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TO CONSIDER OR TO USE? CITATION TO FOREIGN AUTHORITY AND LEGAL AESTHETICS

ANDREW JENSEN KERR*

“We don’t *use* foreign or international law; we *consider* the ideas that are suggested by an international court of law.”¹

—Justice Sonia Sotomayor (April 2009)

Rule 1.2 ... β – to consider but not use; a source for inspiration but without legal authority

* * *

In this essay I consider what it means to consider something. More directly, I consider how a judge might distinguish a source used for inspiration from a source used as legal authority. I wonder if Justice Sotomayor posits this line-drawing problem as a koan to would-be clerks. To my limited ken, the epistemological limits of the English language make it impossible to separate these concepts with precision. I argue that we should instead lobby Bluebook editors to create a new signal that can capture a heuristic of citing something for edifying or contextual value. This is not a purely pedantic or indulgent exercise.² Rather this solution reflects a core motivation of lawyers and judges who cite to non-authoritative authority—that it is bricolage,³ ornamental,⁴ an *aesthetic*. We expect legal documents to *look* a certain way. Perhaps literary icons like First Circuit Judge Bruce Selya can get away with the no-citation opinion.⁵ For the rest

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1. Justice Sonia Sotomayor, *Speech to A.C.L.U. of Puerto Rico*, N.Y. TIMES VIDEO (June 11, 2009), <http://video.nytimes.com/video/2009/06/10/us/politics/1194840839480/speech-to-the-a-c-l-u-of-puerto-rico.html> (July 6, 2009) (cited by STEVEN GROVES, QUESTIONS FOR JUDGE SOTOMAYOR ON THE USE OF FOREIGN AND INTERNATIONAL LAW, THE HERITAGE FOUND. (July 6, 2009), <http://www.heritage.org/courts/report/questions-judge-sotomayor-the-use-foreign-and-international-law>).

2. For a perhaps more indulgent but surely more humorous exercise see Marc Lane Roark & Warren Emerson, *Signals*, SOC. SCI. RESEARCH NETWORK (Nov. 10, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2688685.

3. Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 64 (2004) (citing Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1237–38, 1285–1306 (1999)).

4. Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL’Y 291, 292 (2005).

5. See *Levesque v. Anchor Motor Freight, Inc.*, 832 F.2d 702 (1st Cir. 1987). [Consider a parenthetical explaining case’s relevance] See also Dan Slater, *The Linguistic Talents of Judge Bruce*

of us, there must be a reference to *something*. Whether it is M*A*S*H*,⁶ or rapper Biggie Smalls,⁷ or your own planted dissent or concurrence⁸ from a previous opinion, the reader expects your argument to have a provenance. Signals reify and concretize this visual need for citation, and at the same time congeal ineffable gradations of inference into discrete pictographic symbols with uniform meanings.

I thus present the signal ß—or sharp S—in honor of the alliterative resonance of Justice Sonia Sotomayor’s own name. She first articulated the nicety of this distinction at a 2009 conference in reference to the perennially debated topic of foreign authority in U.S. courts.⁹ According to Justice Sotomayor, judges possess the robotic ability to compartmentalize what they read or experience from what they think or feel. They can look at something without letting it inform them.¹⁰ This feels counter to current trends in constructivist theories of education. It also feels contrived.

Per the American Society of International Law taxonomy of foreign authority in U.S. courts, looking at foreign materials can be “an aid to interpretation.”¹¹ I agree with Justice Kagan’s quip that good ideas are definitionally good, wherever they might come from.¹² And, as surveyed by Professors Calabresi & Zimdahl, foreign materials have been cited since the birth of the United States.¹³ Even Justice Rehnquist thought this practice was okay!¹⁴ But there is of course a lurking problem with the facile citation

Selya, WALL ST. J.: L. BLOG (Feb. 4, 2008), <http://blogs.wsj.com/law/2008/02/04/the-linguistic-talents-of-judge-bruce-selya-2/> (surveying the rich vocabulary of Judge Selya).

