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Gerald Torres

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I. Introduction

I want to thank Charlotte Ku for inviting me to participate in this discussion. A year spent as President of the Association of American Law Schools has given me some ideas about the wisdom of integrating elements of international or transnational law into the curriculum generally and especially into the first year and about how it might be done.

In the Association of American Law Schools we have taken a leadership role in creating an international association of law schools. This effort has arisen out of recognition of the increasing integration of markets (including markets for services). But the effort was also born of our recognition of the critical practical importance that the continually contested idea of the rule of law has for our global community. This reality is now lived everyday—not just in foreign affairs or international commerce. Increasingly, we see that the world is not "over there," but on Main Street as well as on Wall Street. Thus, the average lawyer, while not needing to be an expert in international or transnational law, needs to have some familiarity with other legal systems because wherever she practices, foreign law and foreign legal system are likely to have relevance for the issues that face her clients. Moreover, a study of transnational and international law helps law students understand their own system better because a study in depth reveals underlying values in each.

II. The First Day of School

While I now have a deep interest in international law and comparative law (especially environmental law, human rights and the law relating to indigenous peoples), it did not start that way.

* Bryant Smith Professor of Law, University of Texas at Austin.

Accordingly, property, the first year course I routinely taught, had very little in the way of international content with the exception of the historical material relating to the Anglo roots of American property law. Most of the casebooks had very little, if any explicit international legal content. Of course, the Anglo legal history could scarcely be said to consist of international content since American property law began as but a branch on that tree.

Yet as I began teaching I noted most property casebooks started, if not with wild animals and the law of capture, then with the famous case of *Johnson v. M'Intosh*.[1] I, too, used to begin with *Johnson*. It was typically edited to reveal something about the doctrine of discovery as a basis for a root claim to property ownership. The doctrine of discovery is, of course, an artifact of the colonial expansion of European powers and was one basis for making claims that could be asserted against colonial rival. It also defined the relationship between the "discoverer" and any occupants of the territory discovered.

Despite the attempts of casebook editors to make it simple, it is, in fact, a very difficult case. One, I ultimately decided, was much too difficult for students on their first day of law school.

In some ways, of course, the question in *Johnson v. M'Intosh* could be approached in manner that obscured its difficulty even as it served a heuristic purpose. Baldly put the question was this: should a claimant who derived his title from a purchase from an Indian tribe and thus claimed a legal priority based upon the time of purchase (first-in-time) prevail in an action in ejectment against another claimant to the same parcel of land who derived his title from a later federal patent? Or, phrased another way, does the tribe have residual title in federal territory that can defeat the title claimed by the federal government? So what makes this a difficult case?

What makes it difficult is not making sense of the outcome or following the reasoning as it is typically presented. What makes it difficult is what is usually left out of the typical property casebook. First, there is the question of the audience for the opinion. To whom was Justice Marshall speaking? Was he merely speaking to the parties litigant? If so, his opinion might have directly addressed the international law claims of each side. In this response he would have had to explain why the aboriginal sovereignty of the tribes was insufficient to give them a proprietary interest capable of defeating a later claim. He would have had to have made a *legal* argument. Second, assuming the

1. 21 U.S. 543 (1823). The discussion that follows is substantial drawn from an earlier essay of mine: Gerald Torres and Erin Ruble *Perfect Good Faith*, 5 NEV. L.J. 93 (2004).

students can appreciate the complexity of the answer to the first question: What are we to make of the unspoken successor state theory of law applied by Marshall to support the primacy of the federal government over both the states and the tribes? Or how should we consider the appeals to international law that Marshall uses to validate the holding and to fix the relationship of the federal government both to the states and to foreign sovereigns? (Even if he makes these appeals without resort to citation.) What, indeed, are we to make of the structural constitutional arguments embedded if not addressed in the reasoning?

These questions triggered what Marshall called the "magnitude of interest" the case demanded above the settlement of the simple ejectment action. What stirred the interest was not the straight forward question of the superiority of federal power to that of the Indians. By some lights, that is not even a justiciable question. Justice Marshall uses the dispute to map the contours of federal power both in relation to the states as well as to the powers of Europe that still had pretensions in the Americas.

Marshall was laying the groundwork that established the inherent powers of the federal government as on a par with European nations and thus could use those arguments to claim both title to the land and sovereignty over the inhabitants. It was the settled law among nations that provided for the accommodations in the Americas that established the power in the hands of the federal government. For Marshall, the question became one of consistency with existing law.

> [A]ll the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?[2]

The law announced by Britain that underlay the Proclamation of 1763 represented both the positive law and the theoretical structure for the sovereignty of the states out of which the union was formed. What the states ceded to the federal government, according to Marshall's analysis was not just the territory beyond boundaries agreed upon as the territorial reach of the states, but with it all of the sovereign power over those territories that came to the states from the crown. This power gave to the federal government all of the powers regarding Indians that the crown held, but the monopoly on this power fixed the relationship between the United States and the European powers as one of juridical equality. All of these conclusions would hold whether the land and the entire legislative jurisdiction of sovereignty that the territorial claims

2. *Johnson*, 21 U.S. at 584.

implied had come into the hands of the British and from it to the states and from them to the federal government via discovery or conquest. What should not be lost in this discussion, however, is that all of the "law" that Marshall applied was derived, ultimately from the international law. In *Johnson*, Marshall adverted to the law of nations that limited the prerogatives of the conqueror and gave to the federal government the power to control the actions of those who would interfere with the national government's exercise of that basic power.

