

## **Borders, Law, and Doors -- Opening**

Remarks prepared for Convocation

Bryn Mawr College

May 13, 2006

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## **Introduction**

President Vickers, President Tritton, former President McPherson, graduating students, your family and friends, and my family and friends. I am delighted to be here.

I have to admit that, when I received a phone call from President Vickers inviting me to speak, I told her that I was very honored-- but that I really thought I could not do so, given other commitments, which meant I did not have the time to prepare a talk that befits the occasion. Then I told my spouse, Denny Curtis, about this lovely invitation. Urging me to accept, he said: Don't worry, no one will remember a word that you say. At which point our teenage son, Jonathan Curtis-Resnik, asked: Who spoke at your graduation? I had to admit that I had no recollection.

Thus reassured, here I am. Upon accepting this honor, I did what any Bryn Mawr graduate would do -- research. I asked the College to provide me with the commencement speeches that have been given in the past. Therefore, I am the grateful recipient of a set of speeches and news clippings dating from 1889, when Paul Shorey, a Professor of Greek and Latin here, addressed the first group of 24 graduating students -- telling them that BMC was no

mere high school for girls but a potent force in  
the intellectual life of America.<sup>1</sup>

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1. Bryn Mawr College, Completion of the First Full Course of Study, News Clipping from the "Public Ledger" [? Date], 1898 at 77. My thanks to Nell Pointer and Donna Hecker for making these materials available to me. Thanks are also do to Camilla Tubbs of Yale's Law Library for her

These speeches provide a wonderful slice of American political history about which I will tell you just a bit.<sup>2</sup> Reading the set, I was drawn to names that I knew and topics close to my heart. I therefore paid close attention to when the first woman was the listed speaker -- that was 1912, and she was Jane Addams of Hull House fame, whose address was entitled "The Civic Value of Higher Education."<sup>3</sup> The next woman to speak (four years later, in 1916) was Mary Woolley, President of Mount Holyoke College.<sup>4</sup>

Her presence is one of several markers of the sisterhood between that women's college (founded in 1837) and this one. Today, the connection is reinforced by Nancy Vickers, a Mount Holyoke graduate, who serves as Bryn Mawr's President. I have my own sweet sisterhood connection to Mount Holyoke. My older sister, Elinor, graduated from there; she led the way for me by going to one of the Seven Sisters. On this, and much else, I followed suit.

Of course, as I read the speeches, I took special note of attitudes towards women. Not surprisingly, Mary Woolley told the class of 1916 that

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efforts, and that of Aaron Weiss, who assisted in helping to locate other relevant sources.

2. A caveat to the comments that follow is in order. The set of speeches from 1889-2005 is not (yet) a complete historical account because about twenty or so speeches are missing, with archival searches under way. A suggestion is also appropriate, that a volume be published, with selections from the women's colleges, under a heading such as Speaking to the Seven Sisters.
3. Jane Addams, *The Civic Value of Higher Education for Women*, 6 BRYN MAWR ALUMNAE QUARTERLY 59 (June 1912).
4. Mary E. Woolley, *The Fact of Life*, 10 BRYN MAWR ALUMNAE QUARTERLY 57 (June 1916).

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There is not one multiplication table for a man, another for a woman; logarithms, as far as known, are guiltless of sex.<sup>5</sup>

Bryn Mawr's own President, M. Carey Thomas, speaking in 1919, made the related point, that "women's rights" had as their

inseparable corollaries[,] women suffrage, equal educational opportunity and equal pay for equal work.<sup>6</sup>

Not all speakers agreed. Senator George Hoar of Massachusetts advised the graduating class of 1898, that "every American woman" had to understand

that it was not only her function to be the companion, helper, comfort and nurse of her husband and son and brother in misfortune and sickness and sorrow, but that it is her

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5. Id. at 60.

6. Address by President Thomas, [vol no.?] *BRYN MAWR ALUMNAE QUARTERLY*, 66, 67 (1919) (noting that these were, along with "peace and temperance," "fundamental questions" in need of being settled soon). Thomas became President in 1894 and served for twenty-eight years. See Helen Lefkowitz Horowitz, *The Power and the Passion of M. Carey Thomas* 264 (1994). The speeches by the Presidents are not all "listed" on the roster. Apparently, some years, the President was the only speaker mentioned. In terms of other women listed as speakers in the early years, in 1925, Florence E. Allen (then a judge on the Supreme Court of Ohio, and later the first woman to sit on the federal courts) spoke (her talk is missing). Mary Woolley returned to this podium in 1933, and Alice Hamilton of Harvard Medical School spoke in 1936.

Only in the 1940s do women become more frequent speakers. By the 1970s, women start to dominate the roster. Between 1979 and 2006, the only men listed as speakers were Owen Lattimore (in 1979) and David Oxtoby (in 2003), who was then President Elect of Pomona College, and is also described as a son of a Bryn Mawr Professor and a BMC alum.

special function to be his stimulant to heroism  
and his shield against dishonor.<sup>7</sup>

Yet William Howard Taft, giving his first commencement speech here in 1910,<sup>8</sup> when he was President of the United States, had a very different view. In light of recent brouhahas sparked by Harvard University's President, who raised questions about women's aptitude for math and science, I took special note of Taft's attitudes. Taft told his audience that

[a]ctual experiment has shown the claim that there is any difference in favor of man in the quickness of learning, or the thoroughness of acquisition of knowledge, to be entirely unfounded. Indeed, . . . the averages of women are higher than that of men.<sup>9</sup>

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7. Senator George Hoar, *Influence of Educated American Women*, in THE AMERICAN FRIEND, June [? 9], 1898 at 536, 537. He also explained that he had

carefully avoided touching upon the question of the right or duty of American women to take part in the conduct of the State by voting or holding political office, [as he noted that the] fate of this country [comes not from votes but from the] sentiments which inspire the individual citizen, [and that is what is taught] most of all, at mothers' knees. And it is here that the influence and power of American women in the Republic is to be exerted and is to be decisive.

