*Note: **The Supreme Court And The New International Law by Stephen Breyer Associate Justice Supreme Court of the United States STARTS ON P. 7***

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***348** KEYNOTE ADDRESS

Sandra Day O'Connor [FNa1]

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What I wanted to tell you tonight is that I do not deserve to be your speaker. I do not know much about international law. I am just learning; I am trying to learn and I have no words of expertise to give you on that subject. I am here because I think it is important and because I think I need to know more. Most people in the United States need to know more. That is where you come in. And I am really very nervous about speaking to this audience of experts tonight.

The other thing I wanted to tell you was that, as we get older, we are less inclined to reach out and establish new friendships. When we are young, it is completely natural to be open and accepting of new people and new friends. Later on, we become comfortable with the people we already know. We are not eager to reach out. We are settled in one place, we develop our habits, our routines, and we are just not as open to new contacts as in our youth.

The ASIL is really a relatively new friend of mine, developed in my later years. I became aware of the Society only a few years ago, basically through work I had been doing for the Central Eastern European Law Initiative (CEELI). I had met and admired, many years ago in my home state of Arizona, Rita Hauser, who has been active with you in a variety of ways, and I learned of her involvement with this association.

I was invited, as Arthur Rovine explained, to help establish an advisory group for judicial outreach for the Society to explore ways in which judges in this country might become more knowledgeable about international law. I agreed to chair the advisory group and invited a number of federal judges across the country to join me in thinking about ways in which the Society could help those of us on the bench become better informed about principles of international law and current issues in the field, that we might be likely to encounter on the bench.

The result of the effort has been extremely encouraging. It has resulted in the development of this new friendship for me with the Society and with some of you. With the help of the Society, we have succeeded in providing programs on different aspects of international law at circuit conferences in six of our federal circuits. Three more are presently scheduled. There have been programs for the National Association of Women Judges and the Federal Judicial Center.

We are trying to complete drafting an international law overview for distribution to all federal judges who want it. That is going to be quite an accomplishment: not sophisticated enough for those of you who are experts, but something for people who are not experts to use as a basic primer, if you will. We are also preparing a handbook on

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procedural aspects of international civil litigation and an international human rights overview.

All of these activities have been the result of the effort this association has made in judicial outreach. Chris Borgen, who has been working for this organization, has done a superb job in every respect. The organization has been fortunate to have him.

Despite the robust agenda of the advisory group, I really do feel like a fish out of water in speaking to this group of international law experts in light of my own limited knowledge of the subject.

***349** I ask myself, why does information about international law matter so much? Why should judges and lawyers who are concerned about the intricacies of ERISA, the Americans with Disabilities Act, and the Bankruptcy Code care about issues of foreign law and international law? The reason, of course, is globalization. No institution of government can afford now to ignore the rest of the world.

The importance of globalization should not be underestimated. Thirty percent of our gross domestic product is internationally derived. We operate today under a large array of international agreements and organizations: the UN Convention on Contracts for the International Sale of Goods, the North American Free Trade Agreement, the World Trade Organization, the Hague Conventions on collection of evidence abroad and on service of process, the New York Convention on the Enforcement of Arbitral Awards, to mention only a few of a great many such agreements.

But globalization is so much more than simply these agreements and organizations. Globalization also represents a greater awareness of, and access to, peoples and places far different from our own. The fates of nations are more closely intertwined than ever before and we are more acutely aware of the connections we have with others.

As we learned in this country on September 11th, these connections can sometimes be devastating rather than constructive. But as we are learning in the post--September 11th world, the power of international cooperation and international understanding is much greater than the obstacles we face.

The word globalization has many connotations, some positive, some negative. These varying views reflect both the potential for globalization to increase world harmony and the risk that it will suppress desirable difference and become simply a tool for imposing the preferences of powerful nations, such as our own, on the rest of the world. Harnessing the good that can come from our increasingly global world while avoiding these pitfalls involves--indeed, requires--those with power and influence in our country to develop a greater knowledge and understanding of what is happening outside our nation's borders.

