

## Introduction

---

John H. Barton (1936–2009) was our colleague and our friend. John had retired from full-time teaching at Stanford Law School in 2002, but, in his view, retirement was just an opportunity to become a more productive scholar, as well as a more active husband, father, and grandfather. His Golden Years were cut short by fatal injuries from a bicycle accident, cheating us of more good years and good works from John, but leaving us with warm memories and a lifetime of scholarship. As it turned out, his scholarly contributions have continued from beyond the grave. He had nearly finished this book at the time of his death. It has been our honor, and pleasure, to help guide his last contribution to publication.

John grew up in the Chicago suburbs, going East to graduate from Phillips Exeter Academy in 1954 before returning to the Midwest and Marquette University. His studies at Marquette presaged some aspects of his future career—he graduated in 1958 with joint majors in physics and philosophy. After college he served in the Navy for three years, then went to work as an engineer at Sylvania Electronic Defense Laboratories, a very secret defense contractor, in Mountain View, California.

John was a twenty-eight-year-old engineer, with a wife and four children, when he started Stanford Law School in 1965. During law school he continued to work thirty hours a week for Sylvania and to be an active parent in a growing family. (His and his wife, Julie, became parents of a fifth and final child during winter break of his second year of law school.) In spite of his other obligations, John was a spectacular student. Professor John Merryman remembered John Barton as a first-year Property student. It was “the first time I realized the school was getting so good that some of the students were smarter than

the faculty.” He even had first-year student John teach one of his class sessions.

After graduation, John left Stanford for Wilmer, Cutler, and Pickering, a leading Washington, DC, law firm, but after only a year he came back to Stanford as a member of the law school faculty. He began teaching in fall 1969, won the teaching award (bestowed by a student vote) his first year, and stayed at Stanford Law School, with only temporary exceptions, for the next forty years.

John remained an excellent, and innovative, teacher until his 2002 retirement—and beyond, as he was regularly called back into service from retirement. He pioneered new courses, from Technology as a Business Asset, to Law in Radically Different Cultures, to Biotechnology Law and Policy. He was particularly important for Stanford Law School’s foreign graduate students. These students are lawyers from other countries who bring vastly different backgrounds, as well as widely varying knowledge of the American legal system and American legal thinking. Even in retirement, John always mentored far more than his share of foreign students. He was truly tireless in that role, through which he helped populate and improve law faculties and law firms around the world.

But in spite of his vital role as a teacher, John was first and foremost a scholar—not an ivory tower scholar, but one who wanted to help make policy, with the dirty hands and the occasional scar to prove it. John’s work covered a very broad range, but four aspects of it are especially noteworthy.

First, he was interested in how science and law intersected, including but not limited to intellectual property. Second, he was interested in the whole world, not just the United States. Third, John was thoroughly interdisciplinary before interdisciplinary was cool—when it was unconventional and even a bit odd. He did work that *he* thought was important, in the ways that it could best be done, whether or not that fit into the traditional mold of a law school, or law professor—a mold that has changed, in part because John helped break it. And fourth, he was interested in concrete problems, where solutions would make the world a better place. In the first three, he was decades ahead of his time—forty-five years ago he picked out fields that had not yet begun their enormous growth in importance to law schools. In the last, he was timeless.

John’s first topic as an academic was nuclear weapons control. He then became interested in agriculture—in the Green Revolution and its possible successors. And eventually he came to focus on human health, particularly but not solely through vaccines. To all of these he brought a close engagement with science along with a deep knowledge and interest in the legal tools that shaped

these problems and their possible solutions—public international law, trade law, environmental law, antitrust law, and, increasingly, intellectual property law. He mastered these legal fields not just because they were fascinating but, primarily, because they were important for people’s lives—including the lives of billions of people who did not know they existed, and whose existence these areas of law often ignored.

And so he fought for more food, better drugs, and improved vaccines, but he did it by working with all sides: governments, nongovernmental organizations (NGOs), *and* multinational corporations. He idealized none of them, he demonized none of them—he recognized that all had essential roles to play in any solutions.

