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Please accept my apologies for
for an outrageously preliminary
and incomplete draft

IUS GENTIUM: A DEFENSE OF GENTILI'S EQUATION OF THE LAW OF NATIONS AND THE LAW OF NATURE

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I

"Truth exists," wrote Gentili, "even though it be hidden in a well, and when it is diligently and faithfully sought, it can be brought forth…."[1] This comment is directed at the question of finding the truth about "this law of nations which we are investigating," which is the basis of the law of war. And Gentili wants to say that the "well" which we are to plumb is a well that contains the laws which have been established among human beings as well as the opinions of the jurists:

> Abundant light is afforded us by the definitions which the authors and founders of our laws are unanimous in giving to this law of nations which we are investigating. For they say that the law of nations is that which is in use among all the nations of men, which native reason has established among all human beings, and which is equally observed by all mankind. Such a law is natural law. "The agreement of all nations about a matter must be regarded as a law of nature."[2]

(That last quotation is attributed by Gentili to Cicero.)[3] This equation of the law of nations and the law of nature is common throughout Gentili's work on war. He says that he holds "the firm belief that questions of war ought to be settled in accordance with the law of nations, which is the law of nature."[4]

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[1] Gentili, On the Law of War (OLW), Bk. I, Ch. 1, p. 8 (Carew translation, Hein Online).

[2] Idem.

[3] Idem.: the attribution is to Cicero, Tusculan Disputations, I [xiii.30].

[4] Gentili, OLW, Bk. I, Ch. 1, p. 5 (my emphasis).

But the equation of the law of nature and the law of nations has also sometimes been resisted in the history of jurisprudence. A number of different distinctions have been made.

(1) One distinction is between the laws that apply to nature generally and the laws that apply specifically to humans: we hear this from the author of the Institutes

> The law of nature is that which she has taught all animals; a law not peculiar to the human race, but shared by all living creatures, whether denizens of the air, the dry land, or the sea. … Those rules prescribed by natural reason for all men are observed by all peoples alike, and are called the law of nations.

(2) Another distinction is between the law of nature as a set of first and fundamental premises of natural reason, and the law of nations as a set of intermediate principles which represent applications of the fundamental premises. This position is sometimes associated with Aquinas: rules about property, for example, though not dictated by natural law, may be present in the ius gentium as applications of natural law principles to human affairs.[5]

Now, in general, the law of nature is identified with reason; it is the part of God's divine law that humans can figure out using their rational faculties. Discerning the law of nature—at the bottom of a well or anywhere else—is a sort of philosophical exercise. It seems quite different from the kind of effort required to find out about positive law. Finding out about positive law involves looking to see what humans have historically established in the world in the way of laws and customs. One looks on the ground, as it were, rather than up in the airy domain of pure reason. So, in any contrast between natural law and positive law, the former will tend to have a rationalist orientation and the latter an empirical orientation. But the two distinctions between natural law and ius gentium that we have just considered—the distinction in the Institutes and the distinction in Aquinas—seem to keep us firmly on the rationalist side of that divide: ius gentium is either (1) rational thought devoted specifically to humans (as opposed to all animals), or (2) rational thought devoted specifically to the application of natural law principles in the sorry circumstances of human life.

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[5] Thomas Aquinas, Summa Theologica Pt. I–II, Q. 95, Art. 4, Reply 1, at 298 (R.J. Henle trans., 1993) ("The Law of Nations is indeed in some way natural to man inasmuch as it is rational, since it is derived from the Natural Law by way of a conclusion, which is not very far from the principles."). There's a good discussion in Genc Trnavci, "The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law," 26 U. Pa. J. Int'l Econ. L. 193 (2005).