Id. at 538.

8. Address of President Taft at the Graduation Exercises of Bryn Mawr College, June 2, 1910, 4 BRYN MAWR ALUMNAE QUARTERLY 77, 78-79 (June, 1910). He discussed three models of higher education for women:

[the] state universities where there [was] co-education of the sexes; [the] so-called affiliated colleges in which women's colleges [were] more or less dependent upon a stronger men's college, [and] independent women's colleges, [of which Bryn Mawr was one of the] most successful and useful.

Taft spoke twice more, in 1915 on "A Permanent Basis for International Peace," and in 1919 on "The League of Nations." As of this writing, those speeches have not been located. On the roster in 1919, he was listed as "former President of the United States and father of alumna and dean" [Helene Taft].

9. Taft's 1910 speech, cited above, at 79.

Surprisingly (to me at least) were the ways in which aspects of Taft's speech reminded me of Virginia Woolf's 1929 book, *A Room of One's Own*. Recall that when Woolf wrote, women had only recently gotten the vote,<sup>10</sup> and remember also that Woolf herself was the recipient of a legacy from an aunt -- five hundred pounds a year. Woolf commented:

Of the two--the vote and the money--the money, I own, seemed infinitely the more important;"<sup>11</sup> that "five hundred a year stands for the power to contemplate, that a lock on the door means the power to think for oneself."<sup>12</sup>

Now return to 1910 and William Howard Taft, who similarly encouraged Bryn Mawr's graduating class to enter professions and the business world, so that they could be financially independent. Taft warned students not to equate marriage with happiness,<sup>13</sup> as he advised the class that women ought not

to accept husbands whom they do not respect

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10. In England, women who were thirty became entitled to vote in 1918. In 1928, the age of eligibility became twenty-one. The Nineteenth Amendment, giving women a national right to vote in the United States (as contrasted with that option if a state were to permit it) was ratified in 1920.

11. Virginia Woolf, *A ROOM OF ONE'S OWN* 27 (1928, republished 1957).

12. *Id.* at 110.

13. He also noted that being married could provide wonderful "companionship" between persons sharing "intellectual sympathy and association of ideas." Taft's 1910 speech, cited above, at 82.

and love, and whom they would not marry  
except to escape a life of poverty.<sup>14</sup>

Jumping forward in time, the question of women's rights remains a staple of Bryn Mawr commencement addresses. One fascinating set of comments comes from the first and the only person on the speaker list who is described as a "balloonist." That was Jeannette Ridlon Piccard, who entitled her talk "Caution" and who spoke to the class of 1979. Piccard explained that she had entered Bryn Mawr in 1914, when women did not yet have the vote. She commented that she had assumed, in 1920, that with the vote so many doors would open for women. But her own efforts to gain ordination as an Episcopal priest proved otherwise; she was not able to take her orders until more than fifty years later, in the 1970s.<sup>15</sup> Piccard counseled that the only way to move forward was by

each door being cracked, forced, or unlocked  
and opened.<sup>16</sup>

Reading the talks, I was eager to learn when and how issues of nationality, ethnicity, religion, and race entered the discussion. The first speaker from abroad, coming in 1940, was the Chinese Ambassador, Dr. Hu Shih, who spoke about "Mr. Hitler" and his armies, as he also counselled the students that they had to take moral responsibility for the consequences of the decisions they made.<sup>17</sup> The first mention of race

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14. Id. at 80.

15. Speech by Jeannette Piccard, May 13, 1979, BMC Archives at 2-3.

16. Id. at 3.

17. Intellectual Preparedness: Excerpts from the Commencement Address by his Excellency Dr. Hu  
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relations that I found came in 1944, in the talk by Bryn Mawr President Marion Park, in which she commented on the need for "fundamental changes in race relations."<sup>18</sup> We can all take pride that Martin Luther King joining President Robert Goheen of Princeton, spoke here in the graduation of 1966,<sup>19</sup> and that in the 1960s and thereafter, dozens of stellar women of all colors joined the leadership of the College in speaking to graduating classes.

Obviously, I read the one hundred plus speeches to help me reflect on how I could be useful today. As both a lawyer and someone interested in (if not always adhering to) social customs, I also turned to these speeches as precedent.<sup>20</sup> I found that these talks gave me utter

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Shih, the Chinese Ambassador, [vol. no?] BRYN MAWR ALUMNAE BULLETIN, 7, 9 (July 1940). Dr. Shih spoke movingly, advising that one had first

the duty to verify our facts and check our evidences; second, the humility to admit the possibility of error of our judgment and to guard against bias and dogmatism, and thirdly, a willingness to work out as thoroughly as we can the possible consequences that may follow the acceptance of our view or theory, and to hold ourselves morally responsible for the consequences.

Id. Dr. Shih's papers are at Cornell; he was the chancellor of the University of Beijing in 1946, and in Taiwan, lead its Academia Sinica. See <http://rnc.library.cornell.edu/EAD/html/dos/RMA02578.html>.

I believe the next speaker from abroad was Zeba Mohammed Rasmussen, a graduate of the class of 1976 and a public health physician in Pakistan, who spoke in 1998.

