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ALL THE WORLD'S A COURTROOM:
JUDGING IN THE NEW MILLENNIUM*

Shirley S. Abrahamson**
Michael J. Fischer***

I am honored to be here today. As a native New Yorker, I always enjoy returning to my hometown and visiting the haunts of my youth. The Hofstra University School of Law is in its youth. As a relatively young school, it has already achieved national prominence for providing a stimulating intellectual environment, for being receptive to new ideas, and for its visions and perspectives. It is a special honor to join the numerous distinguished jurists who have delivered the Howard Kaplan Memorial Lecture.

The subject of my talk today is the increasingly worldly role state judges might play as we approach the new millennium. I must admit that I stumbled upon this topic while engaged in one of my more modest and provincial roles as a state court judge—reading briefs in preparation for hearing oral argument in the Wisconsin Supreme Court. I was

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The Authors want to thank Susan Fieber and Joanne Lin for their assistance in editing the manuscript and preparing it for publication, as well as Wisconsin State Law Librarian Marcia Koslov and the library staff for their help and patience. Chief Justice Abrahamson also expresses thanks to Professors Catherine Adcock, Richard J. Bonnie, and Richard Cummins, and to Dean Harvey Perlman for discussing the Essay with her.

** Chief Justice, Wisconsin Supreme Court. The Essay speaks in the first person referring to Chief Justice Abrahamson, as did the speech. Michael Fischer joins her as co-author in recognition of his significant efforts in developing this topic and in the writing and editing of the Essay while serving as Chief Justice Abrahamson's law clerk.

reading the briefs in a case entitled *Gould v. American Family Mutual Insurance Co.*, which raised an age-old issue: Should persons with mental illnesses or disabilities be held liable for their torts? And if so, what standard of behavior should be used to gauge their tort liability? More generally, what legal principles should govern tort law in a case involving two "innocent" persons, namely, the disabled person who unwittingly inflicted the harm and the innocent victim injured by the disabled person?

In the *Gould* case, the defendant, a one-time farmer who had been diagnosed with Alzheimer's disease, struck and injured the head nurse in a health care center where he was confined. The court was asked to resolve one issue: Should the farmer be judged by the traditional tort standard of the reasonable person, or given that he was not capable of either controlling or appreciating his conduct, should he be absolved from civil liability altogether?2

In most states, including Wisconsin, the courts have concluded that a mentally disabled person must be held to the same objective standard of care as someone without such a disability. Thus the mentally disabled are generally held liable for their acts under the reasonable person standard.3

American legal scholars have sharply criticized this traditional American rule. They point out that applying the reasonable person rule to people with mental conditions, in effect, imposes liability without fault, even though the law of negligence is ordinarily grounded in fault, and even though liability is incompatible with modern views and treatment of the mentally ill.4

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1. 543 N.W.2d 282 (Wis. 1996).
2. See id. at 283-84.
4. See, e.g., Elizabeth J. Goldstein, *Asking the Impossible: The Negligence Liability of the Mentally Ill*, 12 J. CONTEMP. HEALTH L. & POL'Y 67, 92 (1995) (advocating a subjective standard relieving individuals of liability who, due to mental illness, cannot prevent their own negligence); Harry J.F. Korrell, *The Liability of Mentally Disabled Tort Defendants*, 19 LAW & PSYCHOL. REV. 1, 55-57 (1995) (asserting that fundamental principles of fault-based tort law require a person's mental disability to be accepted as a defense to certain tort liability); Catherine A. Salton, Comment, *Mental Incapacity and Liability Insurance Exclusionary Clauses: The Effect of Insanity upon Intent*, 78 CAL. L. REV. 1027, 1066-68 (1990) (proposing a standard similar to that used in the defense of the mentally disabled in criminal law to interpret "intentional conduct" exclusionary clauses in insurance policies). But see Splane, supra note 3, at 170 (contending that the objective standard is appropriate for the mentally ill under the current mental health policy of integrating mental patients into the community).
Counsel for the farmer urged the Wisconsin Supreme Court to adopt a rule that persons should be held liable only when they know what they are doing. And like most lawyers urging a court to adopt a new rule, counsel for the farmer sought to reassure the court of the wisdom of change by pointing to law from other jurisdictions, specifically Florida and Canada, which seemed to buttress her point. If the new rule works there, her reasoning went, then surely it could work in Wisconsin.

In response, while counsel for the injured nurse did his best to distinguish the cases decided in the sister state of Florida, the Canadian case was an entirely different matter altogether. "Petitioner is not aware," the brief noted archly, "if Canadian case law has precedential value in the United States." Counsel, of course, knew quite well that it does not. But by the same token, neither does Florida law have precedential value in Wisconsin. Why then did the nurse's counsel single out Canada? Probably because the law of foreign countries is treated today with the suspicion that may have once marked some state courts' approach toward the law of their sister states.