But as one reads Gentili's equation of natural law and the law of nations, it seems to bring the two concepts together on the other side—the empirical side—of the rational/empirical divide. We find out what the law of nations is by diligently investigating the laws and customs that are in use among all nations of men; we ask traders, for example, for stories about foreign lands.[6] What Gentili equates with the law of nature are the laws and customs that have seemed acceptable to all nations (or, as it turns out, most nations—for "as the rule of a state and the making of its laws are in the hands of majority of its citizens, just so is the rule of the world in the hands of the aggregation of the greater part of the world")[7]—which have established themselves in the world, not necessarily by any explicit agreement but by "successively," nation by nation, seeming acceptable to most men. That is plainly an empirical matter. And if the law of nations in this sense is being equated with the law of nature, then we have moved the whole jurisprudential enterprise over from the side of pure moral reason to the side of positive legal inquiry.

I shall say something about some important qualifications to this picture in section II. But first this. In between Gentili's equation of the law of nature and the law of nations on the positive side and the assimilation (or quasi-assimilation) of the law of nature and the law of nations on the rationalist side, one can obviously imagine a position which distinguishes the two as located on opposite sides of this divide. On this account, (3) the law of nature represents rational thought about the law that God or nature has provided for all men (and maybe some of it for animals as well), while the law of nations represents an emerging body of positive law that is not pinned down to any particular state. This seems to many people the most natural account. On this account the law of nations is much more like municipal law or the ius civile than like the ius naturale. Like the ius civile, the ius gentium is a matter of history and contingency—what happens to have been established among men. It is vaguer than the ius civile, no doubt, and the conditions for affirming the positivization of this or that principle or tenet of the ius gentium are less determinate. It doesn't embody such a well-worked-out rule of recognition. But it is positive law nevertheless. And like all positive law, it may be evaluated (and found wanting) by natural law criteria.

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[6] And though "it is true that traders, … busied as they are with their traffic, are careless about the truth," yet "[n]evertheless, much that is true has been learned from them." (Gentile, OLW, Bk. I, Ch. 1, p. 9)

[7] Gentili, OLW, Bk. I, Ch. 1, p. 9.

Let me illustrate this with the example of slavery. One thing that is commonly said in relation to distinction (3) is that the ius gentium in the ancient world permitted slavery, whereas the ius naturae forbade it. On the Institutes' approach—distinction (1)—one would observe that there is no slavery among the animals. On Aquinas's approach—distinction (2)—the only way of parsing that would be to affirm that there is something to be said for slavery in the sorry circumstances of human life.[8] But in the framework laid down by distinction (3), one might say that this is just a familiar case of the existence of moral grounds for condemning a widespread positive law. And that seems to many people to be the most lucid way of analyzing what is going on.

A resolute separation between positive law and natural law, of the kind recognized in distinction (3) seems to be the path of clarity, to modern jurisprudence at least. The modern jurisprude might say: by all means talk about the law of nations if you want to; but don't use that as an opportunity to mix up natural law talk with positive law talk. If the law of nations is positive law, then tell us about its positive presence in the institutions and customs we see established among men, and perhaps also in the overlap between or consensus among the actually-existing municipal legal systems of the world. This seems to accord also with the approach that modern international lawyers would take. They too want to separate out their sense of what international law is, as opposed to what a moral philosopher or natural lawyer might think it ought to be. If there are laws of war, then there ought to be some ways of recognizing or identifying them in treaties, conventions or customs. But if there is no way of establishing the positive existence of some particular proposition, then the legal water should not be muddied by jurists' insistence nevertheless that that proposition "makes sense" or embodies some deliverance of reason on the proper regulation of armed conflict and ought perhaps to be recognized as a component principle of the law of war on that ground alone.

Gentili, it might be thought, satisfies this sort of positivist stricture, by talking about the law of nations in mostly positive-law terms. He doesn't engage in the sort of confusion or wishful thinking that the positivists, with their thesis of the clear separation of law and morality, criticize. Actually, however, I think this is less the case than initially appears. I said a moment ago that the view that Gentili simply equates natural law and the law of nations and locates that equation firmly on the positive law side of the divide needs some qualification, and we still haven't gotten to what those

[8] See Aquinas, ST, II-II, Qu. 57. –reply to obj. 2.