18. Marion Edwards Park, 1944 Speech, BMC archives at 7 (predicting that women could contribute to the "painful unwindings" to come). She also bemoaned the lack of women in public office and in government -- commenting that

the lack of women in public office. . . [and] their comparative absence. . . from committees and administrative bureaus would have disappointed or rather horrified the first feminist missionaries.

19. Dr. King Urges Active Role for Graduates, Evening Bulletin, May 30, 1966, BMC Archives.

20. I always like to know what the customs are, in order to sort out which to accept and when I am violating expectations or rules. A similar note was struck by Hannah Holborn Grey in her 1997 address, when she quoted Hannah Arendt who had, upon receipt of the M. Carey Thomas Award, described -- with admiration -- a friend whose

whole spiritual being was built on the decision never to conform and never to escape. . . .

BMC Archives, May 17, 1997 at 3.

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license to talk about whatever I wanted, from chemistry to health care, from wars to social security, and beyond to ballooning. Of course, it helps to be grounded (pun intended) in one's own expertise. I will follow suit but innovate in one respect. When the final version of this talk is added to the set, it will be the first to have lots of footnotes and, had logistics permitted me to have shown pictures or distributed handouts with the various quotes I use, I would have done so as well.

### **Borders and Bridges**

I turn thus to topics now very much in the news and on which I work as a law teacher, scholar, and advocate.<sup>21</sup> Put broadly, my issue is America's relationship, under our own Constitution, to international lawmaking. The questions include:

Should the US join the International Criminal Court (the ICC), now functioning at the Hague with one hundred nations committed to a permanent court in which to try war criminals for offenses such as genocide?

What about foreign law and the judgments issued by courts such as those in South Africa, Canada, or Israel? Can and should the United States Supreme Court invoke judgments of other courts? And what about international treaties and conventions? Should they be a part of US judges' decisions?

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21. Further elaboration and most of the quoted sources come from two recent essays. See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE LAW JOURNAL 1564 (2006), and Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE LAW JOURNAL 619 (2001).

Further, what about the treaties we have not ratified? Should the United States ratify the Convention on the Rights of the Child? The Convention on the Elimination of All Forms of Discrimination Against Women?

And what about detentions at Guantanamo Bay? Can people, even if labeled "enemy combatants" or "aliens" who are held there, bring claims to the courts of the United States about illegal detentions, mistreatment, and torture?

My first comment is to report on political efforts aimed at muzzling American judges by telling them that, when writing opinions, they are not supposed to cite non-United States law. Specifically, members of Congress have proposed a bill, which they have labeled the *Constitution Restoration Act*, to ban judges from relying on foreign law. The text of the statute that they want to pass reads:

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the

## Constitution of the United States.<sup>22</sup>

Further, this statute threatens judges with impeachment if they disobey.<sup>23</sup> This proposal has been the focus of a great deal of attention within legal communities. One periodical for judges ran a headline on its cover in bold print: "*Foreign Law: Does It Have a Place in American Decisions?*"<sup>24</sup>

In short, the hostility to the "foreign" is startlingly intense at the moment. Yet this insistence on the importance of American borders is not a new phenomenon in the United States but a very old one. Indeed, every great human rights effort in the last three hundred years has been met, states-side, with protests couched in the language of jurisdiction -- arguing the importance of American borders and objecting to "outsiders" trying to change American law.

During the nineteenth century, opponents of emancipation for slaves resented the international liberation movement. In 1844, for example, South Carolina made it a crime for foreigners (from other states or outside the country) to disturb the peace through being concerned with matters regarding "slaves or free colored people."<sup>25</sup>

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22. Constitution Restoration Act of 2005, Title 2 ("Interpretation of the Constitution") of H.R. 1070, 109th Cong. 1st Sess. (March 3, 2005), and of S.520, 109th Cong., 1st Sess (March 3, 2005). The same proposal was made in 2004. See S. 2082, 108th Cong., 2d Sess. (Feb. 12, 2004).

23. Constitution Restoration Act of 2005, cited above, at ' 302 ("Impeachment, Conviction, and Removal of Judges for Certain Extrajurisdictional Activities").

24. THE JUDGES' JOURNAL, vol. 44, no. 2 (ABA, Spring 2005).

25. See Act to Provide for the Punishment of Persons Disturbing the Peace of this State, in Relationship to Slaves and Free Persons of Color, No. 2925, 1844 S.C. Acts 292 (including banishment as a punishment).

Another illustration comes from the twentieth century -- prompted after the founding in 1946 of the United Nations and the promulgation, in 1948, of the Universal Declaration of Human Rights, stating a deep commitment to the "inherent dignity" of all people.<sup>26</sup> Soon thereafter, in the early 1950s, a member of the US Senate, John Bricker, proposed to make it unconstitutional for the United States to enter into human rights treaties that could affect American citizens.<sup>27</sup>

Brickerism, as it is known, wanted to stop liberal ideas from abroad -- about race, about economic subsidies, about women -- from seeping into America. His proposed constitutional amendment lost in the Senate by a single vote, but his point of view continues to haunt us, as can be seen by the hostility towards America's ratification of a variety of UN Conventions (including that on the Rights of Children, on women's rights, and the International Criminal Court). Arguments made today -- that Americans should not be called to account to transnational bodies sitting in New York, Geneva, or The Hague -- echo those made before.

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26.                   Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world. . .  
Universal Declaration of Human Rights, Preamble, G.A. Res. 217(A)(III) (1948). Its first Article declares:

All human beings are born free and equal in dignity and rights

27. In the early 1950s, after the promulgation of the Universal Declaration of Human Rights, Senator John Bricker (a Republican from Ohio) proposed a constitutional amendment that  
No treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution. . .