Today our state courts accept the logic behind Justice Cardozo's famous remark, in a case involving New York and Massachusetts law. New York is "not so provincial," Cardozo wrote, "as to say that every

5. The Court of Appeals held that "a person may not be held civilly liable [for negligence] where a mental condition deprives that person of the ability to control his or her conduct." Gould v. American Family Mut. Ins. Co., 523 N.W.2d 295, 296 (Wis. Ct. App. 1994).
7. The Canadian case cited was Buckley v. Smith Transportation Ltd. [1946] O.R. 798. See Gould Respondent's Brief, supra note 6, at 18. The Reporter's Notes to the RESTATEMENT (SECOND) OF TORTS § 283B app. (1966), states that the Buckley case "held that insanity, which prevented the defendant's driver from understanding his duty of care, or rendered him incapable of performing it, prevented liability for negligence." Id.
8. For recent discussions of the Buckley case, see for example, Canada v. Connolly [1989] B.C.L.R. 162, where the application of Buckley to intentional and negligent torts is discussed, and Hutchings v. Nevin, 1992 Ont. C.J. LEXIS 1461, at *14-17, 25 (Aug. 5, 1992), a negligence case which follows the rule in Buckley.
For a comparison of the tort liability of the mentally disabled in Canada and the United States, see Pamela Picher, The Tortious Liability of the Insane in Canada... with a Comparative Look at the United States and Civil Law Jurisdictions and a Suggestion for an Alternative, 13 OSGOOD HALL J.L. 193 (1975).
9. Id. (emphasis added).
solution of a problem is wrong because we deal with it otherwise at home." But while state courts routinely look to the decisions of their sister jurisdictions for the insights and persuasive value they potentially possess, the nurse’s counsel obviously viewed looking across our national borders as an “inherently suspect activity.”

I was perplexed. Why did the farmer’s counsel’s citation of Canadian law signal desperation and trigger derision? Why, I wondered, should case law from Canada—an English-based, common law jurisdiction geographically closer to Wisconsin than Florida—not be considered persuasive?

The fact is that as the century draws to a close, the American bench and bar are rarely reaching beyond our national borders when seeking guidance in resolving domestic legal issues. And this is not just a 1990s phenomenon. A quick Westlaw survey of Wisconsin cases decided between 1942 and 1995 turns up thirty-nine citations to English cases spread across thirty-four decisions. About one-fourth of the citations are to cases decided before 1800; about two-thirds are to cases decided before 1900. The mean time interval between the Wisconsin decision and the English case cited is 123.9 years; in only two cases is the interval less than ten years, and in only five cases is it less than thirty.

12. Professor Alain A. Levasseur found a mere 35 state court cases (excluding Louisiana and Puerto Rico) during the second half of the twentieth century referring to French law. Furthermore, some of these cases dealt with conflict of law issues in which the state courts were compelled to consider the possible application of foreign law. See Alain A. Levasseur, The Use of Comparative Law by Courts (II), 42 AM. J. COMP. L. 41, 57-59 (Supp. 1994). Professor Levasseur explained: American judges do not venture much outside the law of the land may be because they already have an extensive field of comparative analysis available to them. . . . Drowning under this amount of American law, in a language known by all and immediately usable, it is no wonder that foreign substantive law is not readily used to solve internal legal issues.

Id. at 59. Professor David S. Clark commented:

Outside the recently emerging fields of international civil procedure and international criminal law, there is scant legal literature on the use of foreign and comparative law in United States courts because courts rarely cite foreign law. Historically, the situation was different. Before the Civil War courts regularly referred to Roman law, civil law, and English common law. . . . The comparative law leavening of indigenous American law largely came to an end by the 20th century due to the influence of the historical school of jurisprudence, the adequacy of the West Publishing Company’s national reporter and digest system in accumulating a corpus of American law, and the general social force of nationalism.

English law seems to be considered useful only if it is old. When English cases are cited, it is most likely for their quaint historical value rather than for their ability to persuade or for what they might say about the current state of English law.13

Canadian law fared even more poorly during this fifty-four-year period: a Westlaw search of Wisconsin decisions from 1942 to 1996 yielded a grand total of three citations to Canadian cases, and one of those involved a choice-of-law question. No American jurisdiction appears to have ever cited the 1946 Canadian case referred to by the farmer’s counsel, and counsel herself failed to cite more recent Canadian decisions that would have bolstered her argument.

Professor Alain Levasseur concluded that outside the academy, “the relevance of comparative law is almost non-existent, which is really a euphemism for ‘nil.’ Indeed, as far as the federal and most state courts in this country are concerned, foreign law is not considered as a relevant topic for consideration and even less for study.”14

In the Wisconsin Supreme Court’s opinion in the farmer-nurse case, reaffirming the civil liability of the mentally disabled, the court’s only reference to law from outside the United States was a recognition that the civil liability rule was derived from dicta in a 1616 English case.

13. The computer search revealed:
(1) Thirteen of the citations to English cases appear in eleven Wisconsin cases published in the 1980s; twelve appear in ten Wisconsin cases published in the 1970s; nine appear in eight Wisconsin cases published in the 1960s; three appear in three Wisconsin cases published in the 1950s; and two appear in two Wisconsin cases published in the 1940s.
(2) Two of these citations are from seventeenth-century English cases; eight from eighteenth-century English cases; fourteen from nineteenth-century English cases; and thirteen from twentieth-century English cases. Two of the English cases had no dates.

