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December 10, 1992

Professor Rosalyn Higgins
London School of Economics
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Dear Professor Higgins,

I hope you are doing well. I am working in the energy section of Jackson & Walker, a law firm here in Houston, and have just been engaged, so things are going well for me. I have been wanting to write you for some time, to tell you how much I enjoyed your class, The International Law of Natural Resources. I wanted to wait until after I had received my grades, however, because I did not want to create any impression that I was seeking favoritism etc. But now that the grades are out (and I received a 70 in your class, which I was very pleased with) I feel free to tell you that your class was one of the most stimulating and interesting I've had, and that you were an absolutely superb teacher.

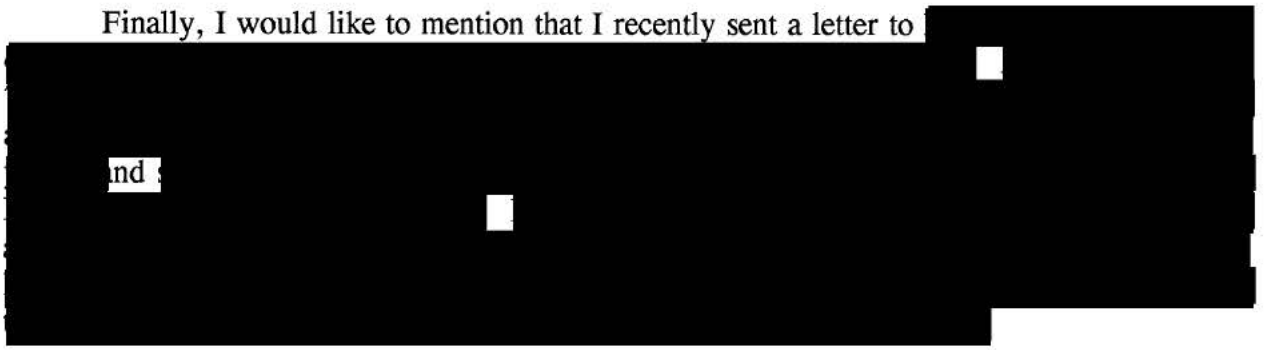
I went to a conference the other day, and the speakers' (Ernest E. Smith and John S. Dzienkowski) handout included material from their upcoming textbook on International Petroleum Negotiations. The first five Tabs in the binder that was handed out looked like very interesting material which would be relevant to your Natural Resources course. Thus, I have photocopied these tabs, as well as a very good law review article by them that I thought you might find interesting, and include them with this letter.

In Shaw's book on *International Law,* as you probably know, he states that: "Professor Higgins has pointed to 'the almost total absence of any analysis of conceptual aspects of property'" (p. 518). Since I am very interested in political and economic theory, this statement piqued my interest. As far as I know, there has been plenty of such analysis. I am personally interested in various property theories and ideas of Ludwig von Mises, Friedrich von Hayek, Murray N. Rothbard, Hans-Hermann Hoppe, John Locke of course, and Bruno Leoni. Perhaps your statement is meant to be qualified with respect to the definition and conceptualization of property in international law. I have asked Danesh Sarooshi, a good friend of mine whom I know works with you, to send me a few pages of your article which Shaw cites. If, as you seem to be saying, there is little conceptual analysis of property in international law, I may be

interested in writing a law review article on that subject. In fact, as I am a great believer in the homesteading principle, I have often wished someone had formulated a sound principle of underground oil ownership. I don't believe governments have any right at all to own oil, nor to prevent individuals from owning minerals in fee simple, as they are (partially) in the U.S. For the government to claim that it owns the oil somehow *first,* and thus can use it as it see fits, is absurd as the governments' claiming that they somehow "own" the surface of the moon, or Antarctica, or the deep sea bed, just because of a verbal decree. After all, other than small pieces of the moon, they have done nothing to homestead it at all. I could claim the moon myself as well as the U.N.; but the minuscule volume of my cry would be ignored, which points to the fact that the governments don't own by *right,* but merely by might. And, after all, isn't "ownership" a *rights*-related normative question? Thus I think that no government has ever justified its claim to "own" natural resources that it did not homestead, regardless of the fact that they have the might to act as if they had.

Since most countries do not recognize any individual-ownership theory of natural resources, perhaps this is one reason that very little analytical work has been done by theorists in searching for the proper way that individuals can homestead oil. If no country is looking for a proper (i.e. theoretically justified) way to recognize individual acquisition of various types of property, particularly natural resources, then it is no wonder that little work has been done to develop such principles. It would be like, I suppose, designing rules for a game that no one plays. Nonetheless, I still think it would be very useful to try to formulate such principles.

Finally, I would like to mention that I recently sent a letter to [redacted]



I hope you have a merry Christmas and a happy New Year. And, again, thanks for a great class last year.