S.J. Res. 130, introduced on Feb. 7, 1952 and reproduced as Appendix C in Duane Tananbaum, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* 222 (1988).

To summarize this first point: time and again, international and transnational human rights movements are met with xenophobic responses, often accompanied by claims fairly characterized as anti-immigrant, anti-socialist, anti-Semitic, and anti-feminist. One can find a long and a depressing "fear of the foreign" in the United States.

My second comment is to understand why such attitudes continue to attract adherents. One source for such hostility is reality; those fearing the foreign are right to worry about "foreign influences" because American law is, in fact, regularly affected by currents from abroad. I have already given you -- implicitly -- two examples: slavery and women's suffrage. Both were worldwide human rights movements, whose organizations criss-crossed the nation-state.

Two centuries ago, in 1840, the first World Anti-Slavery Convention took place in London. That meeting was where Lucretia Mott and Elizabeth Cady Stanton, one coming from Pennsylvania and the other from Massachusetts, met each other. They were participants in their local anti-slavery societies but (ironically), because they were women, they were banned from attending the London Convention. And it was there, in London, in 1840 that these two women determined to do something about women's rights. According to an entry in Mott's diary, the two

resolved to hold a convention as soon as  
[they] returned home, and form a society to

advocate the rights of women.<sup>28</sup>

Eight years later, their enterprising work resulted in the meeting at Seneca Falls, producing the *Declaration of the Sentiments on Women*, a bill of rights insisting that women were persons to be treated on a footing equal to men.

Other examples of jurisdictional seepage come from judicial opinions. During the entire history of the United States, federal and state judges have regularly cited "foreign" law, both comparative (the law of other countries) and international agreements. Those references are made for a variety of reasons -- sometimes to note how other jurisdictions respond to similar problems; sometimes to decide, for example, whether a punishment is "cruel and unusual"; and sometimes to distinguish other countries' laws, for example, by saying, unlike totalitarian regimes, we do not tolerate certain practices.

Thus, a bill like the proposed *Constitution Restoration Act*, aimed at banning American judges from using "foreign" law, would be a radical departure from the Nation's history. Moreover, it would be unworkable. One cannot prevent judges from "relying" on, or "employing" non-US law because, inevitably, judges -- and all of us -- are influenced and affected (whether expressly acknowledging it or not) by judgments from abroad. Laws, like people, *migrate*.

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28. This quote from Mott's diary comes from an essay by Kathryn Kish Sklar, "*Women Who Spoke for the Entire Nation*": *American and British Women in the World Anti-Slavery Convention, London, 1840*, in *THE ABOLITIONIST SISTERHOOD: WOMEN'S POLITICAL CULTURE IN ANTEBELLUM AMERICA* 301, 302 (Jane Fagen Yellin & John C. Van Horne eds., 1994).

A quick recap is in order. My first point was that hostility in the United States to so-called "foreign influences" is longstanding and deep-seated. My second point was that our legal borders, like our physical ones, are permeable, such that the real questions are not *if* or *whether* the United States will be affected by law from outside but rather *how* the United States will be affected and *when*. (And indeed, these are hard questions about what to borrow, under what circumstances, and with what background knowledge of how a particular legal rule really is used in another jurisdiction.)

Move then to a third point, about what kinds of innovations from abroad are perceived as threatening America today. Examples in the news include the Kyoto Protocol to deal with global warming, the International Criminal Court, and various efforts related to women's rights. In light of the concerns expressed by the graduating students, my focus for the moment will be on innovations relating to women's rights. M. Carey Thomas and our other suffragist (great) grandmothers would indeed be pleased to see that women are not only gaining recognition as rights holders, they -- we -- have changed the meaning of rights and the content of obligations.

One focus of activity is politics. Women's groups were the original "NGOs" -- non-governmental organizations not by choice but by exclusion. We did not have the vote, and in many places, no rights to education, property, or law. But over two centuries, women in so many countries have gained political rights. Yet, as balloonist Piccard discussed

in her 1970s remarks here, voting has not had as much punch as had been hoped. The vote -- alone -- has not translated into getting women into positions of leadership in the executive or legislative branches.

Take the United States as one example. Women constitute about half the electorate, but are about twenty-two percent of the U.S. House of Representatives and fifteen percent of the Senate. Looking at the states, women constitute under fifteen percent of the membership in the legislatures of Alabama, Kentucky, Mississippi, Oklahoma, Pennsylvania, and South Carolina.<sup>29</sup>

Outside the United States, other countries had similarly low numbers but, in some, new laws have altered election rules and campaign financing to help bring about what is often called "democratic parity." France, for example, amended its Constitution so that candidates for parliament were listed with women and men in alternating slots. By one count, some ninety countries -- from Argentina to India to Uganda -- have various measures, sometimes called "quotas," sometimes "reservations" or "set asides," sometimes only for women and at other times also for other groups, including ethnicities that have, historically, been oppressed within a social order or for persons coming from rural areas.<sup>30</sup> Further, the UN, the European Community, and the organization linking nations in the Commonwealth have all endorsed "gender mainstreaming," translated to mean that executive branch policy

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29. National Conference of State Legislatures, Women in State Legislatures, 2005, available at <http://www.ncsl.org/programs/wln/2004electioninfo.htm>.

30. In some countries, attention is also being paid to the leadership of the private sector. Norway recently mandated that private corporate boards ensure that women constitute a certain percent of their membership, and some advocates believe that unions should do the same.

initiatives of any kind -- from road work to health care -- should take into account the effects on women of policy decisions on topics ranging from highway construction to schools.