qualifications are. (Bear with me, we will get to them in a moment, in section II.) But even if his position was unqualified, even if it were true that all Gentili does is to equate natural law and the law of nations and locate them both on the side of positive law, the positivists (or some of them) might criticize him for being too positivist. They might criticize him because his position seems to give up any idea that the law of nature can function as an evaluative or moral criterion for judging positive law. Maybe a Kelsenian positivist would applaud this: he thinks that natural law criteria of justice are mostly confused and in any case relative and subjective.[9] But the English positivists, notably H. L. A. Hart and his followers, would object. They say that one reason for insisting upon a clear separation of law and morality is to maintain the integrity of natural law as a legally-uncontaminated basis for the evaluation of positive law.[10] They distinguish as Bentham did between expository and censorial jurisprudence; natural law fits into the censorial side; and it is important to maintain its independence from expository jurisprudence so that it can be useful as an in independent standard for evaluating that which the expository jurist expounds. The English positivists therefore would worry that an equation between law of nature and the law of nations located firmly on the positive law side of the divide leaves us with no usable articulate standards on the normative side of the divide.

II

Now for some very important complications. We have this equation of the law of nature with the law of nations in Gentili's work. But is that all he said? To what extent does Gentili qualify his equation of the law nature and the law of nations? And to what extent does he qualify his apparent location of the two of them in the domain of purely positive law? Three points, I think, are important.

(i) Despite the fact that his account is overwhelmingly oriented to what people have done and what norms have become established, Gentili does from time to time incorporate some more or less pure natural law theorizing into his discussion. I don't just mean his rhetorical conceits like the observations about "the strife of the atoms" in his chapter on "the natural

[9] See Kelsen, PTL, p. 49.

[10] Hart, COL, rev. edition, p. 210: "This sense, that there is something outside the official system, by reference to which in the last resort the individual must solve his problems of obedience, is surely more likely to be kept alive among those who are accustomed to think that rules of law may be iniquitous, than among those who think that nothing iniquitous can anywhere have the status of law."

causes for war."[11] I mean things like the opening paragraph of his chapter "Of Those Who Surrender to the Enemy," where Gentili constructs a natural law argument for the rights of captives who surrender, based on something like a principle of tacit promise. I mean also the argument in the same chapter where he dismisses a distinction between voluntary surrender and involuntary surrender.[12] All surrenders are in a sense compelled, says Gentili: "Hardly any surrender is made in any other way."[13] The argument is worthy of Hobbes: "Fear and liberty are consistent; as when a man throweth his goods into the Sea for feare the ship should sink, he doth it nevertheless very willingly…"[14] In both cases, what we have is pure natural law argumentation. And Gentili mingles this indiscriminately with the historical and empirical and positive-law examples that he uses. He may not be particularly comfortable about labored attempts to prove things whose status is that they are supposed to be self-evident,[15] but he acknowledges that "[a]rguments too and reasoning will play a part here."[16]

Also, in classic natural law theorizing, there is sometimes an overlap into discussions of divine positive law. In principle, natural law is that part of God's law that can be apprehended by reason, i.e. figured out without revelation. But (a) sometimes revelation can be cited to support natural law reasoning and (b) sometimes a natural lawyer will have to deal with apparent conflicts between revelation and natural law. We find examples of both in Gentili. (a) He cites biblical authority to support his natural law reasoning for the position that war must be preceded by a formal declaration of war to the enemy.[17] And also (b) there is an extraordinarily interesting discussion about the rights of women and children, where Gentili lays down a basic position that women and children are not to be killed on account of their natural weakness and inaptitude for fighting, but where he acknowledges the biblical precedent of God ordering Moses to slay them indiscriminately.[18] He writes:

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[11] Gentili, OLW, Bk. I, Ch. xxii, p. 53.

[12] Ibid., Bk,. II, Ch. xvii, p. 216

[13] Ibid., p. 217

[14] Hobbes, Lev., Ch. xxi, p. 146

[15] See his discussion of natural law methodology—"what this natural reason is, or how it is made manifest"—in Gentili, OLW, Bk. I, Ch. I, p. 10.

[16] Ibid., p. 11.

[17] Gentili, OLW, Bk. II, ch. i., p. 131.

[18] Gentili cites Deuteronomy 2: 34.

