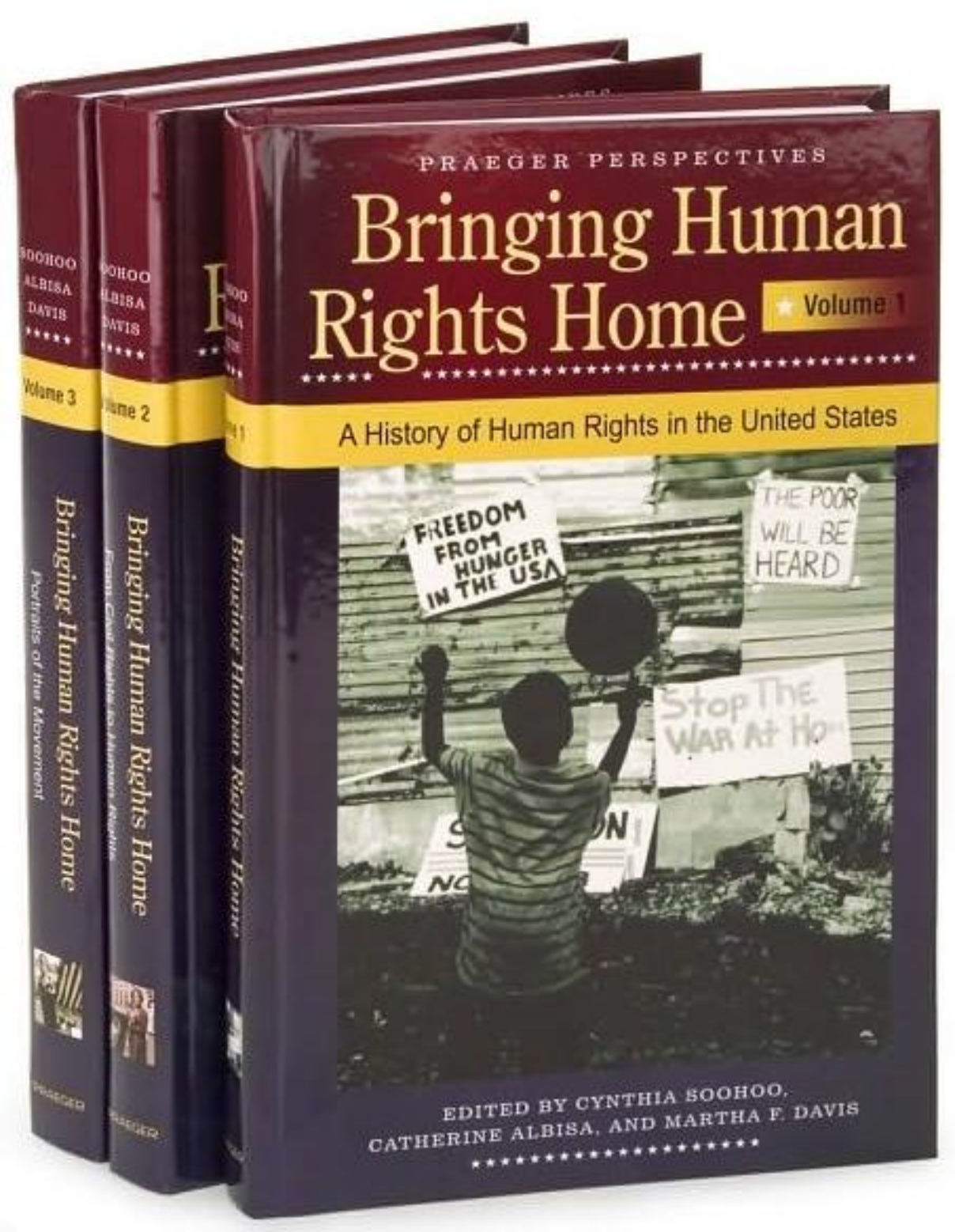
PRAEGER PERSPECTIVES
Bringing Human Rights Home
Volume 1
A History of Human Rights in the United States
FREEDOM FROM HUNGER IN THE USA
THE POOR WILL BE HEARD
EDITED BY CYNTHIA SOOHOO, CATHERINE ALBISA, AND MARTHA F. DAVIS
Volume 3
Bringing Human Rights Home
Portraits of the Movement
Volume 2
Bringing Human Rights Home

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Bringing Human Rights Home

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Volume 1

A History of Human Rights in the United States

Edited by

Cynthia Soohoo, Catherine Albisa, and Martha F. Davis

Foreword by Louise Arbour

Praeger Perspectives

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Foreword

It is with pleasure that I introduce this set of volumes on human rights in the United States, the land of the Four Freedoms speech, a source of inspiration for human rights advocates throughout the world since President Roosevelt first delivered it in 1941.

As the United Nations High Commissioner for Human Rights, it is my duty to promote and protect the rights of all, the freedoms of all. To do so requires concerted efforts at the national level and hence, in recent years, we have devoted special efforts to developing closer links with local partners, national institutions, and organizations with a view to bringing human rights home. I am convinced that building national capacity is an important way to advance human rights protection where it matters most.

It is in this vein that the present set is most welcome. The three volumes offer the reader the opportunity to identify and examine not only the historical richness of the human rights movement in the United States, but its current strengths and challenges. In doing so, the wide array of chapters from scholars, lawyers, and grassroots activists offer diverse perspectives and insights, often through the lens of international human rights standards.

For the United Nations Human Rights System all rights deserve equal treatment and standing since they serve to "promote social progress and better standards of life in larger freedom," as proclaimed in the Universal Declaration of Human Rights. This publication exemplifies these principles, covering diverse topics—from torture to agricultural workers' campaigns to health care—that reflect the essential interdependence and indivisibility of economic, social, civil, political, and cultural rights. I specifically welcome the publication's inclusion of themes relating to economic, social, and cultural rights.

I perceive this as an area where the international community could benefit from greater American leadership.

The combination of case studies, analytical pieces, and testimonial chapters provides a thorough account of the ample spectrum of strategies and views that are currently contributing to the national debate. Moreover, this choice underscores the complexity of global challenges such as migration, security, and governance. For all nations, large and small, and for the United Nations Human Rights System, these issues pose threats and dilemmas of equal relevance, and require a commitment to protecting the rights of individuals while guaranteeing the rule of law.

The approaching sixtieth anniversary of the Universal Declaration in 2008 offers a great opportunity to look back at the many accomplishments of the past decades, in which the U.S. human rights movement has played a central role. Compilations such as this will offer the public a comprehensive review of the past, while shedding light on present and future challenges. I commend the editors and writers for their contribution to the central human rights debates of our time.

Louise Arbour
United Nations High Commissioner for Human Rights
August 2007

Preface

> Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. . . . Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.
>
> —Eleanor Roosevelt

In the early 1990s, the term "U.S. human rights" would have probably elicited vague confusion and puzzled looks. Contemporary notions of human rights advocacy involved the criticism of rights abuses in *other* countries, and claims of human rights violations were leveled *by,* not *at*, the U.S. government. Although human rights documents and treaties purported to discuss universal rights obligations that applied to all countries, the prevailing wisdom was that the American people did not need human rights standards or international scrutiny to protect their rights. Many scholars and political scientists, who described themselves as "realists," expressed doubt that international human rights law could ever influence the behavior of a superpower such as the United States.

Yet, segments of the American public have always believed that the struggle for human rights is relevant to the United States. One of the earliest uses of the term "human rights" is attributed to Frederick Douglass and his articulation of the fundamental rights of enslaved African Americans at a time when the United States did not recognize their humanity or their rights. At various times in U.S. history, the idea that all individuals have fundamental rights rooted in the concept of human dignity and that the international

community might provide support in domestic rights struggles has resonated with marginalized and disenfranchised populations. Thus, it was no surprise that U.S. rights organizations, including the NAACP and American Jewish Congress, played a crucial role in the birth of the modern human rights movement. Both groups helped to ensure that human rights were included in the UN Charter.

Following the creation of the UN, many domestic social justice activists were interested in human rights standards and the development of international forums. Human rights offered the potential to expand both domestic concepts of rights and available forums and allies for their struggles. In the late 1940s and 1950s, Cold War imperatives forced mainstream social justice activists to limit their advocacy to civil claims rights, rather than broader human rights demands for economic and social rights, and to forgo international forums or criticism of the United States. At the same time, isolationists and Southern senators, opposed to international scrutiny of Jim Crow and segregation, were able to effectively prevent U.S. ratification of human rights treaties that required U.S. compliance with human rights standards.

As a result of these pressures, by the 1950s, the separation between international human rights and domestic civil rights appeared complete. Human rights advocacy came to be understood as involving challenges to oppressive regimes abroad, and domestic social justice activists focused on using civil rights claims within the domestic legal system to articulate and vindicate fundamental rights. Recent scholarship by Mary Dudziak and others point out that during the 1950s and 1960s, the United States's civil rights agenda was strongly influenced by concerns about international opinion because Jim Crow and domestic racial unrest threatened to undermine U.S. moral authority during the Cold War. However, although international pressures may have encouraged and supported reform within the United States, the main engine for change was the domestic legal system. Federal civil rights legislation and Supreme Court cases ending *de jure* segregation, expanding individual rights and protecting the interests of poor people through the 1960s seemed to support the perception that the United States did not need human rights.

Soon after, however, the political climate slowly began to shift. Changes on the Supreme Court led to a retreat in domestic protections of fundamental rights. By the end of the 1980s, the assault on domestic civil rights protections was well underway, as illustrated by political attacks on affirmative action and reproductive rights. Political leaders undermined social programs. President Ronald Reagan demonized the poor, claiming that welfare recipients were primarily defrauding the system and women drove away from the welfare offices in Cadillacs. This image of the "welfare queen" created a foundation for further attacks on the rights of the poor in the years to come.

From the 1990s to present day, the deterioration of legal rights for Americans continued at a vigorous pace. Congress and increasingly conservative courts narrowed remedies for employment discrimination and labor violations and restricted prisoners' access to the courts. The legislature and executive branch over time also allotted fewer resources, and even less political will, to government enforcement of laws protecting Americans from job

discrimination, health and safety violations in the workplace, and environmental toxins. Funding for legal services was cut.

Simultaneous to the slow unraveling of the rights of the people in the United States, global events shifted dramatically with the end of the Cold War. Suddenly, the standard politicization of human rights no longer made sense. This opened an important window of opportunity for activists in the United States. Human rights—including economic, social, and cultural rights—could now be claimed for all people, even those within the United States, without triggering accusations of aiding communist adversaries.

As the relevance of international human rights standards grew for the United States, even the increasingly conservative federal judiciary took note. The Supreme Court issued a series of cases citing international human rights standards involving the death penalty and gay rights. These cases were sharply criticized by the most reactionary politicians and members of the Court itself. In 2002, Supreme Court Justice Clarence Thomas admonished his brethren not to "impose foreign moods, fads, or fashions on Americans." Reactionary pundits and scholars picked up on this theme arguing that compliance with human rights standards is antidemocratic because it overrules legislative decisions that constitute the will of the majority.

Nonetheless, the trend toward applying human rights in the United States continued to deepen slowly and quietly until a series of events jolted the American psyche. These events forced the mainstream public to consider what human rights had to do with us, while simultaneously engendering even more vigorous official opposition. As the nation began to recover from the terrorist attacks on 9/11, many were shocked by the anti-terrorism tactics of the Bush administration. To deflect criticism, the administration engaged in legal maneuverings to claim that torture and cruel and degrading treatment were legal under U.S. law, and that international law prohibitions on torture and cruel treatment were not relevant. Voices both within the United States and from the international community challenged the Bush administration, pointing out that torture is a human rights violation in any country.

In 2005, Hurricane Katrina also provided a stark illustration that poor, minority, and marginalized communities need human rights protections and that domestic law falls painfully short of even articulating, much less remedying a wide range of fundamental rights violations. This remains particularly true when affirmative government obligations to protect life, health, and well-being are involved. The government's abandonment of thousands of people too poor to own a car, and the resulting hunger, thirst, chaos, and filth they suffered for many days after the storm shocked the conscience of Americans. People around the world were incredulous to see how the richest nation in the world failed to respond to the needs of its own people. Given an opportunity to rehabilitate its image after the storm, government actions have instead deepened existing inequalities, oppression, and poverty of those affected. Katrina has served as a wake-up call for the region's activists who have collectively embraced human rights as a rallying cry.

Post-9/11 the Supreme Court has served to moderate the worst excesses of the Bush administration's war on terror and, in closely contested cases, brought the United States in line with peer democratic countries by abolishing

the juvenile death penalty and criminal restrictions on consensual homosexual conduct. However, the widening gap between U.S. law and international human rights standards was made brutally clear by the Supreme Court's 2007 decision striking down voluntary school desegregation plans in Seattle and Louisville. The decision effectively overturned a significant part of *Brown v. Board of Education* and signaled an abandonment of the Court's historic role as protector of the vulnerable and marginalized in society. In direct opposition to the UN Convention on the Elimination of All Forms of Racial Discrimination, which allows and in some cases requires affirmative measures to remedy historic discrimination, the Seattle and Louisville cases held that school desegregation programs voluntarily adopted by school boards constitute unconstitutional racial discrimination. In 2007, these cases appear as a harbinger of the battles yet to be fought on the much-disputed territory of human rights in the United States.

This three-volume set tells the story of the domestic human rights movement from its early origins, to its retreat during the Cold War, to its recent resurgence and the reasons for it. It also describes the current movement by examining its strategies and methods and considering advocacy around a number of issues. It is our hope that this book will provide greater understanding of the history and nature of the domestic human rights movement and in doing so respond to unwarranted criticism that domestic human rights advocacy is foreign to U.S traditions and that it seeks to improperly impose the views and morals of the international community on the American people.

Although the history of U.S. involvement in the birth of the modern international human rights movement is well known, the parallel history of the struggle for human rights within the United States has been overlooked and forgotten. Volume 1 reclaims the early history of the domestic human rights movement and examines the internal and external factors that forced its retreat. In order to aid the reader, many of the documents referred to in this set are included in the Appendix at the end of Volume 1. A list of the documents that are included appears at the beginning of the Appendix.

Through the chapters in Volumes 2 and 3, we hope to provide a clearer picture of current human rights advocacy in the United States. Human rights work in the United States is often misunderstood because those who search for it tend to focus on legal forums, forays into international institutions, and human rights reports written by international human rights organizations. While such work is critically important and continues to grow, human rights education and organizing tends to get overlooked. As we tell the story of human rights advocacy in the United States and come to understand the current depth and diversity of the movement and its embrace by grassroots communities, the hollowness of antidemocratic criticism becomes clear. Rather than encompassing a set of foreign values that are imposed upon us, the fight for human rights in the United States is emerging both from the top down and the ground up.

Acknowledgments

We want to express our deep appreciation to the activists profiled in this book, whose work continues to inspire us, and to the authors of these chapters for contributing their experience, insights, and hard work to this effort. Many thanks are in order to Hilary Claggett for encouraging us to pursue this project and to Professor Peter Rosenblum for his support and encouragement. We are also grateful to our publishers at Praeger, Shana Jones, Elizabeth Potenza, and Lindsay Claire.

During the initial stages of this project, we were fortunate to be able to convene two conferences at Columbia Law School in May 2005 and June 2006 to develop the content and themes for this book. Many conference participants became contributing authors or provided first person accounts. Other participants, including Clifford Bob, Ellen Chapnick, Rhonda Copelon, Jamie Fellner, Hadar Harris, the Honorable Claire L'Heureux-Dube, Garth Meintjes, Alice Miller, Judith Resnik, Peter Rosenblum, Amanda Shanor, and Steven Watt provided invaluable comments and suggestions, which helped to shape the direction of the project.

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In addition, each of the editors would like to personally express thanks to the following individuals and institutions:

I am greatly indebted to my colleagues in the Bringing Human Rights Home Lawyers Network for sharing their ideas and projects and providing a continuing source of inspiration. A collaborative project of this scope is by its nature difficult, but it can become an ordeal unless you are fortunate, as I was, to work with colleagues whom you like, respect, and upon whom you can depend. I am grateful to Cathy Albisa and Martha Davis, for their commitment, hard work, vision, and good humor throughout this project. Finally, a special thanks to Sarah and Thomas Creighton for their patience and support and to Daniel Creighton for making this project and everything else possible. —CS

Every social justice effort is by nature a collaborative one. I have many people to thank for making this book possible starting with my family, in particular my mother-in-law Dalia Davila and husband Waldo Cubero, for their steadfast support for my work despite sacrifices they endure as a result; my children, Gabriel and Dario, for being a constant source of inspiration and wisdom on what is clearly right and wrong in this world; my mother Gladys Albisa for her encouragement to commit myself to this work; Larry Cox and Dorothy Q. Thomas for their guidance, leadership, and inspiration; the extraordinary staff at the National Economic and Social Rights Initiative (NESRI) for the depth of their commitment and creativity; my co-founders Sharda Sekaran and Liz Sullivan for their leap of faith in creating NESRI; Laura Gosa and Molly Corbett for their work to ensure the completion of many of the chapters in this book; Tiffany Gardner for her optimism and commitment to carrying this work into the future; the contributing authors with whom I had the honor to work who made time in their impossible schedules to make a invaluable contribution; my board members Mimi Abramovitz, Rhonda Copelon, Lisa Crooms, Martha Davis, Dr. Paul Farmer, Patrick Mason, and Bruce Rabb for their leadership and support; NESRI's partner organizations that exemplify the U.S. human rights movement; our funders mentioned above as well as the Public Welfare Foundation that make the work possible; and most of all our extraordinary colleague Cindy Soohoo who quietly and modestly took on the biggest share of this project and generously allowed all of us to become a part of it. Thank you Cindy, this could not have happened without you! —CA

Thanks to Northeastern Law School for providing both material support and flexibility for me to devote the necessary time to this project. Thanks to Kyle Courtney for his unflagging good humor and library research expertise. Elizabeth Farry provided excellent research assistance. Richard Doyon provided terrific secretarial assistance. Finally, thanks to Cindy Soohoo and Cathy Albisa for their generous invitation to join them in this project, and for being such wonderful, supportive colleagues throughout. —MD

Introduction to Volume 1

Martha F. Davis

In early 1942, just a few months after the attack on Pearl Harbor, the United States Office of Emergency Management dispatched fieldworkers around the country to conduct "man-on-the-street" interviews about the war. Interviewees were asked to address their remarks directly to President Roosevelt. The recordings were ultimately used in a radio program titled "Dear Mr. President," broadcast in May 1942, intended to highlight the voices of everyday people. However, in their raw form, the recordings provide direct and candid access to the views of Americans during a pivotal time in our history, one year after Roosevelt's Four Freedoms speech, shortly after the U.S. declaration of war on Japan, coinciding with the start of the Japanese internments, and hard on the heels of the inception, on January 1, 1942, of the United Nations.

Amid the professions of wholehearted support for the president and willingness to do whatever it takes to win the war, interviewees repeatedly sound notes of concern about the domestic impacts of the effort and, more pointedly, the contrast between the ideals expressed in the war effort and the realities facing some communities in the United States. In particular, in a nation where formal racial inequality was still widely accepted, many of the African American interviewees expressed dismay about the disjunction between the nation's war-time rhetoric and the struggles they faced in their own lives. A grocery clerk in Nashville, Tennessee, observed that "at the present, probably Mr. Hitler or Japan might not be the greatest enemy we have . . . [w]e've got to do something to curb the misunderstanding between minor [*sic*] groups and the groups which are oppressed and robbed of opportunities here in this country, which is a free country."[1] An African American private serving in the U.S. Army described the discrimination that he experienced in his position

before observing that "the Negro hopes that when these things are over, when the war is over, that these promises that has been made to him and these promises that he's fighting for—the promises that he lives and hopes for—will all be made a reality."[2] An unidentified man on the street in New York City summed up these concerns in his message to President Roosevelt:

> As a black American I'm quite naturally interested in democracy. However, I do feel that what we should do is get a little democracy in America first. . . . We are busy trying to bring the four freedoms to the rest of the world, but yet here in America they don't exist. I cite as examples of this the lynching in Sykestown, Missouri, the other day. The brutal shooting of several Negro soldiers in Alexandria, Louisiana, a couple of weeks ago. And the ever-present and still continuing discrimination against Negro craftsmen in defense industries.[3]

These remarkably consistent interviews from around the nation show, among other things, how deeply into the American psyche the wartime message—of exporting democracy, equality, and President Roosevelt's "four freedoms"—had permeated. At the same time, the individual testimonies concerning racial discrimination and lack of economic opportunities demonstrate a keen awareness of how far the nation had yet to go to reach these same ideals domestically.

The chapters in this volume take up the same theme raised by these "people on the streets" of America more than sixty years ago, that is, the contradictions between the United States' historic embrace of human rights principles on the international stage and its deep ambivalence about human rights at home. Written by historians and other scholars of human rights, these chapters train a human rights lens on U.S. history to help understand the historical backdrop for the growing U.S. human rights movement we see today. Collectively, these chapters illuminate several tensions that have, over decades and even centuries, moderated efforts to implement human rights in the United States and that continue to play a role in the human rights movement.

First, as Paul Lauren's chapter, "A Human Rights Lens on U.S. History," so effectively describes, the U.S. government and other influential institutions and leaders have many times embraced human rights principles, as in the Declaration of Independence, Roosevelt's Four Freedoms speech, and more recently, ratification of the International Covenant on Civil and Political Rights.[4] Indeed, as Lauren chronicles, throughout the nineteenth and early twentieth centuries, human rights movements did not stop at the U.S. border. Rather, ideas that developed abroad readily permeated the national consciousness and influenced similar movements within the United States. The nineteenth-century U.S. women's rights movement and the Declaration of Sentiments provide apt examples of these influences.

Yet almost simultaneously, the same government institutions that embraced human rights have had no compunction about rejecting human rights approaches when they might challenge the hegemony of the capitalist system, as Hope Lewis writes in her chapter, "'New' Human Rights," on the challenges of implementing economic, social, and cultural rights in the United States.[5] The U.S. failure to ratify the International Covenant on Economic, Social and Cultural Rights, despite the U.S. government's central role in

drafting the treaty, is a case in point. Not surprisingly, as Carol Anderson describes in her historical chapter on the NAACP's forays into human rights advocacy, titled "A Hollow Mockery," the U.S. government's positions influenced the strategic directions of non-governmental leaders as well.[6] The government's deep ambivalence, and at times opportunistic manipulation of human rights, and the consequences of that ambivalence are central themes in the historical chapters here.

Second, these chapters chronicle the various modes of institutional and social change that affect the fluctuating status of human rights within the United States. On the one hand, Elizabeth Borgwardt's chapter, "FDR's Four Freedoms and Wartime Transformations in America's Discourse of Rights," brilliantly describes the role of nations and national leaders in developing and exploiting the language of human rights in the service of diplomatic and political, albeit progressive, ends.[7] Her account is one of insiders, like Franklin Roosevelt, Winston Churchill, and Eleanor Roosevelt; as the "Dear Mr. President" interviews reveal, these actors played a determinative role in the public understanding and acceptance of human rights concepts and implementation in the critical period before, during, and after World War II. Similarly, Catherine Powell's interview with human rights pioneer Professor Louis Henkin and Professor Powell's framing introduction situate Henkin's work as an insider with influence. Though his immigrant origins were decidedly not those of the privileged elite, he successfully moved law schools and other institutions to begin accepting human rights law as real law—a tremendous step forward for its legitimacy.[8]

On the other hand, insider accounts cannot tell the whole story, and the interview with human rights leader Gay McDougall tells an outsider story.[9] As McDougall's interviewer Vanita Gupta writes in her biographical introduction, McDougall's achievements include both challenging U.S. policy toward South Africa and beginning to move progressive organizations within the United States toward using a human rights framework in their domestic advocacy. In both roles, McDougall worked to shape government policy from the outside, enlisting tools such as grassroots organizing, legislative advocacy, public education, and litigation.

Carol Anderson's engaging chapter on the NAACP's efforts to use international human rights mechanisms to address Jim Crow and other segregationist policies is particularly poignant in light of the "Dear Mr. President" interviews excerpted above. Relegated to a position as outsiders after World War II despite the promise of greater postwar democracy and equality at home as well as abroad, African American activists briefly turned to human rights rhetoric only find that they had been outmaneuvered by Cold War hawks and states' rights supporters. That these developments had such a significant and lasting impact on the status of human rights in the United States underscores the critical role that outsiders play in shaping national policies on these issues. Through the 1950s and 1960s, in the absence of sustained pressure from outside institutions like the NAACP, U.S. government attention to international human rights approaches languished.

Finally, it's worth noting the ways in which issues of race and poverty in America cut across the chapters in this volume as well as the volumes

that follow. Paul Lauren observes the critical roles that race and class issues played in the early development of human rights concepts. Indeed, as he and others note, abolitionist Frederick Douglass is often credited with coining the phrase. Elizabeth Borgwardt links both race and poverty issues after the Great Depression with FDR's conception of the New Deal and, particularly, his pledge of "freedom from want." Carol Anderson and Hope Lewis describe from differing perspectives the role of America's race problem in foreign relations and in its domestic stance on international human rights. Gay McDougall relates the ways in which activism to address South African apartheid introduced civil rights lawyers to human rights, and led to greater human rights activism focused on domestic issues within the United States.

Of course, one of the central reasons for recounting history is to help us understand our current situation. In that respect, these chapters surely succeed. Having identified the U.S. government's awkward waltz with human rights concepts—a three-part dance of ambivalence, rejection, and embrace—these writers identify the critical roles that domestic vulnerabilities, particularly around race and poverty, have played in keeping human rights nearby but at arm's length. Similarly, they note the ways in which government and media manipulation of these concepts have been used in service of other, political ends. Examining the present, these insights can inform our understanding of Hurricane Katrina's aftermath, the incidents of torture in Abu Ghraib and the U.S. government's response, and other human rights developments yet to come. Pertinent to volumes 2 and 3 of this set, these historical insights can also help shape strategies for the new human rights movement emerging in the United States.

The history of human rights in the United States is a difficult story to tell and to hear. But in many ways, the strains are all too familiar. To borrow a phrase from songwriter Paul Simon, it's an American tune. The chorus pits the American dream and lofty national ideals against harsher realities, telling a story of race, economic class, politics, and exceptionalism that the person-on-the-street in Nashville or New York City would have no difficulty believing and understanding, and might even tell as their own.[10] Perhaps once we recognize the contours of this story—including its very commonness—we can begin to test and transcend the boundaries set by our own history.

NOTES

1. "Dear Mr. President," Nashville, Tenn., Jan. or Feb. 1942, AFS 6442B, available online at www.loc.gov.

2. "Dear Mr. President," Granbury, Austin, Hood County, and Fletcher County, Texas, Jan. or Feb. 1942, AFS 6431.

3. "Dear Mr. President," New York, New York, Jan. or Feb. 1942, AFS 6410A, Cut A3.

4. Paul Gordon Lauren, "A Human Rights Lens on U.S. History: Human Rights at Home and Human Rights Abroad," in vol. 1, *Bringing Human Rights Home*.

5. Hope Lewis, "'New' Human Rights: U.S. Ambivalence Toward the International Economic and Social Rights Framework," in vol. 1, *Bringing Human Rights Home*.

6. Carol Anderson, "A 'Hollow Mockery': African Americans, White Supremacy, and the Development of Human Rights in the United States," in vol. 1, *Bringing Human Rights Home*.

7. Elizabeth Borgwardt, "FDR's Four Freedoms and Wartime Transformations in America's Discourse of Rights," in vol. 1, *Bringing Human Rights Home*.

8. Catherine Powell, "Louis Henkin and Human Rights: A New Deal at Home and Abroad," in vol. 1, *Bringing Human Rights Home*.

9. Vanita Gupta, "The Pioneering Career of Gay McDougall: Blazing a Path from Civil Rights to Human Rights," in vol. 1, *Bringing Human Rights Home*.

10. Paul Simon, "An American Tune," on *There Goes Rhymin' Simon*, released May 1973.

CHAPTER 1

A Human Rights Lens on U.S. History: Human Rights at Home and Human Rights Abroad

Paul Gordon Lauren

Throughout their history, from its very beginnings to the present and despite the language of the Declaration of Independence and the Bill of Rights, Americans have seriously argued and sometimes violently contested over human rights. While some have enthusiastically embraced the concept that all people are endowed with certain inalienable or natural rights and have worked to bring this principle into practice, for example, others have insisted that not all people are fully human and that whatever rights exist should be applied instead only to certain groups based upon gender, race, class, opinion, or some other form of distinction. Other contests have raged over whether human rights are all indivisible and possess equal value, or whether political and civil rights are much more important and should be given far more weight than economic and social rights. Americans also have vehemently clashed over the question of whether or not human rights within their own country should be tied in any way to human rights in the world at large.

This debate over the relationship between human rights at home and human rights abroad has been long and intense—and, as the world becomes increasingly interconnected, continues to be so. Historically, of course, only a few arguments existed over the issue of sending human rights overseas. The idea that American values and practices should be exported and thereby serve as the model for others in the world always has been a highly popular theme to invoke among the body politic. As pastor John Winthrop wrote in his famous sermon while crossing the Atlantic Ocean in the seventeenth century: "For we must consider that we shall be as a city upon a hill. The eyes of all people are upon us, so that if we shall deal falsely with our God in this work we have undertaken . . . we shall be made a story and a by-word throughout

the world."[1] This statement, and many others like it, evoked the possibilities of a shining new land of opportunity whose people enjoyed basic rights, free from the trappings of a feudal past, monarchical despotism and oppression, privilege, corruption, class divisions, and the prejudice and intolerance that plagued other, less fortunate, countries. They believed that America was uniquely favored and, consequently, that it should set the standard that served as the model and beacon of hope that all others around the world would admire, respect, and surely want to emulate. As U.S. Senator Alfred Beveridge articulated the mission at the end of the nineteenth century:

> It is a glorious history our God has bestowed upon His chosen people; a history heroic with faith in our mission and our future; . . . a history of prophets who saw the consequences of evils inherited from the past and of martyrs who died to save us from them. . . . Shall free institutions broaden their blessed reign as the children of liberty wax in strength, until the empire of our principles is established over the hearts of all mankind? . . . It is ours to set the world its example of right and honor.[2]

It is not at all difficult to find similar expressions used within American domestic politics during our own day.

The most serious debates thus existed not about exporting human rights abroad, but rather over bringing human rights home. Intense arguments have raged within America over the question of whether there were any ideas, practices, mechanisms, or laws elsewhere that might be useful in establishing, extending, or protecting rights within the United States. There have always been those Americans, for example, who have clearly seen themselves as a part of the larger world, eager to learn from others beyond their own borders, to draw upon international norms and influences for advocacy in domestic politics, and to play a role and actively contribute what they could to developments in the broader evolution international human rights.[3] There also have always been Americans who have been reluctant or ambivalent supporters of international human rights norms, accepting the value of some while simultaneously rejecting others. At the same time, there have always been Americans firmly opposed to establishing or honoring any international standards and norms at all, insisting that their country was so truly exceptional—so special, so superior, and so destined to be different—that it need not surrender its own national sovereignty by being bound by rules or scrutiny from the outside, and that it certainly did not need foreigners telling it what to do.[4]

These sharply contrasting opinions and tensions are evident not only in history but also in contemporary issues of human rights and continuing violations of human rights, as America continues to struggle with its relationship with the rest of the world and the global human rights system. The various chapters in these volumes collectively titled *Bringing Human Rights Home* will describe and analyze some the most significant of these in detail. But it is important to recognize that the patterns of contentious dispute and the sharply contrasting themes of America as advocate, as ambivalent or reluctant participant, and as determined opponent of international human

rights efforts are all part of a long-standing legacy that can be discerned if one examines American history from its beginnings to the watershed experience of World War II through the revealing lens of human rights.

THE CREATION OF THE REPUBLIC, THE CONSTITUTION, AND THE BILL OF RIGHTS

Early American colonists did not find it at all strange to borrow ideas and practices from England and from the broader European intellectual movement known as the Enlightenment.[5] They argued that they were the inheritors and beneficiaries of the rights that had evolved through the Magna Carta of 1215 on the limitations upon royal government and legal protections for certain individual liberties, the Habeas Corpus Act of 1679 establishing the right to be protected against arbitrary detention, and the landmark English Bill of Rights of 1689 with its specific provisions of civil and political rights such as free elections, freedom of speech, religious toleration, trial by jury, and prohibitions against cruel and unusual punishment. These rights, among others, they had read in the seminal *Second Treatise of Government* written by philosopher John Locke, were "natural rights" derived from "natural law." As such, they should apply not just to the continent of Europe, but to "common humanity" and "governments throughout the world." All people are born, Locke declared, with

> a title to perfect freedom and uncontrolled enjoyment of all the rights and privileges of the law of nature equally with any other man or number of men in the world and have by nature a power not only to preserve his property—that is his life, liberty, and estate—against the injuries and attempts of other men, but to judge and punish the breaches of that law in others.[6]

From this premise it followed that people formed governments to preserve these rights, not to surrender them. As a consequence, governments received their powers from the governed with whom they signed a contract. Any government that acted in such a way as to violate these natural rights, wrote Locke in passages widely quoted with approval among colonists in North America chafing under English rule, therefore dissolved the contract and gave people a right to resist.

The ideas about natural law and natural rights articulated by Locke and by other philosophers and writers such as Jean-Jacques Rousseau, Baron de Montesquieu, Marquis de Condorcet, Voltaire, and Denis Diderot from France, David Hume from England, Francis Hutcheson from Scotland, Immanuel Kant from Prussia, and Cesare Beccaria from Milan, among others, heavily influenced the thinking of many of the founders of the early American republic. They drew not only upon the general ideas, but sometimes even the specific language from the other side of the Atlantic. Delegates to the First Continental Congress of 1774, for example, borrowed the words of the *philosophes* of the Enlightenment about "the immutable laws of nature" and "the principles of the English constitution" to assert that the inhabitants of the colonies were "entitled to life, liberty, and property."[7] George Mason

did the same in composing the celebrated Virginia Declaration of Rights, forcefully arguing that "all men are by nature equally free and independent, and have certain inherent rights."[8] Thomas Jefferson knew and utilized the same sources, especially when writing the memorable words of the Declaration of Independence of July 4, 1776:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of those ends, it is the right of the people to alter or to abolish it, and to institute a new government.[9]

These words helped to launch the American Revolutionary War. When that long and painful war finally ended, the task at hand was not to fight and destroy but rather to debate and create. More specifically, the critical undertaking was to institute a new government by consent and to provide for the protection of what were perceived to be the unalienable or natural rights of its citizens, although there was no precise agreement upon exactly what these might entail. The definition of "human rights" would be one that evolved through time and circumstance. The Constitution of 1787 began this process by establishing a federal government with a separation of powers and checks and balances and by enshrining the political rights of voting and of holding office. Many citizens throughout the new republic, however, believed that the Constitution, as it then stood, said far too little about protecting individual rights.[10] They worried not only about threats and abuses that might originate from the government, but also—and very significantly—from a tyranny of the majority. As one of the central founders James Madison expressed it: "In republican government the majority, however composed, ultimately give the law. Whenever therefore an apparent interest or common passion unites a majority, what is to restrain them from unjust violations of the rights and interests of the minority, or of individuals?"[11] Such questions, and the fears and concerns they expressed, as well as the Declaration of the Rights of Man and Citizen that appeared with the outbreak of the French Revolution in 1789,[12] energized rights advocates to mobilize a vigorous, contentious, and lengthy campaign throughout the new country for the purpose of adding amendments to the Constitution that specifically addressed and enumerated critical civil rights.

As a result of their efforts, the first ten amendments, collectively known as the Bill of Rights, were added to the Constitution in 1791.[13] They established the legal foundation for the protection of human rights in the United States. Unlike earlier declarations of rights that used words like "ought" and "should," the amendments employed the word "shall" as a command. Thus, the powerful First Amendment enumerated the freedom of conscience and expression by explicitly stating: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble; and to petition the Government for a redress of

grievances." Other amendments established that people shall be secure in their persons and possessions against unreasonable searches and seizures; shall enjoy the right to a speedy and public trial, a trial by jury, and legal counsel; shall not be compelled to provide witness against themselves; shall not be deprived of life, liberty, or property without due process of law; and shall be protected against excessive fines or cruel and unusual punishment.

Those advocates who had actively campaigned on behalf of rights and supported the inclusion of the Bill of Rights into the Constitution could take justifiable pride in the fact that these protections now became an integral part of the law of the land. They could hardly know, of course, just how important or what kinds of controversies they would generate through time, especially when its provisions were invoked as a rallying cry by those who fell outside its protection and during periods of crisis, national emergency, or war.[14] Some Americans of the early republic even hoped that the provisions they had created would make a significant contribution to human rights by setting an example and inspiring others throughout the world to do the same. As Jefferson himself noted earlier, "a bill of rights is what the people are entitled to against every government on earth."[15]

At times, they did inspire. The early American articulation of human rights certainly went on to influence scores of Europeans of contemporary and subsequent generations, many Asians and Africans in the process of decolonization during the twentieth century, and a number of significant and more recent international efforts. At other times, however, they provided little inspiration for emulation at all, especially when it was clear that they were not fully applied in practice at home. Activists and observers at home and from abroad were quick to point out that the human rights provisions in the much-heralded Constitution and Bill of Rights, for example, did not apply to everyone. Among the many not protected were women, the unpropertied, slaves, indigenous peoples, and children.[16] This fact, they noted, demonstrated a glaring gap between early American vision and American reality.

THE SLAVE TRADE AND SLAVERY

Nothing marked the chasm in America between vision and reality more starkly than the slave trade and the institution of slavery that it supplied. Nowhere were violations of human rights—however defined—more blatant or more brutal than in this debasement of living human beings into property. Indeed, it was precisely the discussion about human rights surrounding the American Revolution and the Bill of Rights in the Constitution that sparked unprecedented public debate at home and abroad about the issue of human bondage. Never before in history had so many people on both sides of the Atlantic so seriously questioned the moral character of political and economic policy and the meaning of human rights. As Christopher Leslie Brown recently observed in his book about British abolitionism titled *Moral Capital*, by invoking universal principles rather than established law or custom, by professing an intense interest in the good of humankind, and by describing liberty as the natural right of all people, Americans inadvertently opened themselves

to criticisms about the justice of holding African men and women, girls and boys, in lifelong bondage and treating them as property rather than as human beings.[17] The American revolutionary Patrick Henry saw the same striking contrast between professed values and practice, and felt compelled to write: "Is it not amazing that at a time when the rights of humanity are defined and understood with precision, in a country, above all others, fond of liberty, that in such a country we find men . . . adopting a principles as repugnant to humanity as it is inconsistent with the Bible, and destructive to liberty?"[18]

Many of those who struggled on behalf of human rights at the end of the eighteenth and beginning of the nineteenth centuries, therefore, focused their attention and energies on abolishing the slave trade and slavery itself. In this effort, Americans both contributed to, and drew support and encouragement from, the broader endeavor of what has been called "the anti-slavery international."[19] The formation of the Society for the Relief of Free Negroes Unlawfully Held in Bondage by the American Quaker pastor and activist Anthony Benzenet and others in Philadelphia, for example, not only created perhaps the very first human rights nongovernmental organization, or NGO, in the world, but in the process served as an example for Thomas Clarkson and other deeply committed campaigners in Britain to establish the much larger and more influential Society for Affecting the Abolition of the Slave Trade. Through time, activists in many countries, including those in the United States, came to look to the British abolitionists for inspiration and for evidence that their own efforts might be successful.[20] Additional NGOs were created, for example, including the Society for the Suppression of the Slave Trade, the Association of Friends for Promoting the Abolition of Slavery, and the American Anti-Slavery Society in the United States; the Aborigines Protection Society and the British and Foreign Anti-Slavery Society in Britain; the Société des Amis des Noirs and the Société de la Morale Chrétienne in France; and the Confederação Abolicionista in Brazil, among others. Together, they learned from each other and in the process developed significant organizational skills and techniques of human rights activism still used today such as writing letters, organizing public lectures and meetings, delivering sermons and speeches, collecting signatures and sponsoring petition drives to pressure governments and diplomats, proposing legislation, conducting research, participating in consumer boycotts, launching press campaigns, publishing pamphlets and articles, printing newsletters, and translating and distributing books (like Clarkson's powerful *The Cries of Africa to the Inhabitants of Europe; Or, a Survey of That Bloody Commerce Called the Slave Trade*) to leading decision makers.

Through time, efforts such as these began to have a cumulative effect. By 1806, for example, President Thomas Jefferson finally felt compelled to declare publicly that it was time to end the slave trade explicitly acknowledged in the U.S. Constitution and urged lawmakers "to withdraw the citizens of the United States from all further participation in those violations of human rights which have been so long continued on the unoffending inhabitants of Africa, and which the morality, the reputation, and the best interests of our country, have long been eager to proscribe."[21] Shortly thereafter, and very much aware of the efforts of each other, the U.S. Congress passed the

Act to Prohibit the Importation of Slaves and the British Parliament enacted the Act for the Abolition of the Slave Trade during the same month in 1807.[22] Although the United States was not a part of the Congress of Vienna following the Napoleonic wars, it nevertheless followed a number of the deliberations closely, and during exactly the same month in 1815 when the European powers signed the Eight Power Declaration opposing the slave trade, it joined Britain in declaring within the text of the Treaty of Ghent that the traffic in slaves was "irreconcilable with the principles of humanity and justice" and agreed to work toward abolishing the trade altogether.[23] In the years that followed, American administrations sometimes willingly cooperated with other countries in the remarkable and unprecedented campaign to successfully end this trade in human beings that had lasted for several centuries and had brought untold wealth to the West, and sometimes they refused to participate at all. This mixed record, of course, reflected not only America's ambivalent attitudes toward international endeavors on behalf of human rights in general, but the extreme divisiveness within the nation over the specific practice that created the market for the slave trade in the first place—slavery at home.

During the first half of the nineteenth century, American abolitionists constantly looked abroad for assessment, inspiration, ideas, and support. Since they constituted a beleaguered minority at home, they found strength and comfort by standing shoulder to shoulder with like-minded people from outside the United States.[24] They carefully read the perceptive and critical judgment made by foreign observers like the Frenchman, Alexis de Tocqueville, in his famous *De la démocratie en Amérique* about the sharp contrast between rhetoric and reality when he noted that "The absolute supremacy of democracy is not all that we meet with in America." Here, he concluded, "the European is to the other races of mankind what man is to the lower animals;—he makes them subservient to his use; and when he cannot subdue, he destroys them. Oppression has, at once stroke, deprived the descendants of the Africans of almost all of the privileges of humanity."[25] Tocqueville's assessment was reinforced by his compatriot and traveling companion, Gustav de Beaumont, whose book entitled *Marie, ou l'esclavage aux Etats-Unis*, observed that Americans "who have perfected the theory of equality" nevertheless failed to heal what he described as "the great canker." "I see," he has his major character say with great sorrow,

> in the midst of a civilized Christian society, a class of people for whom that society has made a set of laws and customs apart from their own; for some, a lenient legislation, for others a bloody code; on one side, the supremacy of law, on the other, arbitrariness; for the whites the theory of equality, for the blacks the system of servitude; two contrary codes of morals: one for the free, the other for the oppressed; two sorts of public ethics: these—mild, humane, and liberal; those—cruel, barbaric, and tyrannical.[26]

Of particular importance, when abolitionists in America looked overseas, they saw successful examples of other countries actually achieving their dream of abolishing slavery and emancipating slaves. These included Costa Rica,

El Salvador, Guatemala, Honduras, Nicaragua, Britain, Argentina, Colombia, Peru, and Venezuela. They also witnessed Prussia, the Austro-Hungarian Empire, Russia, and Poland end serfdom and set serfs free. As Lucretia Mott (who would go on to play a leading role in the movement for women's rights in the United States) pointed out during a major meeting of the American Anti-Slavery Society, "When we look abroad and see what is now being done in other lands, when we see human freedom engaging the attention of the nations of the earth," she declared, "we may take courage."[27] Their desire to bring these examples home to America by strictly peaceful means of persuasion, however, failed. Resistance remained strong and determined. In the end, therefore, it took the American Civil War (which remains to this day the nation's bloodiest military conflict) to transfer power away from those unwilling to share it voluntarily and thereby make it possible to adopt the Thirteenth Amendment finally prohibiting slavery within the United States.

WOMEN'S RIGHTS

The impact of the campaign against the slave trade and slavery extended to another area of human rights as well: Many of those who became leaders in the early crusade for women's rights in America began their activist careers in the abolitionist movement. Once awakened, a sense of justice is not easily contained and, as Adam Hochschild observes, can often cross the boundaries of race, class, and gender.[28] Some campaigners, of course, had been encouraged at a certain level by the earlier statements of Abigail Adams at home that women would not feel themselves bound by any laws in which they had no voice or representation, as well as voices from abroad, including those of Mary Wollstonecraft from England in her impassioned book titled *A Vindication of the Rights of Woman* and of Olympe de Gouges from France in her Declaration of the Rights of Woman and Citizen that shouted: "Women, wake up; the tocsin of reason sounds throughout the universe; recognize your rights!"[29] But it was in the movement for abolition that they first became conscious of the broader nature and interrelationship of human rights and the connection between race and gender, and where they learned how to mobilize themselves into action and to experience successes that gave them both hope and the courage of their convictions. If slaves should have rights, then why shouldn't women? This motivated them to depart from the historic roles and rules of "woman's assigned sphere" and to step out into public activism.[30] "In striving to strike his irons off," acknowledged Abby Kelly Foster referring to black slaves, "we found most surely, that we were manacled ourselves."[31] The deeply religious and committed abolitionist Angelina Grimké reached the same conclusion, arguing that the struggle was one for human rights—not man's alone, not woman's alone, but equal rights for all whatever their color, sex, or station. "This is part of the great doctrine of Human Rights," she wrote, "and can no more be separated from Emancipation that the light from the heat of the sun; the rights of the slave and the woman blend like the colors of a rainbow."[32]

Growing opportunities to publish in the nineteenth century provided the means by which these ideas could receive more detailed expression than in the

past, and this encouraged a broader public discussion of women's rights than ever before. Sarah Grimké's highly influential manifesto entitled *Letters on the Equality of the Sexes and the Equality of Woman* in 1838, explicitly comparing the exploitation of women with that of slaves, for example, received considerable attention.[33] This was followed several years later by Elisha Hurlbut's suggestive book *Essays on Human Rights.*[34] Some men joined in this endeavor of viewing women's rights within the larger context of human rights as well, including abolitionists like William Lloyd Garrison and Frederick Douglass in the United States and George Thompson in Britain who spread their views through publications like *The Liberator*, *The Genius for Universal Emancipation*, *Human Rights*, and *The Rights of All.*

It was in this setting that a major development in the evolution of women's rights occurred. During 1848, the same year that saw revolutions explode throughout the continent of Europe with all of their energies and possibilities, Elizabeth Cady Stanton and Lucretia Mott, among three other women, determined "to do and dare anything" by organizing the very first convention ever held on behalf of the rights of women.[35] They attracted nearly 300 participants who assembled in the Wesleyan Chapel at Seneca Falls, New York. Their discussions and resolutions expressed a variety of strongly held religious, secular, and political beliefs, as well as a determined impulse for reform, sometimes separately and sometimes woven together, into new statements about women's rights and the desire to secure "the equality of human rights." This is particularly evident in their famous Declaration of Sentiments where they began by modeling their language after the most revolutionary document in American history—the Declaration of Independence—and proclaiming:

> We hold these truths to be self-evident: that all men and women are created equal: that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed. Whenever any government becomes destructive of these ends, it is the right of those who suffer from it to refuse allegiance to it. . . . [W]hen a long train of abuses and usurpations, pursing invariably the same object evinces a design to reduce [those who suffer] under absolute despotism, it is their duty to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of the women under this government, and such is now the necessity which constrains them to demand the equal station to which they are now entitled.

The Declaration of Sentiments then transformed the eighteenth-century charges against the English monarch found in the Declaration of Independence into nineteenth-century charges against men and proceeded to describe the long record of abuse. "The history of mankind," it asserted, "is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her." To support this proposition, the document presented a lengthy list: Men prevented women from voting, from owning property, from earning wages, from being an equal partner in marriage, from having custody of children

in cases of divorce, from entering professions, from obtaining a thorough education ("all colleges being closed against her"), from being subject to the same moral code, and assigning a narrow "sphere of action" deliberately designed to destroy a woman's self-confidence, self-respect, and freedom. Because women, "one half of the people of this country," "feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights," the declaration continued, "we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States." This language was followed by a statement that left no doubt about the determination of the signatories: "In entering upon the great work before us, we anticipate no small amount of misconception, misrepresentation, and ridicule; but we shall use every instrumentality within our power to effect our object."[36]

As Stanton would write in her *History of Woman Suffrage*, press coverage of the Seneca Falls meeting and its resolutions and declaration far exceeded her greatest expectations. The entire proceedings were published in major newspapers, prompting considerable editorial opinion and subsequent letters to the editors. This widespread publicity and public discourse, and its accompanying growing women's consciousness, in turn, led to the emergence of a whole new social movement and political activism within the United States. The first National Women's Rights Convention took place in 1850, attracting more than 1,000 participants, and others followed annually for most of the decade, often deliberately held to coincide with state constitutional conventions. Many women worked to gain more control over their own bodies and reproduction, to change laws regarding property and child custodial rights that discriminated against them, to create more educational opportunities, and to free themselves from their assigned "spheres" and presumed "natural order" of the past. The new tone was reflected when Elizabeth Cady Stanton and Susan B. Anthony formed the American Equal Rights Association with its own newspaper entitled *The Revolution* and published with the motto: "Men, their rights and nothing more; women, their rights and nothing less!"[37]

Such developments and forceful declarations and statements from women in the United States contributed significantly to the struggle for women's rights in other countries as well. They provided examples and encouragement to other campaigners during the second half of the nineteenth century who, isolated from their own national contemporaries, eagerly reached out to like-minded activists across borders by exchanging letters, visiting each other and attending conventions, sharing ideas and tactics, and reading a common body of published writings about gender and equality. They thus often considered themselves as working for a universal cause. "This great movement is intended to meet the wants, not of America only," announced Paulina Wright Davis at a women's rights convention in 1853, "but of the whole world."[38]

This larger transnational movement and its sense of solidarity could be seen in many ways. One thinks of the newspaper *Frauen-Zeitung* (Women's Newspaper) published by the German activist Louise Otto, *The Subjugation of Women* written by John Stuart Mill and his wife Harriet Taylor in Britain,

the advocacy of equality between men and women by Mírzá Husayn 'Ali, or Bahá'u'lláh, when founding the Bahá'í faith, the writings of Tan Sitong in China, the remarkable essay by Toshiko Kishida in Japan titled "I Tell You My Fellow Sisters," and the journal *La Camelia* of Rosa Guerra that championed the cause of equality for women throughout Latin America and confidently asserted: "We are entering an era of liberty and there are no rights which exclude us!"[39] Utilizing the nineteenth century's new technological inventions of trains and steamships for transportation and the electric telegraph and penny postage stamp for communication, activists like Jenny d' Héricourt of France, Margaret Bright Lucas of Britain, Fredricka Bremer of Sweden, Stanton and Anthony of the United States, and Kate Sheppard of New Zealand, among others, achieved international stature as speakers, writers, and advocates of women's rights. Together they refused to let their differences divide them or to let the gains they had made in their own countries remain isolated from the rest of the world by deliberately sharing their visions and experiences with others, looking for helpful models for advocacy, and creating networks beyond their own borders. Moreover, to give explicit expression to the global nature of their cause, crusaders from fifty-three American organizations and from eight countries, including India, organized the first International Council of Women in 1888. Here the participants not only sought to take stock of the progress already made in removing women from their "slave status" and "domestic bondage" of the past in such areas as divorce laws, educational opportunities, and property ownership, but also to lay the foundation for the future and what Stanton called the strength and vitality of the "universal sisterhood" among those who advocated women's rights around the world.[40]

Among these various rights sought by women, particular attention focused on the political right to vote. This is understandable, for without the franchise, many women believed that they would never be free or empowered in a democratic society to directly influence the process and, therefore, the agenda of national politics.[41] American women looked initially toward the activities in Britain where they saw the appearance of Harriet Taylor's influential essay on the "Enfranchisement of Women" in 1851, the creation of the Women's Suffrage Committee in 1865, and later the National Union of Women's Suffrage Societies led by Millicent Garrett Fawcett. At home, they formed the National Woman Suffrage Association and the American Woman Suffrage Association in 1869, and then combined the two in 1890 with the creation of the National American Woman Suffrage Association (NAWSA). A determined voice was given to this effort with the publication of Elizabeth Cady Stanton's hard-hitting and widely discussed book, *Woman's Bible*.[42]

Resistance and opposition within the United States to the right to vote, however, remained fierce. Only gradually, only because of pressure from feminist organizations, and only in a few states in the West did this begin to change. Wyoming, Colorado, Utah, and Idaho were among the first to extend the franchise to women. But at the national level, the truly pioneering step was taken elsewhere. In 1893, after many years of unswerving work by Kate Sheppard and her colleagues, New Zealand became the first country in the world to extend to women the right to vote. Nevertheless, even by the

end of the nineteenth century, New Zealand stood alone. The dream of suffragettes within the United States, including Susan B. Anthony and Carrie Chapman Catt who took leadership roles in creating and contributing to the International Woman Suffrage Alliance with affiliates in many countries, of course, was to take this successful example from abroad and bring it home to America.

ECONOMIC AND SOCIAL RIGHTS

It was not at all uncommon in the nineteenth century to hear human rights activists speak excitedly about their reformist impulse and advances as "the progressive spirit of the age."[43] The reason can be found in the fact that during this particular period three great reform movements emerged in American history: ending the slave trade and abolishing slavery, campaigning for women's rights, and promoting economic and social rights for those most seriously exploited. At times, efforts in all three aspects of human rights came together and became intertwined. Activists like William Lloyd Garrison, Frederick Douglass, Franklin Sanborn, Elizabeth Cady Stanton, Susan B. Anthony, and Sojourner Truth, among others, came to see each of them as different threads of a seamless tapestry and different facets of the same common problem created by those with power and prejudice who denied the basic human rights of others. They thus often drew upon their experiences in the abolitionist movement, comparing the status and situation of women with that of black slaves and arguing that men and women workers and their families were the exploited victims of "wage slavery."

Wendell Phillips, the famous and outspoken public orator, certainly personified this interconnectedness and indivisibility of human rights. He labored tirelessly in the abolitionist campaign and in the effort to adopt the Thirteenth Amendment eliminating slavery, the Fourteenth Amendment providing equal protection under the law, and the Fifteenth Amendment giving black and former slave males the right to vote. He then worked in support of women's suffrage and against laws of gender discrimination. All of these experiences to advance political and civil rights, in turn, then led him to advocate economic and social justice. He was one of the very first Americans to call for an eight-hour workday and for an investigation of inhumane factory conditions. "I am fully convinced," he declared in one well-known speech against the concentration of wealth, "that hitherto legislation has leaned too much—leaned most unfairly—to the side of capital. . . . The law should do all it can to give the masses more leisure, a more complete education, better opportunities and a fair share of the profits."[44]

Phillips and his fellow activists and labor organizers, of course, did not operate in a vacuum. They often looked abroad for ideas and strategies. No industrialized country in the world depended so heavily upon immigrants for its manufacturing labor force as did the United States. These workers came with painful personal experiences of poverty and hardship overseas, and brought their hurt and their anger with them. This applied with particular reference to those from Europe where class divisions were severe, where most of the immigrants to America had been born, where the radical political

movement among workers in England known as Chartism championed the plight of the working and unemployed poor, and where so many of the benefits and so many of the tragedies of the Industrial Revolution first became dramatically apparent. There, booming factories, textile mills, and mines brought not only a vast accumulation of wealth to a very few, but the emergence of a vast urban proletariat of working men, women, and children who suffered in wretched squalor, thick smoke and soot, disease-infested water, overcrowded slums, misery, and working conditions of oppression without any prospect of relief. The exploitation of these workers and the accompanying starvation, destitution, crime, prostitution, acute illness, and family dislocations became so tragic, in fact, that it simply could not be hidden. Personal observations, government inquiries, exposés, books like *The Condition of the Working Class in England* by Friedrich Engels and *A Voice from the Factory* by Caroline Norton, provocative commentaries from Karl Marx written for American newspapers, and the dramatizations of such widely read and translated novelists like Honoré de Balzac in *Les Paysans* or Charles Dickens in *Bleak House* and *Hard Times* all contributed to a growing public consciousness of the brutal and widespread extent of human suffering.

In America and throughout the industrializing world, such obvious and severe misery among the working class ignited new and profoundly serious questions about the very meaning of human rights. What good were the political rights of voting and holding office or the civil rights of freedom of speech and religion, asked those who suffered, to people like themselves who had no food to put on the table, no shelter to protect their families, no clothing, no medical care, or no prospect at all for themselves or their children to obtain a formal education? What were the benefits of freedom if the result was destitution? Were Karl Marx and Friedrich Engels correct when they wrote in *The Communist Manifesto* that liberal conceptions of political and civil rights, which sought to protect individuals by limiting the power of the state, were no more than narrow, "bourgeois rights" of the ruling classes? Did this mean that all the declarations and expressions of human rights up to this point in history merely represented the abstract ideas of philosophers, the flowery language of parchment prose, or the empty platitudes of politicians?

With these kinds of questions very much in their minds, many of the have-nots of the working class and their leaders increasingly began to speak out about the necessity of going beyond the "negative rights" or "freedom from" rights to be protected from unwarranted government interference. Given the circumstances of the time, they now forcefully advocated the "positive rights" or "freedom to" rights to receive help and secure assistance in areas such as minimum wage, health care, safe working conditions, and educational opportunities. This marked a significant development in the evolution of human rights, for it extended the meaning of rights beyond the first generation of political and civil rights by moving into the second generation known as economic and social rights.

Americans certainly played an important role and made a contribution to this evolution. In doing so, however, they often found themselves in a difficult dilemma. When they saw the enactment in Europe of laws designed to help the plight of the exploited poor such as those that regulated child labor,

the most egregious working conditions, sanitation, minimum standards for food, and compulsory education, many wanted to bring these examples home to America. At the same time, most had no desire whatsoever of bringing home the European examples of factory sabotage, violent uprisings, or especially the massive revolutionary convulsions that exploded during 1830, 1848, and 1870. Efforts to secure economic and social justice in America would always be plagued by fears that violence and revolution would occur and by charges that in a country of laissez-faire capitalism any action on the part of government that interfered with individualism and the forces of the market were "un-American" and could only lead to the dangers of a welfare state, socialism, or, worse, communism and "class warfare."[45]

In order to protect themselves from exploitation, low wages, dangerous working conditions, and an erratic economy subject to the frequent onset of depressions, a number of workers lashed out against an economic and social order that robbed them of their humanity. They began to participate in petition drives, demonstrations, protests, and strikes. At first, these took place in neighborhoods or in particular factories. Through time, however, workers began to become more conscious of the need to combine and coordinate their collective efforts and therefore founded local unions or national organizations like the Knights of Labor in 1869 and the American Federation of Labor in 1886. Under the leadership of Samuel Gompers, the latter gained a membership of nearly 1 million by the turn of the century. Their efforts often remained peaceful, but not always. Indeed, sometimes they turned bloody. In 1877, for example, railroad workers staged the first and most violent nationwide industrial strike of the nineteenth century that resulted in over 100 deaths. Further violence occurred during the 1886 Haymarket Riot in Chicago, the 1892 Homestead Strike in the steel mills near Pittsburgh, and the 1894 Pullman Strike in the railroad yards of Chicago.

These extreme and polarizing events did not always generate sympathy. In fact, they often provoked fear among those terrified that violence might spread. They also generated countervailing power in the form of opposition strikebreakers, private security forces hired by factory owners, and the deployment of federal troops. In addition, and despite the language of economic and social rights, it was well known that many of the organized unions rarely welcomed women, blacks, non-white immigrants, or Native Americans into their ranks. For all of these reasons, a number of Americans determined that violence would only beget more violence and therefore determined that they could best advance economic and social rights by turning instead to the path of reform. Indeed, the second half of the nineteenth century in America was marked by an unprecedented reforming impulse to help address the claims and the needs of the exploited poor victimized by the forces of seemingly unrestrained capitalism, industrialization, and urbanization as well as to counter the proponents of Social Darwinism who argued that mass fortunes accumulated by a few were beneficial since they encouraged competition and thereby helped to weed out the weak and unfit.[46]

Many of the reformers were motivated not so much by their fear of violence and the extremes, but by their sense of justice and their faith in the capacity of human beings to affect peaceful change and by their strong

religious beliefs. Henry George's highly influential 1879 book titled *Progress and Poverty* contributed much to this approach. By insisting that the "unalienable rights" of the Declaration of Independence would remain empty phrases so long as the right of laborers to the product of their labor was denied, he importantly argued that economic and social rights should be at the same level as political and civil rights in the American tradition.[47] At the same time he observed that wherever the highest degree of "material progress" had been realized, "we find the deepest poverty" with its resultant human costs and loss of Christian values.[48] As a consequence, he encouraged his readers to not fall victim to cynicism or inaction but instead to put their beliefs into action by seizing the energy of reform.

Others gave expression to the same impulses. Protestants found their consciences stirred by innumerable sermons and by one of the best-selling novels of the century, *In His Steps*, written by Charles Sheldon, who asked his readers to ask one simple question: "What would Jesus do?"[49] The answer, he believed, would lead them to become actively involved in alleviating the sufferings of the poor and the exploited. At the same time, Catholics found inspiration in the remarkable 1891 encyclical known as *Rerum Novarum* (Of New Things) issued by Pope Leo XIII, explicitly addressing what he described as "the natural rights of mankind." Here he warned that "the first concern of all is to save the poor workers from the cruelty of grasping speculators, who use human beings as mere instrument for making money. It is neither justice nor humanity so to grind men down with excessive labor as to stupefy their minds and wear out their bodies." For this reason, he declared, human rights

> must be religiously respected wherever they are found; and it is the duty of the public authority to prevent and punish injury, and to protect each one in the possession of his own. Still, when there is question of protecting the rights of individuals, the poor and helpless have a claim to special consideration. Their richer population have many ways of protecting themselves . . . [But] wage-earners, who are, undoubtedly, among the weak and necessitous, should be specially cared for and protected by the commonwealth.[50]

The sense of responsibility to assist those unable to care for themselves that motivated such thoughts as these increasingly came to be known as the Social Gospel. Its message, especially when coupled with emotions aroused by visual images made possible by the recent invention of photography, inspired many to adopt the path of reform. Scenes of impoverishment in slums and despair in the haunting eyes of those in destitution as starkly revealed by Jacob Riis in his 1890 collection *How the Other Half Lives*, inspired many of the upper- and middle-class women who began to create a wide variety of religiously oriented charitable organizations and movements. The largest women's organization in the country, the Women's Christian Temperance Union, under the leadership of Francis Willard, for example, worked in a variety of ways to address issues of poverty, unemployment, alcohol abuse, dangerous labor conditions, and the plight of workers, especially women and children. Its members often worked with unions and other sympathetic supporters to

campaign for particular candidates for public office, to develop building codes for tenements, to actively lobby to abolish child labor and secure a national labor contract law, and to successfully work for the passage of legislation to institute a Department of Labor as a part of the executive branch of the federal government. On other fronts, reforming women activists launched the settlement house movement in the 1890s, seeking to apply their sense of Christian responsibility to the needs of the suffering, working-class poor. These included Jane Addams who founded Hull House in Chicago, Vida Scudder with Denison House in Boston, and Lillian Ward with her house on New York's Lower East Side. They and the growing number of their counterparts elsewhere provided shelter, food, day nurseries, kindergartens, and classes on cooking, health care, and the English language in order to assist newly arrived immigrant families, thereby making a number of incremental and very practical contributions toward economic and social rights.[51]

EFFORTS FOR HUMAN RIGHTS ON A VARIETY OF FRONTS, 1900–1920

The turn of the twentieth century brought not only a sense of anticipation for the possibilities that might exist for advancing human rights, but a greater awareness of the international dimensions and scope of the process. That is, with advent of such technological innovations as wireless telegraph, steamships, railroads, and the exciting new invention of aircraft, previous notions about distance, geographical barriers, and national boundaries began to undergo a dramatic transformation as people and places once regarded as far removed became closer than ever before. Observers thus began to speak of "world politics," "global affairs," and the truly "international" aspects of their concerns.[52] This could be seen in many ways, not the least of which was the announcement of the nongovernmental organization known as the Ligue des Droits de l'Homme in its first publication in 1901 that it would promote human rights not just to those in France but "to all humanity."[53] For advocates of human rights in the United States, such a global perspective meant that the possibilities for making contributions to the rights of others in the world might increase dramatically, as would the possibilities for learning from others abroad and bringing some their ideas home to America.

Those who campaigned on behalf of women's rights within the United States, for example, often looked abroad for their inspiration. They observed with great interest the efforts of feminist leaders like Qiu Jin in China, Hideko Fukuda in Japan, Concepción in the Philippines, and Emmeline Pankhurst in Britain with her organization of the Women's Social and Political Union and their slogan of "Deeds, Not Words!," among others, willing to confront centuries of tradition.[54] They greatly admired New Zealand for becoming the first country in the world to grant women the right to vote, and then excitedly watched as Australia, Finland, and Norway followed suit. During the course of World War I from 1914–1918 they further witnessed the extension of franchise to women, sometimes with certain restrictions, in

Denmark, Canada, Austria, Estonia, Germany, Hungary, Latvia, Lithuania, Poland, Russia, Britain, and Ireland. Belarus, Belgium, Luxembourg, the Netherlands, and Sweden followed shortly thereafter, as did Albania, Czechoslovakia, and Iceland.[55]

American women and their male supporters looked with both admiration and envy at these international developments beyond their own borders. They frequently compared the successes overseas with their own lack of progress at home, noting that even the much-heralded Fourteenth Amendment on equal protection did not seem to apply to them. In 1916 a landmark was reached with the election of Jeannette Rankin from Montana as the first female ever elected to the U.S. Congress, but resistance remained strong. The continued frustration and anger over the lack of a national franchise led to the formation of the militant National Women's Party founded by Alice Paul and Lucy Burns willing to hold protest demonstrations outside the White House, to be arrested, and to serve prison time with forced feedings, all while shouting their rallying cry: "How Long Must Women Wait For Liberty?"[56] Their actions, when combined with those of many others, the desire to acknowledge the significant contributions of women to the war effort, and the interest to appear more democratic before the eyes of the world, finally resulted in the passage of the Nineteenth Amendment to the U.S. Constitution in 1920. This gave women the right to vote, thereby enfranchising 26 million females of voting age within America for the very first time. Interestingly enough in terms of the relationship between human rights at home and human rights abroad, the National American Woman Suffrage Association used its remaining funds after the passage of this amendment to aid suffrage organizations in other countries.[57]

Advances in women's rights were paralleled, if not exceeded, in the area of economic and social rights. The growing number of problems associated with rapid industrialization and urbanization spawned a growing concern for social justice and led to the development of the first nationwide reform movement of the modern era: Progressivism. This movement—or, more accurately, movements—took many forms, but all were designed to alleviate the suffering of the poor and the exploited. A number of activists drew upon their anger and moral indignation over the dangers of untrammeled capitalism and political corruption exposed in books like Robert Hunter's *Poverty*, Lincoln Steffens's *The Shame of the Cities*, and David Graham Phillips's *The Treason of the Senate*; in novels like Frank Norris's *The Octopus* and Upton Sinclair's *The Jungle*; and in the troubling and provocative photographs of Lewis Hine revealing exhausted children exploited in factories and mines. Others were motivated to take action by their religious beliefs, the momentum of the Social Gospel, and the message from highly influential books like *Christianity and the Social Crisis* in 1907 and *Christianity and the Social Order* in 1912 written by Walter Rauschenbush, a young minister from the Hell's Kitchen area of New York City. Still others found themselves inspired by the successful examples of advancing economic and social rights in the industrialized nations of Western Europe who were leading the way in passing legislation providing for old-age pensions and health and unemployment insurance, and wanted to bring these benefits home to America as well.