But, as Virginia Woolf also instructed in the 1920s, politics are not enough. Recall her insistence on economic independence (her "500 pounds a year"). Many occupations, once closed to women, have opened up, but many problems remain. Feminists are increasingly attentive to the fact that what separates women from men is not *who works*; *everyone works*. The difference comes from *who is paid* for the work that they do. None of us come here today without someone who has done the laundry, paid the bills (as well as earned the money to do so), and stocked the refrigerator. And, reorganizing work taking place inside households turns out to be hard. One new attempt is underway in Norway, and some call it a "daddy quota." All new parents get paid leaves from their occupations but, if fathers don't take some of that time, the family unit gets less subsidized leave.<sup>31</sup>

Another arena of innovative lawmaking is violence against women -- in homes, offices, and streets, as well as during war. Around the globe, new laws understand that violence against women is not "just" about interpersonal conflict but is also a means of entrenching subordination and inequality. If I cannot be safe in my home or en route to work, I am less able to participate in the economy or in politics.

On the international front, one such new law is the treaty of the

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31. See, e.g., Arlaug Leira, *Caring as Social Right: Cash for Child Care and Daddy Leave*, 5 SOC. POL. 362 (1998); PARENTAL LEAVE (Peter Moss & Fred Deven eds. 999).

International Criminal Court, created to try war crimes.<sup>32</sup> As I mentioned, much of the discussion on the International Criminal Court is about whether US citizens could be hauled before it as defendants. Less in focus is that the treaty creating the International Criminal Court is an important human rights document for women. The Court's charter is "the first international treaty to recognize a range of acts of sexual and gender violence as among the most serious crimes under international law,"<sup>33</sup> as crimes against humanity. Women are in view in three roles -- as victims of certain specific kinds of war crimes, as witnesses (in need of special procedures to take into account those challenges) and as judges and prosecutors. The ICC has specific rules (with weighted voting measures, a kind of set aside) aimed at insuring that women have leadership roles, as judges and prosecutors, on the Court.

Another international provision, more obviously "about women," is the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (or CEDAW).<sup>34</sup> CEDAW requires signatory states to take

in the political, social, economic, and cultural fields, all appropriate measures, including legislation, to ensure the full development and

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32. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9.

33. Cate Steains, *Gender Issues*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* at 357-64 (Roy S. Lee ed., 1999).

34. 1249 U.N.T.S. 20378 (entered into force Sept. 3, 1981)

advancement of women.<sup>35</sup>

CEDAW calls for nations to take "temporary special measures" -- what we would call affirmative action -- to stop inequalities.<sup>36</sup> And unlike America's equal protection law, CEDAW looks not to whether someone intended to discriminate but to what impact a particular practice or rule has. Further, and again unlike American equal protection law, private actors as well as public actors are obliged to change. CEDAW aspires to reach all aspects of life, from households to labor markets, from early education to old age.

CEDAW has an interesting mechanism for implementation and one used by several UN conventions. Countries that are parties must file periodic reports, full of data about women in education, access to health care, violence against women, and the like. Representatives from the reporting country go thereafter to the United Nations, where a group of 23 "experts" (nominated by their governments and elected by State Parties to the Convention) ask questions in an exchange to understand a reporting state's achievements and problems.<sup>37</sup>

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35. *Id.* at Art. 3.

36. *Id.* at Art. 2 (e), (f); Art. 4. When equality is achieved, these measures are to be discontinued. *Id.* Article 5 speaks of the need to modify "social and cultural patterns of conduct of men and women" to eliminate stereotypes; Article 6 calls on state parties to reduce traffic in women; Article 7 calls for women's equal participation in formulation of government policy and for equal employment opportunities, and Article 16 seeks the elimination of discrimination against women in all matters relating to marriage and family relations. A subsequent policy directive from the CEDAW Committee addressed violence against women as a problem to be redressed under CEDAW's injunctions.

37. Beginning in 2000, states could also join an "optional protocol" that permits individuals or groups, after exhausting national remedies, to file complaints directly against countries and authorizes the oversight committee of CEDAW to initiate investigations. *See* United Nations, THE CONVENTION TO ELIMINATE ALL FORMS OF DISCRIMINATION AGAINST WOMEN; THE OPTIONAL PROTOCOL; TEXT AND MATERIALS at 1-2, 6-7, 110-118 (U.N. Publications, 2001).

As of 2006, 180 countries had ratified the basic provisions of CEDAW, albeit sometimes with reservations limiting obligations on particular aspects. Although President Jimmy Carter signed CEDAW for the United States in 1980, the U.S. Senate has never ratified CEDAW. In short, CEDAW, the International Criminal Court, and environmental proposals such as the Kyoto Protocol are now all underway. The United States remains outside them all, because of opposition from Washington.

But, and here turning to a fourth point, to look only at Washington is to miss important action at the state and local levels. Although the United States has not ratified CEDAW, the City of San Francisco has, making it a part of its own domestic law and implementing it through requiring CEDAW-like reports to examine how policies ranging from parks and streets to employment, housing and the arts affect women.

More generally, the role of localities in bringing non-US norms inside the United States, and thereby turning "foreign affairs" into "domestic affairs," is often under-appreciated. In the nineteenth century, state and local governments -- linking up with transnational human rights movements -- were instrumental in undermining slavery. People in Massachusetts famously protested against enforcement of the Fugitive Slave Act. As for suffrage, women had the right to vote in several states (including, by 1912, Wyoming, Colorado, Utah, Washington, California, Arizona, Kansas, and Oregon) before gaining that right nationally.