> But we follow the laws of God which were made for all men, and the one of those with which we are here concerned is, that we should spare women and children. If there is an order of God to the contrary, it is an extraordinary one, which is not handed down in our books or by the utterance of any man; and the reply must be made that such an extraordinary command is not one about whose justice we consult men.[19]

This interplay between natural law and divine law arguments is present and is mingled with the more empirical arguments that I emphasized in Part I of this paper.

(ii) Sometimes when Gentili appears to be citing to positive legal authority, he is actually citing jurists and philosophers as epistemic authorities on the principles of natural law. In the previous paragraph, I assumed that something counted as a natural law argument only if it involved direct normative reasoning: that, I guess, is a philosopher's view of natural law. But among lawyers (especially international lawyers), I often get the impression that nothing counts as a natural law argument unless it cites Aquinas or Cicero or someone like that. But of course what Aquinas wrote is not itself natural law; what it records is Aquinas's opinion about what natural law is (which opinion may be wrong). Still, if we have confidence in Aquinas's ability at engaging in direct normative rational argument, we may cite him as an authority on that—just as we might cite Richard Dawkins as an authority on evolutionary biology. And Gentili is quite explicit about the importance of "the utterances of great authorities."[20]

But it is worth bearing in mind that this is epistemic authority only; it is quite different from legal authority, i.e. from the sort of authority accorded to a source of positive law. Sometimes that line may seem to be blurred as in the concept of opinio juris, but in principle the distinction makes sense. Actually there are three sorts of authority that may be relevant here: (1) epistemic authority concerning natural law; (2) opinio juris as (partial) source of positive law; and (3) the opinion of a jurist as an epistemic authority on positive law. In the chapter on "Declaring War," it seems to me that Gentili cites Augustine as an authority in sense (1): Augustine tells us that it is not enough to have a just cause for beginning a warm, unless it is

[19] Gentili, OLW, Bk. II, Ch. xxi, p. 255.

[20] Ibid., Bk. I, Ch. i, p. 10.

also carried on justly.[21] He cites Cicero as an authority in (I think) sense (2), when he says that Cicero and others opine that no war could be legitimately begun unless a grievance had been declared and an opportunity for satisfaction afforded."[22] And he cites Alciati as an authority in sense (3)—"Alciati says that this is the law of nations…."[23]—before going up to sum up the effect of all three of these types of authority:

> And there is no doubt that war ought to be declared, if the agreement of so many peoples is of any effect in establishing the law of nations, and if such unanimity on the part of learned men for so many centuries may be called the very voice of nature and of truth.[24]

(iii) In addition, Gentili sometimes cites human practice not because of the positive law that it constitutes and not because it is authoritative, in either an epistemic or a source-of-law sense, but just because it is <u>indicative</u> of what the natural law requires. Into this category fall citations to the actions of great men, provided that one has independent reason for regarding them as honorable and of good repute.[25] Notice that with this last idea—"good repute"—practice builds upon practice. We cite the examples of certain people and then we also cite what the rest of mankind thinks of such people (their repute). We may be aware in such cases that no amount of ramifying practice converts an "is" (practice) into an "ought" (natural law); but we acknowledge that in the circumstances of human life this may be all we have to go on. And in the end we do find Gentili stating that "a decision has greater weight which is supported by the opinions of a large number of men."[26] A modern philosopher might insist that we should rely on our own normative reasoning before we invest this much in the facts of human consensus; but Gentili may be wiser here in the sense he conveys that there is no guarantee that the philosopher's normative reasoning is an any less fallible guide to the objective truths of natural law than the evidence of human practice, supported and ramified in this way. Of course practice validated by repute may in the end turn out to be vicious. But the same is true of direct normative reasoning: "many are led not so much by reason as

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[21] Ibid., Bk. II, Ch. i, p. 131.

[22] Ibid., pp. 131 and 133.

[23] Ibid., p. 132.

[24] Idem.

[25] Ibid., Bk. I, Ch. 1, p. 11.

[26] Idem.

by fantasy."[27] The fact that normative reasoning purports to have a direct rather than an evidential relation to the truth doesn't show that it is more reliable.