These and other motives worked in combination to move Progressives to take action in a number of different areas. Some labored to create organizations that would meet the needs of working women, such the International Ladies Garment Workers Union (ILGWU) founded in 1900 and the Women's Trade Union League in 1903. Other activists focused their efforts on the plight of exploited children and formed the National Child Labor Committee that successfully lobbied to enact legislation that regulated child labor by restricting the hours of work and establishing safer working conditions, governing compulsory education, and creating the Children's Bureau within the Department of Labor. Many reformers worked at the local, state, and national levels to establish better public housing and health care, create more educational opportunities for the disadvantaged, and institute unemployment insurance and workers' compensation. In addition, they helped to enact progressive tax and municipal reform and regulations to govern some of the most egregious and exploitative excesses of the largest corporations and railroads, banks, food processors, and drug manufacturers in ways that dramatically impacted American society.

The experience of World War I greatly affected efforts to advance economic and social rights, both by denying them in the name of wartime exigency and by enhancing them in the name of buttressing the "home front." The most innovative development, however, and the one in which America assumed the leadership position and made the most significant contribution, occurred in the area of humanitarian relief. No war in history up to this point had ever produced such staggering levels of civilian deaths, refugees pouring across borders, and human suffering caused by armed combat and naval blockades. The extent of the wounded, the starving, the homeless, the sick, and the dislocated and destitute simply overwhelmed the capacities of every existing private charity or relief organization. Moreover, no government fighting for its own survival during wartime possessed the resources to adequately deal with its own victims, let alone those of other countries.

Rather than falling victim to either apathy or despair over this catastrophe, a number of Americans determined to step into this breach and offer assistance to those abroad who they regarded as having a human right to life, food, and care. Under the direction of Herbert Hoover, a businessman of Quaker background, they created the innovative Commission for Relief in Belgium. This body engaged in the monumental task of coordinating the work of 5,000 separate volunteer committees in raising funds, cajoling national governments, fighting bureaucrats, collecting food and necessities from around the world, getting supplies through war zones and across belligerent frontiers, and then distributing them to those in desperate need. During the course of the war they distributed an estimated 5 million tons of food and expended $1 billion in loans and private donations. Nearly 4 million signatures appeared on letters and scrolls sent directly to Hoover from grateful recipients of this relief.[58] In the end, this effort not only saved the lives of several million people but contributed heavily to the development of a mechanism for the administration of international humanitarian relief and to a sense of responsibility to the human rights of those who suffer, irrespective of national borders.

Other efforts to advance human rights in the early twentieth century focused upon a particularly difficult problem for America: race. Although slavery had ended after the Civil War, racism and racial prejudice most certainly did not. In fact, the language about race intensified with widely repeated expressions about "superior whites," the "backward colored races," "inferior blacks," "savage reds," "ignorant browns," the "yellow peril," "racial purity," and possible "racial wars."[59] Always alert to the international aspects of this problem, and to the interconnectedness of America and the broader world, the talented intellectual and activist W.E.B. Du Bois issued his much-quoted prediction during the first Pan-African Congress in 1900 that "the problem of the twentieth century [will be] the problem of the color line—the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea."[60] Horrified by the continuing practices of lynching and segregation, angry over the fact that racial minorities often found themselves excluded from many of the benefits of Progressivism, and frustrated over the lack of any progress toward racial equality, Du Bois joined with other activists like Mary White Ovington and Ida Wells-Barnett in 1909 to organize one of the most influential human rights NGOs within the United States, the National Association for the Advancement of Colored People (NAACP). On the occasion of its formation, Du Bois loudly and forcefully declared:

> We will not be satisfied to take one jot or tittle less than our full manhood rights. We claim for ourselves every single right that belongs to a freeborn American, political, civil, and social, and until we get these rights we will never cease to protest and assail the ears of America . . . It is a fight for ideals, lest this, our common fatherland, false to its founding, become in truth the land of the thief and the home of the slave—a byword and a hissing among the nations for its sounding pretensions and pitiful accomplishment.[61]

During World War I, Du Bois and many others in the NAACP were willing to "close ranks" for the sake of military victory. They hoped that their contributions for the war effort would be rewarded and desperately wanted to believe President Woodrow Wilson when he proclaimed that America "puts human rights above all other rights" and that it was fighting for liberty, self-determination, and equality in order "to make the world safe for democracy."[62] But their hopes proved to be short-lived. When Wilson represented the United States at the Paris Peace Conference in 1919, they watched in astonishment and anger as he supported self-determination, democracy, and the protection of minorities in the treaties for Europe—but not among blacks or indigenous peoples in colonial possessions or in America. Indeed, he personally and publicly rejected the principle of racial equality as it was proposed for the Covenant of the League of Nations, even though a majority of other delegates supported it.[63] After all of the sacrifices and the contributions of black soldiers during the war, Du Bois felt overwhelmingly betrayed. "We stand again to look America squarely in the face," he thundered. "We *return*. We *return from fighting*. We *return fighting*. Make way for Democracy! We saved it in France, and by the Great Jehovah, we will save it in the U.S.A. or know the reason why!"[64]

Such determined and forceful statements gave encouragement to those who campaigned on behalf of human rights in America, but among others they provoked strong reactions in the opposite direction. The white-hooded and racist Ku Klux Klan, for example, increased in membership and vowed that they would never allow these demands for racial equality to ever be realized. The summer of 1919 thus saw a whole series of lynchings, cross burnings, floggings, and personal attacks, some of which occurred against blacks in military uniform. These, in turn, provoked violent race riots in Chicago, Knoxville, Omaha, and even the capital of Washington, D.C., among other cities, necessitating the use of police, troops from the Army, and members of the National Guard to quell what some described as nothing short of a "race war."[65] All this, writes the leading historian of race relations in America John Hope Franklin, "ushered in the greatest period of interracial strife the nation had ever witnessed." Moreover, he tellingly observes, the racial violence was not confined to any particular section of the country, but occurred in the North, South, East, and West—"wherever whites and blacks undertook the task of living together."[66]

America not only failed to address the issue of race in human rights at the end of the war, it also refused to participate in the development of what would eventually become international criminal law. In preparation for what they hoped would be a period of peace and the rule of law, for example, a special Commission on the Responsibilities of the Authors of the War and Enforcement of Penalties composed of fifteen distinguished international lawyers from ten different countries issued their final report. Here they declared that

> there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to heads of states. . . . If the immunity of a sovereign is claimed . . . it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind.[67]

Their recommendation that an international criminal tribunal be created for this purpose, however, proved to be too radical for some. The United States, in particular, firmly resisted establishing any such tribunal or holding individual leaders personally responsible for their actions as setting a dangerous precedent that would inflict irreparable damage to their national sovereignty. Secretary of State Robert Lansing, in fact, issued a formal dissent and announced that he had no intention at all of ever bringing this matter of human rights home to America. "The essence of sovereignty," he declared in blunt and revealing language, "is the absence of responsibility."[68]

CONTINUING THE MIXED LEGACY BETWEEN TWO WARS AND BEYOND

As America attempted to move beyond the experience of World War I and enter the period of what it hoped would be peace, there were signs of

both hope and despair for human rights. Some advances during the first two decades of the twentieth century had marked major turning points in the history of the United States and would benefit generations to come, and many activists vowed that they would use these new years of peace to continue their efforts on behalf of human rights. On the other hand, the energy and sense of progress on behalf of human rights in certain areas had been weakened by the war. The desire to stimulate patriotic unity during wartime, for example, greatly exacerbated the desire to stamp out dissent or any other activities deemed to be "un-American" by creating such legislation as the 1917 Alien Act and the notorious 1918 Sedition Act which effectively suspended any number of provisions in the Bill of Rights in their abuse of civil rights. It was not known whether these would continue after the conclusion of the war or not. Moreover, continuing postwar political and economic turmoil at home and abroad generated fear, distrust, confusion, and even further intolerance. Many Americans turned against blacks, Catholics, foreigners, Bolsheviks, and others whom they regarded as radicals, as evident in the 1920s by the growth of super-patriotic societies and the Ku Klux Klan, raids against presumed communists, highly restrictive immigration laws specifically designed to bar Asians, and the highly publicized Sacco and Vanzetti case involving the trial and execution of two Italian anarchists.

The international criticism resulting from these events and developments, of course, was widely resented by many Americans who regarded it as outside interference into their own domestic affairs. As such, it once again raised the difficult issue of the relationship between human rights at home and human rights abroad. Should human rights within the United States be influenced by or tied in any way to efforts, institutions, or standards initiated and developed overseas or not? Many activists within America answered in the affirmative, wanting to engage in transnational networks and to participate in external international organizations in such a way as to frame the broader discussion about human rights, share ideas and methods of advocacy, encourage activism, and thereby bring home concrete changes.[69] But during the interwar years they represented a distinct minority.

The United States during this period by and large retreated into isolationism and turned its back on transnational and international efforts to advance human rights. This was seen in a number of areas, but made particularly dramatic in the case of the League of Nations. Although the creation of this international organization had been championed by Woodrow Wilson, America refused to join in membership. As a consequence, it not only removed itself from many of the highly innovative and creative efforts of the League to protect human rights, but at times actually worked to oppose them. These included standards and mechanisms designed to protect the rights of labor, religious and ethnic minorities, indigenous peoples, women and children, refugees, and prisoners, as well as developing minimum standards of health care and creating the Permanent Court of International Justice.[70] The speeches in the U.S. Congress revealed instead an intense determination to reject participation in such developments. Senator James Reed of Missouri, for example, gave voice in unmistakable and uncompromising language to what he regarded as the most serious problem: "Think of submitting questions

involving the very life of the United States to a tribunal on which a nigger from Liberia, a nigger from Honduras, a nigger from India . . . each have votes equal to that of the great United States."[71] His colleague Henry Cabot Lodge, who led the fight for isolationism, declared bluntly, "We do not want a narrow alley of escape from jurisdiction of the League. We want to prevent any jurisdiction whatever."[72]

Only when disaster struck were the majority of Americans seriously willing to take a new look at matters of human rights again. The outbreak of the Great Depression in 1929 plunged the country and then much of the industrialized world into a catastrophe of monumental proportions. Economic collapse and its attendant factory closures, bank failures, foreclosures, evictions and homelessness, unemployment, starvation, hardship, and dislocation all led to an acute focus on economic and social rights. A number of radicals turned to communism and sought solutions through violence and revolution in class struggle or to socialism and the intense organization of discontented workers and calls for general strikes and militant action. But most Americans were more moderate and turned instead to religious and charitable organizations, established labor unions, and now especially significant, to government as the most important means of securing rights to some basic level of food, housing, employment, and medical care, among other necessities for life.

In this regard, the election of Franklin Roosevelt to the presidency in 1932 signaled the beginning of a dramatic transformation of the role of the federal government in American history. Roosevelt, administration members like Francis Perkins who had been deeply involved with the settlement house movement and became the first woman ever appointed to a cabinet post, advisors like Harry Hopkins who had been a social worker, and Roosevelt's wife Eleanor who was outspoken on the rights of women, racial minorities, and the poor (and who would go on to join the Board of Directors of the NAACP and to play a critical role in the creation of the Universal Declaration of Human Rights) launched what was called the New Deal. The first phase sought to address the immediate problems of recovery from the Depression and relief for the poor and the unemployed, as indicated by the creation of the Federal Emergency Relief Administration (FERA) to appropriate grants to cities and states, the Civilian Conservation Corps (CCC) and the Public Works Administration (PWA) to provide employment and stimulate business activity, among a number of other new programs. The second phase attempted to address larger issues of social reform and social justice, as evident with the landmark Social Security Act of 1935 establishing unemployment compensation and old-age and survivor's insurance, aid to dependent children, and assistance for the care of the crippled and the blind. This was followed by the National Labor Relations Act (frequently described as "labor's bill of rights")[73] of the same year recognizing labor's right to organize and bargain collectively, the National Housing Act of 1937 authorizing low-rent public housing projects for the poor, and the Fair Labor Standards Act of 1938 establishing a minimum wage and a maximum workweek.

At exactly the same time that these developments during the course of the Depression helped to focus the attention of Americans on human rights at home, a growing number of ominous international events increasingly

directed their sight to human rights abroad. The seizing of power by Benito Mussolini in Italy, Adolf Hitler in Germany, Joseph Stalin in Russia, Francisco Franco in Spain, and military leaders in Japan all brought about dictatorships willing to seriously abuse human rights. These abuses occurred first against their own people, and then, in many cases, against others, as tragically evident with the Italian war against Ethiopia in 1935–1936, the Japanese attacks against innocent civilians in China and the notoriously brutal Rape of Nanjing in 1937, and Hitler's invasion of Poland and the deliberate launching of World War II in 1939. As such, these developments increasingly suggested to a growing number of observers an extremely important insight about the interconnectedness of human rights in the world: that is, that nations who abuse the human rights of their own people at home are much more likely to abuse the human rights of others abroad and thereby be a threat to global peace and security.

A clear indication of precisely this point about the connection between the domestic and the international dimensions of human rights was revealed in Roosevelt's annual message to Congress in January 1941. It was at this time that he delivered his famous "Four Freedoms" speech asserting that he and America ought to seek the freedom of speech and expression, the freedom of worship, the freedom from want, and the freedom from fear not only at home but "everywhere in the world." "Freedom," he declared, "means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights or keep them."[74] As the war expanded and escalated, Roosevelt believed that it was important to say even more about this theme of human rights, even though the United States was technically still a nonbelligerent. He wanted to delineate a sharp contrast between the democracies and their adversaries, to declare a purpose for allied endeavors, and to provide principles around which people could rally. Toward this end, he organized a meeting with British Prime Minister Winston Churchill in August 1941. The result was the Atlantic Charter, a declaration boldly asserting their commitment to seek a broad system of peace and security in the world by supporting, among other objectives, "the right of all peoples to choose the form of government under which they will live," the right to have "improved labor standards, economic advancement, and social security" in all nations, and the right of all people to "live out their lives in freedom from want and fear."[75]

The words of this declaration about human rights provided immediately inspiration to others across the globe (one of whom was a young black lawyer in South Africa by the name of Nelson Mandela), but they assumed even greater importance when, a few months later in December, the United States was attacked by the Japanese at Pearl Harbor and then entered the war as a formal belligerent. On January 1, 1942, it joined with twenty-five other nations (the number eventually became forty-six) in signing the Declaration by United Nations, pledging to devote their full resources to the war effort, to refrain from negotiating any separate armistices or peace agreements with their enemies, and to adhere to the principles of human rights enunciated in the Atlantic Charter. Here they promised to engage in the "common struggle against savage and brutal forces seeking to subjugate the world" and

to secure "decent life, liberty, independence, and religious freedom" for all people. Moreover, and of particular importance in recognizing the connection between human rights at home and human rights abroad, they solemnly pledged themselves "to preserve human rights and justice in their own lands as well as in other lands."[76]

What the United States, its allies, and other countries would actually do to fulfill these promises about human rights, of course, was unknown. Their immediate task was to mobilize a coalition and successfully fight and win a war. In this lengthy, complicated, arduous, and at times brutal process, massive violations of human rights would occur and no country or side would be immune from conducting abuses. While declaring its commitment to human rights at home and abroad and while finding many in the world looking to it for leadership, for example, America nevertheless would imprison citizens of Japanese descent in internment camps, do nothing to stop lynching or eliminate racial segregation in its own society and armed forces, refuse to admit many Jewish refugees seeking shelter to its shores, insist on exercising its own prerogatives and national sovereignty in negotiations over postwar policy, and, in the end and like its adversaries, would deliberately attack and kill large concentrations of innocent civilians.

But in 1942 when the Declaration by United Nations with its language of human rights was first signed, the war that would be called "The People's War" was just beginning for America.[77] Neither its leaders nor its people—nor the world—knew precisely what lay ahead or that they stood poised on the very threshold of what would soon become a veritable revolution in human rights. So many abuses would be inflicted, so many human lives would be taken in combat and in the genocide known as the Holocaust, so much effort would be expended, and so many promises about human rights would be made during the course of the war that it was highly unlikely that people would ever go back to where the status of human rights had been prior to the outbreak of hostilities. In addition, the experience of the war often exposed the hypocrisy of the democracies, especially the United States, whose claims about honoring human rights did not always ring true, and thus forced serious self-reflection upon the nation. How could the country oppose the racism of the Nazis and the fascists, asked Gunnar Myrdal again and again as he compared America at home with America abroad for his monumental wartime study titled *An American Dilemma: The Negro Problem and Modern Democracy*, and yet support racist policies so vociferously at home?[78] "The defense of democracy against the forces that threaten it from without," acknowledged Wendell Wilkie, the titular head of the Republican Party, in a remarkably revealing wartime message,

> has made some of its failures to function at home glaringly apparent. Our very proclamations of what we are fighting for have rendered our own inequities self-evident. When we talk of freedom and opportunity for all nations the mocking paradoxes in our own society become so clear they can no longer be ignored.[79]

For all of these reasons, many individuals, NGOs, civic and religious organizations, groups of scholars, and public officials at home and abroad

began to create what one observer described as a "vast movement of public opinion" that "spread and impressed the idea that the protection of human rights should be part of the war aims of the Allied Powers" and that once the war was over, "the future peace would not be complete if it would not consecrate the principle of international protection of human rights in all States and if it would not guarantee this protection in an effective manner."[80]

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The role that America, with all of the power and all of the prosperity that it possessed during and after the war, would play in this new and unfolding human rights revolution that would continue in the twentieth and twenty-first centuries was very much in question. This is not at all surprising. For those who had taken the time to examine American history up to this point through the lens of human rights, they would have seen a country whose practice did not always match its rhetoric and whose record was extremely mixed. There were times when the United States did serve as a leader, a powerful voice, and a significant contributor to human rights both at home and abroad. There were other times when it borrowed ideas and examples of human rights advances in other countries and sought to bring them home and apply them within the United States. There also were times when America was an ambivalent or even reluctant participant in human rights, begrudgingly signing agreements with reservations and derogation clauses or holding other countries to standards that it refused to apply to itself. Finally, there were times when America revealed itself as a determined opponent of human rights, rejecting both its own founding principles and newly emerging international norms and mechanisms. This mixed legacy of the past would be continued by America as it approached human rights at home and human rights abroad in the future that lay ahead.

NOTES

1. John Winthrop, "A Model of Christian Charity," (1630), in Alan Heimert and Andrew Delbanco (eds.), *The Puritans in America: A Narrative Anthology* (Cambridge, MA: Harvard University Press, 1985), p. 91, and based upon the biblical text of Matthew 5:14–15.

2. Alfred Beveridge, "The March of the Flag," speech of September 16, 1898, in Alfred Beveridge, *The Meaning of the Times, and Other Speeches* (Indianapolis: Bobbs-Merrill, 1908), pp. 47–57.

3. For more discussion of these broader developments, see Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 2003); and Micheline Ishay, *The History of Human Rights* (Berkeley: University of California Press, 2004).

4. See Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005).

5. For broad and stimulating discussions, see Michael Zuckert, *Natural Rights and the New Republicanism* (Princeton: Princeton University Press, 1994); Samuel H. Beer, *To Make a Nation* (Cambridge, MA: Harvard University Press, 1993); Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England*

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CHAPTER 2

FDR's Four Freedoms and Wartime Transformations in America's Discourse of Rights

Elizabeth Borgwardt

This chapter highlights 1940s-era transformations in the American discourse of rights. It seeks to complement the important contributions of Paul Gordon Lauren and Carol Anderson in particular by engaging in a discussion of 1930s antecedents. Major themes in this discussion include the international nature of rights talk in the 1940s; the importance of studying a "thin" or globalizing politics as well as offering localized, "thick" descriptions; the importance of nuance and qualification in the various definitions of "human rights" and "fundamental freedoms" to include voices advocating group rights or rights combined with duties; and finally, the use of rights talk as a vehicle for advocating decolonization in the 1940s and injecting an explicitly moral calculus into geopolitics.

Historical perspectives on human rights politics contribute to a larger, ongoing dialogue with activists, lawyers, sociologists, and political scientists. As the historian of ideas Kenneth Cmiel has reminded us, "historians of human rights can do much to further our understanding of global political discourse by not taking the term for granted, by carefully attending to its different uses, and by locating those uses in local, political contexts."[1] Such a deeply contextualized approach in turn anchors broader discussions of what we might learn from particular transformative moments in the past. This kind of expansive analysis helps us interrogate overly facile deployments of historical "lessons" even as it offers affirmative examples of a more capacious definition of the national interest—an approach that would define American values as incorporating ideas about human rights, however imperfectly realized in practice.

ROCKWELL VERSUS ROOSEVELT

Norman Rockwell was feeling rejected. Early in 1942, the well-known American illustrator was interested in making an artistic contribution to the Allied war effort. He hoped to go beyond the sentimental content of his World War I propaganda posters, with their images of well-scrubbed soldiers singing around the campfire. Rockwell hoped to paint something inspirational, ideally with an uplifting ideological message. "I wanted to do something bigger than a war poster," he later explained, in order to "make some statement about what the country was fighting for." Accordingly, Rockwell thought he might illustrate the principles of the August 1941 Atlantic Charter, a short Anglo-American statement of war and peace aims, "thinking that maybe it contained the idea I was looking for."[2]

But how to paint the ideas about self-determination, free trade, disarmament, and collective security articulated in the eight-point Roosevelt-Churchill Atlantic Charter? Rockwell eventually gave up. He noted in his autobiography that, not only could he not *paint* the war and peace aims itemized in the Atlantic Charter; the 376-word document was so boring that he couldn't even bring himself to *read* it. "I hadn't been able to get beyond the first paragraph," he confessed. The artist then decided that although the ideas in the proclamation were doubtlessly very noble, he, Rockwell, was "not noble enough" to paint them. He concluded, matter-of-factly, "Besides, nobody I know was reading the [Atlantic Charter] proclamation either, despite all the fanfare and hullabaloo about it in the press and on the radio."

Nor were the Office of War Information officials whom Rockwell solicited particularly interested in employing the forty-eight-year-old illustrator, anyway. They were seeking someone younger and edgier for a 1942 war bond campaign. They insulted the notoriously thin-skinned artist by suggesting that his realistic style might better lend itself to illustrating a calisthenics manual.[3]

So what was a patriotic and publicity-hungry artist to do? Instead of illustrating an abstract international agreement, Rockwell went on to paint his famously homespun interpretation of a related initiative describing war and peace aims: a depiction of each of Roosevelt's "Four Freedoms"—freedom of speech and religion; and freedom from fear and want—a list drawn from FDR's State of the Union address of January 1941.

Robert Westbrook's recent essay on Rockwell's contribution to the war effort favorably contrasts the illustrator's "salt-of-the-earth" rendition of the Four Freedoms, featuring scenes from the daily lives of the artist's Vermont neighbors, with the "brainy" and "dense" presentation of the Four Freedoms offered by the Roosevelt administration in a 1942 Office of War Information pamphlet. As Rockwell himself put it, "I'll express the ideas in simple, everyday scenes . . . Take them out of the noble language of the [Four Freedoms] proclamation and put them in terms everybody can understand."[4]

Rockwell took the "thin" and universalist terms of the language from Roosevelt's Four Freedoms speech and "thickened" them by using a local, culturally specific idiom. Political theorist Benedict Anderson famously observed that it is easier to motivate citizens to fight and die for their country

rather than for amorphous, transnational values or organizations such as Marxism, the Red Cross, or the United Nations. This phenomenon arguably continues to push expressions of personal loyalty and sacrifice toward a more and more local vernacular, where concrete images of home and hearth exert a more powerful grip than discussions of rights and ideas as symbols of "what we are fighting for."[5] Rockwell had reshaped the Four Freedoms vision into a format that was so culturally specific that his rendition was barely comprehensible even to many of America's anti-Axis allies. The artist noted that the starving and overrun European allies "sort of resented" the image of abundance in the "Freedom from Want" poster, for example, which featured a well-fed family eagerly anticipating consuming an enormous roast turkey.[6]

The major point of contrast between the Rockwell and Roosevelt visions of the Four Freedoms was the distance between a domestic and an international focus for U.S. war aims. While the text of Roosevelt's original Four Freedoms speech percussively highlighted the worldwide relevance of each "freedom," repeating the phrase "everywhere in the world" after each item to emphasize its universal application, Rockwell's Four Freedoms were an almost exclusively domestic affair, in both senses of that term. As the runaway success of Rockwell's vision soon suggested, it proved dramatically easier to sell "national goals which justify asking citizens to make the ultimate sacrifice" as a purely domestic, front-porch-style agenda.[7] Even the initial circulation of these images was privatized: Instead of creating his paintings as a government commission (as he had originally tried to do), Rockwell ended up selling them to his long-time client the *Saturday Evening Post*.

One result of the instant popularity of Rockwell's Four Freedoms series was that it was soon picked up by the Office of War Information anyway, as part of a war bond campaign. Repackaged as a series of posters adorning the walls of schools and other government buildings, Rockwell's Four Freedoms went on to become some of the most enduring images of the war years for many Americans on the home front. Other publicists and advertisers soon integrated references to the popular and recognizable Four Freedoms into portrayals of daily life, as a device for selling consumer goods by linking consumption to war aims. A 1943 advertisement for Wilson Sporting Goods equipment in *Life* magazine asked Americans to dedicate themselves "to the proposition that all men everywhere are entitled to Freedom from Fear, Freedom from Want, Freedom of Speech and Freedom of Worship. *But* let us also be a *Nation of athletes*—ever ready, if need be, to sustain our rights by the might of millions of physically fit sports-trained, freedom-loving Americans."[8]

There were other contrasts between the Roosevelt and Rockwell visions of this boiled-down set of war aims. Rockwell's rendition also neatly elided what might be called the "New Deal content" of the Four Freedoms, namely the way economic rights were mixed together with more traditional political and civil rights. Historian Lizabeth Cohen notes how "Rockwell depicted 'Freedom From Want' not as a worker with a job, nor as government beneficence protecting the hungry and homeless, but rather as a celebration of the plenitude that American families reaped through their participation in a mass consumer economy."[9] By setting his image of abundance in a private space—the

family dining room—Rockwell avoided any implication that ensuring freedom from want was a governmental responsibility.

By contrast, the government-sanctioned message of the Four Freedoms posited "the foundation of a Global New Deal," in the words of historian Robert Westbrook, and implied a "reciprocal relationship" between state and citizen, where the state would be obliged "to provide and protect a minimal level of subsistence for the individuals who comprise it."[10] This mixing of political and economic provisions speaking with the sovereign voice of government was a New Deal–inspired phenomenon, and such provisions were stewed together in the terms of the 1941 Atlantic Charter, as well—the also-ran subject of Rockwell's wartime vision—which sketched a vision for the postwar world where "all the men in all the lands may live out their lives in freedom from fear and want." In a recent essay, the historian of ideas James Kloppenberg highlights "the gap between the privatized utopia of plenty portrayed in Norman Rockwell's rendition and Roosevelt's own more egalitarian conception of the Four Freedoms."[11]

THE GENESIS OF FDR'S FOUR FREEDOMS: LEGACIES OF THE GREAT DEPRESSION

This research traces the wider ideological and more immediate political origins of Franklin Roosevelt's famous Four Freedoms address of 1941, focusing on the evolution and transformation of the content of the phrase "freedom from fear and want." The resulting analysis attempts to recapture a human rights moment that is all but forgotten in many treatments of mid-twentieth-century America: before the advent of the full-blown Cold War, when the ideologies of the mature New Deal were colliding with the politics of oncoming war, and when social and economic rights, along with more traditional civil and political rights, were widely touted as ideological weapons in an anti-Axis arsenal. For Americans in the early 1940s, the very concept of "security" had been reshaped by the broader impact of the Great Depression of the 1930s. America's Great Depression, as a national slice of a transnational phenomenon, shattered lives and often reshaped the worldview of those who experienced it. Over the course of a decade in which unemployment rates never fell below 14 percent, and often approached 50 percent in cities such as Detroit and Chicago, nearly half of all white families, and 90 percent of African American families, lived for some time in poverty. Even the marriage rate declined by almost one-fourth, as pessimistic young people faced an uncertain future.[12]

The American iteration of the Great Depression assumed a pivotal importance not only for the certainties it shattered and the improvisation and resourcefulness it called forth from so many individuals, but also for the scope and variety of institutional responses. As local charities and states with depleted coffers turned helplessly to Washington, it was federally sponsored programs that got the country moving again. The Works Progress Administration employed some 8.5 million of the formerly jobless; the Civil Works Administration employed over 4 million; the Civilian Conservation Corps

put 3 million more to work on forestry, flood control, and anti-erosion projects. The WPA and other programs had an impact far beyond the numbers of those directly employed: For example, over 30 million Americans saw the productions of the federal Theater Project, while the Federal Music Project sponsored over 200,000 performances by 15,000 musicians.[13]

Millions of Americans responded to the New Deal experiment with fervor. The White House received 450,000 letters during FDR's first week in office; seventy people were hired just to respond to the overwhelming volume of mail. President Hoover, by contrast, had managed with a lone mailroom employee during his entire tenure in office. Roosevelt had "altered the fundamental concept and its obligations to the governed," in the words of historian Isaiah Berlin, by initiating "a tradition of positive action." This tradition in turn fed new expectations that quickly ossified into perceived entitlements. Security for individuals—the dominant motif of the New Deal—would be permanently associated with "entitled benefits that only the federal government could confer."[14]

For policymakers, the lessons of the New Deal response to the Great Depression were twofold: first, that there was a connection between individual security and the stability and security of the wider polity; and second, that institutions of governance had "an affirmative responsibility" to help individuals achieve that security. After transborder armed conflict erupted in Europe in 1939, these lessons were readily extrapolated to the international level by Roosevelt's aides in the executive branch as well as by State, War, and Treasury Department planners, many of whom had served as New Deal administrators themselves.[15]

Roosevelt had mentioned an earlier version of the idea of a list of freedoms in a press conference on June 5, 1940, as a response to a question about how he might "write the next peace."[16] Originally framed in the negative, FDR had offered a checklist for "the elimination of four fears": "the fear in many countries that they cannot worship God in their own way"; "the fear of not being able to speak out"; "the fear of arms"; and "the fear of not being able to have normal economic and social relations with other nations."[17] The following month, another reporter's question elicited a list that added up to five protected qualities—freedom of information, religion, and expression, as well as freedom from fear and want—although the fifth one was in effect added by the questioner after the president had finished an initial tally:

> *Q: [Mr. Harkness]:* Well, I had a fifth in mind which you might describe as 'freedom from want'—free trade, opening up trade?
> *The President:* Yes, that is true. I had that in mind but forgot it. Freedom from want—in other words, the removal of certain barriers between nations, cultural in the first place and commercial in the second place. That is the fifth, very definitely.[18]

It is fascinating to trace the evolution of the content of the catchphrase "freedom from want" over the course of 1940–1942. Freedom from want actually starts out as one of the labels for U.S. Secretary of State Cordell Hull's cherished reciprocal free trade agreements. By 1942 it stands in for a

concept much closer to what we would now call a personal entitlement, with its internationalization as the key difference between the post–World War I and post–World War II vision of international order, at least for many U.S. wartime planners.

According to Roosevelt speechwriter Sam Rosenman, reports of contemporaneous debates over social welfare in Britain were a major source of inspiration for Roosevelt's evolving list of "fears" and "freedoms."[19] A clippings file maintained for the president on the general topic of an "economic bill of rights," and used for the preparation of the Four Freedoms speech, contained a letter quoting *New York Post* columnist Samuel Grafton, whose book *All Out* had recently been published in Britain. The Grafton excerpt explained that "In September of 1940 the better sections of the English press began to debate the need for an 'economic bill of rights,' to defeat Hitlerism in the world forever by establishing minimum standards of housing, food, education, and medical care, along with free speech, free press and free worship."

Roosevelt's "Four Freedoms" speech file also contained a December 1940 clipping from the *New York Post*, quoting the joint proposals offered by Protestant and Catholic leaders in Britain, advocating:

1. That extreme inequalities of wealth be abolished,
2. Full education for all children, regardless of class or race,
3. Protection for the family,
4. Restoration of a sense of divine vocation to daily work, and
5. Use of all the resources of the earth for the benefit of the whole human race.

These debates in Britain were part of a transatlantic surge of interest in the relationship of domestic social welfare provisions—individual security—to wider war and peace aims—international security.[20]

In Britain, these concerns about the economic contours of the postwar world found immediate political expression in 1941 with the commissioning of the extensive surveys underpinning the so-called Beveridge Report, which was not published until late 1942.[21] The Beveridge Report, a detailed proposal developed by the British economist and social welfare expert Sir William Beveridge, was "designed to abolish physical want" in Britain through social security programs, noting that "social security for the purpose of the Report is defined as maintenance of subsistence income."[22] When the Report was finally released, a year after the publication of the Atlantic Charter, it mentioned the Charter explicitly and used the language of the Four Freedoms, as did the American and British press coverage analyzing it. The Beveridge Report was "put forward as a measure necessary to translate the words of the Atlantic Charter into deeds," concluded the Report's own official summary, which also explained that "Freedom from want cannot be forced on a democracy . . . It must be won by them."[23]

American press coverage of the Beveridge Report referred to it as a British "blueprint for postwar New Deal," which would stand as "the first attempt to translate the four freedoms into fact" by giving life to "at least one of the rights specified in the Atlantic Charter—the right to live without hunger

or destitution."[24] This use denotes a definite shift in the way Americans were deploying the phrase "freedom from want" from FDR's earlier articulation two years earlier, regarding the "fear of not being able to have normal economic and social relations with other nations." Linking individual security to international security was becoming a fresh way of framing U.S. national interests.

This nexus of ideas explicitly linking individual and international security had started to gain traction before 1941—examples would include the Philadelphia Conference of the Federal Council of the Churches of Christ in America, establishing the Commission to Study the Bases of a Just and Durable Peace, as well as Roosevelt's 1940 State of the Union Address of January 3, 1940 and Radio Address of January 19, 1940—but the logic of linkages between individual and international security did not receive wide attention in the United States until the 1941 Four Freedoms speech.[25] Part of the process of consolidating late Depression-era gains in individual security consisted in shifting the focus to continuing sources of insecurity, namely, the increasingly tense international scene after 1939.

Nor was this an especially American phenomenon: As of 1942, "[m]ore than sixty major statements on the nature of the postwar world have thus far been issued by religious groups in various countries," notes historian Lois Minsky, such as the much more radical Malvern Declaration of Church of England leaders from January 1941, which called for "removal of the stumbling block of private ownership of basic resources, urge[d] unemployment insurance, industrial democracy, equal educational opportunities for all, and the unification of Europe as a co-operative commonwealth." European social and labor movements in the 1930s, such as Leon Blum's French Socialist Party, called for a "social regime" to replace untrammeled individualism, while legal scholars such as Chile's Alejandro Alvarez called for an international bill of rights, and sociologists such as Emile Durkheim and Karl Mannheim called for increased social solidarity. Historian Ken Cmiel has left us an important unpublished essay about four "conscience liberals" who were all professionally active in the early 1940s, all of whom went on to make major contributions to the UN's Universal Declaration of Human Rights in 1948: China's Peng-chung Chang, Lebanon's Charles Malik, Panama's Ricardo Alfaro, and France's Jacques Maritain. All four theorized "security" in ways that included an important role for community, duty, and social bonds.[26]

By 1942 in the United States, such an expansion of the idea of security was taken for granted in Roosevelt administration policy statements, and widely perceived to be one of the lessons of the Great Depression in an increasingly unsettled international environment. A September 1942 pamphlet from the National Resources Planning Board entitled "After the War—Toward Security: Freedom From Want" stated in its introductory note that its own postwar planning efforts were "designed to meet the challenge to our national security caused by lack or inadequacy of jobs or income." Explaining that "without social and economic security there can be no true guarantee of freedom," the agency asserted that these objectives are "indeed a fundamental part of national defense."[27]

Ideas about national security were expanding in the American domestic realm, as well. As a way of pressuring Roosevelt to sign an executive order

prohibiting racial discrimination by defense contractors, labor leader A. Philip Randolph threatened a march of 100,000 African American workers on the White House in June 1941, while lawyer and activist Thurgood Marshall was urging that anti-lynching legislation should be "just as important as portions of the National Defense Program" for a nation that was "starved for military personnel, begging for factory workers, and striving for international credibility."[28]

The Four Freedoms, Atlantic Charter, and Britain's Beveridge Report were only three of the more visible crests in a transatlantic wave of advocacy generated by journalists, social welfare activists, academics, professionals, and church leaders as well as elected political leaders and bureaucrats in the early 1940s.[29] The editor of the London *Times*, Robert M. Barrington Ward, wrote an impassioned letter to Churchill in April 1942, proposing additional dramatic public declarations based on the Atlantic Charter: "The fundamental demand on the peace-makers," the editor explained, "from uncounted millions of mankind, will be for welfare and security. These twin aims sum up the essential purpose of the [Atlantic] Charter. They are aims which will more and more obliterate the distinctions once possible between domestic and foreign policy. The realization of the Charter can and must begin at home."[30] As part of a dialogue that crossed national boundaries, the broader policy context of the Four Freedoms and the Atlantic Charter highlights the reciprocal relationship between domestic and international politics, a still-underemphasized perspective in the study of foreign policy generally, and in the study of the U.S. role in the world in particular.

AN "ECONOMIC BILL OF RIGHTS"

Because of the way scholars commonly write about rights today, discussions of the Four Freedoms and the Atlantic Charter tend to separate the "political" from the "economic" provisions. Skipping ahead to the late 1940s, for instance, we can see how political rights—often known as "civil rights" during the interwar era and embodied, for example, in the U.S. Bill of Rights—had come to be anointed by U.S. analysts as essential fundamental freedoms defining the "free world" in opposition to its remaining totalitarian rival, the Soviet Union. By contrast, economic rights, such as a right to food, shelter, medical care, or employment, had by the early Cold War era come to be denigrated as initiatives that were not merely aspirational or utopian, but affirmatively un-American.[31]

Indeed, by 1949, former State Department official, Roosevelt speechwriter, Librarian of Congress, and unofficial poet laureate Archibald MacLeish was warning that American politics operated "under a kind of upside-down Russian veto"—that is, whatever Moscow advocated must by definition be the opposite of the liberty-loving American approach.[32] Tainted by their association with the USSR, by the late 1940s economic, social, and cultural rights accordingly were being dismissed as anathema to free-enterprise visions of limited government.[33]

But such a polarization was not always the case, particularly at the historical moment in the early 1940s when the realities of oncoming war were colliding

with the ideologies of the mature New Deal. For example, another section of Roosevelt's same 1941 Four Freedoms speech had spelled out FDR's ideas about the "basic things expected by our people of their political and economic systems."[34] Roosevelt's list, in turn, served as the basis for a more elaborate "Economic Bill of Rights" devised by the National Resources Planning Board, and was widely reprinted as a pamphlet under the title *Our Freedoms and Rights*.[35] This Economic Bill of Rights was discussed by the Planning Board's vice-chair, University of Chicago professor Charles E. Merriam, in his 1941 Edwin Lawrence Godkin Lecture on Democracy at Harvard University. In this speech, Merriam outlined a list of "fundamentals which underlie a democratic program guaranteeing social justice":

> For everyone equal access to minimum security as well as to the adventures of civilization.
> For everyone food, shelter, clothing, on an American minimum standard.
> For everyone a job at a fair wage—if he is in the labor market—and a guaranty against joblessness.
> For everyone a guaranty of protection against accident and disease.
> For everyone a guaranteed education, adapted to his personality and the world in which he lives.
> For everyone a guaranty of protection against old age.
> For everyone an opportunity for recreation and the cultural activities appropriate to his time.[36]

This is an astonishing list! One measure of the extent to which our contemporary sensibilities have been shaped by later, Cold War–inspired shifts in the American political discourse of rights is the continuing power of such a New Deal–inspired catalogue to surprise us. In a commentary that could just as easily be about the Four Freedoms proclamation itself, Merriam explained:

> There are two great objectives of democracies in the field of world relationships:
>
> > The security of a jural order of the world in which decisions are made on the basis of justice rather than violence.
> > The fullest development of the national resources of all nations and the fullest participation of all peoples in the gains of civilization.

Linking these two ideas together as a matter of public policy was arguably a New Deal–inspired contribution. Indeed, Roosevelt speechwriter Sam Rosenman referred to the 1941 Annual Message as a whole—which included articulations of innovative initiatives such as Lend Lease, the Four Freedoms, the Economic Bill of Rights—as the president's "renewed summation of the New Deal."[37] Part of what was new about it was its explicitly international focus, putting the New Deal on the path to becoming a war aim. Merriam framed his own speech with the hope that "[s]ome day it will dawn upon us that all the clauses in the Preamble to the Constitution are worth fighting for." He elaborated: "Justice was the first term in the [Constitution's] preamble and liberty the last, but between them came the general welfare, common defense, and domestic tranquility."[38]

Roosevelt's famous phrase that Dr. New Deal would have to give way to Dr. Win the War as the primary physician resuscitating the American body politic has led a number of historians to conclude that the New Deal had ended, or was winding down, under the impact of the war. An alternative framing would be to argue that the New Deal was transformed from a set of domestic programs into a war aim, and infused with a new, explicitly human rights perspective as it was multilateralized by its reiterations in the Four Freedoms and Atlantic Charter.

As legal scholar Cass Sunstein observes, New Deal–infused commitments such as the Four Freedoms "came from a fusion of New Deal thinking in the early 1930s with the American response to World War II in the 1940s. The threat from Hitler and the Axis powers broadened the New Deal's commitment to security and strengthened the nation's appreciation of human vulnerability." In the early 1940s, a thinner and more rhetorical iteration of the New Deal was becoming nothing less than America's vision for the postwar world.[39]

TRANSFORMATION AND REINVIGORATION OF HUMAN RIGHTS IDEAS

This chapter does not assert that "human rights" was somehow a new term born of World War II. A more precise formulation would be to argue that, as a figure of speech, "human rights" entered the lexicon of educated readers and influential commentators as a readily understood shorthand in the World War II era, both in the United States and internationally. More importantly, the term's meaning shifted as it entered general use.

Before the war, the phrase occasionally appeared as a somewhat disfavored variation of the much older locution, "rights of man."[40] In arguing that the basic conception of the rights of man first crystallized in the French revolutionary era, historian Lynn Hunt explains that such rights "require three interlocking qualities: rights must be natural (inherent in human beings); equal (the same for everyone); and universal (the same everywhere)." Even given this essential conceptual framework, however, up through the interwar era, the term "human rights" was seldom used in the United States. It appears occasionally as a synonym for what was then the narrower legal term "civil rights"—which in the interwar era in the United States usually meant controversies relating to the Bill of Rights or specialized fields such as labor rights.[41] By the end of World War II, however, the term "human rights" was serving as a caption for the so-called fundamental freedoms meant to differentiate the Allies from their totalitarian rivals.

Traditional civil rights such as freedom of speech and religion were a lesser, included subset of these fundamental freedoms, which drew on natural law concepts to paint a vision of what scholar of ethics and public affairs Paul Lauren calls "certain basic and inherent rights" to which all individuals were entitled "simply by virtue of being human."[42] For example, for the political theorist Hannah Arendt, the wartime encounter with totalitarianism "demonstrated that human dignity needs a new guarantee which can be found

only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity."[43] Legal scholar Richard Primus explains that what he calls a "resurgence of normative foundationalism" soon resulted in "a new vocabulary of 'human rights'" which linked wartime political commitments with "a broader idea rarely seen in the generation before the war but ascendant thereafter: that certain rights exist and must be respected regardless of the positive law." Lynn Hunt agrees that "human rights only become meaningful when they gain political content," and wartime America supplied the concrete political experiences to transform these much older ideas.[44]

While the precise measurement of such a sea-change is necessarily inexact, one way of highlighting this shift in American political thought would be to examine the *New York Times Index* for the years 1936 to 1956. In 1936, there is no "human rights" heading at all. In 1937, the term makes a tentative appearance with two articles, one on property rights and one on labor rights. By 1946, the term is listed as a separate heading, referring the reader to "civil rights," where there are approximately 150 articles we would recognize as addressing human rights–related topics. In 1956, the human rights heading is no longer cross-referenced to civil rights, but rather to a whole new conceptual universe, "freedom and human rights," under which heading there are over 600 articles.[45]

There is arguably something of a time lag for such an amorphous shift to be reflected in the index of a general-interest newspaper. Indeed, if there were a "moment" when the term acquired its modern meaning, a strong candidate would be the signing of the initial "Declaration by United Nations" on January 1, 1942. This document explicitly "multilateralized" the war aims of the August 1941 Atlantic Charter, and was a product of the second major Churchill-Roosevelt summit, code-named Arcadia, held in mid-December 1941 to early January 1942. Immediately after the December 7th attack on Pearl Harbor, the prime minister proposed a Washington summit to formalize a "Grand Alliance" of Anglo-American military operations. In private at least, Churchill signaled that he no longer saw himself as the hopeful suitor in his relationship with the United States, commenting that "now that she is in the harem, we talk to her quite differently." (Churchill often used gendered or sexualized images not at all uncommon to his day. What is perhaps noteworthy about the prime minister's salty asides is the way they consistently tagged the United States and its leader with feminine imagery.)[46]

Churchill famously took up residence in the White House for fourteen days, keeping Roosevelt up all hours, charming the American press corps and Congress—and having a mild heart attack, kept secret due to its potential effect on Allied morale. In a widely acclaimed address to a joint session of Congress on December 26, 1941, the prime minister noted bluntly that: "If we had kept together after the last war, if we had taken common measures for our safety, this renewal of the curse need never have fallen upon us." At the urging via cable of Deputy Prime Minister Clement Attlee, the two leaders agreed that, in order to emphasize "that this war is being waged for the freedom of the small nations as well as the great powers," their resulting statement of alliance should be broadened to include the twenty-six other nations

then at war with the Axis.[47] FDR himself coined the term "United Nations" for this growing anti-Axis coalition: The president liked the way the term stressed common purpose and de-emphasized the military component.[48] (Churchill preferred "Grand Alliance.") Roosevelt was reportedly so taken with his choice of title that he interrupted Churchill's bath to tell the prime minister about it.[49]

In this January 1942 Declaration by United Nations, the twenty-six Allies began by affirming the "common program of purposes and principles . . . known as the Atlantic Charter." The United Nations coalition went on to assert that they were fighting to secure "decent life, liberty, independence, and religious freedom" as against the "savage and brutal forces seeking to subjugate the world." These nations pledged to cooperate in order "to preserve human rights and justice in their own lands as well as in other lands."[50]

The term "human rights" had been absent from the December 25 draft of the Declaration by United Nations. It was likely added in response to a memo from Harry Hopkins, who wrote that: "another sentence should be added including a restatement of our aims for human freedom, justice, security, not only for the people in our own lands but for all the people of the world." He continued, "I think a good deal of care should be given to the exact words of this and I do not think the reference to the Atlantic Charter is adequate."[51]

Incorporating the Atlantic Charter by explicit reference, the final version of the Declaration by United Nations is the first multilateral statement of the four key elements of a new, anti-Axis reading of the term "human rights."[52] These four elements included (1) highlighting traditional political rights as core values; (2) incorporating a broader vision of so-called Four Freedoms rights, which included references to economic justice; (3) suggesting that the subjects of this vision included individuals as well as the more traditional unit of sovereign nation-states (by means of the Atlantic Charter phrase referencing "all the men in all the lands"); and finally, (4) emphasizing that these principles applied domestically as well as internationally.[53] This was a fresh formulation of a much older term, and all four of these elements continue to inform our modern conception of the term "human rights" today.[54]

There is, of course, a heartbreaking irony in the timing of the United Nations's ringing phrases, which were circulated worldwide during the same month in 1942 as the infamous Wannsee Conference was held among Nazi Germany's wartime leaders.[55] Again with bitter irony, January 1942 is also the very same month that federal officials decided forcibly to "relocate"—under what were effectively POW conditions—some 127,000 persons of Japanese ancestry in the continental United States, roughly two-thirds of whom were American citizens.[56] Such horrifying contrasts only emphasize why it is important continually to juxtapose discussions of words with an examination of lived realities. Reacting to the Declaration of the United Nations, Mohandas Gandhi wrote to Roosevelt in July 1942: "I venture to think that the Allied Declaration that the Allies are fighting to make the world safe for freedom of the individual and for democracy sounds hollow, so long as India, and for that matter, Africa are exploited by Great Britain, and America has the Negro

problem in her own home." (Ken Cmiel reminds us that "Gandhi generally disliked rights-talk of all kinds, associating it with the self-indulgence of the modern age.")[57]

Gandhi's letter underscores how aware historical actors themselves often were of these yawning gaps between rhetoric and reality. In part, it is an awareness of such disjunctures—in the examples above, amounting to a cognitive dissonance so strong as to induce near-vertigo—that may itself constitute an engine of historical change in its own right, precisely in order to narrow the gap. This dynamic may be described as a kind of feedback effect, induced by reading one's own press releases.[58]

This transformation of human rights as a label—from narrow and domestic ideas about civil rights to a broader and internationalized vision of fundamental freedoms—is an unusually clear example of how a conceptual change may be reflected in a rhetorical shift.[59] In short, human rights as a locution achieved what might be called a kind of "cultural traction" in the United States during this era—a congruence with the newly reshaped worldview not only of elite opinion makers, but also of what was then a fairly recently identified demographic growing up between elite and mass opinion, a widening group of citizens known at the time as "the attentive public."

The very demographic group designated as "the attentive public" had itself changed composition considerably during the war. This heterogeneous group included people who occasionally read a "middlebrow" periodical such as *Reader's Digest* or the *Saturday Evening Post*, for example, in addition to a daily metropolitan newspaper. Just a few percentage points' increase in this group could consolidate the critical mass favoring an ever-broader construction of the Roosevelt administration's war aims—a mass that was either absent or quiescent in the wake of World War I. The very term "middlebrow" dates from the early 1940s, although the cultural historian Joan Shelley Rubin traces its roots to the founding of the Book-of-the-Month Club and other developments in the late 1920s. Robert Westbrook describes America's World War II as "the first American war to follow the consolidation of mass culture and social science," putting the formulators of U.S. policy in a position to act on the systematic "investigation of the reflective life of less articulate men and women," especially after the advent of scientific public opinion polling in 1936.[60]

The infusion of these human rights ideas into traditional American conceptions of the national interest resulted in something new under the sun in mid-1940s America. The human rights ideas embedded in the Four Freedoms and the Atlantic Charter—as well as in the 1942 Declaration of the United Nations, the document which further internationalized the Charter—had reshaped the concept of the national interest by injecting an explicitly moral calculus. While international initiatives infused with moralistic ideas were hardly a new development, now mobilized and mainstream constituencies were arguably paying attention and reacting in a way they had not before. These vocal constituencies were quick to shout about the betrayal of the "principles of the Atlantic Charter" when confronted with the cold realities of U.S. policies that ignored British colonialism, strengthened *status quo*

ideologies such as national sovereignty, or facilitated racial segregation and repression.[61]

New Zealand Prime Minister Peter Fraser echoed many of America's allies when he repeatedly invoked "the principles of the Atlantic Charter" which "must be honoured because thousands have died for them." As he elaborated in a 1944 speech to the Canadian parliament linking the Atlantic Charter and the Four Freedoms: "Your boys, boys of New Zealand, South Africa, India, the United States and all the united nations have given their lives that the four freedoms—freedom of speech, freedom of religion, freedom from fear and freedom from want—may be established and the masses of the people given greater opportunities than ever before." He then warned, "Unless we strive to carry out those principles we shall be undoing in peace what has been won on the battlefield."[62]

Similarly, after an early four-power draft of the United Nations Charter was circulated in October 1944, one of the main objections by "smaller" countries not invited to these negotiations was the absence of an explicit discussion of a role for human rights, especially economic and social rights. Representatives of Australia and New Zealand met in Wellington in November 1944 and developed a joint proposal calling for a greater role for expanded provisions on economic and social rights; Poland and Denmark offered proposals to append the 1941 Atlantic Charter to the draft of the United Nations Charter; Norway wanted to append the 1942 "Declaration by United Nations," multilateralizing the Atlantic Charter and explicitly referencing human rights.[63]

Probably the most trenchant human rights–related critique of the draft world charter came from an assembly of nineteen Latin American nations convened at Chapultepec castle near Mexico City in February–March 1945, when Bolivia, Cuba, and Mexico sought to annex an international bill of rights to the UN's proposed "constitution." The delegation from Nicaragua admonished that "the peace and security of the world" now depended on "all nations, large and small, now adopting in their international relations . . . solid principles of equality and justice, of liberty and law," while the delegation from Cuba submitted an extensive "Declaration of the International Rights and Duties of the Individual" which the conference voted to append to the other suggestions to be forwarded to the inaugural San Francisco UN conference. Conference president Ezequiel Padilla, who had formerly served as Mexico's attorney general and as a revolutionary leader under Pancho Villa, explained that wartime solidarity needed to be converted "into a solidarity of peace; a solidarity that considers the poverty of the people, its social instability, its malnutrition."[64]

By the end of the war, the iconic status of the Four Freedoms and the Atlantic Charter had itself become a sort of "entangling alliance" in its own right, in the evocative image of historian Lloyd Gardner. Especially in the realm of social and economic rights, images of "war aims" and "what we are fighting for" contributed to both creating and raising expectations about the justice and legitimacy of any proposed postwar order, much to the inconvenience—and occasional annoyance—of the Allied officials charged with planning for a postwar world.[65]

SOME CONTEMPORARY RESONANCES: CONSTRUCTING A MORE EXPANSIVE VISION OF THE NATIONAL INTEREST

In the wake of World War II, United States security became bound up with the collective security embodied by the United Nations system in a way that large groups of citizens as well as traditional policy elites could intuitively understand. In the words of a 1946 League of Women Voters pamphlet, "Even before this war had ended this nation had decided that singlehanded it could not ensure its own security, and that the only safety lay in working away from the old system of a world organized into intensely competitive nationalistic states working together for agreed-upon ends." American multilateralism became a way of using rules and institutions to entrench U.S. interests in the global arena beyond the war.[66]

This story suggests a correlation between multilateralism—solving problems in tandem with allies—and a globalized, integrated vision of human rights that would apply within national boundaries as well as across them. But in the contemporary world, the shadowy outline of a new and disturbing correlation has emerged on the international scene: an axis linking unilateralism with a *lack* of respect for human rights. Such a link has a certain intuitive traction; that decency itself might become a casualty of discarding what the U.S. Declaration of Independence calls "a decent respect for the opinion of mankind." [67]

Lack of comprehension of these dynamic processes of transformation may well be the pith of what is missing from contemporary neoconservative and "realist" analyses of international politics. Such approaches are too static. They tend to discount the processes for transformation that emerge through the workings of institutions, activism, ideas, education, and technology, and reactions to local or international events. The late-twentieth-century wave of what the international legal scholar Jonathan Greenberg calls "rule of law revolutions" in Eastern Europe, the Philippines, Chile, South Africa, South Korea, and Taiwan was a set of developments that realists' analyses completely failed to predict, for example. These revolutions drew much of their power from international human rights ideas and institutions. Astonishingly, they also unfolded without the cataclysmic violence one would have expected, given the entrenched regimes they overthrew or drastically modified. But no realist-dominated mode of inquiry has been able to explain this phenomenon.[68]

Equally important, standard realist approaches unrealistically discount the possibility of transformation in unwelcome directions, such as the creation of additional terrorists and the alienation of allies through poorly planned and incompetently executed unilateral interventions. A worldview that assumes that the pool of "evildoers" is fixed is just as erroneous as one which assumes that a good process is the same thing as a good result.

In 1941 the political scientist Harold Lasswell expressed his concern that as a democracy mobilized to fight its enemies, it might transform itself into a "garrison state." He feared the emergence of a technocratic dystopia where "the specialists on violence are the most powerful group in society," having usurped legislators and other representative groups where who were merely

"specialists on bargaining." In Hannah Arendt's iconic analysis of the origins of totalitarianism, the first, fatal step on this downward path was the advent of the device of "protective custody" for "undesirable elements . . . whose offenses could not be proved and who could not be sentenced by ordinary processes of law." Repression of traditional civil rights at home was combined with the creation of what Arendt called "a condition of complete rightslessness" in occupation zones abroad.[69]

Wartime political theorists also understood that the process of administering such a garrison state, at home and abroad, would have a transformative effect on individual citizens. The lawyer and sociologist David Riesman worried in 1942 that a kind of authoritarian politics might be possible even in America: "Like a flood," he wrote evocatively, such a collapse of democratic institutions "begins in general erosions of traditional beliefs, in the ideological dust storms of long ago, in little rivulets of lies, not caught by the authorized channels." The ends—order, elite control, and military mobilization—would somehow serve to justify the means—repression, squelching of civil liberties, and the sowing of suspicion among citizens.[70] In the twenty-first century, we are starting to see that transforming one's polity into an occupying power may have dramatic and deleterious effects on the people called upon to do the actual occupying. The cultural critic Susan Sontag examined how individuals take their moral cues from the system in which they are embedded. The U.S. torture scandal beginning in 2004 was "not an aberration," she explained, but rather "a direct consequence of the with-us-or-against-us doctrines of world struggle with which the [U.S.] administration has sought to change, change radically, the international stance of the United States and to recast many democratic institutions and prerogatives." Such an impact also translates transnationally: The international relations expert Rosemary Foot has recently noted how arrests under Malaysia's internal security act have spiked since September 11, 2001, as has internal repression against separatists in Indonesia, with officials in those countries justifying repressive measures against internal opponents explicitly on the basis of America's handling of its own detainees in the war on terror.[71]

Here again the human rights politics of the 1940s have something to tell us. Seeking a different kind of congruence between the internal and the external, Roosevelt in his Four Freedoms address explained that "just as our national policy in internal affairs has been based on a decent respect"—note the deliberate echo of the Declaration of Independence—"for the rights and dignity of all our fellow men within our gates, so our national policy in foreign affairs has been based upon a decent respect for the rights and dignity of all nations, large and small." While FDR's assessment may have been excessively optimistic, he captured a dynamic through which rhetoric may sometimes serve to reshape reality. Legally unenforceable ideals, such as those embodied in the Declaration of Independence or Atlantic Charter, might nevertheless serve "both as personal aspiration and as effective political fulcrum," in the words of legal scholar David Martin, offering an impetus for positive changes.

By contrast, cultivating a reputation as a bully who fails to show decent respect—who scorns the permission slip of multilateral legitimacy for interventionist policies—may turn out to be especially costly and ineffective when

imprudently designed plans go awry. The veteran American journalist Walter Cronkite observed in the waning months of the formal U.S. occupation of Iraq that "in the appalling abuses at Abu Ghraib prison and the international outrage it has caused, we are reaping what we have so carelessly sown. In this and in so may other ways, our unilateralism and the arrogance that accompanies it have cost us dearly." Rather than "draining the swamp of terrorism," in the imagery of today's political strategists, such policies have instead drained the "gigantic reservoir of good will toward the American people"—the increasingly parched resource that Republican presidential candidate Wendell Willkie in the 1940s had termed "the biggest political fact of our time."[72]

This is not to say that rights are always trumps and that a free society can never take steps to protect itself, including bounded curtailments of liberties, as the political commentator Michael Ignatieff has recently argued. But Ignatieff also suggests that it is a significant blow to a free society—a win for the bad guys—when the very institutions underpinning a free society are reframed as a source of weakness. This dystopian narrative, the narrative of Lasswell's 1940s "garrison state," deflates the spacious concept of the national interest by disparaging and diminishing those very values and principles that other peoples might admire about the United States and even seek to emulate.[73]

Policy expert Joseph Nye has coined the term "soft power" for what he describes as "the ability to get what you want through attraction rather than coercion or payments. It arises from the attractiveness of a country's culture, political ideals, and policies." Nye's premier example of this phenomenon is "the impact of Franklin Roosevelt's Four Freedoms in Europe at the end of World War II," which he terms a classic instance of "when our policies are seen as legitimate in the eyes of others."[74] This analysis is even more pointed in an era where human rights have once again become a vector for transformations in America's self image and its role in the world.

NOTES

1. Kenneth Cmiel, "Review Essay: The Recent History of Human Rights," *American Historical Review* 109(1)(2004), pp. 117–135. The work of the late, great historian of ideas Ken Cmiel imbricates almost every point in this analysis, even though FDR's foreign policy *per se* is a topic that engaged Ken hardly at all. In purporting to summarize, consolidate, and modestly extend the growing field of human rights history, Ken Cmiel basically invented it. The most important examples of his work in this field include "Review Essay: The Recent History of Human Rights," *The American Historical Review* 109(1) (2004), 117–135; "Human Rights, Freedom of Information, and the Origins of Third-World Solidarity," in Mark Philip Bradley and Patrice Petro (eds.), *Truth Claims: Representation and Human Rights* (New Brunswick: Rutgers University Press, 2002), pp. 107–130; "The Emergence of Human Rights Politics in the United States," *Journal of American History* 86(3) (December 1999): 1231–1250; and most heartbreakingly, the manuscript "The United Nations and Human Rights: Ambiguous Origins," tragically unfinished. The Department of History at the University of Iowa, where Ken was formerly Chair, maintains a Web page from which many of Ken's works may be downloaded free of charge, and which also features clips of his readings and from his astonishing memorial service: www.uiowa.edu/~history/People/cmiel.html.

2. Atlantic Charter, August 12, 1941, telegram headed, in President Franklin Roosevelt's handwriting, "For delivery to press and radio at 0900 EST on Thursday August 14" and reprinted in Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, MA: Belknap, 2005), pp. 303–304. This chapter expands on my discussion of Roosevelt's Four Freedoms address and the wartime transformation of American ideas about rights in New Deal for the World.

3. Norman Rockwell, *My Adventures as an Illustrator*, as told to Thomas Rockwell (New York: Doubleday, 1960), pp. 338–341; Stuart Murray and James McCabe, *Norman Rockwell's Four Freedoms* (New York: Gramercy Books, 1993), pp. 8, 37–38, 40; Atlantic Charter.

4. FDR, "Annual Message to Congress, Jan. 6, 1941," PPA 1940, p. 672; Office of War Information (OWI) pamphlet, n.a., "The United Nations Fight for the Four Freedoms: The Rights of All Men—Everywhere" (1942) (overseen and likely authored by Archibald MacLeish). See also the excellent discussion of the Four Freedoms paintings as depicting U.S. war aims in Robert B. Westbrook, "Fighting for the American Family: Private Interests and Political Obligation in World War II," in Richard Wightman Fox and T.J. Jackson Lears (eds.), *The Power of Culture: Critical Essays in American History* (Chicago: University of Chicago Press, 1993), pp. 194–221, and reprinted in Westbrook, *Why We Fought: Forging American Obligations in World War II* (Washington, DC: Smithsonian, 2004).

5. Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, rev. ed. (London: Verso, 1991), p. 10.

6. Rockwell, *Adventures*, p. 343.

7. Murray and McCabe, *Rockwell's Four Freedoms*, p. x. Indeed, the only reference to international affairs in Rockwell's Four Freedoms series is an oblique one: the partially obscured headline describing the bombing of London, in a newspaper held by a concerned and loving father, as he watches his children being safely tucked in bed. Westbrook, "Fighting for the American Family," p. 203.

8. Life (October 11, 1943): 73, emphasis in original. Rockwell's editor, Ben Hibbs, described the subsequent career of Rockwell's Four Freedoms paintings: "The result astonished us all," he wrote.

> The pictures were published early in 1943 [in the Saturday Evening Post] . . . requests to reprint flooded in from other publications. Various Government agencies and private organizations made millions of reprints and distributed them not only in this country but all over the world. Those four pictures quickly became the best known and most appreciated paintings of that era . . . Subsequently, the Treasury Department took the original paintings on a tour of the nation as the centerpiece of a Post art show—to sell war bonds. They were viewed by 1,222,000 people in 16 leading cities and were instrumental in selling $132,992,539 worth of bonds." Letter excerpted in Rockwell, *Adventures*, p. 343.

9. Lizabeth Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* (New York: Knopf, 2003), p. 56.

10. Westbrook, "Fighting for the American Family," p. 204. See also Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic, 2004), pp. 9–30.

11. See National Resources Planning Board, "After the War—Toward Security: Freedom From Want," September 1942, FDRPL, PSF, Postwar Planning, Introductory Note, 1,8; FDR, "Annual Message to Congress, Jan. 6, 1941"; Atlantic Charter point six; James T. Kloppenberg, "Franklin D. Roosevelt, Visionary," review essay on Cass R. Sunstein, *The Second Bill of Rights* and on Borgwardt, *New Deal for the World* in *Reviews in American History*, p. 34 (December 2006), pp. 509–520.

12. U.S. Department of Commerce, "Historical Statistics of the United States, Colonial Times to 1970s"; Paul Webbink, "Unemployment in the United States, 1930–1940, Papers and Proceedings of the American Economic Association 30 (February 1941): 250.

13. Franklin D. Roosevelt, "Three Essentials for Unemployment Relief," March 21, 1933, PPA, pp. 80–81; Harry A. Hopkins, *Spending to Save: The Complete Story of Relief* (Seattle: University of Washington Press, 1972), pp. 114, 117, 120; William E. Leuchtenberg, *Franklin D. Roosevelt and the New Deal, 1932–1940* (New York: Harper & Row, 1963), p. 128.

14. Louis M. Howe, "The President's Mailbag," *American Magazine* (June 1934): 22; Leila A. Sussman, *Dear FDR: A Study of Political Letter-Writing* (Totowa, NJ: Bedminister, 1963); Isaiah Berlin, "President Franklin Delano Roosevelt," reprinted in Berlin, *The Proper Study of Mankind: An Anthology of Essays,* Henry Hardy and Roger Hausheer, eds. (New York: Farrar, Straus, and Giroux, 2000), p. 636; Michael Ignatieff, *Isaiah Berlin: A Life* (New York: Metropolitan Books, 1998), p. 132; David M. Kennedy, *Freedom From Fear: The American People in Depression and War* (New York: Oxford University Press, 1999), p. 27.

15. See Anne-Marie Burley (now Anne-Marie Slaughter), "Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State," in John G. Ruggie (ed.), *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (New York: Cambridge University Press, 1993), pp. 125, 126; Marquis Childs, *I Write From Washington* (New York: Harper, 1942), p. 23.

16. Franklin D. Roosevelt, "No. 649-A (June 5, 1940)," *Complete Presidential Press Conferences of Franklin D. Roosevelt* (New York: DaCapo, 1972), p. 498.

17. Ibid., p. 499. See also Laura Crowell, "The Building of the 'Four Freedoms' Speech," *Speech Monographs* 22 (1955): 268.

18. FDR, "No. 658 (July 5, 1940)," *Press Conferences*, p. 18–22.

19. Samuel I. Rosenman, *Working with Roosevelt* (New York: Harper, 1952), pp. 263–264.

20. Samuel Grafton, *All Out: How Democracy Will Defend America, Based on the French Failure, the English Stand, and the American Program* (New York: Simon and Schuster, 1940), p. 60 (internal quotations omitted). Ickes letter discussed in Rosenman, p. 264–265. This proposal by religious leaders in Britain is also discussed in Louis Minsky, "Religious Groups and the Post-War World," *Contemporary Jewish Record* 5 (August 1942): 357–372. On the "economic bill of rights," see generally Sunstein, *The Second Bill of Rights*, pp. 9–30. Sunstein's treatment does not spend much time on the origins of this program, however.

