

(LE) If a principle were a law both of the United States and of many other countries around the world, . . . particular subordinate legal norms or doctrines meant to implement the principle were commonly accepted as law by the legal systems of many other countries,
and ____________, then those subordinate legal norms or doctrines would have epistemic authority for courts in the United States in their determinations of the relevant law.

(ME’) If a moral principle were a law both of the United States and of many other countries around the world, . . . particular subordinate legal norms or doctrines meant to implement the principle were commonly accepted as law by the legal systems of many other countries, and ____________, then those subordinate legal norms or doctrines would have epistemic authority for courts in the United States in their determinations of the relevant law.

—all of which are illuminating, but none of which, according to Toh, clinches the argument that I seem to want.

It is not usually my inclination to formulate propositions this precise before securing a broader sense of what is at stake and what is going on in a given area of thought. Sometimes the demand for this sort of precision can block our consideration of ideas that are, thus far, suggestive of insight rather than stipulative of clear necessary and sufficient conditions. I like my legal and political philosophy a little more open than this. But Toh has bent over backwards to try, in his analytic idiom, to see what I am getting at in Partly Laws Common to All Mankind, and it would be churlish to repudiate the assistance he has offered. So let us consider the terms of his (ME’) and (LE).

The most striking difference between them is the difference between the explicit reference to a “moral principle” in the first condition of (ME’) and more generically to “a principle” in (LE). Toh thinks this makes (LE) less eligible as a way of capturing my thesis. He says that I must accept this because the leading case that I use to illustrate my thesis—Roper v. Simmons, an American case about the juvenile death penalty— involves “fundamental moral rights.” That is true so far as the subject-matter of Roper v. Simmons is concerned. But many principles that are about fundamental moral rights are in fact legal principles, and many of them would probably not find expression in moral terms apart from their presentation in the law.

Toh also seems to think that legal principles that are not moral principles would not excite the same concern about the versions of them that courts adopted or about the subordinate norms and doctrines used to implement them: “any variation in the versions that are accepted would not be troublesome.” Maybe I have too narrow a conception of the moral, but I can imagine people attaching pragmatic or policy importance to the way in which a principle is elaborated even if the different elaborations do not present themselves initially as important moral differences. Let me illustrate with an example. In the South African case of President of the Republic v. Hugo, the Constitutional Court of South Africa had to consider (among other things) whether prerogative actions—such as amnesties—could be reviewed for compliance with rights-based anti-discrimination norms. At the time of the decision, South Africa was beginning to take its place among a large array of nations united in their commitment to equality and constitutionalism, and it seemed important to the Court to figure out what the consensus was among older democracies about the extension of review based on anti-discrimination norms into this area of governmental power. The judges referred to American, German, Irish, British, and also other Commonwealth case-law on the judicial reviewability of prerogative actions, such as the power to pardon, and they charted a recent sea-change in world constitutionalism that was bringing the last of the executive’s prerogative powers under the supervision of the rule of law in most of these other countries. I would not want to have to argue for the proposition that “Prerogative powers of mercy should be subject to judicial review on anti-discrimination grounds” is a specifically moral principle, nor would I say it represents a version or an interpretation or an application of a moral principle. But it does indicate an important issue, even if it is not an issue that arises for moralists to discuss outside the context of constitutional doctrine.

Toh also thinks that my invocation of Ronald Dworkin’s account of principles must indicate that I am interested in moral principles, not principles generally. I think we disagree here about how Dworkin is to be understood. I have never understood his conception of principles in law as being primarily about things that could be identified independently as moral principles. Dworkin sometimes speaks of them as hybrid principles having a moral aspect as well as a legal or doctrinal aspect, and this is part of what is challenging about his jurisprudence. Toh says that on Dworkin’s account the principles are supposed to be part of the best moral justification of the legal system to which they are imputed. But of course it would be a fallacy to infer that everything that is part of the best moral justification must itself be a moral element.

Even if I stick with something like Toh’s (LE), he thinks that the case I make is unconvincing. For one thing, (LE) is about epistemic authority, not legal authority. Now I myself would prefer not to obsess about this particular division between epistemic and practical authority. A hard distinction in the legal context between practical and epistemic authority ignores the fact that law is a matter of reasoning. True, it is reasoning to a practical conclusion, but the reasoning is quite complicated and often involves working one’s way through what can only be described as a body of knowledge in its careful application to a tangle of practical issues. So, for example, consider the acceptance by a New Zealand judge of the proposition that in dealing with cases about free speech, it is best to work first through the issue of whether a given limitation on speech is imposed for a legitimate purpose and only then to scrutinize the proportionality of the legislative means that are used for that purpose. The New Zealand judge accepted this proposition from some American case-law, to which she accorded some though not conclusive authority. Is the authority in question in this case epistemic or practical? It seems epistemic in the sense that it is guiding a part of the judge’s reasoning, rather than dictating an outcome to her. It is guiding part of her reasoning rather in the way that a local precedent might guide part of her reasoning in a complex area of common law. And for my money, that makes it legal authority even though it is not practically directive of an action or decision. I think Toh accepts this; he certainly writes sensitively and sensibly about the comments I make in the book on the subject of doctrinal reasoning, legal analysis, and argumentation in the law.