6. Austen L. Parrish, Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law, U. ILL. L. REV. 637, 655 (2007).

7. Melzer v. CNET Networks, Inc., 934 A.2d 912, 920 (Del. Ch. 2007).

8. See, e.g., Lawrence v. Texas, 539 U.S. 558, 572 (2003) (“These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. ‘[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.’ County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring).”).

9. Sotomayor, *supra* note 1.

10. *Id.*

11. Am. Soc’y of Int’l Law, *Uses of International Law in U.S. Courts*, in BENCHMARK ON INTERNATIONAL LAW § I.C (Diane Marie Amann ed., 2014), www.asil.org/benchmark/uses.pdf.

12. See, e.g., Justice Ruth Bader Ginsburg, Speech at the American University International Academy of Comparative Law: “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication (July 30, 2010), https://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp_08-02-10.

13. Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005).

14. Daniel A. Farber, The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History, 95 CAL. L. REV. 1335, 1340 (2007).

to foreign case law for non-authoritative value: the unexplained reference gives rise to conflicting interpretations.

Professors Delahunty & Yoo confirm there is nothing wrong with citing foreign authority for the same reason one might cite a law review article.¹⁵ However, law review articles are always and inherently persuasive materials. We don't need extra in-text qualifications from a legal writer to remind us she is citing to Professor Sunstein as instructive guidance. Additional clarification would be read as superfluous or amateur. A citation to a law review—with or without an accompanying Bluebook signal—reads as a “good idea that has been valorized by the submissions and editorial process of the academy.”

However, the standalone citation to a foreign case is opaque. How are we to interpret the unexplained nod to, e.g., the European Court of Human Rights¹⁶—as having binding value on the court? As a manifestation of an interesting thought? As providing contrast or context for what we could choose to do here, but ultimately decide not to do?¹⁷ Judges probably often consider and use foreign authority for multiple, perhaps contrary reasons. I exclude here one very specific kind of reference—when per conflict of laws analysis a foreign law *must* be applied. Use of foreign authority can be required when interpreting the Laws of Nations or a tort or contract dispute whose locus is abroad. Use of foreign authority is here analogous to use of another U.S. state's law in diversity jurisdiction.

But the caution that many judges exercise when approaching foreign authority also casts light on the hubris of those who do choose to enlist it. In his “Demystifying the Determination of Foreign Law,” Matthew Wilson provides a catalog of tools to help hesitant judges use foreign law appropriately when *needed*.¹⁸ This situation is discrete from citation to foreign law as comparative insight. But it does expose the confidence of judges who do not sense this same humility when working with foreign materials.

I offer instead a Bluebook-based solution for when lawyers or judges cite to foreign authority for the same reason they might cite to a dissenter or an academic—because the idea seems like a good one (Kagan) and they can't find the same idea in a controlling majority opinion, and so they are

15. Delahunty & Yoo, *supra* note 4, at 295.

16. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

17. *See generally* Rebecca Lefler, Note, *A Comparison of Comparison: Use of Foreign Case Law As Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia*, 11 S. CAL. INTERDISC. L.J. 165 (2001).

18. Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887 (2011).

encouraged to look elsewhere for reference to this good idea to provide legitimacy for their position—even if the cite is only an aesthetic cover or anodyne for the expectant reader. Justice Thomas reminded Justice Breyer that Breyer was citing to a Zimbabwe opinion in *Knight v. Florida*, not because that court is necessarily held in high prestige or because Zimbabwe shares a modality of juridical reasoning or process, but simply because it was there.¹⁹ It was an act of both opportunity and desperation²⁰: “I want to do this thing; I have to think of some reason for it. I have to write something that—you know, that sounds like a lawyer. I have to cite *something*. . . . what am I going to use?”²¹

* * *

We might ask if this opportunistic posture frames the process of case selection in all of common law method. An important contribution of the Legal Realists is their revised description of how judicial work gets done. The judge is not deducing the most pellucid syllogism from a full & complete data set of precedent, which itself represents the arc of natural law to progress, generality, granularity, efficiency, fairness, intelligibility, etc. Instead a variable as prosaic as what the judge ate for breakfast²² might inform her gestalt for the case, and encourage her to pick and choose case law that supports this inclination, while distinguishing as inappropos or dated those precedents that clash with her intuition. In short, case selection is subjective and purposive even in domestic law. It inheres the same motivation as Breyer’s Zimbabwe case, but it is masked by the familiarity of a local jurisdiction.