More recently, local action helped to change United States' policies on apartheid in South Africa and on the use of land mines. Returning to CEDAW, some forty-four cities, eighteen counties, and sixteen states have enactments on it. Moving to global warming, more than 200 mayors of American cities have endorsed climate control protocols akin to those of the Kyoto Protocol.

Local action takes different forms. One is expressive -- such as resolutions from cities like Philadelphia that call on the US to ratify CEDAW. Another kind of local innovation is incorporative -- making new laws (such as San Francisco's CEDAW-like provisions) that incorporate concepts from abroad and apply them to local actors, as internal city rules.<sup>38</sup> Thus, a good deal of innovative "foreign" law makes its way into the United States not through national ports of entry but by crossing various city and state lines.

On then to my fifth comment: that we are not only an import nation but an export nation as well. An easy example of export is the United States Constitution, which has been a model for drafters of constitutions around the world and which served as a major influence on the 1948 Universal Declaration of Human Rights.

But more recently, America has come to be identified with a very different kind of legal export, one that is not to be celebrated but decried. Here the painful example is the US position that torture is, in some

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38. The lawyers here will also know that sometimes such local action is challenged as an impermissible exercise of power that has been vested by the Constitution exclusively in the national government.

times, against some people, and in some places, neither absolutely prohibited under current law nor redressible. The practice of torture is tied to images of the prison, Abu Ghraib, run by Americans in Iraq; to the detention facility on Guantanamo Bay, also run by Americans; and to a legal act called "extraordinary rendition," which is a euphemism for sending detainees to countries where they may be tortured.<sup>39</sup>

In 2004, we learned that our government's lawyers had written that inflicting intense physical and mental pressures was not really "torture."<sup>40</sup> In memos sent in August of 2002, the Office of Legal Counsel within the US Department of Justice advised the Attorney General that

Only the most egregious conduct, [such as] sustained systematic beatings, application of electric currents to sensitive parts of the body and tying up or hanging in positions that cause extreme pain [fell under the definition of] torture.

Our Justice Department's lawyers advised that, unless a person's organs were failing, the harms imposed on that person was not legally torture,

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39. As Ariel Dorfman has described, it is not only a crime committed against the body [but also] a crime committed against the imagination [because it requires dehumanizing people so much that] their pain is not our pain.

See Ariel Dorfman, *The Tyranny of Torture: Is Torture Inevitable in Our Century and Beyond*, in *TORTURE: A COLLECTION 8* (Sanford Levinson ed., 2004).

40. See Memorandum from Office of the Assistant Attorney General to Alberto R. Gonzales, Counsel to the President, Aug. 1, 2002 at pp. 1-2. A few different memos were written, and I have grouped them all under this heading.

and moreover that to torture required the specific intent

to inflict excruciating and agonizing physical  
and mental pain or suffering.<sup>41</sup>

Further, the Justice Department's memorandum argued that the President -- when acting as Commander-in-Chief during a war -- was not bound by various conventions to which we are a party nor was he constrained by the United States's own laws.<sup>42</sup>

I must add that I thought long and hard about whether -- in light of the joy of this occasion -- I should comment on this aspect of America in the world. As justification for mentioning this awful subject, I could cite precedents of many speeches here, in which speakers took up the topics of war, terrorism, poverty, and hunger. But that is not why I decided to bring this up. Rather, I agree with the Chinese Ambassador who spoke here in 1940 that we are all morally responsible for the consequences of our actions. I need to speak of torture in an effort to impress upon those of you younger than I am how profoundly bizarre it is for the issue to be present at all, today.

I graduated from Bryn Mawr in 1972 and from NYU Law School in 1975. During my entire career as a student and then as a lawyer, I

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41. Id. at 16, 46.

42. Even if an interrogation method arguably were to violate [18 U.S.C.] Section 2340A [prohibiting torture], the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign.

Id. at 31. After these memos were leaked to the Press in 2004, the Office of Legal Counsel revised its position.

knew virtually nothing about what is called the "law of torture." The sum total of my knowledge can be summed up in a couple of sentences. I knew that in Europe, during the Renaissance, torture was a technique used under judicial supervision to extract confessions, which were needed (unless two witnesses had seen the crime) in order to execute a criminal. I had thought that torture had been abandoned by all democracies, not only because of moral outrage but because torture produced such unreliable statements.<sup>43</sup> My impressions were bolstered by the worldwide embrace, after the end of World War II, of the concept of human dignity, embedded in the UN Declaration of Human Rights and in new constitutions around the world.

Further, up until just a few years ago, no lawyer, no law professor, and no member of the Department of Justice of whom I was aware proffered arguments trying to distinguish US practices of sensory deprivation and intimidation from those banned by the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which is one UN Convention that the United States *has* ratified (in 1988).

Indeed, over the second half of the twentieth century, it has been America that proudly led the way with a ban on coercive extraction of information; that is why movies and television all over the world show police giving "*Miranda* warnings" -- named after a Supreme Court decision in the 1960s holding that detainees have rights to counsel and to

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43. See John Langbein, *The Legal History of Torture*, in TORTURE: A COLLECTION (Stanford Levinson ed., 2004), cited above; JOHN LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME (1977).

be silent in order to protect them from police abuses.

Even before that decision, a federal appellate court in the mid-1950s derided the New York City police for holding a man “incommunicado” for 27 hours, for “refusing to allow his lawyer, his family, and his friends to consult him,” and for questioning him continuously in a cell that made “sleep virtually impossible.”<sup>44</sup> Because that isolation and psychological pressure was so abusive, the court threw out the confession, explaining that

[a]ll decent Americans soundly condemn [such] satanic practices, [which were methods used only by] totalitarian regimes [and which did not] comport with the barest minimums of civilized principles of justice.<sup>45</sup>

Yet, as you may know from today's press, detainees in Guantanamo have been held, in custody, incommunicado, and without access to lawyers and family, for a lot more than 27 hours. Hundreds of individuals have been at that naval base for years, kept by *our* government, which has argued in *our* courts that, because these individuals are not on United States soil and are alleged not to be United States citizens, the Constitution does not regulate how Americans -- how we -- treat them.