21. "Social Insurance and Allied Services, Report by Sir William Beveridge" Papers of William H. Beveridge (first Baron Beveridge), Archives of the London School of Economics and Political Science, Part 8, File 46, "Summary and Guide to [Beveridge] Report and Related Papers, 1941–44." See also Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA: Belknap, 1998), especially his concluding chapter, "London, 1942."

22. Beveridge Report, "Summary and Guide," pp. 7–8.

23. Ibid., p. 8.

24. American Division, Ministry of Information, "Beveridge Report: American Survey" by cable from the British Press Service, New York, "Report of Friday, December 4, 1942," quoting the *Louisville Courier Journal* of December 3, 1942 and "Report of Saturday, December 5, 1942," quoting the *Atlanta Constitution* of December 3, 1942, in Beveridge Papers, Part 8, File 49, part 2.

25. PPA, 1940 vol., pp. 1, 53. See also Minsky, "Religious Groups and the Post-War World," p. 362.

26. Minsky, "Religious Groups," p. 362; Special issue of the *Leiden Journal of International Law*, "Alejandro Alvarez and the Periphery" 19(4) (2006); Kenneth Cmiel, "An International Bill of Rights," unpublished essay.

27. National Resources Planning Board, "After the War—Toward Security: Freedom From Want," September 1942, FDRPL, PSF, Postwar Planning, Box 157, Introductory Note, pp. 1, 8.

28. Carol Anderson, *Eyes Off the Prize: The United Nations and the African-American Struggle for Human Rights, 1944–1955* (New York: Cambridge University Press, 2003), pp. 11, 14. FDR signed the highly controversial Executive Order 8802, setting up the Fair Employment Practices Division, but declined to present anti-lynching legislation during the war; Randolph cancelled the march on Washington. Excerpts from *Eyes off the prize* © 2003 by Carol Anderson. Reprinted with permission of Cambridge University Press.

29. On the British side, see, for example, Deputy Prime Minister Clement Attlee's speech notes for the International Labor Organization, November 16, 1941: "Undoubtedly the evils from which we are suffering today are to a large extent due to the economic conditions of the last two decades which by destroying the security of millions made them ready in despair to listen to the promises of gangster dictators"; Attlee speech notes, November 16, 1941, CHAR 20/23: 86, Churchill College Archives, where he also explains that the general text for his speech "must be Franklin D. Roosevelt's four freedoms and the clauses of the Atlantic Charter . . ." Ibid., p. 87. See also Rodgers, *Atlantic Crossings*, pp. 485–501.

30. Robert M. Barrington-Ward to Churchill, April 14, 1942, CHAR 20/62: 9–10 (this letter with attached memo also mentions the not-yet-published Beveridge Report).

31. For a vivid example of this winnowing out of economic rights in the late 1940s, see Stuart J. Little, "The Freedom Train: Citizenship and Postwar Political Culture, 1946-1949," *American Studies* 34 (1979): 35–67. One measure of the disfavor into which economic and social rights had fallen is indicated by the decision of the conservative, private-sector sponsors of the Freedom Train exhibition to cut the text of the Four Freedoms speech from the original list of exhibits proposed by the staff of the National Archives. The text of the Four Freedoms address was removed, along with the Wagner Act, because, as one of the consultants on the project wrote in private correspondence in 1946, "I think a great number of people in this country are sick and tired of many of the New Deal ideologies." Ibid., p. 48.

32. Archibald MacLeish quoted in Studs Terkel, *"The Good War": An Oral History of World War II* (New York: Pantheon Books, 1984), p. 13. MacLeish, in 1941 the Librarian of Congress and co-editor of one set of Felix Frankfurter's papers, had headed the State Department's Office of Facts and Figures, an agency created in October 1941. He was also occasionally called in to polish FDR's speeches. In June 1942 the OFF was folded into a new agency, the Office of War Information. MacLeish resigned in January 1943 under attack from Congress for acting as a "propagandist for Roosevelt and his policies." See Arthur M. Schlesinger Jr., *A Life in the 20th Century: Innocent Beginnings, 1917–1950* (Boston: Houghton Mifflin, 2000) especially chapter 14, "Blowup at OWI." See also R & H, p. 215.

33. See generally, Les K. Adler and Thomas G. Patterson, "Red Fascism: The Merger of Nazi Germany and Soviet Russia in the American Image of Totalitarianism, 1930's-1950's," *American Historical Review* 75 (April 1970): 1046–1048; Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought* (New York: Viking Press, 1968), pp. 149–158.

34. FDR, "Annual Message to the Congress, January 6, 1941," PPA 1940, p. 672. For additional background on the drafting of the speech, see Rosenman, *Working*

With Roosevelt, pp. 262–265; and Crowell, "The Building of the 'Four Freedoms' Speech," pp. 266–283.

35. Charles E. Merriam, *On the Agenda of Democracy* (Cambridge, MA: Harvard University Press, 1941); National Resources Planning Board, "After the War—Toward Security: Freedom From Want," September 1942, in President's Secretary's File, Subject File: Postwar Planning, Box 157, FDRPL, especially pp. 19–28; National Resources Planning Board, National Resources Development: Report for 1942, p. 3, as discussed in Rosenman, *Working With Roosevelt*, pp. 53–54.

36. Merriam, *Agenda*, pp. 98–99. See also Merriam, "The National Resources Planning Board: A Chapter in the American Planning Experience," *American Political Science Review* 38 (December 1944): 1075, 1079.

37. Rosenman, *Working With Roosevelt*, p. 264.

38. Merriam, *Agenda*, pp. 9, 52–53, 78; Sunstein, *Second Bill of Rights*, p. 4.

39. Sunstein, *Second Bill of Rights*, p. 1. Ken Cmiel argues that "historians should set aside their preoccupation with 'thick descriptions' of culture and ponder the uses of 'thin' cultural messages in our mass-mediated world." Cmiel, "The Emergence of Human Rights Politics in the United States," Journal of American History 86 (3) (December 1999): 1233.

40. Lynn Hunt traces the term to philosophical debates in mid-eighteenth-century France, which then took on a more concrete quality in the French revolutionary era. See generally, Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton, 2007). For an excellent summary of the recent literature focusing on 1940s-era transformations in the politics of human rights ideas, see Ken Cmiel, "Review Essay: The Recent History of Human Rights," *American Historical Review* 109 (February 2004): 117, 129n35.

41. Hunt, *Inventing Human Rights*, p. 20. On civil rights, see, for example, Henry J. Abraham, *Freedom and the Court: Civil Rights and Liberties in the United States*, 5th ed. (Oxford: Oxford University Press, 1988); Geoffrey R. Stone, "Reflections on the First Amendment: The Evolution of the American Jurisprudence of Free Expression," *Proceedings of the American Philosophical Society* (September 1987), p. 131; Samuel Walker, *In Defense of American Liberties: A History of the ACLU*, 2nd ed. (Carbondale: Southern Illinois University Press, 1999).

42. See Paul G. Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998), p. 1.

43. Hannah Arendt, *The Origins of Totalitarianism* (New York: Schocken, 2004), p. xxvii.

44. Primus, *Language of Rights*, pp. 179, 178; Hunt, *Inventing Human Rights*, p. 21; see also Hersch Lauterpacht, "The International Protection of Human Rights," *Académie de Droit International de la Haye, 70 Recueil des Cours 1947* (I): 1–108. For a discussion of the links between this changing conception of the sources of international human rights and what historian Peter Novick calls "Holocaust consciousness," see chapter 8 in Borgwardt, *New Deal for the World*, on the Nuremberg Charter. Novick, *The Holocaust in American Life* (Boston: Houghton Mifflin, 1999).

45. These 600 articles are only a partial listing: They are accompanied by a caveat explaining that the 600 entries are limited merely to articles pertaining to human rights in the United States, and that additional human rights articles focusing on other countries may be found under the separate country headings.

46. Churchill quoted in Arthur Bryant, *The Turn of the Tide, 1939–1943* (London: Grafton, 1986), p. 282.

47. Attlee cable quoted in R & H, pp. 446.

48. John Milton Cooper traces the phrase "united nations" to a 1915 speech given by, of all people, Woodrow Wilson's nemesis, Senator Henry Cabot Lodge. This appears to be a coincidence—Lodge was not using the phrase as a caption for anything

specific, but was speaking in a general way of the need for great power unity: "The great nations must be so united as to be able to say to any single country, you must not go to war, and they can only say that effectively when the country desiring war knows that the force which the united nations place behind peace is irresistible." Lodge, "Force and Peace," speech of June 9, 1915 in Henry Cabot Lodge, *War Addresses, 1915–1917* (Boston: Houghton Mifflin, 1917), as quoted in John Milton Cooper Jr., *Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations* (Cambridge, UK: Cambridge University Press, 2001), p. 12. It seems unlikely that Roosevelt would have known of this isolated reference.

49. Roosevelt's personal secretary Grace Tully reported seeing the president shortly after this alleged encounter and having FDR confide to her that the prime minister was "pink and white all over." Tully, *FDR My Boss*, p. 305. It seems to have been rather commonplace for Churchill to have visitors during his twice-daily baths.

50. Declaration of the United Nations, January 1, 1942, FRUS 1942, 1: 25–26; see also U.S. Department of State, *Cooperative War Effort: Declaration by United Nations, Washington, D.C., January 1, 1942*, and *Declaration Known as the Atlantic Charter, August 14, 1941, US Department of State Publication 1732, Executive Agreement Series 236* (Washington: US GPO, 1942), p. 3. Forty-six countries ultimately adhered to this Declaration. Roosevelt himself insisted that India and other dominion countries sign as independent entities, and not under Great Britain's signature. Roosevelt, Papers as President, PSF Safe File, Box 1, Atlantic Charter (1), FDRPL. On Roosevelt's coining the term "united nations," see Churchill, *The Grand Alliance* (Boston: Houghton Mifflin, 1953), pp. 575, 577.

51. R & H, p. 448. The phrase "in their own lands as will (*sic*) as in other lands" was added by Roosevelt and appears in his own handwriting in an undated draft of the Declaration. Declaration of the United Nations draft, PSF, Box 1, Atlantic Charter (1), FDRPL.

52. The first unilateral example of such a statement was, arguably, the Four Freedoms speech itself.

53. While this definition is my own formulation, these elements may be extracted from the introductory sections of most basic texts on the history, law, or politics of human rights. See, for example, Lauren, *Visions Seen*; Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, and Morals*, 2nd ed. (Oxford: Clarendon Press, 2000); Richard Pierre Claude and B.H. Weston (eds.), *Human Rights in the World Community*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 1992).

54. See, for example, Amartya Sen, "Elements of a Theory of Human Rights," *Philosophy & Public Affairs* 32(4) (2004): 315–356; Sebastiano Maffettone, "Universal Duty and Global Justice," paper presented to Global Justice Working Group, Freeman Spogli Institute for International Studies, Stanford University, December 2006 (available online at www.globaljustice.stanford.edu).

55. Wannsee is widely cited as the meeting where the decision was made to implement the genocide of European Jews known as the "Final Solution." See Richard Breitman, *The Architect of Genocide: Himmler and the Final Solution* (New York: Knopf, 1991); Ian Kershaw, "Improvised Genocide? The Emergence of the 'Final Solution' in the Warthegau," Transactions of the Royal Historical Society, 6th Series, 2, (1992), pp. 51–78, although more recent accounts suggest earlier decisions. See Christopher R. Browning, *The Origins of the Final Solution: The Evolution of Nazi Jewish Policy, September 1939–March 1942* (Lincoln: University of Nebraska Press, 2003), which notes that Himmler commissioned concentration camps with gas chambers for mass killings three months earlier, in October 1941.

56. See, for example, Greg Robinson, *By Order of the President: FDR and the Internment of Japanese Americans* (Cambridge, MA: Harvard University Press, 2001);

Roger Daniels, Prisoners *Without Trial: Japanese Americans in World War II* (New York, 1993); Eugene V. Rostow, "The Japanese American Cases—A Disaster," *Yale Law Journal* 54 (1945): 489–533.

57. Gandhi to Roosevelt, July 1, 1942, FRUS, 1942 (1): 678–679; Cmiel, "The Recent History of Human Rights," *American Historical Review* 109 (2004): 120.

58. For example, diplomatic historian Lloyd Gardner has observed that in FDR's press conferences, the president "often confronted his own rhetoric." Gardner, "The Atlantic Charter: Idea and Reality, 1942–1945," in Douglas Brinkley and David R. Facey-Crowther (eds.), *The Atlantic Charter, Franklin and Eleanor Roosevelt Institute Series on Diplomatic and Economic History* (New York: St. Martin's, 1994), p. 48. See generally, Primus, *Language of Rights*, pp. 7–8; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996); William E. Forbath, "Habermas's Constitution: A History, Guide and Critique," *Law & Social Inquiry* 23 (Fall 1998): 969–1016.

59. A similar shift, including the time lag, is mirrored in the more detailed and specialized Index to Legal Periodicals for this era. Volume 6, covering August 1940 to July 1943, does not list Human Rights as a topic heading, although a total of roughly twenty-four articles under both Civil Rights and International Law headings address a human rights topic explicitly. The same is true for Volume 7 (August 1943 to July 1946), where approximately forty-six articles deal directly with human rights. Human Rights has its own heading for the first time in Volume 8 (August 1946 to July 1949), cross-referenced to Civil Rights for all article listings, which now number 146 specifically on human rights, (including 40 with the term human rights in the title, up from zero in 1940–1943 and two in 1943–1946).

60. Robert Westbrook, "Fighting for the American Family"; for a discussion of the concept of the attentive public, see Gabriel A. Almond, *The American People and Foreign Policy*, 2nd ed. (New York: Harcourt Brace, 1960), pp. 139–143, 150–152, 233; see also Eugene R. Wittkopf, *Faces of Internationalism: Public Opinion and American Foreign Policy* (Durham: Duke University Press, 1990); William L. Rivers, *The Opinionmakers* (Boston: Beacon, 1965). On the idea of "middlebrow" culture in America, see Joan Shelley Rubin, "Between Culture and Consumption: The Meditations of the Middlebrow," in Fox and Lears (eds.), *Power of Culture*, pp. 162–191; Virginia Woolf, "Middlebrow," in Woolf, *The Death of the Moth* (New York: Harcourt Brace Jovanovich, 1974), pp. 180–184; Russell Lynes, "Highbrow, Lowbrow, Middlebrow," *Harper's* (Feb 1949): 19–48. On the measurement of U.S. public opinion, see William A. Lydgate, *What America Thinks* (New York: Thomas Y. Crowell, 1944); Sarah Igo, *The Averaged American: Surveys, Citizens and the Making of a Mass Public* (Cambridge, MA: Harvard University Press, 2007); and Susan Herbst, *Numbered Voices: How Opinion Polling Has Shaped American Politics* (Chicago: University of Chicago Press, 1993).

61. See, for example, the Christian Century editorial, "President Roosevelt Sabotages the Atlantic Charter," beginning, "He intended to undermine still further any moral authority which that much flouted declaration might retain." *Christian Century* 62 (January 3, 1945): 3–4; Horace R. Clayton, "That Charter: We Seem to be Reneging on the Principles of the Atlantic Charter," *Pittsburgh Courier* (November 28, 1942): 12, as cited in Penny M. Von Eschen, *Race Against Empire: Black Americans and Anticolonialism, 1937–1957* (Ithaca: Cornell University Press, 1997), p. 198n15. For a fascinating description of the international backlash against the disappointed hopes raised by the moralistic U.S. foreign policy of the Wilsonian era, see Erez Manela, *The Wilsonian Moment: Self-Determination and the International Origins of Anti-Colonial Nationalism* (New York: Oxford University Press, 2007).

62. New Zealand Prime Minister Peter Fraser addressing the Canadian Parliament, Friday, June 30, 1944, Debates, House of Commons, Session 1944, vol. 5 (Ottawa: Edmond Cloutier, 1945), p. 4424.

63. Edward R. Stettinius Jr., Papers "Dumbarton Oaks Diary," Albert and Shirley Small Special Collections Library, University of Virginia; British Commonwealth Conference, *Yearbook of the United Nations 1946–1947, Department of Public Information, United Nations* (Lake Success, New York: 1947), p. 10; United Nations Conference on International Organization: Selected Documents, Department of State Publication No. 2490 (Washington, DC: US GPO, 1946), pp. 94–99; Division of International Organization Affairs, "Comments and Suggestions by Other Governments," undated, Harley Notter Papers, RG 59, Box 164, NARA; telegram from U.S. Embassy in Norway to State Department, March 2, 1945, Notter Papers, Box 185; Division of International Organization Affairs, "Comments and Suggestions on the Dumbarton Oaks Proposals," March 28, 1944, Box 214, Notter Papers.

64. "Synopsis of Essential Observations Made by the Mexican Delegation on the Dumbarton Oaks Proposals," Inter-American Conference on Problems of War and Peace (Chapultepec Conference), February 25, 1945, Conference File, Papers of Leo Pasvolsky, LC; Editorial in El Universal (Mexico) February 28, 1945. The Conference of Chapultepec consisted of the members of the Pan-American Union minus Argentina, where the fascist-leaning government of General Edelmiro Farrell had seized power in 1944. On human rights–related provisions, see also "Resolution XXX of the Inter-American Conference on Problems of War and Peace" in 12 State Department Bulletin (March 18, 1945), pp. 449–450; Committee II, "An Account of the Essential Comments Made by the Delegates to the Inter-American Conference on Problems of War and Peace Concerning the Bases of Dumbarton Oaks," Records of the Office of UN Affairs, RG 59, Box 30, NARA; "Proposals of the Delegation of Cuba for the Declaration of the International Duties and Rights of the Individual," Notter Papers, RG 59, Box 23, NARA; U.S. Department of State, "Report of the Delegation of the United States of America to the Inter-American Conference on Problems of War and Peace" (Washington, DC: US GPO, 1946).

65. Gardner, "The Atlantic Charter: Idea and Reality, 1942-1945," in Brinkley and Facey-Crowther (eds.), *Atlantic Charter*, pp. 45–81.

66. Slaughter, "Regulating the World"; *Clark M. Eichelberger, Organizing for Peace: A Personal History of the Founding of the United Nations* (New York: Harper & Row, 1977), p. 197; National League of Women Voters, "Memorandum: The United Nations: The Road Ahead," undated pamphlet but likely Fall 1945, Seeley Mudd Library, Princeton, pp. 3–4.

67. For an excellent discussion of the meaning of this phrase in the context of colonial and revolutionary American politics, see David Armitage, *The Declaration of Independence: A Global History* (Cambridge, MA: Harvard University Press, 2007).

68. Jonathan D. Greenberg, "Arendt and Weber on Law, Violence and the State," paper presented at the annual conference of the Law & Society Association, June 4, 2005, Las Vegas; see also Jonathan Schell, *The Unconquerable World: Power, Nonviolence, and the Will of the People* (New York: Metropolitan, 2003); Jonathan D. Greenberg, "Does Power Trump Law?" *Stanford Law Review* 55 (May 2003): 1789–1820; Hannah Arendt, *On Violence* (New York: Harcourt, Brace and World, 1970).

69. Harold D. Lasswell, "The Garrison State," *American Journal of Sociology* 46 (January 1941): 455–468; Hannah Arendt, *The Origins of Totalitarianism* (1948; New York: Schocken, 2004), pp. 568, 375.

70. David Riesman, "Civil Liberties in a Time of Transition," in Carl J. Friedrich and Edward S. Mason (eds.), *Public Policy* (Cambridge, MA: Harvard University Press, 1942), p. 96.

71. Susan Sontag, "The Photographs Are Us," *Sunday New York Times Magazine*, May 23, 2004, pp. 25–29, 42; Judith Butler, "Indefinite Detention," in *Precarious Life: The Powers of Mourning and Violence* (London: Verso, 2004), p. 50; Rosemary Foot, "Changing the Script of Modern Statehood: U.S. Human Rights Policy in Asia Post 9/11," paper presented at the Rothermere American Institute, Conference on the United States and Global Human Rights, (November 11–13, 2004)(Foot discusses how Indonesian officials have set up a facility deliberately modeled on the extraterritorial features of the U.S. detention complex at Guantanamo, for the indefinite detention without recourse to proper legal process of separatist fighters from Aceh province.) See also the account by social psychologist Philip Zimbardo, designer of the famous Stanford Prison Experiment and expert witness at the court-martial of one of the Abu Ghraib guards, *The Lucifer Effect: Understanding How Good People Turn Evil* (New York: Random House, 2007).

72. "Permission slip" phrase from George W. Bush, State of the Union Address, January 20, 2004, available online at www.whitehouse.gov/news/releases/2004/01; Walter Cronkite in the *Seattle Post-Intelligencer*, May 20, 2004, as quoted in Lisa Hajjar, "Our Heart of Darkness," Amnesty International, Amnesty Now, Summer 2004; Lexington, "The Fear Myth," *Economist* (November 18, 2004); Wendell L. Willkie, *One World* (New York: Simon & Schuster, 1943), pp. 134, 137.

73. Ignatieff tries to "chart a middle course between a pure libertarian position which maintains that no violations of rights can ever be justified and a purely pragmatic position that judges antiterrorist measures solely by their effectiveness." He further asserts, however, that "actions which violate foundational commitments to justice and dignity—torture, illegal detention, unlawful assassination—should be beyond the pale." For Ignatieff, the key corrective measures are transparency and openness, especially "the process of adversarial review that decides these matters. When democrats disagree on substance, they need to agree on process, to keep democracy safe both from our enemies and from our own zeal." Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004), p. viii.

74. Joseph S. Nye Jr., *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004), p. x; Ryan Goodman and Derek Jinks, "How to Influence States: Socialization and International Human Rights Law," *Duke Law Journal* 54 (December 2004): 621–703; see also Zbigniew Brzezinski, *The Choice: Global Domination or Global Leadership* (New York: Basic, 2004).

CHAPTER 3

Louis Henkin and Human Rights: A New Deal at Home and Abroad

Catherine Powell

> I was a New Dealer, I wanted to be a New Dealer, and when I got out of uniform I wanted to join The New Deal, and someone said you better go right to the UN [United Nations], so that's how I got from The New Deal to the international movement. . . . I think people don't recognize that when Franklin Roosevelt spoke about "The Four Freedoms," he was speaking about a world order. So he was projecting UN participation, and the world order he projected would include freedom of expression, freedom from want. And he was committed to that as [he was to] his New Deal . . . and he lived to see it."[1]
>
> —Louis Henkin

INTRODUCTION

These words are drawn from an interview with Columbia Law professor Louis Henkin, who spoke about his experience as part of the founding generation that established human rights as a universal and international idea.[2] Professor Henkin viewed President Franklin D. Roosevelt's Four Freedoms speech as a call for a New Deal for the world. In his Four Freedoms speech, FDR called for freedom of expression, freedom from religious persecution, freedom from fear, and freedom from want.[3] Discussing how this vision influenced the institutional framework of the post–World War II world order, historian Elizabeth Borgwardt points out, "The designers of the Bretton Woods, UN, and Nuremberg charters actively struggled to redefine the idea of 'security' in the international sphere to include economic and political security, much as New Deal programs had redefined security domestically for individual American citizens."[4] FDR's recognition that a new world order must secure economic and social rights as well as civil and political rights

was deeply informed by his twin experiences with the scourge of the Great Depression and Nazi occupation of Western Europe.

As a founding father of the contemporary human rights idea and the movement that has inspired and been inspired by this idea, Louis Henkin has been profoundly influenced by his own experience as an immigrant who: fled communist Russia at age five in 1923; came of age in the tenements of Manhattan's Lower East Side during the New Deal; and received a Silver Star for gallantry in action during World War II. Increasingly historians and biographers are beginning to see that to understand great moments in history, it helps to hear the first hand account of somebody intimately involved in those events. So, to understand the historic events surrounding the establishment of human rights—particularly as that field developed in the United States—this chapter recounts the story of Louis Henkin. Professor Henkin shared his story with me in a series of dialogues conducted from 2006 to 2007 (at 88–89 years old), with the support and guidance of the Columbia Oral History Research Office. The present work is an edited and annotated version of the interview transcripts.

This chapter is divided into four parts, representing four phases of Henkin's life and his contributions to the evolution of human rights in the United States.[5] The first part provides a sketch of how the seeds of the human rights idea were planted in the young Louis Henkin as an immigrant from communist Russia, who came of age as part of the greatest generation[6]—during the Great Depression, New Deal, and World War II. The second part investigates Henkin's belief that international institutions and international law offer a "New Deal" vision for the world, in aiming to provide political security, economic security, and human security. Henkin's insight, that while the state has an important role to play in helping to realize rights, sovereignty should not be used as a barrier to human rights, is then examined. The final part concludes with Professor Henkin's skepticism about the continuing vitality of war as a concept in international law, as well as his thoughts on President Bush's "War on Terror" and its uneasy relationship with human rights. In each of these parts, my questions and notations are shown in italic type and Professor Henkin's remarks are printed in roman.

FROM COMMUNISM TO NEW DEAL: FINDING A PROPER ROLE FOR THE STATE

The following dialogue reflects how the seeds of the human rights idea were planted during Louis Henkin's childhood. "Lazar," as he was called in childhood (a nickname for Eliezer), was born on November 11, 1917 and left Russia with his family in 1923. Even while Henkin's upbringing on the Lower East Side stressed the value of hard work and self-reliance, his father modeled the importance of helping others. His father, Rabbi Yosef Eliahu Henkin, was a well-known religious scholar and figure in the Jewish community who worked for a social services organization named Ezras Torah, which provides support to needy Torah families and has assisted refugees in rebuilding their lives on safer shores.[7] *"My father [was] devoted to the three ideas . . . probity, piety, and poverty[,]" Professor Henkin explains.*[8] *Henkin's biological mother, Freida Rebecca Kreindel, was*

also committed to the spirit of community service. When there was an attack of dysentery in the small village in Russia where they lived, she went out to tend to the sick, and she herself got sick, perhaps succumbing to the same illness. As a result, she died. Under the care of his father and stepmother, Hannah Katakov—who raised little Lazar and his older five siblings—Henkin learned the importance of hard work, discipline, and community service.[9] *"My father [and stepmother] were simple, they got up at six o'clock in the morning, went to the synagogue, studied, came home, took a nap, went back to the Ezras Torah office."*

• • •

Why did your family leave Russia?

My father was a very religious man, and he was worried about religion and the treatment of Jews in communist Russia. So he wanted out of Russia. I'm the original refugee from communism. And fortunately from that perspective my stepmother had a brother living in Ohio, and he had come here earlier and made by the standards of the time a small fortune, about 25,000 dollars. We wanted to leave for America . . . so he sent us . . . trip tickets, we came by ship—before plane—we came in 1923. We traveled third class, and settled on the Lower East Side. My father became famous as a scholar and, in order to earn a living, 'cause he didn't want to sponge, he became secretary for a charity fund.[10]

What were your initial impressions when you came to the United States?

We arrived at Ellis Island. And I remember a large hall. And every day they came out with a sheet of paper, and if it was one color it means you can go on to the United States, if it was another color you go back. Now the shipping companies were obligated to take you back. . . . so they got me in front of an interpreter who could speak Yiddish, it's the only language I could speak. At home my sisters spoke Russian quite fluently, but at home we spoke Yiddish. And there was this gentleman representing in effect the immigration service. And this man says to me in Yiddish, "What's your name?" I wasn't going to tell him my name. My father says, "Tell him your name." He speaks Yiddish to me in front of the interpreter. Well he wasn't sure if he had a deaf-mute on his hands, and my father began to worry. So he . . . started talking to this interpreter, and said, "He's really a very smart boy. Believe me he's a very smart little boy." He said, "Tell him your name." So he saw he was getting nowhere with the interpreter, he started pleading with me. He said, "Hey, Lazar, how much is 18 x 3?" . . . "54." I never did tell him my name.[11]

And how did you get the name Louis Henkin?

You ask all the interesting questions. They sent me to the local Hebrew school, and the vice principal said, "What's your name?" . . . I said, "Lazar." He said, "Lazar, that's not a name. Lazar—Louie." And to this day when someone calls me Louie, I know it's somebody whose grandfather was at school with me, wanting me to help him get his grandson to the Harvard Law School. . . . It stuck. . . . This man had decided that [Lazar] was not a good enough English name, and made me Louie, and Louie became Louis, and Louis became Lou, and it stuck through my years at Yeshiva College[.][12]

Growing up on the Lower East Side, did you see the United States as the beacon of liberty that we think of it being historically?

No, we were not bothered. My father had a job, so they let us in. We lived on the Lower East Side among people who spoke Yiddish. My father . . . never

learned English. We didn't own a radio, and there were no televisions in those days. And we lived in a Yiddish-speaking community with other Yiddish speakers and I was the smart little boy who did well at school. It may interest you to know that our school in those days was a little different. We went—first of all we went to school on Sundays: Sunday, Monday, Tuesday, Wednesday, Thursday, and half of Friday, to get ready for the Sabbath. So I—my associations were all with Yiddish speakers. But as time passed on my classmates wanted—we all wanted to be Americans so we all learned English pretty well.[13]

And, Lou, you were the youngest?

I was the youngest . . . [o]f six children . . . three girls, three boys . . . the oldest of the three boys died at the age of seventeen, I think from a ruptured appendix in the days when they didn't know what to do about that.[14]

What do you recall from your childhood that you think might have fed your current interest and passion in human rights, international law, and comparative constitutionalism?

Well that's a little hard, but I'll try. The words "human rights" were not known to international law, by definition human rights are individual. [T]hey were the rights of individuals in the society, not the rights of nations[.] I was originally a mathematician. I was pretty good at it, got prizes at . . . Yeshiva College in mathematics.[15] . . . When I should have been studying the Talmud, I had a copy of my advanced algebra course.[16]

[T]he Yeshiva College people decided that—there was a young man on the premises who needed some more piety than he had, and they thought I could instill it in him. He was fancier than I; he was born in England. [T]hey put us in a room together. I came home one day and . . . I said, "What are you doing?" He said, "I'm filling out applications for the Harvard Law School." I said, "Harvard Law School, what's that?" I'm almost quoting myself . . . And law school, how do you pay for it? Well you pay for the first half of your first year, and then if you do well they'll refund your first semester's funding. And so it was. So I was in effect monitoring his religious education, and he made me more sophisticated.[17]

You were on Law Review at Harvard Law School, and clearly you thrived. Was there anyone in particular who mentored you there?

Well it was easy. One day one of my professors at Harvard Law School, by the name of Henry Hart—a nice man—tapped me on the shoulder and said, "Would you like to work for [Judge] Learned Hand? I by then didn't know the name Learned Hand—that was the application. . . . The next year, Learned Hand tapped me on the shoulder and said, "Would you like to work for [Supreme Court Justice] Felix Frankfurter?"[18] That's the whole story.

TRANSCENDING THE STATE

Upon finishing his clerkship with Justice Frankfurter, Henkin came to believe that international institutions and international law offered a "New Deal" vision for the world, in aiming to provide political security, economic security, and human security. While Henkin's family had fled communist-controlled Russia shortly following the Russian Revolution, Henkin found himself attracted to the ideals underlying the New Deal. Moving beyond the negative rights paradigm of

the state, the New Deal embraced a positive role for the state in affirmatively providing social safety nets and economic security. While, at first blush, Henkin's embrace of the New Deal, against the backdrop of having been a refugee from communist Russia, presents something of a puzzle, in fact his family's decision to leave Russia was primarily motivated by concern over the communists' rejection of religion, and the consequent implications of this for Judaism. Thus, as the following dialogue indicates, the family's misgivings about communism had more to do with its failure to protect religious freedom and individual autonomy more broadly than its emphasis on state regulation of the economy.

Paradoxically, while the New Deal of the 1930s depended on the state to provide social safety nets, the international institutions created post–World War II provide a way to transcend the state. At the same time, even while international human rights law requires the state to get out of the way to allow for individual liberty and freedom, it also depends on government establishing mechanisms (i.e., courts) to enforce negative rights (i.e., the right to be free of torture) as well as government support for positive rights (i.e., the right to housing), when they cannot otherwise be guaranteed. The following dialogue reflects Henkin's early thinking on the role of international human rights in supporting domestic social justice.

• • •

You've been referred to as "The Father of Human Rights," and I want to ask whether as part of the founding generation you realized at the time that you were helping to create a new field?

The words "human rights" didn't exist in international law, didn't exist in U.S. law, except colloquially. I once tried to find out what was the first use of the words "human rights," without a capital H or a capital R, and it goes way back to one of the abolitionists, [Frederick Douglass]—[he called slavery] a violation of human rights, and he didn't know he was creating a field.[19]

[M]y involvement [in human rights] came through my interest in the New Deal, my being persuaded that the way you move to a New Deal on a worldwide basis is through the UN . . . and when the New Deal sort of floundered—when the international commitment floundered in the United States[,] a number of us moved over into the UN system [and] said, "We'll do this through the UN, and if you read [about] U.S. participation in the international covenants, you'll see how . . . it all stems from the commitment to the Four Freedoms: but a world order with four freedoms. To have a world order with Four Freedoms means a UN body, and the only way we can get a UN body is get it on the terms the world will accept.[20]

I went to law school in 1937, and nobody took international law. . . . Why should I? I was very interested in the New Deal, and I went to law school with a hope of working for the New Deal. The New Deal died as you probably know. And it was—I went to a party in Washington . . . and ran into a fellow by the name of Eric Stein [.] He said—we were socializing—"what are you going to do?" I said, "Well, I'd like to work for the New Deal." He said, "You wanna work for the New Deal, you got to work for the UN, because that's the New Deal. That's the New Deal of the postwar period." And I said, "Well, how do I get to work for the UN?" He said, "Well, . . . I'll get you an interview." So he got me an interview with that part of the State Department, which married

Europe and the UN, and that was called Regional Affairs, essentially the ancestor of NATO [North Atlantic Treaty Organization]. So he got me an interview with this fellow, and the fellow said, "Well you have these fancy clerkships, you must be a good constitutional lawyer, why don't we get you a job in the Office of Regional Affairs," which included NATO and The Economic and Social Council of the United Nations. He got me an interview and I got the job. I spent five years with the bureau of—originally known as The Bureau of UN Affairs. My first boss was a man by the name of Dean Rusk. If I had come six weeks earlier my first boss might have been a man by the name of Alger Hiss.[21]

And because of that I got to know . . . a man named Philip Jessup.[22] . . . He was on leave—he was a world figure by then. He was on leave from Columbia, but he had run into me and we liked each other, and he once asked me would you like to spend the year studying disarmament," and I said, "Maybe, I don't know." By then, as I'd like to tell it, at least to my children and you can refute this, I decided they were not going to make me Secretary of State. And therefore, if I couldn't save my soul I would become an academic. . . . Now if I show you my publications list, you'll see how my publications list went from disarmament to international studies . . . and to human rights somewhere along the way.[23]

And what about your work as a consultant at the UN? Did your job at the State Department lead to your work at the UN?

Oh, you ask all the right questions, I'll give you the right answer. I was looking for a job. I went to see a fellow by the name of Oscar Schachter. [H]e was one of the chief legal officers of the UN [and later joined the Columbia Law School faculty]. . . . And there was a lawsuit being brought at that time to keep the United Nations from being established in the United States, and this lawsuit was being brought by—I forget his name—a reactionary Catholic priest. . . . Oscar Schachter said—since I was already a constitutional lawyer, he [said], "Somebody is trying to prevent the UN from being established in the United States and we think the UN is immune, and can we go to court and plead the immunity of the UN to suit?" I said, "I don't know about it, but I'll learn." And I did. . . . So we wrote this brief, and we succeeded in persuading that they can't sue the UN, because they had immunity, and I became an expert on immunity. And I went into international law.[24]

And I take it the lawsuit was not successful at preventing the UN from being established.

The lawsuit was not successful. And it was established . . . first in Lake Success, and then[,] the property on the East Side of Manhattan, and that's where they are [today.][25]

What were the grounds or argument against trying to stop the establishment of the UN?

They didn't like it. It was a foreign institution. Let me—I seem to digress, but not really. The United States went through some interesting periods in history. Woodrow Wilson wanted us to join the League of Nations, and he couldn't get that through.[26]

"AWAY WITH THE 'S' WORD"

Henkin has become well known for his pithy expressions. One such expression, "Away with the 'S' word"— referring to "sovereignty"[27] — captures the skepticism

many human rights scholars and activists have toward states that hide behind the banner of sovereignty to shield against international scrutiny. As a scholar, Henkin developed several important ideas about the role of the nation-state, sovereignty, and compliance with international law. The dialogue that follows explores these ideas and traces his scholarly work in some of these areas back to his days as a practitioner.

Following his stint at the U.S. Department of State and the consultancy with the United Nations, Henkin served on the faculty at the University of Pennsylvania Law School, before joining the Columbia Law School faculty, where he has pioneered work on constitutional law and foreign relations, international law and diplomacy, and human rights. In 1981, Columbia designated Henkin a University professor, acknowledging his expertise in both law and political science, long before interdisciplinarity was trendy.[28] *"Thanks to him, Columbia University remains a place where international law is still taught outside the law school and to those laypersons, including heads of corporations and government officials, who might benefit most from learning something about the need to respect the dignity of the individual."*[29] *He returned to the UN years later in 2003 on a part-time basis, serving on the Human Rights Committee, the UN body charged with monitoring the implementation of the International Covenant on Civil and Political Rights.*[30]

Henkin is a remarkable example of someone who has had a career at the UN and U.S. State Department, and as treaty negotiator, impartial human rights expert, scholar, and Chief Reporter of the Third Restatement U.S. Foreign Relations Law. In this sense, Henkin's life story is a case study of the value of scholarly engagement with policy and the world of diplomacy.[31] *His skepticism with the "S" word reflects this engagement with both theory and practice.*

* * *

You taught at University of Pennsylvania Law School for five years leading up to 1962 before you came to Columbia. When you were at U Penn were you focusing on international law in your scholarship? What led you to your current scholarly interests?

The job at the State Department, which I took. I had often thought I'd be an academic because being an academic is in my blood. . . . I taught constitutional law which was my first love . . . [but] I wanted to do things international, and I wanted to do . . . things about peace and—my best known book[s were], *Foreign Affairs and the U.S. Constitution* [and] *How Nations Behave*.[32]

You have become legendary for developing notable expressions that reflect fundamental insights about international law and human rights. One such celebrated phrase is your claim that "It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all the time."[33] *Of that famous line, Yale Law School dean Harold Koh says, "That's called the sentence that launched a thousand articles. And in my case, it pushed me to an inquiry into why nations obey international law that will occupy the rest of my life."*[34] *In terms of where we sit today, in the aftermath of the U.S. invasion of Iraq without UN Security Council approval, and with the U.S. government's position on torture and the Geneva Conventions, do you still stand by the claim that almost all nations observe almost all international law almost all of the time?*

I'm wondering whether you think this observation is still true today, and if so, what do you think explains compliance today? Why do almost all nations obey almost all principals of international law almost all of the time?

I think it's still true. [States] do it from mixed motives, some of them.[35] . . . We [the U.S. government] tend to be selective as to what it is we pick when we say, "Which law, which countries, or which time?" Remember, everybody's interested in globalization and trade. . . . [T]hey observe all the trade treaties, or they lose out. And the United States is careful not to adopt treaties that it can't live up to, so it doesn't adopt them, or adopts them with RUDs [reservations, understandings, and declarations]. So, yes. But remember, *How Nations Behave* [tried to explore the] skepticism of our international law.

Another memorable expression that you've come up with is "Away with the 'S' word," referring to "sovereignty." I wonder if you could talk about your objection behind the "S" word, and whether you still have that skepticism?

Yes, I still have the same objection to the "S" word. I see it as an obstacle to human progress. It stands in the way of human values.[36]

Well, a key feature of sovereignty is the capacity of states to delineate boundaries between citizens and non-citizens. I want to ask you about your experience on the committee that drafted the 1952 Convention Relating to the Status of Refugees.[37] Of course, the Refugee Convention was one of the early major human rights instruments. While the U.S. did not join the Refugee Convention, it did become a party to the Refugee Protocol.[39] Could you talk about your experience in negotiating and drafting the Refugee Convention?

[T]here was a convention being drafted on the status of . . . refugees . . . and the State Department wanted someone to represent the U.S. there, and they really never had the intention to sign or ratify it. [A colleague] said to me, "You're a lawyer, why don't you represent the U.S.?" So I went to represent the U.S. in this body, and . . . I was to tell them—as far as I know the United States has no intention of signing that convention. That's the way it was sometimes done. . . . Someone at the State Department said, "We're not going to sign that. We need somebody to represent the U.S." There was a seat called U.S. because we were getting to be an important figure. So I said, "Okay." . . . And before I left that meeting—at the end of the session at least—I had to admit I don't think the U.S. is going to sign this convention we just drafted. . . . [But] we went in there and I participated fully[.] I'd like to take credit, not for the term but for the idea of *nonrefoulement*.[39] And as I remember, it was a Frenchman [who] said we have to end this convention with something that says, you can't send the Jews back to the Gestapo.[40]

From your experience working on the Refugee Convention and observing U.S. participation in the development of the human rights system, what is your view of U.S. leadership in human rights. We know the U.S. played a major role in World War II and during its aftermath to promote the idea of human rights, but I wonder what your impressions are of the U.S. role since World War II.

Now the key document to read is [Roosevelt's] "Four Freedoms Speech." . . . It's interesting but the French talked about *liberté égalité fraternité*. We use the word freedom; the question [is] whether there's any difference between freedom and liberty. He said, "We look forward to a world order,"—not to a new country, a world order—"which would have freedom of expression, freedom of religion, freedom from want, and freedom from fear." And if you look at those four things, freedom of expression is easiest in the First Amendment of the U.S.

Constitution, freedom of religion is also—freedom from wants means economic and social rights, and freedom from fear is you won't have to be afraid of the Hitlers. [There's] that nasty joke [that] say[s], "It was Hitler who made us an international nation." We began to—we didn't want to knock on the door, we didn't want genocide, and so we became . . . internationalist.

[The League of Nations] didn't take. [The UN] took . . . [R]ead the preamble of the UN Charter, read the preamble of the Universal Declaration [of Human Rights]. And the first—the new word in all that literature is "dignity," a word out of the German philosopher, [Immanuel Kant].[41]

I would like to ask you about the U.S. role in the UN, how that's changed, and what you'd like to see in terms of the U.S. involvement in the human rights agenda of the UN?

The last major effort by the United States to involve itself in international human rights was essentially a mood. After World War—when the [UN] Charter was adopted, Eleanor Roosevelt . . . was all in favor of promoting and participating [in the UN].[42] [As a] result we were inevitably involved in various committees and commissions that were created, but we never played a central role because—I can't say we were really wholehearted about it. When the United States finally climbed off its isolationism and began to participate in the UN, it was prepared to do so only on its own terms—what you want to look at is the paper I wrote called, "The Ghost of Senator Bricker,"[43] and what you'll find in that paper is an effort—the United States wants to participate in an international human rights movement, but on its own terms. And therefore we didn't want a single covenant because it had obligations and we weren't sure we were prepared to accept, or that Congress would let us accept. We insisted on being a part of the UN Human Rights Commission but we weren't eager to make the UN Human Rights Commission a very important public body. We therefore supported the breaking up of the Universal Declaration [of Human Rights] into two covenants and we were not prepared to adopt obligations under the covenant of economic and social rights [International Covenant on Economic, Social and Cultural Rights.][44]

Another of your well-known statements is "in the cathedral of human rights, the United States is more like a flying buttress than a pillar—choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to the scrutiny of that system."[45] Is this still the case?

I asked a Republican legal advisor, "Are we going to adhere to the covenant on economic and social rights?" He said, "No." . . . I asked "why not?" He said, "They're not rights, economic and social." I said, "But we thought they were in 1948 when we promoted the Universal Declaration." He said, "That was then." I said to him, "There were very important people who in that time who favored U.S. participation, like Eleanor Roosevelt." He said, "That was they." . . . So if you want to know what the U.S. attitude is, you saw what I wrote on "The Ghost of Senator Bricker." . . . [W]e wanted to be involved, but we wanted to not be involved in ways which we thought . . . would cost us too much money. So we never took a leadership role in the covenant of economic and social rights, although I also think we misinterpreted, the covenant doesn't say that we have to provide economic and social rights, we have to see to it that they get provided.[46]

In your article on Senator Bricker, you note that his ghost in effect lives on because the U.S. attaches numerous reservations, understandings and declarations—the

RUDs—such as declaring treaties non-self-executing. Do you think it would be better if the U.S. didn't ratify treaties in the first place, or is there some value to having ratification of the human rights treaties subject to these limitations?

[Y]ou [ask] would [it] be better, from whose perspective? If the United States wants to be a leader in many of these movements it's gotta be a part of it, gotta be a part of it, and it will be a part of it, only with the limitations that it's prepared to accept.[47]

As a charter member of Human Rights First [previously the Lawyers Committee for Human Rights] what do you think such non-governmental organizations can do to finally banish the ghost of Senator Bricker, whether it's withdrawal of RUDs or getting ratification of new treaties without RUDs?

[I]f you're talking about the future, I don't see any likelihood that the United States would agree to any new international instruments without some kind of Rs and some kind of Us and some kind of Ds.[48]

And what about the special role—and responsibility—of the academy in training government lawyers, judges, and other potential human rights practitioners? You were instrumental in launching the Center for the Study of Human Rights, Columbia's university-wide center, as well as the Human Rights Institute at Columbia Law School. Both of these centers are responsible for training a new generation of scholars, practicing lawyers, and activists. But what about the new generation of critics of international law who are, for example, raising red flags about the fact that the Supreme Court is citing to foreign and international law?

Well I shrug my shoulders, I don't—there's no reason why the Supreme Court can't cite foreign law. We have not changed our system in the United States. Treaties [are] still the law of the land. . . . The foreign law that people talk about is law that . . . is inspired by the United States. [F]oreign law is—much of it is U.S. law—borrowed from us, and transposed—transported. . . . If the African States decided they were to adopt U.S. law through international law, let them. . . . I think this is ideological, not legal . . . that people who are somehow afraid of foreign influences—and I think protection against that is to keep the powers of the president limited, and to keep Congress on the alert. Now I think we were foolish to oppose the International Criminal Court, but I know why we did it, they were afraid of having the American soldiers tried in a non-American court.[49]

Let me bring this back to the university context specifically. What would you like to see for the future with human rights programs in the university?

I'd like to see program[s] which make[] human rights available in various forms . . . and that students will be able to take human rights, which will have both constitutional rights and international law in it. . . . Did I ever tell you how I got to constitutionalism? . . . I was offered an opportunity to go to China to give a speech. And when I got there, there were thirty or forty important lawyers in a place which didn't have as many—didn't have as many books as I have on my shelf. This fellow . . . said to me, "What are you going to talk about?" I said, "Human rights." He said, "Hmm?" So thinking fast . . . I said, "How about constitutionalism?" He said, "Alright," so we moved from human rights to constitutionalism [based] on . . . that reservation." And then I began . . . to talk about constitutionalism, and . . . the elements of constitutionalism. And I have a paper called, "The Elements of Constitutionalism" . . . So human rights came in through constitutionalism, into the international movement, and into legal education at Columbia. So I like that a lot, students have the opportunities

to [learn] human rights whether it's part of the subject of constitutionalism, or as an independent subject.[50]

Well, you've also helped pioneer comparative constitutional analysis—long before Justice Antonin Scalia began to criticize his fellow justices for using comparative foreign law.[51] What role do you think comparative foreign law should play in constitutional analysis today? Do you agree with Scalia's view?

No, I almost never agree with Scalia's view.[52]

AWAY WITH THE "W" WORD

Henkin has noted, "Perhaps, a small measure of success in the battle against the 'S' word has encouraged me to 'take on' two other words: the 'W' word, 'war,' and the 'T' word, 'terrorism'."[53] In fact, in between Henkin's two clerkships, he spent four years in the army after being drafted in 1940, as the U.S. was about to enter World War II. With his expertise in both law and mathematics, he was assigned to serve in an artillery observation unit, which saw combat in Tunisia, Sicily, and Southern Italy. The unit later made its way through the Rhone valley to the German border. While near Toulon during the invasion of France, thirteen U.S. soldiers including Henkin came upon three German officers. Following a standoff with arms drawn, Henkin spoke Yiddish to the German soldiers, which initiated negotiations that paved the way for his meeting with the local German company commander, ultimately convincing the commander, his seven officers and sixty-seven men to surrender to the thirteen Americans. Henkin's skills as a negotiator earned him a Silver Star, a recognition of his daring and persuasiveness.[54]

The following dialogue reveals Professor Henkin's skepticism about the continuing vitality of war as a concept in international law following World War II as well as his thoughts on President Bush's "War on Terror" and its uneasy relationship with human rights.

• • •

I want to ask you about your time in the service in World War II. . . . How did your time in the army shape the way you think about the world. For example, the fact that World War II was a war for democracy and for stopping the Nazis, did this shape the way you think about international law and human rights?

[T]hat's a good question. . . . [I]t stopped me from being an isolationist. The United States had gone through the isolationism phase. You couldn't get them for the League of Nations.[55]

You've recently said, "Away with the 'W' word," referring to "war." Yet war is on everyone's lips, with the President's "War on Terror" and the war in Iraq. What's wrong with the word "war?"

Well, first of all it's a word [not in] international law, and it has no significance in international law. . . . War stands in the way of international law. First of all it has to be defined. We don't use the word ' "war" carefully.[56]

In fact, the UN Charter doesn't refer to the word "war."

The Constitution does.[57]

The Constitution does, that's right, that's right, but does the UN Charter change that?

Well the Constitution accepts the word "war" and uses it colloquially[.][58]

The UN Charter uses the phrase, "use of force," right, and it says that force can be used in self-defense, but otherwise it has to be authorized by the Security Council. So does the Charter's focus on use of force—as opposed to war—does this in effect abolish the concept of war from international law?

I think it does.[59]

In terms of what President Bush is doing in Iraq today, is that justified, or is his "War on Terror" justified, or is war just the wrong paradigm?

Well the word "war" is in the U.S. Constitution, and therefore it binds us. But I suppose the most important term in the UN Charter is, "Nations shall not use force against each other." Article 2, Section 4 says, "Nations shall not use force."[60]

So then how do we fit that within the U.S. legal framework? The Constitution, which was written more than 200 years ago, speaks of the concept of war, but then the UN Charter says, "Nations shall not use force." Does that bind the U.S.? Does that mean that we should no longer use war as a tool of foreign policy?

I suppose. . .[61] The most important principle is Article 2(4), "Nations shall not use force against each other."[62]

But what of the fact that the U.S. invades Iraq without authorization from the UN, without a Security Council resolution, and says that this is a preemptive attack? What of that? What use then is international law if a powerful country like the U.S. can go to war [and] can invade a country like Iraq without Security Council authorization?

The UN Charter says, "Nations shall not use force against each other," and then has Article 51[.][63]

That's the right to self-defense, that countries can use force to defend themselves.

That's the only use of force that's permissible.[64]

Can the U.S. justify the invasion of Iraq on Article 51 grounds as a use of self-defense, using force in self-defense? Can the Bush administration use the argument that there were weapons of mass destruction in Iraq that they felt posed an imminent threat?

You take Article 2(4) and Article 51 together and they say, "Nations shall not use force against each other, except in self-defense," and that has to be squared with—This is the most important treaty of the United States. It was adopted and adapted by the biggest majority in legal history[.][65]

And can the U.S. square the invasion of Iraq with Article 2(4) and Article 51 of the UN Charter?

I don't think it can, and that's the obstacle.[66]

What about the fact that the U.S. sent Colin Powell, for instance, to the Security Council to provide evidence about weapons of mass destruction in Iraq, and to therefore try to make the case that the anticipated invasion was in compliance with Article 51 of the UN Charter. Does that show that international law still has force, or do you think that the Bush administration's actions in invading Iraq were just completely lawless? I'm just wondering what you think now, now that we're four years into the Iraq war.

I haven't changed my mind. The four years into the Iraq war means we have no business in Iraq. We have agreed in the UN Charter not to use force except if

you combine Article 2(4) with Article 51; those are the limits on our use of force that we accepted, and we should live with it.[67]

Well, what does self-defense mean? Does it mean that you've already been attacked, or does it mean that you're on the brink of being attacked or may be attacked down the road?

No, it says—Look at Article 51, and let's get hold of a copy of it.[68]

Okay, so Article 51 of the UN Charter says, "Nothing in the present covenant shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security."[69] So "if an armed attack occurs"—

It doesn't mean if an armed attack "might occur," "is on the verge of occurring," and that's what we agreed to.[70]

Okay, that's what we agreed to, so your position is that the U.S. invasion of Iraq does not comply with that.

That's right. An armed attack hasn't occurred.[71]

Let me ask you, moving more into the area of your work on foreign affairs and the Constitution: Critics of international law have in the past criticized international law as being weak and impotent, but today they are critical of international law and institutions as too strong. They worry about the power and the strength of international law and institutions in contrast to their past concern about its weakness. So, for instance, they object that when we allow an international institution to make law for the U.S., that it is an unconstitutional delegation of power. What's your response to that objection?

There's no basis for it.[72]

And let me also ask you about your book, Foreign Affairs and the Constitution, which you wrote long before anyone noticed that the President was enjoying certain unanticipated powers as commander in chief.[73] Some scholars though point out that the Constitution was written at a time when the U.S. was a relatively weak state, whereas today we're a global hegemon,[74] and so perhaps the president needs more power.

Needs it for what purpose? He gave away that power in Article 51.[75]

Well, there are those who are supportive of a broad view of executive power and will discount the checks and balances written into the Constitution and imposed through international law. How do you respond to these scholars?

Well, I suppose we could change the Constitution.[76]

What about those scholars who want to allow for greater executive power, say in terms of the treatment of post-9/11 detainees? For example, Congress essentially has said, "Thou shalt not torture," and yet internal legal memos of the Office of Legal Counsel [OLC] say, "Thou can torture." Under the Bush administration, OLC has said that the president, under his commander-in-chief powers, doesn't need to be bound by Congress's prohibition on torture, under the Federal Torture Statute or the War Crimes Act, for example.

Well, they misread the Constitution.[77]

We've heard so much about the president's "War on Terror" since September 11th. Do you think an age of terror is replacing the age of rights?[78]

No, well, it's a good question. I don't think the age of terrorism has replaced the age of rights. We are an age of rights but we're subject to the consequences

of terrorism. Keep in your mind that terrorism has never been defined. It's not a word in international law—that I know of. So we are in the age of rights *subject* to terrorism, not the age of terrorism, I don't accept the concept. And I think those of us that care about rights have to keep the idea of rights alive and kicking, and to keep whatever is done in opposition to terrorism limited to what is necessary and not as an excuse for getting rid of the UN etc. . . . [W]e expect the age of rights to take account of terrorism, but not to bow to it.[79]

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NOTES

1. Louis Henkin, in discussion with the author, New York, NY, 13–14 March 2006, *Life of Louis Henkin* (New York: Columbia University Oral History Research Office), Session 1, 3-27 [hereinafter Oral History, Session 1].

2. Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990), pp. 2, 13–29 (describing the universalization and internationalization of the human rights idea). While the rights idea can be traced back to Lockean ideas of individual autonomy developed in the seventeenth and eighteenth centuries, the contemporary idea of rights became universalized and internationalized in the aftermath of World War II.

3. Franklin D. Roosevelt, Annual Message to Congress (6 January 1941). Available online at www.fdrlibrary.marist.edu/4free.html. Accessed 27 May 2007.

4. See Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge: Harvard University Press, 2005), p. 8. See also ibid., pp. 5–6 (describing link between Four Freedoms speech and post–World War II institutional framework).

5. The structure of this chapter draws inspiration from Yale Law School dean Harold Koh's tribute of Louis Henkin's life, which points out that "in the time that Lou has been in this field, international human rights law has gone through four modern phases[,]" including universalization, institutionalization, operationalization, and globalization. Harold Hongju Koh, "Speech at Louis Henkin Tribute," (speech, Columbia Law School, New York, NY, 21 September 2006). I have taken a slightly different tack here, however, by focusing on phases of Henkin's life and his contributions to human rights as opposed to Dean Koh's more comprehensive mapping of the broader human rights field.

6. Tom Brokaw, *The Greatest Generation* (New York: Random House, 1998).

7. Sonia von Gutfeld, "Columbia Celebrates the Human Rights Legacy of Professor Louis Henkin," *Columbia Law Report* (Winter 2007): 14, 15.

8. Louis Henkin, in discussion with the author, New York, NY, 4 May 2007. *Life of Louis Henkin* (New York: Columbia University Oral History Research Office), Session 2, 2-2 [hereinafter Oral History, Session 2].

9. Years later, Louis Henkin married Alice Henkin, who like her husband, has bridged a quest for knowledge with community service, as the director of the Aspen Institute's Justice and Society Program.

10. Oral History, Session 1, 1-3.

11. Ibid., 1-5 and 1-6.

12. Ibid., 1-6 and 1-7.

13. Ibid., 1-7 and 1-8.

14. Ibid., 1-8 and 1-9.

15. Ibid., 1-9.

16. Ibid., 1-16.

17. Ibid., 1-9.

18. Ibid., 1-9 and 1-10.

19. Oral History, Session 1, 1-2. As Henkin explores in his book, *The Rights of Man Today* several earlier thinkers had invoked the idea of rights. Louis Henkin, *The Rights of Man Today* (Boulder, CO: Westview, 1978), pp. 1–30. See, e.g., Thomas Paine, *The Rights of Man* (New York: Dolphin Books, 1961), pp. 281, 411 (explicitly using the term "human rights"). Paine "drew principally on John Locke, (perhaps filtered through Blackstone), Montesquieu, and Rousseau[.]" Henkin, *The Rights of Man Today*, p. 9. Frederick Douglass helped to expand and popularize human rights, explicitly using the terminology of "human rights" far more extensively than these earlier thinkers. See Ronald Burke, *Frederick Douglass: Crusading Orator for Human Rights* (New York: Garland, 1996); Lois Belton Kinney, *A Rhetorical Study of the Practice of Frederick Douglass on the Issue of Human Rights, 1840–1860* (Ann Arbor, MI: University Microfilms, 1975).

20. Oral History, Session 1, 3-27.

21. Ibid., 1-11 and 1-12.

22. Among other things, Philip Jessup was a judge on the International Court of Justice and a professor at Columbia Law School. The Philip C. Jessup International Moot Court Competition is named after him.

23. Oral History, Session 1, 1-11 and 1-12.

24. Ibid., 1-12 & 1-13.

25. Ibid., 1-13.

26. Ibid., 1-14.

27. Louis Henkin, *The Mythology of Sovereignty* (notes from addresses delivered at the Annual Meeting of the Canadian Council on International Law, Ottawa, October 1992, and the International Law Weekend, New York, November 1992), reprinted in "Notes From the President," *ASIL Newsletter* (March–May 1993): 1. For an earlier discussion, see Louis Henkin, *International Law: Politics, Law and Functions*, 216 REC. DES COURS 24-28 (1989-IV).

28. Jose Alvarez , "On Louis Henkin's 50th Anniversary in the Academy" (remarks at Columbia Law School, p. 1, Columbia Law School, New York, NY, 21 September 2006) (transcript on file with author) (noting that Professor Henkin's work was inherently interdisciplinary before crossing disciplinary boundaries became trendy, and lamenting that Henkin "reflects a (regrettably) somewhat lost tradition—when political scientists and lawyers spoke to and even sometimes liked each other").

29. Ibid., p. 2.

30. International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976.

31. Alvarez, "On Louis Henkin's 50th Anniversary in the Academy," p. 2.

32. Oral History, Session 1, 1-18 and 1-19. See Louis Henkin, *Foreign Affairs and the United States Constitution*, 2nd ed. (New York: Oxford University Press, 1996); Louis Henkin, *How Nations Behave*, 2nd ed. (New York: Columbia University Press, 1979).

33. Louis Henkin, *How Nations Behave*, 2nd ed., p. 47.

34. Harold Hongju Koh, "Speech at Louis Henkin Tribute," Columbia Law School.

35. Oral History, Session 2, 2-5.

36. Ibid., 2-6.

37. United Nations, Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force 22 April 1954 [hereinafter Refugee Convention].

38. United Nations, Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force 4 October 1967.

39. *Nonrefoulement* is a French word meaning no return for refugees who risk persecution if returned to the country from which they fled. See, e.g., Refugee Convention, Article 33 ("No Contracting State shall expel or return ["refouler"] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

40. Oral History, Session 1, 3-21. In one particularly notorious incident, in 1939, a ship called the St. Louis was carrying 937 mostly Jewish passengers who were trying to flee the Nazis by setting sail from Hamburg, Germany to Havana, Cuba. Upon being denied entry into Cuba, the ship sailed onward toward the United States. According to the Holocaust Encyclopedia of the United States Holocaust Memorial Museum: "Sailing so close to Florida that they could see the lights of Miami, passengers on the *St. Louis* cabled President Franklin D. Roosevelt asking for refuge. Roosevelt never answered the cable. The State Department and the White House had already decided not to let them enter the United States." *United States Holocaust Memorial Museum, Holocaust Encyclopedia*, "Voyage of the St. Louis," available online at www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005267 (accessed 25 May 2007). The ship was forced to return to Europe, where "[m]any of the passengers . . . later found themselves under Nazi rule." Ibid.

41. Oral History, Session 1, at 3-22.

42. Eleanor Roosevelt was on the drafting committee for the Universal Declaration of Human Rights, a foundational human rights instrument. See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2002).

43. Louis Henkin, *Editorial Comments: U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AJIL 341 (1995) (noting that even though Senator Bricker's proposal to amend the Constitution to make treaties non-self-executing was defeated, we essentially live with the ghost of Senator Bricker today in that when the U.S. ratifies treaties, it attaches conditions to treaties to declare them non-self-executing).

44. Oral History, Session 1, 3-23.

45. Harold Koh, *A United States Human Rights Policy for the 21st Century*, 46 St. Louis U. L.J. 293, 308 (2002) (attributing the statement to Louis Henkin).

46. Ibid., 3-23 and 3-24.

47. Ibid., 3-24.

48. Ibid., 3-25 and 3-26.
49. Ibid., 3-28.
50. Ibid., 3-28 and 3-29.
51. Alvarez, "On Louis Henkin's 50th Anniversary in the Academy," p. 2 (noting the many ways in which Henkin's scholarship was ahead of his time in this regard).
52. Oral History, Session 2, 2-14.
53. Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 Santa Clara. L. Rev. 817, 817 (2005).
54. Paul Martin, *Essay on Henkin*, p. 2 (on file with author).
55. Oral History, Session 1, 1-16.
56. Oral History, Session 2, 2-6.
57. Ibid.
58. Ibid., 2-7.
59. Ibid.
60. Ibid.
61. Ibid., 2-8.
62. Ibid.
63. Ibid.
64. Ibid., 2-9.
65. Ibid.
66. Ibid.
67. Ibid., 2-10.
68. Ibid.
69. United Nations Charter, Article 51, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945.
70. Oral History, Session 2, 2-11.
71. Ibid.
72. Ibid., 2-12.
73. Jose Alvarez, "Tribute to Professor Louis Henkin Panel" (remarks, Columbia Law School, New York, New York, 21 September 2006) (noting the many ways in which Henkin's scholarship was ahead of his time in this regard).
74. Cf. Thomas H. Lee, *Originalism, War and the Foreign Affairs Constitution* (manuscript on file with author) (noting the "incongruity that originalism creates by prescribing a constitutional framework for foreign affairs designed for a weak state in 1789 when the United States has become a hegemonic power in 2007[,]" but addressing this mismatch "by demonstrating how weak-State rules may be optimal for the conduct of a hegemon's foreign-policy in the present world order").
75. Oral History, Session 2, 2-12.
76. Ibid. at 2-13.
77. Ibid. at 2-14.
78. See Louis Henkin, *The Age of Rights*.
79. Oral History, Session 1, 3-31.

CHAPTER 4

A "Hollow Mockery": African Americans, White Supremacy, and the Development of Human Rights in the United States

Carol Anderson

Compelled to state the obvious, Walter White, executive secretary of the National Association for the Advancement of Colored People (NAACP), explained to several congressional leaders that "Democracy doesn't mean much to man with an empty belly."[1] Although the context of that discussion was on human rights in the emerging nations, White (and the NAACP) had earlier grasped that that particular maxim was equally applicable to the United States. From the organization's long, hard years battling Jim Crow, the Association realized that political and economic rights had to converge. One could not carry the heavy burden of equality all alone. The NAACP fully recognized, nonetheless, that most people of color had never even experienced political democracy. For millions of African Americans, the right to vote, to participate in civil society, to enjoy the freedoms associated with checks on government abuse, and to benefit from the protection of civil rights had become articles of faith, pillars of hope, and the ephemera of dreams, but certainly not the substance of reality. Indeed, much of black life in America focused on how systematically and completely those basic civil rights were repeatedly denied, ignored, and trampled on.

A new, major study, for example, focuses on the NAACP's almost 100-year-long battle to integrate African Americans into the political life of the United States.[2] In the early years, the white primary, election-day terrorism, and the poll tax had eliminated generations from the voting booth. Historian Manfred Berg, therefore, notes that by the time of the 1942 congressional elections one report "estimated that . . . only 3 percent of the total population of the seven poll tax states had cast their ballots, compared to 25 percent in the rest of the nation." In fact "[m]ore votes were cast in Rhode Island, the

smallest state in the Union with roughly seven hundred thousand residents and two representatives, than for all of the thirty-seven representatives of Alabama, Mississippi, Georgia, Virginia, and South Carolina, with a total population of more than 11 million."[3] Yet, as important as the right to vote was and is, the quest for equality would require more than simply ending disenfranchisement. As Walter White indicated, if black life was really going to be about life and not just survival, there was something beyond civil rights that had to be achieved.