Stare decisis exerts a centripetal force that anchors the evolution of the common law, and the Herculean judge is asked to fit her reasoning within its compass (Dworkin). But “[s]tare decisis is not an inexorable command.”²³ We may reject the obsolete precedent, because of mere desuetude or because there is something patently wrong or icky about it that offends contemporary sensibilities. This way of thinking about common law lawyering is now so ubiquitous that it functions as a shared presumption.

19. *Knight v. Florida*, 528 U.S. 459, 459 (1999) (Thomas, J., concurring) (mem.).

20. *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 528 (2005).

21. *Id.* at 531. See also Emily Bazelon, *What Would Zimbabwe Do?*, THE ATLANTIC, Nov. 2005, <http://www.theatlantic.com/magazine/archive/2005/11/what-would-zimbabwe-do/304298/>.

22. See, e.g., Mark DeAngelis, *Legal Realism: The Law Depends on What the Judge Had for Breakfast*, LEGAL STUDIES CLASSROOM BLOG (Oct. 14, 2013) (citing JEROME FRANK, COURTS ON TRIAL 162 (1973)), <http://legalstudiesclassroom.blogspot.com/2013/10/legal-realism-law-depends-on-what-judge.html>.

23. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

Lawyers are evaluated on their ability to select wise precedent. It is what we call good judgment.

In the domestic context we share these assumptions about case selection. But the citation to foreign authority obfuscates judicial intent by conflating edification and use. My proposed β signal prevents the opportunistic judge from feigning the edifying cite, while actually making a pretextual use reference. The subterfuge is accessible, and is well-demonstrated by my own familial banter. My wife is particularly skilled at cloaking the veiled criticism within the aura of a joke, where I am put in the conflicted position of either being a bad sport (it was only a joke, Andrew!) or obtuse (no, *really*, quit wearing that garish windbreaker²⁴). My wife's comment is meant to be interpreted as instrumental, but her charm and diplomatic disposition requires her to frame it with humor. My instinct is many judges also furtively want the reader to interpret the opaque citation to foreign materials for both edification and authority. The instrumental use value might not be immediate, but over time the opportunistic lawyer or judge of the future will re-frame it as authoritative.

Professor Parrish instead argues transparency should be a cardinal ambition of U.S. courts, and encourages judges to be candid about what they read and how it informs their decision-making.²⁵ Justice Breyer relays the anecdote of the congressperson who condoned Breyer's study of foreign materials so long as he did not publicly disclose this inspiration in his opinions.²⁶ I share this legislator's concern of the unqualified reference being misconstrued by readers. But opacity is not a solution. And thus the β : it contributes to the social knowledge project of The Common Law while also insulating Justice Breyer's summer reading list from the legal canon. Perhaps the public might also find the Supreme Court of Canada²⁷ to be good beach reading, and appreciate the tip.

Apparently jurists from many other nations do. Justice Ginsburg laments the declining cite counts to the U.S. Supreme Court, while noting that the Supreme Court of Canada has become more a hub or node for cutting-edge judicial work.²⁸ This meta-conversation with other courts is of course secondary to the primary job description of a high court judge: to

24. *But* it is hypercolor and my mom bought it for me at a 90% discount from Filene's Basement!

25. Parrish, *supra* note 6, at 674.

26. *A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, *supra* note 20, at 522–23.

27. *See id.* at 528.

28. *E.g.*, Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES (Apr. 11, 2009), http://www.nytimes.com/2009/04/12/us/12ginsburg.html?_r=0.

pick a winner and provide a reasoned ratio decidendi to guide lower courts. But to the extent that Justice Ginsburg's goal is a valid one the β allows the author to share good ideas within the spirit of good will. Diluted signals such as *see*, *e.g.*, and *cf.* capture a reduced quantum of necessity or relevance, but they also connote that a court should recognize an illustrative example or analogous argument as at least somewhat persuasive. The β lacks this same didactic thrust. It is not telling the reader to think a certain way; it is just letting the reader know a certain way of thinking exists.