The Authors also examined three volumes, selected at random, of the Wisconsin Reports containing nineteenth-century Wisconsin cases. In volume 65, covering December 1885 to April 1886, eleven citations to English authority were located. In volume 80, covering June to December 1891, twenty-two were found. And in volume 95, covering January to April 1897, seventeen were found. No doubt there are more. In any event these numbers are themselves impressive: in the latter two volumes, each covering a period of less than one year, we found exactly the number of citations (thirty-nine) that we found in our fifty-four-year survey of cases during the period from 1942 to early 1996.

14. Levasseur, supra note 12, at 41-42. Professor Levasseur continues:
Today, and even since the last decades of the last century, these courts have shown no ... curiosity to look into comparative law (in the sense of foreign legal systems) as a possible source of legal or natural law support for their own decisions or as a means of providing a more cogent rationalization of their own rulings.
The court did not press on to investigate what had happened in English law after 1616. But would not the evolution of English common law or Canadian law since 1616 have been useful to the Wisconsin Supreme Court in evaluating whether it should retain allegiance to a 380-year-old doctrine?  

The questions began to come thick and fast. Why, even as we are reminded daily that the global village demands an international perspective on topics ranging from health care to trade to technology to literature, do we not hear more about the international influences shaping American law? The tariffs and political borders which have divided us are crashing down. Why do the political borders continue to matter so much for the American legal system? Are we lawyers and judges suffering from legal xenophobia?

Compounding my confusion and adding to my questions was the knowledge that while American lawyers and judges rarely venture beyond our borders in looking for answers to domestic legal questions, we have stepped up our role abroad in spreading the gospel about the virtues of the American legal system. In recent years, American law has become one of our chief exports.

For example, the American Bar Association’s Central and East European Law Initiative (“CEELI”) has, with the support of the federal government, dispatched scholars, practitioners, and judges into former Soviet countries to review constitutional drafts and help formulate laws, especially in the economic sphere. A vast array of scholarly writings
and statutory models pertaining to the organization of the legal profession, legal education, and commercial, environmental, and criminal law has been proffered to post-Communist legislators, judges, lawyers, and legal educators.  

We are also exporting rules of judicial conduct and principles of judicial administration. Under the auspices of the State Department, the American Bar Association, the Ford Foundation, and others, delegations of American judges and lawyers have visited eastern Europe and Asia to explain how America’s independent judiciary protects citizens’ basic legal rights against state action. And in Cambodia, American lawyers and judges have teamed up with their counterparts from Australia and India to help Cambodian lawyers and judges develop a legal system.

Meanwhile, the globalization of the American economy has hastened the internationalization of American law firms. With deals being struck from Bangkok to Budapest, numerous American firms have established offices abroad. The lawyers in the firms’ domestic and foreign offices are learning about the laws of the countries in which their clients do business. Even modest and seemingly small-town American law firms are being affected by the change. For example, lawyers working for a firm in Elkhorn, Wisconsin, population 6,301, travel regularly to Japan on behalf of their client Kikkoman, which grows soybeans and manufactures soy sauce in Wisconsin. Just check the bottle. Kikkoman’s Soy Sauce is a product of the great Dairy State.

But while growing numbers of American lawyers now recognize the importance of other countries’ laws for their clients, American lawyers and judges seem to pay little or no attention to the law of other countries when focusing on the domestic issues they litigate and adjudicate here at home.

Maybe, I thought, American lawyers and judges are right. Notwithstanding the glitz and glamour of international business transactions, most American legal proceedings remain local affairs involving family law, property disputes, criminal law, contract actions, or tort liability. What insights could other countries’ law offer the

20. The International Human Rights Law Group, based in Washington, D.C., oversees a project in Cambodia.
American legal profession? How, that is, might other countries’ law help settle disputes in our home villages and towns in contrast with the global village to which we nominally belong?

The only way to find out, I decided, was to take specific legal cases with which I had wrestled recently as a state judge and explore whether the law of other countries would have improved the lawyers’ briefs or the Wisconsin Supreme Court’s approach to the issues involved. From my desk and the law library I would embark on an international tour to discover whether the other countries of the world had any light to shed on Wisconsin law.

I turned to the doctrine of informed consent, which the Wisconsin Supreme Court addressed in 1995 and 1996. Simply put, under the informed consent doctrine, a patient has a right to the information necessary to make an intelligent decision regarding medical treatment options. A doctor’s failure to provide this information constitutes tortious behavior.

The courts of many jurisdictions around the world have struggled to balance the values integral to the doctrine: individual autonomy vs. efficient administration of justice and health care systems. In American law, the informed consent doctrine has played a dominant role in the quarter-century since the 1972 landmark Canterbury v. Spence decision of the Court of Appeals for the D.C. Circuit.