I have outlined three ways in which what appears to be Gentili's empirical or positive inquiry into the law of nations (which he then equates with the law of nature) may also involve, sometimes, an indirect inquiry into the law of nature conceived in a more normative non-positive sense.

In addition, I think it is worth emphasizing that even the positive inquiry into the law of nations—conceived simply as a body of human law in the world—may involve an element of what we would call moral inquiry. Gentili's position is that we can find out what the law of nations is by inquiring into what has become established successively as law among the different nations of the world. I noted earlier his observation that

> [i]t is not necessary to understand omnes in such a way that when one speaks of the usage of all nations it should be considered to mean absolutely every nation. … [A]s the rule of a state and the making of its laws are in the hands of majority of its citizens, just so is the rule of the world in the hands of the aggregation of the greater part of the world.[28]

This is partly because some nations remain unknown to us, and partly because the practice of some nations may have to be regarded as depraved outliers relative to a more general consensus. Gentili's analogy to the majoritarian practice of municipal law-making makes it sound as though this could be done purely on the numbers. But this is surely not the case. On any given topic, we may have to choose between one partial consensus and another, and that choice may perhaps be guided by some independent sense of the moral quality of the consensus. In a stylized case, we may find that 45% of nations allow a successful siege to end in the slaughter of a city's defenders if they were offered, at a late stage in the siege, an opportunity to surrender the city with impunity, while 40% of countries may in these circumstances prohibit the slaughter of defenders who ask for quarter after the city's walls have been breached. Both consensuses are partial. But we may regard the latter as the law of nations, even though it is numerically inferior (40% < 45%) on account of its embodying a morally superior

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[27] Idem.

[28] Ibid., Bk. I, Ch. 1, pp. 8-9.

standard. We trade off the extent of support against the moral quality of the position. At an extremity, of course, this becomes pure natural law moralizing. But in the stylized case I have mentioned, it is more like Rawlsian reflective equilibrium.[29]

Sometimes the moral side of this equilibrium may be mediated by a sense that the 40% of countries who follow the second practice are or have the reputation of being more "civilized" than many of the 45% who are less humane in the rules they follow for ending a siege. This is a little bit like the notion of individual repute mentioned above under heading (iii).[30]

In this way the consensus that is adduced has a partly moralized quality that allows it to operate as a normative resource. If the law of nations were established in a purely statistical way, then it is not clear how it could ever be normative for any given system. On the one hand, if a consensus-concept is to function normatively, it has to be less than complete (so that there could be someone whose choices can be guided or constrained by it). On the other hand, unless one can vest normativity in pure majoritarianism—and it is not clear how one can do this in the present context[31]—then the normativity has to reflect something else about the way we have chosen to focus on one consensus rather than another (on a given topic). As I have just said, if one is looking for anything less than a complete consensus, then there are choices to be made, and those choices will be guided by a sense of justice and right.[32] But that sense of justice and right need not present itself as idiosyncratic to any particular jurist; it might itself be informed by things like (α) an evidently-shared sense of justice or (β) the sense of justice evidently embodied in elements of statistically less problematic consensus that already exist in our conception of the ius gentium or (γ) coherence with values that the ius gentium undoubtedly embodies, and so on. This process of back-and-forth, well understood in moral philosophy,[33] accounts for the Janus-faced status of the law of nations—descriptive and normative—and it accounts also for its character as a rich and textured source of both moral and legal insight.[34]

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[29] See John Rawls, A Theory of Justice (1971), pp. 46-53 (on reflective equilibrium in moral inquiry) and Norman Daniels, Wide Reflective Equilibrium _____ (expanding and elaborating Rawls's conception).

[30] See supra text accompanying note 25.

[31] Though in other contexts one can: see Waldron, The Dignity of Legislation, Ch. 6.

[32] The process would be "interpretive" in Dworkin's sense: see Ronald Dworkin, Law's Empire __ (1986), on the relation between fit and moral appeal in interpretation.

[33] See note 29 above.

[34] Part of this paragraph is drawn from Waldron, "Foreign Law and the Modern *Ius Gentium*," 119 Harvard Law Review 129 (2005).