This is true of courts as much as it is of any other governmental body. One of the topics discussed at this annual meeting is the internationalization of legal relations. We are already seeing this in American courts, and should see it increasingly in the future. This does not mean, of course, that our courts can or should abandon their character as domestic institutions. Very few treaties are directly enforceable in American courts. In the Breard case, [FN1] for instance, our Supreme Court declined to entertain a Vienna Convention claim in a death penalty case on the basis of a procedural default, as well as a belief that neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States courts to set aside a criminal conviction and sentence for violation of the consular notice provisions.

On the somewhat rare occasions when we are called upon to consider international law, however, the court on which I sit often refuses. Just this term, we declined to hear a case about the definition of custody in the Hague Convention on International Child Abduction, despite the fact that the lower court's ruling contradicted that of courts in several other signatory countries. Since the Second Circuit's decision in Filartiga v. Peña-Irala, [FN2] American courts have entertained Alien Tort Claims Act and Torture Victim Protection Act cases involving international law violations by other sovereigns with significant impacts on the international terrain. In the Karadzic case, [FN3] for instance, the Second Circuit allowed a suit against Radovan Karadzic for crimes against women in the ***350** Bosnian conflict, expanding the act's coverage to include suits against those who are not recognized as heads of states.

Exemplified by suits like these, international human rights litigation has become a sort of cottage industry in the United States. Yet our Supreme Court has not reached in to clarify these statutes, despite the explicit urgings of some lower court judges who do not have such control over their own dockets.

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Those federal courts that have no choice but to entertain suits like the Karadzic case may be doing so without full awareness of the implications for the international arena. These judgments against foreign leaders, which are rarely if ever enforced in any traditional sense, play an important role in shaping diplomatic initiatives around the globe. The impact of such litigation on international relations is not always positive, as Curtis Bradley has pointed out. [FN4] Whatever the merits of allowing these suits, courts should be aware of the effects their decisions in such important cases may have.

Although international causes of action like these are still relatively rare, there are many other ways that international issues are coming before American courts. This is because international law is no longer confined in relevance to a few treaties and business agreements. Rather, it has taken on the character of transnational law--what Philip Jessup has defined as law that regulates actions or events that transcend national frontiers. Both public and private international laws are included, as are other rules that do not wholly fit in to such standard categories.

Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts. This is sometimes called "transjudicialism."

American courts have not, however, developed as robust a transnational jurisprudence as they might. Many scholars have documented how the decisions of the court on which I sit have had an influence on the opinions of foreign tribunals. One scholar has even said that, when life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, DC or the state of Washington or Springfield, Illinois.

This reliance, unfortunately, has not been reciprocal. There has been a reluctance on our current Supreme Court to look to international or foreign law in interpreting our own Constitution and related statutes. While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.

The court on which I sit has held, for more than two hundred years, that acts of Congress should be construed to be consistent with international law, absent clear expression to the contrary. Somewhat surprisingly, however, this doctrine is rarely utilized in our court's contemporary jurisprudence. I can think of only two cases during my more than twenty years on the Supreme Court that have relied upon this interpretive principle.

We have refused to consider international law and the law of other nations when interpreting our own Constitution. We are sometimes asked to do so, particularly when dealing with Eighth Amendment challenges to the death penalty. Litigants claiming that the execution of those who were juveniles at the time they committed the crime violates the International Covenant on Civil and Political Rights, as well as general international norms, are sometimes before us.

***351** This very term, we are considering a case involving the constitutionality of executing people who are mentally retarded. Several of the briefs focus on the practice of other nations. We have even received an amicus brief from a group of American diplomats, discussing the difficulties posed for their missions by the American death penalty practice. Until now, however, we have always held that when interpreting the meaning of cruel and unusual punishment, under the Eighth Amendment, only national norms are relevant.