Jerry Canterbury was a nineteen-year-old clerk-typist who sought care from Dr. William Spence for back pain. Suspecting a ruptured disc, Dr. Spence recommended surgery. Questioned about the gravity of the operation, Dr. Spence replied that it was no more serious than any other operation. Canterbury consented to the operation; afterwards he was partially paralyzed from the waist down. His ensuing lawsuit, as Judge Robinson wrote, was “[i]n a very real sense...an understandable search for reasons.”

The court could find no reason why Canterbury was not told more about the risks—including the possibility of paralysis—accompanying his surgery. Although Dr. Spence had procured nominal consent to operate, the court held that because he had not adequately explained to Canterbury the risks he faced, any consent was void. The court held

22. See Martin ex rel. Scoptur v. Richards, 531 N.W.2d 70 (Wis. 1995).
24. See id. at 500-01.
26. Id. at 776.
27. See id. at 791.
that a doctor needs to procure a patient’s *intelligent* consent rather than simply going through the motions.\(^{28}\)

What, then, must patients be told before their consent to a procedure or operation is considered intelligent and informed? Must doctors tell their patients about infinitesimally small risks in conjunction with the most routine of procedures? Must my doctor inform me, for example, that the hepatitis vaccination I need for travel to Borneo carries a 1 in 100,000 risk of paralyzing me?

Who gets to decide what I should be told? Should doctors themselves set the standard? Should the standard be what a reasonable person placed in my position would want to know? Or should the standard be subjective, assessing what I, the particular patient bringing a claim, would have wanted to know?\(^{29}\)

The Wisconsin Supreme Court addressed these issues in the 1975 case of *Scaria v. St. Paul Fire & Marine Insurance Co.*\(^{30}\) K.S. Scaria had come to the United States from India and was teaching in a small college in Waukesha, Wisconsin. At the age of forty-one, he went to see an allergist because of hay fever attacks. In examining Scaria, the allergist discovered that he was suffering from severe hypertension and referred him to a specialist in internal medicine and cardiology.\(^{31}\)

The specialist recommended an aortagram, in which dye would be injected into Scaria’s femoral artery to determine whether a narrowing of the arteries leading to the kidneys might be causing his high blood pressure. When Scaria inquired about the risks accompanying this procedure, his doctor characterized the procedure as routine. Scaria testified that he was given the impression that there was only a 1 in 1,000 chance of any complications. When he asked, “Is that all?” his doctor replied, “That’s all.”\(^{32}\)

But that was not all. Scaria’s doctor did not tell him that the procedure could lead to the puncturing of the aorta, an allergic reaction to the dye, paralysis, or even death. Within two hours of the procedure Scaria was paralyzed from the waist down.\(^{33}\)

\(28.\) See id.

\(29.\) For discussions of the history and distinctions between the traditional professional physician standard, the prudent patient standard, and the subjective patient standard, see generally PAUL S. APPELBAUM ET AL., INFORMED CONSENT 41-49 (1987); 3 DAVID W. LOUSSL & HAROLD WILLIAMS, MEDICAL MALPRACTICE § 22.05 (1997); and 1 MILES J. ZAREMSKI & LOUIS S. GOLSTEIN, MEDICAL AND HOSPITAL NEGLIGENCE § 15.03 nn.16-20 (1995 & Supp. I 1996).

\(30.\) 227 N.W.2d 647 (Wis. 1975).

\(31.\) See id. at 649-50.

\(32.\) Id. at 650.

\(33.\) See id. at 650-51.
The issue before the Wisconsin Supreme Court was whether Scaria’s consent to the surgery had been informed. At trial, the jury was instructed that what Scaria’s doctor was required to disclose was limited to that information “which physicians and surgeons of good standing would make under the same or similar circumstances, having due regard to the patient’s physical, mental and emotional condition.”34 Scaria objected that this instruction gave his doctor the “sole power to decide what information is to be imparted to the patient and what is to be withheld on the ground that ‘the doctor knows best.”’35 Citing Canterbury, Scaria argued that the question of whether or not he had been given enough information to render an informed consent to surgery should not be dependent upon a self-imposed professional tradition.36

In a 5-2 decision, the Wisconsin Supreme Court agreed with Scaria, adopting what has come to be known as the prudent patient standard. The court held that a reasonable physician standard allowing doctors to establish what constitutes informed consent was too broad a limitation on what patients might need to be told.37 Instead, the court held, a doctor’s duty should extend to and be determined by the information which a reasonable person in the plaintiff’s position would have considered material in making a decision.38

But much like the Canterbury court, the Scaria court declined to go further and allow informed consent to be measured according to the needs of the particular patient bringing a claim. Under such a subjective standard, the Scaria court reasoned, disappointed patient-plaintiffs, operating with the benefit of hindsight, might claim that they would have decided against surgery had they been better informed.”39

To return to my vaccination example, a subjective patient standard would allow me, Shirley Abrahamson, to argue after the fact that had I been told of the infinitesimally small risk of paralysis, I would have foregone vaccination altogether, even if this decision would have trebled my chances of contracting hepatitis.