What I have tried to do in this section is establish that Gentili's equation of the law of nature and the law of nations is not just an obliteration of the distinction between rational/normative and positive/descriptive elements in legal theory, but an imbrication[35] of the two.

III

At the end of section I, mention was made of the view held by the English positivists like H.L.A. Hart (in contrast to Kelsenian positivism) to this effect: a clear separation between law and morality—or perhaps between positive law and natural law—is important as much for moral clarity as for legal clarity: we want to preserve a sense of something outside positive law can be judged. This view sounds very sensible. But I think we should reject it.

Moral philosophers say they value the purity of moral thought, uncontaminated by any empirical element (except to the extent that empirical considerations are made relevant by principles which have been themselves established by pure moral reason). But there are reasons for giving the empirical/positive element a more prominent place in moral reasoning than this.

One important consideration is that, as we develop a code or a principle to be used normatively, we want to be assured that it is viable. By that I mean (1) that it is or can be stable and also (2) that it is reasonable (in the sense of not inhumanly demanding)—both aspects of viability relating to the circumstances in which the code or principle is to operate. What has actually worked in the established laws and practices of actually existing societies can be very important in this regard. I guess that some thought about viability (in the sense of stability or reasonableness) might be attempted by the philosopher from his armchair: Rawls's discussion of stability is rather like this.[36] But if we are trying to think about codes and principles for application in time of war, we are thinking about situations (and pressures and fears and emotional stresses) with which the armchair philosopher may be utterly unfamiliar. Nothing but a sensitive account of what has actually been tried and what has actually worked in the relevant circumstances will do. I don't mean that the jurist must pander to the lowest common denominator among warriors; but he must be sensitive to what

[35] In the sense of the OED's third meaning for "imbrication": An overlapping as of tiles; a decorative pattern imitative of this.

[36] Rawls, TJ, 454 ff.

warriors have shown themselves able to bear in the way of restraint in order to determine what the upper bound of duty should be.

More generally, we philosophers may overestimate the quality of pure moral thought. It has not always been considered a safe way of proceeding concerning important matters. Many thinkers have grave doubts about isolating it entirely from a proper appreciation of historical experience. As Edmund Burke put it, "We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages."[37] Similar misgivings help explain why many jurists have preferred to think in terms of ius gentium rather than ius naturale.[38] They thought there were significant limits on what we can learn from "untutored nature," and the idea that our choices of positive law should be guided and evaluated by moral standards that have been kept pure of any association with (or origin out of) actually existing human legal experience—the idea that they should be guided by natural law in that sense of extreme abstraction—would strike them as preposterous.

Like modern moral philosophy, our impulse in modern analytic jurisprudence is to sharply separate law and morality, i.e. to set up a strong wall of separation between our concept of existing positive law and whatever normative idea, like natural law, we use for evaluating legal arrangements. The one is positive and it exists on the ground as a social fact about power and practice. The other is notional and transcendent and lives in the realm of value, abstract principle, and the operation of critical reason. This separation of law and morality has been the bread-and butter—in my view, the rather stale and rancid bread and butter—of jurisprudence since the time of Jeremy Bentham. And since we associate positive law most naturally with power and practice in the context of a well-organized political community, there's a tendency also to think that whenever we move outside those bounds we must be moving up in the direction of natural law

So, for example, when the Nuremberg tribunal refused to decline jurisdiction over crimes against humanity merely because there was no German law regarding them at the time the genocide was committed, everyone said that this represented the resurrection of natural law.[39] And

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[37] Burke, Reflections on Revolution in France.

[38] See the discussion in Tuck, Natural Rights Theories, 33-7.

