

# America as Pattern and Problem

by Carl E. Schneider

*Let us look to America, not in order to make a servile copy of the institutions that she has established, but to gain a clearer view of the polity that will be the best for us; let us look there less to find examples than instruction; let us borrow from her the principles, rather than the details, of her laws. The laws of the French republic may be, and ought to be in many cases, different from those which govern the United States; but the principles on which the American constitutions rest, those principles of order, of the balance of powers, of true liberty, of deep and sincere respect for right, are indispensable to all republics; they ought to be common to all . . .*

—Alexis de Tocqueville  
*Democracy in America*

Since the days of Tocqueville, foreign observers have seen America as both a pattern and a problem. They still do, and in ways that illuminate the way law deals with bioethical issues both here and abroad. America was long exceptional in having a written constitution, in allowing its courts the power of judicial review, and in letting courts exercise that power to develop and enforce principles of human rights. Today, that pattern looks markedly less exceptional. After the Second World War, Germany and Japan were persuaded to adopt constitutions that included human rights provisions and that endowed courts with the power to interpret them. Since that time, a number of other countries—Canada, for example—have also moved closer to the American constitutional pattern.

Many countries, however, have not been content to borrow American constitutional principles and practices. Their courts have also asserted their authority to develop and enforce principles of human rights in two other ways. First, courts in many countries have assumed jurisdiction over questions in-

volving those rights by virtue of their duty to interpret treaties their countries have signed. Second, and strikingly, courts in many countries have come to see themselves as joint participants in the work of building an international body of human rights law. As my colleague Christopher McCrudden writes in his fascinating study of this development, “It is now commonplace for courts in one jurisdiction to refer extensively to the decision of other courts in interpreting human-rights guarantees.”<sup>1</sup>

This is where America has come to seem a problem to our foreign observers. For the United States has been irritatingly reluctant to sign these treaties, and American courts have been irritatingly unwilling to consult the decisions of foreign courts. Why?

The reasons are—obviously—various. Foreign observers are not infrequently pleased to believe that Americans are irredeemably provincial. (What do you call someone who speaks two languages? Bilingual. What do you call someone who speaks one language? American.) And it is perfectly true that, while lawyers in many countries are

likely to have had some instruction in a foreign law (and even to have studied in a foreign country—often the United States), American lawyers have generally not been so blessed. To be sure, Americans lawyers have less need. They work in the world’s dominant economic power, one so vast that much more internal trade occurs within American boundaries than within any other industrialized country. American lawyers, to put the point differently, are more narrowly trained because—more than the lawyers in other countries—they can afford to be.

Foreign observers also relish suggesting that America has resisted signing some international human rights treaties because it is hopelessly arrogant and cannot believe it has anything to learn about human rights from abroad. It is surely true that American foreign policy has in recent decades often seemed loftily confident of its mission to bring the wretched heathen to the human rights light. But the reluctance to sign such treaties has other, less evident, roots as well. For one thing, a number of international human rights agreements have grown out of regional (and particularly European) efforts at economic and political integration, efforts in which the United States has been, if anything, a competitor. More significantly, however, the government of the United States is—more than almost any foreign country’s—federal. We confide many issues with human rights implications to the states, not the federal government. In addition, some Americans have opposed these treaties because they take them seriously enough to be uneasy about where judicial interpretation will take their provisions.

That the American executive and legislative branches have not leapt to endorse human rights treaties may help explain why American judges have not felt encouraged to be guided by the developing international law of human rights that judges in many countries are creating. But two other factors are probably even more significant. First, the ethos of the American law stubbornly retains its common law inspiration,

while Europeans still find their inspiration in civil law. This matters because the attempt to evolve a body of international human rights law—in practice if not in necessity—seems more consonant with the civil law than the common law.

The common law grew out of the decisions of English judges in particular cases, while the civil law looks to general principles of law embodied in codes that are supposed to be systematic. The common law approach as Americans understand it is experimental, flexible, and pragmatic; it is of this time and of that place. It seeks to discover through social experiment what programs and practices in fact work for us here today. That is why Brandeis' description of the states as laboratories of democracy still appeals to us and why we still remember that Holmes said that the life of the law is not logic, it is experience.

Proponents of civil law, on the other hand, with their allegiance to general principle, are more readily charmed by abstraction and broad assertions of principle. This difference in attitude has for some years been exemplified for me by an exchange I had with one of my German students. We had been discussing a nuisance case in which the court had sided with a plaintiff who had "come to the nuisance." My student protested that this violation of one of the common law's undoubted aphorisms made the law "incoherent." I suggested that it nevertheless made for good social policy. I could hardly have distressed her more. The law, she asseverated, must above all be a set of coherent principles. I was pleased to be able to quote Goethe in my defense, which in Germany usually ends discussions: "Grau, theurer Freund, ist alle Theorie, und Grün des Lebens Goldner Baum" (Gray, dear friend, is all theory, and green life's golden tree). But she remained unappeased and even horrified at the common law's betrayal of the idea of legal integrity.

The civilians' taste for grand theory, their thirst for universal, timeless truths, perhaps explains how so much of the legal world can tolerate what to unreconstructed common lawyers look sus-

piciously like natural law ideas embodied in contemporary treaties and the judicial opinions of many countries in human rights cases. When the common lawyer hears the kinds of expressions common in the defense of these treaties and opinions, when, for instance, the common lawyer is admonished to protect "human dignity," Jeremy Bentham's jibe springs irrepressibly to mind—that natural law is "nonsense on stilts."

"Nonsense on stilts" rings true to common lawyers because they believe, again with Holmes, that general propositions do not decide concrete cases, that vague expressions of vast principles can be interpreted so variously that they neither instruct nor constrain judges, that natural law incorporates more rhetoric than reason. Postmodernism, structuralism, and their ilk appeal not at all to American judges, but they know vacuity when they see it. The "right of individual self-determination" is no doubt a fine thing, but what does it tell you, for example, about how implacable a duty of informed consent to impose on doctors?

This leads me to what must in this cramped space be our last reason American judges have not swarmed to join their European—and even Commonwealth—brethren in building a common law of human rights. The common law gives judges extraordinary liberty to make law. But only in some areas, and only subject to the untrammelled review of legislatures. Ultimately, as we understand the common law tradition, it is democratic. How, we ask, is it democratically decent to hand over lawmaking power to unelected judges guided not by policy electorally established, not by their understanding of their own people's law and tradition, but by what they and their upper middle class confreres from abroad think true at the end of the twentieth century?

These questions about the role of unelected judges in a democracy have been honed to biting sharpness in the United States by our constitutional history. Through the New Deal, that was a history of judicial reaction. In recent decades, the direction of judicial activism has shifted, but in ways that have

provoked vehement and tumultuous dissent, as the words "*Roe v. Wade*" suffice to remind us. This (probably unanticipated) response and the changes in judicial personnel that the response has helped inspire have made the Supreme Court leery of expansive interpretations even of our own Constitution, much less of developing an international law of human rights that might lead the Court into who knows what thickets of brambles and briars. The Court's latest encounter with human rights in a bioethical context—the assisted suicide cases—exemplifies just this caution. In those cases the Court declined to articulate any broadly phrased right, postponed further decision until more empirical evidence grows out of experience, and saluted the virtues of decisions reached by state legislatures. The United States thus seems fated to remain—as it has long been—both pattern and problem.

## References

1. C. McCrudden, "A Part of the Main? The Physician-Assisted Suicide Cases and Comparative Law Methodology in the United States Supreme Court," in *Law At the End of Life: Assisted Suicide and the Supreme Court*, ed. Carl E. Schneider (University of Michigan Press, forthcoming).