The NAACP, the nation's largest, oldest, and most influential civil rights organization, had, therefore, slowly but surely begun to grasp the power and importance of economic rights in the struggle for equality.[4] The first glint came during the Great Depression. That economic meltdown had brought a horrific spike in the killing of black America as the number of lynchings and the degree of sadistic, spectacle violence increased. The Depression had also led to scores of impoverished black sharecroppers being driven off the land so that plantation owners could reap multimillion-dollar windfalls from the New Deal. And, while the overall unemployment rate in the United States was a crushing 25 percent, the jobless rate in the black community hovered well above 50 percent overall and in some cities lingered at a death-defying 80 percent. The right to vote, or any other civil right, was not going to solve this alone. Stark, raving abject poverty had black America buckling under the strain.[5]

The onset of World War II did little, initially, to ease this burden. While the United States's emergence as the "arsenal of democracy" finally gave most whites freedom from the economic devastation of the Great Depression, rampant discrimination in the defense industries and, frankly, throughout most sectors of the employment market kept African Americans locked out and locked down. More than half of the defense industries surveyed by the United States Employment Service, for example, "stated flatly that they would not" hire an African American for any position.[6]

Thus, as the United States prepared to destroy regimes championing Aryan and Japanese supremacy, economic and political oppression continued to converge like a vise on black life in America. From education, to medical care, to housing, to employment, to the court systems, even to the hallowed ground of the vote, there was no escaping the fact that there was, indeed, a "flagrant disparity" between the lofty rhetoric and the actual practice of American democracy. Presidential candidate Wendell Willkie would call it the "mocking paradoxes."[7] The Japanese government was even more blunt. The American people, Emperor Hirohito's regime declared, have " 'run amuck' in an orgy of Jim Crowism."[8]

The killing of Cleo Wright, less than a month after the attack on Pearl Harbor, was painfully illustrative. In January 1942, while the United States was spelling out for the entire world its postwar human rights vision, Wright was lynched in Sikeston, Missouri. There was no question that he had brutally assaulted a white woman. There was also no doubt that, while resisting arrest, the black laborer had slashed a cavernous hole through half of a deputy's face. And it was, therefore, equally certain that Cleo Wright, staggering under the effects of "bad whiskey," had just committed the ultimate transgressions,

especially for a black man in Jim Crow America, in an area of the country where African Americans barely earned $50 a year, where nearly 100 African American families, denied access to new public housing, stayed in tents year-round, and where other blacks "lived in cabins behind the northeast homes of wealthy whites, or in . . . alley quarters . . . 'unfit for human habitation.' "[9]

The attempted rape of a white woman and the knifing of a sheriff led to a blistering counterattack. When it was over, Wright, bloodied, pistol-whipped, and suffering from at least eight gunshot wounds, was taken to the only available medical facility in the area, a "whites only" hospital, where, with no painkillers, the doctor patched, stitched, and plugged up what he could. An overnight stay was, of course, out of the question. Bandaged and hovering near death, Wright was eventually packed off to the local jail. Although the end was a foregone conclusion, either through his numerous wounds or Missouri's criminal justice system, the "good folk" of Sikeston had concluded that a plain, old, run-of-the-mill death was not going to be enough. Black men may have accounted for nearly 90 percent of all executions in the United States for the offense of rape, but there were some lessons that no judge, no jury, and no hooded executioner could ever deliver.[10] The criminal justice system was just not fast enough or brutal enough to compensate for the fact that "[t]hese damn niggers are getting too smart," "too cocky," and were "just looking for a lynching."[11]

In the twilight hours, angry whites stormed the jail, overpowered the state troopers, pulled an unconscious Wright from his cell, hooked his bullet-riddled body to the bumper of a car, and set out for the black neighborhood. After trolling Sikeston's black district that Sunday morning with their macabre bumper ornament in tow, his lynchers cut Wright's mangled body from the car, soaked him in five gallons of gasoline, and lit a match. Wright, somehow miraculously still alive, let out an agonizing wail. In his last grasp for life, Wright's flame-whipped arms "reached skyward as if pleading for a mercy that did not come" while the thick putrid smoke from his roasting carcass poured through the windows of the packed local black church.[12] "This was," of course, "not a matter of executing justice." The point, as the lynchers made clear, was "to terrify the Negro population and to show them who was boss."[13] The lessons, however, were still not over. Although it was well known who, precisely, had participated in every phase of the lynching—from the storming of the jail to tossing the lit match on the black man's gasoline-soaked body—a "federal grand jury refused to return any indictments" because although the murderers "had denied Wright due process, . . . they had committed no federal offense since Wright was either already dead or dying."[14]

The black press erupted, "Remember Pearl Harbor . . . and Sikeston, Missouri."[15] The NAACP's report, while more restrained, was in its own way equally incendiary. This was war. Although the battle against the Axis powers was evident, there was an equally important battle to be fought at home. African Americans (and whomever their allies may be) were going to have to eliminate, root and branch, the economic and political conditions that had led to the killing of Cleo Wright and all of the thousands of Cleo Wrights that had gone before him. "[N]o change in legal procedure alone will solve the

problem," the NAACP concluded. "Its roots are buried too deep in racial feeling and in our economic set-up. In southeast Missouri today Negroes . . . have never had an opportunity to develop beyond their position as serfs." In fact, because blacks "were imported to pick cotton," the report continued, there had been a concerted, conscious effort to ensure that they would have "little education and little earning power." The general fear was that "if they were educated they" might actually refuse to toil for pennies a day in the plantation owners' fields and, as a consequence, just "might be more troublesome." The NAACP's investigators concluded that it was the economic system that had left African Americans mercilessly exposed to the political and economic ravages of white supremacy. As a result, the Association insisted, there was only one way out of this abyss. "The change from feudalism to a system whereby Negroes can earn enough to stand independently on their own, can only come . . . when the Negro reaches a point where he merits and receives respect as an independent individual with human rights."[16]

The Association, in short, recognized that that horrible moment in Missouri—a lynching designed to terrorize and remind the economically depressed and politically vulnerable African American population of their "place" in the racial hierarchy; a "whites only" hospital that virtually ignored the medical needs of thousands of its residents; a readily identifiable black part of town that reflected the housing segregation, substandard education, and poverty wages that haunted African Americans; an all-white political power structure that fretted over the excessive violence of the lynching but was more concerned about maintaining a cheap, exploitable labor supply; and a judicial system that weighed guilt and innocence on racially rigged scales that denigrated black life and privileged whiteness—was but a microcosm of the human rights violations that had dogged African American communities for centuries. Cleo Wright was no aberration.[17]

That had to change. For the NAACP, the right to education was the wellspring of that change.[18] Education could broaden employment opportunities, provide access to better-paying jobs, create the wherewithal for quality housing, break the back of and expose the racist underpinnings of literacy tests, poll taxes, and other tools of disenfranchisement, and develop the healthcare system to meet the needs of millions who had little or no access to decent medical treatment.

That kind of education, however, was decidedly unavailable, especially for blacks in the America of World War II. One report on the status of black America in the early 1940s noted that "[a]pproximately four-fifths of all Negroes in the United States have had access to none other than segregated schools for their public education. To thousands of Negroes in the South, not even segregated schools have been available."[19] And, to be clear, the education served up to black people may have been separate, as *Plessy* allowed, but it certainly lacked the equality, which *Plessy* required. The federal government estimated in 1941 that it would take the equivalent, in 2005 dollars, of more than $4.2 billion to equalize the black school system in the United States.[20] The NAACP noted that when it came to state investment in school facilities "252% *more* money was spent on *each* white child than was spent on *each* Negro child in the same community—ranging from 28.5%

in Oklahoma to 731.9% in Mississippi. In some counties the difference is 1500%."[21] A newspaper in Jackson, Mississippi, was even compelled to remark on the staggering disparities. Although African American children comprised nearly 60 percent of the school age population in Jackson, they received "only 9 percent of the budget."[22] This pattern repeated itself throughout the state like a debilitating refrain. By 1940, more than half of all African American adults in Mississippi had less than five years of formal education; almost 12 percent had no schooling whatsoever. The figures for the "mis-education of the Negro" were even higher in South Carolina, Louisiana, Georgia, and Alabama.[23]

The fact that there were millions of uneducated, barely educated, and miseducated held major repercussions for nearly every sector of black life in America. The effect on the healthcare system was immediately apparent. There was a critical need for African American physicians throughout the United States's segregated healthcare system but there were only a few who could slog through the miasma of Jim Crow education to meet that overwhelming demand. This chronic shortage was, unfortunately, exacerbated by the discriminatory admissions policies of universities and medical schools throughout the United States. In Philadelphia, for example, which housed five different medical schools, "only eighteen Negroes have been graduated . . . in twenty-seven years." In New York, "no Negro enrolled at Cornell University College of Medicine at any time between 1920 and 1942" and Columbia University destroyed its admissions records when asked to provide racial data on medical school applicants and enrollees. In fact, only "eighty-five colored students are currently enrolled in twenty Northern and Western schools, as against 25,000 whites. About fifteen Negroes are graduate from these schools each year."[24]

With the bulk of higher education closed to African Americans, two historically black universities, Howard University Medical School and Meharry Medical College, accounted for nearly "85 per cent of all the Negro doctors now in practice."[25] Despite their herculean effort, however, those two medical colleges did not have the capacity to produce a sufficient number of doctors to meet the healthcare needs of a malnourished, impoverished population, whose life expectancy rate was nearly a decade less than whites and whose infant mortality rates were double. That is to say, while the American Medical Association had determined that the minimum ratio of doctor to population was one for every 1,500, the ratio in the black community was more than twice that. On average, in the 1940s, there was only one African American "doctor for every 3337 Negroes. . . . In Mississippi the ratio is one to 18,527."[26]

Dr. Roscoe Conkling Brown, Chief of the Office of Negro Health Work for the United States Public Health Service, summarized the conditions that had created this crisis. "Poor housing, malnutrition, ignorance, and inadequate access to basic health essentials—hospitals, clinics, medical care—are among the social factors contributing to the Negro's health status. This racial group 'has a problem of such size and complexity,'" he noted, "as to challenge the leadership of both the Negro and white races to intelligently, courageously, and persistently prosecute for the nation a definite program of general health betterment for all people without recrimination or discrimination."[27]

The NAACP, whose chairman of the board was Dr. Louis T. Wright, chief of surgery at Harlem Hospital, decided that this challenge and all of the other challenges surrounding the human rights of African Americans had to be met.

The war and the language of war proved an important vehicle in the Association's fight to make human rights a viable force in the United States. In 1941, before Pearl Harbor, and despite President Franklin Roosevelt's concerns as he watched one European nation after the next being mowed under by the German *Wehrmacht*, isolationists had effectively blocked American entry into the war. Although Britain now stood alone as the thin dividing line between the democratic West and the global domination of Nazi Germany, the isolationists, haunted by the legacy of World War I, dug in. Senator George Aiken (R-VT) summarized the sentiment best when he noted that: "The farm and village folk of my State . . . would go all the way, down to the last dollar and the last man, to protect Canada. But they do not see why American boys should give their lives to define the boundaries of African colonies, or to protect American promoters or exploiters in Indochina or New Guinea. Neither do I."[28] This was the implacable resistance that President Roosevelt and British Prime Minister Winston Churchill had to overcome.

On August 14, 1941, they issued the Atlantic Charter to make clear that this was not like World War I. This was not about secret treaties, secret clauses, colonial swap meets, and territorial envy. Rather, the war against the Nazis was different. A victory this time would create a better, new world order. This brave new world, the Atlantic Charter proclaimed, would be predicated on justice, democracy, and human rights. Historian Elizabeth Borgwardt brilliantly lays out, though, that the message in the Atlantic Charter was, in fact, many messages. It had one specific meaning for the British, another for the American government, and a decidedly different one for those living under racial oppression.[29]

The Atlantic Charter's language was specific enough, eloquent enough, and vague enough to envelope a range of interpretations. African Americans clearly saw it as a way out of no way. The second and third points of the Atlantic Charter, for example, spoke of self-determination, that all people had the right to choose their own government. That bedrock principle of democracy would, ironically enough, prove particularly troublesome for the two leaders. The people who lived in Britain's colonial possessions did not have the right to vote, could not choose their leaders or what form of government they wanted. Was Churchill finally saying that Hitler's attack, besides bringing Britain to its knees, had also brought the nation to its senses? And in the United States, African Americans, particularly in the South, were systematically denied the right to vote, denied the right to choose their governmental officials and the right to have a political voice in shaping the conditions under which they lived, worked, and died. Did this pledge from the president of the United States mean that the federal government was now finally going to compel Mississippi, Alabama, South Carolina, Louisiana, and the rest of the states to adhere to the Constitution and the Atlantic Charter? The African American leadership certainly thought that it did.

The Atlantic Charter offered more than mere self-determination, however. The fifth point in that historic document truly seemed to be the dawn

of a new world order. The United States and Britain pledged "to bring about the fullest collaboration between all nations in the economic field with the object of securing, *for all*, improved labor standards, economic advancement and social security."[30] The phrase "for all" was unintentionally but decidedly revolutionary. The leaders seemed to promise that the world's citizens would finally have human rights—better working conditions, better and increasing pay, and a safety net of economic security. The British and American leadership had grasped that it was the destabilization in the world markets, which had then avalanched into the Great Depression, that had made Hitler so appealing to the Germans. Roosevelt and Churchill were determined that never again would a nation's economy be so ravaged that the only way out of darkness was through a raving demagogue like Adolf Hitler. Although this may have been the intention of the president and prime minister, African Americans, whose living conditions were simply appalling, interpreted this as a pledge by the federal government to remove the barriers that had systematically prevented them from reaping the benefits from centuries of the unpaid and barely paid hard labor, which had built the wealthiest nation on earth.

Moreover, this vision of a new world, where there would never, ever be another Cleo Wright, was, for African Americans, encapsulated in the sixth principle of the Atlantic Charter. Roosevelt and Churchill averred that "after the final destruction of the Nazi tyranny, they hope to see established a peace which . . . will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want."[31] This, of course, was intended to put a halt to military invasions and all the Gestapo-like goon squads who abused power and terrorized people. But it meant more than that to African Americans. It was not the Nazis that terrorized them day after day. It was the Ku Klux Klan, it was the police and sheriff's departments, it was the lynch mob, it was racial oppression in the United States. Indeed, African Americans looked at Nazi Germany and saw an evil that was distinctly, painfully familiar. In 1941, after reviewing a series of Nazi edicts such as the sterilization of the mulatto "Rhineland bastards" and the application of the Nuremberg Laws to Germany's black population, *Pittsburgh Courier* journalist George Schuyler remarked that "what struck me . . . was that the Nazi plan for Negroes approximates so closely what seems to be the American plan for Negroes."[32] Walter White and NAACP board member Earl Dickerson echoed that sentiment by continuously pointing to the similarities between white supremacy in the United States and Aryan supremacy in Nazi Germany and the inevitable destruction that rained down on so-called marginal populations whenever either of those supremacist doctrines came into play.[33] Had this picture of racial oppression been frightening enough, like the portrait of Dorian Gray, to compel the American government to reclaim its soul and honor its oft-spoke commitment to equality and democracy?

The black leadership, of course, had no illusions that this reclamation project would or could happen overnight. The sobering and unforgettable false promises of World War I still resonated like a bitter refrain. African Americans' unrequited faith in democracy and misguided "patriotic" silencing of agitation for equality, had not helped make the world, or the United States for that matter, "safe for democracy." Instead, after World War I, African Americans

felt the cold, malevolent embrace of a nation that had reified white supremacy, welcomed the resurgence of the Klan, and drowned America in the black blood of Red Summer. Hardened by that unflinching betrayal, African Americans learned an invaluable lesson. White House aide Philleo Nash immediately noticed the difference. The tenor and tone of the black community during World War II was like nothing he had ever seen before. "Negroes," he warned the Roosevelt administration, were not the Negroes of World War I. This time, he noted with alarm, they are "in a militant and demanding mood."[34] Indeed, one black soldier encapsulated that militancy best when he declared, "I'm hanged if I'm going to let the Alabama version of the Germans kick me around when I get home. . . . I went into the Army a nigger; I'm coming out a *man*."[35]

This was a new day. African Americans were demanding "freedom [and] rejecting [the] idea of racial inferiority." The language of the Atlantic Charter's Four Freedoms, particularly freedom from fear and freedom from want, meant that the "[c]ontinued humiliation to Negroes who are segregated in the armed forces," the perpetuation of persistently "[b]ad and inadequate housing," and rampant "[u]nemployment even where man-power shortages are present," were not going to be tolerated. Not this time.[36] A "war for the Four Freedoms," the NAACP declared, had erupted in black America.[37]

Therefore, when Churchill insisted that the Atlantic Charter was, for all intents and purposes, a "whites only" affair, Walter White and other members of the black leadership repudiated the prime minister and called on President Roosevelt to issue a Pacific Charter "so that dark-skinned and colonial peoples may be given greater hope of real political democracy and freedom from economic exploitation." White then challenged Roosevelt to "prove to the colored peoples . . . that you are not hypocrites when you say this is a war for freedom. Prove it to us and we will show you that we can and will fight like fury for that freedom. But," White added, "we want—and we intend to have—our share of that freedom."[38]

The "moral cross roads of the war has been reached."[39] The communist-dominated National Negro Congress (NNC) saw it, as well. There "is no middle road today," the leadership asserted, "there are only two paths before us." One "strives to secure for mankind the four freedoms that characterize a democratic government—freedom of speech, freedom of worship, freedom from want, freedom from fear." For "15,000,000 American Negroes," the NNC insisted, "this spells freedom from oppression." The other pathway, as the Axis powers, as well as the lynchers in Sikeston, Missouri, had made abundantly clear, "drowns in bloodshed the lives, dignity and culture of minority peoples."[40] The African American leadership had seized upon the reality that the needs in black America had converged with the wartime language of human rights to provide the road map for freedom.

NAACP board member William Hastie, former dean of Howard University's law school, carefully and meticulously articulated this human rights vision. He declared that "When we as victors lay down our arms in this struggle against . . . enslavement" by the Nazis and other Axis powers, "we take up arms immediately in the great war against starvation, unemployment, and the rigging of the markets of the world." "Starvation," he observed, "has no Bill

of Rights nor slavery a Magna Carta." For this powerful member of the NAACP's board of directors and future federal judge, housing, education, and health care were now the newly enshrined rights. "We cannot," he intoned, "offer the blueprints and the skills to rebuild the bombed-out cities of other lands and stymie the rebuilding of our own cities. Slums have no place in America. We cannot assist in binding the wound of a war-stricken world and fail to safeguard the health of our own people. We cannot hope to raise the literacy of other nations and fail to roll back the ignorance that clouds many communities in many sectors of our own nation . . . all people [must] have the opportunity for the fullest education." Hastie then laid out that "Our choice is between democracy for everybody or for the few—between the spreading of social safeguards and economic opportunity to all the people" as outlined in the Atlantic Charter or, in sliding down into the hole of the "good old days of Americanism," which meant "the concentration of our abundant resources in the hands of . . . a few" who epitomized "selfishness and greed."[41]

It is within this framework of the Four Freedoms and human rights that the African American leadership soon began "formulating a program of post war needs for the American Negro." At the top of that list was "first-class citizenship" as defined by "basic civil rights" such as "the right to vote in all parts of the country." There was also a recurring emphasis on "essential economic rights" such as the "right to compete in fields of employment on equal levels," "the right to work," "the right to remuneration for work on the basis of merit and performance," and "the right to advance in rank and salary in terms of ability and productive contribution." In addition, African Americans sought the right to "unsegregated and unrestricted housing" and the "right to live without the burdens and embarrassments that are provoked by the unwarranted segregation" in education, health care, and in public accommodations.[42] Yet, as the Association leadership and its allies in the African American community continued to thrash out what a definitive platform for equality looked like, it soon became obvious that all the discussions, all the debates, all the meetings, and all the conferences would have little or no impact unless African Americans were at the peace table. Black people had to have a meaningful role in shaping this new world order. It was simply too important to leave to the British, the Soviets, and, yes, even the Americans.[43]

This point was made abundantly clear at Dumbarton Oaks, which was the British, American, and Soviet conference to determine the shape, power, and form of the new international organization, the United Nations. The shortcomings of the 1944 Dumbarton Oaks agreement sent a warning shot across the bow to the black leadership about the ways in which the supposed new world order was, if the Allies had their way, going to look painfully like the old world order. One of the most striking and glaring deficiencies was that despite the Atlantic Charter, despite Nazi atrocities, and despite Japanese brutality, human rights had barely—and just barely— made a cameo appearance in the draft plan for the United Nations.

Venerable scholar and NAACP co-founder, W.E.B. Du Bois, who had rejoined the Association specifically to address the human rights and colonialism issues that World War II had so rawly exposed, leveled a searing critique

at the Dumbarton Oaks plans for the United Nations. The weaknesses, he warned, were predicated on the continuation of white supremacy and if allowed to become embedded in the operating code of the proposed United Nations, would prove fatal not only to the organization but to the hundreds of millions of people of color throughout the globe.[44] Du Bois, therefore, began to lobby the State Department to have the NAACP attached as an official consultant to the U.S. delegation at the founding conference of the United Nations in San Francisco. Officially known as the United Nations Conference on International Organization (UNCIO), it was here where the organization's structure and powers would be finalized.

As incredibly unrealistic as Du Bois's demand may have seemed, the State Department had learned one key lesson from the debacle following World War I: Without popular support, no peace treaty could ever get through the Senate. Hence, the invitation to the NAACP and more than forty other major organizations to join the U.S. delegation in San Francisco. Hence, as well, the dilemma. For the United States the crafting of a new world order that denounced Aryan supremacy and all of its vestiges as abhorrent and unacceptable to civilized society while at the same time shielding, protecting, and privileging white supremacy in the United States was going to be a difficult feat. As one journalist noted, "It is easy to talk about freedom for all; but it isn't easy to mean it. *All* is a [mighty] big word."[45] And the United States government knew it. Caught between the bitter harvest of the Holocaust and the "Strange Fruit" of lynching, the United States searched desperately to find some way to "assert . . . [America's] moral leadership in [the] field" of human rights while still maintaining the status quo of Jim Crow and racial inequality.[46] That was the dilemma that the powerful Southern Democrats had no intention of solving for the United States. As far as the Southern Democrats were concerned World War II had not changed a thing; there was no "American Dilemma," no new world order, and no emerging human rights regime. There was only the sacred old order that white supremacy had established. Mississippi Senator James O. Eastland, in his own patriotic, Capra-esque moment, "explained that white southerners were fighting [in World War II] . . . 'to maintain white supremacy and control of our election machinery.'"[47] The Southern Democrats had, therefore, fought every piece of civil rights legislation that dared to come near Capitol Hill. They consistently blasted the NAACP as the "nigger advancement society," defended "lynching as necessary 'to protect the fair womanhood of the South from beasts,'" and foamed at the thought of "burr headed niggers" having equal opportunity in employment, education, or health care. This was no mere ranting from the ideological fringe. The Southern Democrats "dominate[d] more than sixty percent of the Senate and House Committees which determine[d] not only domestic legislation but foreign affairs and the shape of the post war world."[48]

Early on they flexed their political muscle in determining the U.S. response to the founding of the United Nations and the UN's human rights initiatives. The hostility to a strong UN Charter, with explicit guarantees of rights, emanated from the same supremacist swamp that drowned federal anti-lynching bills, anti-poll tax measures, Fair Employment Practices Committees, and

other civil rights legislation. A major part of the clout they were able to exert came from Texas Senator Tom Connally, who chaired the Senate Foreign Relations Committee, and who had also been instrumental in scuttling three anti-lynching bills in Congress. Connally was now a key member of the U.S. delegation at the founding conference for the United Nations. State Department officials were well aware of this and even admitted that "when you had men like . . . Connally [on the U.S. delegation to the UN] . . . you didn't go sailing off into the blue. You had to keep your eye all the time on not putting too much limitation on American sovereignty."[49] For Connally, that translated into ensuring that states' rights would never be challenged or curtailed by any international treaty. States' rights was the *sine qua non* of the South's power. The region had effectively used the doctrine to enshrine white supremacy, bar African Americans from enjoying their rights as U.S. citizens, and ensure that, like *Dred Scott*, blacks "had no rights which the white man was bound to respect."[50]

At the UNCIO Connally immediately wielded his power in the cause of white supremacy. The senator, despite numerous pleas from other delegations and the consultants, refused to even entertain the notion that all people, regardless of race, had the right to education. If the cacophony continued and the United States gave in, he warned, any UN Charter with the right to education embedded in it would never pass through his committee. Connally, in short, was willing to scuttle the entire treaty in order to maintain the Jim Crow education that was essential to black political and economic disenfranchisement. This was a high-stakes, political game of chicken that the American delegates were not prepared to play. While Connally stood firm, they blinked. The Americans, therefore, worked overtime to quell the clamor at the UNCIO by presenting Connally's indefensible position as viable, logical, and politically feasible.[51] That scramble to shroud in reasonableness the totally unreasonable would repeat itself over and over again as the United States, with one eye always on the Southern Democrats, tried to craft human rights language that would leave white supremacy untouched.

This would not go unchallenged. With forty-seven other nations and a contingent of headstrong consultants, the United States could not keep human rights the nice symbolic, meaningless gesture that the State Department intended. The consultants, led by the NAACP and the American Jewish Congress, exposed this problem when they demanded, of all things, establishment of a human rights commission. The American delegation may have been appalled at the suggestion, but the horrors of the Holocaust and, frankly, the horrors of America compelled the Jewish and African American consultants to view an international commission as absolutely essential.[52]

Understanding the problem, the revulsion at Nazi atrocities on one hand and the need to maintain Jim Crow on the other, foreign policy guru John Foster Dulles was confident that he could devise a human rights plan that would pacify the consultants and satisfy the Southern Democrats. His solution was simple. Amid an unequivocal statement "guaranteeing freedom from discrimination on account of race, language, religion, or sex," Dulles inserted an amendment that "nothing in the Charter shall authorize . . . intervention in matters which are essentially within the domestic jurisdiction of the State

concerned." This "domestic jurisdiction" clause meant that the United States could continue to use the rhetoric of "freedom" but would not "be put in a position of having matters of domestic concern interfered with by the Security Council." More specifically the clause would ensure that the UN could not "requir[e]" a state to "change [its] . . . immigration policy or [Jim Crow] legislation."[53] While the American and Soviet delegations immediately embraced Dulles's stroke of genius, the other nations and the consultants sent up a wail of protest.[54]

Dulles did not care.[55] He insisted that the United States had to protect itself. The future secretary of state then made it abundantly clear that the domestic jurisdiction clause was America's price for allowing human rights to seep into the UN Charter. This "is as far as we can go," he said. "If [the domestic jurisdiction clause] is rejected," Dulles warned, "we shall be forced to reexamine our attitude toward increases in the economic and social activities of this Organization." After Dulles clarified the American position, the debate stopped and the other nations agreed to accept the domestic jurisdiction clause. The United States had just won an important battle in keeping human rights from darkening America's doorstep.[56]

This battle, however, was far from over. The State Department, given the emerging Cold War and the depth of atrocities in the Soviet Union, was convinced that a key strategy in highlighting the moral bankruptcy of Marxism was to position America as "the tower of strength and the innovator and the pioneer in the field of human rights." Yet, no matter how hard the department tried, it simply could not do it.[57] The truth of the matter, one department official admitted, was that no nation had an exemplary human rights record—not even the United States. "[T]he United States with all its power," he explained to his supervisors, "has not yet been able even to get up on the first rung of the ladder, namely elections which are free enough to provide the prerequisite basis for the honoring of even the most tangible of human rights, which are the legal ones."[58]

Human rights, however, was too important a Cold War arena in which to concede defeat, especially to the Soviets. The goal, as novelist Ralph Ellison so eloquently stated, was to find a way to "reconcile democratic ideas with an anti-democratic reality."[59] That is, the United States had to find a way to fight for human rights to expose the sham of the Soviets' people's democracy, while doing so in a manner that left intact the racial inequality that kept the Southern Democrats firmly ensconced in the Senate and House of Representatives and blocked Jim Crow and all its progeny from international scrutiny.

This was going to be tricky. While, to be sure, the Soviet Union ruthlessly quashed civil liberties, constructed a lethal gulag system, and saw to the destruction of millions of "political opponents" through forced starvation, mock trials, and real executions, the United States had a thriving and harsh convict lease-labor system, rampant debt slavery, widespread political and economic disenfranchisement, and extensive legal and extra-legal violence aimed at millions of minority citizens. Nonetheless, despite their track records, these flawed superpowers began playing their disingenuous human rights game.

The Americans made the first move; on their terms; on their turf—the First Amendment. Knowing that it would be beyond impossible for the Soviet-controlled organs *Izvestia* and *Pravda* to compare favorably to the *New York Times*, *Le Monde*, the *London Times*, and thousands of other independently owned newspapers throughout the West, the United States quickly arranged to have the UN investigate the status of freedom of the press throughout the globe. For the Kremlin, this looming international exposure could prove highly embarrassing.

The Soviets, therefore, quickly counterattacked at America's weakest point—Jim Crow. The USSR successfully urged the United Nations to form a Sub-commission on the Prevention of Discrimination and Protection of Minorities (MINDIS). With the Nuremberg Trials fully underway, the United States had no choice but to assent to the sub-commission's creation. That grudging assent, however, was about as far as the United States was willing to go. In addition to trying to sabotage MINDIS outright by changing its membership and scuttling its meeting schedule, the State Department also filleted the definition of "minority" so finely that it automatically excluded African Americans from the sub-commission's purview. Although MINDIS was created to address the plight of minorities, the State Department argued that, in actuality, "national minorities" were the targeted group. For the State Department, "national minorities" had a separate language, a separate culture, and separatist political aims. African Americans, the department reasoned, therefore, were not a "national minority." Nor did it appear were Mexican Americans, Asian Americans, and even Native Americans. In fact, the State Department concluded that, "there probably are no national minorities in the United States."[60] In other words, national minorities—Kurds, Armenians, and Basques—were a European problem, not an American one.

The State Department also decided, as a self-protective measure, to take the lead on the drafting of the Covenant on Human Rights, which, unlike the Declaration, was a treaty. The U.S. delegation worked hard to navigate around the "obstacles to the United States support for a Covenant," which were the "non-discrimination article" and "[i]ts import for other articles of substance" such as provisions dealing with the right to education, health care, housing, voting, and employment. Equally important was the fact that "we don't want others meddling in our affairs."[61] Thus, in order to get this treaty through the Southern-dominated Senate, the Truman administration broke the Covenant in two, separated civil and political rights from economic and social rights (which were seen as communistic), proposed removing the most "offensive" rights, like voting, from the Covenant because it violated Southern electoral policies, and inserted a federal-state clause that meant that even though the federal government may sign and ratify the treaty, no state in the system would be bound by its tenets. In championing the federal-state clause, Eleanor Roosevelt, chair of the Commission on Human Rights (CHR), emphasized three key, important areas in which the current balance of federal-state power would be sacredly preserved. The federal government, she promised the South, would never interfere in "murder cases," investigate concerns over "fair trials," or insist on "the right to education." In essence, Eleanor Roosevelt had just assured the Dixiecrats that the sacred troika of

lynching, Southern justice, and Jim Crow schools would remain untouched even with a Covenant on Human Rights.[62]

The State Department also decided to use the unimpeachable cachet of Eleanor Roosevelt as chair of the Commission on Human Rights to ensure that the CHR would not have the authority to do anything with the thousands of petitions the UN received. The last thing the United States wanted was a Commission on Human Rights with power. If the United States had its way, a key State Department official Durward Sandifer admitted, the Commission would be "of little use" regardless of the extent of the human rights violation. Sandifer remarked that in his estimation even the "ghastly" treatment of the "natives of the Belgian Congo or the persecution of the Christian Armenians by the Turkish Empire," would not have been enough to warrant international intervention. Given that nearly 90 percent of the Armenians in Turkey and 10 million Africans had been killed, Sandifer had set the bar for UN intervention at an extremely high and dangerously lethal level.[63]

All of this maneuvering to turn the CHR into "the most elaborate waste-paper basket ever invented" was driven by the State Department's concern that those who lived below the Mason–Dixon line would try to find redress for their "domestic maladjustments" at the UN. The State Department knew how unresponsive the American political arena was to black demands for equality. The "trinity of constitutional guarantees, judicial decisions and administrative support," the State Department admitted, had certainly proven impotent in breaking the shackles of African Americans' second-class citizenship.[64] "No other American group is so definitely subordinate in status or so frequently the victim of discriminatory practices" as the Negro, one State Department analysis averred. The report then detailed what those discriminatory practices were.

Among the more important of these practices are: segregation legislation in Southern and border states; restrictive covenants which limit the residential mobility of Negroes in many of the municipalities of the United States; economic restrictions and vocational discrimination—about 80 percent of the complaints before the Fair Employment Practice Committee from July 1943 to December 1944 were from Negroes; lynching; restriction of the Negro's access to the courts and various limitations on his participation in political activities, particularly in reference to the use of the franchise and office-holding; unequal access to schools, public facilities, and social services generally; and the social restrictions placed on the Negro by custom and convention. These practices, many of which are nationwide, are obviously in conflict with the American creed of democracy and equality of opportunity for all.[65]

These conditions, the State Department understood, made the United States a prime candidate for a UN hearing. "There is an alert and intelligent public, composed of Negroes and whites, keenly aware of the disabilities suffered by the Negro. Elements within this public," the report warned, "may be inclined to press for consideration of the Negro's case before the Human Rights Commission." The State Department further realized that the goodwill intentions of American democracy were simply not enough to forestall a

determined international inquest. Although in "theory discrimination is not allowable under the American constitution and law" and

> segregationists legislation of southern and border states has been interpreted in the courts as not discriminatory, on the assumption that the facilities and services provided Negroes . . . are not of necessity unequal. In fact, however, facilities are on an unequal basis; and this and other discriminatory practices may give us some trouble before an international body concerned with preventing discrimination.[66]

This was not a trivial matter because the Cold War had intensified America's "mocking paradoxes" and made the cost of exposure almost too much to bear.[67] "The peculiar disadvantage of the United States," one official wrote to the assistant secretary of state, "would be that with the seat of the United Nations in this country and with a freer flow of information here than elsewhere the United Nations could be flooded with petitions relating to United States abuses . . . thus giving the impression that the United States was the chief offender against rather than defender of civil liberties."[68]

In 1947, the State Department's worst nightmare came true. Following the example of the National Negro Congress, the NAACP decided to challenge the domestic jurisdiction clause. The Association petitioned the UN Commission on Human Rights to investigate the conditions under which African Americans lived and died in the United States. In doing so the NAACP made the disastrous error of overestimating its allies and underestimating its opposition. The petition, however, was first-rate. *An Appeal to the World!*, written under Du Bois's leadership, stated that although "there is general agreement that the 'fundamental human rights' which" members of the "United Nations are pledged to promote . . . 'without distinction as to race,' include Education, Employment, Housing and Health" it is clear that "the Negro in the United States is the victim of wide deprivation of each of these rights." In his chapter of the petition, Washington Bureau chief and trained sociologist, Leslie S. Perry, began first and foremost with the right to education because, he noted, "those who would continue to exploit the Negro, politically and economically have first tried to keep his mind in shackles."[69]

The petition had, therefore, carefully documented the gross disparities in educational attainment, opportunity, quality, and funding. It had noted that in school districts where African Americans comprised over 75 percent of the school-age population, only $2.12 per capita was spent on them as opposed to $28.50 per white student. The Association had further documented that in 1943–1944, while the United States was at war with the Nazis, Southern states spent 111 percent more on white students than black. Mississippi led the way, of course, with a staggering 499 percent difference between its funding of black and white schools.[70] Moreover, because of the South's insistence on paying black teachers significantly less than white ones, African Americans lost $25 million per year in wages, which in 2005, would equal nearly $1.6 billion annually.[71] As statistic after statistic rolled through the pages of the NAACP's petition to the United Nations about state-sponsored racial inequality—in education, in employment, in housing, in health care—one U.S. diplomat at the United Nations insisted that the Jim Crow Leader of the

Free World could not afford to be exposed as a "nation of hypocrites" and he used his influence to bury the petition deep within the UN bureaucracy.[72]

Additional opposition came from "friend of the Negro," NAACP board member, and chair of the UN Commission on Human Rights Eleanor Roosevelt. In an article and a series of letters that read like "The Education of Walter White" she emphasized that the NAACP had made a big mistake in going to the UN to air African Americans' grievances because the petition played into the Soviets' hands, and, she intimated, the only petitions the USSR ever supported were those authored by known communist-dominated groups. White also needed to understand, she continued quite sternly, that the U.S. delegation "could not let the Soviet (*sic*) get away with attacking the United States" and dodge having their own shortcomings exposed.[73] Roosevelt also warned Du Bois that the NAACP did not ever want to run the risk again of "exposing the United States to distorted accusations by other countries." She firmly believed that the "colored people in the United States . . . would be better served in the long run if the NAACP Appeal were not placed on the Agenda." Then, in the ultimate lesson, Roosevelt submitted her resignation from the NAACP board of directors. Although she did not mention the petition that she had helped squash, the timing of her resignation seemed to carry with it a very distinct, ominous message. White, of course, pleaded with her to reconsider. The Association "would suffer irreparable loss if you were to resign." She held firm. He begged her again. "[U]nder no circumstances would we want you to resign from the Board. Your name means a great deal to us." His pleas, astutely, never mentioned the UN but only how much needed to be done domestically and how only she had the clout to make that happen. Roosevelt eventually agreed to stay. And White began to seriously rethink the NAACP's investment in the struggle for human rights.[74] Indeed, the following year, as part of the growing fissure between Du Bois and him, which was then buttressed by the hard, cold reality of Roosevelt's displeasure with *An Appeal to the World!*, White announced to a State Department official that the NAACP "had no intention" of pressing its case ever again before the United Nations.[75]

Even with all of that, by the time Dwight D. Eisenhower came to power in the early 1950s, a group of Republicans joined with the Southern Democrats and decided that the Truman administration had not done enough to protect the United States from the UN and human rights. That "evil combination" of the GOP and Dixiecrats, as the NAACP called it, charged that the U.S. Constitution and America were under attack by human rights, human rights proponents, and the United Nations, as that foreigner-dominated organization set out to subvert American values with socialistic, even communistic, ideas about freedom and democracy.

To rescue America and its children from the UN, Republican Senator John W. Bricker of Ohio proposed the ultimate weapon—a constitutional amendment to alter the treaty approval process. This was an incredibly radical move for such an arch-conservative because it attacked the very foundational American heritage that he claimed he was fighting to preserve. From the days of the Founding Fathers, treaties had to be ratified by two-thirds of the U.S. Senate to become the "law of the land." But now, for the senator and his

allies, that was no longer enough. With the UN and human rights stalking America's shores, threatening to breach the bridgehead of American sovereignty and states' rights, a mere two-thirds of the Senate seemed like an incredibly weak and permeable line of defense. The Bricker amendment was, therefore, designed to reinforce significantly America's battlements against the foreign invasion of human rights law. Although the amendment would maintain the requirement that all treaties had to be ratified by two-thirds of the Senate, Bricker then added executive agreements as part of the package. The point of including these instruments of diplomacy was to keep the president from using them to bypass the legislative branch and congressional oversight. Yet, that was only the beginning. After ratification by two-thirds of the Senate, the executive agreement or treaty would then need to pass both houses of Congress with enabling legislation. Despite the enormous difficulties of transforming a bill into a law, as the stillborn anti-lynching, poll tax, and fair employment bills demonstrated, America's rampart, in Bricker's opinion, was still not high enough. The isolationist wing of the GOP and Southern Democrats, therefore, determined that state legislatures would be the final, impenetrable brick in the wall that could stop these human rights initiatives, especially the much-dreaded Genocide Convention, dead in their tracks. The reliance upon the recalcitrance of state governments was not surprising. The Southern Democrats had repeatedly voiced their fears that the Genocide Convention, if ratified, could trump states' rights, transform lynching into an international crime, and obligate the federal government to prosecute those who had, heretofore, killed black Americans with impunity.[76] The Bricker Amendment, as a result, included the provision that *all* forty-eight state legislatures had to ratify treaties and executive agreements. The Ohio senator crowed that this amendment, with its multiple lines of defense—two-thirds of the Senate; majority votes in both Houses of Congress; and approval by all forty-eight state legislatures—would rein in the "eager beavers in the UN" and prevent "some Americans" from using UN treaties "as a substitute for national legislation on purely domestic matters."[77]

The much-heralded Bricker Amendment enjoyed the support of a number of conservative, "patriotic" organizations and, even more important, enough senators from both parties to ensure its ratification. With over sixty senators sponsoring the amendment and the Republican Party firmly behind Bricker, President Eisenhower realized that he had a fight on his hands because although the target was clearly the UN's human rights treaties, the Bricker Amendment's language was broad enough to strip the executive branch of any real authority whatsoever in foreign policy. In order to preserve his presidential role in foreign relations, Eisenhower now desperately searched for some sort of compromise.[78]

The solution that Dulles and the president seized upon was the complete abandonment of both the Covenant on Civil and Political Rights, even though it was designed to mimic the U.S. Bill of Rights, and the Covenant on Economic, Social, and Cultural Rights, which in the State Department's estimation was no more than a Pandora's box filled with the "inarticulate Slavic desire for the economic well-being of the masses."[79] For good measure Secretary of State Dulles added the Convention on the Political Rights of Women

and the Convention on the Abolition of Slavery.[80] In the process, Eisenhower particularly withdrew support for the Genocide Convention because, as Vice President Richard Nixon noted, that treaty was the primary catalyst for the Bricker Amendment. The Southern Democrats, everyone recognized, were afraid that the human rights treaties, in general, just "might affect the Colored question" and that the Genocide Convention, in particular, could become, in the hands of the NAACP's attorneys, "a backdoor method to a federal anti-lynching bill."[81] These were the burnt offerings that Eisenhower presented to the senate in exchange for saving presidential power.

Walter White, who had been relatively quiet on the human rights front since Eleanor Roosevelt had taken him and the NAACP to the woodshed, was outraged. He asserted that the Bricker Amendment, with its proviso that all forty-eight state legislatures had to approve any treaty, would drag the United States down to the "moral and intellectual level of the most backward state of the nation." That frightening scenario, he exclaimed, meant "that as a nation we could take no higher moral ground than that permitted by states like Mississippi or South Carolina." But, of course, he added, that was the whole point. The NAACP chieftain stated that it was no accident that Senator Bricker's crusade gained momentum only after a California court ruled that a racially discriminatory law violated the Declaration of Human Rights. That ruling, White explained, caused "consternation in conservative circles lest our international moral commitments require us to live up to those commitments here at home."[82] The "more we study this amendment," he noted in an address to congressional leaders, "the more dangerous we believe it to be."[83] The Senate, however, would not budge.

Only an idolized World War II hero like Eisenhower could stop the Bricker juggernaut and it took him nearly a year to muster the will to do so. When the president finally came out openly against the Bricker Amendment, the battle in the Senate began in earnest.[84] The old general knew that this was a campaign he could not afford to lose and his considerable influence pulled several Republican supporters away from the senator. This loss of key votes led one version of the amendment after another to fail. But just when it looked like victory was imminent, into the breach stepped Senator Walter George (D-GA), who, as everyone knew, "commanded attention and got respect from members of the Senate."[85] That influence combined with his Southern Democrat values portended disaster. George, an ardent states' rights champion, made no secret of the fact that he was particularly concerned that the Genocide Convention "would bring within the area of Congressional power anti-lynching legislation." As a result, George wanted the Bricker Amendment to succeed at all costs. He introduced his own substitute proposal and, with his cachet and clout, immediately breathed new life into the amendment's sagging chances.[86]

As historian Duane Tananbaum noted, this was the "showdown." After intense debates, the voting began. "As the clerk began calling the roll that evening for the final vote . . ., the outcome remained uncertain." At one point, it "looked bleak" especially after several Eisenhower Republicans jumped ship and "voted with Bricker and George." But then, several Democrats, who had previously supported the amendment, swung to the other side. Back and

forth it went until "as the vote was ending, 60 senators had voted for the amendment and only 30 had voted against it." Bricker had his two-thirds! But then out of the blue, or more accurately, out of the tavern, "staggered into the Senate chamber" Harley Kilgore, "a liberal Democrat from West Virginia." The drunken lawmaker was "propped up by various aides and colleagues" and when the clerk "asked for the senator's vote . . . a 'nay' was heard—whether from Kilgore or one of the others is uncertain." What was certain, however, was that the George resolution had just gone down to defeat—by one drunken vote.[87]

Although Eisenhower clearly felt vindicated, it was a pyrrhic victory for African Americans. The fact that the president chose to confront the Bricker forces only at the very last minute and instead attempted, at least initially, to appease the right wing by auctioning off the human rights treaties, cost African Americans dearly. The administration's sacrifice of the Covenants and Genocide Convention, the loss of real American involvement in the development of international human rights protocols, and, most important, the pervasive notion that there was something un-American and foreign, if not totally communistic and dangerous, about human rights converged to severely constrict the agenda for real black equality, particularly as its advocates got destroyed by the McCarthy witch hunts.[88]

In many ways, that retreat from human rights, particularly as the civil rights movement erupted in Alabama the next year in 1955, bequeathed an agenda for equality that was too restricted to even ask the right question, much less provide the answer, about the root cause of systemic and perpetual inequality.[89] Over the next decade, as one civil rights triumph after the next left virtually untouched the human rights catastrophe brewing in the black communities, the limits of the movement became painfully apparent.[90] In 1985, Bayard Rustin, the logistics genius behind the 1963 March on Washington told a college audience that two decades after the apogee of the civil rights movement, all still was not well. The "problems of the early sixties . . . were more easily solved than our current dilemma," Rustin observed. "First of all, it did not cost the government billions of dollars to do away with segregation in public accommodations, to give us the right to vote, to integrate the schools." These gains, Rustin made clear, were not without costs. It "took the bombing of churches and the murder of innocents" but "it was fairly easy to get most Americans to understand that it was *un*-American to continue segregation." Rustin warned, however, that the next phase of the struggle would be even more trying because "We are now asking for education, medical care, jobs and housing."[91]

In many horrific ways, nearly a generation later, the 2005 disaster in New Orleans exposed how black Americans were still in search of those basic human rights. Senator Barack Obama (D-IL) summarized it best when he intoned, "I hope we realize that the people of New Orleans weren't just abandoned during the hurricane." "They were abandoned long ago— . . . to substandard schools, to dilapidated housing, to inadequate health care, to a pervasive sense of hopelessness."[92] Oddly enough, in 1952, U.S. Ambassador to the UN, Warren Austin had told the NAACP that if the United States did not deal with human rights "at home, . . . all our Declarations on Human

Rights would be a hollow mockery." This Cassandra-like prediction came true as Hurricane Katrina "exposed some shocking truths about" the United States: "the bitterness of its sharp racial divide, the abandonment of the dispossessed, the weakness of critical infrastructure. But the most astonishing and most shaming revelations has been of its government's failure to bring succour to its people at their time of greatest need."[93] Or, as Walter White said more than fifty years earlier, "Democracy doesn't mean much to a man with an empty belly."[94]

NOTES

Parts of this chapter first appeared in Carol Anderson's *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955* (Cambridge: Cambridge University Press, 2003). Excerpts from *Eyes Off the Prize*, © 2003 by Carol Anderson. Reprinted with permission of Cambridge University Press.

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12. Capeci, *Lynching*, p. 23.

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23. Guzman, *Negro Year Book*, p. 70. The actual percentages for African Americans age twenty-five and older with less than five years education are: Alabama: 54.1 percent; Georgia: 58.6 percent; Louisiana 60.9 percent; Mississippi: 52.5 percent; and South Carolina: 62.4 percent. For comparison, the figures for whites in those states with less than five years education are: Alabama: 16.3 percent; Georgia 16.6 percent; Louisiana 21.9 percent; Mississippi: 10.3 percent; and South Carolina: 18 percent.

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CHAPTER 5

"New" Human Rights: U.S. Ambivalence Toward the International Economic and Social Rights Framework

Hope Lewis

> It is not charity, but a right—not bounty but justice that I am pleading for . . . The confluence of affluence and wretchedness continually meeting and offending the eye, is like dead and living bodies chained together.
>
> —Thomas Paine[1]

> A Bill of Rights for the disadvantaged, applicable to white and Negro families alike . . . could mark the rise of a new era, in which the full resources of the society would be used to attack the tenacious poverty that so paradoxically exists in the midst of plenty.
>
> —Dr. Martin Luther King Jr. [2]

WHO NEEDS "NEW" RIGHTS?: THE UNITED STATES AND THE OUTSIDER STATUS OF ECONOMIC AND SOCIAL RIGHTS

Economic and social rights[3] (including rights to food, adequate housing, public education, the highest attainable standard of physical and mental health, fair wages, decent labor conditions, and social security) still occupy a second-class, "outsider" status in official United States domestic and foreign policy. This is no accident. The full recognition and implementation of such rights pose a direct threat. But that threat is not primarily to democracy or "American values" as some believe. Rather, because they demonstrate our system's failure to achieve equality, they threaten the deeply held belief that our country has achieved a truly representative, human rights–based society.[4]

This chapter provides an overview of American engagement with the international economic and social human rights system. It particularly explores how and why the U.S. engagement with international economic and social rights has been so deeply ambivalent. The chapter begins by reviewing the international context in which U.S. attitudes about economic and social rights developed and early U.S. influences on the drafting and promulgation of foundational human rights instruments. As described below, however, the initial, and deep, official U.S. engagement with the international human rights framework was soon undermined. American racism, among other factors, resulted in an effective suspension of U.S. formal engagement with internally applicable international human rights treaties for decades. Further, Cold War politics played a key role in the ultimate division of the UN's Covenant on Human Rights into two separate treaties. This period helped entrench fear and distrust about the domestic application of human rights which surfaces in some circles even today.

Although the United States signed all of the instruments in the International Bill of Rights in the late 1970s in preparation for ratification, domestic and foreign policy concerns undermined or voided entirely the practical legal application of international human rights standards in the United States. With few exceptions, that ideological legacy, including the formal rejection of economic and social rights, continues to impact U.S. government policy into the twenty-first century.

Nevertheless, there is room for optimism. The chapter ends by briefly highlighting some contemporary efforts that may help overcome the disappointing history of American ambivalence and make socioeconomic rights a reality in the United States.[5] Among those opportunities is the growing awareness of, and attention to, economic and social rights among grassroots groups, leading non-governmental organizations, and other U.S. human rights advocates. Rejecting U.S. ambivalence, these entities grapple with such "domestic" U.S. problems as racial and ethnic discrimination, poverty, homelessness, abuses of workers' rights, and lack of access to health care by invoking international economic and social human rights standards.

EVERYTHING OLD IS "NEW" AGAIN: INTERNATIONAL CONTEXTS FOR THE RECOGNITION OF SOCIOECONOMIC RIGHTS

Political precursors to contemporary socioeconomic rights were in the air during the U.S. postrevolutionary period. By the 1790s, the French constitution provided for free public education and maintenance of the poor and Thomas Paine was promoting his views on the redistribution of land and wealth in *Agrarian Justice*.[6] Rights to land and cultural integrity of indigenous peoples, resistance to the enslavement of African Americans, the theft of their labor, prohibitions on their literacy and violent interference with the enjoyment of family, religion, or cultural life, calls for recognition of the inheritance and employment rights of women, the rights of workers to a fair wage under safe conditions and to bargain collectively, the rights of Asian and European immigrants to enter the country and live decent lives—all represented early

forms of economic, social, and cultural rights advocacy in the United States.[7] And, of course, the rights to "property" and "the pursuit of happiness" were enshrined in our Declaration of Independence, if only for free white men who already owned property.[8]

The title of this chapter, "'New' Rights?," however, reflects the common perception that socioeconomic rights concepts were "new" to the United States during the post–World War II period in which the foundational international human rights instruments were being drafted. The United States and the major European powers were most familiar with the liberal tradition of individual civil and political rights such as those elaborated in the French Declaration of the Rights of Man, the U.S. Declaration of Independence, and the U.S. Bill of Rights. This led some in the United States to define civil and political rights as the equivalent of "human rights." For them, it seemed self-evident that individuals needed protection against a state's abuse of its power: torture, arbitrary arrest, detention, and execution, as well as arbitrary restrictions on freedom of movement, freedom of religious belief and political conscience, freedom of speech, and the right to political participation. Such "negative" rights, it was argued, were clearly defined and had a long and well-developed comparative jurisprudence analyzing their scope and implementation. Courts would adjudicate them primarily as protections against state abuse of power over individual autonomy or the state's failure to appropriately protect individuals from certain private abuses.

In this strong form of Western liberal rights analysis, food, housing, education, and health care seemed, at best, "private" concerns that could or should be negotiated in the marketplace as matters of individual responsibility. To the extent that poverty or other deprivations led to lack of access to such goods, religious and other private charities were to step in. Government could also address such social problems, but in the limited form of voluntary benefit provisions that were to be applied in a nondiscriminatory manner, rather than as "rights" that are fundamental to all.[9]

Further, some argued, economic and social rights are "positive" in nature and therefore required affirmative actions by the subnational state, as well as the significant expenditure of state resources, to fulfill. Such public expenditures should therefore be authorized by legislative process and administered by the executive. It was considered anti-democratic and an infringement on the separation of powers for courts to step in except if such rights were being unconstitutionally or unfairly recognized or applied by the other branches.[10] This liberal philosophical view largely defined U.S. federal approaches to the rights of individuals while the fundamental international human rights instruments were being drafted and beyond.[11]

On the subnational level, however, a number of state constitutions took a different approach. For example, many states recognized the importance of a broad-based right to public education as important for a representative democracy. A number recognized subsistence, health, or other social welfare rights as well.[12] Yet even such state constitutional socioeconomic rights provisions tend to be narrowly construed.

The United States was not alone in its criticism and caution. Developing countries were also concerned that state responsibility for implementation of

economic and social rights would severely disadvantage poor countries by imposing significant costs that they would be unable to bear. Historians have charted in detail how the recognition of individual economic and social rights, nondiscrimination rights, and the right to the self-determination of peoples was to become part of a global political game in the period following the founding of the UN and in the Cold War to follow.[13]

Despite the post–World War II U.S. and international concerns about socioeconomic rights outlined above, concepts associated with socioeconomic justice are not entirely "new"—even to American political and social contexts. Economic and social rights originate from very old beliefs about the inherent claims of individuals on society and the obligations of that society to provide the fundamentals necessary to protect human dignity. Such concepts originated from both non-Western and Western sources.[14] Although the formal international human rights legal framework is a product of twentieth-century norm creation in the United Nations and in American and European regional bodies, there were many precursors to contemporary human rights systems in non-Western contexts. For example, certain communitarian cultural traditions and religious doctrines among Asian and African peoples required the effective redistribution of wealth and material assistance to the poor, the sick, widows and orphans, and strangers to the community. Nevertheless, the provision of such assistance was generally structured as a duty of the faithful rather than the right of those in need.[15]

Similarly, Western religious leaders and European liberal philosophers and political activists elaborated various bases for a moral obligation to address the needs of the poor.[16] Even during the revolutionary foundations of the United States, activist Thomas Paine argued for a more just and equitable division of property and other economic and social goods.[17] Religious, philosophical, and political influences also informed Western popular movements of the eighteenth and nineteenth centuries, including the French and American revolutions, the anti-slave trade and abolitionist movements, the women's movement, and the movement for workers' rights.[18] Latin American constitutions such as Mexico's Constitution of 1917 protected the rights of workers.[19] The early twentieth century saw efforts to protect the rights of European linguistic and religious minorities, and the elaboration of President Woodrow Wilson's views on the "self-determination of peoples."

These varied religious, philosophical, and political influences were all represented to some extent at the UN's founding and during the drafting of the International Bill of Rights although the traditions as interpreted by the major powers—the United States, the Soviet Union, the United Kingdom, France, and China—played the most dominant roles.[20]

But it was the devastation caused by World War II, including the revelations of the nature and extent of the Holocaust and other wartime horrors that further undergirded calls for the recognition of international human rights, including economic and social rights. In addition to the sheer physical violence associated with both world wars, it was widely recognized that economic dislocation, rampant inflation and the associated inability to purchase food and other basic needs, massive unemployment, as well as existing racial and

religious prejudice, had created conditions ripe for the perverted philosophies of fascism and Nazism to take popular hold.[21]

The protection of economic and social human rights can be seen as an additional security measure, aimed at the prevention of further global and domestic conflicts. Further, the sheer inhumanity that millions witnessed in newsreels and print demonstrated how starvation, enslavement, and horrific medical experiments could be used as weapons against civilian populations. Exposing such atrocities could also reveal how recognizing and protecting rights to food, appropriate working conditions and wages, and the right to the highest attainable standard of health could be linked directly to civil and political rights to life, prohibitions on slavery, and integrity of the person.

These realities led to popular demands (despite governmental fears about the undermining of state sovereignty) that the promotion and protection of all human rights and fundamental freedoms (including socioeconomic rights) should be a primary purpose of the new United Nations so that it could fulfill its promise as an international peace and security organization.[22] United States President Franklin D. Roosevelt had called for such a pride of place for human rights, including economic and social rights, and United Kingdom Prime Minister Winston Churchill had confirmed this view in the Atlantic Charter of 1941.[23] That Charter also laid out a clear vision that the "freedom from want" was essential to the U.S.-British vision of a postwar international system.

Although the obligation to promote and respect human rights and fundamental freedoms was imposed on all UN member states by the legally binding Charter of the United Nations,[24] it remained necessary to specifically elaborate the content of those human rights. Thus, the first UN Commission on Human Rights was charged with the drafting of a bill of rights (to be partially modeled on domestic constitutional standards of the day—including the U.S. Bill of Rights) that would elaborate specific human rights standards for which member states were to be responsible. Economic and social rights were an important part of this set of standards from the beginning. They were certainly controversial, but the participation of the Soviet Union, as well as Latin American, Middle Eastern, and Asian and Pacific states, made the inclusion of socioeconomic rights in the International Bill of Rights almost inevitable.[25]

Although official U.S. policy later became overtly hostile to the recognition and implementation of economic and social human rights in the United States, the influence of U.S. leaders was crucial on the international stage and in the Commission's deliberations. United States presidents Franklin D. Roosevelt and Harry S. Truman, along with Eleanor Roosevelt (head of the U.S. delegation to the UN and appointed as the first chair of the UN Commission on Human Rights in 1947) were key players with regard to the inclusion of economic and social rights in early international human rights instruments. The subsequent U.S. hostility to the international socioeconomic rights regime stemmed both from Cold War rejection of Eastern bloc political and economic philosophies as well as fears about the real or imagined implications of making such rights an operable part of U.S. law.

FROM NATIONAL TO INTERNATIONAL ECONOMIC AND SOCIAL SECURITY: ROOSEVELT'S FOUR FREEDOMS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

United States official foreign and domestic policy was to become distinctly unfriendly toward socioeconomic rights by the beginning of the twenty-first century. But, in the period leading up to the founding of the United Nations, the United States was, in fact, a leader in the articulation of such rights. Rather than being "alien" to American values, economic and social rights were embraced and elaborated by none other than U.S. President Franklin D. Roosevelt.

The nation's initial engagement with socioeconomic rights and subsequent official discomfort with them resulted from a complex interplay of domestic and international social and political priorities. FDR's early vision allowing for a holistic view of international human rights contributed to an atmosphere of global optimism and possibility as World War II ended. America's later ambivalence toward economic and social rights and its exceptionalist approach to human rights set the stage for further domestic and international conflict during the long Cold War and well beyond.

During World War II, President Roosevelt eloquently described the principles that would come to be known as "the Four Freedoms." In his 1941 State of the Union Address, he began to lay out what would become a foundational framework for an international economic, social, and cultural human rights regime:

> We look forward to a world founded upon four essential human freedoms. The first is the freedom of speech and expression everywhere in the world. The second is the freedom of every person to worship God in his own way everywhere in the world. The third is the freedom from want, which, translated into world terms, means economic understandings which will secure to every nation a healthy peace-time life for its inhabitants everywhere in the world. The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.[26]

This early iteration, set forth during the midst of the violence plaguing Europe, Africa, and Asia, but prior to the U.S. entry into the war, clearly delineates the international context of human rights. The "freedom from want," for example, which was to serve as a partial underpinning of many specific economic and social rights, is described as part of an international economic order necessary to allow for such a freedom to be protected.

Roosevelt's list extended beyond a traditional American concern with civil and political rights to address the poverty, unemployment, and lack of access to basic needs that his administration had sought to address in New Deal legislation.[27] By treating these freedoms as equally important and linked, Roosevelt appeared to embrace the principle that civil, political, economic, social, and cultural rights are indivisible. Although most UN member states

still fail to put it into practice, Roosevelt's acknowledgement of the interdependence of rights categories was later to be reiterated at important moments in the international human rights movement and even confirmed by U.S. officials.[28]

By articulating clearly that the freedoms applied "everywhere in the world," Roosevelt rhetorically acknowledged that certain rights should be universal, rather than limited only to certain races, ethnicities, cultures, or political and economic systems.

A few years later, while the United States was fully engaged in the war, Roosevelt further developed the economic and social rights aspects of the "four freedoms" concept and highlighted the links between the international and domestic spheres by calling specifically for an "Economic Bill of Rights" in the United States.[29]

> We cannot be content, no matter how high . . . [the] general standard of living may be, if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure. . . .
>
> We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." People who are hungry and out of a job are the stuff of which dictatorships are made.
>
> In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed. . . .
>
> America's own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for our citizens.[30]

This 1944 State of the Union message made explicit Roosevelt's view that, without adequate food, shelter, employment, or housing, a person's ability to pursue and enjoy the right to vote or the freedom to exercise religious or political conviction, is curtailed or unattainable. Further, in Roosevelt's view, U.S. "exceptionalism" should take the form of an enthusiastic embrace of all human rights in order to set a worldwide example. It was particularly remarkable that "new" economic, social, and cultural rights were to be recognized as an integral part of this early embrace of international human rights at home.

Roosevelt was clear that this call for a "second Bill of Rights" was in U.S. national security interest. A complete failure to protect and ensure such rights and freedoms might well lead to social and political unrest and even violence. The Great Depression, in which millions in the United States (and abroad) were unemployed and barely able to provide subsistence for themselves and their families, highlighted the importance of economic security as well as political and military security. While not explicitly rights-based, many of the administration's New Deal policies were aimed at addressing the growing needs of the poor and working class and to respond to actual or potential unrest among displaced workers and veterans.[31]

One of the most challenging aspects of Roosevelt's 1944 speech, for some, was the assurance that socioeconomic rights should be extended to all "regardless of station, race, or creed." Many African Americans, for example, survived

(or did not) "at the bottom of the well," while a culture of racial violence and discrimination acted to regulate and limit their ability to participate in organized resistance.[32] Rather than seizing the opportunity to make the new international human rights vision meaningful for all at home, some in the U.S. Senate and subsequent administrations came to see human rights as exacerbating "the race problem" and a potential cause of embarrassment. Indeed, this marked contradiction between the articulation of human rights values in American political rhetoric about leadership in rights and freedoms and the realities faced by Americans of color ultimately poisoned FDR's lofty aspirations of U.S. leadership in human rights by the beginning of the Eisenhower administration of the early 1950s.

Roosevelt also recognized that economic, social, and cultural insecurity and abuse were linked inextricably to the violence and horrors of war itself. He also embraced a pro-business stance in which trade and markets figured prominently, arguing in the 1944 State of the Union speech for "rights" to free trade and the protection of business interests. Thus, even early on, modern human rights policy was linked to domestic and global economic agendas. The human rights effects of international economic policies and corporate activity has only grown more significant today, but so far has not served the majority of the world's peoples in the positive ways that Roosevelt imagined.

The links between economic security and political security later reappeared in the preamble to the UDHR.[33]

The "four freedoms" approach to rights was both a domestic and an international strategy. An important force behind the founding of the United Nations, Roosevelt hoped that the new organization would promote the kind of international peace and security that had eluded the League of Nations.[34] Roosevelt was unable to see the culmination of this vision having passed away in 1945. It was left to Eleanor Roosevelt, a civil rights activist and humanitarian in her own right, to move U.S. policy forward with regard to international economic and social human rights.

Mrs. Roosevelt's record as a social justice activist stirred hope in many, including African American leaders, that she would be a strong advocate for guaranteeing the full range of human rights protections within the United States as well as abroad. As chair of the Commission that drafted the Universal Declaration of Human Rights and that helped shepherd it to adoption, Eleanor Roosevelt's place in history as a human rights leader is self-evident. Unfortunately, however, Mrs. Roosevelt's approach to economic and social rights (along with Truman administration policy) became increasingly circumscribed and cautious as Cold War concerns took priority.

Because of her status as the former First Lady, as well as because of her internationally renowned commitment to bettering the lives of the poor, workers, and women, President Harry S. Truman appointed Mrs. Roosevelt to lead the U.S. delegation to the UN and to act as the first chair of the newly created Commission on Human Rights (now the Human Rights Council). The discourse in the UN's founding instruments suggested that the protection of human rights was a high priority on the agenda of the UN and its member states, and that the Commission's work would be central to the UN's mission.

The Charter of the United Nations specifies in its preamble and in Article 2 that the promotion and protection of "human rights and fundamental freedoms" is an important purpose of the organization. Articles 55 and 56 together create a legal obligation with regard to human rights on all member nations. Article 55 requires the new organization to promote

(a) higher standards of living, full employment, and conditions of economic and social progress and development;
(b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
(c) universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[36]

However, despite their inclusion among the founding purposes of the UN, the protection of human rights was not initially a high priority on the agenda of the UN or its member states.[36] The most powerful states following the end of World War II built in to the structure of the Charter a seemingly strong provision protecting state sovereignty over internal affairs in Article 2(7):

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII [Security Council consideration and authorization of action with regard to matters deemed to be a threat to international peace and security].

Thus, the Charter's text reflects a continuing tension in the international legal system, including the human rights system. On the one hand, governments understood that it was in the interest of most states to cooperate across borders and to make collective arrangements to ensure international peace and security. By doing so, they hoped to prevent future global wars and to address issues—such as poverty and socioeconomic development—that are of an international character. At the same time, both dominant and developing states also feared that the new organization would interfere with the political or economic policies considered internal to each country—creating an unacceptably strong form of "world governance." Under contemporary analysis, the notion that human rights might be a solely domestic matter has been strongly rejected by most governments and international legal scholars. During the early days of the UN's existence however, and for decades to follow, the paper shield of "sovereignty" concerns was used by some to argue against more effective international approaches to human rights violations—including violations of economic and social rights.

United States administrations, beginning with that of President Harry S. Truman, were not exceptions with regard to the overprotection of sovereignty. The United States resisted UN actions and policies—including language and interpretations of the international human rights instruments that might allow other major powers (or coalitions of small countries) to interfere in U.S. "domestic" policies. Of course, this position on sovereignty did not

prevent the United States from adopting foreign policies throughout its subsequent history that interfered politically, economically, or militarily in the domestic affairs of other nations.[37]

Representatives of some smaller developing countries also feared that the new UN organization would be dominated by the major powers or that human rights might be used as an excuse for colonial or neocolonial military and economic interventions. The latter fear turned out to be prophetic.

Nevertheless, in the period shortly after World War II, a grassroots movement for international human rights was starting to flourish. Ordinary people around the world hoped that a new international organization, and the worldwide recognition of fundamental human rights, could be helpful tools in struggles against government abuses, racism, ethnic oppression, and colonialism. Those abuses included economic exploitation and social privations that killed many along with the civil and political abuses implemented at the point of a gun.

Once the Commission on Human Rights was created, many saw the UN, and its new Commission, as a potential protector of the range of human rights against the powerful. Activist groups, including some within the United States, filed petitions alleging widespread human rights violations in their home countries. Delegates from some developing countries argued that the protection of human rights, including economic and social rights, must be taken seriously as a principal purpose of the new UN; they helped raise the profile of the issue.[38] Mrs. Roosevelt's own commitment to humanitarian causes also made human rights advocacy a high-profile matter.

Drafting Socioeconomic Rights Standards

The first task assigned to the Commission on Human Rights, therefore, was to draft an "International Bill of Rights"—a statement identifying and elaborating what the "human rights and fundamental freedoms" described in the UN Charter were to consist of. It was to be no easy task. Among the concerns initially raised was whether it was even possible to identify a set of rights norms that were common to all peoples, including those from different political and economic systems, cultural traditions, and racial and ethnic make-up.

Further, sovereignty concerns in the Truman administration and among other governments delayed the development of implementation and enforcement mechanisms for the new human rights framework. Instead of a binding treaty, a statement of (initially) non-binding principles, was deemed an achievable first step to allay fears about the potential impact of a legally binding instrument on the domestic affairs of powers like the United States and the Soviet Union.

Thus, the Commission began to draft a "Universal Declaration of Human Rights" with the ambitious agenda of setting forth a fundamental set of human rights standards common to all peoples everywhere. And although it is in the form of a "declaration" of principles, the instrument has proved to have significant moral and political influence.[39]

Mary Ann Glendon describes in some detail the drafting process and the often complex relationship between official government policies and the

individual visions and personalities of the delegates involved.[40] From the beginning, the make-up of the Commission ensured that both civil and political rights traditions (associated, arguably, with the U.S.-Western European bloc) and economic, social, and cultural rights traditions (associated, arguably, with the Soviet Union and Eastern bloc countries) were to be included in the UDHR.[41] Latin American states also were important supporters of the inclusion of economic and social rights, some having already recognized such rights in domestic contexts.[42]

The influential Four Freedoms appear in the preamble to the UDHR, which notes "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want" as "the highest aspiration of the common people."