What Toh does not address, however, is the topic of “persuasive authority.” This is an ambiguous phrase, but the ambiguity is important and productive. A precedent, P, is sometimes said to have persuasive authority because the reasoning it embodies tends to persuade us of the conclusion towards which it drives. This does not mean we could have reached the same result without P. The line of argument in P might not have occurred to us apart from our acquaintance with the reasoning of P. Of course, in principle what persuaded the original judge in P might have persuaded us. But often the phenomenology of arguing is not like that, and it might be thought that it is important to insist on judges’ consulting P just so that they do not miss the persuasive line of argument that it embodies.
Precedents are sometimes said to be “persuasive” in a second sense. They are persuasive in that their standing for a particular result or proposition is not conclusive of the authority of that result or proposition, but still weighs heavily in its favor. This may be because of its persuasiveness in an epistemic sense, or it may be because of the relation between the court or jurisdiction in which P was decided and the court or jurisdiction in which P’s authority is now being entertained. When I studied law in New Zealand, we learned a lot of English precedents. Now most of these do not and did not have conclusive binding authority in New Zealand; but nevertheless they weighed heavily in the direction to which they pointed. And if counsel on one side in a New Zealand court could bring up a number of English precedents that pointed in the direction he was arguing for, the opposing counsel would be embarrassed if he were not able to distinguish these precedents or to cite other (perhaps also foreign) precedents to outweigh them. Even within the same jurisdiction, some the precedents of co-ordinate or lower courts might be said to have persuasive, though not binding authority over a court that sat beside them or above them.

If foreign law has the sort of authority I claim in Partly Laws Common to All Mankind, I suspect it is persuasive rather than binding authority except in areas (like admiralty law) where the ius gentium has explicitly been made dispositive. I think I would want my version of Toh’s (LE) to reflect this, and I would want to avail myself of both senses of “persuasive,” in part to resist being saddled with any thesis about foreign authority binding national courts, and in part to capture the difficulties I have already mentioned with any straightforward application in this area of the distinction between practical and epistemic authority.

Finally, let me say something brief about filling in the gap in Toh’s formula (LE). Toh envisages that a version or a doctrinal elaboration of a principle will have authority in a given legal system because it is widely accepted in some other legal systems. But he suggests that this may be subject to further conditions (“and if ______”) and he worries that I have not specified what these further conditions are. In effect, I have done so under his tutelage in the second paragraph of this response to Toh. I indicated there that my thesis about the persuasive authority of certain legal principles or strands of doctrine (interpretations, elaborations, arguments) applies when the legal system in which this authority is in question is a member of a set of legal systems each of which is already committed to a certain broad array of policies, purposes, principles, and values. I mean this as a background of commonality quite apart from the practical principle or doctrine that is under consideration in the instant case. The commonality may be quite tight in the case of legal systems that share a common law heritage or a heritage of constitutionalism; or it might be looser, in some cases consisting simply of a commitment to human rights or even just the rule of law. The point is that the extent and force of the persuasive authority will be partly a function of the character and tightness of the commonality.

But we are talking here about different legal systems, each ruled in large measure by its own distinctive laws (as well as whatever laws are common to mankind, in the phrase I took from Justinian). It is possible that one country may have unique circumstances to face, or may have embarked on distinctive experiments in doctrinal thinking, or may be distinguished more or less sharply from its companion legal systems on some moral or doctrinal basis. Some of these bases of distinction may be worth considering as perhaps filling the gap in Toh’s (LE) formulation. One might say that doctrines or principles drawn from other countries have persuasive authority in a given legal system (that shares broad values, etc. with those other legal systems), unless there are compelling differences between the circumstances that law faces in this country and the circumstances it faces in other countries, or compelling doctrinal differences between the way the law has developed in this country and the way it has developed in the other countries. I would not want to try to pin the matter down much more precisely than that. Often the value of formulae like Toh’s (LE) is that they provide a reasonably clear idea of the shape of one’s position, even if they cannot be understood as precise algorithms. I am at any rate grateful for the attention and energy that he has devoted to this attempt to untangle and interpret my position.