[39] For example: Ronald C. Slye, Review of *Human Rights in Theory and Practice*, ed. Shute & Hurley, 18 Fordham Int'l L.J. 1566 at 1584 "It was natural law that justified the Nuremberg verdicts, preventing them from being tainted as an exercise in retroactive legislation." See also David Luban, Moral Responsibility In The Age Of Bureaucracy, 90 Mich. L. Rev. 2348 (1992) at 2352: "[I]nternational revulsion at the official

people got very excited about that. Whereas in fact what was relied on at Nuremberg and also in the Eichmann trial in Israel in 1961 was not natural law in the sense of transcendent moral truth, but something much more like the ius gentium, universal law that has a positive existence among the nations, despite its not being law particular to Nazi Germany. As Attorney-General Hausner said in Jerusalem in his response to the defendant's preliminary objection in the Eichman trial:

> Nazi Germany abused the sacred principles of the maintenance of law … and by … a series of unprecedented crimes created a vacuum, a legal chaos, an abdication of the law … Against the legal vacuum … mankind employed new legal principles, or more correctly—gave expression to those principles which had been entrenched and rendered sacred and which had become the heritage of all civilized peoples.[40]

—not just moral principles, not just God's principles, but principles which had their own positivity right here on earth—principles which had become, which were already "the heritage of all civilized peoples," even if the Nazis had sought to repudiate them. That is exactly an instance of the concept I am trying to get at: ius gentium, laws common to all mankind, as largely a positive law concept, not a natural law one.

IV

I have drifted away from Gentili, at least so far as exposition is concerned, and I will drift further away as this final section proceeds. But let me say that I have been trying in this sketch of an essay to understand why the idea of an equation between natural law and the law of nations might have seemed sensible to Gentili and others like him, why he would have wanted to resist the view that a normative law for governing warfare could be based don a conception of natural law which repudiated any such equation. As usual, the situation turns out to be much more complex than words like "pure reason," "normative argument," "positive law," and "equation" suggest. But I think understanding this complexity—and the point of it—is

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criminality of Hitler's regime, as manifested legally in the Nuremberg trials, represents a triumph for natural law thinking"

[40] For the relevant parts of the Eichmann transcript, see http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-002-02.html and http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-002-03.html

very important for us in our legal work as well as for a proper understanding of what Gentili and his contemporaries were up to.

Let me finish by explaining one context—a context that is now miles away from reflection specifically on Gentili's work—a context in which I think the broader point of my reflections here does make a difference.

I have recently become very interested in the citation of foreign law in American constitutional cases and in the possibility that this might represent a revival of something like the ius gentium, the law of nations (in the older sense that didn't just mean international law).[41] In Roper v Simmons,[42] for example, the Supreme Court of the United States referred to the dissonance between (what had been until then) the US position that the execution of young man for a crime committed when he was a child was not cruel and unusual punishment and the fact that the juvenile death penalty had been officially abolished, as far as one can tell, in every other country in the world. The opinion of the world community does not control our outcome, said Justice Kennedy. But he said it "does provide respected and significant confirmation for our own conclusions"[43]—i.e. the conclusion in Roper v Simmons to strike down the juvenile death penalty.

Now it is not clear what jurisprudential theory the citation of foreign law is based upon.[44] A number of commentators have said it must be based on natural law jurisprudence. Richard Posner, for example, has said that the citation of foreign decisions

> marks Justice Kennedy … as a natural lawyer. The basic idea of natural law is that there are universal principles of law that inform—and constrain—positive law. If they are indeed universal, they should be visible in foreign legal systems and so it is "natural" to look to the decisions of foreign courts for evidence of universality.[45]

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[41] See Waldron, "Foreign Law and the Modern *Ius Gentium*," 119 Harvard Law Review 129 (2005). http://www.harvardlawreview.org/issues/119/Nov05/WaldronFTX.pdf See also Waldron, Storrs Lectures, Yale Law School, September 2007 (on file with author).

[42] Roper v. Simmons, 543 U.S. 551 (2005).

[43] Page cite.

[44] See Waldron, "Ius Gentium," op cit. note 41, at pp. 129-31.

[45] Richard A. Posner, The Supreme Court, 2004 Term. Foreword: A Political Court 119 HARV. L. REV. 31 (2005), at 85.