Although our reliance on international and foreign law is rare, it is not nonexistent. For instance, we have looked to international law notions of sovereignty when shaping our federalism jurisprudence and to international law norms in boundary disputes between American states. In areas such as these, it would be a mistake to ignore the rich resources developed in the law of nations. I suspect that, with time, we will rely increasingly on international and foreign law in resolving what now appear to be purely domestic issues.

I have not even scratched the surface of the issues and areas of application of foreign and international law in U.S. courts. The fact is that international and foreign law are being raised in our courts more often and in more areas than our courts have the knowledge and experience to deal with. There is a great need for expanded knowledge in the

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field, and the need is now.

This is an interesting time in world history. For one thing, for the first time there are now democratically elected governments in more than half the countries of the world. By last count there are approximately 120 democracies out of 190 nation states. Even in countries that do not have democratically elected governments, there are laws and legal systems and judicial systems. Law is basically a formal expression of society's agreement on basic principles by which we will conduct ourselves in relation to others. It is the way in which we express the ideals of our respective societies.

To the Western world of law, the great gift of the Magna Carta, signed in 1215, was the notion that no person, including the sovereign, is above the law and that all persons shall be secure from the arbitrary exercise of the powers of government. The Magna Carta is the spiritual and legal ancestor of the concept of the rule of law.

With the breakup of the Soviet Union, we have had a sudden expansion of nation states striving to establish democratic societies under the rule of law. The rule of law and the ideals it enforces exist in only part of the world today. Since September 11th, we have been reminded that other parts of the world do not share our notions of the rule of law, or the notion that it is the key to liberty. But it seems to me that at some level, every nation state, including Iraq, Iran, and North Korea, has relations, commerce, and other dealings with other nations and with businesses in other nations. There is inevitably the need for the resolution of international disputes.

The classic statement about how and why international law is developed was made some years ago by Louis Henkin. It bears quoting:

> Every nation derives some benefits from international law and international agreements. Law keeps international society running, contributes to order and stability, provides a basis and a framework for common enterprise and mutual intercourse. Because it limits the actions of other governments, law enhances each nation's independence and security. In other ways, too, by general law or particular agreement, one nation gets others to behave as it desires. [FN5]

***352** Just as we have said since the Paquete Habana case, "International law is part of our law." [FN6] International law, which is the expression of agreement on some basic principles of relations between nations, will be a factor or a force in gaining a greater consensus among all nations concerning basic principles of relations with nations that, as of now, are withholding their agreement on some aspects. It can be, and is, a help in our search for a more peaceful world.

A broad consensus on how nations should treat prisoners of war has recently to a degree influenced our own government in its handling of prisoners taken in Afghanistan; they were perhaps not technically covered by the Geneva Convention but they will nevertheless be treated largely as if they were.

Acting in accord with international norms may increase the chances for development of broader alliances, or at least silent support from other nations. The efforts of each of you who belong to this society to educate other lawyers and judges, both in the United States and abroad, about international law really are efforts well spent. Kofi Annan has said that the rule of law is essential to peace, development, and the realization of human rights. The practice of law is a privilege, but a privilege that carries with it a heavy responsibility to ensure respect for the law.

Through the ASIL's efforts, American judges are becoming more aware of their responsibilities to respect not only domestic law but also the law of nations. But more effort is needed. Law schools must ensure that their students are well versed in the increasingly international aspects of legal practice. The University of Michigan Law School has just begun requiring all students to complete a two-credit course in transnational law.

Developments like this are surely welcome, but understanding law in a global context requires more than reference materials and classroom education. It requires travel to foreign nations and a dialogue with foreign jurists and lawyers.

I have been fortunate through my involvement with CEELI and through the opportunities presented by virtue of my office to meet with the members of the judiciaries of many countries. In fact, on September 11th, I arrived at the airport in New Delhi, India, for a meeting with representatives of the Indian Supreme Court and other high courts.