Very truly yours,

N. Stephan Kinsella

Enclosures

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February 23, 1993

Professor Rosalyn Higgins Q.C.
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Dear Professor Higgins:

I thought you might be interested in an article which I recently co-authored with Paul Comeaux, who also had your natural resources course last year, and therefore I've enclosed a copy. The article is entitled *Reducing the Political Risk of Investing in Russia and Other C.I.S. Republics: International Arbitration and Stabilization Clauses,* and it will be published in the RUSSIAN OIL & GAS GUIDE (Vol. 2, No. 2, 1993). The GUIDE is published here in Houston by the same group that publishes THE OIL AND GAS JOURNAL. As you can tell from the article, the information gained from your class was invaluable. In fact, Paul and I are planning two more articles in the same journal with respect to reducing the risks of investing in Russia, one on bilateral investment treaties, and one on MIGA and OPIC. We are also planning a more theoretical article together, concerning the concepts of illegality and inalienability and their interrelation with the international law on expropriation and permanent sovereignty over natural resources. If this article turns out well, we plan to submit it to some top international law journals, such as the ICLQ and the AJIL.

(Incidentally, J. Lanier Yeates, a partner I work under, chairs the Editorial Advisory Committee of the GUIDE this year. If you happen to know anyone who would be interested in contributing an article concerning international energy business in Russia or any members of the other former Soviet Union republics, I would be pleased to submit it to Lanny for publication in the GUIDE.)

Paul and I also had a good experience lately which you may be interested in hearing about. We were asked to be judges in the Jessup International Law Moot Court Competition regional rounds, which was held at South Texas College of Law here in downtown Houston. We both participated as judges in the initial rounds, and were asked back as judges in the semi-finals and finals. We were both very up on the international law issues being argued, concerning an expropriation, since that is what we studied in your class, and we each were clearly the dominant judge on our respective tribunals. The participants were told that the

tough, substantive questions they got from Paul and I were of the sort they could expect at the international finals in Washington, D.C.—which we here you may be judging.

Finally, I thought you might be pleased to know, if you already don't, that the [redacted]

Best wishes, and I hope you have a Happy New Year.

Very truly yours,

N. Stephan Kinsella

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July 1, 1994

Professor Rosalyn Higgins, Q.C.
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Dear Professor Higgins:

I've come across a few things that I thought you might find of interest, and I also wanted to tell you how much I enjoyed your latest book. I of course haven't written much at all compared to you, but still I realize that writing in nonfiction fields like law one relatively rarely gets feedback on one's work. I often wonder if more than ten or so people read various law review articles I put out in law reviews. But nevertheless I find it immensely rewarding. So I thought you'd appreciate some comments on your book, since I read it word for word, footnote for footnote, very carefully. I really enjoyed it, since it's got such good critical comments on the various gray, hard, and interesting areas of international law. I found it very well written, especially chapters 10 and 11. And the cover art is just beautiful and appropriately chosen.

I honestly don't know if I agree completely with you that law "is" a process. I understand what you're getting at, and I of course agree that all the relevant facts, motivations and interests of the parties, etc., should be taken into account, but I am not sure that you need to recharacterize law as a set of accepted rules into "process" in order to emphasize this. It seems to me that law comes from a process, and the nature of the process might very well be relevant in determining what the law *is*; but I am not quite clear on how it can actually be a process itself.

Nevertheless, I found your definition of law arising from this characterization to be provocative and insightful—law is the interlocking of authority with power. I think this quite right, if some qualifications are made, that is, if the term "authority" is considered to be substantive legitimacy. I do believe in natural law and natural rights, although those expressions connote meanings I do not intend. I notice you try to avoid its use in your book as well, perhaps, at least in part, to avoid these confusing connotations (religion, faith, etc.). But I believe that saying there is natural law and natural rights is nothing more than to say that individuals do have certain rights; if this is so, then obviously this must be because of our

nature. Humans have (human) individual rights because they are humans; worms do not, because they do not have a human nature. So "natural" is redundant or inherent. But by this anti-positivist view that there are certain objective individual rights in existence, they follow from the Law. So I think your "interlocking of authority and power" is quite good for this purpose. A right may exist, but we also need a system where they are enforced. Thus the Law serves this purpose. A right to not be murdered, for example, in a state of chaos or dictatorship, is not enacted into law. And a lat that commands this is not Law, because it has power but not authority. A law consistent with individual rights that do exist is Law—i.e., it has power (the right is actually enforced) and authority (it is an actual right that is enforced, so the law is legitimate).

Of course this is a rather libertarian view which in all likelihood you do not share to as much a degree.

I jotted several comments in the margin throughout your book, some of which I will mention here. On. p. 13, you mention that the question of why a normative system is regarded as binding is a different issue as to why states should comply with the norms of international law. I am not sure these are different. A (moral) norm by definition is something that one *should* do. When I tell a child it is immoral to lie, and moral to be truthful, that is synonymous with saying he should be truthful, it seems to me. I admit the content of "should" is very slippery and elusive, but I don't think it's reducible much further. It makes no sense to say, "Yes, I admit that you have demonstrated that it is moral for me to do X, but why *should* I?" This would be as nonsensical as to say "I agree you've shown I should do X, but why should I?" So when you say why a given system should be regarded as binding, it seems to me the answer is, to the extent it is demonstrated or known to be true, that is why. Because when people acknowledge a norm to be true, they are necessarily admitting that the "should" follow it; that is what a norm *is*, a way to apply shoulds to people. So your first question of whether a normative system should be regarded as binding, is really a question of whether the norms are true; whether they are demonstrable; whether they are right. But then this is the same object of your second question, why states should comply with norms of international law. Or, maybe not. Maybe you are saying that the first question is the general issue of why a proposed norm should be obeyed (which may be answered as I've attempted above); and the second question is, *is* international law one of those types, or is it instead a false normative system. Anyway, this dichotomy you draw is provocative.