Such a "world made new"[43] was to include civil and political rights, economic and social rights, and, as specified in Article 28, an entitlement to "a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

The Scope and Influence of the UDHR

The most highly regarded and widely recognized of the international human rights instruments, the UDHR can be broadly divided into a list of civil and political rights (Articles 1–21) and economic, social, and cultural rights (Articles 22–27). As noted above, Article 28 places this rights regime for individual human beings in the broader context of the society and the international community. Finally, Article 29 recognizes that, for such an individual rights regime to be effective, individual duties to the community and lawful limitations on rights are to be provided for.

Setting the stage for important nondiscriminatory language common to all of the major international human rights instruments to follow, the UDHR provides that "everyone" is entitled to the enumerated rights without discrimination as to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Among the economic and social rights elaborated are the right to own property (Article 17), labor rights—rights to work and to free choice of work, just working conditions and remuneration, and the right to form and join trade unions (Article 23), the right to rest and leisure (Article 24), the right to free primary public education (Article 26), and intellectual property rights and to "share in scientific advancement and its benefits" (Article 27).

Articles 22 and 25 set out some of the most significant general provisions on socioeconomic rights. Article 22 provides that: "Everyone, as a member of society, has the right to social security, and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of the State, of the economic, social and cultural rights indispensable for the dignity and the free development of his personality."

Article 25 (the right to an adequate standard of living) lays out what were to become some of the most controversial socioeconomic rights for many in part because they may require substantial resource expenditures: "Everyone

has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

Since the Declaration was intended to be a statement of principles rather than a legally binding treaty, its substantive provisions are phrased in passive terms, in most cases without identifying a specific duty-bearer ("Everyone has the right to . . ."). The major drafting powers, including the United States, the United Kingdom, and the Soviet Union, all had significant interests in beginning the elaboration of international human rights in a form that was not legally binding. They were still suspicious of the potential implications of legally enforceable rights on their own policies. Such concerns also resulted in the lack of specificity as to the duty-bearer of most rights listed. With regard to the inclusion of economic and social rights, however, the Soviets and Eastern bloc countries argued that the state should be clearly identified as having primary responsibility for the protection of such rights.[44] This view dovetailed with the Soviet Union's prioritization of economic and social rights over civil and political rights.

The UDHR was to become the primary statement of international human rights as well as the most widely disseminated and respected instrument on this issue. After much intense debate over its content, the final version of the UDHR was adopted by unanimous vote of the UN General Assembly on December 10, 1948, with very few states abstaining.[45] Subsequently, the newly independent states that entered the UN system in the postwar period have, at least rhetorically, embraced it as an authoritative statement of fundamental rights and freedoms to be promoted and respected by all.

With President Truman's support, the United States adopted the UDHR in 1948 and agreed, at least as a moral and political matter, to respect its principles, including its provisions on economic and social rights.[46] Nevertheless, Eleanor Roosevelt expressed the United States's discomfort with a strong form of economic and social rights protection. Shortly before adoption, Roosevelt stated that ESC rights did not "imply an obligation on governments to assure the enjoyment of these rights by direct governmental action."[47]

For the human rights movement, for the peoples of developing countries, for the poor and racial, ethnic, and religious minorities in the United States, 1948 marked a unique moment of hope and possibility. The UDHR represented the utopianism of Eleanor Roosevelt's prayer for a "world made new." Although that dream continues to have strong significance and commitment among many today, the realities of political and economic struggle also revealed the limits of rights discourse.[48]

The years following the adoption of the UDHR saw the outbreak of a full-blown Cold War and the devolution, in some circles, of human rights to the status of political football. Nothing illustrates this retrogression on effective human rights protection more clearly than the U.S. role in the creation and ultimate bifurcation of the legally binding Covenant on Human Rights that was intended to complete the International Bill of Rights.

A DIVIDED WORLD: COLD WAR POLITICS, THE THREAT OF SOCIOECONOMIC RIGHTS, AND THE BIFURCATION OF THE HUMAN RIGHTS COVENANT

The U.S. relationship with the international human rights framework, including that for economic and social rights, played a key political role at the height of the Cold War. The battle for power and influence between East and West took many forms; human rights debates were no exception.

Race was often at the center of such controversies. The UN's international human rights–related instruments, reflecting as they did the closely felt experience of recent European genocide, all had clear nondiscrimination, equality, and cultural protection provisions with regard to race, ethnicity, and religious difference.

The American legacy of racism in all aspects of civil, political, economic, and social life, however, made the international recognition of such equality and nondiscrimination principles particularly troublesome for U.S. policymakers. In addition to the perceived threat of rising internal expectations among African Americans and other racially subordinated groups, the United States was beginning to be subject to external criticism from the newly (or soon to be) decolonized nations of the Global South and the stinging criticism of the Soviet Union as the Cold War intensified in the 1950s.

The Soviet Union used media reports about race riots, lynchings, and racial segregation in the United States very effectively as evidence of U.S. human rights hypocrisy.[49] How could the United States claim moral superiority if it countenanced the political and economic subordination of millions within its own borders?

The Race Petitions

This Cold War context created greater political risk for those domestic groups hoping to use the new UN system and the UN Charter to expose human rights violations and promote social justice. Even prior to the adoption of the UDHR, African Americans and U.S. civil rights organizations were among those submitting complaints and petitions to the newly created UN Commission on Human Rights. The National Negro Congress filed a petition with the UN Economic and Social Council in 1946 asking that the United Nations examine, and take corrective action on, patterns of racial abuse in the United States.[50] In addition, leading intellectual, internationalist, and civil rights leader W.E.B. Du Bois co-authored an influential petition on behalf of the National Association for the Advancement of Colored People (NAACP) titled, "An Appeal to the World: A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and An Appeal to the United Nations for Redress."[51] The petition, presented by Du Bois to the UN in October 1947, described in book form a panoply of human rights violations against blacks—discrimination in housing, education, health care, and employment, lynchings and other forms of violence, and the legacy of slavery itself.[52]

Although Eleanor Roosevelt, herself a board member of the NAACP, initially seemed supportive of efforts to include racial injustices in the United States on the UN agenda,[53] the petition's biting analysis and broad foreign support raised the stakes beyond what U.S. officials could bear in the Cold War context. Du Bois had garnered the support of numerous other domestic civil rights organizations. Perhaps even more significantly, peoples in the emerging nations of South Asia, Africa, and the Caribbean saw the petition as additional moral and political support for an end to colonialism and the promotion of self-determination of peoples on an international scale.[54] India, which had placed South African apartheid on the UN agenda, was supportive of the petition's racial equality goals, but feared that formally bringing the matter for debate might mean "participating in functions which deal with controversial domestic politics or with sectarian affairs."[55]

Because neither the United States nor India were willing to take the ultimate step of sponsoring the Du Bois petition for debate before the Commission on Human Rights, it was the Soviet Union that formally placed it on the Commission's agenda.[56] In the tense international political atmosphere, Soviet support for the petition was treated as a political betrayal by U.S. officials and some in civil society as well. The organizations and individuals who filed the petition were subject to suspicion. Some within NAACP leadership, as well as conservative African American commentators, argued that African American criticism of the United States on the world stage was disloyal. Du Bois, in contrast, criticized Eleanor Roosevelt for bowing to State Department concerns about the political effect of the petition.[57] Ironically, however, the furor surrounding Soviet involvement arguably hastened or led to some actual or attempted civil rights reforms under the Truman administration.

Keenly aware of the growing foreign and domestic criticism of civil rights and U.S. vulnerability to charges of human rights hypocrisy, Truman's legislative agenda attempted to blunt the criticism. Such efforts focused primarily on outlawing overt civil and political public discrimination (such as segregation within the military) rather than the equally devastating impact of racism on housing, education, working conditions, and health care, however.[58]

Even Truman's efforts at securing basic civil and political rights for African Americans, however, were sometimes stymied by a conservative and segregationist Congress, leaving the United States open to international and domestic criticism on racial (in)justice. For some in the Truman administration and the U.S. delegation to the UN, external criticism only underscored their call to circle the wagons. Fears about communist influence overrode even the brutality of American apartheid.[59]

In December 1951, William Patterson of the Civil Rights Congress (CRC), a radical civil rights organization, and W.E.B. Du Bois submitted an even more incendiary communication to the UN titled "We Charge Genocide." Patterson argued that the violations occurring against African Americans met the definition in the recently adopted Convention on the Prevention and Punishment of the Crime of Genocide. Particularly embarrassing for a Truman administration facing elections in 1952, the communication highlighted specific cases of racial brutality, segregation, and discrimination already being

discussed in the press. Foreign delegates began to ask members of the U.S. delegation about domestic conditions facing blacks and other minorities.[60]

The Convention defines "genocide" broadly to mean "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" including killing or committing other forms of physical or mental violence against the group. In a phrase that is most telling for the socioeconomic rights violations experienced by blacks, genocidal acts were also defined to include "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[61] Adopted by the General Assembly and opened for signature on December 9, the Genocide Convention was signed by President Truman almost immediately—on 11 December 1948.

Although it was criticized by Eleanor Roosevelt and others as exaggerated in light of the genocide that had just killed millions in Europe, the CRC stimulated significant interest throughout the world. A petition describing the historical atrocities and continuing legacies of American racism—an evil that had resulted in the murders, abuse, and social dislocation of millions—was finally being heard on the world stage. Individuals, indigenous peoples, and oppressed ethnic groups began to see the petition process as an effective route through which to bring publicity to long-ignored causes. Such grassroots efforts and public attention could not easily be ignored and helped pressure the Commission to begin drafting several of the long-anticipated legally binding human rights treaties.[62] The possibility that the new Commission, and the UN itself, would be inundated with individual or group petitions, and perhaps, the power of some of those petitions to persuade others of a cause, prompted renewed efforts to create and define legally binding, if deliberately circumscribed, mechanisms for human rights monitoring and review.

The economic and social status of African Americans and other subordinated groups was highlighted in the petitions and the African American and foreign press as well. The majority of African Americans lived and worked in segregated communities and were relegated to the poorest quality housing, schools, and other public accommodations; most suffered the effects of unemployment or underemployment, poverty, and lack of access to adequate health care. The Eastern bloc's emphasis on the state's role in improving economic and social conditions was a key point of rhetorical distinction to be drawn between U.S. and Soviet policies. Soviet and U.S. communists made the most of U.S. failure to protect the rights of its own minorities, while hiding the Soviet Union's own atrocities against ethnic and religious minorities.

The United States was an eager participant in the propaganda wars. Anticommunist African American leaders were brought into UN fora to condemn the Soviet and U.S. communist reports on the racial situation as hyperbole.[63]

Officials at both executive and congressional levels had recognized the country's potential vulnerability on charges of racial discrimination and abuse early on—even during the drafting of the UDHR. However, Mrs. Roosevelt, among others, defended against Soviet and other countries' critiques of the United States by arguing that lynchings and other forms of racial violence, were at least prohibited under U.S. law and, presumably, punishable by criminal sanctions. By contrast, she argued that the religious and political

persecution and executions occurring in the Soviet Union were matters of official policy and therefore of a different character.[64] U.S. critiques of Soviet programs, political and religious persecution, and travel restrictions were valid subjects of human rights condemnation. Nevertheless, Roosevelt's defense of the United States masked the legally and culturally enforced apartheid under which many civil, political, economic, and social rights were denied to African Americans and other groups. Even those protective laws on the books were only haphazardly enforced to protect African Americans in many jurisdictions.

The racial atmosphere and conditions in the United States also played a considerable role in Congressional opposition to U.S. application of the international human rights regime in general. U.S. ratification of international treaties under Article II of the Constitution requires a two-thirds majority vote of the Senate after presidential signature before the treaty can become U.S. law. Isolationist opposition in the U.S. Senate to the Treaty of Versailles had previously stymied President Woodrow Wilson's efforts to build and sustain a strong League of Nations in the aftermath of World War I.

The shadow of that failure strongly influenced U.S. administrations thereafter, including State Department officials. U.S. delegates to the UN were therefore wary of possible Senate opposition to international human rights treaties. The Senate's formal rejection of an important human rights treaty supported by the administration would send a strong negative signal to the world community. In the Cold War context, such a failure would both embarrass the administration on a world stage and might well undermine the impact of the United Nations human rights system as a whole.

Cold War opposition to the ratification of human rights treaties was led by Senator John Bricker (a Republican from Ohio) and Southern segregationist senators.[65] Their opposition was said to be based on isolationism, federalism, and concerns about potential violations of U.S. sovereignty, but the question of race lay at the heart of the matter.

If existing and proposed international human rights treaties became U.S. law, racist senators feared that African Americans, Asian Americans, Native Americans, Latinos, and other disfavored minorities would use the law's nondiscrimination provisions to attack the system of segregation that the senators so dearly cherished. Indeed, U.S. litigants and courts had already begun to cite to the Charter of the UN in civil rights litigation.[66] Conservative fears about the meaning of international human rights in the United States certainly included the extension of economic and social rights to African Americans, who were particularly disadvantaged with regard to housing, employment, education, and health care. Senator Bricker and his supporters therefore sought to put a halt to efforts to establish human rights in the United States by introducing a series of proposed legislative initiatives (known as the "Bricker amendments") that would amend the U.S. Constitution so as to prevent international human rights treaties from having significant internal impact in the United States.[67] The Truman administration was concerned that increasing support for such measures might have disastrous consequences for U.S. foreign policy overall.

After the election of Republican President Dwight D. Eisenhower in 1952, Secretary of State John Foster Dulles attempted to nullify the threat to

presidential powers and foreign policy flexibility posed by the Bricker amendments. He proposed a "compromise." Dulles conveyed to the recalcitrant senators the administration's position that it would not seek further ratifications of international human rights treaties in return for the withdrawal of the Bricker amendments. This capitulation to racial animus effectively undermined the formal application of international human rights to the significant racial, ethnic, gender, and economic challenges facing the United States for many years.[68]

Cold War brinksmanship occasionally had a salutary effect on domestic human rights struggles even during this period of early pessimism for the internal application of international human rights standards. Mary Dudziak argues, for example, that the 1954 Supreme Court case legally ending educational segregation, *Brown v. Board of Education*, was influenced by U.S. government attempts to counter Soviet propaganda about official U.S. racism.[69] And, as noted above, Truman's earlier domestic civil rights agenda was invigorated, in part, by the fear that the Soviet propaganda mill could influence African Americans (and developing nations that were closely observing progress on race relations in the United States).

Dividing the Covenant on Human Rights

Despite the failure to formally recognize some of the civil and political rights of blacks and other minorities in the United States until the 1960s and 1970s, the Truman and subsequent U.S. administrations were at least relatively more comfortable with the civil and political provisions of the UDHR and a proposed UN Covenant on Human Rights. They, like many in the U.S. legal community saw international civil and political rights as more reflective of U.S. constitutional and liberal law and values than economic and social rights. Some such civil rights were already elaborated in the Constitution in the Bill of Rights, and the U.S. civil rights movement of the 1940s and early 1950s seemed to be making some headway toward the end of legal segregation.

On the other hand, the United States was concerned that economic and social rights provisions might be drafted so as to require the kind of centrally planned forms of government established by the Soviets and other communist countries. The historical U.S. commitment to the right to private property, a (seemingly) laissez-faire economic policy, and its democratic traditions, it argued, were inconsistent with a strong form of "positive" economic and social rights obligations imposed on the state. Less explicitly stated, of course, was the perceived threat that the legal recognition of economic and social rights in U.S. law might lead to fundamental changes in the socioeconomic order. Such rights, after all, might lead to the redistribution of wealth from small powerful elites to millions of poor or subordinated Americans. The implications seemed revolutionary.

By contrast, the Soviet Union feared the implications of a strong civil and political rights regime providing for freedom of political thought and dissent, freedom of the press, freedom of religion, freedom of movement, and the rights of asylum-seekers. They emphasized that their political and economic system provided the majority of their people with access to free

public education, health care, housing, and collective agricultural and distributional systems for food security. Yet Soviet officials refused to acknowledge the contradictions of their claims toward a utopian society—why was political dissent and freedom of expression considered such a threat if socioeconomic needs were appropriately provided for?

Thus, despite the two superpowers' evident failure to live up to their own grandiose public pronouncements about each system's superior ability to protect the rights of their citizens, the two nations each pressed for their own set of prioritized rights in a planned Covenant on Human Rights. This conflict ultimately resulted in the bifurcation of the Covenant into two separate treaties. Between 1949 and 1951, the Commission on Human Rights worked to produce a single legally binding Covenant on Human Rights. But given growing pressure from the United States and other Western democracies, the Commission finally prevailed upon the General Assembly to authorize the creation of two separate treaties.[70]

There were both theoretical and practical reasons supporting division of the Covenant. At a practical level, some advocates of bifurcation hoped that the best way to get around the Cold War stalemate was to create separate instruments. One would provide largely for civil and political rights and another would address economic, social, and cultural rights. That way, each state could choose for itself which document was most consistent with its political and economic views and traditions. The goal was to achieve as widespread ratification as possible for at least one of the legally binding human rights treaties.

But there were deep-rooted ideological and philosophical reasons as well that continue to cause controversy about the indivisibility and implementation of the full range of rights to this day: According to annotations to the draft text of what was originally a single International Covenant on Human Rights:

> Those in favour of drafting two separate covenants argued that civil and political rights were enforceable, or justiciable, or of an "absolute" character, while economic , social and cultural rights were not or might not, be; that the former were immediately applicable, while the latter were to be progressively implemented; and that, generally speaking, the former were rights of the individual "against" the State, that is, against unlawful and unjust action of the State, while the latter were rights which the State would have to take positive action to promote. Since the nature of civil and political rights and that of economic, social and cultural rights and the obligations of the State in respect thereof, were different, it was desirable that two separate instruments should be prepared.[71]

Arguments over the nature and implementation of economic and social rights, further complicated by Cold War competition for the loyalties of the newly emerging postcolonial states, delayed the drafting process considerably. Final texts for the binding instruments in the International Bill of Rights were not adopted by the General Assembly until 1966. The impact of the Bricker Amendment and the Eisenhower/Dulles compromise proved devastating to U.S. involvement in the drafting and negotiating efforts as well.

In announcing the Dulles compromise, the Eisenhower administration not only suspended plans for any future U.S. ratification of international

human rights treaties, it also "refused to reappoint Eleanor Roosevelt to the Commission on Human Rights, even though she still had two years remaining before the end of her term,"[72] thereby removing at least one strong U.S. advocate for human rights from the drafting process. The impact of this position was clear. Rather than have its sins and shortcomings exposed to scrutiny on the world stage, one of the most powerful actors had picked up its marbles and gone home.

Even after the formal adoption and opening for signature of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), it still took another decade before the two covenants received a sufficient number of ratifications for entry into force in 1976.[73] Ironically, it was the adoption of another human rights treaty on racial discrimination that broke the international impasse on international human rights treaties.

The racial and ethnic context in which the UN itself was founded and which undergirded and lent false legitimacy to colonialism itself, led many newly emerging Third World states to a shared sense that an end to racial discrimination was of primary importance if the UN enterprise was to move forward. Therefore, the adoption of an International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1965 occurred even prior to the adoption of the covenants.[74] Significantly, ICERD includes the full panoply of socioeconomic rights as well as civil and political rights in its overall prohibitions on racial discrimination. It therefore creates legally binding international obligations with regard to economic and social rights. Predictably, however, the United States did not ratify ICERD until the 1990s, and then only with significant limitations on its domestic application.[75]

Despite the hobbling impact of the Dulles compromise, U.S. silence on its own human rights responsibilities was undermined by significant domestic human rights–related unrest and political activism. The Kennedy, Johnson, Nixon, and Ford administrations presided over a time of unprecedented social justice activism in the United States, often in resistance to administration policies. The African American civil rights movement, the women's rights and gay rights movements, anti–Vietnam War activism, labor unionism, and antipoverty and welfare rights efforts all contributed to a broader sense among the population (and among some policymakers) that a human rights analysis might be relevant to U.S. problems.[76] Policymakers recognized that the Dulles compromise had limited U.S. effectiveness with regard to international human rights influence. In response to regrets about the foreign policy implications of the compromise, antiwar sentiments, and labor union pressures, Congress even enacted legislation in the early 1970s that linked various forms of U.S. economic foreign assistance to "internationally-recognized" human rights and labor standards.[77]

Some of this popular activism focused on economic and social issues and linked domestic struggles to international contexts[78]—including U.S. foreign policies affecting the poor and subordinated groups in other countries. This increased both internal and external pressure for the reestablishment of a more active official U.S. engagement with the international economic and social rights framework as well as human rights as a whole.

DOMESTIC HUMAN RIGHTS AS U.S. FOREIGN POLICY IMPERATIVE?: FLIRTING WITH (AND REJECTING) THE INDIVISIBILITY PARADIGM

Official U.S. passivity with regard to international human rights lasted until the 1970s, although there were attempts at reform under the Kennedy administration.[79] However, President Jimmy Carter signaled an important shift in U.S. international human rights policy. Carter, at least in part because of concerns about the image and influence of the United States abroad, rejected the Dulles compromise legacy. He believed that U.S. foreign policy influence, including on human rights issues in other countries, would be undermined if the United States could be criticized for failing to ratify the International Bill of Rights. The administration was also influenced by significant congressional activism on human rights stimulated by opposition to the Vietnam War.

Carter, and other Democratic and Republican administrations in the decades to follow, recognized that the United States was open to charges of hypocrisy when it failed to ratify important international human rights treaties while attempting to impose human rights standards on others. Similarly, U.S. rejection of human rights treaty ratification might well undermine its efforts to hold the line, especially in the Third World, against communist influence. At first, it even appeared that Carter also appreciated the relationship between civil and political and economic, social, and cultural rights. In a famous articulation of administration policy on rights categorization, Secretary of State Cyrus Vance described "human rights as falling into three broad categories: rights that protect the integrity of the person; rights that guarantee fulfillment of basic economic, and social needs; and rights that protect civil and political liberties." The administration promoted protection of all categories of rights as being complementary and mutually reinforcing.[80]

Carter's rejection of the Dulles compromise and limited embrace of the international human rights treaties created room for later administrations to support occasional U.S. ratification of some instruments. This process occurred over a period of decades and still continues (slowly) today. Unfortunately, U.S. ratification of the ICESCR has been one of the most difficult to obtain because of substantive divisions within the human rights community about its implementation as well as because of isolationist politics.

In 1977, President Carter signed the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the American Convention on Human Rights and submitted them to the Senate for advice and consent to ratification in early 1978.[81] The ICESCR was included as the companion treaty to the ICCPR and as an important component of the International Bill of Rights.

Despite this promising development for U.S. human rights advocates, the administration, with the advice of the State Department, transmitted the treaties to the Senate with significant "reservations, understandings, and declarations" (RUDs) intended to clarify the supremacy of U.S. constitutional law interpretations and to limit the practical implementation of the human

rights treaties in the United States, including as a cause of action. In some sense, the package of RUDs, and the even more restrictive limitations to be imposed on subsequent treaties by later administrations were the lasting legacy of the Bricker amendments.

The most important such limitation, attached to all subsequent international human rights treaties, was a provision declaring even ratified human rights treaties to be "non-self-executing." In the administration's view, only implementing legislation passed by Congress would allow the treaties to be given full effect in U.S. courts.

In addition to the non-self-executing declaration, Carter attached substantive, and controversial, reservations and understandings to the ICESCR. The most significant of these made explicit the Cold War hardening of attitudes about the nature of socioeconomic rights: "The United States understands paragraph (1) of Article 2 [the general obligations provision of the ICESCR] as establishing that the provisions of Article 1 through 15 of this Covenant describe goals to be achieved progressively rather than through immediate implementation."[82]

The transmittal letter then goes on to reject the international economic cooperation many in the UN system had contemplated as a necessary condition for the realization of socioeconomic rights: "It is also understood that paragraph (1) of Article 2, as well as Article 1), which calls for States Parties to take steps individually and through international cooperation to guard against hunger, import no legally binding obligation to provide aid to foreign countries."[83]

The administration's interpretation of the ICESCR, apparently intended to make ratification more palatable to Senate decision makers, instead had the effect of reasserting American exceptionalism and undermining a strong interpretation of the ICESCR's requirements internationally.[84] But even the watered down version of the ICESCR created by the attachment of the RUDs was not enough to overcome significant opposition to its U.S. ratification. The ICESCR was, and is, still largely perceived to be a threat to "American values." This led some supporters of ratification to adopt a stealth approach that would argue strategically that ratification would have only a largely symbolic foreign policy effect. Such an approach resonated with the administration's view that the ICESCR's provisions were "for the most part in accordance with United States law and practice."[85] Philip Alston, a chair of the UN Committee that later administered the ICESCR, rejected such an approach by U.S. activists in subsequent years, arguing instead for a "robust" public debate on ratification. He argued that "the starting point for such a debate must be recognition of the fact that a significant range of obligations would flow from ratification."[86]

Carter's transmittal of the treaties and subsequent congressional activities in human rights did reinvigorate the debate about the application of human rights to the United States and their role in U.S. foreign policy. Importantly, since the 1970s Congress has directed the State Department to collect data and publish annual "Country Reports" summarizing human rights violations in countries around the world.[87] The reports, often relied on by human rights activists and scholars, do not fully address economic, social, and cultural

rights violations, however. They contain a section on workers' rights because of union advocacy for U.S. domestic law tying foreign aid to observance of labor rights protections.[88] However, most economic and social rights violations are not included because of the U.S. ideological position treating them as somehow outside the panoply of human rights.[89] Nevertheless, the existence of such official reports creates space for critique and supplementation on economic and social issues by NGOs and other members of civil society.[90]

Unfortunately, the Senate Foreign Relations Committee, which held hearings in 1979 on the four human rights treaties transmitted by Carter, did not support them. Similarly, Carter's signature of the newly adopted Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1980 was allowed to quietly languish in the Senate Foreign Relations Committee until the 1990s.[91] It was not until the Reagan and Bush (I) administrations that the Genocide Convention, signed by Truman in 1948, was finally ratified by the U.S. in 1989, signaling a new period of optimism that the U.S. would once again begin to engage with international human rights treaties in a domestic context.

Other ratifications of major human rights treaties followed in subsequent years as the Cold War ended and the United States fought for global influence among the newly emerging post–Cold War democracies. The ICCPR was finally ratified by the George H.W. Bush (I) administration in 1992; the International Convention for the Elimination of Racial Discrimination, the first major legally binding UN human rights treaty, was ratified by the Clinton administration in 1994, as was the Convention Against Torture. Notably, the ICESCR, CEDAW and the Convention on the Rights of the Child, although signed, have still not been ratified as of the time of this writing. Even though all four treaties transmitted by Carter suffered from Senate inaction and opposition, the ICESCR likely was the most controversial human rights treaty for the United States and remains so today.

As the Cold War drew to a close in the late 1980s and early 1990s, the world saw another shift in U.S. government attitudes toward international human rights. As the Soviet Union collapsed and relatively peaceful popular democratic movements asserted themselves U.S. officials and some political economists trumpeted the triumph of democratic and neoliberal political and economic systems as dominant in the new global economy. The Bush (I) administration's ratification, for example, of the ICCPR was argued to be a strong signal to the rest of the world about the supremacy of U.S. liberal democratic values.

Nonetheless, that administration clung strongly to the philosophy of non-self-execution of international human rights treaties. After all, officials argued, the United States was a world leader in the protection of civil and political rights, already had significant federal and state laws on the subject, and should serve as a model for the rest of the world rather than be subject to its criticisms. Complaints by activists and some U.S.-focused NGOs about race and class discrimination in application of the death penalty, police brutality, voting rights abuses, and continuing discrimination in housing, health care, education, and employment fell on deaf ears with regard to the need for an international perspective on these issues.

THE CONTROVERSIAL NATURE OF ECONOMIC AND SOCIAL RIGHTS

Why were and are the rights outlined in instruments like the ICESCR so controversial within U.S. official and civil society circles? They seem so clearly to codify the "four freedoms" and the "second bill of rights" envisioned in the 1940s by President Roosevelt. Clues can be found in Mrs. Roosevelt's statement in support of bifurcating the ICCPR from the ICESCR. Although at least rhetorically acknowledging that civil and political rights should have the same normative status as economic, social, and cultural rights, she accepted the view that the two categories of rights were different in nature and required different mechanisms of implementation. The Commission on Human Rights had failed to attach the kind of implementation machinery to economic and social rights that were included for civil and political rights provisions in a draft Covenant on Human Rights. Mrs. Roosevelt noted the following:

> It was felt by those with whom I discussed the matter in the Commission that this machinery is not appropriate for the economic, social, and cultural rights provisions of the Covenant, since these rights are to be achieved progressively and since the obligations of states with respect to these rights were not as precise as those with respect to the civil and political rights. These members of the Commission thought that it would be preferable with respect to the economic, social, and cultural rights, to stress the importance of assisting states to achieve economic, social, and cultural progress rather than to stress the filing of complaints against states in this field.[92]

As she noted, Mrs. Roosevelt was not alone in the view that socioeconomic rights were to be treated differently in the international human rights legal regime. But the differences were sometimes exaggerated or misunderstood in order to protect the international or domestic balance of power. Both West and East feared the implications of strong economic, social, and cultural rights enforcement. The text of the ICESCR reflected such concerns, but it also reflected strong pressure from the peoples of the world to hold their governments and the international community accountable for poverty and social injustice. As discussed below, the U.S. ratification debate largely tracked the legal requirements of the ICESCR itself.

LEGAL OBLIGATIONS OF PARTIES TO THE ICESCR

Despite the early protestations about the indivisibility and interdependence of all human rights, whether civil and political, or economic, social, and cultural, the ICESCR reflected the controversial nature of ESC rights in its very structure. For example, the ICESCR, like the ICCPR, is a legally binding treaty. As such, states could choose (or not) to ratify the treaty and take on the legal obligations described. However, at first glance, the legal obligations created under the ICESCR seem vague and less immediate than the obligations of the ICCPR. This reflected the ideological divide, discussed above, not only between East and West, but also among those who questioned

whether economic and social rights could, or should, properly be called "human rights" at all.

Like the UDHR and the ICCPR, the ICESCR begins with a preamble, setting forth the purposes and rationale of the document, and general articles with legal principles such as the all-important self-determination of peoples provision in Article 1, and the equally important nondiscrimination provision in Article 2(2).

Such provisions caused official United States discomfort, not least because they might strengthen the cause of indigenous advocates for substantive fairness and equality, but also because of the long history of abuses against African Americans and other minority groups. Of course, the civil rights movement of the 1950s and 1960s had helped motivate changes in federal and state discriminatory laws and policies with regard to voting, desegregation of education and housing opportunity, and other civil rights. However, the potential for new obligations providing for legal rights to food, housing, education, health care, work and fair working conditions, and social security seemed to be another matter. But what, exactly, did the ICESCR require?

Article 2 of the Covenant sets forth the general legal obligations of the parties and serves as an interpretive guide to the other substantive provisions:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Unlike the ICCPR, provision was not made for the creation of a separate implementing body for the ICESCR. Rather, states parties were to submit initial and periodic reports on the status of ESC rights in their countries to the UN's Economic and Social Council, the large UN political body that had responsibility for oversight of human rights as well as other broadly mandated social issues. This omission reflected the initial distrust among many, including the United States, about the implementation of ESC rights. Such misgivings about the potential role of human rights monitoring and implementation bodies had been expressed even during the drafting of the UDHR because of fears about the impact on traditional notions of state sovereignty. Although this resistance was overcome with the inclusion of a Human Rights Committee to implement the ICCPR, and the creation of other human rights bodies such as subcommissions, working groups, and special rapporteurs under the authority of the Commission on Human Rights, the implementation of the ICESCR was maintained in a second-class status at least until the 1980s.

REPORTING

Like most international human rights treaties, the ICESCR requires reporting by states parties under Article 16 of the Covenant to the UN Economic and Social Council (ECOSOC). The secretary-general of ECOSOC also may

disseminate the reports to the UN specialized agencies (such as the World Health Organization, UNESCO, the United Nations Development Programme, UNIFEM, and the United Nations Children's Educational Fund [UNICEF]) to the extent that they are relevant to the work of the agency. This reflects the understanding that the reporting process was aimed, in part, at providing information that would be helpful to the parties and to the UN itself in understanding and ameliorating problems of a socioeconomic or cultural nature. Article 17 indicates that the parties should submit such reports within one year after the Covenant entered into force for that party "in stages" in accordance with rules established by ECOSOC.

In and of itself, mere reporting would seem like a minor and non-threatening obligation for the United States to accept. U.S. officials from both parties had argued, after all, that the United States was a leader in the actual provision of socioeconomic goods such as public housing, health care, and public education. But "embarrassment" is likely the most potent weapon in the international human rights movement. Because the international human rights legal structures (excluding the Security Council) are unable to impose strong sanctions on violator states, the system relies heavily on public exposure of violations in the hope that states will take corrective action to avoid international or internal condemnation. Similarly, exposing abusive practices may also be supportive of the efforts of internally affected groups in opposition to government policies. Rather than a "violations" approach, however, the CESCR has tended to embrace a consensus-building and cooperative approach.[93] Such an approach emphasizes data gathering for the purpose of assisting the state in fulfilling its obligations.[94]

What could the United States find objectionable in such cooperation and assistance? Even superpowers can be embarrassed. Accepting technical assistance or guidance from other states or an international body might, some believed, undermine U.S. status as a superpower and human rights model.

ARTICLE 2 AS LIMITATION AND OPPORTUNITY

As drafted, the text of Article 2(1) seems a masterpiece of bets-hedging. Rather than a more straightforward guide to the legal obligations of states parties, its phrasing incorporates the pressing concerns expressed both by developing countries and by the United States and other Western powers about the "different" nature of economic, social, and cultural rights.

"Take steps, individually and through international assistance and co-operation, especially economic and technical . . . "

This language makes a promising beginning to the article. The undertaking required obligates the parties to the Covenant to "take steps"—implying positive action by the states parties. Nevertheless, it also indicates that the drafters believed that all or some of the obligations set forth might require a multilevel process over time—steps on the way to some higher attainable standard. The phrase "individually and collectively" evidences the understanding

that economic, social, and cultural rights such as food and health care could not effectively be protected solely within national borders and through national measures—international cooperation along the lines contemplated at the founding of the UN itself, would be necessary.

Article 23 set forth language defining, but not limiting, what such international action could include:

> The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant include such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

The responsibility to provide international economic assistance and fair terms of trade, for example, remained a point of considerable controversy, and led, in the United States, to Carter's attempt, through an "understanding," to limit the interpretation of the provision. Newly independent Third World states, in the majority at the UN, had begun to make political and moral demands for a "New International Economic Order" (NIEO) and a "right to development" that surfaced the responsibilities of wealthy nations to developing countries.

"To the Maximum of its Available Resources"

This phrase evidenced a key concern and conflict that had arisen in the debate over social and economic rights at the UN. Developing countries, although smaller in number at the time of the UN's founding, had been quite vocal about the often vast differences in economic wealth among states between the industrialized and colonizing states and the developing states. If rights such as food, housing, free primary education, and health care were to be guaranteed by the state, it was argued that limits needed to be recognized based on differences in resources. On this point, the developing countries succeeded in building such a limitation into the Covenant. Western critics of social and economic rights also argued that the failure to recognize resource limitations would result in the rights provided for in the treaty being undermined as empty promises. Of course, the key interpretive question was, and is, the meaning of "available." Should this mean, for example, that if a state sets aside an amount for public housing in its overall budget, the maximum of that set-aside should be used? Or, does it mean that the state has an obligation to maximize and prioritize budget allocations to fulfill the enumerated rights?

U.S. critics on both the left and the right were concerned about resource and allocation issues. While it should seem self-evident that one of the wealthiest countries in the world would have less concern about the availability of resources to protect the rights of poor, homeless, or sick people within its borders, conservatives worried that a rights approach would lead to inappropriate expectations and a lack of initiative on the part of those seeking a "handout." Market-based or other private sector approaches, they argued,

would ultimately do the most good for the most people and do so more efficiently than could central government. Those on the left were concerned that the elevation of socioeconomic needs to "rights" might be misleading and divert attention and resources away from more effective strategies.[95] Might not homeless or poor people simply be wasting precious resources or time by attempting long, complex, and expensive judicial remedies to which only a lucky few could gain access?

Similar concerns were raised about allocation. Once it was determined that health is a "human right" on the domestic level, for example, and judges had the discretion to interpret that right, might not judges abuse or misapply that power? How, for example, would a court's decisions to direct allocation of public health resources between cancer treatments or diabetes prevention be constrained? Should that decision not be better left to a democratically elected legislature and executive?[96]

Finally, some questioned whether "available resources" might not also include external sources such as international aid. Would such a requirement interfere inappropriately with a sovereign state's decisions about how to use foreign aid?

"With a view to achieving progressively the full realization of the rights recognized . . . "

The concept of "progressive realization" was intimately related to the resource problem discussed above. As the UN grew in membership with the progress of decolonization, newly independent developing states emphasized that time and resources were needed to adequately fulfill social and economic rights. Having become responsible in the postcolonial period for problems such as massive unemployment, trade imbalances, poverty, racial, ethnic, and religious conflict, and disease, many developing states argued that social and economic rights could not be implemented immediately in the same way as so-called negative rights (civil and political rights) which, it was said, only required the state to refrain from abusive actions against individuals under its jurisdiction.

Such a clear theoretical divide between "negative" and "positive" rights is subject to challenge, however.[97] The right to political participation, for example, not only requires that the state refrain from creating roadblocks to voting, it may also require that the state create elaborate and expensive primaries, voting sites, accessible voting machines, ballots, counting systems, etc. By contrast, some could interpret a right to housing as a "negative" right in the sense that it could be narrowly interpreted only to prohibit the state from interfering with one's own efforts to purchase or build a home, rather than the more expansive and "positive" obligation of the state to provide housing for those who cannot otherwise obtain it.[98]

Still, the ideological divide remained strong and the limitation of "progressive realization" became an important aspect of the Covenant. Even wealthy Western states saw progressive realization as a pragmatic response to differences in economic status among states. Recognizing that fulfillment might take time, progressive steps might lend greater credibility to the legal status

and legitimacy of social and economic rights concepts. Both wealthy and developing states, however, tended to read the provisions as narrowly as possible, hoping to limit the extent of their potential economic obligations.

". . . By all appropriate means, including particularly the adoption of legislative measures."

The final phrase in Article 2(1) raised the question of implementation of social and economic rights. Like all major international human rights treaties, the ICESCR relies on the states as sovereign powers to provide for the primary means of implementation and protection of the rights listed in the Covenant. This is a fundamental irony of the international human rights movement: that states, often the most egregious violators of human rights at the time of the drafting of the International Bill of Rights, were also to be relied on as the primary and most powerful protectors of human rights. The drafters of the UDHR avoided this question by focusing primarily on the rights and duties of individuals and groups rather than which entities, individuals, or groups bore responsibility for implementing and enforcing them. Article (2)1 clearly identifies legislation as an "appropriate means" of national implementation. But the underlying controversy, which was to remain the key question for promoters of social and economic human rights, was whether or not such rights were "justiciable."

If so-called rights could not be adequately or appropriately protected in courts and by judicial process, some argued, could they still legitimately be called "rights" at all? Was it not more appropriate to think of them as social goods or benefits that a state or other entity could choose to distribute if it had the resources? To the extent such benefits intersected with civil rights, it was said that they should be distributed in a nondiscriminatory way,[99] but the United States largely rejected the notion that social and economic rights could or should be appropriately adjudicated in national or international courts or constitutionalized at the federal level.[100]

The controversies inherent in the legal framework created for the ICESCR, and others, were all implicated in the internal debates over ratification of the ICESCR that occurred within the United States after the treaty's submission to the Senate in 1978.

The Struggle Continues: New Realities and the Struggle to Make Space for the "Other" Human Rights in the United States

The disappointing history of U.S. encounters with the economic and social human rights framework so far evidences an important ideological barrier to the future recognition and implementation of socioeconomic rights in the United States. In addition, post-9/11 efforts to backtrack on the applicability of international law and especially international human rights and humanitarian law have contributed to an atmosphere in which the domestic status of human rights in general was thrown into question.

Yet, there are many signs of hope and progress. Particularly within civil society, these are groups and institutions operating outside of official U.S.

government policy and seeking to reflect the hopes and aspirations of many ordinary Americans. The catastrophe in the Gulf Coast of the United States during and after Hurricane Katrina in fall 2005 revealed the continuing reality of racial discrimination in housing, education, health care, and employment more than five decades after assertions of U.S. human rights exceptionalism that followed World War II. Grassroots and legal advocates have responded strongly through a variety of means, including the use of international human rights mechanisms.[101] Opposition to the George W. Bush administration's foreign policy and domestic human rights failures may also have led to a popular backlash and a more receptive atmosphere for the recognition of economic and social rights (as well as the reclamation of civil and political rights). This concluding section briefly outlines some of the areas in which such U.S. activism and advocacy around economic and social rights has been reasserted over the decades since Carter's signing of the ICESCR. Subsequent chapters in this multivolume work discuss many of these human rights strategies in more detail.

UN ELABORATION OF THE CONTENT AND IMPLEMENTATION OF ESC RIGHTS: THE WORK OF THE COMMITTEE ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

The perception that economic and social rights are more vaguely defined than the civil and political rights with which they are more familiar remains a key sticking point for U.S. officials and some American activists.[102] Commentators have pointed out that some civil and political rights are also broadly and vaguely defined in the texts of international instruments and in national constitutions as well, often resulting in years or decades of interpretive litigation. Despite those interpretive problems with regard to civil rights, many agree on their importance, if not their sufficiency in achieving social justice. However, for some time there was relatively little jurisprudence and formal interpretation by authoritative international bodies of the meaning and content of economic and social rights.

Perhaps no other international institution has done more to address this situation than the UN Committee on Economic, Social and Cultural Rights (CESCR). Although the ICESCR was deliberately created without a specific monitoring and implementing body, advocates for ESC rights and experts on such issues were able to prevail upon ECOSOC to create such a body in 1986. Such a body could review and provide Concluding Observations on the reports submitted by states parties to the Covenant, and, through the mechanism of "General Comments," could provide authoritative interpretations of, and specificity to, the substantive provisions of the ICESCR.[103]

International experts on economic, social, and cultural rights met in Limburg (The Netherlands) in 1986 to adopt unofficial recommendations with regard to the interpretation and implementation of the ICESCR. The groundbreaking "Limburg Principles" resulting from the meeting strongly influenced the CESCR's interpretation of the nature and content of socioeconomic

rights and their implementation.[104] A decade later in 1997, a similar expert consultation in Maastricht resulted in the highly influential "Maastricht Guidelines on Economic, Social, and Cultural Rights."[105] Among other things, the guidelines grappled with the thorny questions raised in U.S. objections and elsewhere about the indivisibility and relationship of socioeconomic rights to civil and political and collective rights, the justiciability of ESC rights, the legal obligations of states parties to the Covenant, minimum core obligations, immediate obligations of states versus the principle of progressive realization, creating benchmarks for the realization of rights, and addressing the question of resource limitations in fulfilling the rights.

Most significantly, the Guidelines and the "General Comments" issued by the Committee have specified the substantive and theoretical content of many ESC rights and state obligations to "respect, protect, fulfill and ensure" them. They therefore reveal that economic and social rights themselves have "negative" and "positive" aspects which may involve state action (or a requirement that a state refrain from acting) and the requirement that a state provide the legal and social circumstances in which a right can be fulfilled. It also reveals the actual or potential role of non-state actors such as private individuals and groups, corporations and other business enterprises, and international trade or financial institutions.

The Committee adopted a cooperative approach to administration of the ICESCR, working with states parties to recommend methods of improving compliance and collaborating with UN specialized agencies and other bodies to build expertise and technical assistance on specific issues such as the right to housing and the right to food. This growing body of interpretive material can act as an important response to the continued U.S. arguments about the vagueness and indeterminacy of socioeconomic rights. To be sure, all international human rights are elaborated at a certain level of breadth and indeterminacy; their meaning must constantly be contested in the political realm rather than through textual interpretation in isolation from political and historical context. But the process of working to define socioeconomic rights in practical and concrete contexts will likely contribute to their legitimization and ultimate protection. The danger remains, of course, that as the substantive obligations created by the fulfillment of economic and social rights are more specifically defined, resistance to their U.S. application might intensify in the U.S. Congress and in the administration.[106]

THE INFLUENCE OF COMPARATIVE JURISPRUDENCE ON ECONOMIC AND SOCIAL RIGHTS AWARENESS IN THE UNITED STATES

One unfortunate consequence of official U.S. exceptionalism about socioeconomic human rights is that it has been "left behind" as other countries work to define and implement them in domestic context. Over the past decade, there have been increasing measures internationally to constitutionalize economic and social rights, or to interpret civil and political rights in ways that are protective of such concerns. U.S. legal scholars and some jurists, among

others, have taken note of this influential comparative jurisprudence in considering whether, and how, to apply such principles to U.S. law.

The post-apartheid jurisprudence of the South African Constitutional Court has been particularly prominent in this regard. The 1996 Constitution of South Africa enshrines economic, social, and cultural rights protections as well as civil and political rights in its text. It also explicitly acknowledges the interpretive relevance of international law and comparative law. The court has therefore engaged in (sometimes controversial) efforts to give meaning and substance to constitutional protections for economic and social rights. Leading decisions have included interpretations of the right to health and to emergency care[107] and the right to adequate housing.[108] The constitution provides for a "reasonableness" standard against which state action or inaction is to be measured with regard to the protection of some socioeconomic rights. In interpreting this standard, the court has struggled with the question of separation of powers and the appropriateness of judicial engagement with economic and social rights.[109]

Courts in India, interpreting the "directive principles" approach of their constitution, have similarly responded to "social action litigation" strategies aimed at homelessness and other rights violations against the poor.[110] European and Latin American courts and human rights bodies have interpreted rights traditionally identified as civil and political (such as the right to life) to have socioeconomic application as well.[111] Such judicial analysis has undermined official U.S. arguments that economic and social rights are non-justiciable.

NGO STRATEGIES

As discussed above, some major international human rights NGOs based in the United States resisted application of ESC rights in the United States. Some feared that limited financial and staff resources might be diverted from monitoring and advocacy for important civil and political rights, which seemed much more attainable than the seemingly ill-defined and impractical economic and social rights. Others feared that the prioritization of economic and social rights might mask existing violations of civil and political rights.[112] Still others remained unconvinced about the justiciability of socioeconomic rights in U.S. courts and the unfamiliarity of the general U.S. public with such rights.

With the end of the Cold War, this attitude among major U.S. human rights NGOs began to break down significantly. Leading human rights NGOs like Human Rights Watch, Amnesty International, and Lawyers Committee for Human Rights (now Human Rights First) reversed their original positions and began to monitor and document violations of economic and social rights, including violations in the United States. Such NGOs prepared reports on violations of the rights of U.S. workers in the meatpacking industry, violations of the rights of domestic workers, and violations of the rights of undocumented workers. In addition, grassroots activists began to focus on the abusive effects of welfare reform and lack of access to affordable and adequate housing and health care as human rights issues. Southern NGOs began to combine

traditional civil rights strategies with economic and social rights approaches to address racial violence, discrimination, and economic injustices against workers.[113]

These grassroots campaigns often avoid the legal barriers to U.S. implementation of socioeconomic rights by engaging in multilevel strategies involving documentation and monitoring, community organizing, popular education, direct action (protests, occupation of abandoned housing), publicity, and formal international and regional human rights complaints mechanisms alleging U.S. violations of economic and social rights.[114]

Many such projects build on the theory that many poor or otherwise disadvantaged Americans already have some sense that they have a "right" to food, health care, education, and other basic needs, but that they have not previously been exposed to the language and legal status of the international instruments outlining those rights.

Perhaps most encouraging, some NGOs were specifically formed to focus on economic and social human rights, such as the Center for Economic and Social Rights, EarthRights International, Physicians for Human Rights, and the National Economic and Social Rights Initiative. Such organizations contribute to the continuing effort to dispel the myths surrounding the undefined nature of economic and social rights by monitoring and identifying violations, advocating for social change, and educating the public and policymakers. Some work with international coalitions, such as the International Economic, Social, and Cultural Rights Network to create cross-border alliances. Coalitions of activists and NGOs, such as the U.S. Human Rights Network, prominently include economic and social rights in their literature and analysis. EarthRights International and the Center for Constitutional Rights have both attempted to push the boundaries of U.S. litigation under the Alien Tort Statute to hold multinational corporate actors accountable for violations of the rights of workers and communities adversely affected by corporate activity.

A recent colloquy between the executive director of Human Rights Watch (Kenneth Roth) and Physicians for Human Rights (Leonard S. Rubenstein) on the roles of NGOs in addressing economic and social rights revealed significant differences about approach, but it also revealed a shared sense that many human rights NGOs will have to take account of such issues in today's globalized world.[115] The implications for U.S. policy at home and abroad are significant.

These NGO and grassroots movements are likely to have at least two important effects on the U.S. encounter with the international human rights framework in coming years: 1) They are likely to galvanize popular awareness of, and support for, an economic and social rights–based approach to U.S. economic and social problems in conjunction with existing approaches; and 2) they are likely to create pressure for, and lend additional legitimacy to, judicial interpretive efforts, legislative efforts, and administrative interpretations of the recognition and promotion of socioeconomic rights.

This overview of the U.S. encounter with the international economic and social rights framework argues that U.S. fears and misconceptions about the nature and legal implications of socioeconomic rights are largely misplaced. The protection and implementation of such rights is indeed complicated, and

will require careful democratic, judicial, and executive decision-making. The protection of civil and political rights has been equally complex. But the national commitment to the latter rights has made the continuing effort worthwhile. Until we see the reality of discrimination, homelessness, malnutrition, educational disparities, and lack of health care as of similar priority, we will not be willing to expend that effort. The inspiring and continuing activism, legal work, and international and comparative leadership in giving meaning to such rights are important indicators that future U.S. encounters with the ESC framework will be more positive.

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NOTES

1. Thomas Paine, "Agrarian Justice" (1792), excerpted in Jeanne M. Woods and Hope Lewis (eds.), *Human Rights & the Global Marketplace: Economic, Social, and Cultural Dimensions* (Ardsley, NY: Transnational Publishers, 2005), p. 62.

2. Martin Luther King Jr., "The Time is Always Right to do Right," (speech presented at Syracuse University, New York, July 15, 1965), available online at students.syr.edu/osvp/drkingaddress.html (accessed February 15, 2007).

3. This chapter refers interchangeably to "economic and social rights" and "socioeconomic rights." It focuses primarily on individual economic and social rights as elaborated in international standards rather than cultural and religious rights. See Articles 1–2, 22–26, 28, Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); Articles 1–14, International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976. For discussions of U.S. attitudes toward the equally important and interdependent cultural and religious rights of individuals, and the collective rights of minorities, peoples, and indigenous peoples, see, e.g., Ian Shapiro and Will Kymlicka (eds.), *Ethnicity and Group Rights* (New York: New York University Press, 1997); S. James Anaya and Robert A. Williams Jr., "The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System," *Harvard Human Rights Journal* 14 (2001): 33.

4. Philip Alston, "U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy," *American Journal of International Law* 84 (1990): 365, excerpted in David Weissbrodt, Joan Fitzpatrick, and Frank Newman (eds.), *International Human Rights: Law, Policy, and Process*, 3rd ed. (Cincinnati, OH: Anderson Publishing, 2001), p. 134.

5. On activist support for economic and social rights in the United States see, e.g., Alston, "An Entirely New Strategy;" Frank Deale, "The Unhappy History of Economic Rights in the United States and Prospects for their Creation and Renewal," *Howard*

Law Journal 43 (2000): 281; Ford Foundation, *Close to Home: Case Studies of Human Rights Work in the United States* (New York: Ford Foundation, 2004); Rhoda E. Howard-Hassmann and Claude E. Welch (eds.), *Economic Rights in Canada and the United States* (Philadelphia: University of Pennsylvania Press, 2006); Barbara J. Stark, "Economic Rights in the United States and International Human Rights Law: Toward 'an Entirely New Strategy,'" in David P. Forsythe (ed.), *The United States and Human Rights: Looking Inward and Outward* (Lincoln: University of Nebraska Press, 2000); Cass R. Sunstein, *The Second Bill of Rights: Franklin D. Roosevelt's Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2004); United States Human Rights Network: *Something Inside So Strong: A Resource Guide on Human Rights in the United States* (Washington, DC: United States Human Rights Network, 2003).

6. "Declaration of the Rights of Man and Citizen," in Frank Maloy Anderson (ed.), *Constitution of the Year 1* (1793), *The Constitution and Other Selected Documents Illustrative of the History of France* 1789–1901, p. 170 (1904), excerpted in Jeanne M. Woods and Hope Lewis (eds.), *Human Rights and the Global Marketplace: Economic, Social, and Cultural Dimensions* (Ardsley, NY: Transnational Publishers, 2005), p. 53; Paine, *Agrarian Justice* in Woods and Lewis, *Human Rights*, p. 60. See also Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998), pp. 18–20.

7. Woods and Lewis, *Human Rights*, pp. 43–67.

8. See, e.g., Barbara J. Stark, "Deconstructing the Framers' Right to Property: Liberty's Daughters and Economic Rights," *Hofstra Law Review* 28 (2000): 963, 967, excerpted in Woods and Lewis, *Human Rights*, p. 850.

9. See, generally, "Chapter 10: The United States of America: Federal Rejection, State Protection," in Woods and Lewis, *Human Rights*, pp. 841–930; Herman Schwartz, "The Wisdom and Enforceability of Welfare Rights as Constitutional Rights," *Human Rights Brief* 8(2) (2001), available online at www.wcl.american.edu/hrbrief/08/2rights.cfm.

10. See San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) ("Education is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find basis for saying it is . . . "), excerpted in Woods and Lewis, *Human Rights*, pp. 868, 871.

11. As chair of the commission drafting the Universal Declaration of Human Rights (UDHR), Eleanor Roosevelt expressed the "wholehearted support" of the United States for its socioeconomic rights provisions. "The United States did not, however, consider them to 'imply an obligation on governments to assure the enjoyment of these rights by direct governmental action.'" Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), p. 186.

12. "Since neither the U.S. Constitution nor international law have yet been construed to create federal minimum welfare guarantees, we must go back to the original protector of the poor- state law. Historically, state and local governments have played the primary role in assuming responsibility for those unable to care for themselves. This continues to be the case today. The language of state statutory and constitutional law often contains explicit intentions to provide minimum welfare guarantees. These have frequently provided the basis for court decisions upholding state economic rights." Deale, "The Unhappy History," p. 320.

13. See, e.g., Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955* (Cambridge: Cambridge University Press, 2003); Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton, NJ: Princeton University Press, 2000); Paul Gordon Lauren,

Power and Prejudice: The Politics and Diplomacy of Racial Discrimination, 2nd ed. (Boulder, CO: Westview Press, 1996); Brenda Gayle Plummer, *Rising Wind: Black Americans and U.S. Foreign Affairs*, (Chapel Hill: University of North Carolina Press, 1996). Excerpts from *Eyes off the prize* © 2003 by Carol Anderson. Reprinted with permission of Cambridge University Press.

14. Woods and Lewis, *Human Rights*, pp. 43–67.

15. Woods and Lewis, *Human Rights*, pp. 64–67.

16. Immanuel Kant, "The Doctrine of Virtue," in *The Metaphysics of Morals* (1797) (Mary Gregor trans. 1991) in Woods and Lewis, *Human Rights*, pp. 54–55.

17. Paine, *Agrarian Justice* in Woods and Lewis, *Human Rights*, pp. 60–63.

18. See Woods and Lewis, *Human Rights*, pp. 63–64, n. 5.

19. The Constitution of Mexico (1917), excerpted in Woods and Lewis, *Human Rights*, p. 71.

20. For early criticism of Western dominance in elaborating "universal" human rights standards, see, e.g., American Anthropological Association, "Statement on Human Rights," *American Anthropologist* 49(4) (1947): 539, excerpted in Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (Oxford: Oxford University Press, 2000), pp. 372–374. In later years, the Association issued statements modifying its 1947 position and embracing a culturally sensitive human rights approach. Ibid., p. 374; Woods and Lewis, *Human Rights*, p. 80. Prior to the adoption of the UDHR, however, UN representatives did make efforts to draw on diverse religious and cultural traditions in determining common standards. Mary Ann Glendon, *A World Made New*, p. 17 (describing advocacy by U.S. religious, legal, labor, and civil rights groups for the U.S. Department of State to take an approach to international human rights that would be inclusive on the basis of race, ethnicity, religion, and economic status.); Paul Gordon Lauren, *The Evolution of Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998), pp. 223–225 (noting the influence of "150 prominent individuals from a variety of cultures and fields" as well as "an expert Committee on the Philosophic Principles of the Rights of Man . . . composed of leading scholars, jurists, and religious leaders of the day"). The range of rights enumerated as recognized throughout the world included a range of economic and social rights. Ibid., p. 225.

21. The Treaty of Versailles (1919) drafted by the victorious powers at the end of World War I, imposed massive reparations obligations on Germany, among other things. The economic dislocations resulting from World War I, the Great Depression, and ethnic and religious intolerance set the stage for the rise of fascism and nationalism in Europe and Asia and ultimately the catastrophe of World War II. See Versailles Treaty (June 28, 1919). (See especially, Articles 227–230 [Penalties] and 231–247 [Reparations], available online at history.sandiego.edu/gen/text/versaillestreaty/vercontents.html, accessed March 27, 2007).

22. Glendon, *A World Made New*, pp. 10, 13.

23. But see, generally, Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2000) (arguing that the International Bill of Rights was insufficiently influenced by the perspectives of peoples from the Third World); Franklin D. Roosevelt and Winston S. Churchill, The Atlantic Charter (August 14, 1941) (reproduced in Appendix); Lauren, *Evolution of International Human Rights*, p. 142.

24. Charter of the United Nations. June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force October 24, 1945.

25. See, e.g., Paolo G. Carrozza, "From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights," *Human Rights Quarterly* 25, no. 2 (2003): 281, excerpted in Woods and Lewis, *Human Rights*, pp. 72–74

(Latin American influences); Mary Ann Glendon, "The Sources of 'Rights Talk,'" *Commonweal* 28(17) (October 13, 2001): 11, excerpted in Woods and Lewis, *Human Rights*, pp. 84–85 (Latin American and Asian influences).

26. Franklin D. Roosevelt, "Four Freedoms" Speech, 87-1 Cong. Rec. 44, 46–47 (1941), excerpted in Weissbrodt, Fitzpatrick, and Newman, *International Human Rights* 86.

27. Sunstein, *Second Bill of Rights*, pp. 1, 18–19 (describing FDR's call for a second bill of rights as linked to the experiences of the Great Depression and New Deal policies).

28. "All human rights are universal, indivisible, and interdependent and interrelated . . . . [I]t is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights, Vienna, June 25, 1993 (A/CONF. 157/24 [Part I] chap. 111), excerpted in Woods and Lewis, *Human Rights*, p. 89.

29. Roosevelt, "1944 State of the Union Address," in Woods and Lewis, *Human Rights*, pp. 75–77. (Portions reproduced in Appendix).

30. Roosevelt, "1944 State of the Union Address," in Woods and Lewis, *Human Rights*, pp. 75–77. See also more extended excerpts in Appendix.

31. Sunstein, *Second Bill of Rights*, pp. 10–11.

32. Anderson, *Eyes Off the Prize*, pp. 16–17.

33. The UDHR acknowledges the fear that the failure to protect international human rights might lead to civil unrest: "It is essential, if man is not to be compelled to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." Preamble, Universal Declaration of Human Rights, G.A. res. 217 A(III), December 10, 1948, U.N. Doc. A/810, p. 71 (1948).

34. Lauren, *Evolution of International Human Rights*, p. 124.

35. Article 56 requires member states "to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." As a UN member state, the United States was, and is, therefore under such a general obligation, however vaguely defined in the Charter's text. Because its human rights provisions are so vaguely stated, legislators and courts in the United States subsequently treated the Charter as non-self-executing; it therefore could not serve as the sole basis for a cause of action in U.S. courts absent implementing legislation. Bert B. Lockwood Jr., "The United Nations Charter and United States Civil Rights Litigation: 1946–1955," *Iowa Law Review* 901 (1984): 69. See also *Sei Fujii v. State of California* (1952) 38 Cal.2d 718, 729 [242 P.2d 617] (finding that the human rights provisions of the UN Charter are non-self-executing and therefore do not automatically void conflicting U.S. law despite the status of duly ratified international treaties as part of the supreme law of the land).

36. Louis Henkin, "International Law, Politics, Values and Functions," *Collected Courses of The Hague Law Academy of International Droit*, vol. IV (1989), pp. 215, 216, excerpted in Steiner and Alston, *International Human Rights in Context*, p. 141.

37. See, e.g., Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment, ICJ Reports 1986, p. 98, para. 186.

38. Glendon, "Sources of 'Rights Talk,'" in Woods and Lewis, *Human Rights*, pp. 84–85 (noting involvement of delegates from Lebanon, the Philippines, and China, among other non-Western countries in negotiation and drafting of UDHR).

39. Steiner and Alston, *International Human Rights in Context*, pp. 138–139.

40. See, generally, Glendon, *A World Made New*. Among the influential members of the first UN Commission on Human Rights were Chair Eleanor Roosevelt of the

United States, Charles Malik of the Lebanon, and Rene Cassin of France. Steiner and Alston, *International Human Rights in Context*, p. 138.

41. The legacy of Franklin Roosevelt's Four Freedoms speech, a draft submission by the American Law Institutes, and the support of Mrs. Roosevelt helped ensure the inclusion of economic and social rights in the UDHR. Steiner and Alston, *International Human Rights in Context*, p. 244. "Egypt, several Latin American countries (particularly Chile), and . . . the (Communist) countries of Eastern Europe" also supported socioeconomic rights provisions during the drafting of the UDHR. Australia, the United Kingdom, and South Africa were opposed, "arguing that such rights represented desirable goals, rather than rights as such." Further, they expressed the fear that the level of state control necessary to ensure the fulfillment of such rights would lead to totalitarianism. Ibid.

42. Glendon, "Sources of 'Rights Talk,'" in Woods and Lewis, *Human Rights*, pp. 84–85; Constitution of Mexico (1917), excerpted in Woods and Lewis, *Human Rights*, p. 71; Paolo G. Carrozza, "From Conquest to Constitutions," excerpted in Woods and Lewis, *Human Rights*, pp. 72–74.

43. "Save us from ourselves and show us a vision of a world made new." Eleanor Roosevelt, "Eleanor Roosevelt's Nightly Prayer," from Elliott Roosevelt and James Brough, *Mother R.*, reprinted in Glendon, *A World Made New*, p. ix.

44. "All of the Communist countries gave priority to social and economic rights, wanted them to be accompanied by corresponding civic duties, and insisted that the state should be the primary enforcer." Glendon, *A World Made New*, p. 43.

45. The UDHR was adopted by the UN General Assembly on December 10, 1948. Forty-eight states voted in the affirmative, eight states abstained (Byelorus, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, Ukraine, and Yugoslavia)." Lauren, *Evolution of International Human Rights*, p. 345, n. 129. See also ibid., pp. 238–239 (discussing concerns raised by the abstaining states as primarily related to the protection of sovereignty). But see Steiner and Alston, *International Human Rights in Context*, p. 138 (discussing South Africa's stated concern that the inclusion of economic and social rights might lead to totalitarianism).

46. See, e.g., Steiner and Alston, *International Human Rights in Context*, pp. 142–143.

47. Glendon, *A World Made New*, p. 186.

48. Mutua, *Political and Cultural Critique*. Mutua criticizes the International Bill of Rights as an unfulfilled and limited promise for the peoples of the Third World and the poor.

49. See, e.g., Mary L. Dudziak, "Desegregation as a Cold War Imperative," *Stanford Law Review* 41 (1988): 61; Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton, NJ: Princeton University Press, 2000); Lauren, *Evolution of International Human Rights*, p. 227.

50. Gay McDougall, "Shame in Our Own House," *The American Prospect* (October 2004): A23–A24.

51. The petition was drafted by W.E. B. Du Bois, Milton Konvitz, Rayford Logan, and Earl B. Dickerson. Brenda Gayle Plummer, *Rising Wind: Black Americans and U.S. Foreign Affairs, 1935–1960* (Chapel Hill: University of North Carolina Press, 1996), pp. 180–181.

52. Lauren, *Evolution of International Human Rights*, pp. 226–227; Plummer, *Rising Wind*, pp. 178–184.

53. Plummer, *Rising Wind*, p. 179.

54. Lauren, *Evolution of International Human Rights*, pp. 226–227; Plummer, *Rising Wind*, p. 179.

55. Plummer, *Rising Wind*, p. 182.

56. Plummer, *Rising Wind*, pp. 182–183.

57. Plummer, *Rising Wind*, pp. 183–184.

58. Plummer, *Rising Wind*, p. 183.

59. Carol Anderson, *Eyes Off the Prize*. Excerpts from *Eyes off the prize* © 2003 by Carol Anderson. Reprinted with permission of Cambridge University Press.

60. Plummer, *Rising Wind*, pp. 202–203; U.S. President Reagan signed the Genocide Convention in November 1988 (it entered into force at the beginning of the first Bush administration in 1989) following the adoption of domestic implementing legislation in 1987. Weissbrodt, Fitzpatrick, and Newman, *International Human Rights*, p. 124.

61. Plummer, *Rising Wind*, pp. 202–203.

62. Plummer, *Rising Wind,* pp. 202–203.

63. Anderson, *Eyes Off the Prize*, pp. 203–206.

64. Glendon, *A World Made New*, pp. 99–100.

65. Weissbrodt, Fitzpatrick, and Newman, *International Human Rights*, p. 117.

66. Lockwood, "United States Civil Rights Litigation," 901.

67. Art. VI of the U.S. Constitution provides that international law, along with federal law, is the "supreme law of the land." In addition, a leading U.S. Supreme Court decision (with the Court sitting as a prize court) states that "international law is part of our law." In cases of conflict, the Constitution itself is supreme, with federal statutes and ratified international treaties sharing the same level of priority. Federal courts have taken the view that federal statutes and U.S.-ratified international treaties should, as far as possible, be interpreted consistently, but in case of unavoidable conflict, the "later in time" instrument prevails. Detlev F. Vagts, "The United States and Its Treaties: Observance and Breach," American Journal of International Law 95 (2001): 313, 320.

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, [. . .] as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." Paquete Habana, 175 U.S. 677 (1900), excerpted in Woods and Lewis, *Human Rights*, pp. 67, 70.

68. The desire to preserve U.S. racialism at almost any cost even went so far as efforts to promote the exclusion of African Americans and other U.S. religious or ethnic groups from the international human rights mechanisms aimed at the protection of minority rights. Gay J. McDougall, "Shame in Our Own House," *The American Prospect* (October 2004): A22.

69. Dudziak, *Cold War Civil Rights*; *Brown v. Board of Education*, 347 U.S. 483 (1954).

70. Annotations on the Text of the Draft International Covenant on Human Rights, UN Doc. A/2929 (1955), p. 7, excerpted in Steiner and Alston, *International Human Rights in Context*, pp. 244–245.

71. Ibid.; See also "Statement by Mrs. Franklin D. Roosevelt," Department of State Bulletin, pp. 1059, 1064–1066 (December 31, 1951), excerpted in Woods and Lewis, *Human Rights*, pp. 85–88 (accepting the equal importance of socioeconomic rights, but elaborating her views with regard to the distinct nature of states obligations with regard to economic and social rights).

72. Lauren, *Evolution of International Human Rights*, pp. 245–246

73. International Covenant of Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16),p. 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976; International Covenant on Economic, Social, and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), p. 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976.

74. Lauren, *Evolution of International Human Rights*, pp. 253–254.

75. See Periodic Report of the United States of America to the United Nations Committee on the Elimination on Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination (April 2007), available online at www.ushrnetwork.org/pubs/CERD%20Report%204-07.pdf (second report of the United States).