And the β does so with the effortless modesty of a "below the line" pictograph. Judges and lawyers alike should loathe having to insert additional qualifications in the text of their writing. Prolixity interrupts flow, and periphrasis can create logical confusion. Why require an author to disclaim their citation to a foreign court with in-text phrasing like "I cite to X only to suggest this as a possible direction for this court to go; however, I instead select the nuanced position Y" when this labored point can be expressed efficiently in a footnote? We welcome flair below the line. The excursive footnote that points the reader to additional conversation on a point of law reflects our metaphor of scholarship as an ongoing conversation.²⁹ *See generally* is too generic for the direct foreign authority citation. *See also* is good advice for checking out further literature on a debated point. But what if there is only *one* relevant citation and it comes from Zimbabwe? There is not the conditional prior thing to then have the paired *also*. In that case we require a separate signal to share our erudition with the world.

I look forward to the diverse and thoughtful ways the β might be employed. Besides making judges more accountable, it can also help inform their legacies by making their individual jurisprudences more defined. One judge's *See* might be another judge's β . For example, Justice Thomas might cite to an eighteenth century opinion from the English Court of Chancery as authoritative, whereas Justice Breyer might use the β to indicate its merely edifying nature. The reverse would likely be true for a reference to a contemporary opinion from a nation that possesses kin liberal-democratic-post-capitalist values.

I am aware my proposal might feel a bit heady and abstruse for something as seemingly mundane as a footnote. But I parry that my ambitions are immediate and pragmatic. Much has been written about the consideration & use of foreign materials, but the eristic debate continues. I

29. *Cf.* Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. LEGAL EDUC. 65, 74–77 (2010) (surveying the explanatory footnote). *See also* Kenneth Burke.

seek to end it here. Well-meaning scholars have supported the use of foreign authority so long as it contextualized and done well.³⁰ But this prescription is platitudinous. One could make the same “do it well” argument for any human adventure, and could make the same “cite it appropriately” instruction for any kind of academic work. The fact that lawyers are a particularly opportunistic bunch (see the regular citation to unpublished opinions³¹) increases the need for a less subjective test. Choosing the authoritative signal over the β requires volition, and thus puts the calculating lawyer or judge in a tougher spot. I am however confident that—like Justice Breyer’s mention of Zimbabwe—most jurists will view the β not as an obstacle but as an opportunity. Perhaps Justice Thomas might even be inspired to provide comparative insight to his own singular form of originalism. Please contact your local Bluebook editor to remind them of this important omission.³² Let’s save the β ³³ and put an end to this sophistic attempt to articulate a test for considering useful foreign materials.

30. See, e.g., Stephen Yeazell, *When and How U.S. Courts Should Cite Foreign Law*, 26 CONST. COMMENT. 59, 70–71 (2009) (“International law, if it is to be used, should be used well—not as an ornament or afterthought. . . . [T]he point is simple: ‘good’ citation of foreign law will have the same characteristics as good citation of domestic law; they will be complete, careful, and contextualized.”).

31. See generally Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235 (2004).

32. *Contacting Us*, THE BLUEBOOK (last visited Nov. 17, 2016), <https://www.legalbluebook.com/Public/ContactUs.aspx> (“If you have feedback or notice errors or omissions in Bluebook content or on The Bluebook Online site, please contact us at editor@legalbluebook.com.”).

33. E.g., Hyde Flippo, *Spelling Reform: Double-s Words - German Language - Eszett*, ABOUT EDUCATION (Aug. 3, 2016) (describing controversy over German spelling reform and “possible demise” of the β), <http://german.about.com/od/vocabulary/f/Spelling-Reform-Double-s-Words-German-Language-Eszett.htm> (last visited Nov. 17, 2016).