I notice on p. 14 you discuss the Third World theory that consent is the basis for obligation, thereby making custom suspect. However, I notice an unusual aspect to such an argument. Saying that consent can give rise to obligations, is a theory about international law that cannot itself be based on consent (that would be circular). So if a socialist says that consent is binding (while custom is not), he must assume there is some basis pronouncing on the validity of consensual obligations. But this can only be based in custom, or in reason, or

some other sort of nonconsensual reflection on international and human nature. So anyone objecting to nonconsensual norms contradicts himself because nonconsensual norms are assumed before saying consensual norms are binding. In short, whatever makes pacta sunt servanda a true norm, could also make others, like custom, true norms.

Also, regarding positivism, you make it clear in several places (e.g. p. 97) that you are not a positivist. But, despite this, several things you say seem to imply positivism. E.g., you say on p. 96 that a right to not be tortured is a surely a legal right. But it seems to me that this is so only when it's so. In a country where torture is legal under the law, certainly it is not a legal right. It might be a natural right, an individual right (or human right, if you will, although I dislike the term because of its collectivist, socialist connotations, and therefore I prefer individual rights). But this to me means that it *should* be afforded protection under the legal system. It should be law. But it is not always. But anyway, you say that a right is really a demand of high intensity made by individuals against their governments (105). Now this seems clearly positivist to me. This process may be what causes legal rights to form, and maybe this is all you mean. But if you mean human or individual rights, I think this view is positivistic, and wrong. On p. 21 you also say that "To assert an immutable core or [sic, of] norms which remain constant regardless of the attitudes of states is at once to insist upon one's own personal values (rather than internationally shared values) and to rely essentially on natural law in doing so. This is a perfectly possible position, but it is not ont I take." Yet I do not see how this squares with your impassioned statements about permanent, universal human rights on p. 97. One view seems to me relativistic, skeptical, and positivistic; the other not.

I also do not agree that rights can be collective, at all. (p. 102). Furthermore, you say that certain fundamental human rights exist even if not implemented by the domestic legal system, which is clearly a non-positivistic view. But then you say that the source of the right is not the domestic legal system (true), but is instead international human-rights law. It seems to me that this skips a level or two of "source." If anything, international human-rights law is some sort of codification of what rights people have, in *natural* law, because they are people. If nations have a "right" to exist, it is by virtue of the rights that individuals have and their nature, because individuals are all that exist. I'm not sure if it means anything to ask about the "source" of a right, though, because that implies a view of positivism in itself. Even if one believes in complete natural law, and believes that God is the source of Good, Right, morals, Law, Rights, etc., isn't this a type of super-positivism? It seems to me that, because we can conceive of God as good means we are judging him by standards external to Him, and that thus if He is good, we are indeed fortunate, but He could never change that. Morals have no "source," in my opinion, any more than the fact that $2 + 2 = 4$ has a "source," or the truth of the fact that there is existence, or consciousness, has a "source." The continued physical existence of a rock in my hand, it stays permanent and tactile, this continued staying in existence has no "source". It is the way things are, rather.

Regardless of this meandering view on the "source" of rights, my point is that the primary is the individual. Individual have individual rights; human rights, some say. These rights exist even where not respected, either by lone criminals or organized ones in the form of government. If artificial groupings of individuals called "states" have some sort of status and right in international law, this must be reducible to and dependent upon the constituent elements thereof, viz. individuals and their rights. My point is that I think it erroneous to call the source of human rights international human rights law. All rights are "international" in the sense that they are true because of human nature and thus artificial political boundaries are irrelevant. But international law seems to me a subset of natural law, not vice-versa.

I note your discussion of estoppel on p. 36. I think there is deep meaning behind this concept, and have written on it, and plan to write more. I've enclosed a paper of mine on estoppel, "Estoppel: A New Justification for Individual Rights," 17 *Reason Papers* 61 (1992). Also, I note your comment on p. 12, about the necessity of universality of international laws to be accepted. This is reminiscent of Kant's universalization principle, which is tied up in my estoppel thesis and also in the related theories of Hans-Hermann Hoppe, a brilliant German economist at the University of Nevada Las Vegas. I've thus also enclosed a recent review essay of mine reviewing Hoppe's latest book. The essay is "The Undeniable Morality of Capitalism," 25 *St. Mary's L. J.* 1419 (1994) (reviewing Hans-Hermann Hoppe, *The Economics and Ethics of Private Property* (1993)). Hoppe is, as I am, a strict Lockean.

Strangely enough, I believe the legal concept of estoppel—binding someone who detrimentally relied on another's representations—is not coherent. Reliance must be reasonable; but it is never so *unless* it is first presumed that the representation relied upon might be enforced in court. Otherwise it is just an imprudent action based on a prediction (about someone else's representations) that did not come true. I notice many example of circular reasoning in the law, and it always makes me think about writing about it, but I don't know if I'll ever get round to it. E.g., on p. 35, you say "Unilateral acts will be binding on the state making them only if they evidence an intention to be bound." And on p. 39 you recite the requirement of "capacity to enter into relations with other states" as being a quality of statehood in international law. Both these seem circular to me.

I quite liked your comment on p. 49, "We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint." Your analysis in that chapter, e.g. p. 54, is conclusive.