Once these conditions are laid out it quickly becomes clear that in order to teach this case well and, in fact, to teach it in a way that informs more about the nature of legal argument than about property law doctrine, some background understanding of international law is required. In fact, I think it is almost impossible to fully understand the nature of the ***legal*** argument Marshall is making without reference to the claims that are rooted in international law. Equally important in that case is the way in which domestic legal ideas about ownership and relativity of title only make sense in light of the surrounding principles of international law. Without that analysis it is easy to slip into a discussion of the opinions as an expression of law as *just* politics and to sow some of the seeds of cynicism that so often infects law students.

The experience of trying to teach *Johnson*, however, (and I am a little embarrassed to say this) revealed to me the extent to which a sensitivity to international legal norms was both instructive and required to really do the basic job of preparing students for the serious study of law. I wondered how the other first year instructors did it or if it occurred to them.

III. Deus Ex Machina

Later, some time after I abandoned the idea of teaching *Johnson* in the first year, I had a student who proposed a pedagogical research project. What she wanted to do was to design international law units for every first-year class. How could I refuse? The idea behind the project was that international law is something that all law students should be exposed to early and systematically. The best way to do this would be to integrate it into what students are led to believe constitute the basics of a legal education. What her project did was to reorient my thinking about how international and transnational law ought to be incorporated into the curriculum. As my discussion of *Johnson* makes clear, international law was and has always been part of the first year curriculum.

Adopting a pervasive approach as proposed by my student in her research project (and, I am told, by a variety of writers) would not substitute for a comprehensive course on international or transnational

law. The project did crystallize a concern about how to illuminate the international and transnational content that was already there. This is the point I tried to highlight in my discussion of *Johnson*. What that discussion should also have crystallized is my concern about the need to historicize the study of international and global legal institutions and practices.[3]

I think that building an understanding of the legal/historical processes entailed in a developing global world order is critical for an accurate understanding of the contours and state of international law.[4] In a review of international law casebooks, David J. Bederman made the following observation:

> The ultimate measure of the quality of an international law casebook should not be its fidelity to some intellectual agenda or theoretical methodology, but rather, its coherence in presenting the subject to student readers and in sparking an abiding interest in the study of international law as a professional practice, as a field of intellectual inquiry, and as a necessary and vital adjunct of an informed citizenry.[5]

Of course this is true, but it really begs the question asked by Professor Mathais Reimann in his essay calling for a new transnational course: what is the measure of coherence?[6] Certainly, it is, at a minimum, fidelity to a narrative line concerning the evolution of international law; even if that narrative is at root atheoretical (casebooks have not yet adopted the disnarrative as a pedagogical device).[7] The quality of coherence, it seems to me is measured by a narrative line that connects the current state of transnational and international law with the other law that students are learning. That is the lesson that my student's research project revealed. It is not a deep insight, assuredly, but it is central to the evolving integration of systems of law and legal

3. Mathias Reimann develops this point in his call for a new transnational course, *see* Mathias Reimann, *From The Law of Nations to Transnational Law: Why We Need A New Basic Course for the International Curriculum*, 22 PENN ST. INT'L L. REV. 397 (2004). I also tend to agree with Reimann that what counts as international law has itself become a contested idea and one not given to razor sharp boundaries. As my co-panelist makes plain, this is especially true in the practice of transnational/international law.

4. In a different context Walter Mignolo makes a similar point in the continuing relevance of enlightenment ideas in the post-colonial world, *see*, Mignolo, *Local Histories/Global Designs* (2000).

5. David J. Bederman, *Review Essay International Law Casebook: Tradition, Revision, and Pedagogy* 98 AM. J. INT'L L. 200 (2004)

6. Reimann, *supra* note 3.

7. A disnarrative structure would be one that focused on the disjunctive experience of life or presented itself as a chronicle of the immediate or a representation of an emergent hybridity.

institutions. This integration needs to occur at the level of pedagogy because it is occurring at the level of practice, the level of doctrine, and ultimately at the level of theory.

IV. Conclusion

Of course, the discussion of one early case from property does not prove anything about the necessity of familiarizing students with the contours of international law. Yet, as Professor Janet Levit has pointed out recently in an essay in Tulsa Journal of Comparative and International Law, international law turns up every day in venues as diverse as the United States Supreme Court or the Oklahoma Court of Criminal Appeals.[8] It is not the province of recondite cases, but as central as life and death. The *Torres* case chronicled in Professor Levit's essay revolved around the role of international norms in state court adjudication of charges that resulted in a state court death sentence for the defendant, Torres. Yet, her discussion of how international law norms would be applied (and which might be applicable) revealed that "state courts are clearly transnational, not mere parochial, actors; yet their role in solidifying international norms and furthering compliance with international law is woefully underappreciated."[9] Perhaps more to the point she makes plain that the implications for practice are just as important as they might be for scholars. She notes that:

> If state courts are important transnational actors, what does this suggest about advocacy tactics? Judges, and not merely state judges for that matter, sometimes misstate even the most fundamental tenets of international law and simply must receive more training in international law. So it is crucial that lawyers, who advocate before such judges, understand their briefs not only as advocacy opportunities but also as opportunities to instruct courts in the legal dynamics of international law. Accordingly, all lawyers, not just those elite international law professors and those affiliated with certain NGOs, should become familiar with basic international law concepts (with strong implications, of course, for law school curricula).[10]

Her conclusions reinforce the point I have been trying to make. International law is a part of all the law we learn and has already been in

8. Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163 (2004). *See also* Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

9. Koven Levit, *supra* note 8.

10. *Id.* at 186.

the material we teach. It is perhaps time to make that presence visible.