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44. United States ex rel Caminito v. Murphy, 222 F.2d 698, 701 (2d Cir. 1955).

45. Id.

In one such argument, held in December of 2003, a lawyer for the Department of Justice took the position before a panel of three judges that our government was free to imprison anyone it deemed an "enemy combatant" and that no court had the power to oversee the detention. At that argument, a judge on the Court of Appeals of the Ninth Circuit posed what sounded at the time like a smart rhetorical question. He asked:

What if a detainee alleged torture? or summary executions? Is the government's position that no court could hear that claim?

The question seemed like a "gotcha" -- backing the government lawyer into the obvious admission that, of course, the US Constitution gives such a person a right of access to court. But the Justice Department lawyer said otherwise, answering that no court could hear claims -- even of torture or of summary executions. As the published appellate decision in that case records, that response shocked those judges (who are older than I am) and who wrote that it was the first time in their lives that they had heard the United States government asserting this "extreme," "grave and startling proposition."<sup>46</sup>

About a year later, in 2004, we all learned that the rhetorical was real, that people at Guantanamo were and are claiming that they have been subjected to torture. Further, we all got to read those 2002 Justice

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46. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), cert. granted and judgment vacated in light of *Padilla v. Rumsfeld*, and of *Rasul v. Bush*; see 542 U.S. 952 (2004).

Department memos -- now called "the Torture memos"-- which had argued that one could inflict pain without violating various laws. We came to understand that these memos have been written to give defenses to persons ordering or imposing such awful practices on persons within America's control. And in December of 2005, while purporting to condemn torture, our Congress passed legislation trying to limit access of aliens at Guantanamo to the US courts and to provide defenses to those who are accused of torturing or imposing grave harms on individual detainees.

The litany of horrors has not abated. Just a few months ago, a federal judge in New York refused to hear most of the claims of a Canadian citizen (Maher Arar), whom our government's officials had detained for thirteen days, incommunicado, at JFK airport in September of 2002, and then shipped off to Syria, where he was subjected to torture and kept for almost a year in a grave-like cell. And just this past week, before a UN committee in Geneva, the State Department's senior lawyer made the statement that, while the US would apply standards against torture,

[a]s a purely legal matter, we think it is crystal clear in reading the terms of the (torture) Convention . . . that it does not apply to transfers that take place outside the United States.<sup>47</sup>

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47. US Defends Treatment of Terror Suspects to UN Body, NY TIMES, May 5, 2006 (quoting John Bellinger).

In other words, it is the official position of the government that it will voluntarily comply with prohibitions on torture (again with the caveat of an argument about what constitutes torture) but does so in some instances on a voluntary basis -- that there are law-free zones in which the government is not required to comply.

I am not going to march you through the legal arguments about which parts of the "law of war" codified in what parts of the 1949 Geneva Conventions (which the US ratified in 1955) are violated by US treatment of detainees at Guantanamo and elsewhere. Nor will I here rehearse arguments about whether the UN Torture Convention, American constitutional law, America's criminal law, military law, and the US Army Field Manual of 1992 are -- or are not -- violated.<sup>48</sup>

I am learning how to do so, in part from a listserv, called Torture, on which law professors, lawyers, and journalists exchange information as we try to keep track of claims about ghost detainees, secret prisons, waterboarding, four year detentions, and the various legal justifications proffered. Through this listserv, the word, Torture, is on my email roster from five to twenty-five times every day of the week.

But I am not here in that lawyerly hat. Rather, I am here to report, *as a witness* rather than as a lawyer, that I can't believe I am in any of these conversations. I am not, of course, naive. I do not think

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48. Others have done so eloquently. See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

that either the world or my own country has been torture-free since the Renaissance. But I was hopeful enough, patriotic enough, to believe that my government would never justify harming a person just short of when his or her organs were failing. I believed that my American government would never claim that law itself (national and international) did not apply when it was acting "off shore," or to the President, whenever he is acting. It simply had never occurred to me that my government would claim that any zone was one in which the United States could act completely unbounded based on a theory that the Constitution gives the President a blank check -- not to be checked.

My anxiety is not only about the underlying activities (gruesome that they are) but also about the corruption of American law. I am horrified that my current students might think that the discussions about the legality of torture are normal -- as if, on a Monday, one studied about the First Amendment and, on a Tuesday, one turned to the legal arguments about what forms of the infliction of pain were egregious enough to constitute torture. Debating the legality of waterboarding -- which is strapping people to boards and putting them under water to create the sensation that they are drowning -- is obscene.<sup>49</sup> Justifying such harms ought to be seen as like trying to argue that America could keep slaves, as long as they were held off shore, or by someone else, or not hurt too much.

Such arguments should be understood as antithetical to, rather

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49. See Matthew Schofield, *U.S. Says It Will Ban Controversial Interrogation Practice*, (Knight Rider papers, May 8, 2006). One issue is whether the prohibition on torture is applicable, and another is whether personnel from the CIA as well as the Department of Defense are subject to the relevant constraint.

than plausible within, the fabric of American law. Oddly then, I think we are in need of something called a *Constitution Restoration Act*. But the one that I want is not to ban the citation of foreign law but to reconfirm what we think American constitutional law already provides.