On secession, I disagree that there is no legal right of secession where there is representative government. Of course, though, my view is not mainstream, as I am a classical liberal, or libertarian. I realize your view might be proper as far as international law reasoning goes, but, still, there is a higher law. If it can be shown that there is indeed an inalienable individual right of people, to secede and become sovereign (indeed, how can states logically be

sovereign if the people are not, whom it depends upon for its very existence??), then I would have to say that international law must be subordinate to that. And indeed I do believe this can be, and has been, shown. A good recent article you might be aware of is Robert W. McGee, "The Theory of Secession and Emerging Democracies: A Constitutional Solution," 28 Stanford J. Int'l L. 451 (1992). This is a very well-reasoned, systematic, libertarian viewpoint on the matter. You acknowledge on p. 124 that "peoples" are groups of race, ethnicity, etc., but I believe that voluntarily chosen groups matter as much to people—e.g. political groups, e.g. a group of secessionists.

As for ownership of the deep sea bed, I am opposed to government in general, and think it illegitimate, and only a private property system legitimate. I do favor Lockean homesteading theory—without his "proviso," too. I do not think *anyone* owns an unused, unappropriated part of the commons—whether it be Antarctica, the moon, the sea bed, or even parts of outer space. I think it hubris in the extreme for governments to deign to verbally decree their ownership (whether collective or not) of things no one has yet appropriated. I believe in all truth, that an individual who lands on the moon privately is in right the owner of the piece he homesteads. Same with the ocean floor. Whether or not nations, or the U.N., respect this, it is still a right.

One level up, if the U.S. or any other nation wants to expropriate the sea bed, or allow its subjects to do so, I do not see how this violates the rights of any other nation, basically, because Locke was right.

You mentioned on p. 138 the issue of ownership of oil in situ under the OCS. I am not familiar with the international law in this area, but I wonder if this is completely accurate. In the U.S., as you know, private landowners own the mineral rights under their surface. In some states, such as Texas, the right is actually to the oil & gas in place—but subject to the rule of capture so a neighbor isn't subject to conversion. In others such as Louisiana the owner owns the right to search and then to keep what is produced, so there is no need for the rule of capture. I gather the latter sort of system is what you envision in most of the rest of the world, with respect to state-ownership of minerals and licensing out of this right to producers. In the U.S. federal OCS, I know this is how the license works—title passes at the wellhead to the producer/licensee. But I wonder about the U.S. in particular—it is still possible that it claims to own, or owns, the oil in situ but then just licenses it out so that title passes from the state to the licensee at the wellhead—as in onshore licenses by states. Subject to the rule of capture, I could see the U.S. validly asserting its ownership of the minerals under its OCS. However, I admit I am unfamiliar with the relevant national and international law in this area so this could be settled and my ruminations uninformed.

Interestingly, your problem on p. 139 (how can an investor be sure that he'll be allowed to reap the benefits of his investment?), obviously, the answer is, he cannot. Of course this is because in the end nations do have sovereignty over their territory, and no other nation ever

would or has the right to invade them to stop a nationalization. I suppose this sovereignty entails a certain inalienability of the nation's decision-making discretion—i.e. it can't alienate its right to nationalize, even if it wants to. This is to its detriment, but that is the way it is.

I thought this whole section on compensation and nationalization very interesting, and of course much was familiar after having taken your course. Paul Comeaux and I are working on an article regarding these issues right now, but basically I agree with your conclusion at the end of the chapter that no extra compensation should be given for discriminatory or non-public purpose takings. However, combine this with the fact and right of sovereignty and the ensuing inalienability and legislative sovereignty, and combine this with your observation that a right without a remedy is hollow, even nonexistent (p. 16 n. 42, p. 53, p. 99), and I believe it is arguable (and I intend to so argue in an article with Paul) that nondiscrimination and public purpose are *not* requirements at all. Other independent reasons support this, and I'm excited about writing about it. E.g., the hate-crime legislation over here is unjustifiable—rape and murder are wrong, no matter what the underlying motivation. I do not comprehend the mindset of making penalties stiffer for crimes committed for racial reasons than for pure callousness or whatever motivates such criminal minds. I see similar logic to an expropriation.

A few other minor observations— . . . p. 178, I do not agree that weighted voting is wrong at all in the U.N., and do not believe it is an affront to the sovereignty of states assumed by the U.N. Personally I think the U.N. should never have been formed, and, even today, I believe the U.S. should withdraw—so it wouldn't bother me even if weighted voting were an affront to the U.N.'s purpose or philosophy. But in America, the original United States (10th Amendment) were *supposed* to be sovereigns; yet as you well know the House of Representatives has weighted voting; although of course the Senate does not. That is not seen as an affront to the sovereign equality of the United States, and I do not believe it ineluctably means that for the U.N.

Of course you have probably encountered almost all these views before, but I thought you might be interested nevertheless. Please do not think I mean to be critical, I thought your book wonderful. I have not recounted the dozens of heavily underlined and starred passages in your book, which is just brilliant.