In the twenty years since the Scaria decision the Wisconsin Supreme Court has reaffirmed Scaria’s principles. In 1995 and again in 1996, we have rejected both a reasonable physician standard on the one

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34. Id. at 652 (quoting the jury instructions given by the trial judge).
36. See id. at 18-19.
37. See Scaria, 227 N.W.2d at 653.
38. See id. at 653-54.
39. See id. at 655.

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hand, and a subjective, patient-specific standard on the other. But while Wisconsin continues to stay the course first charted in Scaria, a vigorous debate taking place beyond American borders has placed the prudent patient standard under a microscope.

Several foreign jurisdictions suggest that America's law of informed consent has not gone far enough. The German Federal Supreme Court, in an important 1984 decision on informed consent, stated that, "[t]he patient's right of self-determination, which is meant to be protected by the physician's legal duty of disclosure, extends to decisions which according to medical judgement appear to be indefensible." The question is not, the German court concluded, what a reasonable patient would need to know and what a reasonable patient would do with that knowledge, but rather what the particular patient whose claim was at issue would need to know in order to render an intelligent and informed consent.

The concerns regarding patient autonomy expressed in the German court's decision reverberate in other foreign jurisdictions as well. The Australian appellate court of New South Wales unanimously rejected the prudent patient standard and adopted the subjective standard in its place. The prudent patient standard, said the Australian court, failed to show "respect for the integrity of the patient as an individual, entitled to have command over his or her body." Prior to 1980, Canadian appellate courts also championed the subjective standard.

40. See Martin ex rel. Scoptur v. Richards, 531 N.W.2d 70, 78-79 (Wis. 1995).
41. See Johnson ex rel. Adler v. Kokemoor, 545 N.W.2d 495, 502-03 (Wis. 1996).
43. See id. at 304-05.

I think it is the safer course on the issue of causation to consider objectively how far the balance in the risks of surgery or no surgery is in favor of undergoing surgery. The failure of proper disclosure pro and con becomes therefore very material. And so too are any special considerations affecting the particular patient.


The principle of self-determination in other medical contexts continues to be highly valued by the Canadian appellate courts. The principle of self-determination, wrote the Ontario Court of Appeal, presupposes "the patient's capacity to make a subjective treatment decision, based on her understanding of the necessary medical facts provided by the doctor and on her assessment of her
Autonomy. Self-determination. Personal integrity. Patient dignity. The vocabulary deployed in these cases was strikingly familiar to that used in the Wisconsin Supreme Court’s informed consent decisions. But while the Wisconsin Supreme Court saw the prudent patient standard as facilitating patient autonomy, courts adopting the subjective standard saw the prudent patient standard as compromising the very autonomy it was intended to promote.

Who, they rhetorically asked, was this prudent patient? If medical experts and medical testimony were allowed to give this prudent patient shape and hue, then how was the prudent patient standard different from the reasonable physician standard? Didn’t patient autonomy give a patient the right to make “unreasonable” demands regarding what she wanted to know, or indulge “unreasonable” fears when deciding whether she should undergo surgery? Shouldn’t doctors, once aware of a patient’s particular needs and fears, have an obligation to respect them?

If you look at the American law of informed consent in isolation from the rest of the world, you do not hear or ask these questions. You get the impression that there is little to be said for the subjective standard. As best I can tell, only two states, Oklahoma and Oregon, have adopted the subjective patient standard in informed consent cases. Their decisions are recent and relatively short; neither addresses fully the policy issues driving the debate in Australia, Canada, Germany, and New Zealand. Only a wider angled legal lens reveals the potential tensions between the prudent patient standard and the promotion of patient autonomy.

I do not mean to suggest which of these standards—the prudent or subjective patient standard—is right. I do mean to say that when courts from around the world have written well-reasoned and provocative opinions in support of a position at odds with our familiar American views, we would do well to read carefully and take notes. At the very least, we American judges should write our decisions with a conscious


47. See Arena v. Gingrich, 748 P.2d 547, 550 (Or. 1988) (in banc).

48. See, e.g., Giesen, supra note 42, at 303-04 (noting that opinions from Australia, Germany, New Zealand, and Switzerland are well-reasoned and directly explore the problems of the subjective approach); Giesen & Hayes, supra note 44, at 119-22 (discussing Australian, German, Canadian, and New Zealand opinions that have noted problems with the objective test).
awareness that decisions from abroad, if considered, might complicate and challenge our analyses.

I can already hear the objections. You cannot glean the substance of a legal system from an examination of its particular rules of substantive law, let alone from a smattering of opinions interpreting a narrow issue. The law of a particular country is deeply rooted in that country's history and traditions. It gives voice to aspirations, fears, and priorities specific to that country's culture. Although the rhetoric and terminology used by different jurisdictions may sound and even feel similar, the same words and phrases can and often do convey different meanings.

As one commentator has stated, "[A] good comparatist is one who, while studying the law of any country, looks not merely at the particular rules of its substantive law, but rather at the many processes and institutions by which substantive law is transformed into reality."