William Butler Yeats captured this horror in his poem, *The Second Coming*. Yeats wrote:

The blood-dimmed tide is loosed, and  
everywhere  
The ceremony of innocence is drowned;  
The best lack all conviction, while the worst  
Are full of passionate intensity.<sup>50</sup>

May Yeats, however, be wrong in claiming that poets have

no gift to set statesmen right.<sup>51</sup>

Let me now sum up the leitmotifs of my discussion about the relationship between American law and international law. I hope I have conveyed that the idea of a sharp distinction between the "foreign" and the "domestic" is misguided. Just as products with the label "made in

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50. THE COLLECTED POEMS OF W.B. YEATS, 1868, 15th printing at 184-185.

51. Id. at 153, from *On Being Asked for a War Poem*. And would I have instead been able to invoke lines I much prefer, from the closing stanzas of his poem, *Among School Children*, which reads:

O chestnut-tree, great-rooted blossomer,  
Are you the leaf, the blossom, or the bole?  
O body swayed to music, O brightening glance,  
How can we know the dancer from the dance?

Id. at 241.

America" have parts from elsewhere, so too is law that is "made in America" constituted from elements both foreign and domestic.

Import and export are the activities that lace our legal history. Sometimes, with our permeable borders and migrating principles, come radical innovations bringing new and moving understandings of human dignity and equality. That is the very cheerful part of these comments. At other times come efforts to condone the worst of human degradation, about which I must also report today.

What I hope is also clear is that neither those inside the United States nor those outside have any "lock" on being progressive equality-seekers, respectful of human dignity and helping more people to flourish. Indeed, despite the many international proclamations on the equality of people, hundreds of millions are starving, subject to pandemics, and lacking education and health care. Moreover, women represent unduly large percentages in all those categories, in contrast to their underrepresentation in terms of serving in most governments' legislatures. No set-asides are needed, as women are at the front of those lines.

One can, therefore, have no romance about either the global or the local. And, because we cannot assume that any one level of power -- international, transnational, national, or local -- can be an enduring source of equality and dignity, we must be engaged and work actively at all of these levels. It is not the source of law that guarantees a law's quality but the people who make those laws who will give us either hope or despair.

## **Gifts and Opportunities**

The time is coming for my remarks to end. As I reviewed the hundreds of graduation speeches from the past, it was plain that a standard move at this point is to offer a good deal of advice. I won't. That's what your parents and teachers are for. Instead, I will end with a very short reflection on just four of the many gifts that Bryn Mawr gave to me.

One gift comes from the combination of Bryn Mawr and Haverford. I am delighted that President Tritton is here today for me to give these thanks personally to him, as Haverford's leader. I owe a debt to both Bryn Mawr and Haverford. By studying here, with the two colleges so intertwined, I had the first-hand opportunity to understand intellectual diversity – that within any one discipline come competing accounts of what is intellectually interesting, important, and innovative.

For example, when I was here, the Bryn Mawr psychology department was experimental in its orientation. In contrast, the psychology department at Haverford was focused on social psychology. Taking courses at both, I fed pellets to pigeons on this campus, and I did T-groups at Haverford. Thus, at age eighteen, I learned first-hand about *intra-disciplinary* disagreement over central issues. I learned to be a skeptic about canonicity. These questions emerged not only from debates about which books written by authors of what genders, races, and ages, ought to be read but also by learning from professors who were plainly brilliant, committed scholars within the same discipline but who had very different takes on what was central to that discipline.

Second, Bryn Mawr taught me about the vital link between work and companionship. The news media is awash with stories that posit women struggling about life versus work, home versus the office. My working life does not track that divide, as work -- begun here at Bryn Mawr -- has always generated friendship and family and, through friendship and family, new shared projects emerge.<sup>52</sup> Moreover, my working friendship networks, founded at or through Bryn Mawr, stretch across generations. I gained mentors and friends here,<sup>53</sup> and I continue to gain new friends through Bryn Mawr, which serves as a bridge to others, sometimes colleagues and sometimes my students, who also went here and to Haverford.<sup>54</sup>

Third, Bryn Mawr gave me William Butler Yeats. I had not read him before coming here. And I continue to pull off from my shelves the copy of his *Collected Works* that I bought when I was a freshman here. BMC is also where I first read Moliere and many others. I am grateful for those divisional requirements, which continue to serve me well.

Fourth, and finally for now, Bryn Mawr taught me about the possibilities that do open up, when women are taken seriously.<sup>55</sup> So I

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52. Reflective of those deep connections is that I am joined today by a classmate of mine, Professor Sandy Baum, whom I met the first day of college and with whom I work on projects related to higher education and women.

53. Included here today are Pat McPherson, who was the dean of the College, and Jane Widseth, then teaching in Haverford's psychology departments.

54. Mary Clark and Hannah Hubler are two of those able to join me today.

55. This theme -- serious women and taking women seriously -- is a constant one in President Mary Patterson McPherson's speeches at Commencement Ceremonies. See BMC Archive, May 19, 1996, at 13 (quoting President Marion Edwards Park, on the importance of living "serious lives").

shall close by returning to the words of Virginia Woolf who (not surprisingly) can capture this thought better than I. Borrowing again from her 1929 book *A Room of One's Own*, listen to what she wrote then:

[I]n a hundred years, I thought, reaching my own doorstep, women will have ceased to be the protected sex. . . .

Anything may happen when womanhood has ceased to be a protected occupation, I thought, opening the door.<sup>56</sup>

Happy graduation.

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56. Woolf, *A ROOM OF ONE'S OWN*, cited above, at 41.