* * *

I've enclosed some items I thought you might find of interest in light of your evident interest of the sources of international law, in particular custom etc. In Louisiana, as you know, we are the only civil law state in the U.S., even more civilian than Scotland, for we have a variant of Spanish civil law and the French Code Napoleon, of course direct descendants of Roman Law. I've come across some interesting discussion of the role of custom and natural law in Louisiana law, that I thought you might enjoy. I've enclosed Robert A. Pascal, "The

Sources of Civil Order According to the Louisiana Civil Code," 54 *Tulane L. Rev.* 916 (1980). In this article Pascal concludes that the Louisiana Civil Code is not legislatively positivistic. He says that the codal law is based (according to the codal scheme of things) on natural law and reason, in general, as "grand positive sources of order." These are what are supposed to guide even the legislator. In this hierarchy, a judge should first look to law = legislation and custom (which may be inspired by precedent), the collective judgment of society. Next, convention is examined, and then unilateral cooperative action, as the judgements of particular persons as evidence of the grand positive sources of law and order. Then natural law and reason may be consulted; and usages not amounting to custom. Behind this there is a "plasma" (I believe this may be Professor Shael Herman's term) which can be used suppletively.

Anyway, this is quite fascinating. I believe I sent you Shael Herman's *The Louisiana Civil Code: A European Legacy for the United States* (1993), but I am not sure whether I did or not. I've included Professor Pascal's recent book review on this book in case I did. On pp. 830-31 of that review, published at 54 *La. L. Rev.* 827 (1994), Pascal discusses the sources of civil law again. I've also enclosed more recent civil code articles passed in 1987, that do not much change Pascal's analysis discussed above. As you'll notice, two sources of (positive, man-made) law are legislation and custom. (La. Civ. Code arts. 1-3) If there is no legislation or custom, judges proceed according to equity (art. 4), and to do so he is to resort to justice, reason, and prevailing usages. Prior to 1987 art. 21 referred to natural law rather than justice; but the comments to new art. 4 say the law has not changed, so justice still means natural law.

As Pascal has stated to me, if natural law and reason are to be considered sources of norms of right order in the absence of legislation and custom, it must be because they are also the norms for legislation and custom. How could judges be bound by natural law and reason, when they must find the right rule of order, if legislators are not also so bound? So Pascal argues that legislation passed in Louisiana must conform to natural law to be valid substantively, even if it is valid procedurally because all constitutional procedures are followed in its enactment.

Along the same lines, I have an article coming out in the next issue of the *Louisiana Law Review* that you may be interested in, "A Civil Law to Common Law Dictionary," 54 *La. L. Rev.* 1265 (1994). I've enclosed a draft author's copy that is almost identical to what will be published in a few weeks.

Sincerely yours,

N. Stephan Kinsella

Encl.

SCHNADER, HARRISON, SEGAL & LEWIS

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December 2, 1994

Professor Rosalyn Higgins, Q.C.
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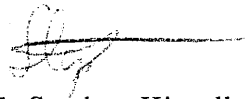
Dear Professor Higgins:

I trust all is well with you. I am finding computer patent law practice fascinating, and am enjoying many aspects of the North, although some of the differences take some getting used to; the North and the South are like different countries (although Abraham Lincoln might disagree). Previously I sent you a draft author's copy of my article that was forthcoming in the *Louisiana Law Review*, "A Civil Law to Common Law Dictionary," 54 *La. L. Rev.* 1265 (1994). The article just came out so I've enclosed a copy of the published version.

Hoping you have a Merry Christmas, I remain,

Sincerely yours,



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March 5, 1996

Judge Rosalyn Higgins
International Court of Justice
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NETHERLANDS

Dear Judge Higgins:

My book review of your book, *Problems and Process*, has just been published in the libertarian journal *Reason Papers*. I have enclosed a copy, as I thought you might like to see it. Paul Comeaux's and my book, *Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk*, should be published by Oceana Publishing in a few months. I plan to send you a copy when it comes out.

With best wishes, I remain,

Very truly yours,

N. Stephan Kinsella

Enclosure

Dear Judge Higgins, **[NOT SENT]**June 4, 1996

I hope you are doing well and that you are finding your new position fulfilling. I received your letter in response to mine, by which I forwarded to you my review of your book, and I noted your comment on my referring to your views as "sometimes positivist." As positivism has been on my mind for the past several months, I thought I would take the time to express to you a few thoughts in this regard.

It appears to me that legal positivism is used in at least two distinct, even if related, senses. In one sense, it identifies a view that all law (and the rights that are declared thereby) must and ought to be positively declared by a law-maker, the state, at least in part because law can be nothing but what the sovereign posits, since natural law is groundless and "unscientific." In another, narrower, view, legal positivism is simply the view that it is *possible* to identify an existent law without inquiring into its moral validity. The latter view seems obvious and even compatible with natural law, since in my view we can certainly identify various laws and the legal rights recognized thereby. Knowing what natural rights we have allows us to know what legal rights *ought* to be enshrined by positive law, however, and from our knowledge of natural law we can thus criticize various positive laws as being valid or not, obligatory or not, and the like.

The problem with the former type of legal positivism (which I take to be the primary definition of the term) is the view that rights (through laws) can be *created* at will, e.g. by an enforcing agency, and that there are no such thing as natural rights that one could judge positive or enforced rights as being contrary to. I think this is incorrect. Rights cannot be created at all. Legal rights are certainly created recognized by legislation, but these legal rights at best mirror the natural rights we have. To the extent a law protects legal rights that are actually natural rights, like a law against murder that implies a legal right to not be murdered, which is consistent with the actual natural right to not be murdered, the law is valid. To the extent the law sets up illusory rights, such as a right to welfare or education, the law is invalid, or at least not in accordance with natural law. Anyway, this to me is the essence of legal positivism, a relativistic view that the only rights that can be said to exist are those that are posited, or created, by society or some agent thereof.