Informed consent law may vary from jurisdiction to jurisdiction based on considerations such as whether bringing suit is difficult or easy, whether expert testimony is generally available to plaintiffs, the level of government involvement in providing services to individuals, and the level of dignity accorded to individuals.

Admittedly, my foray into the informed consent law of other countries involved almost no spadework into the respective countries' legal cultures, and I have no extensive knowledge of the different legal systems whose cases I share with you today. As a consequence, I may misrepresent the legal traditions from which these cases come or fail to discern nuances in the opinions.

But the risks inherent in exploring different legal systems are risks that American lawyers and state court judges take every day. We are already comparatists. We just don't think of ourselves that way.

The American federal system has made seasoned comparatists of all of us. Every American law school class and casebook uses the comparative law method, drawing upon examples and opinions from numerous states and state courts. Every American lawyer and judge must pay attention to the law developing in other state jurisdictions.

So when I, as a state court judge, figuratively leave my jurisdiction searching for insights from court opinions issued in places like Alabama.

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50. See id. at 855.
51. Id. at 856.
or Alaska, I venture into unfamiliar terrain. I may feel insecure, but I go nevertheless. And thanks to my training as an American federalist, I know what to do when I get there.

Of course, when I cite to or draw upon the reasoning of an insurance case arising in Alabama or a products liability case arising in Alaska, I never for a moment imagine that I have magically become an expert in the law of either jurisdiction. Opinions from other American state courts may respond to wrinkles and nuances in their own particular legal and political histories about which I know little or nothing. Nevertheless, those courts will frequently see such problems in a light which, from my vantage point, is fresh and provocative. Those courts inform and illuminate. They may help me formulate or clarify issues. They may suggest a solution or possible alternatives. They may challenge my perspective. In short, I wouldn’t dream of doing without the insights provided by these trips into unfamiliar terrain, even though they can leave me feeling apprehensive.

Why shouldn’t our experiences as American comparatists embolden more American lawyers and judges to explore the law of non-American jurisdictions in the same spirit? Why shouldn’t we take advantage of the comparatist instincts learned in our law schools and practiced in our courts by venturing farther afield?

Indeed, we can cross the divide separating us from other jurisdictions around the world. And if we do so with the modest intent to borrow ideas on classifying, discussing, and solving a particular problem, we should not be deterred by unfamiliarity with foreign legal systems. We may fail to understand a particular system of law or even misinterpret some foreign decisions. Nevertheless, we may also find unexpected answers or new challenges to domestic legal issues.\footnote{See Thomas Allen & Bruce Anderson, The Use of Comparative Law by Common Law Judges, 23 ANGLo-AM. L. REV. 435, 443-444 (1994) (discussing how comparative law can be used as an aid in proposing possible solutions to domestic legal issues); Mark Tushnet, Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty, 94 MICH. L. REV. 245 (1995) (exploring policy distortion in U.S. constitutional law by analyzing recent constitutional experience in France and Canada).

Professor Glendon comments on the difficulties encountered in using foreign law in domestic law cases as follows:

It is not at all easy to determine which foreign experiences are most relevant to one’s own situation, or in what, precisely, that relevance consists. In using comparative law as an aid to law reform, it is even sometimes hard to tell whether a particular foreign example should be regarded as a beacon or a warning. When comparatists look at how problems in their own country are handled abroad, it is almost never with the thought that they will find a “solution” which can be picked up, brought home, and plugged in like some new electric appliance. Instead, what they usually hope for, and
The judges who authored the foreign cases I turned up in my own survey were clearly cognizant of the importance of surveying the international legal landscape. They almost invariably reviewed the international state of the law in the sphere being addressed.

In foreign cases on informed consent, references to *Canterbury* were legion, even though several of the courts I examined had rejected *Canterbury*’s prudent patient standard. But confronting and criticizing *Canterbury* only strengthened the opinions of the foreign judges adopting a different view.

To the extent that foreign courts call into question decisions such as *Canterbury*, their opinions should be all the more valuable here at home. Most American courts take the *Canterbury* framework for granted and limit their analyses to how the framework should be interpreted. By reading cases that reject the *Canterbury* framework altogether, American courts can expand the range of questions they should consider.

In fact, foreign opinions could function like superstar amicus briefs, offering otherwise unavailable viewpoints, delivered from unique perspectives, by some of the world’s leading legal minds. But as far as I can tell from their opinions, American courts are not reading these superstar amicus briefs.