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Much of my dialogue with foreign jurists involves American judges giving guidance to countries developing their legal systems about how to make them run more fairly and effectively, but the dialogue has not been a one-way street. We have learned a great deal from other nations' jurists, as well.

For instance, I recall vividly how impressed I was with watching the more efficient selection of jurors in British courts, and in observing a higher degree of respect and civility given by lawyers to each other and to courts in some nations other than our own.

There are, of course, other ways to encounter foreign legal systems. The New York University Law School, for instance, has brought foreign law professors to the United States to share their expertise and perspectives with students and faculty. Yale Law School has established a seminar for members of constitutional courts from around the world.

Developments like these are important if the American legal profession is going to take seriously the realities of practice, not only the ways in which transnational legal issues must be addressed but also the potential for using the law to make a difference in the issues facing our world.

In remarks I have given to groups of lawyers since September 11th, I have noted the need for lawyers in this difficult time has not decreased, it has increased. Because of the ***353** scope of the problems that we face, understanding international law is no longer just a legal specialty. It is becoming a duty.

I like to say we must not be tone deaf to the music of the law. There are lawyers who never do hear the law's music as they go through life. Indeed, there are those who think there is none, who think the law is just a business, one for which high fees can be charged, and maybe collected, for the necessary services only a lawyer can provide.

But if you listen and understand the law's music, to quote a former law school classmate of mine,

> it is a music filled with the logic and clarity of Bach, the thunder, sometimes over-blown and pompous, of Wagner, the lyrical passion of Verdi and Puccini, the genius of Mozart, Gershwin's invention, Rossini and Vivaldi's energy, and Aaron Copeland's folksy common sense, Beethoven's majesty, and unfortunately not a little of the ponderous tedium of Mahler, and the sterile intellectualism of Schoenberg.

The words you can hear to the music of the law are words of equality, justice, fairness, consistency, predictability, equity, the wrongs righted, and the repose of disputes settled without violence, without undue advantage, and without leaving either side with bitter feelings of having been cheated. It is the music sung in the world of childlike innocence in which the lion lies down with the lamb. Perhaps it is not a world that ever was, or ever will be, but it is a world worth living toward.

[FNa1]. Associate Justice, United States Supreme Court.

[FN1]. Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998), cert denied sub nom. Breard v. Greene, 523 U.S. 371 (1998).

[FN2]. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[FN3]. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

[FN4]. See, e.g., Curtis A. Bradley, The Costs of International Human Rights Litigation, 2 CHI. J. INT'L L. 457 (2001).

[FN5]. Louis Henkin, How Nations Behave 29 (2d ed. 1979).

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[FN6]. The Paquete Habana, 175 U.S. 677, 700 (1900).

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The Supreme Court And The New International Law
Stephen Breyer
Associate Justice
Supreme Court of the United States

The American Society of International Law
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Nearly a century ago twenty-four Members of the Mohonk Conference on International Arbitration founded the American Society of International Law. Elihu Root was the Society's first President. Its vice presidents included three members of the Supreme Court - Chief Justice Fuller and Justices Brewer and Day - as well as William Howard Taft, who would later become both President, and then Chief Justice, of the United States. Their participation then made clear that the Court's members understood the importance of international law and its direct relation to their work. Many members of the Supreme Court continue to hold that view - a view that now extends beyond public international law to embrace foreign law and legal institutions as well.

Justice O'Connor, for example, has said that she thinks that "American judges and lawyers can benefit from broadening our horizons" and that her own experience on the Court has suggested that "we often have a lot to learn from other jurisdictions." Just last year at this meeting she suggested that "conclusions reached by other countries and by the international community should at times constitute persuasive authority." Similarly, Justice Ginsburg has explained that, in her view, "comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world." Justice Stevens and Justice Souter have referred to comparative foreign experience in several important recent opinions. And I have tried to explain, both in opinions and public remarks, why I believe foreign experience is often important to our work.