76. See, e.g., Malcolm X, February 21, 1965 speech to the Organization of Afro-American Unity (OAAU). Available online at www.malcolmx.org/docs/gen_oaau.htm (advocating for placing the status of African Americans on the UN human rights agenda and linking with the struggles of other subordinated groups cross-culturally).

77. See sections 116 and 502B of the Foreign Assistance Act of 1961 (FAA), as amended, and section 504 of the Trade Act of 1974, as amended. See also David P. Forsythe and Eric A. Heinze, "On the Margins of the Human Rights Discourse: Foreign Policy and International Welfare Rights," in Howard-Hassmann and Welch (eds.), *Economic Rights in Canada and the United States*, pp. 55, 58; Weissbrodt, Fitzpatrick, and Newman, *International Human Rights*, pp. 530–531.

78. Just prior to Martin Luther King's 1968 assassination in Memphis, Tennessee, he was working in support of a local garbage workers' "I am a Man" campaign for decent wages and working conditions. Most of the workers were African American. See, e.g., "I Am a Man: An Exhibit Honoring the 1968 Memphis Sanitation Workers' Strike" (available online at www.reuther.wayne.edu/man/1intro.htm). In addition to civil rights, King began a "Poor Peoples' Campaign" in which he echoed FDR's calls for a "second Bill of Rights." Martin Luther King Jr., "The Time is Always Right to do Right," (speech presented at Syracuse University, New York, July 15, 1965), available online at students.syr.edu/osvp/drkingaddress.html.

79. Weissbrodt, Fitzpatrick, and Newman, p. 118.

80. Cyrus Vance, "Human Rights and Foreign Policy," *Georgia Journal of International & Comparative Law* 7 (1977): 223, excerpted in Weissbrodt, Fitzpatrick, and Newman, *International Human Rights*, p. 141.

81. "Four Treaties Pertaining to Human Rights: Message From the President of the United States," 95th Cong., 2nd Sess., p. VIII–XI (1978), excerpted in Weissbrodt, Fitzpatrick, and Newman, *International Human Rights*, p. 142.

82. Weissbrodt, Fitzpatrick, and Newman, *International Human Rights*, p. 143 (quoting transmittal letter).

83. Ibid.

84. Burns Weston, "U.S. Ratification of the International Covenants on Economic, Social and Cultural Rights: With or Without Qualifications?" in Richard B. Lillich (ed.), *U.S. Ratification of the Human Rights Treaties: With or Without Reservations?* (1981), pp. 30–38, excerpted in Weissbrodt, Fitzpatrick, and Newman, *International Human Rights*, pp. 145–148.

85. "Four Treaties Pertaining to Human Rights: Message From the President of the United States," 95th Cong., 2nd Sess.,p. VIII–XI (1978), excerpted in Weissbrodt, Fitzpatrick, and Newman, *International Human Rights*, p. 142.

86. Phillip Alston, "Entirely New Strategy," excerpted in Weissbrodt, Fitzpatrick, and Newman, *International Human Rights*, p. 138. See also Barbara J. Stark, "Economic Rights in the United States and International Human Rights Law: Toward 'an

Entirely New Strategy,'" in David P. Forsythe (ed.), *The United States and Human Rights: Looking Inward and Outward* (Lincoln: University of Nebraska Press, 2000) (discussing pro-ratification activist strategies during the Clinton administration).

87. The annual country reports on human rights can be accessed on the U.S. Department of State Web site. Bureau of Democracy, Human Rights, and Labor, United States Department of State. "Human Rights," available online at www.state.gov/g/drl/hr/.

88. Forsythe and Heinze, "On the Margins," in Howard-Hassmann and Welch, *Economic Rights*, p. 58.

89. Ibid. sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (FAA), as amended, and section 504 of the Trade Act of 1974, as amended.

90. For the current State Department articulation of U.S. foreign policy on international human rights, see, Bureau of Democracy, Human Rights, and Labor, United States Department of State, "Human Rights," available online at www.state.gov/g/drl/hr/ (accessed March 9, 2007).

91. Weissbrodt, Fitzpatrick, and Newman, *International Human Rights*, p. 128.

92. "Statement by Mrs. Franklin D. Roosevelt," Department of State Bulletin, pp. 1059, 1064–66 (December 31, 1951), excerpted in Woods and Lewis, *Human Rights*, pp. 85, 87.

93. Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties Obligations under the ICESCR," *Human Rights Quarterly* 9 (1987): 156, excerpted in Steiner and Alston, *Human Rights in Context*, pp. 1327–1328.

94. See, generally, The Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights, UN Doc. E/CN.4/1987/17, Annex (1987) and reprinted in *Human Rights Quarterly* 9 (1987): 122–135 and *International Commission of Jurists Review* 37 (December 1986): 43; Committee on Economic, Social, and Cultural Rights, General Comment No. 3 (Nature of States Parties Obligations), U.N. Doc. E/1991/23 (Fifth Session, 1990), excerpted in Woods and Lewis, pp. 199–201; The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, U.N. Doc. E/C.12/2000/13, pp. 16–22 (1997), excerpted in Woods and Lewis, *Human Rights*, pp. 194–198.

95. See, e.g., David P. Forsythe and Eric A. Heinze, "On the Margins of the Human Rights Discourse: Foreign Policy and International Welfare Rights," in Howard-Hassmann and Welch (eds.), *Economic Rights in Canada and the United States*, pp. 55, 58; David Beetham, "What Future for Economic and Social Rights?," *Political Studies* 41 (1993): 443, excerpted in Steiner and Alston, *Human Rights in Context*, pp. 255–256; Herman Schwartz, "The Wisdom and Enforceability of Welfare Rights as Constitutional Rights," *Human Rights Brief* 8(2) (2001), available online at www.wcl.american.edu/hrbrief/08/2rights.cfm; Barbara Stark, "Economic Rights in the United States and International Human Rights Law: Toward an Entirely New Strategy," *Hastings Law Journal* 44 (1992): 79; Barbara J. Stark, "Economic Rights in the United States and International Human Rights Law: Toward 'an Entirely New Strategy,'" in David P. Forsythe (ed.), *The United States and Human Rights: Looking Inward and Outward* (Lincoln: University of Nebraska Press, 2000).

96. See, e.g., Schwartz, "Welfare Rights."

97. Ibid.

98. See, generally, Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* 2nd ed. (Princeton: Princeton University Press, 1996).

99. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

100. Schwartz, "Welfare Rights."

101. See, e.g., Statement of Jeanne M. Woods and Hope Lewis Prepared for the Hearings of the United Nations Special Representative on Extreme Poverty, Dr. Arjun

Sengupta (October 27, 2005), available online at slaw.neu.edu/clinics/WoodsLewis.pdf (accessed October 12, 2006); George E. Edwards, "International Human Rights Law Violations Before, During, and After Hurricane Katrina: An International Law Framework for Analysis," *Thurgood Marshall Law Review* 31 (2006): 356; Arjun K. Sengupta, "Extreme Poverty and Human Rights - A Mission Report on the United States" (January 6, 2007), available online at ssrn.com/abstract=961230 (accessed March 12, 2007); UN Human Rights Committee, Concluding Observations on Report of the USA to the Human Rights Committee (July 27, 2006), available online at www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf (accessed March 9, 2007).

102. U.S.-based human rights advocates from major human rights organizations or foundations such as Human Rights Watch, Physicians for Human Rights, and the Open Society Institute have debated the substantive or practical merits of economic and social rights approaches. See, e.g., Aryeh Neier, "Social and Economic Rights: A Critique," *Human Rights Bulletin* 13(2) (Winter 2006): 1; Kenneth Roth, "Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights* Quarterly 26 (2004): 63–73; Leonard S. Rubenstein, "How International Human Rights Organizations Can Advance Economic, Social, and Cultural Rights: A Response to Kenneth Roth," *Human Rights Quarterly* 26 (2004): 845–865.

103. See United Nations, Office of the High Commissioner for Human Rights, Committee on Economic, Social, and Cultural Rights, available online at www.ohchr.org/english/bodies/cescr/.

104. Limburg Principles.

105. Maastricht Guidelines.

106. A recent attack on the idea of economic and social rights in the pages of the U.K. magazine *The Economi*st (March 22, 2007) illustrates the kind of retrenchment and debate that is already happening in Europe. Despite the provenance of economic and social rights and significant recent global activity on them, articles criticized Amnesty International's decision to further highlight such rights. This caused a significant response among the large network of activists, academics, and international diplomats who champion international economic and social rights. For the original articles and a range of responses to them, see, e.g., Amnesty International, "Economic, Social and Cultural Rights are Human Rights," available online at web.amnesty.org/pages/economist-response-index-eng (regularly updated Web site).

107. *Minister of Health and Others v. Treatment Action Campaign and Others* 2002(5) S.A. 721 (CC).

108. *Government of Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC).

109. Woods and Lewis, "Chapter Eight: South Africa: The Bill of Rights Approach," in *Human Rights*, pp. 715–780.

110. Woods and Lewis, "Chapter Seven: India: The 'Directive Principles' Approach," in *Human Rights*, pp. 653–713.

111. Woods and Lewis, "Chapter Nine: The Council of Europe: A Blending of the Categories," in *Human Rights*, pp. 781–839; Alicia Ely Yamin, "The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda," *Human Rights Quarterly* 27 (2006): 1200–1244 (on Latin America).

112. Cf. Rhoda Howard-Hassmann, "The 'Full-Belly' Thesis: Should Economic Rights take Priority over Civil and Political Rights? Evidence from sub-Saharan Africa," *Human Rights Quarterly* 5(4) (1983): 467–490.

113. See, e.g., Mississippi Worker's Center for Human Rights, available online at www.msworkerscenter.org/.

114. See, e.g., Woods and Lewis, *Human Rights*, pp. 923–930; Ford Foundation, *Close to Home*; U.S. Human Rights Network, *Something Inside*.

115. Roth, "Defending Economic Rights"; Rubenstein, "A Response to Kenneth Roth."

CHAPTER 6

Blazing a Path from Civil Rights to Human Rights: The Pioneering Career of Gay McDougall

Vanita Gupta

> I think it's necessary to realize that we have moved from the era of civil rights to the era of human rights.
>
> —Martin Luther King Jr., 1967

INTRODUCTION

Martin Luther King Jr. uttered these words at a meeting of the Southern Christian Leadership Conference (SCLC) forty years ago. He was assassinated just months later. While he was robbed of the opportunity to spread this message more widely, he had articulated in 1967 a broader vision of social justice work in the United States that a few emerging civil rights lawyers came to embrace in the 1970s. One such lawyer, Gay McDougall, has for the past several decades led the movement to bring human rights home in this country. Gay has fundamentally changed the way U.S. civil rights advocates, activists, and lawyers engage with human rights both domestically and globally.

Gay grew up in the segregated Deep South in the 1950s and 1960s. In 1965, civil rights leaders selected her to integrate a previously all-white college in Georgia. Upon graduation from law school in the early 1970s, she worked for two years at a commercial law firm. She then joined the National Conference of Black Lawyers (NCBL), an organization that was dedicated to mobilizing African American lawyers around the country to push for economic and social rights as well as the more traditional civil and political rights issues that had been the focus of the traditional civil rights movement. At NCBL, Gay was already a human rights lawyer working to make connections between U.S. rights work and international rights work. She was NCBL's

representative to the United Nations (UN), and was deeply committed to decolonization and anti-apartheid agendas while also using the UN forums to address racial justice concerns in the United States. Her prisoners' rights work at NCBL also incorporated and promoted international human rights standards as guiding principles for reform in this area.

After leaving NCBL and getting a Master's degree in international human rights in England, she went to work for the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee). For fourteen years at the Lawyers' Committee, she led the U.S. arm of the Southern Africa anti-apartheid movement. In that capacity, she mobilized hundreds of civil rights lawyers in this country to provide resources and legal assistance for Southern Africa's anti-apartheid movements. This assistance was critical to parties negotiating with the apartheid government for a transition to a post-apartheid democratic government, by providing to the negotiators analyses of comparative constitutional arrangements. She also gave direct financial and substantive assistance to the defense of thousands of political prisoners in South Africa and Namibia.

In 1989, Gay founded the Commission of Independence for Namibia that successfully intervened to force modifications to legislation that would have undermined the fairness of the nation's election process. In a culmination of all of this work for a free Southern Africa, she left the Lawyers' Committee after being appointed to the Elections Commission in South Africa for the 1994 elections.

When she returned to the United States in 1995, she took a job leading the International Human Rights Law Group, now called Global Rights. At the helm of that organization, she raised U.S. engagement in the human rights movement to new levels. In 1998, she was elected to serve as an independent expert on the United Nations treaty body that oversees the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD). She was the first American to be elected to the body of eighteen international experts who oversee compliance by governments worldwide with the obligations established under the treaty. At its 1996 session, the United Nations Commission on Human Rights elected her to serve a four-year term as a member of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Human Rights Commission. In that capacity, she also served as Special Rapporteur on the issue of systemic rape, sexual slavery, and slavery-like practices in armed conflict.

Her impact in the field of human rights has revolutionized social justice work in the United States. She has transformed countless civil rights lawyers in the United States into human rights advocates—connecting them with global struggles, pushing for non-litigation strategies to achieve social justice, and trying to ensure that social, cultural, and economic rights have a place in the U.S. rights movement, which has been traditionally limited to civil and political rights. Throughout her career, she has built bridges between U.S. civil rights lawyers and international human rights advocates, particularly in the anti-apartheid movement in Southern Africa and in organizing U.S. nongovernmental organization (NGO) participation in the World Conference Against Racism in Durban, South Africa, in 2001. In so doing, she has multiplied the

capacity of domestic social justice organizations to engage in the international human rights movement and to bring this movement home.

Gay has also demonstrated to civil rights lawyers at home the shortsightedness of limiting social justice advocacy to litigation. She has impressed upon civil rights lawyers the need to use a more multidimensional approach, one that combines documentation and fact-finding, grassroots outreach and organizing, public education and media, and policy lobbying with litigation to achieve social change. Gay has been extraordinarily effective at working both within and outside of international government structures to bring change.

Throughout her career, Gay has brought a human rights frame to reorient civil rights work in the United States. This reorientation was necessary to break the logjam of domestic civil rights law and advocacy in an age of increasingly conservative courts. She has recognized and promoted the paramount importance of social, cultural, and economic rights in the United States, challenging traditional civil rights groups to expand domestic notions of rights. Her work has been responsible for pushing such groups to acknowledge their elitism and reconnect with their constituencies on the basic economic and social issues about which average people are most concerned.[1]

In 1999, Gay received a MacArthur Foundation Fellowship—a "genius grant"—for her "innovative and highly effective" work on behalf of international human rights.[2] Gay's career exemplifies the move from civil rights to human rights. She has blazed a path for countless civil rights lawyers in the United States to expand the struggle both in terms of what rights are as well as where and how rights can be affirmed and promoted.

The interview below provides much more detailed descriptions of Gay's approach and achievements in her own words. It was completed in several sessions via e-mail and in person by Vanita Gupta, with assistance from Cynthia Soohoo, from fall 2006 through spring 2007.

• • •

Why did you turn to human rights work early in your career?

There was no grand "turning point" in my life. I have always seen myself as involved in the human/civil rights movement. I grew up in Atlanta in the 1950s and 1960s, in a totally segregated society. I attended completely segregated public schools. My high school was the first (and for many years the only) public high school in Atlanta or even perhaps Georgia for African American kids. When I graduated from that school in 1965, the *Brown v. Board of Education* Supreme Court decision was just a faint rumor. Atlanta's schools were as segregated as ever. And so was the city.

More important, Atlanta had also become the headquarters of the nation's civil rights movement. And, because of the historic black colleges (Spelman, Morehouse, Clark, Atlanta University, and Morris Brown) and the talent they had attracted over the decades, it had a long legacy of black intellectual opposition to racial oppression. By his own telling, W.E.B. Du Bois turned radical while he was teaching at Atlanta University during the 1906 riots and was stunned by how the white community regaled in the lynchings. We lived around the corner from Martin Luther King's family. My aunt was one of the YWCA organizers who, in the 1940s, moved around through the South trying to build

a youth movement for interracial justice. The headquarters of SNCC (Student Non-violent Coordinating Committee) were down the street and around the corner. The headquarters of SCLC (Southern Christian Leadership Conference) headquarters were on the other side of town on Auburn Avenue, a historic black Atlanta business street. During "the Atlanta Movement," my family and I, and everyone else in my community walked miles while we were boycotting the buses. We refused to shop where the owners would not let us try on clothes or sit at the lunch counters. Throughout the 1960s, I participated in sit-ins, protest demonstrations, voter registration drives, and community organizing projects in Georgia, South Carolina, and Alabama. In 1965, I was chosen by community leaders to integrate a previously all-white college in Georgia. It was an assignment, not an honor.

As you can see, this work is not something I "came to." I guess I would make two additional points about my early years. First is that for as far back as I can remember, my own thinking, my focus, was on poverty—economic rights, as we would say today. While I never thought of myself or my family as poor, living in what would be called a township in apartheid South Africa, poverty was always all around me and very close to me. Segregation meant that one could not be a stranger to what that kind of hardship means in daily life. My community was still just two steps away from slavery. Limited life choices defined the entire community.

The second thing I want to emphasize was the sense that we all had at that time that there was an outside world (outside of this country) that had different values than those that prevailed in the "Jim Crow" South. The black American community has a long legacy of appeals to the international community for redress that goes all the way back to the antislavery movement.

When I was very young, the ordinary black person in the south—my parents' generation—had pretty complex attitudes toward Africa. I won't go into that, but by the early 1960s, the decolonization movement had taken off and we in the United States were being inspired by the notion that there were places where black and brown leaders had power. The "Third World" was emerging and we were hearing about its successes. And yes, there was also the rise of socialist states, including Cuba. And they reflected a very different system of values that eschewed racism and focused on economic equality.

If you look hard at the pictures of the Selma march, you'll see that someone in the front is carrying a United Nations flag. Those early days of the UN were a great source of inspiration to me. I remember the first time I saw a picture of the UN on TV. Must have been in the late 1950s. You can imagine what it meant to someone living in a pretty closed society to see people from all over the world, in their national dress, there to make decisions on (well, what I thought then) the basis of equality. There was a different world out there!

By the end of the 1960s, I, along with many of my generation of black civil rights activists, was deeply involved in work to support the liberation struggles gaining momentum in the then-remaining African colonies. Many of us were frustrated with the limited track into which our movement had been channeled (gains in the civil and political rights sphere solely, none in the economic rights sphere). We believed there was a broader vision taking shape in the southern African movements and were very attracted to it.

With the formal civil rights movement in disarray after King's assassination, many black Americans who were part of the movement started to look at the emerging struggles in Africa. Some focused on Africa as a source of cultural

identification. Others focused on the politics of the African liberation struggles. We thought we could learn something from those emerging struggles—in terms of ideology as well as process—that would be of relevance here in our ongoing struggles for racial equality. As black Americans of a slightly earlier generation moved to Ghana after that country's independence, to donate their skills and solidarity to nation-building in West Africa, ten years later, many of my generation sought political identification in newly independent Tanzania. The high level of black American participation in the Sixth Pan-African Congress held in Tanzania in the early 1970s was a statement of both pride of identification and a sort of searching for inspiration.

You started out as a domestic civil rights and social justice lawyer and then turned to international work when you focused on anti-apartheid and postcolonial democracy in Africa, which in turn led to a number of prominent positions in the UN and the Executive Director of Global Rights. During the course of your career, did you characterize yourself as a civil rights lawyer or a human rights lawyer?

I went to law school to be what is traditionally called a civil rights attorney. But at that time, I was very involved in the liberation movements going on in Africa. So I had an international focus too. After law school and a brief stint at a law firm, I worked at the National Conference of Black Lawyers (NCBL) in New York starting in 1974. That's when I started to do work at the United Nations and to think of bridging my international and domestic rights work professionally. I later took a job with New York City government working on the rights of prisoners in the city jails. But by that time, I had decided to return to school to focus on international human rights law. I spent a couple of years in London getting an LL.M. at the London School of Economics and Political Science.

Starting at the time of my work with the NCBL, I was clearly in my view a human rights lawyers. That's why I went back to get training in human rights, which was really at that point a field of study that was only emerging. In the mid-1970s, when I said I was an international lawyer, I was making reference to international standards, and was involved in the global community that was developing those standards, and was also involved in trying to apply those standards to struggles in Southern Africa and here.

Let me share one practical example from my work in the mid-1970s doing prisoners' rights work in New York City. This unusual work opportunity emerged out of the rebellion in Attica State Prison in the early 1970s. As a consequence of the revelations about the horrendous conditions in prisons, the city of New York established a special board of citizens to review conditions in the New York City jails and adopt special legislation to address the problems. I was hired on staff. We decided to use the United Nations Standard Minimum Rules for the Treatment of Prisoners as the basis for the legislation and argued that it was the international standard to be followed.

Just to finish describing my job history, when I returned from London in 1980 I started work at the Lawyers' Committee for Civil Rights Under Law where I was Director of the Southern Africa Project for fourteen years. I left there because I was appointed to be a member of the sixteen-person Elections Commission in South Africa that ran the 1994 elections that resulted in the presidency of Nelson Mandela. I spent a year doing that. When I came back in 1995, I took a job at what is now Global Rights but was then called the International Human Rights Law Group.

How did the history and status of human rights in the United States shape your work in the 1970s and 1980s?

The profound legacy of the economic system that America built on the foundation of slavery was a community so completely shattered that the promises of the Voting Rights Act and the Civil Rights Act seemed hollow without addressing the other equally fundamental rights. We believed that the critical issue was the full participation of African Americans in the economy of the country. While we certainly did not use the language then, the notion of the indivisibility of the complete package of rights was clear to us. We had been encouraged when the "Southern Movement" went north and Operation Breadbasket [an arm of the SCLC] was initiated to focus on economic rights. The "Poor Peoples Campaign" geared up for a dramatic initiative to create a tent city of poor people living on the Washington Mall to dramatize the issues and MLK [Martin Luther King Jr.] went to Memphis to help the garbage men campaign for economic rights. We took it as a warning that MLK was killed as he moved to the economic rights agenda and the international agenda of opposition to the Vietnam War. We interpreted the warning to be that the path to economic and social rights led beyond what this country would tolerate—that was a no-go area.

Can you describe a little bit more your work with the NCBL?

The NCBL was an activist group. We were dedicated to mobilizing black lawyers around the country to use their skills to further the movement for social change in the U.S. Our platform was explicitly a human rights platform that distinguished itself by a focus on economic and social rights (what we referred to then as social justice) as well as the more traditional civil and political rights issues that had been the focus of the traditional rights movement. We were among the many who felt that the earlier momentum of the civil rights movement had been deliberately blunted by diverting it into a cul de sac of demands that were solely in the realm of civil and political rights.

In the early 1970s, NCBL worked to join the U.S. rights work with the international rights work. We had NGO status at the UN and I was the UN representative, a role I played alongside the other organizing work in the U.S. Our approach at the UN was to be deeply involved with the decolonization and anti-apartheid agendas while also using the UN forums to raise issues of racism in the United States. For example, every year we would give a statement at the UN on the International Day of Commemoration of South African Political Prisoners. In those statements I would always couple my discussion of the situation of political prisoners in South Africa with comments on the situation of prisoners in the U.S, in order to make that connection.

Also, each year we sent a delegation of African American lawyers to Cuba to learn more about how the Cubans had structured their focus on economic rights. We were additionally active in the international peace movement.

Our internationalism was fueled by the sense, long embedded in the African American community, that there were forces outside of the United States that were genuinely antiracist and that we could leverage our domestic struggles by appealing for redress to the international community. We viewed American racism at home as a mirror image of its foreign policy of imperialism and we found common cause in emerging movements in other parts of the world that challenged America's limited notion of rights and the responsibility of government for the fundamental rights of their citizens to the necessities of life.

One thing we took away from our encounters with progressive movements in other parts of the world (both through the work at the UN and elsewhere)

was a greater understanding of how to articulate our issues and demands using a more "universal rights" language as well as the potential of using the UN forums as places to plead those rights.

What relationship do you see, if any, between the anti-apartheid mobilization within the United States in the late 1980s and early 1990s and current efforts to focus on human rights issues domestically? What lessons should domestic U.S.-focused human rights activists draw from the anti-apartheid movement?

The first point that I would make is that the anti-apartheid mobilization in the U.S. was not a late 1980s phenomenon. There was consistent and intense work being done at least back to the 1950s. The late 1980s would never have taken off but for the really hard work that was being done in the late 1970s and early 1980s. That's one lesson to focus on. It takes a long-term struggle often during periods when you feel your efforts are being ignored.

Second, some of the early efforts to use the domestic courts to enforce human rights norms were attempts to sever ties between the apartheid system and U.S. entities. I was involved in a series of cases in the late 1970s and early 1980s, largely through my work at the Lawyers' Committee, that tried to get domestic courts to make a range of orders based on international law arguments, including denying South African Airways landing rights at JFK airport because they had segregated ground crew in violation of New York City law, barring the *New York Times* from running employment ads for South African state-controlled businesses, attaching South African property in the U.S. as reparations for injuries caused by apartheid medical facilities in South Africa, and enjoining the proposed transfer of enriched uranium to South Africa, for example.

Third, the anti-apartheid movement found a way to engage a wide array of people with a broad variety of skills. Lawyers, community organizers, academics, medical professionals, students, lawmakers, people in business were all able to find ways to contribute to the movement by doing something within their own occupational arenas. That didn't happen overnight, but it eventually created a multiplier effect that was critical.

Fourth, in the anti-apartheid movement we learned the importance of framing the issues around universal principles and to engage the international community and forums. It seems to me that is precisely what the "Human Rights at Home" movement is doing with increasing effectiveness.

You were at the Lawyers' Committee for Civil Rights Under Law from 1980 to 1994. When was the Southern Africa project at the Lawyers' Committee founded? How did it happen that the program ended up at Lawyers' Committee, a domestic civil rights organization?

It was somewhat of an accident that brought this project to the Lawyers Committee. There was a South African lawyer who was defense counsel in one of the first trials under South Africa's notorious Prevention of Treason Act in the late 1970s. He happened to have personal friend who worked at the Lawyers' Committee in Washington. The South African lawyer asked his friend at the Lawyers' Committee for help and the friend, using the institutional framework of the Lawyers' Committee, raised funds to contribute to financing the trial. That started the Project.

When I started at the Lawyers' Committee (I came aboard in 1980), it was still a very small operation. As I mentioned above, there were a number of lawsuits filed in U.S. courts that were using innovative tactics to seek sanctions against apartheid South Africa. There were some early attempts to engage the U.S. courts in looking beyond our borders. Soon the 1980s became a watershed era

in South Africa, and so the Project came to be a very significant player. Between 1980 and 1994, the Project played a central role in defending thousands of political prisoners in South Africa and Namibia by hiring South African lawyers and financing the defense work.

We also tried to educate U.S. lawyers about South Africa and to understand the connections between institutions in the U.S. and the maintenance of apartheid. We were sending people down to South Africa to monitor trials. The first person I sent was Judge Nathaniel Jones, Sixth Circuit Court of Appeals—the first sitting federal judge to go to another country to monitor a trial. And he got arrested while there. Judge Jones was previously General Counsel of the NAACP. He was a civil rights lawyer. I sent him down for a treason trial of a large number of defendants—a large proportion of the black leadership of South Africa was on trial. The lawyer who was defending these individuals was brutally assassinated the day before Judge Jones arrived there. I think Judge Jones's presence there had an important impact on the trial and on Judge Jones and his colleagues here in the U.S. federal judiciary who he briefed on his return.

I also frequently asked U.S. lawyers to draft briefs for South African lawyers to use in cases there. I organized lawyers during the Free South Africa Movement, when there were sit-ins at the South African Embassy in Washington everyday. We had a Lawyers Against Apartheid Day and over 1000 lawyers came out. We organized thousands of them to lobby the U.S. Senate for sanctions. We asked them to give direct assistance to lawyers in South Africa who were involved in political cases. There was a lot of contact among U.S. and South African lawyers during this period.

When it came to negotiation time in South Africa, when the liberation movement was actually beginning to sit at the table with the apartheid regime to negotiate terms, I ran an operation here that was a backup to the liberation movement. The apartheid regime had a phalanx of lawyers; the liberation movement didn't really have many lawyers. I would get a call from liberation movement negotiators saying that there was a proposal on the table about a national constitutional court, for example, and could they get some insight to determine what position to take. So I would contact law firms that were on standby, and tell them that we needed a memo overnight describing the structures of constitutional courts in countries around the world within twenty-four hours. The next day, when African National Congress members would walk into the room, they would have a substantial memo in hand to help them make decisions.

I ran a separate operation within the Lawyers' Committee, but in many ways, I was leaning heavily on U.S. civil rights lawyers. All of the lawyers I took to South Africa were U.S. civil rights lawyers. The Lawyers' Committee has a membership of sorts, so it was all about outreach. I also took a group of U.S. civil rights lawyers to monitor elections in Namibia in the late 1980s. Namibia won independence in 1990, so in 1988, 1989, and 1990, I took a team of prominent U.S. civil rights lawyers back and forth to Namibia to monitor the whole process as the nation moved from a state of South African occupation to free elections and a new constitution.

After leaving the Lawyers' Committee in 1994, you went on to become executive director of the International Human Rights Law Group (later changed to Global Rights). What were your goals while there?

I left the Lawyers' Committee because I was appointed to be a commissioner on South Africa's Election Commission, a sixteen-member body that organized the elections leading to Nelson Mandela's presidency. I was the only American

on the Commission and one of only five who were not South African. It was a body established under a South African statute that was the basis for their transition from apartheid to democracy. That was a phenomenal experience, but not within the scope of this interview.

When I returned to the U.S., I took the job of Executive Director of the International Human Rights Law Group. We later changed the name to Global Rights. One of the important goals at IHRLG was to be working on the ground, strengthening local movements in countries as well as expanding their capacity and adding to their work an international human rights dimension. IHRLG was transformed from a typical U.S. advocacy group into an organization that had field operations, actually working with groups over a long period of time in other countries. Over the time that I was there, IHRLG grew to have offices in ten countries in regions that included Africa, Asia, Latin America, and Eastern Europe, some of which serviced more than one project per country. I also started a project in the U.S., which had not been a part of that organization's prior vision. We used the same process—identified political actors on the ground who were already engaged in human rights work, and attempted to bring added value by helping them develop an international strategy.

There were a lot of challenges in our U.S. project. But we gained momentum thanks to the fact that we were just going into the process leading up to the World Conference Against Racism. When I started the U.S. project, I asked the head of every major civil rights organization—NAACP, LDF, La Raza, etc.—to serve on the advisory committee of the U.S. Project. I invited them to Washington in 1996, had a couple of meetings to introduce the project, explained how the project related to their work, and how their work could relate to international human rights. And they fully understood that and bought in to this vision. They allowed us to present to their staff and constituencies an international strategy.

I also was able to use the U.S. Project as a vehicle for some activities that were meaningful for me personally. The W.E.B. Du Bois–authored petition that was submitted to the UN in 1947 has always been an inspiration to me. I decided that I wanted to recreate that. And so working with that core advisory group, we wrote a petition about U.S. racial issues. It was a Call to Action to the United Nations. It contained facts about the economic, social, and political conditions in communities of color across the U.S. Over a hundred different organizations and individuals signed on. We presented the petition at the UN to Mary Robinson, then High Commissioner for Human Rights, in a ceremony held in the Decolonization Chamber of the UN Headquarters in New York. I then invited Julian Bond, Wade Henderson, and Mary Frances Berry to come with me to Geneva to present the petition to the UN Human Rights Committee.

The initiative served as a message to the UN that we're here and we want our issues to be heard. It demonstrated to the U.S. civil rights movement that this is a forum that we must use to advance U.S. civil rights issues. For a number of technical reasons, it was not formally submitted for action on the agenda of the Human Rights Commission. But the initiative was more important than any formal procedure could have been. The symbolism of having Julian Bond, an internationally renowned civil rights figure, read the petition out loud to the UN Human Rights Committee was extraordinarily powerful.

This was all a build up for the mobilization that occurred for the UN World Conference Against Racism that was held in Durban in 2001. The Ford Foundation had given me a lot of money to facilitate involvement of rights groups in

the U.S. to participate in the conference. There was a lot of press activity, work to organize groups and get involved in negotiating language in the outcomes documents that would speak to the race issues that we have in the U.S. We did a series of meetings around the U.S. with groups to assess how international involvement could advance their movement. We were going around to places that were generally out of the mainstream of East Coast activism to reach out to groups to think about themselves and the world, and how the world could impact what they're doing.

In your view, what was the impact of the World Conference Against Racism in Durban, South Africa?

It was a two-and-a-half year process that involved a number of Preparatory Meetings (Prep Comms) and then the final Conference in 2001.

I think that Durban opened everyone's eyes to new approaches to problem solving around issues relating to racism. We all gained a greater understanding of what was happening in other places and significantly greater access to the kinds of problem solving in other parts of the world. U.S. groups gained knowledge about how the UN works, what you can get out of it, and a sense of realism about how this relates to what you do day-to-day.

It exposed the potential for working in totally new kinds of alliances. It created a tremendous, unprecedented collaboration between and among movements in the U.S. that otherwise operated as silos, connecting indigenous people to Asian and Latino immigrant activists and African Americans. It connected African descendant groups in the U.S. to those in Latin America, and activists in Asia with those in Africa. Most people never knew what a Roma was or that there was racial profiling going on in other parts of the world, and how that relationship can enhance what you're doing here. It was a very rich experience of alliances and cross-cutting discussions. I would say that if you take all of that as a whole, it was a uniquely diverse group of activists coming together in different ways around combating racism.

It also generated some unique encounters between U.S. activists and the representatives of the U.S. State Department. I think that most of the groups that participated from the U.S. had no idea about how they/we were being represented at intergovernmental forums. That was a real eye opener. The discussions between the U.S. NGOs and the State Department representatives were at times very bitter. People were able to argue with the government about international representation. While we did not win in terms of the government's stance towards the conference, it was tremendously educational.

There was an interesting dynamic in the delegation that we took to the Prep Comm meetings because of the division between the national, established civil rights groups and local grassroots groups. It was very interesting to see their different visions of progress in the U.S., and therefore their different views of what they wanted to get out of the Conference in terms of international engagement. These meetings created the space for some unusual and even historic encounters. We convinced the UN (everything happens there with regional caucuses, and the U.S. is in the Western group with Europe, Australia, and Canada), but I persuaded the UN that for purposes of the World Conference, the caucus of relevance was that of the American hemisphere. So for the first time, there was a caucus that included Latin America, North America, and the Caribbean which shared similar histories of conquest and slavery. It was unprecedented and it led to unique discussions of not only the problems but also of the approaches to dealing with the problems.

How did your background of human rights work in the U.S. affect your four-year service on the CERD Committee, which monitors treaty compliance with the Race Convention?

When I was appointed, the first CERD review of the U.S. was coming up. There had been a long encounter with the U.S. government around the issuing of this report, and it got handed off to the Bush administration. There was a long period of engagement about the issuing of this report, and after it was finally issued, I decided that my colleagues on the CERD Committee would benefit greatly from an extended and very considered interaction with people in U.S. NGOs around specific issues. Global Rights organized people to focus on what state governments around the U.S. were doing. And we strategically chose a number of states that law firms could do reports on with an activist NGO on critical state issues related to CERD. This began the process of shadow reports focused at the state level. I also organized a day-long hearing on CERD. All of my CERD colleagues showed up and we had identified panels of people to speak to specific issues such as affirmative action, problems faced by Native Americans, the failures of the public education system and reforming the welfare system. That turned out very well.

The Advocacy Bridge Program was a part of the IHRLG. Can you describe the Advocacy Bridge Program? What were the program goals? What involvement did U.S. lawyers have? What obstacles did you have in getting participation? What impact? What change over time?

Prior to the establishment of the U.S. Project, Global Rights ran an annual program to bring activists from around the world to the sessions of the UN Commission on Human Rights in Geneva. The idea was to introduce new human rights activists to the procedures of the Commission and to help them shape strategies to use that forum to further their own human rights goals at home. The name of the program refers to bridging the gap between domestic and international advocacy strategies. When the U.S. project was inaugurated, we included in it the Advocacy Bridge project.

The first groups that we took from the U.S. were involved in the environmental justice/racism movement. There were even some groups from Cancer Ally [an area in Louisiana with a concentration of industrial plants] in the delegation. One of the things we did was speak to the UN Special Rapporteur on toxic waste dumping. That gave the environmental justice groups a chance to clarify for the Special Rapporteur the way in which toxic dumping in the U.S. is a racial discrimination issue.

Did you ever feel that you were struggling with U.S. activists when pushing for a human rights lens in your work?

Yes. But the reason it has been hard has to do with the history of the rights movement in the U.S. The successes of the civil rights movement that were won in U.S. courts, coupled with our narrow focus on civil and political rights, made the movement overwhelmingly value judicial decisions as a source of remedies. The movement in this country started thinking that if a right is not justiciable, ergo, it's not a right. Even community activists began to channel all efforts into gaining a court victory. Foundations and other funding sources channeled the lion's share of funding to litigation groups, so groups that relied on other tactics became marginalized.

I think the hardest group of U.S. activists to convince that a human rights framework has merit has been (and still is) the community of civil rights and

civil liberties lawyers. While we have made tremendous gains in the past few years, it remains a difficult proposition to get litigators to include human rights law in their arguments to courts. We've been encouraged by the dicta from certain Supreme Court Justices to date, but in those few cases, international human rights law was only presented to the Court by amici, not the principal parties, and while there were judicial references, human rights law has not yet been relied upon as the basis for the decision. The recent "national security" cases have forced the courts to reckon more fundamentally with international humanitarian law.

I attended the NAACP LDF's annual Airlie House civil rights conference for many years to talk about international human rights law and how civil rights attorneys can use it. I would talk about it in the context of litigation. Over the course of time, courts were slowly becoming more willing to entertain these issues. That said, international human rights law has up till now been more useful as advocacy fodder than litigation fodder. I first made a presentation at Airlie in 1997. The interest was there from the beginning. The question was really one of getting people to think about how they can use international human rights. It was fascinating to people theoretically, but they all had questions about how to use it practically. Now, it has caught on as something that everyone is thinking more about. It is not an everyday tactic. If you go to a court and that's all you have to argue, you lose. We need legislative responses to make sure that international human rights is fully recognized in the courts before litigation using this framework could be fully successful.

On the other hand, I have rarely found it difficult to convince community-based activists that their issues belonged within a human rights framework. I remember a talk I gave to a community group in rural North Carolina in the late 1990s. They had been doing everything possible to fight the environmental damage to their community from massive hog-breeding operations that abutted the African American community. The judicial process wasn't working for them. The Environmental Protection Agency was not helpful. They seemed out of ideas and out of hope.

I was invited to talk with them about using human rights law and international forums. Specifically, I told them about the International Convention on the Elimination of All Forms of Racial Discrimination. The U.S. had ratified it. It was U.S. law, good for everything except filing a lawsuit. Most important, it closed a gap in domestic law that the EPA was using as an excuse for its inaction.

Now I wish I could say that this made all of their problems disappear. Of course, it did not. But the rural setting belied the fact that these folks were seasoned activists who have for a long time been in the struggle. They seized on the opportunity to restore momentum to their work. They used ICERD well in their future interactions with the EPA and I hosted some of them at the subsequent session of the UN Human Rights Commission in Geneva.

The environmental justice movement, which was gaining steam under skillful activists like Damu Smith and Monique Hardin, came in to support the North Carolina communities. They grabbed the ball and ran with it to fashion a sophisticated international human rights approach.

As someone who has been a pioneer in U.S. human rights work, could you give a few concrete examples that you believe best demonstrate successful use of the human rights frame by U.S. activists and/or lawyers?

The word "successful" gives me pause. What is the definition of successful that applies here? I see a human rights–based approach as being a framework for

action that can add value to ongoing efforts, rather than as a determined outcome. It could include an appropriate use of and reference to the international legal standards that create the obligations of states to take certain steps to protect rights. For example, the U.S. has ratified several of the human rights treaties, and the jurisprudence of the oversight committees, the treaty bodies, could be used to help us frame a lot of our domestic issues in the context of broader rights than exist in U.S. law.

It was therefore value added when the environmental justice movement, in its arguments to the EPA, cited U.S. obligations under ICERD as requiring the government to take action against the clear pattern of the disproportionate placement of toxic waste dumps close to minority communities even in the absence of proof of discriminatory intent. U.S. law, prior to ratifying ICERD, would require proof of intent to discriminate.

It was clearly a success when Supreme Court Justice Ginsburg referenced in her concurring opinion in *Grutter/Gratz v. University of Michigan*, that ICERD encourages governments to adopt affirmative action programs, even though she did not say that it was an obligation in that case.

And, the efforts to use international standards as a basis for governmental policies (whether or not binding at the international level), as was done in San Francisco with CEDAW [Convention on the Elimination of All Forms of Discrimination Against Women] or in Massachusetts in the Department of Health, I consider to have been successful practices.

A successful use of a human rights–based approach would use the forums that are open to claims of lack of governmental compliance with human rights norms, such as the periodic reviews of U.S. compliance by the treaty bodies, the UN Human Rights Council with its system of Special Rapporteurs, and the quasi-judicial procedures of the Inter-American Commission and Court. For example, it was a success when lawyers for the District of Columbia Statehood movement got a decision against the denial of the voting rights of District citizens from the Inter-American Commission on Human Rights, along with statements of concurring concerns from CERD and the UN Human Rights Committee.

A successful use of a human rights–based approach can bring targeted international pressure. It can focus the federal government on local struggles that may have otherwise been considered to be outside of its jurisdiction—for example, issues that are generally reserved for control by the state governments. An international claim frames rights at the local level as the responsibility of the federal government. Take for example the death penalty. Except for the limited federal death penalty, capital punishment is considered a state prerogative. But when, for example, the International Court of Justice renders a decision considering whether executions in Texas violate international law, the federal government is certainly implicated.

In fact, I think that the anti–death penalty movement has been successful in using several of the aspects of a human rights–based approach. It has used international standards effectively in litigation in the U.S. courts and in petitions before the Inter-American Commission on Human Rights. It has lobbied successfully for resolutions from a number of UN bodies and has used the positive feedback received at the international level to add new momentum to domestic mobilization efforts by demonstrating to communities that international law and the international community are on its side. It has been skillful in generating new allies both within the country and internationally.

Given your historical perspective, how is the U.S. human rights movement today in 2006 different from that in the 1980s?

The way the question is phrased makes me begin with my own question. When you ask about the U.S. human rights movement in the 1980s, are you referring to that portion of today's movement that was recognized as such then? Or do you mean the broader rights movement in the 1980s?

If you are referring to the former, then I would say that the human rights movement in the 1980s was a very small elite, primarily dominated by white males whose center of gravity was the East Coast of the United States. It was a relatively new movement which had been given a significant boost by the human rights focus of the Carter Administration and the Helsinki Accords. Many of its prominent leaders had come out of the civil liberties movement, as distinct from the civil rights movement. The focus of their concerns was extra-territorial and centered on U.S. foreign policy. It was dominated by lawyers who relied on disclosure of abuses through report writing and "elite-to-elite" lobbying to persuade policymakers to penalize violators and enforce rights. They based their arguments on "the rule of law," treaty rights, and the power of sanctioning bad actors by imposing conditions on foreign aid.

There were a few groups that used a mobilization strategy, like Amnesty International/USA. But Amnesty had other constraints—primarily its mandate that was limited solely to work relating to the release of prisoners of conscience and a restriction that they could not work in their own country.

The movement then was exclusively focused on civil and political rights, both as a matter of ideology and a byproduct of the leadership of somewhat conventional lawyers who believed that justiciability is the sine qua non of a right.

At that time, it was a movement that saw itself as distant by necessity from the other more grassroots movements of that time. Notions of objectivity, neutrality, dispassion and non-politicization were considered critical to the legitimacy of the rights being established.

As a consequence, the more broad-based movements at that time were excluded from finding a place under the human rights banner. In the 1980s these more broad-based movements were, for example, the anti-apartheid movement and the grassroots campaigns for democratic and indigenous rights in Central America that were galvanizing the progressive churches and inspiring those who had participated in the anti-war movements of the previous decade. And, of course, the antipoverty work that was ongoing in the central cities of the U.S. was not included under the human rights banner.

What are the limitations of using a domestic, civil rights lens to attacking racial justice problems in the U.S. rather than a human rights one, in your opinion?

The traditional domestic civil rights lens has failed so far to develop a rights-based approach to the economic and social issues that are the intractable core of the problems we face here in the U.S. today. This is not to say that we have solved all problems relating to voting rights or direct racial discrimination. But I think that our successes so far have taken us to the point that we cannot avoid confronting the reality of the indivisibility of all rights. We need to develop new tactics for our work that incorporate that reality.

Litigation strategies may need to move more to the background. While courts in the U.S. are more open to human rights arguments than ever before, the next stage of racial justice work in this country will surely not be initiated through litigation.

What do you envision are the biggest challenges ahead for the U.S. human rights movement? What are your prescriptions for the U.S. human rights movement from here on out?

One great challenge that confronts us all is to stay grounded in the work here in the U.S. while at the same time remaining informed by the global context and connected to the global movement. It is important that a human rights–based approach broadens the field of sight and enables activists and communities to gain a better understanding of how local barriers and power structures are driven by dynamics at the global level.

In today's world, societal problems like racism and poverty are complicated affairs. Globalization has created a world in which we are inextricably connected to people on the other side of the globe, our economies are intertwined and so too are our social problems. In today's world, there is no way that one can completely solve social problems in one country—like poverty or racial discrimination—without addressing its global context. I think you cannot really tackle racial discrimination in the twenty-first century without tackling the reality of the global economy.

Increasingly, the critical issues that affect how we live day-to-day are being made at the international level—the WTO, the IMF, the G8 and Davos Summit, etc. Those are the places where decisions are going to be made that will determine if we have jobs, and if so, in what sector, and how much we will pay for a cotton dress or a loaf of bread.

These are not battles that can be won by activism solely within the national boundaries of one's home country. When we talk about institutional racism today, the institutions are such that they span national boundaries and defy anybody's traditional notions of jurisdictional limits. These are not problems that can be solved by any one country's domestic laws. We need to gain allies in other countries that are fighting similar battles. Isolation could doom us.

But to gain allies in other countries we will need to balance our issues with theirs and understand how they interconnect. These are complex issues that aren't always easy to balance.

ACKNOWLEDGMENTS

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NOTES

1. McDougall, Gay. "A Decade in Human Rights Law: Decade of NGO Struggle," *Hum. Rts. Br.* 11(12) (2004): 6–7.

2. Available online at www.ushmm.org/conscience/analysis/bios.php?content=mcdougall.

Appendixes

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17. Maastricht Guidelines on ESC Rights (1997)

1. THE DECLARATION OF SENTIMENTS (1848)

When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes that impel them to such a course.

We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed. Whenever any form of government becomes destructive of these ends, it is the right of those who suffer from it to refuse allegiance to it, and to insist upon the institution of a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer. While evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their duty to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of the women under this government, and such is now the necessity which constrains them to demand the equal station to which they are entitled. The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world.

He has never permitted her to exercise her inalienable right to the elective franchise.

He has compelled her to submit to laws, in the formation of which she had no voice.

He has withheld from her rights which are given to the most ignorant and degraded men—both natives and foreigners.

Having deprived her of this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides.

He has made her, if married, in the eye of the law, civilly dead.

He has taken from her all right in property, even to the wages she earns.

He has made her, morally, an irresponsible being, as she can commit many crimes with impunity, provided they be done in the presence of her husband. In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.

He has so framed the laws of divorce, as to what shall be the proper causes, and in case of separation, to whom the guardianship of the children shall be given, as to be wholly regardless of the happiness of women—the law, in all cases, going upon a false supposition of the supremacy of man, and giving all power into his hands.

After depriving her of all rights as a married woman, if single, and the owner of property, he has taxed her to support a government which recognizes her only when her property can be made profitable to it.

He has monopolized nearly all the profitable employments, and from those she is permitted to follow, she receives but a scanty remuneration. He closes against her all the avenues to wealth and distinction which he considers most honorable to himself. As a teacher of theology, medicine, or law, she is not known.

He has denied her the facilities for obtaining a thorough education, all colleges being closed against her.

He allows her in church, as well as state, but a subordinate position, claiming apostolic authority for her exclusion from the ministry, and, with some exceptions, from any public participation in the affairs of the church.

He has created a false public sentiment by giving to the world a different code of morals for men and women, by which moral delinquencies which exclude women from society, are not only tolerated, but deemed of little account in man.

He has usurped the prerogative of Jehovah himself, claiming it as his right to assign for her a sphere of action, when that belongs to her conscience and to her God.

He has endeavored, in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.

Now, in view of this entire disfranchisement of one-half the people of this country, their social and religious degradation—in view of the unjust laws above mentioned, and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States.

2. FDR'S ADDRESS TO CONGRESS, JANUARY 6, 1941 (excerpt)

In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

The first is freedom of speech and expression—everywhere in the world.
The second is freedom of every person to worship God in his own way—everywhere in the world.
The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.
The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.

That is no vision of a distant millennium. It is a definite basis for a kind of world attainable in our own time and generation. That kind of world is the very antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb.

To that new order we oppose the greater conception—the moral order. A good society is able to face schemes of world domination and foreign revolutions alike without fear.

Since the beginning of our American history, we have been engaged in change—in a perpetual peaceful revolution—a revolution which goes on steadily, quietly adjusting itself to changing conditions—without the concentration camp or the quick-lime in the ditch. The world order which we seek is the cooperation of free countries, working together in a friendly, civilized society.

This nation has placed its destiny in the hands and heads and hearts of its millions of free men and women; and its faith in freedom under the guidance of God. Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights or keep them. Our strength is our unity of purpose.

To that high concept there can be no end save victory.

3. THE ATLANTIC CHARTER, AUGUST 14, 1941

The President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty's Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.

First, their countries seek no aggrandizement, territorial or other;

Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;

Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them;

Fourth, they will endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;

Fifth, they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security;

Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want;

Seventh, such a peace should enable all men to traverse the high seas and oceans without hindrance;

Eighth, they believe that all of the nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments.

Franklin D. Roosevelt
Winston S. Churchill

4. DECLARATION BY UNITED NATIONS (JANUARY 1942)

A Joint Declaration by the United States, the United Kingdom, the Union of Soviet Socialist Republics, China, Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa, Yugoslavia

The Governments signatory hereto,

Having subscribed to a common program of purposes and principles embodied in the Joint Declaration of the President of the United States of America and the Prime Minister of the United Kingdom of Great Britain and Northern Ireland dated August 14, 1941, known as the Atlantic Charter.

Being convinced that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands, and that they are now engaged in a common struggle against savage and brutal forces seeking to subjugate the world,

DECLARE:

1. Each Government pledges itself to employ its full resources, military or economic, against those members of the Tripartite Pact: and its adherents with which such government is at war.

2. Each Government pledges itself to cooperate with the Governments signatory hereto and not to make a separate armistice or peace with the enemies.

The foregoing declaration may be adhered to by other nations which are, or which may be, rendering material assistance and contributions in the struggle for victory over Hitlerism.

Done at Washington
January First, 1942

5. FDR'S 1944 STATE OF THE UNION ADDRESS

State of the Union Address
Franklin D. Roosevelt, 11 January 1944
To the Congress:

This Nation in the past two years has become an active partner in the world's greatest war against human slavery.

We have joined with like-minded people in order to defend ourselves in a world that has been gravely threatened with gangster rule.

But I do not think that any of us Americans can be content with mere survival. Sacrifices that we and our allies are making impose upon us all a sacred obligation to see to it that out of this war we and our children will gain something better than mere survival.

We are united in determination that this war shall not be followed by another interim which leads to new disaster—that we shall not repeat the tragic errors of ostrich isolationism—that we shall not repeat the excesses of the wild twenties when this Nation went for a joy ride on a roller coaster which ended in a tragic crash.

When Mr. Hull went to Moscow in October, and when I went to Cairo and Teheran in November, we knew that we were in agreement with our allies in our common determination to fight and win this war. But there were many vital questions concerning the future peace, and they were discussed in an atmosphere of complete candor and harmony.

In the last war such discussions, such meetings, did not even begin until the shooting had stopped and the delegates began to assemble at the peace table. There had been no previous opportunities for man-to-man discussions which lead to meetings of minds. The result was a peace which was not a peace.

That was a mistake which we are not repeating in this war.

And right here I want to address a word or two to some suspicious souls who are fearful that Mr. Hull or I have made "commitments" for the future which might pledge this Nation to secret treaties, or to enacting the role of Santa Claus.

To such suspicious souls—using a polite terminology—I wish to say that Mr. Churchill, and Marshal Stalin, and Generalissimo Chiang Kai-shek are all thoroughly conversant with the provisions of our Constitution. And so is Mr. Hull. And so am I.

Of course we made some commitments. We most certainly committed ourselves to very large and very specific military plans which require the use of all Allied forces to bring about the defeat of our enemies at the earliest possible time.

But there were no secret treaties or political or financial commitments.

The one supreme objective for the future, which we discussed for each Nation individually, and for all the United Nations, can be summed up in one word: Security.

And that means not only physical security which provides safety from attacks by aggressors. It means also economic security, social security, moral security—in a family of Nations.

In the plain down-to-earth talks that I had with the Generalissimo and Marshal Stalin and Prime Minister Churchill, it was abundantly clear that they are all most deeply interested in the resumption of peaceful progress by their own peoples—progress toward a better life. All our allies want freedom to develop their lands and resources, to build up industry, to increase education and individual opportunity, and to raise standards of living.

All our allies have learned by bitter experience that real development will not be possible if they are to be diverted from their purpose by repeated wars—or even threats of war.

China and Russia are truly united with Britain and America in recognition of this essential fact:

The best interests of each Nation, large and small, demand that all freedom-loving Nations shall join together in a just and durable system of peace. In the present world situation, evidenced by the actions of Germany, Italy, and Japan, unquestioned military control over disturbers of the peace is as necessary among Nations as it is among citizens in a community. And an equally basic essential to peace is a decent standard of living for all individual men and women and children in all Nations. Freedom from fear is eternally linked with freedom from want.

There are people who burrow through our Nation like unseeing moles, and attempt to spread the suspicion that if other Nations are encouraged to raise their standards of living, our own American standard of living must of necessity be depressed.

The fact is the very contrary. It has been shown time and again that if the standard of living of any country goes up, so does its purchasing power—and that such a rise encourages a better standard of living in neighboring countries with whom it trades. That is just plain common sense—and it is the kind of plain common sense that provided the basis for our discussions at Moscow, Cairo, and Teheran.

Returning from my journeyings, I must confess to a sense of "let-down" when I found many evidences of faulty perspective here in Washington. The faulty perspective consists in overemphasizing lesser problems and thereby underemphasizing the first and greatest problem.

The overwhelming majority of our people have met the demands of this war with magnificent courage and understanding. They have accepted inconveniences; they have accepted hardships; they have accepted tragic sacrifices. And they are ready and eager to make whatever further contributions are

needed to win the war as quickly as possible—if only they are given the chance to know what is required of them.

However, while the majority goes on about its great work without complaint, a noisy minority maintains an uproar of demands for special favors for special groups. There are pests who swarm through the lobbies of the Congress and the cocktail bars of Washington, representing these special groups as opposed to the basic interests of the Nation as a whole. They have come to look upon the war primarily as a chance to make profits for themselves at the expense of their neighbors—profits in money or in terms of political or social preferment.

Such selfish agitation can be highly dangerous in wartime. It creates confusion. It damages morale. It hampers our national effort. It muddies the waters and therefore prolongs the war.

If we analyze American history impartially, we cannot escape the fact that in our past we have not always forgotten individual and selfish and partisan interests in time of war—we have not always been united in purpose and direction. We cannot overlook the serious dissensions and the lack of unity in our war of the Revolution, in our War of 1812, or in our War Between the States, when the survival of the Union itself was at stake.

In the first World War we came closer to national unity than in any previous war. But that war lasted only a year and a half, and increasing signs of disunity began to appear during the final months of the conflict.

In this war, we have been compelled to learn how interdependent upon each other are all groups and sections of the population of America.

Increased food costs, for example, will bring new demands for wage increases from all war workers, which will in turn raise all prices of all things including those things which the farmers themselves have to buy. Increased wages or prices will each in turn produce the same results. They all have a particularly disastrous result on all fixed income groups.

And I hope you will remember that all of us in this Government represent the fixed income group just as much as we represent business owners, workers, and farmers. This group of fixed income people includes: teachers, clergy, policemen, firemen, widows and minors on fixed incomes, wives and dependents of our soldiers and sailors, and old-age pensioners. They and their families add up to one-quarter of our one hundred and thirty million people. They have few or no high pressure representatives at the Capitol. In a period of gross inflation they would be the worst sufferers.

If ever there was a time to subordinate individual or group selfishness to the national good, that time is now. Disunity at home—bickerings, self-seeking partisanship, stoppages of work, inflation, business as usual, politics as usual, luxury as usual these are the influences which can undermine the morale of the brave men ready to die at the front for us here.

Those who are doing most of the complaining are not deliberately striving to sabotage the national war effort. They are laboring under the delusion that the time is past when we must make prodigious sacrifices—that the war is already won and we can begin to slacken off. But the dangerous folly of that point of view can be measured by the distance that separates our troops from

their ultimate objectives in Berlin and Tokyo—and by the sum of all the perils that lie along the way.

Overconfidence and complacency are among our deadliest enemies. Last spring—after notable victories at Stalingrad and in Tunisia and against the U-boats on the high seas—overconfidence became so pronounced that war production fell off. In two months, June and July, 1943, more than a thousand airplanes that could have been made and should have been made were not made. Those who failed to make them were not on strike. They were merely saying, "The war's in the bag—so let's relax."

That attitude on the part of anyone—Government or management or labor—can lengthen this war. It can kill American boys.

Let us remember the lessons of 1918. In the summer of that year the tide turned in favor of the allies. But this Government did not relax. In fact, our national effort was stepped up. In August, 1918, the draft age limits were broadened from 21–31 to 18–45. The President called for "force to the utmost," and his call was heeded. And in November, only three months later, Germany surrendered.

That is the way to fight and win a war—all out—and not with half-an-eye on the battlefronts abroad and the other eye-and-a-half on personal, selfish, or political interests here at home.

Therefore, in order to concentrate all our energies and resources on winning the war, and to maintain a fair and stable economy at home, I recommend that the Congress adopt:

1. A realistic tax law—which will tax all unreasonable profits, both individual and corporate, and reduce the ultimate cost of the war to our sons and daughters. The tax bill now under consideration by the Congress does not begin to meet this test.
2. A continuation of the law for the renegotiation of war contracts—which will prevent exorbitant profits and assure fair prices to the Government. For two long years I have pleaded with the Congress to take undue profits out of war.
3. A cost of food law—which will enable the Government (a) to place a reasonable floor under the prices the farmer may expect for his production; and (b) to place a ceiling on the prices a consumer will have to pay for the food he buys. This should apply to necessities only; and will require public funds to carry out. It will cost in appropriations about one percent of the present annual cost of the war.
4. Early reenactment of the stabilization statute of October, 1942. This expires June 30, 1944, and if it is not extended well in advance, the country might just as well expect price chaos by summer. We cannot have stabilization by wishful thinking. We must take positive action to maintain the integrity of the American dollar.
5. A national service law—which, for the duration of the war, will prevent strikes, and, with certain appropriate exceptions, will make available for war production or for any other essential services every able-bodied adult in this Nation.

These five measures together form a just and equitable whole. I would not recommend a national service law unless the other laws were passed to keep down the cost of living, to share equitably the burdens of taxation, to hold the stabilization line, and to prevent undue profits.

The Federal Government already has the basic power to draft capital and property of all kinds for war purposes on a basis of just compensation.

As you know, I have for three years hesitated to recommend a national service act. Today, however, I am convinced of its necessity. Although I believe that we and our allies can win the war without such a measure, I am certain that nothing less than total mobilization of all our resources of manpower and capital will guarantee an earlier victory, and reduce the toll of suffering and sorrow and blood.

I have received a joint recommendation for this law from the heads of the War Department, the Navy Department, and the Maritime Commission. These are the men who bear responsibility for the procurement of the necessary arms and equipment, and for the successful prosecution of the war in the field. They say:

> When the very life of the Nation is in peril the responsibility for service is common to all men and women. In such a time there can be no discrimination between the men and women who are assigned by the Government to its defense at the battlefront and the men and women assigned to producing the vital materials essential to successful military operations. A prompt enactment of a National Service Law would be merely an expression of the universality of this responsibility.

I believe the country will agree that those statements are the solemn truth.

National service is the most democratic way to wage a war. Like selective service for the armed forces, it rests on the obligation of each citizen to serve his Nation to his utmost where he is best qualified.

It does not mean reduction in wages. It does not mean loss of retirement and seniority rights and benefits. It does not mean that any substantial numbers of war workers will be disturbed in their present jobs. Let these facts be wholly clear.

Experience in other democratic Nations at war—Britain, Canada, Australia, and New Zealand—has shown that the very existence of national service makes unnecessary the widespread use of compulsory power. National service has proven to be a unifying moral force based on an equal and comprehensive legal obligation of all people in a Nation at war.

There are millions of American men and women who are not in this war at all. It is not because they do not want to be in it. But they want to know where they can best do their share. National service provides that direction. It will be a means by which every man and woman can find that inner satisfaction which comes from making the fullest possible contribution to victory.

I know that all civilian war workers will be glad to be able to say many years hence to their grandchildren: "Yes, I, too, was in service in the great war. I was on duty in an airplane factory, and I helped make hundreds of fighting planes. The Government told me that in doing that I was performing my most useful work in the service of my country."

It is argued that we have passed the stage in the war where national service is necessary. But our soldiers and sailors know that this is not true. We are going forward on a long, rough road—and, in all journeys, the last miles are the hardest. And it is for that final effort—for the total defeat of our enemies—that we must mobilize our total resources. The national war program calls for the employment of more people in 1944 than in 1943.

It is my conviction that the American people will welcome this win-the-war measure which is based on the eternally just principle of "fair for one, fair for all."

It will give our people at home the assurance that they are standing four-square behind our soldiers and sailors. And it will give our enemies demoralizing assurance that we mean business—that we, 130,000,000 Americans, are on the march to Rome, Berlin, and Tokyo.

I hope that the Congress will recognize that, although this is a political year, national service is an issue which transcends politics. Great power must be used for great purposes.

As to the machinery for this measure, the Congress itself should determine its nature—but it should be wholly nonpartisan in its make-up.

Our armed forces are valiantly fulfilling their responsibilities to our country and our people. Now the Congress faces the responsibility for taking those measures which are essential to national security in this the most decisive phase of the Nation's greatest war.

Several alleged reasons have prevented the enactment of legislation which would preserve for our soldiers and sailors and marines the fundamental prerogative of citizenship—the right to vote. No amount of legalistic argument can becloud this issue in the eyes of these ten million American citizens. Surely the signers of the Constitution did not intend a document which, even in wartime, would be construed to take away the franchise of any of those who are fighting to preserve the Constitution itself.

Our soldiers and sailors and marines know that the overwhelming majority of them will be deprived of the opportunity to vote, if the voting machinery is left exclusively to the States under existing State laws—and that there is no likelihood of these laws being changed in time to enable them to vote at the next election. The Army and Navy have reported that it will be impossible effectively to administer forty-eight different soldier voting laws. It is the duty of the Congress to remove this unjustifiable discrimination against the men and women in our armed forces—and to do it as quickly as possible.

It is our duty now to begin to lay the plans and determine the strategy for the winning of a lasting peace and the establishment of an American standard of living higher than ever before known. We cannot be content, no matter how high that general standard of living may be, if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill housed, and insecure.

This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty.

As our Nation has grown in size and stature, however—as our industrial economy expanded—these political rights proved inadequate to assure us equality in the pursuit of happiness.

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." People who are hungry and out of a job are the stuff of which dictatorships are made.

In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all regardless of station, race, or creed.

Among these are:

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;
The right to earn enough to provide adequate food and clothing and recreation;
The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;
The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;
The right of every family to a decent home;
The right to adequate medical care and the opportunity to achieve and enjoy good health;
The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;
The right to a good education.

All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.

America's own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for our citizens. For unless there is security here at home there cannot be lasting peace in the world.

One of the great American industrialists of our day—a man who has rendered yeoman service to his country in this crisis—recently emphasized the grave dangers of "rightist reaction" in this Nation. All clear-thinking businessmen share his concern. Indeed, if such reaction should develop—if history were to repeat itself and we were to return to the so-called "normalcy" of the 1920's—then it is certain that even though we shall have conquered our enemies on the battlefields abroad, we shall have yielded to the spirit of Fascism here at home.

I ask the Congress to explore the means for implementing this economic bill of rights—for it is definitely the responsibility of the Congress so to do. Many of these problems are already before committees of the Congress in the form of proposed legislation. I shall from time to time communicate with the

Congress with respect to these and further proposals. In the event that no adequate program of progress is evolved, I am certain that the Nation will be conscious of the fact.

Our fighting men abroad—and their families at home—expect such a program and have the right to insist upon it. It is to their demands that this Government should pay heed rather than to the whining demands of selfish pressure groups who seek to feather their nests while young Americans are dying.

The foreign policy that we have been following—the policy that guided us at Moscow, Cairo, and Teheran—is based on the common sense principle which was best expressed by Benjamin Franklin on July 4, 1776: "We must all hang together, or assuredly we shall all hang separately."

I have often said that there are no two fronts for America in this war. There is only one front. There is one line of unity which extends from the hearts of the people at home to the men of our attacking forces in our farthest outposts. When we speak of our total effort, we speak of the factory and the field, and the mine as well as of the battleground—we speak of the soldier and the civilian, the citizen and his Government.

Each and every one of us has a solemn obligation under God to serve this Nation in its most critical hour—to keep this Nation great—to make this Nation greater in a better world.

6. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)

Adopted and proclaimed by General Assembly resolution 217 A (III) of December 10, 1948

On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights the full text of which appears in the following pages. Following this historic act the Assembly called upon all Member countries to publicize the text of the Declaration and "to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories."

Preamble

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,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

7. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (1948)

Adopted by Resolution 260 (III) A of the United Nations General Assembly on December 9, 1948.

Article 1

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article 2

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article 3

The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Article 4

Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article 5

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.

Article 6

Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article 7

Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article 8

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.

Article 9

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article 10

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article 11

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 12

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article 13

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a proces-verbal and transmit a copy of it to each Member of the United Nations and to each of the non-member States contemplated in Article 11.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article 14

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article 15

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article 16

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article 17

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in Article 11 of the following:

(a) Signatures, ratifications and accessions received in accordance with Article 11;
(b) Notifications received in accordance with Article 12;
(c) The date upon which the present Convention comes into force in accordance with Article 13;
(d) Denunciations received in accordance with Article 14;
(e) The abrogation of the Convention in accordance with Article 15;
(f) Notifications received in accordance with Article 16.

Article 18

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States contemplated in Article 11.

Article 19

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

8. U.S. RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS, CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, CONG. REC. S1355-01 (DAILY ED., FEBRUARY 19, 1986)

I. The Senate's advice and consent is subject to the following reservations:

1. That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.
2. That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

1. That the term "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in Article II means the specific intent to destroy, in whole or in substantial part, a national ethnical, racial or religious group as such by the facts specified in Article II.
2. That the term "mental harm" in Article II(b) means permanent impairment of mental faculties through drugs, torture or similar techniques.
3. That the pledge to grant extradition in accordance with a state's laws and treaties in force found in Article VII extends only to acts which are criminal under the laws of both the requesting and the requested state and nothing in Article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.
4. That acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention.
5. That with regard to the reference to an international penal tribunal in Article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.