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For example, the lead Canadian abortion decision, \textit{Regina v. Morgentaler},\textsuperscript{55} discussed decisions by the U.S. Supreme Court, the German Supreme Constitutional Court, and the European Court of Human Rights. The most recent U.S. Supreme Court abortion decision, \textit{Planned Parenthood v. Casey},\textsuperscript{56} contains only one citation to judicial developments on abortion in the rest of the world: a one-paragraph footnote in Chief Justice Rehnquist's concurrence in part and dissent in part, contrasting the leading German and Canadian abortion decisions as opposing authorities.\textsuperscript{57}

The case with which I began this talk, the Wisconsin tort liability case involving the farmer with Alzheimer's disease and the nurse, provides yet another example of American courts' failure to draw upon legal developments in other countries. The Canadian case cited by the farmer's counsel was hardly an isolated view of the civil insanity issue. Argentina,\textsuperscript{58} Australia,\textsuperscript{59} France,\textsuperscript{60} and Japan\textsuperscript{61} have all refused to hold mentally disabled persons liable for tortious behavior. Because these jurisdictions focus on fault and the cause of injury rather than on compensation and the fact of injury, their courts' opinions offer a different perspective on a central tension in American tort law: whether the law's primary function should be fault-finding or victim compensation.

Don't get me wrong. I am not suggesting that the German Supreme Court or the European Court of Human Rights has the better view on abortion. Nor am I suggesting that Canada's approach to the defense of mental disability should be adopted in Wisconsin. That is not my purpose here today.

What I \textit{am} suggesting is that we ought not to assume that adoption of a position by a majority of our states makes that position right and renders further inquiry pointless. To do so would be like reading only majority opinions and never turning to concurrences or dissents. I suggest that American courts, although they rightly view themselves as independent, can surely strengthen and better convey their message if they are willing to broaden their vision. Hence, we should not deride a party who cites Canadian law. We should be citing Canadian law

\begin{itemize}
\item \textsuperscript{55} [1988] S.C.R. 30.
\item \textsuperscript{56} 505 U.S. 833 (1992).
\item \textsuperscript{57} \textit{See id.} at 945 n.1 (Rehnquist, C.J., concurring in part and dissenting in part).
\item \textsuperscript{58} \textit{See Picher, supra} note 7, at 222.
\item \textsuperscript{59} \textit{See id.} at 212.
\item \textsuperscript{60} \textit{See id.} at 222.
\item \textsuperscript{61} \textit{See id.}
\end{itemize}
ourselves, along with law from the rest of the world.

What happens when our courts decline this challenge and the tough thinking it requires? Professor Mary Ann Glendon has drawn attention to the insularity of modern American constitutional law. As an example, she contrasts the approach to the privacy rights of homosexuals in the leading European case, Dudgeon v. United Kingdom, and the later U.S. Supreme Court case, Bowers v. Hardwick. Several of the six opinions in Dudgeon were filled with comparative law references, including references to American jurisprudence. The U.S. Supreme Court as well as the attorneys for both parties in Bowers, decided six years after Dudgeon, seem to have been unaware of the European precedent.

Jeffrey Dudgeon, like his American counterpart Michael Hardwick, charged that anti-sodomy laws violated his rights. Dudgeon brought his claim under the European Convention on Human Rights while Hardwick brought his under the U.S. Constitution. Dudgeon won and Hardwick lost. Which outcome you prefer does not concern us here. Rather, what concerns Professor Glendon, as she explains in her excellent discussion of the two cases, is that the American Bowers decision lacks the care evident in the Dudgeon court’s consideration of the controversial and legally difficult issues at stake.

The European Dudgeon court carefully balanced the state’s conceded interest in regulating some aspects of private sexual activity with the individual rights that such regulation would inevitably compromise. Both the majority and the dissent in the American Bowers case, on the other hand, discussed privacy rights in absolutist terms. Their disagreement, observes Glendon, was confined to whether Hardwick was “in” or “out” of the protected sphere.

The European Dudgeon court carefully considered how other countries, including the United States, had addressed the relation between privacy rights and homosexuality; the six opinions issued in Dudgeon contained thoughtful arguments on both sides. The U.S. Supreme Court in Bowers, along with the lawyers of both principal parties, ignored what Dudgeon had to offer.

63. 478 U.S. 186 (1986).
64. See MARY ANN GLENDON, RIGHTS TALK 146-51 (1991).
"The six Dudgeon opinions," Glendon writes, "issued by some of the world’s leading jurists, contained ideas and information that could have focused issues, enlarged perspectives, improved the quality of reasoning, and ultimately helped to place our Court’s decision—whichever way it went—on a sounder and more persuasive footing."

Instead the Bowers Court perpetuated a trend that has characterized the U.S. Supreme Court for the past 150 years.

As an English commentator assessing the isolationist tendencies of

66. GLENDON, supra note 64, at 152.


Justice Stevens, dissenting from a denial of certiorari, examined English law to determine cruel and unusual punishment in Lacey v. Texas, 514 U.S. 1045, 1046-47 (1995). Justice Stevens asserted that the highest courts in other countries have found persuasive arguments that execution after inordinate delay infringes the prohibition against cruel and unusual punishments. See id.

The opinions in Printz v. United States, 117 S. Ct. 2365 (1997), also discuss the value of examining the experience of other countries in regards to federalism issues in deciding the constitutionality of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended at 18 U.S.C. §§ 921-925A and 42 U.S.C. § 3759). Justice Scalia contended that comparative analysis is inappropriate, see Printz, 117 S. Ct. at 2377 n.11; Justice Breyer argued that the experience of other countries, even though differences exist, ’may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . .‘ Id. at 2405 (Breyer, J., dissenting).