Since you, in your book, objected to natural law and commented that rights are what is demanded with a sufficient intensity by the people (and thus respected by the government), it seems to me at least somewhat identifiable as a positivistic view (which is why I said you "seem" to have a "sometimes" positivistic view of rights). If you meant instead to describe the process by which *legal* rights typically come to be enforced by a law, I would not disagree with you and would not call such a description positivistic; it is merely factual or historical. However, in view of your explicit disavowal of natural law I took your comment about how rights are formed to be a comment not about legal rights but about the basis of rights as such. If you believe that the only way for us to know what rights there "truly" are is to see what is demanded by certain pressure groups, this seems to me to be a relativistic belief that denies that we can have objective, culturally-independent standards by which to criticize existent laws. It seems to be a belief that admits that rights can be *created*—whether by the government itself or by a majority or consensus

in society—which seems to go the the heart of legal positivism.

As you are aware, there is logical positivism, typically referred to solely as "positivism," at least in philosophical circles, which is akin to scientism and empiricism. Then there is legal positivism, also sometimes referred to, confusingly, solely as positivism, in legal discussions. I must admit I have not yet discovered the exact relation between the two, if there is any. Some authors think they are linked; some seem to think they are completly unrelated.

I believe that today they are sometimes conflated, which is unfortunate if the concepts do not have much relation; and confusing even if they are. In my view, logical positivism (which I will refer to herinafter solely as "positivism"; I will refer to legal positivism expressly), is a clearly false doctrine. Essentially, it holds that all true or "scientific" knowledge must be empirically based, and verifiable, or perhaps at least falsifiable, by repeated experiment or experience. (Hence its connection to empiricism and scientism. It is also, I believe, referred to as, or linked with, naive rationalism or constructivism by Popper and Hayek.) I believe the neo-Kantian epistemology expounded by the Austrian economist Ludwig von Mises, and his followers Murray Rothbard and Hans-Hermann Hoppe, demolishes the positivist view. Mises makes the case for epistemological dualism .....

Now as for legal positivism, there seem to be variations of it. I do accept the basic view that to identify law one need not validate it. I.e., there can clearly be an existent "law" that is immoral. There can also be laws that one is not bound to obey (whether this means any law that is not substantively moral or only a subset of substantively immoral laws is another question). However I think Lon Fuller et al. to be incorrect if they believe that any purported "law" is not really a true law if it is immoral. If they mean that any immoral "law" is not *binding* on citizens, they may be right, but this is different from saying that you cannot identify laws without being concerned for their morality.

Now typically the natural lawyers like Fuller are contrasted against this legal positivistic view. I happen to be a type of natural lawyer. I am not a (logical) positivist, so do not believe all knowledge has to be falsifiable or verifiable by experiment. I believe, for various reasons which are not relevant here, that we can unambiguously identify certain normative truths, including ethical truths like what rights individuals have. I do not base these views on any religious, supernatural, mystical, intuitionistic, irrational, or utilitarian reasoning. (Thus I would not identify with the Catholic or religious "natural law" theories, except in the belief that individuals have certain rights whether government and law recognizes them or not.) Rather, I think they are very rational views, as rational as, and as scientific as, theories in the empirical sciences like physics and chemistry. In fact it is this normative (moral, rights-oriented) background from which I criticize particular existing laws as being immoral or invalid. It is these background morals that I would draw on to describe an ideal legal/political system that embodies the (natural) rights that all individuals have.

This anti-scientistic view also opposes cultural and moral relativism and moral skepticism, because it holds, and holds that it can prove, that individuals have certain rights, regardless of

whether others or a given culture or society recognize them. However, the libertarian belief in individual rights is not necessarily opposed to legal positivism, in my view. We can simply identify a given law, and then decide, based on natural individual rights (and the ideal laws that correspond therewith) whether the law is valid or not. This judgment may be used to disapprove of the law, to agitate for its legislative repeal, for example, or that the relevant court ignore or reverse the invalid rule.

Now to backtrack for a second, let me say that I am also in agreement with Fuller's point that law is purposive. You can hardly interpret a statute without the concept that it was drafted to accomplish a certain purpose, without interpreting it in view of that purpose. Yet I do not see that this is inconsistent with legal positivism, for a legislator or other promulgator of a law can have an immoral purpose (examples abound) and infuse this into a law. The law can still be identified; its purpose is still necessary to understand and apply the law (even if the purpose is evident from the plain text of the statute); and the law (and its purpose) can still be condemned as immoral or otherwise invalid. I see no necessary inconsistency in all this. If the natural lawyers mean more than that any true law is "purposive"—that the "purpose" is the same as "morality"—I disagree, for the above-stated reasons. Yet I do not disagree with natural law in the sense of believing that we can rationally identify ethical truths, individual rights, which may be called, I suppose, "natural" rights that accord with "natural law." To me, the concepts "natural rights" and "natural law" do nothing more than identify the simple fact that it is *true* that, e.g., individuals have certain rights. Individual have certain rights, "naturally" one might say. These rights are either protected, or violated, by positive laws, that is, by laws in force. Laws in accord with rights are valid; laws violative of rights are invalid. Laws that establish positive rights that are not true rights are invalid laws.