This afternoon I should like to continue to explain why so many of us have taken this position. It is neither that we are, in any political sense, "internationalists," nor are we trying to move the law in a particular substantive direction. Rather, our perception of need and of usefulness arises out of our daily experience - experience of the following kinds:

First, we face an increasing number of domestic legal questions that directly implicate foreign or international law. We recently had to decide whether the Constitution permitted Congress to extend the term of copyright from the life of the author plus fifty years to life plus seventy years. The briefs discussed European experience extensively, as did our opinions. Why? Because Congress's legislative purposes included harmonization of European and American laws. Obviously we had to understand the European system in order to evaluate that American objective. The same is true when we interpret American jurisdictional provisions designed with foreign, state-owned, corporations in mind. The growing number of such statutes reflects the

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commercial, technological, and political changes that we often use the cliché "globalization" to describe.

Second, we find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison. This change reflects the "globalization" of human rights, a phrase that refers to the ever-stronger consensus (now near world-wide) as to the importance of protecting basic human rights, the embodiment of that consensus in legal documents, such as national constitutions and international treaties, and the related decision to enlist judges - i.e., independent judiciaries - as instruments to help make that protection effective in practice. Judges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances, for example in respect to multi-racial populations, growing immigration, economic demands, environmental concerns, modern technologies, and instantaneous media communication. Thus, it is not surprising to find that the European Court of Human Rights has issued decisions involving, for example, campaign finance laws and free expression or that the Supreme Court of India has written extensively about "affirmative action."

Several years ago a professor asked me to name one instance in which a constitutional cross-country comparison had proved useful. After thinking about it, I eventually mentioned a French example involving state schools and the wearing of the Muslim chador. Today I would not have to hesitate. One or more of the current Justices has considered comparative experience in Eighth Amendment death penalty cases, in federalism cases, in cases involving right to die statutes, in such technical matters as the "ancient title" of Massachusetts to Nantucket Sound, and various others.

I recognize that some of my colleagues believe that comparative analysis is "inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one." But comparative use of foreign constitutional decisions will not lead us blindly to follow the foreign court. As I have said before - "[o]f course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem;" for example, in a federalism case, "the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity." Ultimately, I believe the "comparativist" view that several of us have enunciated will carry the day - simply because of the enormous value in any discipline of trying to learn from the similar experience of others.

Third, I would not limit comparative materials to formal court decisions. We, for example, are not the only democracy to face a terrorist threat that will likely require courts to decide just when a constitutional phrase, protective of basic human liberty, authorizes a restriction designed for reasons of security. It may well be valuable to determine how other democracies have responded in similar circumstances. And relevant descriptions and analysis may be found in documents readily available on the internet. The Council of Europe, for example, has published guidelines describing application of European Court precedent in such circumstances. That document does not bind the United States, but it may help courts, or others, to understand the relevant problems.

Fourth, I have found discussions with foreign judges increasingly valuable in respect to institutional matters. In the past few months, for example, several of us have met with Members

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of the Supreme Court of India and discussed at some length the problem of overcrowded dockets - too many cases. Many of the Indian judges believe they can benefit from American methods for alternative dispute resolution. At the same time, I thought we might have something to learn from a mediation program I saw in Gujarat. The program, called the "womens' cell" of a legal aid clinic, puts teams of three professionals (a lawyer, a clinical psychologist, and a social worker) to work dealing with the underlying problem that likely led the woman in question to seek legal aid. Judging from the lines outside the clinic, the twenty-four hours per day work schedule, and the settlement rate, the program seemed to work well. And I could not help but wonder if we, in the United States, did not have something to learn from the cross-disciplinary, problem-based, approach.