In Washington v. Glucksberg, 117 S. Ct. 2258 (1997), Chief Justice Rehnquist, writing for the majority, noted that other countries are embroiled in the issue of physician-assisted suicide and referred to the experiences of Canada, Great Britain, Australia, Colombia, New Zealand, and the Netherlands. See id. at 2266 n.16. The Chief Justice, however, did not analyze the approaches used by the jurists of those countries.

Judges on other courts are referring to the domestic law of other countries as well as international law. Judge Guido Calabresi looked to the constitutional courts of Germany and Italy in discussing what courts should do when a law, rational when enacted, becomes increasingly dubious over time. He wrote:

At one time, America had a virtual monopoly on constitutional judicial review . . . . [drawing] origin and inspiration from American constitutional theory and practice. . . . These countries are our “constitutional offspring” and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.

United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (citation omitted).


the American courts has said, "[P]erhaps it is now the Americans who have assumed the attitude once ascribed to the British: when told how things are done in another country they simply say 'How funny.'"

But it isn't funny. And as the world continues to become smaller as technological capabilities grow, the provincial attitudes of American courts are becoming less excusable. Law from around the world is literally at our fingertips.

Westlaw and Lexis as well as the Internet provide instant access to foreign materials. Thanks to CD-ROM, hitherto almost inaccessible materials from Asia and Africa are becoming available. When I was in Indonesia in the summer of 1995, for example, the country's economic statutes were being placed on CD-ROM—even though Indonesia's statutes have not appeared in book form.

The Internet provides access to specialized library catalogues and enables law professionals to communicate, form discussion groups, and share ideas. Increasing numbers of judges can thus communicate with each other across borders and oceans. Professor Anne-Marie Slaughter has dubbed this phenomenon "transjudicial communication."

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68. James Michael, Homosexuals and Privacy, 138 NEW L.J. 831, 831 (1988). Justice Kirby, President of the Court of Appeal of Australia, in his Farewell Speech on February 2, 1996, commenting on what he considered as important aspects of his service on the bench, included his practice of referring to non-English sources of judge-made law and to international norms. He stated:

I was insistent that the Court should look beyond the traditional English sources of judge-made law. In an early case I tried this out on Mr. R.P. Meagher QC, telling him that I had seen relevant authority in a recent decision of the Supreme Court of Iowa. His immortal response was: "Your Honour is such a tease." But nothing is stable in this uncertain world. He has been known of late to cite international human rights norms in support of his opinions. I am now patiently waiting for him to use feminist legal theory to overrule Lord Eldon;

... [T]he reference to such international norms by me was at first thought heretical. Justice Powell (and doubtless others) still think so. But I comfort myself in the memory of my occasional dissenting opinions during my service in this Court. Now, elsewhere, I may have a chance to convert heterodoxy into new legal principle. This, after all, is the way our legal system operates—by an appeal to ultimate persuasion; ...  


70. Anne-Marie Slaughter, A Typology of Transjudicial Communication, 29 U. Rich. L. Rev. 99, 100-01 (1994) (describing transjudicial communications and contending that as a result, the quality of judicial decision making should improve worldwide); see also Allen & Anderson, supra note 52, at 437-40 (describing uses for comparative law); Günter Frankenberg, Critical Comparisons: Re-thinking Comparative Law, 26 Harv. Int'l L.J. 411, 455 (1985) (noting that the advantage of comparative law is that it provides the chance to re-evaluate legal norms); Kozyris, supra note 69, at 168 (noting that language and cultural obstacles prevent the teaching of foreign
If the world's courts increasingly talk to and about each other while American courts persist in talking to and among themselves, it is our law that will be deprived of the new ideas and solutions being vetted around the globe. "[A] lawyer," writes Professor John Kozyris, "even in the most mundane practice, will be impoverished if he wears the blinders of his own jurisdiction."71

Professor Glendon, describing the rewards of comparative analysis, has said:

We can only benefit from a heightened awareness of the ways in which other nations have approached problems with which our own legal system is currently struggling. Even though legal devices developed in other countries are rarely suitable for direct transplant, they often serve the cause of law revision and reform by showing that our range of choice may be wider than we had imagined, and by alerting us to the potential drawbacks as well as the possible advantages of alternative methods of proceeding. The study of foreign experiences can also be a fertile source of inspiration and ideas. And even when it does not immediately move us into a new stage of thinking, it nearly always affords us a deeper understanding of, and a more balanced perspective on, our own law.72

Whether other countries' legal developments will move our courts into a new stage of thinking, there is no question that changes in the world as a whole have catapulted our courts onto a new stage in a legal production as wide as the globe itself. Under such circumstances, stage fright is understandable. But like it or not, the world is now our courtroom. The question confronting our courts as we approach the year 2000 is whether we are willing to do what it takes to be world-class players.

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71. Kozyris, supra note 69, at 168.