III. The Senate's advice and consent is subject to the following declaration:

That the President will not deposit the instrument of ratification until after the implementing legislation referred to in Article V has been enacted.

9. BRICKER AMENDMENT, S.J. RES. 1, 83RD CONGRESS— JANUARY 7, 1953

Section 1. A provision of a treaty which denies or abridges any right enumerated in this Constitution shall not be of any force or effect.

Section 2. No treaty shall authorize or permit any foreign power or any international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States enumerated in this Constitution or any other matter essentially within the domestic jurisdiction of the United States.

Section 3. A treaty shall become effective as internal law in the United States only through the enactment of appropriate legislation by the Congress.

Section 4. All executive or other agreements between the President and any international organization, foreign power, or official thereof shall be made only in the manner and to the extent to be prescribed by law. Such agreements shall be subject to the limitations imposed on treaties, or the making of treaties, by this article.

Section 5. Congress shall have power to enforce this article by appropriate legislation.

10. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD) (1965)

Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of December 21, 1965, entry into force 4 January 1969, in accordance with Article 19.
The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organisation in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960,

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of Al l Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end,

Have agreed as follows:

PART I

Article 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial

discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group

of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:
  (i) The right to freedom of movement and residence within the border of the State;
  (ii) The right to leave any country, including one's own, and to return to one's country;
  (iii) The right to nationality;
  (iv) The right to marriage and choice of spouse;
  (v) The right to own property alone as well as in association with others;
  (vi) The right to inherit;
  (vii) The right to freedom of thought, conscience and religion;
  (viii) The right to freedom of opinion and expression;
  (ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:
  (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
  (ii) The right to form and join trade unions;
  (iii) The right to housing;
  (iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;
(vi) The right to equal participation in cultural activities;
(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

PART II

Article 8

1. There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties. Each State Party may nominate one person from among its own nationals.
3. The initial election shall be held six months after the date of the entry into force of this Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations

Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. (a) The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee;
   (b) For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.
6. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 9

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention:
   (a) within one year after the entry into force of the Convention for the State concerned; and
   (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.
2. The Committee shall report annually, through the Secretary General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

Article 10

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.
3. The secretariat of the Committee shall be provided by the Secretary General of the United Nations.
4. The meetings of the Committee shall normally be held at United Nations Headquarters.

Article 11

1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention

of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.
3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.
4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information.
5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

Article 12

1. (a) After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention;
   (b) If the States parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members.
2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States parties to the dispute or of a State not Party to this Convention.
3. The Commission shall elect its own Chairman and adopt its own rules of procedure.
4. The meetings of the Commission shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Commission.
5. The secretariat provided in accordance with article 10, paragraph 3, of this Convention shall also service the Commission whenever a dispute among States Parties brings the Commission into being.

6. The States parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.
7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States parties to the dispute in accordance with paragraph 6 of this article.
8. The information obtained and collated by the Committee shall be made available to the Commission, and the Commission may call upon the States concerned to supply any other relevant information.

Article 13

1. When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute.
2. The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission.
3. After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention.

Article 14

1. A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.
2. Any State Party which makes a declaration as provided for in paragraph I of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.
3. A declaration made in accordance with paragraph 1 of this article and the name of any body established or indicated in accordance with paragraph 2 of this article shall be deposited by the State Party concerned with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect communications pending before the Committee.

4. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certified copies of the register shall be filed annually through appropriate channels with the Secretary-General on the understanding that the contents shall not be publicly disclosed.
5. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months.
6. (a) The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent. The Committee shall not receive anonymous communications;
   (b) Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
7. (a) The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged;
   (b) The Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.
8. The Committee shall include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.
9. The Committee shall be competent to exercise the functions provided for in this article only when at least ten States Parties to this Convention are bound by declarations in accordance with paragraph I of this article.

Article 15

1. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV) of 14 December 1960, the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialized agencies.
2. (a) The Committee established under article 8, paragraph 1, of this Convention shall receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration

of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies;

(b) The Committee shall receive from the competent bodies of the United Nations copies of the reports concerning the legislative, judicial, administrative or other measures directly related to the principles and objectives of this Convention applied by the administering Powers within the Territories mentioned in subparagraph (a) of this paragraph, and shall express opinions and make recommendations to these bodies.

3. The Committee shall include in its report to the General Assembly a summary of the petitions and reports it has received from United Nations bodies, and the expressions of opinion and recommendations of the Committee relating to the said petitions and reports.
4. The Committee shall request from the Secretary-General of the United Nations all information relevant to the objectives of this Convention and available to him regarding the Territories mentioned in paragraph 2 (a) of this article.

Article 16

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

PART III

Article 17

1. This Convention is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 18

1. This Convention shall be open to accession by any State referred to in article 17, paragraph 1, of the Convention.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 19

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 20

1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.
2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.

Article 21

A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary General.

Article 22

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Article 23

1. A request for the revision of this Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 24

The Secretary-General of the United Nations shall inform all States referred to in article 17, paragraph 1, of this Convention of the following particulars:

(a) Signatures, ratifications and accessions under articles 17 and 18;
(b) The date of entry into force of this Convention under article 19;
(c) Communications and declarations received under articles 14, 20 and 23;
(d) Denunciations under article 21.

Article 25

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States belonging to any of the categories mentioned in article 17, paragraph 1, of the Convention.

11. U.S. RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS, INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, 140 CONG. REC. S7634-02 (DAILY ED., JUNE 24, 1994)

I. The Senate's advice and consent is subject to the following reservations:

1. That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.
2. That the Constitution and the laws of the United States establish extensive protections against discrimination, reaching significant areas of nongovernmental activity. Individual privacy and freedom from governmental

interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in Article 1 to the fields of "public life" reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of Article 2, subparagraphs (1)(c) and (d) of Article 2, Article 3 and Article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.

3. That with reference to Article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

II. The Senate's advice and consent is subject to the following understanding, which shall apply to the obligations of the United States under this Convention: That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.

III. The Senate's advice and consent is subject to the following declaration: That the United States declares that the provisions of the Convention are not self-executing.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

Nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

12. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) (1966)

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966, entry into force March 23, 1976, in accordance with Article 49.

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, 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,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the

provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:
   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
   (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
   (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour;
   (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a

crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
   (c) To be tried without undue delay;
   (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
   (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
   (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.
3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.
2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.
3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.
4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.
2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.
2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than

absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.
2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.
2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.
3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.
2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
   (a) Twelve members shall constitute a quorum;
   (b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:
   (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
   (b) Thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered

only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

  (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

  (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1. (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;
   (b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.
2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.
3. The Commission shall elect its own Chairman and adopt its own rules of procedure.
4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.
5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.
6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.
7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it

shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.
9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.
10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of

accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:
   (a) Signatures, ratifications and accessions under article 48;
   (b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

13. U.S. RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 138 CONG. REC. S4781-01 (DAILY ED., APRIL 2, 1992)

I. The Senate's advice and consent is subject to the following reservations:

1. That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.
2. That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.
3. That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.
4. That because U.S. law generally applies to an offender the penalty in force at the time the offense was committed, the United States does not adhere to the third clause of paragraph 1 of Article 15.
5. That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of Article 10 and paragraph 4 of Article 14. The United States further reserves to these provisions with respect to individuals who volunteer for military service prior to age 18.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Covenant:

1. That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status—as those terms are used in Article 2, paragraph 1 and Article 26—to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of Article 4 upon discrimination, in time of public emergency, based "solely" on the status of race, color, sex, language, religion or social origin not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

2. That the United States understands the right to compensation referred to in Articles 9(5) and 14(6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject of the reasonable requirements of domestic law.
3. That the United States understands the reference to "exceptional circumstance" in paragraph 2(a) of Article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.
4. That the United States understands that subparagraphs 3(b) and (d) of Article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3(e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.
5. That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

III. The Senate's advice and consent is subject to the following declarations:

1. That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.
2. That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, Article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes

them to a lesser extent, has particular relevance to Article 19, paragraph 3, which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

3. That the United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant.
4. That the United States declares that the right referred to in Article 47 may be exercised only in accordance with international law.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

14. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1966)

Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of December 16, 1966, entry into force January 3, 1976, in accordance with article 27.

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, 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,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present

Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.
2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:
    (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
    (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8

1. The States Parties to the present Covenant undertake to ensure:
   (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
   (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
   (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
   (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
   (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
   (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
   (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
   (b) The improvement of all aspects of environmental and industrial hygiene;
   (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
   (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
   (a) Primary education shall be compulsory and available free to all;
   (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
   (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
   (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
   (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:
   (a) To take part in cultural life;
   (b) To enjoy the benefits of scientific progress and its applications;
   (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.
2. (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;
   (b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of

accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.
3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 26;
(b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

15. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 39/46 of December 10, 1984, entry into force June 26, 1987, in accordance with article 19.

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
   (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
   (b) When the alleged offender is a national of that State;
   (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph I of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph I of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to

complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.
3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At. Ieast four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.
6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.
7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties. (amendment (see General Assembly resolution 47/111 of 16 December 1992);

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
   (a) Six members shall constitute a quorum;
   (b) Decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.
4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article. (amendment (see General Assembly resolution 47/111 of 16 December 1992);

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.
2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.
3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph I of this article.

Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the Committee referred to in paragraphs I to 4 of th is article s hall be con fidential , and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure;
   (a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
   (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
   (c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is

unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;

(f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.
3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph I and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.
5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:
   (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;
   (b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective reliefto the person who is the victim of the violation of this Convention.
6. The Committee shall hold closed meetings when examining communications under this article.
7. The Committee shall forward its views to the State Party concerned and to the individual.
8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

Article 23

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph I (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

PART III

Article 25

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph I of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference,

the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph I of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from thc date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by paragraph I of this article with respect to any State Party having made such a reservation.
3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.
3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

(a) Signatures, ratifications and accessions under articles 25 and 26;
(b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;
(c) Denunciations under article 31.

Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

16. U.S. RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, CONG. REC. S17486-01 (DAILY ED., OCTOBER 27, 1990)

I. The Senate's advice and consent is subject to the following reservations:

1. That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.
2. That pursuant to Article 30(2) the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

1. (a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting

from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article 1 of the Convention, the United States understands that "sanctions" includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to Article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.

2. That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."
3. That it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.
4. That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.
5. That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.

III. The Senate's advice and consent is subject to the following declarations:

1. That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.
2. That the United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

The President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

17. MAASTRICHT GUIDELINES ON ESC RIGHTS (1997)

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights

Introduction

On the occasion of the tenth anniversary of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (hereinafter 'the Limburg Principles'), a group of more than thirty experts met in Maastricht from 22–26 January 1997 at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute for Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). The objective of this meeting was to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies.

The participants unanimously agreed on the following guidelines which they understand to reflect the evolution of international law since 1986. These guidelines are designed to be of use to all who are concerned with understanding and determining violations of economic, social and cultural rights and in providing remedies thereto, in particular monitoring and adjudicating bodies at the national, regional and international levels.

I. The Significance of Economic, Social, and Cultural Rights

1. Since the Limburg Principles were adopted in 1986, the economic and social conditions have declined at alarming rates for over 1.6 billion people,

while they have advanced also at a dramatic pace for more than a quarter of the world's population.[1] The gap between rich and poor has doubled in the last three decades, with the poorest fifth of the world's population receiving 1.4 percent of the global income and the richest fifth 85 percent. The impact of these disparities on the lives of people—especially the poor—is dramatic and renders the enjoyment of economic, social and cultural rights illusory for a significant portion of humanity.

2. Since the end of the Cold War, there has been a trend in all regions of the world to reduce the role of the state and to rely on the market to resolve problems of human welfare, often in response to conditions generated by international and national financial markets and institutions and in an effort to attract investments from the multinational enterprises whose wealth and power exceed that of many states. It is no longer taken for granted that the realization of economic, social and cultural rights depends significantly on action by the state, although, as a matter of international law, the state remains ultimately responsible for guaranteeing the realization of these rights. While the challenge of addressing violations of economic, social and cultural rights is rendered more complicated by these trends, it is more urgent than ever to take these rights seriously and, therefore, to deal with the accountability of governments for failure to meet their obligations in this area.
3. There have also been significant legal developments enhancing economic, social and cultural rights since 1986, including the emerging jurisprudence of the Committee on Economic, Social and Cultural Rights and the adoption of instruments, such as the revised European Social Charter of 1996 and the Additional Protocol to the European Charter Providing for a System of Collective Complaints, and the San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988. Governments have made firm commitments to address more effectively economic, social and cultural rights within the framework of seven UN World Summits conferences (1992–1996). Moreover, the potential exists for improved accountability for violations of economic, social and cultural rights through the proposed Optional Protocols to the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women. Significant developments within national civil society movements and regional and international NGOs in the field of economic, social and cultural rights have taken place.
4. It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.
5. As in the case of civil and political rights, the failure by a State Party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty. Building upon the Limburg Principles,[2] the considerations below relate primarily to the International Covenant on Economic, Social and Cultural Rights (hereinafter 'the Covenant'). They are equally relevant, however, to the interpretation

and application of other norms of international and domestic law in the field of economic, social and cultural rights.

II. The Meaning of Violations of Economic, Social and Cultural Rights

Obligations to respect, protect, and fulfill

6. Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.

Obligations of conduct and of result

7. The obligations to respect, protect and fulfill each contain elements of obligation of conduct and obligation of result. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. In the case of the right to health, for example, the obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality. The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard. With respect to the right to health, for example, the obligation of result requires the reduction of maternal mortality to levels agreed at the 1994 Cairo International Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women.

Margin of discretion

8. As in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. State practice and the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development of universal minimum standards and the common understanding of the scope, nature and limitation of economic, social and cultural rights. The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question. The State cannot

use the 'progressive realization' provisions in article 2 of the Covenant as a pretext for non-compliance. Nor can the State justify derogations or limitations of rights recognized in the Covenant because of different social, religious and cultural backgrounds.

Minimum core obligations

9. Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. . . . Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the Covenant."[3] Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.

Availability of resources

10. In many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25–28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.

State policies

11. A violation of economic, social and cultural rights occurs when a State pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result. Furthermore, any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

Gender discrimination

12. Discrimination against women in relation to the rights recognized in the Covenant, is understood in light of the standard of equality for women under the Convention on the Elimination of All Forms of Discrimination Against Women. That standard requires the elimination of all forms of discrimination against women including gender discrimination arising out of social, cultural and other structural disadvantages.

Inability to comply

13. In determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the

inability from the unwillingness of a State to comply with its treaty obligations. A State claiming that it is unable to carry out its obligation for reasons beyond its control has the burden of proving that this is the case. A temporary closure of an educational institution due to an earthquake, for instance, would be a circumstance beyond the control of the State, while the elimination of a social security scheme without an adequate replacement programme could be an example of unwillingness by the State to fulfil its obligations.

Violations through acts of commission

14. Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:
    (a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;
    (b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;
    (c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;
    (d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;
    (e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;
    (f) The calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;
    (g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.

Violations through acts of omission

15. Violations of economic, social, cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Examples of such violations include:
    (a) The failure to take appropriate steps as required under the Covenant;
    (b) The failure to reform or repeal legislation which is manifestly, inconsistent with an obligation of the Covenant;
    (c) The failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;
    (d) The failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;
    (e) The failure to utilize the maximum of available resources towards the full realization of the Covenant;

(f) The failure to monitor the realization of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;
(g) The failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;
(h) The failure to implement without delay a right which it is required by the Covenant to provide immediately;
(i) The failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
(j) The failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.

III. Responsibility for Violations

State responsibility

16. The violations referred to in section II are in principle imputable to the State within whose jurisdiction they occur. As a consequence, the State responsible must establish mechanisms to correct such violations, including monitoring investigation, prosecution, and remedies for victims.

Alien domination or occupation

17. Under circumstances of alien domination, deprivations of economic, social and cultural rights may be imputable to the conduct of the State exercising effective control over the territory in question. This is true under conditions of colonialism, other forms of alien domination and military occupation. The dominating or occupying power bears responsibility for violations of economic, social and cultural rights. There are also circumstances in which States acting in concert violate economic, social and cultural rights.

Acts by non-state entities

18. The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.

Acts by international organizations

19. The obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions,

to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights. Member States of such organizations, individually or through the governing bodies, as well as the secretariat and nongovernmental organizations should encourage and generalize the trend of several such organizations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights.

IV. Victims of Violations

Individuals and groups

20. As is the case with civil and political rights, both individuals and groups can be victims of violations of economic, social and cultural rights. Certain groups suffer disproportionate harm in this respect such as lower-income groups, women, indigenous and tribal peoples, occupied populations, asylum seekers, refugees and internally displaced persons, minorities, the elderly, children, landless peasants, persons with disabilities and the homeless.

Criminal sanctions

21. Victims of violations of economic, social and cultural rights should not face criminal sanctions purely because of their status as victims, for example, through laws criminalizing persons for being homeless. Nor should anyone be penalized for claiming their economic, social and cultural rights.

V. Remedies and Other Responses to Violations

Access to remedies

22. Any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels.

Adequate reparation

23. All victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.

No official sanctioning of violations

24. National judicial and other organs must ensure that any pronouncements they may make do not result in the official sanctioning of a violation of an international obligation of the State concerned. At a minimum, national judiciaries should consider the relevant provisions of international and regional human rights law as an interpretive aide in formulating any decisions relating to violations of economic, social and cultural rights.

National institutions

25. Promotional and monitoring bodies such as national ombudsman institutions and human rights commissions, should address violations of economic, social and cultural rights as vigorously as they address violations of civil and political rights.

Domestic application of international instruments

26. The direct incorporation or application of international instruments recognizing economic, social and cultural rights within the domestic legal order can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.

Impunity

27. States should develop effective measures to preclude the possibility of impunity of any violation of economic, social and cultural rights and to ensure that no person who may be responsible for violations of such rights has impunity from liability for their actions.

Role of the legal professions

28. In order to achieve effective judicial and other remedies for victims of violations of economic, social and cultural rights, lawyers, judges, adjudicators, bar associations and the legal community generally should pay far greater attention to these violations in the exercise of their professions, as recommended by the International Commission of Jurists in the Bangalore Declaration and Plan of Action of 1995.[4]

Special rapporteurs

29. In order to further strengthen international mechanisms with respect to preventing, early warning, monitoring and redressing violations of economic, social and cultural rights, the UN Commission on Human Rights should appoint thematic Special Rapporteurs in this field.

New standards

30. In order to further clarify the contents of States obligations to respect protect and fulfil economic, social and cultural rights, States and appropriate international bodies should actively pursue the adoption of new standards on specific economic, social and cultural rights, in particular the right to work, to food, to housing and to health.

Optional protocols

31. The optional protocol providing for individual and group complaints in relation to the rights recognized in the Covenant should be adopted and ratified without delay. The proposed optional protocol to the Convention on the Elimination of All Forms of Discrimination Against Women should ensure that equal attention is paid to violations of economic, social and cultural rights. In addition, consideration should be given to the drafting of an optional complaints procedure under the Convention on the Rights of the Child.

Documenting and monitoring

32. Documenting and monitoring violations of economic, social and cultural rights should be carried out by all relevant actors, including NGOs,

national governments and international organizations. It is indispensable that the relevant international organizations provide the support necessary for the implementation of international instruments in this field. The mandate of the United Nations High Commissioner for Human Rights includes the promotion of economic, social and cultural rights and it is essential that effective steps be taken urgently and that adequate staff and financial resources be devoted to this objective. Specialized agencies and other international organizations working in the economic and social spheres should also place appropriate emphasis upon economic, social and cultural rights as rights and, where they do not already do so, should contribute to efforts to respond to violations of these rights.

NOTES

1. UNDP, Human Development Report 1996, p. 29.
2. The relevant Limburg Principles are the following:
   70. A failure by a State party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant.
   71. In determining what amounts to a failure to comply, it must be borne in mind that the Covenant affords to a State party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control may adversely affects its capacity to implement particular rights.
   72. A State party will be in violation of the Covenant, inter alia, if:
   – it fails to take a step which it is required to take by the Covenant;
   – it fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfillment of a right;
   – it fails to implement without delay a right which it is required by the Covenant to provide immediately;
   – it wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
   – it applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;
   – it deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeur*;
   – it fails to submit reports as required under the Covenant.
   73. In accordance with international law each State party to the Covenant has the right to express the view that another State party is not complying with its obligations under the Covenant and to bring this to the attention of that State party. Any dispute that may thus arise shall be settled in accordance with the relevant rules of international law relating to the peaceful settlement of disputes.

The full text of the Limburg Principles was published in UN Doc. E/CN.4/1987/17, Annex. It was reprinted in 9 Hum. Rts. Q. 122–35 (1987) and 37 ICJ Rev., Dec. 1986, at 43, 43–55.

3. *See* Committee on Economic, Social and Cultural Rights, *General Comment No. 3*, 5th Sess., 1990, UN Doc. E/1991/23, Annex III, p. 10.

4. *Bangalore Declaration and Plan of Action* (1995), *reprinted in* 55 ICJ Rev., Dec. 1995, at 219, 219–27.

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Bringing Human Rights Home

Bringing Human Rights Home

Volume 2
From Civil Rights to Human Rights

Edited by

Cynthia Soohoo, Catherine Albisa,
and Martha F. Davis

Foreword by Louise Arbour

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Contents

Foreword

It is with pleasure that I introduce this set of volumes on human rights in the United States, the land of the Four Freedoms speech, a source of inspiration for human rights advocates throughout the world since President Roosevelt first delivered it in 1941.

As the United Nations High Commissioner for Human Rights, it is my duty to promote and protect the rights of all, the freedoms of all. To do so requires concerted efforts at the national level and hence, in recent years, we have devoted special efforts to developing closer links with local partners, national institutions, and organizations with a view to bringing human rights home. I am convinced that building national capacity is an important way to advance human rights protection where it matters most.

It is in this vein that the present set is most welcome. The three volumes offer the reader the opportunity to identify and examine not only the historical richness of the human rights movement in the United States, but its current strengths and challenges. In doing so, the wide array of chapters from scholars, lawyers, and grassroots activists offer diverse perspectives and insights, often through the lens of international human rights standards.

For the United Nations Human Rights System all rights deserve equal treatment and standing since they serve to "promote social progress and better standards of life in larger freedom," as proclaimed in the Universal Declaration of Human Rights. This publication exemplifies these principles, covering diverse topics—from torture to agricultural workers' campaigns to health care—that reflect the essential interdependence and indivisibility of economic, social, civil, political, and cultural rights. I specifically welcome the publication's inclusion of themes relating to economic, social, and cultural rights.

I perceive this as an area where the international community could benefit from greater American leadership.

The combination of case studies, analytical pieces, and testimonial chapters provides a thorough account of the ample spectrum of strategies and views that are currently contributing to the national debate. Moreover, this choice underscores the complexity of global challenges such as migration, security, and governance. For all nations, large and small, and for the United Nations Human Rights System, these issues pose threats and dilemmas of equal relevance, and require a commitment to protecting the rights of individuals while guaranteeing the rule of law.

The approaching sixtieth anniversary of the Universal Declaration in 2008 offers a great opportunity to look back at the many accomplishments of the past decades, in which the U.S. human rights movement has played a central role. Compilations such as this will offer the public a comprehensive review of the past, while shedding light on present and future challenges. I commend the editors and writers for their contribution to the central human rights debates of our time.

Louise Arbour
United Nations High Commissioner for Human Rights
August 2007

Preface

> Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. . . . Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.
>
> —Eleanor Roosevelt

In the early 1990s, the term "U.S. human rights" would have probably elicited vague confusion and puzzled looks. Contemporary notions of human rights advocacy involved the criticism of rights abuses in *other* countries, and claims of human rights violations were leveled *by,* not *at*, the U.S. government. Although human rights documents and treaties purported to discuss universal rights obligations that applied to all countries, the prevailing wisdom was that the American people did not need human rights standards or international scrutiny to protect their rights. Many scholars and political scientists, who described themselves as "realists," expressed doubt that international human rights law could ever influence the behavior of a superpower such as the United States.

Yet, segments of the American public have always believed that the struggle for human rights is relevant to the United States. One of the earliest uses of the term "human rights" is attributed to Frederick Douglass and his articulation of the fundamental rights of enslaved African Americans at a time when the United States did not recognize their humanity or their rights. At various times in U.S. history, the idea that all individuals have fundamental rights rooted in the concept of human dignity and that the international

community might provide support in domestic rights struggles has resonated with marginalized and disenfranchised populations. Thus, it was no surprise that U.S. rights organizations, including the NAACP and American Jewish Congress, played a crucial role in the birth of the modern human rights movement. Both groups helped to ensure that human rights were included in the UN Charter.

Following the creation of the UN, many domestic social justice activists were interested in human rights standards and the development of international forums. Human rights offered the potential to expand both domestic concepts of rights and available forums and allies for their struggles. In the late 1940s and 1950s, Cold War imperatives forced mainstream social justice activists to limit their advocacy to civil claims rights, rather than broader human rights demands for economic and social rights, and to forgo international forums or criticism of the United States. At the same time, isolationists and Southern senators, opposed to international scrutiny of Jim Crow and segregation, were able to effectively prevent U.S. ratification of human rights treaties that required U.S. compliance with human rights standards.

As a result of these pressures, by the 1950s, the separation between international human rights and domestic civil rights appeared complete. Human rights advocacy came to be understood as involving challenges to oppressive regimes abroad, and domestic social justice activists focused on using civil rights claims within the domestic legal system to articulate and vindicate fundamental rights. Recent scholarship by Mary Dudziak and others point out that during the 1950s and 1960s, the United States's civil rights agenda was strongly influenced by concerns about international opinion because Jim Crow and domestic racial unrest threatened to undermine U.S. moral authority during the Cold War. However, although international pressures may have encouraged and supported reform within the United States, the main engine for change was the domestic legal system. Federal civil rights legislation and Supreme Court cases ending *de jure* segregation, expanding individual rights and protecting the interests of poor people through the 1960s seemed to support the perception that the United States did not need human rights.

Soon after, however, the political climate slowly began to shift. Changes on the Supreme Court led to a retreat in domestic protections of fundamental rights. By the end of the 1980s, the assault on domestic civil rights protections was well underway, as illustrated by political attacks on affirmative action and reproductive rights. Political leaders undermined social programs. President Ronald Reagan demonized the poor, claiming that welfare recipients were primarily defrauding the system and women drove away from the welfare offices in Cadillacs. This image of the "welfare queen" created a foundation for further attacks on the rights of the poor in the years to come.

From the 1990s to present day, the deterioration of legal rights for Americans continued at a vigorous pace. Congress and increasingly conservative courts narrowed remedies for employment discrimination and labor violations and restricted prisoners' access to the courts. The legislature and executive branch over time also allotted fewer resources, and even less political will, to government enforcement of laws protecting Americans from job

discrimination, health and safety violations in the workplace, and environmental toxins. Funding for legal services was cut.

Simultaneous to the slow unraveling of the rights of the people in the United States, global events shifted dramatically with the end of the Cold War. Suddenly, the standard politicization of human rights no longer made sense. This opened an important window of opportunity for activists in the United States. Human rights—including economic, social, and cultural rights—could now be claimed for all people, even those within the United States, without triggering accusations of aiding communist adversaries.

As the relevance of international human rights standards grew for the United States, even the increasingly conservative federal judiciary took note. The Supreme Court issued a series of cases citing international human rights standards involving the death penalty and gay rights. These cases were sharply criticized by the most reactionary politicians and members of the Court itself. In 2002, Supreme Court Justice Clarence Thomas admonished his brethren not to "impose foreign moods, fads, or fashions on Americans." Reactionary pundits and scholars picked up on this theme arguing that compliance with human rights standards is antidemocratic because it overrules legislative decisions that constitute the will of the majority.

Nonetheless, the trend toward applying human rights in the United States continued to deepen slowly and quietly until a series of events jolted the American psyche. These events forced the mainstream public to consider what human rights had to do with us, while simultaneously engendering even more vigorous official opposition. As the nation began to recover from the terrorist attacks on 9/11, many were shocked by the anti-terrorism tactics of the Bush administration. To deflect criticism, the administration engaged in legal maneuverings to claim that torture and cruel and degrading treatment were legal under U.S. law, and that international law prohibitions on torture and cruel treatment were not relevant. Voices both within the United States and from the international community challenged the Bush administration, pointing out that torture is a human rights violation in any country.

In 2005, Hurricane Katrina also provided a stark illustration that poor, minority, and marginalized communities need human rights protections and that domestic law falls painfully short of even articulating, much less remedying a wide range of fundamental rights violations. This remains particularly true when affirmative government obligations to protect life, health, and well-being are involved. The government's abandonment of thousands of people too poor to own a car, and the resulting hunger, thirst, chaos, and filth they suffered for many days after the storm shocked the conscience of Americans. People around the world were incredulous to see how the richest nation in the world failed to respond to the needs of its own people. Given an opportunity to rehabilitate its image after the storm, government actions have instead deepened existing inequalities, oppression, and poverty of those affected. Katrina has served as a wake-up call for the region's activists who have collectively embraced human rights as a rallying cry.

Post-9/11 the Supreme Court has served to moderate the worst excesses of the Bush administration's war on terror and, in closely contested cases, brought the United States in line with peer democratic countries by abolishing the

juvenile death penalty and criminal restrictions on consensual homosexual conduct. However, the widening gap between U.S. law and international human rights standards was made brutally clear by the Supreme Court's 2007 decision striking down voluntary school desegregation plans in Seattle and Louisville. The decision effectively overturned a significant part of *Brown v. Board of Education* and signaled an abandonment of the Court's historic role as protector of the vulnerable and marginalized in society. In direct opposition to the UN Convention on the Elimination of All Forms of Racial Discrimination, which allows and in some cases requires affirmative measures to remedy historic discrimination, the Seattle and Louisville cases held that school desegregation programs voluntarily adopted by school boards constitute unconstitutional racial discrimination. In 2007, these cases appear as a harbinger of the battles yet to be fought on the much-disputed territory of human rights in the United States.

This three-volume set tells the story of the domestic human rights movement from its early origins, to its retreat during the Cold War, to its recent resurgence and the reasons for it. It also describes the current movement by examining its strategies and methods and considering advocacy around a number of issues. It is our hope that this book will provide greater understanding of the history and nature of the domestic human rights movement and in doing so respond to unwarranted criticism that domestic human rights advocacy is foreign to U.S traditions and that it seeks to improperly impose the views and morals of the international community on the American people.

Although the history of U.S. involvement in the birth of the modern international human rights movement is well known, the parallel history of the struggle for human rights within the United States has been overlooked and forgotten. Volume 1 reclaims the early history of the domestic human rights movement and examines the internal and external factors that forced its retreat. In order to aid the reader, many of the documents referred to in this set are included in the Appendix at the end of Volume 1. A list of the documents that are included appears at the beginning of the Appendix.

Through the chapters in Volumes 2 and 3, we hope to provide a clearer picture of current human rights advocacy in the United States. Human rights work in the United States is often misunderstood because those who search for it tend to focus on legal forums, forays into international institutions, and human rights reports written by international human rights organizations. While such work is critically important and continues to grow, human rights education and organizing tends to get overlooked. As we tell the story of human rights advocacy in the United States and come to understand the current depth and diversity of the movement and its embrace by grassroots communities, the hollowness of antidemocratic criticism becomes clear. Rather than encompassing a set of foreign values that are imposed upon us, the fight for human rights in the United States is emerging both from the top down and the ground up.

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We want to express our deep appreciation to the activists profiled in this book, whose work continues to inspire us, and to the authors of these chapters for contributing their experience, insights, and hard work to this effort. Many thanks are in order to Hilary Claggett for encouraging us to pursue this project and to Professor Peter Rosenblum for his support and encouragement. We are also grateful to our publishers at Praeger, Shana Jones, Elizabeth Potenza, and Lindsay Claire.

During the initial stages of this project, we were fortunate to be able to convene two conferences at Columbia Law School in May 2005 and June 2006 to develop the content and themes for this book. Many conference participants became contributing authors or provided first person accounts. Other participants, including Clifford Bob, Ellen Chapnick, Rhonda Copelon, Jamie Fellner, Hadar Harris, the Honorable Claire L'Heureux-Dube, Garth Meintjes, Alice Miller, Judith Resnik, Peter Rosenblum, Amanda Shanor, and Steven Watt provided invaluable comments and suggestions, which helped to shape the direction of the project.

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We must also acknowledge the significant contributions by Columbia Law School and the staff of the Human Rights Institute's Bringing Human Rights Home project, Caroline Bettinger-Lopez and Trisha Garbe, without whom this project could not have been completed. Finally, we thank Samuel Fury Childs Daly and Karen Lin for outstanding editing assistance.

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I am greatly indebted to my colleagues in the Bringing Human Rights Home Lawyers Network for sharing their ideas and projects and providing a continuing source of inspiration. A collaborative project of this scope is by its nature difficult, but it can become an ordeal unless you are fortunate, as I was, to work with colleagues whom you like, respect, and upon whom you can depend. I am grateful to Cathy Albisa and Martha Davis, for their commitment, hard work, vision, and good humor throughout this project. Finally, a special thanks to Sarah and Thomas Creighton for their patience and support and to Daniel Creighton for making this project and everything else possible. —CS

Every social justice effort is by nature a collaborative one. I have many people to thank for making this book possible starting with my family, in particular my mother-in-law Dalia Davila and husband Waldo Cubero, for their steadfast support for my work despite sacrifices they endure as a result; my children, Gabriel and Dario, for being a constant source of inspiration and wisdom on what is clearly right and wrong in this world; my mother Gladys Albisa for her encouragement to commit myself to this work; Larry Cox and Dorothy Q. Thomas for their guidance, leadership, and inspiration; the extraordinary staff at the National Economic and Social Rights Initiative (NESRI) for the depth of their commitment and creativity; my co-founders Sharda Sekaran and Liz Sullivan for their leap of faith in creating NESRI; Laura Gosa and Molly Corbett for their work to ensure the completion of many of the chapters in this book; Tiffany Gardner for her optimism and commitment to carrying this work into the future; the contributing authors with whom I had the honor to work who made time in their impossible schedules to make a invaluable contribution; my board members Mimi Abramovitz, Rhonda Copelon, Lisa Crooms, Martha Davis, Dr. Paul Farmer, Patrick Mason, and Bruce Rabb for their leadership and support; NESRI's partner organizations that exemplify the U.S. human rights movement; our funders mentioned above as well as the Public Welfare Foundation that make the work possible; and most of all our extraordinary colleague Cindy Soohoo who quietly and modestly took on the biggest share of this project and generously allowed all of us to become a part of it. Thank you Cindy, this could not have happened without you! —CA

Thanks to Northeastern Law School for providing both material support and flexibility for me to devote the necessary time to this project. Thanks to Kyle Courtney for his unflagging good humor and library research expertise. Elizabeth Farry provided excellent research assistance. Richard Doyon provided terrific secretarial assistance. Finally, thanks to Cindy Soohoo and Cathy Albisa for their generous invitation to join them in this project, and for being such wonderful, supportive colleagues throughout. —MD

Introduction to Volume 2

Catherine Albisa

There is a growing movement with a core commitment to holding the United States accountable to human rights. This growing movement is not entirely unified, and faces many challenges both external and internal. This volume covers the political, legal, and social evolution of this movement, as well as examines its current limits and potential. It tracks the roots of the latest manifestation of the U.S. human rights movement, in particular the period from 1990—the "end of the Cold War"—to the present day through thematic chapters as well as first person accountants from important activists. It scans the landscape of this work across the country, and examines watershed moments that resulted from the impact on human rights of the September 11, 2001 attacks on the World Trade Center and Hurricane Katrina in August 2005.

With regard to September 11, 2001, it remains to be seen whether the damage done by the Bush administration through its broad and indiscriminate abuse of unchecked executive power in response to the attack has permanently tarnished the reputation of the United States on the international stage. More important, it is also an open question whether the embrace of indefinite detention, unauthorized wiretapping, and torture has irreparably damaged the political, legal, and social infrastructure that protected individual rights domestically.

One clear outcome of these abuses and deep wrongs, however, has been the increasing use and relevance of international human rights standards as our domestic institutions continue to break down under the weight of the government's manipulation of public anxiety over possible terrorist acts. "The Impact of September 11 and the Struggle against Terrorism on the

U.S. Domestic Human Rights Movement" by Wendy Patton and "Bush Administration Non-Compliance with the Prohibition on Torture and Cruel and Degrading Treatment" by Kathryn Sikkink carefully detail the environment in which progressive activists found themselves after September 11, 2001, and their fierce efforts to prevent and curtail some of the worst abuses using every tool in their arsenal, particular universal international human rights standards.

In the post-9/11 landscape, however, Americans have sacrificed far more than specific human rights directly linked to the "war on terror." We are facing an illegal war of aggression, clearly prohibited by the Geneva Conventions, into which the government has invested over $400 billion. So far, the payout has been chaos, political instability, ongoing carnage, and death. This, in itself, of course represents an international human rights crisis. But it also has direct budgetary repercussions for issues such as health care, education, and economic security, all of which are basic human rights.

These rights, as noted in Chapter 2, "Economic and Social Rights in the United States: Six Rights, One Promise," have never been fully recognized or adequately protected in the United States, although there was a period of time where public and government support was far greater than it is now. Currently, the gross disregard for even basic survival rights has reached stunning proportions. We witnessed our government's abandonment of poor people in the Gulf Coast after Hurricane Katrina, who were left, some to die, without food and water. To add cruel insult to this injury, Barbara Bush, a former First Lady and mother of the sitting president, stated publicly after this horror that "so many of the [displaced] people in the [Houston] arena here, you know, were underprivileged anyway, so this, this is working very well for them."[1]

In the face of such profound social ills and such an abject failure on a nationwide level to respect human dignity and freedom, activists have—not surprisingly—turned to less traditional approaches for their advocacy. In particular, they are undertaking domestic human rights work. Human rights work in the United States is multifaceted and involves educators, organizers, artists, musicians, Web activists, lawyers, scholars, policy advocates, economists, and other activists. But as Dorothy Q. Thomas explains in "Against American Supremacy: Rebuilding Human Rights Culture in the United States," regardless of what specialty human rights activists come from, the work is fundamentally about challenging supremacy in all its forms and demanding equality and social inclusion. The work is also supranational from a legal perspective in that it lays claim to a body of law that is not dependent on national legislation or constitutions.

U.S. activists have—as detailed in Margaret Huang's "Going Global: Appeals to International and Regional Human Rights Bodies"—increasingly brought domestic issues to the international stage, including holding hearings and bringing cases to the Inter-American Commission on Human Rights, working with UN experts that do global reporting, appearing at the annual UN Human Rights Council meetings, and filing "shadow" reports when the United States has to report to a UN treaty body. Activists have found new potential, but also limitations, in bringing the fruit of these international interventions

back to their localities. Other activists, as put forth by Martha F. Davis in "Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights," have adopted an inverse strategy, bringing international human rights standards to the local level through municipal ordinances and resolutions. Additionally, Cynthia Soohoo in "Human Rights and the Transformation of the 'Civil Rights' and 'Civil Liberties' Lawyer" describes the struggle of activist lawyers to embed human rights values and standards into the U.S. legal system. Finally, Lance Compa in "Human Rights and Trade Unions" provides a cogent analysis and example of how human rights strategies and approaches have begun to intersect with other major movements, such as the labor movement.

Together these chapters paint a picture of a growing body of work that may yet significantly influence the political landscape in coming decades. This movement is unique in the breadth of its scope and audacious in its aspirations. In short, it is idealistic. It seems we are at a moment in history where to have ideals is suspect. Better—some argue—to accept that some rights, like freedom from torture, are not absolute when we are afraid, and others, like health care, are only commodities that serve market interests.

This volume brings you the voices of those who argue, intensely and passionately, that this view cannot and must not prevail. The authors argue that we must hold on to the best of what is inherent in our identity and ideals as a country, and heal ourselves of the systemic dysfunctions that lead to widespread violations of dignity, equality and freedom. The disease is easy to identify: violence, inequality in all its forms, greed, exclusivity, cruelty, indifference, ignorance and poverty. The upcoming chapters explore a growing movement that believes that human rights is the cure.

NOTE

1. As heard on September 5, 2005, on Marketplace.

CHAPTER 1

Against American Supremacy: Rebuilding Human Rights Culture in the United States

Dorothy Q. Thomas

Is this America?

—Fannie Lou Hamer

WHERE WE BEGIN

The contemporary movement for human rights in the United States arises out of a struggle over the identity of the nation, its people, and each and every individual within its jurisdiction. It takes place simultaneously at the personal and the political level, unfolding as much within the confines of the individual, the community, and the group as it does in the corridors of the Congress, the White House, or the nation's highest courts. Like any effort at self-definition, the U.S. human rights struggle is irreducible to any particular period, or exclusive type or single strand; it is intergenerational, multidimensional, and mixed. This chapter traces the development of the contemporary movement for human rights in the United States, analyzes its evolving character, and recommends ways to strengthen its voice in the struggle to determine what America stands for in the eyes of its own people and of the world.

Before discussing the origins, nature, and future of the contemporary U.S. human rights movement in detail, it is important to understand what precipitates it. At its core is the question of racism or, more broadly, supremacy. Its nearest roots lie in the sharp conflict of the mid-1940s and 1950s between the principles of human rights and the practice of discrimination based on race. At the time, the U.S. government chose explicitly and aggressively to protect domestic racial segregation at the cost of its own adherence to

human rights, despite the origin of those rights in much of its own leadership and tradition.[1] The contemporary U.S. human rights movement is, perhaps more than anything else, a renewed expression of the global struggle against structural and individual racism in the world and a resurgent voice in the effort to reclaim the United States as a nation which eschews supremacy for equality and favors dignity over oppression in both domestic and foreign policy.

Even as the struggle for human rights in the United States is about strengthening the fight against structural racism in America and elsewhere, it is also about situating race in the context of systematic inequality more generally. This wider analysis is what makes the U.S. human rights movement so complex, so powerful and, for some, so threatening. In trying to relink the struggles for civil and human rights, it seeks to connect the fight against racism to the often parallel fights against class, sex, nationality, or other status-based discrimination not only in this country but elsewhere.[2] It also seeks to reconnect the struggle for civil and political liberty with that for economic, social, and cultural equality. As noted by the Reverend Martin Luther King Jr. in a 1966 speech at Howard University, "Now we are grappling with basic class issues between the privileged and the under privileged. In order to solve this problem, not only will it mean restructuring the architecture of American society, but it will cost the nation something. . . . If you want to call it the human rights struggle, that's all right with me."[3]

Often the contemporary U.S. human rights movement is criticized for this all-embracing framework, for what is called its "kitchen-sink" quality, that is, its seeming dilution of the significance of particular rights abuses or of particular abused groups in the name of promoting all human rights for everyone. This critique arises most virulently from the conservative, corporate right, which in any case contests the legitimacy of all but the most narrow rights claims.[4] But it also resonates quite deeply with respected human rights leaders who question its effectiveness and a wide range of progressive social justice movements that identify themselves with single issues or groups or both. In sum, opposition to or concern about the U.S. human rights movement is as wide-ranging as the movement itself. This, as I will discuss throughout, has had a significant effect on the movement's development, its character, and its strategy.

Before we take a closer look at the most recent ancestry of the contemporary human rights movement in the United States, the fate of that early work, the various arenas in which it currently unfolds, the culture surrounding it, its most pressing challenges, and, finally, how it might go forward, we would do well to remember one simple fact about human rights: They belong to us. They don't belong to any one of us, or any group of us, or any political party of us, or any nation of us, or any continent of us, or any hemisphere of us. Human rights belong to all of us, everywhere. If the movement for human rights in the United States is about anything, it is about reaffirming this simple fact. It reminds us all that if the most powerful country in the world is allowed to slip uncontested out the vision and system of human rights, nothing less than the affirmation of our common humanity and the recognition of our shared fate are at stake.

WHERE WE ARE FROM

Freedom means the supremacy of human rights everywhere.

—Franklin Delano Roosevelt

A full discussion of the origins of the contemporary human rights movement in the United States would require a review of American and world history taken up, in part, in Volume 1 of this series. Here, I have confined myself to a more abbreviated discussion of the contemporary movement's proximate intellectual and political antecedents in order to set the stage for my discussion of that movement's current form.

The contemporary U.S. human rights movement's nearest intellectual relative is the fight against fascism. The movement takes as its premise the belief that assertions of supremacy, whether in the international or interpersonal sphere, are anathema to fundamental principles of equality and dignity. It assumes as its mantle the long American tradition of distrust of any form of government that sets itself above the will of the people or doubts the integrity of the common woman or man. It claims as its anthem Franklin Delano Roosevelt's 1941 assertion of the Four Freedoms: from fear, from want, to think, and to believe,[5] which were subsequently given fuller expression in the Universal Declaration of Human Rights of 1948. It asserts as its mission the restoration of what the Rev. Martin Luther King Jr. called "the era of human rights."

As much as the contemporary U.S. human rights movement takes its inspiration from the fight against fascism, its activism—even its very existence—arises out of the contradictions in that same tradition, especially in its American iteration. "It's tragic," then-president of the National Association for the Advancement of Colored People (NAACP) Walter White noted in 1944, "that the Civil War should be fought again while we are waging a World War to save civilization." He found it incomprehensible, Carol Anderson tells us "that the United States could fight 'a war for freedom' with a Jim Crow army." White's determination to resolve this contradiction in favor of freedom for all people drove the NAACP and more than forty other domestic groups to demand a place at the 1945 conference in San Francisco to establish the United Nations. "On behalf of the negroes not only of America but of Africa, the West Indies and other parts of the world," White said that the NAACP was going to make its "voice heard."

In San Francisco, the coalition of domestic groups fought hard for the inclusion of human rights in the UN Charter, an unequivocal commitment to decolonization and the creation of a human rights commission. Under the leadership of W.E.B. Du Bois, the NAACP's San Francisco delegation reached out to the organization's membership and mobilized pressure on the United States to stand against colonialism and for greater enforcement powers with respect to human rights. Du Bois later told a Chicago reporter "We have conquered Germany, but not [its] ideas. We still believe in white supremacy, keeping negroes in their place and lying about democracy, when [what] we mean [is] imperial control of 750 million human beings in the colonies."[6]

The domestic groups' unified efforts to link the fight against colonialism abroad with the struggle against racism at home provoked the very supremacist and nationalist forces they sought to defeat. As noted in *Eyes Off the Prize*, Secretary of State Edward Stettinius, who headed the U.S. delegation, avowed that his "job in San Francisco was to create a charter . . . not to take up subjects like . . . 'the negro question' or to allow something so 'ludicrous' as a delegation of American Indians . . . to present a plea . . . for recognition for the independence of the Six Nations (The Iroquois)."[7] Stettinus was equally lackluster in his support for decolonization. And John Foster Dulles ultimately saved the day for Southern segregationists by drafting an amendment to the Charter to ensure that nothing within it would "authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[8]

The conflict within the United States about the relevance of human rights to domestic racial, economic, and other injustice reached a fevered pitch over the next decade, exacerbated greatly by the politics of the Cold War. As noted above, I do not intend to restate this history here, which in any case has been much better told by Carol Anderson, Thomas Jackson, and others. My aim instead is to establish that the struggle for human rights in the United States, whether then or now, does not arise out of a battle *between* America and the rest of the world. Instead, it is a product of contradictions *within* the country's own political and legal tradition. Far from being a "foreign" problem, the relation of human rights to U.S. culture is a quintessentially domestic concern. It defines who the United States is as a nation and what it stands for in the eyes of its people and of the world.

HOW WE GOT LOST

> *[The] era of . . . domestic, social and economic 'reforms' through international treaties is at an end.*
>
> —John Foster Dulles

Still, it seemed throughout most of the Cold War that the early movement for human rights in the United States had come to naught. Beginning with Dulles's insertion of the "domestic jurisdiction" clause in the UN Charter right up until the ratification of the Genocide Convention in 1988, the U.S. government forestalled any significant application of human rights to itself. In the 1950s, the Eisenhower administration protected its treaty-making power by assuring Southern democrats there would be no ratifications challenging race discrimination. It wasn't until the Carter administration nearly twenty years later that any meaningful executive action with respect to human rights took place. Although the 1980s and 1990s witnessed U.S. ratifications of several key human rights treaties, in many cases their approval was accompanied by reservations and understandings that sharply limited their effect on domestic law and practice.[9]

Some notable exceptions to this trend did occur, but largely on the part of civil society. For example, in the 1960s, in the context of anticolonialism and the war in Vietnam, Malcolm X and the Reverend Martin Luther King Jr. both reiterated the need to link the civil and human rights struggles and adopt a

more comprehensive and internationalized approach to social and economic justice. In the 1980s, U.S. civil and other rights activists joined in the global campaign to end apartheid. In securing the passage of U.S. sanctions against South Africa, this coalition and its congressional allies handed Ronald Reagan the most significant foreign policy defeat of his presidency. These examples speak to an undercurrent of sustained resistance to the split between civil and human rights, as well as domestic and international advocacy. They also illustrate the linkage's enduring value for effective work for social change in the United States and other countries.

These telling exceptions, however, could not sufficiently counter the cumulative effect of several U.S. administrations' sustained resistance to the domestic application of human rights. Despite their historic links to domestic thought and advocacy, human rights came to be constructed as utterly foreign to the nation's internal life and the United States proclaimed itself as essentially above the law that it argued should apply to every other country. This "negative exceptionalism," as Harold Koh calls it,[10] not only separated the United States from the international community, but also divided it from itself. The unity of vision and purpose reflected in the human rights–related advocacy of the U.S. civil, women's, and workers' rights groups in the early period, for example, was largely lost to the polarizing effects of the Cold War and its internal and external progeny. Domestic antiracist, antisexist, and antipoverty movements, separated not only from their counterparts in the rest of the world, but also from each other. Efforts via human rights to reconnect them in whatever sphere were and often still are decried as *un*-American. Nonetheless, the early phase of U.S. human rights work accomplished a lot. More than anything else, it exposed the world to the internal contradictions in the character and conduct of the United States, helping to generate pressure for federal reform and to spur domestic change.[11] During the U.S. government's long course of self-inoculation from human rights, the domestic civil, women's, workers', and other social justice movements flourished as did the international movement for human rights. Both these developments arose, at least in part, out of the U.S. government's willingness to improve rights at home and defend them abroad in order to shore up its Cold War status as the "leader of the free world." Instead of working together to shape progressive U.S. policy on both fronts, however, these movements were now for all ideological and practical purposes distinct.

OUR WORLDS FELL APART

How is a black man going to get "civil rights" before he first wins his human rights?

—Malcolm X

This is the bifurcated world of social justice activism into which I, and most of my contemporaries, was born: civil rights on one side, human rights on the other. The one was domestic, the other foreign. Most U.S. social justice organizations were of one type or the other, as were the programs that funded them.[12] Not surprisingly, the situation within the Congress, the courts, and the

executive branch was much the same. There were, and still are, separate congressional committees for civil and human rights, elaborate barriers between international and domestic law, and a profound disconnect between the rights machinery at the Department of Justice and that at the Department of State. The current Bush administration is doing more than virtually any other to ensure that these movements, systems, and mechanisms remain apart.

Given this present context and past experience, many observers have argued that contemporary activists who seek to relink the struggle for civil and human rights should leave well enough alone. They suggest that although the various domestic social justice and international human rights groups operate in separate spheres, they have undeniably accomplished a lot; that the matters of interest to the civil and human rights committees of Congress are manifestly distinct; that the relationship between international and domestic law is fraught; and that Justice and State have different mandates. The effort required to interconnect all these separate spheres is monumental and, if the past is prelude, risky.

The content of this critique is accurate, but its aim is not. The goal of the contemporary U.S. human rights movement, as I understand it, has never been to confuse these distinct arenas or to collapse them. Instead it seeks to challenge the legitimacy of assuming (and institutionalizing) their innate separation. To Du Bois's generation the split between human and civil rights represented a mortal threat to everything they held dear. They saw in it a defense of white and American and other forms of supremacy that imposed significant limitations on the struggle for equality and freedom at home and in the world. To mine, a scant fifty years later, this exact same split was, more or less taken as a given. In whatever movements we were most active, we largely operated within the very limitations on the nature of our struggle (separated not unified), the scope of our rights (civil not economic), and the shape of our movement (domestic not international) that our forbearers were determined to resist. I was a human rights professional for nearly a decade before I ever worked on my own country. I'll never forget the words of the first domestic rights activist I reached out to for an investigation on the sexual abuse of women in U.S. prisons. "Where the hell," she asked me, "have you all been?"

To me this felt (and feels) like a legitimate question, especially as it was one she also asked herself. And it has become one that an increasing number of U.S. activists, communities, and groups, whatever their interests and in a variety of forms, are now asking each other: Why are we so separate? Whose interests does this separation serve? Does this really reflect who we are and for what we stand? Can we get back together?

WE REDISCOVER AND REBUILD OURSELVES

> *There is simply no better way to broaden all our struggles for social justice then through human rights.*
>
> —Loretta Ross

The contemporary movement for human rights in the United States reemerged out of a growing awareness, particularly among those most affected

by the denial of rights, that the old divisions between civil and economic or citizen and alien or domestic and international no longer made much sense. Some of its earliest leaders, including Cathy Albisa, Sandra Babcock, Willie Baptist, Ajamu Baraka, Larry Cox, Lisa Crooms, Krishanti Dharmaraj, Mallika Dutt, Heidi Dorow, Fernando Garcia, Steve Hawkins, Jaribu Hill, Monique Harden, Paul Hoffman, Cheri Honkla, Ben Jealous, Keith Jennings, Ethel Long-Scott, Leni Marin, Brenda Smith, Deborah LaBelle, Sid Mohn, Catherine Powell, Loretta Ross, and myself, were all deeply embedded and engaged in domestic civil, political, environmental, women's, workers', immigrant, prisoner, welfare, and gay rights advocacy. We saw the divisions between these movements as unresponsive to the experiences of the people we represented and unequal to the threats we faced.

The biggest challenge to this new U.S. human rights leadership—aside from the visceral opposition of the U.S. government—was that we ourselves were largely of a generation for which all these issues and strategies and arenas were ideologically and practically distinct. We understood from the beginning, therefore, that the contemporary human rights movement in the U.S. could and would not be built from the top down. It would have to come from within: within ourselves, within our communities, within our organizations, within our movements, within our government, and ultimately, within our country. As such, it would require a sustained community education and organizing effort, a push for the internal transformation of existing institutions and movements, a systematic reintegration of human rights into domestic law and policy, and the cultivation of new organizations, skills, and leadership to support this change. These insights lie at the heart of the approach to and strategy for rebuilding the U.S. human rights movement and culture that is outlined below, under subheadings drawn from the poetry of T.S. Eliot.

Home Is Where One Starts From

The contemporary movement for human rights in the United States begins with people in community. Many of its early leaders were of the same communities in which they worked. We were determined to demolish the divide between professional advocates and affected groups that had become quite pervasive in U.S. social justice advocacy more generally. These efforts amounted to a ground-level assault on the mini-supremacies of privilege and mini-nationalisms of identity that had trickled down from similar trends in U.S. legal and political life more generally. "To me," Fernando Garcia of the Border Network for Human Rights once said, "human rights are about equality and dignity. I felt the people themselves should make the decisions and do the work."

Garcia was not alone. Activists like Albisa, Dharmaraj, Hill, and Ross, for example, all created new projects or organizations, like WILD for Human Rights or the Mississippi Workers' Center for Human Rights, in which the work was determined by and the leadership drawn from the community itself. The aim was never to create a new set of institutions to compete with established civil, women's, or other rights groups, but to renew the human rights voice and vision within and across these existing movements. Human rights,

whether in the United States or in any other part of the world, does not function as a substitute for civil, women's, immigrant, gay, or other work. Instead they arise out of and reinforce such distinct work and connect it to similar activism in other issue areas and parts of the globe.

Still, these early U.S. human rights leaders and groups looked and felt like interlopers in their own communities. The by now ingrained perception of human rights as "foreign," however contrary it may have been to the history, values, and aims of U.S. social justice groups, colored many of these groups' profound skepticism with respect to the domestic human rights endeavor. One of my most respected professional mentors, for example, told me that the idea of reintegrating human rights into U.S. social justice activism "was a loser" and its potential "miniscule." This experience was not unique. U.S. human rights activists consistently report that they face substantial criticism from people and organizations with whom they were usually allied. This has had a profound effect on the movement's development and the mindset of its leadership.

The Wisdom of Humility Is Endless

The tendency of some U.S. human rights leaders when faced with criticism from within their own communities, organizations, and movements was to become defensive. I myself spent a long time avidly denouncing "American exceptionalism," before I ever acknowledged my own grandiosity in this regard. By contrast, the most effective human rights work and leadership within the United States involves a patient exercise in humility, a debunking from the inside out of the ideas of personal or racial or sexual or economic or national supremacy which have come to characterize the country despite its roots—however twisted—in the declaration of freedom and equality.

The point is that the contemporary movement's rebuilding strategy must encompass as much its own constitution and leadership as it does the country's. As noted in *Making the Connections*, "If human rights is to live up to its promise, the individuals that lead the movement and organizations that support it must consistently and deliberately examine our own conduct and ensure that the principles we hold up to others are ones that we uphold ourselves."[13] This level of self-discipline does not come easily to any human being, including one dedicated to the promotion of human rights. It requires not only a fairly unusual organizing strategy, but also a unique form of leadership.

It may seem counterintuitive to adopt humility as an organizing strategy, but for U.S. human rights activists it makes perfect sense. At the level of principle, as Garcia pointed out, human rights require an egalitarian approach. At the level of practice, no other method for rebuilding a domestic human rights movement will succeed. To assert the primacy of human rights would be to reaffirm their separation from existing U.S. social justice work. On the other hand, to reintroduce human rights as a way to respect and strengthen that work is to reclaim their inherent (and inherited) connection to the pursuit of lasting social change. Once the connection to human rights is rediscovered within domestic social justice work it becomes less treacherous to navigate its resuscitation in the internal political, legal, and popular culture of the country overall.

And All Is Always Now

In pursuit of this broader transformation, the U.S. human rights movement aims to link its in-depth education, training, and organizing work in particular areas or communities with outreach to social justice activists and movements more generally. It also functions cross-sectorally, connecting work at the community level with activism at the level of the U.S. judiciary and even of the international community. It also deploys multiple methodologies, linking its education and organizing efforts with participatory fact-finding work, policy advocacy, and legal change. Obviously, the enormity of this task frequently overwhelms the fledgling movement's capacity. Nonetheless, the disaffection from human rights and the addiction to supremacy so pervades U.S. identity that the appeal of human rights must be reinvigorated at all these levels simultaneously. Otherwise progress at one level will be, and often is, preempted at another.

Still one has to question the advisability or even conceivability of pursuing a movement-building strategy of such inordinate ambition and complexity. To pursue such changes in consciousness and action within a single-issue movement is challenging enough. To do so in a cross-issue effort is exponentially more difficult. Not surprisingly, the contemporary U.S. human rights movement is under constant pressure, from within and without, to narrow its focus: to emphasize a single issue, prioritize a particular sector, or choose a single method. By and large, this pressure to self-limit is one that, in principle at least, the contemporary movement resists. Whether it should continue to do so—given the degree to which its current resources are overstretched—is one of the most pressing strategic questions now facing it and will be discussed in more detail in the section below on challenges. As it stands now, significant work across a wide range of communities, issue areas, sectors, and methods is taking place and, as discussed in the remainder of this section, it increasingly takes a better capacitated and more coordinated form.

The Detail of the Pattern Is the Movement

So much is happening at once in contemporary human rights work that is can be difficult to discern the movement's overall shape or even its actual existence. The fact that it does not yet entirely cohere, however, does not mean that it isn't there. In fact, it's popping up everywhere, from international, national, state, and local groups, to a wide range of issue areas, across a variety of sectors and methods and with respect to advocacy at both the domestic and international level.

International, National, State, and Local Groups:

U.S.-based international human rights organizations like Amnesty International U.S.A (AIU.S.A), Global Rights, Human Rights Watch, Human Rights First, and Physicians for Human Rights, which once focused almost exclusively outside the country, have expanded their U.S. programs and reestablished their relationships with domestic social justice groups. National civil and other rights organizations with state and local counterparts, like the ACLU

and the Leadership Conference on Civil Rights, increasingly see human rights as a dimension of their own work, rather than something carried out by other organizations focused elsewhere. Additionally, new national organizations have been founded to address the needs of the field, including the National Center for Human Rights Education, the National Economic and Social Rights Intuitive (NESRI), the Opportunity Agenda, and the U.S. Human Rights Network. A growing number of local and regional groups have also arisen, like the Border Network for Human Rights, the Mississippi Workers' Center for Human Rights, Montana Human Rights Network, the North Dakota Human Rights Coalition, WILD for Human Rights, the Women of Color Resource Center, or the Urban Justice Center Human Rights Project, all of which frame and carry out their U.S. work entirely in terms of human rights.

Work in Different Issue Areas

The contemporary human rights movement is diverse not only geographically, but also by issue area. For example, along with the Border Network, immigrant rights groups like CLINIC, Hate Free Zone, the National Network for Immigrant and Refugees Rights, and the Rights Working Group have all begun to integrate human rights into their education, organizing, and advocacy work. Similar work in criminal justice is being pursued by the Center for Community Alternatives, the Haywood Burns Institute, the Youth Law Center, and groups working on juvenile life without parole in Michigan, Illinois, and Minnesota. Groups like Gender-Pac, Immigration Equality, IPAS, and SisterSong are building human rights into their gay and gender-based advocacy, including in the area of reproductive rights. The Indian Law Resource Center and the Western Shoshone all use human rights to advance the local work of Native Americans. Community Asset Development Redefining Education (CADRE), the Deaf and Deaf-Blind Committee For Human Right, the Coalition of Immokalee Workers, the Miami Workers Center, the National Economic and Social Rights Initiative, National Law Center for Homelessness and Poverty, and the Poor People's Economic Human Rights Campaign increasingly work with local communities to demand access to housing, health care, decent work, and education. Advocates for Environmental Human Rights and other groups that are focused on the effects of Hurricane Katrina are using human rights to take an integrated, structural approach to issues like racism, sexism, environmental degradation, economic depravation, and the right to return.

Multiple Methodologies

Current U.S. human rights work also takes place across a wide range of methods. Groups like the Border Action Network and Breakthrough are pioneering community-based education and organizing strategies that are gradually being adapted by other groups. AIU.S.A, NESRI, the Poor People's Economic Human Rights Campaign, the Urban Justice Center, and Witness are all developing participatory fact-finding methods that affected communities can themselves use to record and combat abuse. The ACLU, the Center for Constitutional Rights, Legal Momentum, and some state-level legal groups

increasingly raise human rights claims in their briefs and arguments. Similar work has yet consistently to emerge regarding local-, state-, and national-level policy, but significant advocacy campaigns are underway with respect to the military commissions, the restoration of habeas corpus and adherence to the norms prohibiting torture and cruel, inhuman, and degrading treatment.

Relinking Domestic and International Advocacy

Increasingly this internal human rights work reconnects to advocacy at the international level. In June 2006, more than 140 U.S. organizations representing a wide range of issue areas and sectors participated in an unprecedented collaborative effort to challenge the U.S. report to the UN Human Rights Committee and to actively engage the international human rights process as a supplement to their domestic advocacy. Similar efforts are envisioned for the U.S. report to the UN Committee that monitors compliance with the treaty to eliminate race discrimination. Alongside these relatively episodic activities, groups such as AIU.S.A, Human Rights Watch, and other traditional human rights groups with expertise in international advocacy more regularly ally with their domestic counterparts to raise issues of mutual concern. Similarly domestic groups like Advocates for Environmental Human Rights, the Center for Constitutional Rights, or the Kensington Welfare Rights Union consistently link to their sister organizations in other countries.

Training and Communications Support

This interwoven tapestry of U.S. human rights activities can increasingly count on high-level and much-needed support from organizations and projects that have arisen to build domestic human rights capacity and effect via issue-, method-, and sector-specific training or communications strategy and support. For example, the ACLU's Human Rights Project, the Center on Housing Rights and Evictions, the National Center for Human Rights Education, the National Economic and Social Rights Initiative, and the U.S. Human Rights Network all offer regular trainings by issue area or method or both. These groups in turn increasingly receive assistance from law school and other university-based human rights centers including those at American, Berkeley, Columbia, Connecticut, Fordham, Georgetown, Harvard, New York, Northeastern, Northwestern, Seattle, and Yale. These groups can also count on ever more expert assistance to enhance their strategic communications through the groundbreaking work of the Border Human Rights Coalition, Breakthrough, Fenton Communications, the U.S. Human Rights Network, the Opportunity Agenda, Riptide, the Spin Project, and Witness among others.

Networking and Coordination

Finally, all of these groups are gradually finding ways to come together at local, regional, and national levels, and by issue area and sector, for both domestic and international advocacy. For example, the Atlanta-based U.S. Human Rights Network (and its issue and method based caucuses), the border-based Border Rights Coalition, the Chicago- and Minneapolis-based Midwest

Coalition for Human Rights, the DC-based Rights Working Group, the Mississippi-based Southern Human Rights Organizer's Network, and the New York–based Bringing Human Rights Home Lawyers Network all bring their constituents together on a regular basis to develop both strategy and capacity.

As a result of these developments, the contemporary effort to relink civil and human rights in the United States has a far greater chance of gaining momentum than it did even a decade ago. International human rights, domestic human rights, and U.S. civil, economic, and other rights groups have joined the effort. The work is taking place at the local, state, regional, national, and international level, within a wide range of issue areas and via everything from popular education to litigation to academic scholarship. Although it remains markedly undercapacitated and underresourced in the depth of its work and the pattern of its relationships, a new movement for human rights in the United States has clearly emerged.

The success of the contemporary movement derives from the fact that it arises out of domestic social justice work rather than, as is often alleged, being imposed upon it. At the micro level, the renewal of human rights in the United States reflects the domestic movement's collective fatigue with being divided within itself and from its counterparts elsewhere. At the macro level, it responds U.S. civil and human rights groups' growing recognition that an America which sets itself above the rest of the world poses a threat to equality and dignity not only abroad but also at home. These various groups remain largely distinct but they are no longer ideologically and practically disconnected. This is a significant accomplishment of the contemporary movement for human rights in the United States. The question for the next section is whether that movement can expand beyond itself and connect to the culture at large.

THE CURRENT ENVIRONMENT

A universal-feeling, whether well or ill-founded, cannot be safely disregarded.

—Abraham Lincoln

Even as the contemporary movement has expanded its influence, it has never lost sight of the fact that deference to human rights is no more ingrained in American identity than is defense of supremacy, perhaps even less so. What preoccupies the movement is the struggle between these two tendencies at every level of U.S. society. The hunger for supremacy in the United States may famish its craving for human rights, but it also fuels it. The question now facing U.S. human rights activists is how best to stoke the country's growing demand for human rights and at the same time dampen its appetite for the opposite. As a matter of survival, this means the movement must find ways to resonate with the broader legal, political, and popular culture, counter those who seek to eradicate it and, most important, attend to the needs the vast majority of people who fall somewhere in between.

There can be no doubt that the horrific events of September 11, 2001, and their aftermath accelerated, but also fueled resistance to, the uptake of

human rights by mainstream legal and political culture in the United States. As the remainder of this section sets forth, powerful actors from the Supreme Court on down increasingly assert the relevance of human rights to domestic law, policy, and practice. Yet, the White House, the attorney general, the former secretary of defense, and many other influential figures assert the exact opposite. In the middle there are ever more key stakeholders, including jurists, policy makers, academics, donors, and activists who reject the exceptionalist assertions of the executive, but remain resistant to the domestic resort to human rights. Leaving aside for the moment its need to appeal to the general public, the contemporary movement must take heed of the concerns of these key stakeholders if it is to rebuild not only itself but a broader culture of respect for human rights. These various actors, from allies, to enemies, to skeptics are discussed in that order below.