Fifth, I have not seen many traditional public international law issues arise in the course of my daily work. But I know that there are such issues, for example, in "death penalty" cases, where international treaties and decisions of international courts may eventually prove relevant. In one recent death penalty case, for example, the Court rejected a treaty-based defense on procedural grounds, leaving open the possibility of such a defense in a case that did not involve a procedural default. The number of treaties relevant to particular domestic legal disputes seems to be growing.

The five different ways in which foreign or international law has a growing impact on my professional life lead to several more general observations. For one thing, my description blurs the differences between what my law professors used to call comparative law and public international law. That refusal to distinguish (at least for present purposes) may simply reflect reality. The commercial law of various States, for example, has become close to a single, unified body of law, in part through the work of uniform state law commissioners, in part through a pattern of similar judicial responses to similar problems, in part because of the work of intermediate judicial institutions such as federal bankruptcy courts, in part because the interstate nature of commercial contracts means that judges in different states apply each other's law. Formally speaking, state law is state law. But practically speaking, much of that law is national, if not international in scope. Analogous developments internationally, including the development of regional or specialized international legal bodies, also tend to produce cross-country results that resemble each other more and more, exhibiting common, if not universal, principles in various legal areas.

These growing institutional and substantive similarities are important, for to a degree they reflect a common aspiration. They reflect a near universal desire for judicial institutions that, through guarantees of fair treatment, help to provide the security necessary for investment and, in turn, economic prosperity. And through their respect for basic human liberty may help to make that liberty a reality. The force of this aspiration, I hope and believe, is virtually irresistible.

For another thing, the personal experiences that I have described suggest an agenda for many in this organization. Neither I nor my law clerks can easily find relevant comparative material on our own. The lawyers must do the basic work, finding, analyzing, and referring us to, that material. I know there is a chicken and egg problem. The lawyers will do so only if they believe the courts are receptive. By now, however, it should be clear that the chicken has broken out of the egg. The demand is there. To supply that demand, the law professors, who teach the law students, who will become the lawyers, who will brief the courts, must themselves help to break down barriers - barriers that exist between disciplines, so that the criminal law professor as well

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as the international law professor understands the international dimension of the subject; barriers that exist between the academy and the bar; barriers that exist between the international specialist and the trial or appellate lawyer.

Neither can international institutional issues be treated as if they were exotic hot house flowers, rarely of relevance to domestic courts. Those issues, when relevant, must be briefed fully with the legal relationships between our Court, and say the International Court of Justice, comprehensively explained.

Finally, the trans-national law that is being created is not simply a product of treaty-writers, legislatures, or courts. We in America know full well that in a democracy, law, perhaps the majority of all law, is not decreed from on high, but bubbles up, out of interactions among the interested publics, affected groups, specialists, legislatures, and others, who interact through meetings, journal articles, the popular press, legislative hearings, and in many other ways. That is the democratic process in action. Legislation typically comes after this process has long been underway. And judicial decisions work best, particularly decisions from our Court, when they come last, after experience makes the consequences of legislation apparent.

When I can, I like to remind audiences that I love the American bar associations, with their 600,000 members and 800,000 committees because it is in those committee meetings, through discussion and debate that law is created. The same, I should add, is true today of much international, or trans-national, law. Is it not? Look at the agenda for this meeting, focusing in part upon criminal law, economic law, regional trade, natural resources, human rights, and terrorism. The content of these topics - as their labels suggest - is not uniquely international. And the discussions here will have an impact on the shape of institutions as well as the content of the law that will in fact affect people in many democratic societies.

As my comments indicate, I believe that there is much fundamental legal and institutional work to be done. It is important that you are undertaking that work. I encourage you to continue. And I want particularly to encourage the younger among you, including the students who are here. After all, what could be more exciting for an academic, practitioner, or judge, than the global legal enterprise that is now upon us? Wordsworth's words, written about the French Revolution, will, I hope, still ring true:

"Bliss was it in that dawn to be alive
But to be young was very heaven."

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