In his last decade, John may have been happiest about his role in 2001 and 2002 as chair of the Commission on Intellectual Property Rights. The Commission’s report, “Integrating Intellectual Property Rights and Development Policy,” was an evidence-based effort to understand what kind of intellectual property regimes could promote economic development. Its conclusions reflected John’s appreciation for the power of technology, and the incentives that create innovation, as well as his commitment to improving the lot of the poor:

We need to ensure that the global IP system evolves so that the needs of developing countries are incorporated and, most importantly, so that it contributes to the reduction of poverty in developing countries by stimulating innovation and technology transfer relevant to them, while also making available the products of technology at the most competitive prices possible.

The report was extraordinary; so is the fact that the British government, which created this commission, reached out to an American scholar to chair it. But then, John was an extraordinary American scholar.

It may seem ironic that this book, John Barton’s last publication, departs from his general approach. John’s work dealt mainly with specific, concrete problems and required rich descriptions of the settings of those problems. This book is a much more theoretical and normative effort. And yet, in a way, this book is the culmination of all his work, a result of John’s taking the insights he had gathered from a forty-five-year career in and around international law and using them to propose a whole new framework for international law—and, indeed, for the world.

Concern for human flourishing lay at the heart of everything John Barton did—whether teaching students who were eager to learn from him, in the many intellectual projects John tackled over his academic career, or in his personal relations with friends and colleagues. That concern underwrites the footprint of this book. Barton wished the affairs of the world, from the international to the individual, to be ordered by a global constitutional culture: one that would take seriously the goals of freedom, democracy, and participation in public deliberation.

While human rights are the normative heart of this book, the principal intellectual insight is that globalization has altered the nature of relationships between people and their government through the creation of international bodies and institutions. These institutions have arisen not only because the post–world war economy has encouraged national governments to formalize the ways in which they deal with other governments, but also because the last decades have seen a surge of human rights claims at the individual level, and these claims are increasingly being channeled through international organizations.

The first three chapters of this book provide a careful and balanced analysis of three different domains of human rights that have become crucial catalysts in both the formation and critique of international institutions. While these three domains are divided into the familiar categories of international human rights—civil and political rights, social and economic rights, and cultural rights—this division is not presented as a hierarchy. Rather, this book adopts an approach opposite to virtually all U.S.-based academic work on human rights. That work all too reflexively mimics the U.S. Constitution’s focus on civil and political rights and, as a result, diminishes social, economic, and cultural rights as lesser (sometimes even dismissing them as artifacts of “socialism”). Instead, this book notes that the formation and continuation of contemporary international institutions has in many ways elided these outdated divisions.

These first three chapters make a superb and lawyerly case for the need for intellectuals and policy-makers in the United States to step fully into a world that is less defined by the old categories of human rights and more defined by human well-being. Like the careful “lawyer’s lawyer” and academic that he was, John makes the case for a United States that opens itself to the new realities of rights and international institutions. John’s goal for the United States is that it both govern better at home and ensure that its footprints abroad are humane

and appropriate. His goal for humanity is that international institutions learn to serve both individuals and governments.

John is clear on issues that for some remain controversial: he clearly believes that new media technologies have a vital role in expanding international freedom of speech; that a balance can and must be struck between intelligence and security concerns and the international prosecution of the harmful actions of governments; and that much greater attention must be paid to the “democratic deficit” in international organizations through expanding participatory rights. Within the United States, the iconoclastic and oftentimes parochial actions of U.S. policy-makers must be routinely tested against countervailing international trends. And at the level of the United Nations, the UN Security Council must loosen the stranglehold of its five permanent members.

John’s approach to administrative matters is similarly practical. People, rather than governments, should be able to present their human rights claims to international institutions in ways similar to how Europeans can take their claims to the European Court of Human Rights in Strasbourg. The international system must provide participatory mechanisms not only for governments but also for citizens. To ensure that participation in such institutions is effective, new international scientific and statistical institutions must be created—all people must have the chance to know about the fundamental health and environmental issues that confront them, and that will confront future generations. And John calls urgently for an *international* freedom of information act, in part to keep international institutions honest, but also to national governments to apply international principles consistently over time. Within the United States, this could be achieved by simply ensuring that the U.S. Administrative Procedure Act demands U.S. participation in the international regulatory process, as John explains in his treatment of “Economy and Equality” in Chapter 3.