And Roger Alford has argued that "[n]atural law is perhaps the most coherent rationale for recognizing the validity of comparative analysis in constitutional adjudication."[46]

Justice Scalia, on the other hand, takes a much more skeptical view. He has tried to represent the citation of foreign law as just a cover for value preferences: he sees in the citation of foreign law nothing much more than "the subjective views of five Members of this Court and like-minded foreigners."[47] And when asked to explain why judges would go to the trouble of dressing up their "subjective views" in this way, he said this:

> It's pretty hard to put together a respectable number of pages setting forth (as a legal opinion is supposed to do) *analytical* reasons for newly imposed constitutional prescriptions or prohibitions that …rest [only on] one's moral sentiments, one's view of natural law, one's philosophy, or one's religion.[48]

Reference to some sort of official judgments, even if it is foreign, helps rescue judges from a feeling of intellectual nakedness. Just asserting that it is objectively wrong to execute individuals for crimes committed when they were children might be viewed as an expression of subjective sentiment rather than an insight into moral fact. Judges sound more substantial when they talk about "the overwhelming weight of international opinion against the juvenile death penalty."

Now, on the modern understanding of natural law jurisprudence, there might be something to this last observation by Justice Scalia. According to modern natural lawyers, judges are required to make judgments about moral facts in a spirit of objectivity as part and parcel of figuring out what the law is. They are required to engage in their own voice in pure moral reasoning about the issues they are addressing.[49] And such reasoning is bound to seem shaky and naked and subjective when addressed to the public, even when, with the best will in the world, the natural lawyers are presenting the

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[46] Roger P. Alford, In Search of a Theory for Constitutional Comparativism, 52 UCLA Law Review 639 (2005) at p. __. See also Eric Engle, European Law In American Courts: Foreign Law As Evidence Of Domestic Law, 33 Ohio N.U. L. REV. 99 at 103: "The Court in its use of foreign law does not admit to invoking the idea of natural law, but that is what it is doing. It is looking for universal standards to be discovered in the law of foreign nations, 'out there.'" See also Joan Larsen p. 1293, for example, associates it with "moral fact-finding"

[47] Page cite from Roper v Simmons.

[48] Justice Antonin Scalia, Keynote Address (Apr. 2, 2004), *in* 98 Am. Soc'y Int'l L. Proc. 305, 308 (2004).

[49] Refer to Michael Moore's work.

questions they are asking themselves as questions about objective moral truth and the answers they are giving as their own best efforts to identify what the moral truth is. It doesn't feel to them as though they are just articulating their own subjective moral preferences; but still they can't help but be uncomfortably aware, first, that they may be mistaken about the natural law, secondly that others—proceeding just as honorably and in just as objective a spirit—might come up with answers that differ from their own, and thirdly that the whole business does look horribly subjective from the outside.

So if the judges did think of themselves as engaging in natural law reasoning, you could understand the impulse to throw in some official-sounding authority (like case law from other countries). After all, even the legal philosophers do this: modern natural lawyers, especially in the Catholic tradition, festoon their arguments with quotations from Aquinas and other philosophers, because they too feel naked without that, even though they know that Aquinas et al. are at best nothing more than epistemic authorities as to what the natural law is.[50]

All that is at the level of what feels comfortable to a judge or a theorist. In principle, there is no reason at all why a pure natural lawyer would be interested in foreign authority. If you are supposed to be asking and answering natural law questions, then why would one cite and defer to other people's answers to these natural law questions (the answers of the French and the British and the Australians)? Why not just ask and answer the questions oneself?

But on the analysis I have given and on the position taken by Gentili, this sharp dichotomy between pure natural law reasoning—which looks like moral philosophy—and the citation of positive law authority (e.g. from other countries) is simply misconceived. Natural law is better understood as something discernible most reliably from a careful, critical and morally well-informed study of universal or consensual human practices. And the citation of foreign law might be understood as an appeal to the law of nations, the ius gentium, conceived now as a emergent body of law—of positive law—in the world, albeit a body of positive law whose apprehension requires moral discernment. Each of those positions seems worth taking very seriously, and if one takes them seriously, then I think that we can begin to see the virtue of Gentili's assimilation of the one to the other in his equation of the ius gentium with the ius naturae.

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[50] See above, text accompanying notes 20-24.