It seems that there is some tendency for there to be overlap between positivists and legal positivists. Did not Bentham say that natural rights were nonsense on stilts? Doesn't this, and his scientistic utilitarianism, amount to a type of logical positivism, even ethical skepticism? Criticism of natural law thus seems to me to often rest on logical positivistic grounds, on the basis that we cannot know moral truths, thus natural law is pure mysticism or emotivism. Yet a legal positivist would also criticize natural law, if only because natural lawyers claim that legal positivism wrongly ignores the necessarily moral content of law. I consider myself to be a type of natural lawyer, as I said, yet I see no problem identifying law even if it is immoral (a pro-legal-positivist view), although I don't think this prevents one from admitting that laws are purposive by nature. Yet as a natural lawyer—as a defender of epistemological dualism and an opponent of scientism—I oppose positivism and its attack on the rational basis for ethics. So I do not see why both legal positivists and logical positivists seem to position themselves as allies against natural law, for only logical positivism seems to me to be necessarily inconsistent with natural law.

I am not sure if the legal and philosophical layout is as I have presented it here, as I have never seen a discussion getting to the heart of the interrelationship between natural law (and related fields like libertarianism, individual rights, etc.), legal positivism, and logical positivism, though it is not for want of looking. In any event, this is how it seems to me.

It also seems to me that perhaps one reason there has been the unfortunate (and partically incorrect) conflation or linking between legal and logical positivism is that some legal positivists adopt part of logical positivism's views; or, one reason some legal positivists are legal positivists is *because* they are logical positivists. If one is a logical positivst, one does not believe in moral truths. One is a skeptic in the field of ethics. Norms, rights, morals—all the "non-hard" sciences like economics, ethics, etc.—are seen as inferior to "truly" scientific fields like physics, chemistry, those that are subject to the scientific method, those that are verifiable or at least falsifiable by experiment or experience. I have explained above why I believe this view is short-sighted and wrong. Moreover it is naive and arrogant, and indeed I believe it is this scientistic view—the view that everything can be modelled after the physical sciences, even human beings who have free will (which can be ignored since it is qualitative not quantitative)—that has led to the great horrors of our bloody century, namely central and state planning, socialism, fascism, communism. All these have been miserable failures in part because one *cannot* apply the same methods of the "hard" sciences to human actors, who are purposive beings. The view that we can mold human nature (communism) by central command and edict has been shattered. The beliefs that we can plan economies by central planning bureaus (socialism) or tinker with economies to make them better and more efficient (fascism, Keynesianism, welfare-statism) have imploded in the wake of the final inevitable fall of communism, stagflation, etc.

My point is that a logical positivist, believing in no natural law or independent, rational, scientific source of morals, rights, etc., would tend to believe that rules and laws *should* come from a central planner, namely the government. For some reason, many legal positivists also seem to share this belief. Not only do legal positivists believe that we can identify law without necessarily judging the law's validity (a relatively uncontroversial view), many of them seem to favor "positive" law enunciated by the legislature or sovereign, as opposed to customary law, common law, natural law. I.e., Bentham, with his utilitariansm, skepticism of natural rights, and scheme of legislatively (i.e. "positively") codifying the common law.

I do not know if I have accurately described these subjects or their interrelationship, and I do not fully understand why there is such a relationship. However, it does appear to me as if many legal positivists gravitate to logical positivism or at least some related view, such as a view that law should be positively enunciated, i.e. legislated, perhaps on the grounds that we cannot know from reason what law "should" be, therefore we have to have a sovereign enunciate it. It is because of this type of connection that I associate in my mind rights-skeptics, pro-legislation types, and legal positivists. When I think of a typical positivist, I think of someone who holds the following views in some combination: (1) we cannot know what "natural" rights there are or what laws there "should" be, since natural law is hogwash, mere emotivism (a logical-positivistic type of view); (2) because natural law is hogwash, legal positivism must be valid; and (3) because of (1) and also because of our naive rationalist view that we can plan everything by central decree, laws are only what the sovereign decrees and can not be criticized on rational, moral grounds since morals are mere emotions and not scientific. I associate "positivists" with the view that our rights "come from" the government or sovereign—as opposed to the natural law view that they "come from" our *nature*, and can only be recognized, or not, by government.

If I am right in my analysis, there is a mistake here. Perhaps it was the mistake in the seeming miscommunication between legal positivists and natural lawyers initially. Legal positivists should be willing to recognize the importance of "purpose" in the law, and natural lawyers should be willing to admit that there can be invalid laws in force in a society. But since there was this conflict, perhaps natural law is seen as opposed to both legal positivism and logical positivism. Or perhaps it is because legal positivists were swept up in logical positivism with the rest of the 20th century, and thus had to oppose natural law. I am not sure.

But this is why, whenever I encounter any view that tends to oppose the view that we can have rationally justified knowledge of normative truths, I associate it with "positivism." This includes opposition to natural law, and advocacy or cultural or moral relativism, radical or ethical skepticism, or logical positivism. All these seem to making the same epistemological error that we cannot have rational knowledge of rights, i.e. of what laws ought to be. In your book, as I pointed out, you explicitly said you do not favor natural law. You also indicated a belief that rights "are" what various majorities or other groups make sufficiently intense demands for. This seems to me a relativistic view. Rights, to a non-relativist or natural lawyer, exist whether they are recognized or not, whether they are "sufficiently" demanded or not. (Indeed, in my view even some allegedly "natural law" views, such as the religious view that rights "come from" God, while superior to mundane positivism and relativism, are themselves a type of positivism, since they think God can "posit" what our rights are. I do not believe a legislature, even a supernatural one, can change what is true, nor can it legislate what our rights are. It is immoral to murder another, and one has a right to not be murdered, no matter Who decrees otherwise.)