Most important, John argues, consistent with key philosophers, sociologists, and anthropologists, that one can no longer assume that the dotted line of a nation-state’s border is in any way coterminous with a single homogeneous culture of its citizens. Rather, countries contain myriad cultures that need to be encouraged to engage in constant dialogue—within and across national borders. That dialogue is most fairly conducted within institutional frameworks that are not overdetermined by any particular religious ideology; John makes

clear that he believes secularism supports the best procedural mechanisms for ensuring equal representation in a heterogeneous country.

And in a world of shifting populations, the basic rights of the immigrant must be protected within a system that bestows full citizenship rights within a reasonable timeframe—even if longer-term residents retain voting and subsidy preferences over noncitizens. Crucially, cultural disputes within and between nation-states need international forums in which they can be properly aired. These locations may quite likely be outside formal international institutions such as the World Trade Organization (WTO) and the International Monetary Fund, but they must nonetheless have channels to the social and economic institutions that vitally affect the daily lives of the world's poor and under-represented.

The second half of this book adopts the governance template that began first in the U.S. and French constitutions and has since become the taken-for-granted model of good governance: the traditional division of government into the three branches of the executive, legislative, and judicial. The purpose in so doing is to note the differences in their operation at the national and international levels, and to restructure all of them so that the protection of human rights is at the heart of how they work.

John's sweeping analysis of international organizations includes the United Nations, most especially the UN Security Council; the WTO; the World Bank (together, and with ancillary agencies known as IFIs, or international financial institutions); and the International Court of Justice. John makes a brilliant and novel proposal, in two steps. First, that these institutions have bills of rights and judicial procedures that apply to both governments *and* individuals; and second, that the G-8—those countries in the world that among them hold all the power that the United Nations, the World Trade Organization, and the World Bank so often neutralize—should form a *de facto* international executive that would oversee pre-existing international institutions. This new body ought similarly to ensure procedural rights to both governments and individuals.

Perhaps the most challenging, or possibly incomplete, chapter of this visionary book is Chapter 6, which deals with the prospect of an international legislature. This currently comprises the treaty system, and also the WTO, which means therefore that it is driven by the interests of governments—both good governments, representative and functional, and bad ones, autocratic and

dysfunctional. John would temper this with national mechanisms that ensure the voice of civil society as represented by international NGOs and subject it to an international budgetary oversight process. These are laudatory aims, but of all John's hopes for the international community, this one seems farthest from reach, not least because of the multiple incentives, both good and bad, that drive political parties within national governments.

The third branch of international organization is the judiciary. In short, John foresees the development of an international common law. He argues that greater development of human rights norms is essential at the level of national systems, both in receiving more of the standards adopted in current international judicial bodies like the International Criminal Court, and also in sharing the jurisprudence coming from regional human rights courts and from the most human rights-respecting national systems.

Lest it be thought that this book proposes wildly utopian aims that will never gain traction, each of John's design proposals and normative injunctions functions to strengthen already existing institutions, taking the best of what already exists and adapting it elsewhere. At heart, John's starting wish is to strengthen national constitutions with real democracy and participation, and to extend such participation to international institutions that themselves have bills of rights—especially procedural rights. Such bills of rights notwithstanding, John wants an international organization watchdog agency that ensures democratic participation and due process as a necessary check on national interests.

John Barton's last work is a tour de force that fully reflects his spirit. Just as he held everything he did to a high standard of meticulous care, so he holds us all—and all our governments and international organizations—to a high standard of care for our world and for each other. His valedictory is both the culmination of his forty-five years of scholarly work and a distillation of his own, fundamentally caring and decent approach to the world. We are all bereft by his death; we are all enriched by his parting gift of this, his last work.

H.M.S.

H.T.G.