Thus, given my understanding of these concepts, I associated your apparent (though inconsistent) relativism and view that rights are somehow created by various demands, with positivism. If you say that rights are what some group intensely demands, this implies the right is created or "posited" by people. Which means they can change, if people's desires and demands and views change. To me this is relativist, and thus incorrect, since it controverts the fact that there are certain rights, that do not change with changing cultural or societal or governmental views. It is also positivist because, first, you specifically objected to natural law, one mark of a (legal) positivist; and second, like the logical an legal positivists who favor law's being decreed by the sovereign, you seem to imply that the government in conjunction with various pressure groups (should?) create rights and laws. I am not trying to argue that you are wrong, just why your view seems "positivistic."

Obviously, I could not put all this into a brief book review, nor would I want to, especially given some of my uncertainty as to the overall correctness of my view. In retrospect, instead of saying that you seem to have a "sometimes..." view, I should have merely left it at my point that there seemed to be a contradiction between your moral absolutism, on the one hand (with which I agree, and which I did praise in the review as admirable), and your apparent moral/cultural relativism, on the other.

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JUSTICE: Tipping the scales Dame **Rosalyn Higgins** enters the **International Court** of Justice as its first woman judge. She told Owen Bowcott about her work

OWEN BOWCOTT

THE FIRST woman appointed to serve as a judge on the **International Court** of Justice has spent the past 10 years quizzing the world's nations on their human rights records. When Dame **Rosalyn Higgins**, aged 58, takes up a seat in The Hague, she will break a run of nearly 70 years of male exclusivity.

Resolving border disputes or ruling on the legality of nuclear weapons are the types of challenges which have persuaded her to resign as Professor of International Law at the London School of Economics.

Last month she was in Geneva to attend her final sequence of hearings as a member of the United Nations' Human Rights committee. She remains a firm advocate of international law despite the unpunished atrocities which have disfigured the former Yugoslavia.

"It's a common perception that international law is an abstraction," she conceded. "Laws set standards. What's visible in the press are the cataclysmic events whereas the everyday use of international law (in resolving conflicts) is not always a matter of interest to the public."

Donning the black robes of a judge on the International Court, will require her to set aside her practice as a barrister at Strasbourg, Luxembourg and The Hague. She has appeared as counsel before the Court several times; in the Lockerbie case, she represented Britain and appeared for Portugal in a hearing on the predicament of East Timor.

Clearly she relishes her new role: "We will soon be dealing with disputes between the US and Iran over oil platforms in the Gulf, the conflict in the Balkans and the question of genocide and Hungary and Slovakia's row about a dam on the Danube. There's an enormous range of questions there."

Does the fact that she will be the first woman to sit on the

Court - since 1922, if one counts its previous incarnation under the League of Nations - make her anxious?

"I have always been in a profession in which one has been vastly outnumbered by (male) colleagues. I don't notice it. I can understand in certain professions women are extremely conscious of being outnumbered by men. In terms of my life, it's been a total non-event."

Her husband, the Conservative MP for Worthing, Sir Terence Higgins "has been marvellously supportive throughout," she notes. Her official title may even eclipse his. Created a Dame in honour of her appointment to the court, she should now be addressed as Her Excellency Judge Higgins.

As a student she went to Cambridge with the idea of becoming a solicitor. "Then I realised that international law was what really interested me. I got an internship at the UN in New York working in the legal division and I was instantly hooked."

She is a well known figure in Geneva who has proved her independence from the wishes of her national government. While the UK has repeatedly refused to incorporate a bill of rights into domestic law, she has made clear her disagreement and urged Britain to sign the so-called optional protocol, allowing individuals to take their cases direct to the human rights committee. "If there's right of individual application it can become very important for domestic law." There are flashes too of loyalty. Asked why Britain, unlike many countries, never sends a minister to committee hearings, she replied: "What's important for the committee is to have the people who have a good grasp of the information. In certain countries it will be the solicitor-general. Senior civil servants are the best placed."

Have human rights standards improved overall? "It's a patchy picture. When I joined 10 years ago we were in the middle of the cold war. Eastern Europe was party to the Covenant but they were artificial examinations and the whole of Latin America was under military rule. Now it's a continent of democracies and we have begun to see the beginnings of multi-party rule in Africa. But the same period has seen large scale abominations and exoduses. There have been some improvements and some dreadful things." At The Hague, she may have to cope with similar frustrations. Relatively few countries accord full recognition to the International Court's jurisdiction.

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Around the World

The United Nations appointed the first woman justice to the World Court on Wednesday.

Rosalyn Higgins, 58, a University of London professor of international law, was elected without opposition by the Security Council and the General Assembly. Her term expires in 2000.

The Briton replaces compatriot Sir Robert Jennings, who stepped down Monday.

The 15-judge tribunal, formally known as the **International Court** of Justice, is the judicial arm of the United Nations. It is based in The Hague, Netherlands.

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