Supreme Court Justices

The U.S. human rights movement boasts some extremely unlikely and perhaps unwitting allies, including several current and former justices of the United States Supreme Court. While they consistently argue that international law is "not controlling," Justices Breyer, Ginsberg, Souter, Stevens, O'Connor, and Kennedy have all defended its interpretive weight. For example, on March 1, 2005, when the Supreme Court cited human rights in its decision to overturn the juvenile death penalty, Justice Kennedy wrote, "It does not lessen our fidelity to the Constitution . . . to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those rights within in our own heritage of freedom." Similarly, in a speech on February 7, 2006, Supreme Court Justice Ruth Bader Ginsberg restated her belief that "the U.S. Supreme Court will continue to accord 'a decent respect to the opinions of [Human]kind' as a matter of comity and in a spirit of humility."

Legal Scholars and Practitioners

Interest is also growing in the broader legal community. The Aspen Institute hosts annual programs to educate American judges about human rights and humanitarian law and Brandeis University sponsors convenings of U.S. and international judges to address issues related to international justice. Columbia, Fordham, Georgetown, Howard, and New York University law schools are all hosting conferences on the applied use of human rights in domestic legal thought and arguments with specific regard to immigration, civil rights, and criminal and economic justice. The American Society of International Law increasingly features debate on the domestic application of human rights in its annual meetings and the American Constitution Society is developing a human rights dimension to its Constitution 2020 project.

Policymakers, Think Tanks and Networks

Although outside the areas of torture, detention, and due process U.S. policymaker support for the reintegration of human rights remains weak, policy

advocates, think tanks, and support group express growing human rights interest. The Migration Policy Institute, for example, released a 2006 report titled *America's Human Rights Challenge: International Human Rights Implications of US Immigration Enforcement Actions Post-September 11*. The Center for American Progress joined the campaign against the military commissions at Guantánamo Bay and for the restoration of habeas corpus. The Western States Center integrated human rights into its effort to strengthen regional social justice movements. The Applied Research Center has expressed interest in researching the historic and current links between civil and human rights. By contrast, MoveOn.Org told a May 2006 meeting of U.S. human rights activists hosted by Breakthrough that human rights is not a language that resonates very well at the moment with its membership. This remains characteristic of opinion in this sector.

National Civil and Other Rights Organizations

Given the United States's utter determination to shield itself from meaningful legal accountability to human rights, it is notable that a growing number of public-interest legal organizations are developing their capacity to deploy human rights. The Center for Constitutional Rights has a historical and sustained commitment to this approach and the ACLU has more recently developed a sophisticated human rights unit. The Asian American, Mexican American, and NAACP Legal Defense Funds, the Center for Reproductive Rights, and Legal Momentum have all, to varying degrees, made use of human rights arguments in domestic litigation and they increasingly express an interest in developing their internal knowledge and expertise in this area. Legal Momentum is also in the process of developing a program to provide training to U.S. judges with respect to the domestic application of human rights.

Media

Domestic human rights work has never attracted much attention from the mainstream media. But via the leadership of groups like the Border Network for Human Rights, the Kensington Welfare Rights Union, the Mississippi Worker's Center, the U.S. Human Rights Network, and others, U.S. human rights issues—and the movement itself—are attracting more attention from the ethnic, local, online, and, occasionally, national press. *The American Prospect*, for example, did a special supplement dedicated solely to the reemergence of a domestic human rights movement, which was also the sole focus of the spring 2007 issue of *YES!* magazine. The Opportunity Agenda, in cooperation with a wide range of advocacy and communications groups, is coordinating a national effort to poll American attitudes on human rights and the U.S. and to develop and disseminate more persuasive messages in this regard.

Donors

One of the great ironies of the resource-starved movement for human rights in the United States is that it is often charged with being "donor driven." This

charge is frequently leveled at human rights movements in other countries as well. It implies that the domestic human rights movement in question is actually instigated by something foreign to itself. Here, as elsewhere, and now, as before, this is a very potent charge. In the case of the United States it is often leveled by observers with a genuine concern about the movement's bona fides. But it has the perhaps unintended effect of further obscuring the U.S. civil and other rights groups' historic links to human rights and of abetting the assault on domestic human rights activism as inherently un-American. It also effectively denies the existence and advocacy of the domestic human rights activists themselves.

Donors who support domestic human rights work, and their numbers are steadily growing, don't drive that work. Instead, they try to make way for it in their own programs or via collaborative funds. Quite often these donors are themselves undergoing a change in approach to the rights work being supported by their own institutions. They see a need, for example, to better link their international and domestic programs, or to better connect their grant making across issue areas or to strengthen their support for the defense of human rights across the board. Some donors, like the Ford Foundation, the Libra Foundation, the Mertz Gilmore Foundation, the Otto Bremer Foundation, the Overbrook Foundation, and the Shaler Adams (for whom I work) frame and carry out a great deal of their U.S. grant making in human rights terms. Many others, like the Atlantic Philanthropies, the JEHT Foundation, and the Open Society Institute support domestic human rights work when it most effectively intersects with their existing priorities. Increasingly these and other donors work together to respond to cross-cutting needs of the movement and strengthen its effect. In June 2005, for example, a number of donors founded the U.S. Human Rights Fund, a collaborative effort to respond to the self-expressed needs of the movement to enhance its capacity, connection, communications, and impact.

Staunch Opponents

One of the most encouraging, if frustrating, things about the contemporary human rights movement in the United States is that its most likely supporters are also its most loyal critics. To be sure, extreme opponents to relinking civil and human rights exist. Today's version of the supremacist and nationalist voices of the Cold War denounce the contemporary U.S. human rights efforts as foreign, a threat to American sovereignty, a vehicle for undue racial, sexual, and economic equality and, directly or indirectly, a sop to terrorists. On March 2, 2007, for example, the *Rocky Mountain News* decried the decision of the Inter-American Commission on Human Rights to take up a U.S. case involving severe, unremedied, and ultimately fatal domestic violence as "an attempt to undermine U.S. legal sovereignty."

The extreme opposition to human rights in the United States is well organized, well resourced, and emboldened by fifty years (or more) of dominance. For meaningful changes in U.S. policy and practice to occur it must be countered. But ideas of American or white or other supremacy will never be effectively challenged unless the contemporary U.S. human rights

movement first successfully allies itself with those who also oppose such extreme exceptionalism, but remain unconvinced that it can be effectively countered via the reintegration of civil and human rights. Such friendly critics abound in American legal and political life, in and out of government, among both elite and grassroots groups, representing both donors and activists. Their voices cannot and should not be rejected alongside those of the extremists who reject the domestic application of human rights altogether. The movement ignores its more tempered critics at its peril.

Loyal Opponents

Generally speaking, the views of what might be called the contemporary movement's loyal opposition reflect little disagreement with its basic premise: that the United States should uphold human rights. The loyalist critique is more pragmatic. It relies on two key assumptions: (1) that reinvigorating the domestic human rights movement will provoke a legal and political backlash which does more harm than good, and (2) that reintegrating human rights into on U.S. legal and political culture will, in any case, have little meaningful impact. Movement supporters often counter that the more powerful the backlash the more substantial the impact. This may be true. But to those potential allies concerned about the best way to defend rights in the current context, provoking one's opponents without accruing immediate benefits seems a torturous and risky route. If the movement is to broker the broader alliances which are necessary to its overall success, pervasive concerns about backlash and impact will have to be more thoroughly addressed.

Concerns about backlash are well founded. Justice Ginsberg, for example, revealed in February 2007 that she and Justice O'Connor had received death threats due to their use of foreign and international law in U.S. jurisprudence. Federal judges in general who cite to human rights and humanitarian law have been threatened with impeachment. Potential citation to the Geneva Conventions in the context of the so-called war on terror led the current attorney general to denounce them as "quaint" and "outmoded." U.S. activists who have raised domestic human rights concerns in the Inter-American or United Nations systems report being personally reprimanded by representatives of the U.S. government. Their experiences recall those of Du Bois and his colleagues who, for all their troubles to bring the fate of black Americans to the attention of the United Nations, were denounced as pro-Soviet, and, in some cases, deprived of their passports. The early movement did not survive this backlash, hence the instinctive reaction of modern-day critics that its progeny will suffer the same fate.

In the intervening years, however, a more conducive environment for domestic human rights work has arguably emerged. In the past five years in particular two interrelated developments have helped to challenge the notion that adherence to human rights is bad for America. The first, as noted above, is the so-called war on terror. As result of the actions of the Bush administration and its allies, more and more people have seen the costs at home and

abroad of America's double standard with respect to human rights and have from the military to the judiciary to the polity risen up to demand U.S. accountability to standards prohibiting torture and prolonged detention and requiring due process of law. While these voices might not all speak up for the reintegration of human rights into every other area of concern to domestic social justice advocates, they have opened up significant political space for the second main development of recent years: the increasingly trained, organized, and vocal domestic human rights movement. These two advantages were not ones enjoyed by Du Bois and his peers. If the contemporary movement can further expand its outreach and strengthen its effect it may be better able to withstand the withering attack on its legitimacy that is sure to come.

Herein, however, lies the rub. The contemporary movement for human rights in the United States cannot expand its outreach and impact without courting backlash. But backlash, or fear thereof, significantly constrains its breadth and effect. Although the environment has changed, the movement still operates within the ruling mindset that the domestic application of human rights to the United States is un-American or dangerous or ultimately and, for the government's purposes conveniently, without effect. Even if the first two assumptions can be successfully challenged, the last, if left unaddressed, is fatal. The contemporary movement for human rights in the United States must either better explicate and demonstrate its impact or the risk involved in rebuilding it will be taken only by those for whom it is a matter of necessity or conviction or both. At present these spirited U.S. human rights defenders, while increasingly numerous, do not constitute a large enough percentage of the American public or its elected leadership to reshape the country's identity, institutions, and culture to favor an inner allegiance to human rights. Additional proof of the "value-added" of human rights to U.S. social justice, however instrumental this may sometimes seen, is desperately needed if support for the movement is to grow.

Proving the value-added of human rights in a country that for more than fifty years has argued that human rights are the one value it need not add is tough. Despite an arguably more conducive legal and political and advocacy environment for the domestic reintegration of human rights, the instruments of such a broad cultural change, whether in the White House, or the Congress, or the courts, or the organizations, or the communities, or even the people themselves remain insufficiently mobilized for it. To engage them more actively in the movement's objectives requires, as discussed in some detail above, a simultaneous education, organizing, fact-finding, policy advocacy, litigation, and scholarship effort across issue areas, sectors, and localities which is simply not conducive to short term outcomes. Yet without such relatively immediate effects, and the infrastructure necessary to obtain them, the movement will never be able to build the momentum and membership necessary to deliver on the longer-term change. These issues of infrastructure and impact, raised in the context of the need for an overall strategy and concluding with a reflection on capacity, are discussed in the next section on current challenges.

OUR CURRENT CHALLENGES

What makes this hope radical is that it is directed toward a future goodness that transcends the current ability to understand what it is.

—Jonathan Lear

The only way to move as much change as is envisioned by the U.S. human rights movement is to divvy up the labor in the context of a coordinated overall strategy that provides for both meaningful impact and requisite capacity. Sadly, and not for lack of trying, the movement as yet lacks a sufficient quantity of all four of the above areas. There are at present too few opportunities to devise coordinated strategy, not enough people and organizations to make it stick, insufficient impact, particularly with respect to policy, and underdeveloped capacity. The remainder of this section sets forth how some of these challenges are already being and might further be addressed.

Overall Strategy

The pursuit by U.S. human rights activists of a unified field-building strategy which works simultaneously across issues, methods, sectors, and localities far surpasses the current movement's infrastructure and capacity. As a result, it faces constant pressure, from within and without, to focus on this or that issue, one or another sector, a single method or place. By and large the movement has resisted this pressure to self-limit. But as it has grown, the tension between long-term mobilization and short-term effect has only gotten more and more acute.

No simple resolution of this dilemma exists. On the one hand, focused human rights work in a single-issue area or sector might deliver visible benefits in the short run even if they did not accrue to the entire movement. On the other hand, more widespread work to build the field as a whole might produce more pervasive change in long run even if was of little immediate assistance to the movement's various constituents. For the U.S. human rights activists, the answer thus far lies somewhere in between these two extremes. It involves both the retention and refinement of a long-term, unified movement-building strategy and, within that context, the setting of short-term, discrete priorities.

To its immense credit, the contemporary movement for human rights in the United States has already assembled the component parts of a unified strategy. The trouble is, that with the exception of the certain regular meetings like biannual convenings of the U.S. Human Rights Network or the Southern Human Rights Organizers Conference, it rarely has enough space of time to review its progress overall, identify gaps, and set priorities. Smaller issue- or sector-specific conferences also take place, but they are relatively infrequent and don't always connect up to a broader strategic process. If the movement is to be able to prioritize key initiatives without sacrificing overall progress, it will have to devote greater space and increased resources to the elaboration and dissemination of its overall strategy.

In the meantime, mounting pressure on the movement to adopt the very same issue-, sector-, method-, or region-specific divisions it arose to help heal is at once unforgiving and understandable. The contemporary movement for human rights simply is not yet at the stage where it can deliver the type of immediate results which existing social justice groups and their supporters need and expect. By the same token, it cannot afford to shortcut the movement-building process. Caught between this particular rock and hard place, the movement has no choice but to withstand the critique of its long-term base-building strategy and, at the same time, find ways to deliver short-term outcomes that benefit its constituents and foster its necessary alliances.

The challenge, assuming progress in the elaboration, dissemination, and implementation of an overall movement-building strategy, is how to set these short-term priorities. A recent assessment of the U.S. human rights field suggests that they are less likely to be defined by issue area than they are by sector, with priority given to community-based education, training, and organizing across issues and localities. This makes strategic sense. Any other approach inhibits the participation of affected groups and fuels the notion that human rights are foreign to American culture, come from the top down, or pertain only to certain groups. The rub is that education, training, and organizing work at the level of the community across both geography and issue area takes time. It does not always yield short-term changes in government policy, particularly at the federal level. Unless the necessary infrastructure is developed to link community education, training, and organizing to influencing related local, state, and federal policy, the tension between the U.S. human rights movement's long- and short-term work may emerge as its Achilles heel.

Infrastructure

The problem of linking local organizing and national policy is hardly unique to the U.S. human rights community. What is unique to this community is its intention to do so across issue areas and via the reintegration of human rights into work at all levels. To achieve this end, the movement has had to develop a set of organizations as a supplement to existing progressive infrastructure in the United States, which are designed to foster cross-issue work and help to develop human rights expertise at all levels. This U.S. human rights infrastructure, which has already been enumerated above, provides education and organizing support to local communities, trains advocates in key issue areas and sectors, builds essential communications skills and strategies, links U.S. human rights activists and groups to each other, and reaches out to social justice movements and other key stakeholders in the U.S. and elsewhere. In large measure, it serves as a map of the movement's current impact on U.S. culture and an itinerary for its future work. The variety of groups and the diversity of their locales, areas of interest, and sectors paints an encouraging picture of the movement's initial success and potential longevity.

Two areas in which this infrastructure is particularly underdeveloped, however, concern public interest litigation and policy advocacy—whether at the state, national, or international level—and grassroots organizing. Legal and policy work at all these levels does occur, but it could benefit from much

more targeted research, sharper strategy, and technical support. Similarly, priority has been given to outreach and education at the grassroots level, but it needs to be accompanied by an increased focus on and capacity for community organizing. It may make sense in the coming phase for the movement to consider focused efforts in these two areas, in the context of its overall strategy, both by relying on existing infrastructure and developing any necessary supplementary capacity.

Impact

At the risk of contradicting everything I have said so far about the need for field-wide strategy and infrastructure, I am going to make an argument for the contemporary movement, in the context of an overall strategy and reliant on related infrastructure, to focus more intensively on issue-specific advocacy. I recognize that if we are after overall unity in a country and set of social justice movements characterized by its opposite, this may tempt fate. At an earlier stage of in the movement's development, as proved true of its Cold War predecessor, too narrow a focus would have rendered it unsustainable. But given the contemporary movement's growth, its determined iteration of an overall strategy and the gradual emergence of a field-wide infrastructure, I believe it would be possible to develop coordinated efforts to advance short-term, single-issue campaigns in a way that would assist rather than derail the movement's overall advance.

Some likely candidates for such issue specific work have already emerged: These include U.S. adherence to the ban on torture and cruel, inhuman, and degrading treatment; the restoration of habeas corpus; an end to the practice of sentencing juveniles to life with no possibility of parole; the reinvigoration of judicial oversight of deportation; the recognition of the right to return, including to public housing, of those displaced by Hurricane Katrina; the right to non-discrimination, including with respect to asylum, on the basis of one's gender identity or HIV status; and finally, the right to accessible and accountable education and health care. These issues have several things in common: They affect a large number of people across a wide array of communities in different parts of the country, they lend themselves to multi-method and cross-sector advocacy, they have both grassroots and elite constituents, they are of great interest inside and outside the country, and they all have an inherent relationship to fundamental principles of human rights. Perhaps via the articulation of criteria such as these, the contemporary movement can ensure that as it responds to the demand for focused, short-term impact, it also advances its longer-term, field-building goals.

Capacity

I want to close this section on challenges with a brief reflection on the issue of capacity. The contemporary movement for human rights in the United States asks and expects a lot of itself, its potential allies, its government and, ultimately, its country. I believe it does so in all humility and out of a conviction that one's inner commitment to human rights says a lot about

who one is as a person or as a nation. For all this idea's simplicity, however, it involves an enormously complex cultural shift and one that must go head-to-head with the equally, if not more powerful notion that our identity depends on the assertion of our supremacy whether over other individuals or other countries. Such a struggle must be waged, however incrementally, at every level of American society. This requires a level of capacity that the contemporary movement and those who support or ally with it do not yet have.

At one level, this is obviously about resources. For example, the long-term movement-building effort and related work on overall strategy and infrastructure is *very difficult* to adequately resource. At the same time, the short-term issue- or sector-specific work is also remains underfunded. The donors, like the movement itself, need a grant-making strategy wherein they *both* pool their funds to advance the movement's long-term, field-wide efforts *and* use their own issue- or sector-specific programs to fund shorter-term human rights–inflected work in those discrete arenas. In my view, the movement itself needs to develop a parallel fundraising strategy and defend it collectively.

At another level, however, the question of capacity is much more about leadership than it is about money. In this respect, the contemporary movement is quite rich. Human rights, as the movement's mantra goes, begin in small places, close to home. Its leadership strives to be as principled, accountable, egalitarian, and diverse as the change it seeks. Such leadership, whether in this or any other movement, is a rare commodity and its development could do with some targeted attention and flexible support, particularly for younger activists whose generation already sees human rights as more integral to its culture than did, for example, my own.

WHERE DO WE GO FROM HERE?

Let America be America again.
Let it be the dream it used to be.

—Langston Hughes

The contemporary movement for human rights in the United States owes a huge debt to those early leaders like Mary McLeod Bethune, W.E.B. Du Bois, Fannie Lou Hamer, Martin Luther King Jr., Eleanor and Franklin Roosevelt, Walter White, and Malcolm X who, in their own ways and with varying degrees of conviction and success, laid the groundwork for the present effort to reintegrate human rights into U.S. social justice work and American legal, political, and popular culture more generally. Now, as then, this is a complex and risky undertaking. It involves resisting the lure of national, or white, or other supremacies wherever they occur and choosing instead the promise of equality and dignity in every walk of public and private life. It requires a unified strategy across issue, method, sector, and place that is rooted in affected communities and links domestic social justice groups to each other and to their counterparts in other countries. It entails strategic alliances at all levels of American society with those who may not join the

movement's ranks but nonetheless share in its aims. And it relies on supporters and leaders who reflect and enable this vision.

Given the inequality, polarization, deprivation, and disillusion that characterize so much of U.S. legal, political, and popular life at the current moment, such a vision may seem more like a dream. And so it is. Yet, inspired by its forbearers and instigated by their progeny, the contemporary movement for human rights in the U.S. has gradually become a reality. What remains going forward is to strengthen its strategy, infrastructure, impact, and capacity so as to give it a fighting chance to once again define the United States as a country which in the eyes of its own people and of the world stands for the idea that human rights belong to us all.

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NOTES

1. Carol Anderson, Excerpts from *Eyes Off the Prize* (Cambridge: Cambridge University Press, 2003) reprinted with permission of Cambridge University Press; Mary L. Dudziak, *Cold War Civil Rights* (Princeton, NJ: Princeton University Press, 2000); Thomas F. Jackson, *From Civil Rights to Human Rights: Martin Luther King, Jr., and the Struggle for Economic Justice* (Philadelphia: University of Pennsylvania Press, 2006).

2. See, e.g., Women's Institute for Leadership Development for Human Rights and Shaler Adams Foundation 2000, *Making the Connections*, available online at www.fordfound.org/publications/recent_articles/docs/close_to_home/part3.pdf; U.S. Human Rights Network, *Something Inside So Strong: A Resource Guide on Human Rights in the United States*, 2002, available online at www.ushrnetwork.org.

3. Martin Luther King, Seventh Annual Gandhi Memorial Lecture, Howard University, November 6, 1966, cited in Jackson, *From Civil Rights to Human Rights*, p. 244.

4. See "Stand up for your rights," *The Economist* March 22, 2007), available online at www.economist.com/opinion/displaystory.cfm?story_id=8888856.

5. Franklin D. Roosevelt, Four Freedoms Speech to the 77th Congress, January 6, 1941, available online at www.presidentialrhetoric.com/historicspeeches/roosevelt_franklin/fourfreedoms.html.

6. Anderson, *Eyes Off the Prize*, p. 51. Excerpts from *Eyes Off the Prize*, © 2003 by Carol Anderson. Reprinted with permission of Cambridge University Press.

7. Anderson, *Eyes Off the Prize*, p. 41 (*quoting* Edward Stettinius, diary, Box 29, week 8–14, April 1945). Excerpts from *Eyes Off the Prize*, © 2003 by Carol Anderson. Reprinted with permission of Cambridge University Press.

8. Charter of the United Nations, Article 2, para. 7.

9. See, among others, Dorothy Q.Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 Harv. Hum. Rts. J. 9 (Spring 1996): 15.

10. Harold Hongju Koh "Foreword: On American Exceptionalism," *Stanford Law Review* 55 (2003).

11. Dudziak, *Cold War Civil Rights*; Anderson, *Eyes Off the Prize*.

12. See Dorothy Q. Thomas, A *Revolution of the Mind, Funding Human Rights in the United States*, a report to the Ford Foundation, 2002.

13. "Making the Connections: Human Rights in the United States," WILD for Human Rights and the Shaler Adams Foundation, 2000, p. 26.

CHAPTER 2

Economic and Social Rights in the United States: Six Rights, One Promise

Catherine Albisa

Few people would hesitate to condemn poor education systems, inadequate healthcare infrastructure, hunger, scores of families suffering from abject poverty and homelessness, wages that do not support a dignified life, and widespread economic insecurity. Nor would anyone plausibly deny that all of these are sharply evident in the United States. Yet, the U.S. government steadfastly refuses to recognize fundamental economic and social rights to be free from such conditions and has failed to reform its legal and political system to protect people from the structural inequalities that amount to a systemic assault on human dignity.

It is a contemporary cultural paradox that the United States places immense values and emphasis on human freedom, but simultaneously debases and discounts the human dignity that constitutes the foundation for any legitimate expression of freedom. To be free only to suffer deprivation and exclusion is no kind of freedom at all. Freedom inherently implies the ability to exercises choices, and that ability is fully dependent on a protective, effective, and rational social infrastructure.

Economic and social rights are the foundation for freedom. The United States has recognized this indisputable link at different points in history, most explicitly in recent history through the administration of Franklin D. Roosevelt, as well through popular sentiment at the time. Roosevelt's well-known "Four Freedoms" speech permanently connected freedom from violence and war with freedom from want, and recognized that "necessitous men are not free men." This vision took root within an international human rights system that was born of the horrors of the Nazi genocide, and was grounded in a belief

that every human being had fundamental rights, including economic and social rights, simply by virtue of being human.

The Universal Declaration of Human Rights, drafted under the watchful eyes of Eleanor Roosevelt, was truly a revolution in values. Not only did it proclaim that every human being, without exception and irrespective of the position of his or her particular government, had fundamental rights regardless of race, sex, religion, or any other status, it also included among those fundamental rights access to adequate housing, education, food, and decent work, along with a right to health and social security.

These six rights were part of one large and visionary promise. A promise by all the participating nations in the United Nations to create a new world where no group of people could ever be so marginalized and unprotected that another genocide would occur. It is far from a secret that this historical promise remains painfully unfulfilled. The world has suffered from a multitude of genocides since World War II, including the genocides in Rwanda and Bosnia after which, once again, international tribunals were set up to deal with the grisly aftermath in the name of "accountability to human rights."

But the notion of accountability has limited meaning if it is confined to narrow legal criminal processes directed against a few individuals after the abuses occur. This notion of accountability is based on the flawed assumptions that violations are all inherently individual in nature, when in fact the vast majority of violations across the globe have a structural component, often referred to as *structural violence*. This is convincingly expressed in *Pathologies of Power* and other writings by Dr. Paul Farmer, as well as the argument that this structural component is often, although not exclusively, expressed in the form of social exclusion and economic oppression and disempowerment.

This chapter does not provide an analysis of structural violence or structural racism, which is a closely tied concept. That said, this chapter is premised on the notion that a deeper accountability to all human rights, including civil and political rights, requires the recognition and implementation of economic and social rights and that the protection of this set of rights is a precondition for addressing structural violence and racism.

This concept that rights depend on each other to be realized—that is, the concept of interdependency—is clearly recognized in the foundational human rights conventions—the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights. Both of these conventions state in their preambles respectively that:

> Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights. — Preamble to International Covenant on Economic, Social, and Cultural Rights

> Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created

> whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights. —Preamble to International Covenant on Civil and Political Rights

Indeed, initially the first members of the United Nations had not planned to create two separate covenants, but rather one major human rights convention. Cold War politics intervened, however, and splitting the full range of rights into two covenants became the first volley in the degrading dynamic that has gone on for decades of using human rights as a manipulative tool of foreign policy. With regard to the Western governments, politicians would avoid responsibility for economic and social rights by claiming they were associated with communist regimes and repressive highly centralized economies.

But there are a variety of points of views as to why the United States is so resistant to economic and social rights, and Cold War politics figure prominently in only some of them. One point of view assumes that racism is the leading factor and that support for economic and social rights began to weaken after the civil rights movement succeeded in creating nondiscrimination laws and standards that would make it far more difficult to protect these rights only for the White community and required equal access to social support and services. Another point of view ascribes the resistance to some inherent individualistic tendencies within U.S. culture. Finally, yet another perspective is that because many social programs in the United States, such as Medicaid and Section 8, were designed only for the poor, the concept never took hold in the imagination of the middle class and had the necessary "buy in"—unlike similar social programs in Europe that benefited both the poor and middle class. This theory is buttressed by the recent outpouring of support for the social security public pension program in the United States, after the second Bush administration threatened to privatize it. This program is available and confers a benefit to all people who worked legally in the United States irrespective of class.

All of these theories are likely to play some role in the unusual resistance economic and social rights engenders within the United States among elites and non-elites alike. People in the United States do express greater support for certain rights, such as health and education. Nonetheless, despite some pockets of support for specific rights, the one thing that remains certain is that the United States stands out among developed nations, in fact among all nations, in its hostility toward making commitments to assure that that its people are able to achieve an adequate standard of living consistent with human dignity, freedom, and equality.

The Door Opens

Human rights were held hostage to the Cold War for several decades. The West accused the East of violating civil and political rights, and the East accused the West of violating economic and social rights. And through this dialogue of the deaf, both sides used human rights as a foreign policy weapon in a manner far removed from the integrity inherent in the language and founding principles of the human rights system. Only after the disintegration

of the Soviet Union was the human rights and social justice community able to take stock of the wreckage left in the wake of the ideological war. In the United States, in particular, there were at least six clear victims left in this wreckage: the right to housing, health, education, food, social security, and decent work.

Despite having provided critical leadership on economic and social rights early in the development of the human rights system, after the 1950s the United States consistently took the position at global conferences and other international venues that economic and social rights were in fact not really rights at all, but aspirations that were all but unrealizable.[1] In short by the 1990s, the United States had become the chief opponent of economic and social rights on the international stage. Even earlier, starting at least with the 1980s, opponents of economic and social rights were gaining ground at home. The U.S. Supreme Court, which came close to recognizing the "rights of the poor" in the 1960s and 1970s, changed direction after President Nixon added his Supreme Court appointees to the bench. While the country had an extensive social protection infrastructure, consisting of the welfare program, Section 8 housing program, Medicaid and Medicare health programs, social security pension system, minimum wage and other labor protections, and several other programs and policies, this infrastructure was severely underfunded and increasingly coming under political attack. Rhetorically the attack began under President Reagan and his references to "welfare queens" as single mothers defrauding the system. By the 1990s, even liberal democrats, such as President Clinton, made vows such as "ending welfare as we know it."

The economic and social rights vision launched by Roosevelt that is detailed so elegantly in Professor Cass Susstein's book *The Second Bill of Rights* seemed effectively dead. For the average person in the United States, an explicit human rights strategy focusing on economic and social rights would not have seemed viable for improving human well-being and protecting human dignity and freedom. But the early activists of the human rights movement in the United States were far from average people. They were tenacious people moved by a vision larger than themselves, which they promoted when and wherever possible. No venue was too small, no audience unimportant.

These very early conversations about economic and social rights as a necessary part of a "human rights platform" in the United States were held in car rides on journeys to meetings and demonstrations, in elevators, over dinner among activists, and "at the water cooler" among activist staff in nonprofit organizations that would ultimately come to embrace this vision. From these early conversations, committees formed, conferences were held, presentations and trainings developed and were taken "on the road," organizations sprung forth and ultimately major institutions began to acknowledge the legitimacy of this vision.

This chapter does not pretend to document or even mention all the relevant actors and activities that have led to the still nascent but emerging economic and social rights wing of the human rights movement in the United States. While emerging networks and more consistent meeting venues have helped to link the various strands of the work, the efforts still remain too fragmented. It would require intensive study to really identify all the pockets of movement

and speculate as to how and whether they will converge. Rather, this chapter simply represents reflections based on the author's personal experiences and individualized perspective of a slice of these wonderful, underresourced, and seemingly against-all-odds but compelling efforts.

These efforts can be found in every region of the country, and activists from each region have come into relationship with the economic and social rights movement in different ways. In the Southern United States, activists embraced this approach early and strongly emphasized the intersection of racism and economic and social rights. This region has had a national influence, and birthed important national organizations. Activists originating in Philadelphia reached out to the middle of the country with a relentless focus on class. Surprising allies have emerged in the Midwest, including traditional service organizations that have taken up leadership in the movement. Pockets of intense activity can be found up and down the West Coast, and several initiatives in the Northeast reflect a sustained commitment from that region to build an economic and social rights movement. Finally, activists in the Gulf Coast have found themselves bound together after Katrina through their joint demands for a human right to return for poor and Black communities displaced by government action and the disaster. The next section details some of the work and perspectives found in each of these regions.

Interdependence of Rights in the South

Not surprisingly some of the earliest rumblings on reviving a human rights vision for the United States came from the cradle of Dr. Martin Luther King Jr.'s work, the Southern United States. As reflected in Ajamu Baraka's interview published in this volume, today's generation of human rights leaders within the African American community have been meeting and discussing the potential of human rights for the movement for racial equality since the 1980s, even before the end of the Cold War when greater possibilities for this approach emerged. Activists such as Keith Jennings, Jaribu Hill, Ajamu Baraka, and Loretta Ross had developed a political analysis not too dissimilar from activists from earlier eras. For African Americans to win the struggle for real equality, a human rights vision that recognized the full range of rights—civil, political, economic, social, and cultural—for everyone must take hold in the country.

These activists spoke widely, in small and large spaces, to the fact that we are a society that is still fractured by race and driven by perceived, not even actual, self-interest. They eloquently surfaced that in the United States, we have yet to embrace the moral imperative that human rights are universal, and that only by ensuring and recognizing the rights of everyone regardless of race, class, or any other status can we truly ensure the rights of anyone. They argued that there was a desperate need to develop a political community that is grounded in human rights and solidarity to counter this dynamic, and that we cannot abolish poverty, sexism, and racism in separate struggles. Their point of view was, and is, that traditional civil rights approaches will not dismantle structural racism, which is significantly manifested in the social and economic sphere; mainstream feminism will not touch the lives of women

of color; race-blind approaches to poverty will never guarantee the rights of communities of color; and until we successfully situate our specific struggles within a broader human rights effort, we won't become part of the solution.

These visionary activists soon realized that they needed to create a venue, a political space, to further develop this conversation. By the 1990s, organizers in the Deep South, under the leadership of Jaribu Hill (who was an outspoken civil rights attorney as well as an organizer), pulled together over thirty organizations in spring 1996 to plan the first Southern Human Rights Organizers' Conference (SHROC I). This conference was held at the University of Mississippi in Oxford in September 1996. Two hundred activists attended the conference, a large portion of which worked on economic justice. Indeed, Jaribu Hill is the director of the Mississippi Worker's Center for Human Rights. There have been six SHROC biannual conferences since 1996. The conferences are very much a community and grassroots affair, and intentionally so. With little concern for the more restrained approaches of self-identified elite institutions and organizations, SHROC approached the pervasiveness of human rights violations in the United States as an ongoing national emergency. SHROC is a space where civil disobedience is actively valued and appreciated as a necessary strategy to address the crisis.

SHROC has also been a space for a wide range of perspectives from the grassroots. Attending a SHROC conference you might find sitting on one side an AIDS activist who has been fighting hard for access to anti-retroviral medications for her or his community, and on the other an activist who believes that AIDS is a myth created by the White community to destroy African Americans. Although, it has been my experience you are likely to find far more of the former than the latter. The key point, however, is that it is both a fascinating and inspiring experience to watch debate and exchange on a range of disparate viewpoints mitigated through a human rights framework that holds people together through this common language, and with the goal of identifying and connecting through common values.

At SHROC there is always a political demonstration or action organized to communicate the significance of a human rights approach, and it usually incorporates an economic and social rights element. During SHROC IV in 2002 in Miami, Florida, several hundred activists at the conference took to the streets for a direct action that targeted three community struggles—Haitian refugees seeking fair treatment on asylum issues; African Americans at Scott Carver Homes in their fight against urban removal and gentrification; and the Coalition of Immokalee Workers in their boycott against Taco Bell. It is rare for an event to pull together such disparate constituencies and issues—immigration policy, housing "redevelopment" policies, and supply chain issues affecting wages of farm workers—for what was a highly disciplined and powerful action in a place such as Miami, Florida. Yet, where these issues were linked under a broader umbrella of economic and social rights. Ultimately, SHROC has been an important space for on the ground activists to come together around the broad human rights frame, but particularly on critical issues involving the intersection of race and poverty, and the interdependence of civil/political and economic/social rights.

In addition to the SHROC gatherings, organizations were emerging in the 1990s that would ultimately spearhead the economic and social rights vision in this part of the country. The Mississippi Human Rights Worker's Center, the Coalition of Immokalee Workers, and the Miami Worker's Center are a few examples of that generational wave of post–Cold War organizations addressing economic and social issues as human rights as a significant part of their agenda. Many of these organizations have had stupendous and surprising important victories. Just some examples include the Coalition of Immokalee Workers' recent agreements with McDonald's and the parent corporation of Taco Bell, Yum! Brands Inc., that double the wages of tomato pickers and create participatory worker-led monitoring of labor abuses.

The Miami Worker's Center, after an extraordinarily impressive and creative struggle, forced the notoriously corrupt city of Miami to provide housing to poor African American families displaced and forcibly evicted by the destruction of public housing. The center is now striving to create a base in Liberty City, a historically black and poor neighborhood, of community leaders that would ensure that redevelopment efforts in their community benefit and meet the needs of the families that have been living there for generations. They have placed this effort within a human rights context. In particular, influenced by a global meeting in Barcelona, Spain, of civil society groups, they have spearheaded the development of a framework focused on every person's "human right to the city," which includes access to transportation, housing, and other necessary public infrastructure. This is an incredibly important concept as concentrated wealth returns to urban centers and gentrification threatens to push out entire communities from every major city in the country. Additionally, the National Center on Human Rights Education and the U.S. Human Rights Network are both based in Atlanta. Both of these national organizations, discussed in more detail below, emerged from the work in the South to deeply influence the movement.

The organizations and people committed to a human rights vision in the South have painstakingly worked on building a movement for well over a decade now, almost two. Still the existing organizations remain small and underresourced. With notable exceptions, attracting resources remains a serious challenge and obstacle to growing this work in the United States. SHROC and now U.S. Human Rights Network conferences are exciting and inspiring but still draw hundreds and not thousands of people. Most of the activists involved have invested years of their lives on the assumption that this is the beginning of a very long-term project that will truly bear fruit decades down the road, similar to the pattern of the civil rights movement in the twentieth century. Only time will tell whether "human rights in the U.S." was a temporary trend in activism, or truly the foundation for the next burst of human progress toward universal freedom, dignity, and equality.

Class Unity through Human Rights in the Rust Belt and Beyond

No campaign did more to bring attention to international economic and social rights as a strategy for social justice than the Poor People's Economic Human Rights Campaign. This campaign emerged out of the work of the

Kensington Welfare Rights Union (KWRU) in Philadelphia, Pennsylvania. Using guerilla tactics, members of KWRU raised public awareness about the cruelly indifferent housing policies in Philadelphia by doing "housing take-overs" and moving homeless families (mostly women and children) into abandoned city-owned property. Naming these properties "human rights houses," KWRU put the city in a position where they had to either allow families to live in possibly dangerous subhuman conditions or forcibly and very publicly throw these families into the street. Neither option was very attractive, with the former highlighting the many empty city properties that the city had inexplicably failed to care for properly and make available to poor families to address the acute affordable housing crisis. Most of the time, the city found housing for the families.

These tactics were far from universally popular, and many housing advocates criticized KWRU for "grandstanding" and not doing anything that would solve the crisis for the city as a whole. While KWRU did not offer detailed and concrete policy alternatives, it is also the case that the more mainstream housing advocates were unable to push the city to solve the crisis. These tactics did bring to light the urgent nature of the crisis and reflected a decision to respond to it as a serious emergency. For families in the street, at risk of losing their children to city agencies that were ruthlessly efficient at the more expensive process of placing kids in foster care but seemingly incapable of the far less expensive alternative of housing these families, it was without question a severe emergency that called for desperate tactics. In other words, KWRU sought to establish the housing situation in Philadelphia as a human rights crisis, which justified civil disobedience. KWRU members faced criminal trials based on charges of trespassing and other petty crimes. They mounted a political "necessity defense," and none were convicted.

In the mid-1990s, KWRU, under the leadership of Cheri Honkla and Willie Baptist, decided to reach out nationally with their vision and approach. The analysis that the organization adopted was one grounded in the assumption that class was the issue that people in the United States needed to face, and that issues of race had obfuscated a serious conversation about class to the detriment of poor people. The organization's stated goal was to unite the poor across color lines. This approach engendered some controversy among human rights activists, particularly those working on the intersection of race and class who felt that failing to talk about race was tantamount to accepting racism. KWRU was clearly antiracist and much of the leadership and membership was African American and Latino. It was often Willie Baptist, an African American leader in the organization with roots in the Black Power movement, who made the most impassioned arguments in favor of side-stepping the discussion on race as part of the strategy to win unity among and rights for the poor.

The other principle that KWRU sought to promote across the country was leadership by the most affected—that is, the poor. This is a principle espoused by many organizations with varying levels of success in actually implementing it. One of KWRU's strengths was its consistent fidelity to this principle in practice. Reaching out to a wide range of groups during bus tours and other organizing and education events, KWRU formed the Poor People's Economic Human Rights Campaign (PPEHRC).

PPEHRC used the United Nations as its symbolic rallying point, holding Truth Commissions across the street from the UN and enlisting the support and gaining the admiration of high-level UN officials, such as Mary Robinson, the former High Commissioner of Human Rights, and Kofi Annan, the former Secretary General. Similar to the work in Philadelphia, PPEHRC was quite effective at raising the visibility of the suffering created by poverty. It was less effective at creating a clear infrastructure for the loose collection of groups that came into contact through PPEHRC. While in more recent years PPEHRC lists members publicly, there is no formal membership process, and some organizations and individuals are surprised to find themselves listed despite years of not having had contact with PPEHRC. It has also declined to develop a policy agenda. None of this takes away from the immense contributions it has made to bringing the human rights conversations to places like Ohio, West Virginia, Utah, and other states often neglected and excluded as a resulted of East and West Coast hegemony over human rights discourse. PPEHRC has been one of the important forces in liberating that discourse and giving a far wider range of affected communities ownership over these ideas and concepts.

PPEHRC's analysis and the deep political education it offered resonated strongly with poor people after President Bill Clinton dismantled the entitlement to welfare. This was a period where, for example, state agencies in Wisconsin had internal memos suggesting that case workers tell their clients to rummage in garbage bins behind supermarkets if they were short on food. It was a low point for compassion in the United States, and an even lower point for respecting basic rights to dignity and social security. Poor people across the country visited by the PPEHRC leadership were hungry for a countervision to the punitive policies they faced daily. The campaign has since faced many challenges, but the most recent and possibly strongest challenge came in the aftermath of Hurricane Katrina which inextricably linked race and class in the United States in the minds of people within our borders and around the world. Today, PPEHRC retains its exclusive class-based analysis and vision of "uniting the poor across color lines." Its mission statement still does not refer in any way to discrimination or racism (or sexism). This approach may prove increasingly challenging as the post-Katrina discourse has intensified the racialized nature of the activist conversation in a wide range of fora.

Some of PPEHRC's most lasting work may be the result of its educational arm, the University of the Poor. Co-led by Willie Baptist and Reverend Liz Theo-Harris, the University of the Poor focuses on political education for communities. Its key members and leaders have traveled around the country for the kind of deep conversations at the community level that are necessary precursors for successful movements. This mobile and unorthodox university has spawned more traditional institutional arrangements as well, as it provided the source of inspiration for the recently established Poverty Institute at the highly respected Union Theological Seminary in New York.

The Heartland's Emerging Alliance

In addition to PPEHRC's work reaching parts of the country not normally deeply immersed in human rights discourse, there has been a growing network

in the Midwest linking that region of the country to the national conversation. There has always been a human rights consciousness in the Midwest and an important coalition for human rights in that region. The focus in the region has been historically more traditional in nature, primarily targeting civil and political rights with a strong emphasis on refugee and international issues. This is slowly changing, and long-standing groups like Minnesota Advocates for Human Rights are looking at domestic human rights issues like education in the United States. There has been particularly innovative work by one service organization—intentionally referenced in the subtitle for this section—the Heartland Alliance for Human Needs and Human Rights in Chicago under the leadership of Sid Mohn.

If applying international human rights standards in the United States sounds strange to many people, doing so in the Midwest of the United States may seem positively weird. Polite neighbors and well-kept streets in homogeneous neighborhoods are the kind of images that generally come to mind in response to references to the Midwest. Add to that, human rights work by a charity that keeps people fed and housed and provides access to health care in the heartland in the United States, and few people would credit your sanity. Why would such an organization join a domestic human rights movement?

In truth, the Midwest is increasingly diverse and has always had major cities with the kinds of human rights concerns that inevitably arise in urban centers. Additionally, the Midwest faces poverty in both rural and urban areas, and grapples with violence, hunger, homelessness, racism, xenophobia, and sexism among other social ills. The Heartland Alliance is a substantial social service organization addressing some of these social ills using traditional methods such as soup kitchens and health clinics, as well as fairly standard policy advocacy work. Several years ago, however, the organization intentionally underwent a transformation.

It still provides a range of social services and engages in policy advocacy, but it has refocused its identity and mission around a human rights mission. This transformation has impacted the dynamic between staff and clients whereby it is no longer simply a charitable endeavor, but one that raises consciousness and engages in ongoing human rights education. Staff members consider themselves human rights workers and opportunities are created and seized to share information about human rights with those coming to seek services.

Additionally, once you view poverty as a symptom of human rights violations, it is no longer adequate to seek to reduce or manage poverty, it becomes imperative to abolish it. No one speaks about reducing torture or managing violations of free speech, the goal is to prevent these violations altogether. Human rights necessarily makes poverty abolitionists of us all, and when a large and important social service organization incorporates that vision it is bound to have effects both within and outside the organization.

The Midwest is an important bellwether for the direction of the country as a whole. It is symbolically the heartland, and what emerges from that region cannot easily be tarred as foreign or incompatible with U.S. culture. Moreover, leadership on human rights has emerged from states such as Illinois

in the past. For example, once the death penalty had become a common form of punishment again in the United States, it was in Illinois that then-governor George Ryan began to question its legitimacy. In 2000, Governor Ryan imposed a moratorium on all executions, making Illinois the first of thirty-eight states with capital punishment to do so. This helped to reverse the trend of indiscriminate use of this barbaric method of punishment, and led to—among other things—the banning of the juvenile death penalty by the U.S. Supreme Court. Recently, now Governor Blagojevich of Illinois issued a press release about new health and education programs in the state in which he said: "Access to affordable healthcare and high-quality education should not be a privilege for the very wealthy—these are basic human rights." We can only hope that such views are a harbinger of things to come.

Up and Down the West Coast

While the work in the Southern United States and in the center of the country on economic and social rights is linked together to some extent, the West Coast from California to Montana is following more of a model of each locality "doing its own thing." There are shining examples of work up and down the West Coast, but little communication among those efforts. Thus, it is more difficult to see the work as having a regional identity. Many of the organizations involved are more connected to national efforts than to each other.

In Los Angeles, Community Asset Development Redefining Education (CADRE) has incorporated human rights into its parent-led organizing in schools in South L.A. In partnership with the National Economic and Social Rights Initiative, which I direct, CADRE has trained parents to engage in human rights documentation, held human rights tribunals, and developed human rights training materials for community members. CADRE has done in-depth organizing work and has recently helped to move the Los Angeles Unified School District to adopt a "positive discipline support policy." This policy requires each school to develop a plan as to how they will prevent disciplinary problems and support students who are struggling. Given the punitive and harsh disciplinary approaches to date, which have led to some schools suspending one in three students and contributed to soaring drop-out rates, this change of approach may turn out to be a crucial step toward protecting the human right to access education in the city. In this effort, CADRE has integrated its analysis of a "push-out" crisis in public education with human rights standards. This reframing has been very compelling for community members and has increased and motivated their organizing base. Thus far, however, it has had less of a direct impact on how policymakers see the issue. In other words, while there has been an important policy gain through increased organizing using this approach, it has been far more difficult to persuade policymakers to see and formally recognize the human rights dimensions of these issues.

Further up the coast, activists in San Francisco have successfully taken the approach into the policy arena in explicit ways. San Francisco is unique among major urban centers in its openness to human rights approaches

and the amount of explicit human rights work taking place in the area. "Thinking Globally, Acting Locally" by Martha Davis in this volume describes the campaign leading to the local human rights ordinance in San Francisco, and therefore this chapter will not go into that effort in detail. What is worth noting is that the work in San Francisco and the surrounding area (such as Oakland) generally looks at economic and social rights through the lens of discrimination. Thus, the local ordinance requires agencies to ensure there is no gender discrimination in any area of local government activity, which encompasses the economic and social sphere. The San Francisco ordinance does not, however, focus on the underlying minimum economic and social rights guarantees irrespective of any discrimination. It is typical to see campaigns and projects work from one perspective or another—that is, either looking at basic minimums or discrimination but rarely both at once. Integrating both approaches remains a challenge for the work across the country.

On a statewide level, the Women of Color Resource Center (WCRC) has had an interesting experience in developing their campaign to have California opt out of the child exclusion law that is part of the 1996 national welfare overhaul. The child exclusion law, also known as the family cap, prohibits a child from receiving welfare benefits if he/she is born into a family already on welfare. States can opt out of this policy if they so choose, and many states have done so, but not California. WCRC initiated their campaign with arguments about how the law impinged on women's reproductive freedom and discriminated against families of color. Bringing in human rights arguments added new dimensions, including the child's right to basic social security, freedom from hunger, and an adequate standard of living. Activists from WCRC report that policymakers have responded positively to the arguments focused on the rights of the child, and there is now pending a bill to opt out of this policy. At the end of this effort, it will be interesting to assess whether WCRC shifted from antidiscrimination arguments to those focused on basic access to economic and social rights or whether it was possible to integrate both approaches to achieve success.

Up the coast, there has been much progressive work by Uplift in Seattle and surrounding areas on the human right to health. Using grassroots approaches such as petitions at farmer's markets, local coalitions with technical assistance on human rights standards by Uplift succeeded in having the city of Seattle adopt a human right to health resolution calling for universal access to care. Uplift hopes to expand this effort to other cities in Washington and possibly to Oregon. Washington and Oregon are relatively progressive states with a natural openness to issues such as health. What remains to be seen is whether these states can carry out such change within the framework of economic and social rights. These states have already relatively progressive policies and whether and how they can deepen their commitment within the existing national constraints remains to be seen. Another interesting development in the Northwest is the Montana Human Rights Network's growing interest in economic and social rights. The Network arose up in response to white supremacists and hate groups in the state, but has now begun a process

to address economic and social inequity. Given that Montana is a place known for its rugged individualism, how activists and communities approach issues that inevitably have a collective component will also yield important insights for the movement.

The Northeast

States and localities in the Northeast, as well as activists in the region, are receptive to at least discussing human rights approaches. In New York City, the Urban Justice Center (UJC) under the leadership of Heidi Dorow and then Ramona Ortega has promoted the development of policy through human rights at the local level. Specifically, it has been spearheading a local ordinance modeled upon the San Francisco effort. In addition to the work focused on nondiscrimination in the economic and social sphere, the UJC has worked from a basic access to economic and social rights perspective and developed innovative analysis on the right to food within the city's food stamp program and the right to welfare benefits. Housing activists have also been embracing the approach in the city, particularly with respect to the housing needs of those who are HIV positive. Additionally, an all-volunteer network called the Independent Commission on Public Education has undertaken the mammoth task of working with communities to redesign the New York City school system to conform with human rights principles and develop policy proposals based on that redesign. ICOPE has set up five Independent Borough Education Commissions made up of local activists to run this conversation. Despite this growing activity, actual policy change from this perspective has been more difficult to come by than expected in the rough-and-tumble local politics of New York. Political victories still come primarily as a result of deals based on exchange of political support and power, with little room or role for common values and vision.

In Massachusetts and Pennsylvania, activists have persuaded the state legislature to look at statewide human rights resolutions calling for review of state laws to assess whether they meet human rights standards. The Pennsylvania effort has been undertaken as a partnership between the state social workers' association and the Poor People's Economic Human Rights Campaign and has a clear economic and social rights focus. The Massachusetts effort emerged from the women's community and focused on gender discrimination, but the activists are making attempts to integrate a more general economic and social rights perspective. In Pennsylvania, the resolution has been adopted by the state House of Representatives and in Massachusetts it is still under consideration. The activists involved view these resolutions as organizing and education efforts targeting both legislators and communities. The question is whether the energy invested in this kind of broad-based political education on a range of issues will truly bear fruit in the long run, or whether energy is better spent on more targeted policy change using human rights standards. It is a strategic question that remains absolutely unresolved in the human rights community. Most people agree both are needed, but how much of each is anyone's guess.

The Gulf Coast

Although the United States at the present moment is an a state of collective amnesia about the government abandonment of poor people left behind after the storm, the situation in the Gulf Coast may yet become an important catalyst in demanding basic economic and social rights in the United States. This may turn out to be the case if only because rights most often spring from deep wrongs, and what has happened in the Gulf Coast is a striking example of brutal wrongs committed against the most vulnerable people in the region.

The Gulf Coast policies and practices after the storm are designed to purge poor people from the region, and to privatize public systems and services such as schools and hospitals, which has a clear impact on how economically accessible such services are to middle-class and poor communities. People have been locked out, at government expense, of their public housing units despite very little damage from the storm, and as of the writing of this chapter, every neighborhood now has electricity restored except the historically poor and black Lower 9th ward.

As the chapter focused on Katrina in the third volume of this series reflects, human rights language has resonated in a powerful way for affected residents in the Gulf Coast. Prior to the storm, Advocates for Environmental Human Rights (AEHR)—located in New Orleans—had undertaken important right-to-health campaigns, including a corporate accountability campaign targeting Shell Oil for its practices leading to environmental degradation and soaring cancer rates in a poor African American community. That campaign led to a settlement, which allowed the community to relocate. It also put the region on the map as one of the centers for innovative human rights advocacy.

After Katrina, AEHR teamed up with national organizations to do training on the human rights of hurricane survivors. Today, activists in the Gulf Coast are deeply committed to the concept of a right to return, which is inclusive of basic economic and social rights. The right-to-return language has taken such a deep hold in the region that it has filtered up to major figures and institutions, such as Reverend Jesse Jackson and the Congressional Black Caucus. Activists are also participating in important global solidarity exchanges.

Most significantly, activists and communities have lost all faith in domestic legal and political structures to protect basic human dignity in their still storm-affected communities. Turning to the international and universal arena of human rights not only makes perfect sense, but in many ways is the only refuge for communities facing chronic deprivation and abandonment. First left to die without food and water immediately after the storm, and now left to survive as they may in mold-infested damaged homes or inadequate trailers, without basic services, poor communities in the Gulf Coast have good reason to believe their government has not failed, but rather succeeded, in its attempt to erase or purge the poor from public consciousness and from any role in the rebuilding and redevelopment of the Gulf Coast. These are the unfortunate conditions from which human rights movements emerge.

New National Organizations

National organizations have also developed in order to support the range of local and regional work using human rights. There is a desperate ongoing need to build capacity within the United States on using the human rights approach in order to counter the view that human rights offers nothing more than superficial rhetoric and cannot be implemented in real and concrete ways. To strengthen human rights activism in the United States requires increased support for creative uses of the standards and analysis, greater coordination, persuasive public messages, and stronger links across this activist work. This requires support from the national level as local and regional organizations are often stretched beyond capacity in doing their existing work.

The first national organization created toward this end was the National Center on Human Rights Education (NCHRE) in Atlanta. The obvious first step in bringing human rights to the United States is actually ensuring that activists and others know what they are! NCHRE provided countless workshops at the community level to demystify human rights and give community leaders ownership over this framework. The role of human rights education in the development of the U.S. human rights movement cannot be underestimated. It is almost impossible to find an activist promoting human rights in the United States today that had not at some point heard Loretta Ross (former director of NCHRE) speak. She emerged from the Southern United States to criss-cross the country spreading the message of human rights, with a profound emphasis on the interdependence of economic and social rights on the one hand, and civil and political rights on the other.

WILD for Human Rights (WILD) was founded a decade ago in San Francisco to build leadership among young women of color in the human rights movement, and has spearheaded a number of nationally relevant initiatives focused on human rights and identity. WILD played a significant role in linking the women's movement with economic and social rights activists, and breaking down the barriers between identity-based and issue-based activism.

Three national organizations have emerged more recently to support the field as well. The U.S. Human Rights Network, founded in 2003, is situated in Atlanta, Georgia. The Network is the first of its kind and seeks to provide an umbrella and collective voice for the diverse range of grassroots and national organizations that have committed to bringing a human rights vision and practice to the United States. The development and creation of this network is a very important part of the story of human rights in the United States. The network emerged from a series of meetings of extremely diverse activists—from high-profile national constitutional lawyers to impressive strategists organizing local communities working on every issue imaginable. Normally, it is rare for advocates against torture to be in discussion with education and housing advocates. The different activist communities simply never get a chance to exchange information and perspectives. It is worth noting that the U.S. Human Rights Network is unique in its integrated mission and membership reflecting the value placed on protecting a full range of rights—civil, political, economic, social, and cultural.

The network is a center for information sharing, training, and meeting, and there are hopes that in the future it may provide a space for joint strategizing for the movement. As a fairly new organization, it faces daunting challenges in its mission to serve an extremely large base covering a multitude of issues and communities. How to identify the cross-cutting threads and ideas that join together its disparate membership is one of its biggest and most important tasks.

The National Economic and Social Rights Initiative (NESRI) was formed in 2004 to support activists in the use of human rights as an integral part of their campaign strategies. NESRI's role is to demonstrate how human rights works in practical and concrete terms, and works in partnership with activists to build new models of advocacy not typically used in the United States. The Opportunity Agenda (OA) was also founded in 2004 in order, among other things, to test and develop public messages using human rights. The goal of OA is to identify how the public views human rights at the moment in order to assist activists in influencing and moving those perceptions. With the exception of NESRI, none of these organizations are exclusively dedicated to economic and social rights, yet all of them have made this set of rights a central part of the agenda.

The development of these national organizations is indicative of the state of human rights within the activist community. It is no accident that the first national organization to arise on human rights in the United States focused on educating the community; knowledge is the foundation of building any field or movement. Leadership is the next obvious ingredient, and education and leadership building was the core of the work for the first decade. The newer organizations clearly focus on the next stage of development: building actual models of advocacy, creating ongoing and strong networks, and identifying public messages. When you put these national organizations together it is clear that activists are building the necessary components for a domestic human rights movement. Interestingly, despite the fact that they each serve a different and necessary purpose, and do not duplicate each other, there was no actual discussion or coordination in creating these organizations (with the exception of the U.S. Human Rights Network which was a broad collective effort). Rather, activists invested in and committed to the success of this work identified gaps along the way and found avenues to address them.

Institutional Paradigm Shifts

Another reflection of the increasing interest in and legitimacy of international economic and social rights in the United States is the ongoing shifts within major institutions. Amnesty International (AI) has both expanded its mandate to include economic and social rights and focused greater energies on the United States. AI is on the verge of launching its first global campaign against poverty, which should prove to be a historical milestone in this work. Moreover, with Larry Cox now the Executive Director of Amnesty International USA, it can be expected that AI will be working more closely and in concert with the U.S. human rights movement, in particular its economic and social rights wing. Larry Cox, while at the Ford Foundation, was a key

participant in most of the important movement discussions in the last decade, is clearly a friend of the U.S. human rights movement, and is widely admired, respected, and trusted by many in the movement.

Additionally, major organizations still very focused on civil and political rights have started to build relationships with economic and social rights activists and incorporate some issues into their work representing the intersection between civil/political and economic/social rights. For example, Human Rights Watch has issued major reports focused on the United States on worker health and safety, as well as one on discrimination in housing. The American Civil Liberties Union has created a human rights unit that works on, among other things, the abusive treatment of young people when sent to alternative schools or boot camps after expulsion from regular schools in Mississippi, which touches on important right-to-education issues.

Organizations and institutions in the health field have also taken significant steps to further the human rights approach. The FXB Center on Health and Human Rights at the Harvard School of Public Health, which has focused almost exclusively on international work, is partnering with U.S. advocates to map out human rights indicators for universal healthcare efforts at the state level. The National Health Lawyers Program, a forty-year-old organization that is domestically focused both in geography and approach, is one of FXB's partner organizations and is seriously exploring human rights strategies and approaches for its own work and to bring to its large network of members.

The National Law Center on Homelessness and Poverty (NLCHP), under the leadership of Maria Foscarini, was one of the frontrunners among national organizations to interest itself and develop a human rights approach. NLCHP has built a human rights–to-housing caucus that it brought wholesale to the U.S. Human Rights Network. The caucus has held conferences, worked with the UN Special Rapporteur on Housing to bring attention to gentrification and displacement in Chicago, and organized trainings for hundreds of housing advocates. It's been more difficult for NLCHP to identify litigation opportunities to use human rights, which is telling given that it is primarily a litigation organization. Translating the enthusiasm for economic and social rights from the activist community to the courts may be a very long journey for groups like NLCHP. It seems an equally long journey to translate this enthusiasm to the beltway, and few groups with a legislative focus have taken up the approach. Even NLCHP, when writing policy briefs targeting a beltway audience, makes little or no mentions of human rights.

Finally, it is important to note that some national rights organizations have always kept a twin focus on constitutional and human rights. In particular, the Center for Constitutional Rights (CCR) that has led the charge against abusive post-9/11 actions by the executive branch has a long-standing history that integrates a domestic and international approach. Despite CCR's broad mission and vision, it has not in recent years become involved in bringing economic and social rights to the United States. It is a notable absence in the field, but one that is understandable in light of the heavy demands placed on progressive litigators involved in curtailing post-9/11 abuses combined with the challenging nature of identifying litigation opportunities using economic and social rights standards.

These institutional paradigm shifts, where international economic and social rights standards are shaping the way major organizations are doing their work, show both the opportunities and limitations of the approach at the present moment. On the one hand, some of these institutions are exploring new ways to do their work in order to promote economic and social rights, including more often using partnership with local communities to move their agendas forward. On the other, some of their standard strategies, such as litigation, present limited opportunities to move forward because there is still so much more to do to legitimate and integrate these standards into the political and legal fabric in the United States.

Identity-Based Movements and Human Rights

Some of the work of legitimating economic and social rights still needs to be focused on existing progressive movements in the United States. These movements are our natural allies; however, many of them have, at best, an ambivalent relationship with the U.S human rights movement—in particular its economic and social rights wing. Identity-based movements are a particularly interesting example. Does the universal nature of human rights make linking to these movements a challenge or an opportunity? Or does the strong emphasis on nondiscrimination in human rights standards make them natural partners?

A majority of the activists that have become part of the U.S. human rights movement have come from one of the many identity-based movements, such as the women's, racial justice, or lesbian/gay/bisexual/transgender movements. Let's examine one example—the women's movement. The women's movement radically changed some of the ways that we perceive social relations, yet stopped short of addressing structural economic issues that enabled much gender discrimination. These questions were more squarely at the center of the feminist agenda in the early years, but were ultimately crowded out by a dominant approach focused on privacy, freedom from violence, and "free choice" to work with equality. How and why economic and social issues constrained free choice for or enabled violence against the average woman was relegated to side conversations among the most progressive feminists and in particular among women-of-color activists. Today, women's equality, such as it is, is often dependent on cheap nannies and domestic workers; in other words, on the oppression of an entirely different class of women. Some women-of-color activists argue that the feminist movement has made strides exclusively on the increasingly burdened and abused backs of women of color.

Several women's human rights activists, coming from both the international arena and the domestic sphere, sought to reach for a new vision that would unite the interests of women across both race and class and address the weaknesses in feminism today as a progressive vision. Analytical and conceptual leadership came from feminists such as Rhonda Copelon and Celina Romany while at CUNY Law School, Charlotte Bunch at the Center for Women's Global Leadership at Rutgers University, and Dorothy Q. Thomas, the first director of the Women's Division at Human Rights Watch. All these women have in common a deep involvement in the international arena paired with a

background in the United States. They, with others such as Radhika Balakrishnan at Marymount College and Mallika Dutt now of Breakthrough, became key "importers" of the human rights approach from the international to the United States. Some played a role through mentoring future activists, others were phenomenal speakers that moved other women into the work through their inspiring presentations. Radhika Balakrishnan, a radical feminist economist, has made monumental efforts to bring a human rights framework to hetrodox economists. And all these women contributed through their writings and convenings.

Other equally important key thinkers include Hope Lewis and Martha Davis at Northeastern Law School. Hope Lewis has contributed intellectual leadership on the intersection of migration, development, and economy with regards to human rights. While Legal Director of Legal Momentum (formerly NOW LDF) Martha Davis was one of the consistent voices within the mainstream women's movement both for economic and social rights and for a human rights vision in the United States. Today, she is one of the most important legal scholars on the question of the relationship of human rights law to economic and social issues affecting women. Similarly, Lisa Crooms, a professor of law at Howard University, has written extensively on the intersection of race, gender, class, and human rights in the United States and hosted several key scholarly and activist conferences, including the one that launched the U.S. Human Rights Network.

The one consistent organizational voice from the gender perspective was the Women's Institute on Leadership Development for Human Rights, also known as WILD, headed by Krishanti Djamerah. Dorothy Thomas worked closely with WILD to organize a meeting of self-identified women's human rights activists in Mill Valley, California, in 1999. The decision emerging from this meeting to reach out to other U.S. human rights activists not working on gender issues was the first important step towards the creation of the U.S. Human Rights Network. The importance of Dorothy Thomas's role in linking the women's movement to other threads of the U.S. human rights movement simply cannot be underestimated.

Each of these women made a somewhat different contribution, and was instrumental in different ways in supporting the growth of a nascent U.S. human rights movement and its economic and social rights wing. Although it was professional feminists—among them Loretta Ross mentioned earlier—that provided a great deal of the "fuel" for this kind of U.S. human rights work, with the exception of WILD, there are relatively few NGO voices on economic and social rights issues in the domestic human rights movement that are specifically "gendered" in their approach.

One exception that stands out already mentioned above is the Women of Color Resource Center. Sister Love, working on issues such as HIV among African American women, is also an organization that has embraced this approach since its inception. There are projects anchored in academic institutions, such as the International Women's Human Rights Law Clinic run by Rhonda Copelon at CUNY Law School, that take on domestic projects. But in terms of constituency-based groups, there are more active ones within PPEHRC that address women's issues, and the irony is that they have come

to the human rights approach through an arm of the movement that discourages putting discrimination front and center as a primary issue. Similarly, domestic workers groups in New York have strongly embraced the approach, but the public education and organizing appear much more focused on issues of class than gender.

What is one to make of this anomaly whereby leadership by feminist women within the domestic human rights movement has somehow not directly translated to leadership explicitly on feminist issues at the grassroots level? Is this simply a result of a less active grassroots movement on women's issues? Or are feminist leaders focusing on nonfeminist issues in the interest of the broader movement and to the detriment of issues affecting women (as some argue occurred during the civil rights movement)? One alternative possibility is that many activists on women's issues have been disappointed with the mainstream women's movement (it is often criticized as having a narrow agenda and vision, particularly because of an absence of an economic and social rights focus) and have joined other efforts rather than continue to try and reform their own movement. Human rights activism has recently transformed the public conversation on issues as diverse as death penalty, LGBTQ rights, and farm workers' wages and conditions of work. It will be interesting to see how or whether this approach will have an impact on the community of activists working on "women's issues" in the United States. Particularly, whether it will raise up the importance of economic and social rights within this community. This question can just as easily be posed for other identity-based movements, including the more traditional work for racial equality, as well as the LGBT movement.

The World Responds: Solidarity through Common Vision

The validity and value of an internationally grounded economic and social rights movement in United States may still be a subject of debate within progressive movements and sectors in the United States, but around the world the response has been decidedly different. Sitting across from an East African human rights advocate in a hotel restaurant in Antigua, Guatemala, during a global meeting held by the Ford Foundation, I first started to understand—to my profound surprise—that the human rights movement in the United States was important to people in other places. It turns out that people in Africa and Asia, as well as most other parts of the world, have a strong interest in the success of this movement, in particular its economic and social rights wing. "What can we do for you, what can we do to help?" This is a question that has now been asked of me by activists from several regions.

With only moderate reflection, it becomes clear why. The refusal by the U.S. government to recognize the legitimacy of economic and social rights has repercussions all over the world. The dynamics that lead to public hospital closures in poor neighborhoods in the United States are not dissimilar to those that lead to such closures in poor parts of the world that are affected by international policies influenced and designed by the United States. The United States is, by far, not the only factor in decisions that deny scores of people access to health care, clean water, food, and decent jobs, but the U.S.

government is clearly a powerful actor on the international stage and exercises disproportionate influence in such decisions.

What would the world be like if the United States took leadership in the *protection* of economic and social rights? Communities around the world would definitely like to know! But in order for this to happen, the United States has to begin recognizing the legitimacy of these rights for its own people. These activists are offering true solidarity, as they view our work as part of a common vision that serves our collective common interests.

It has become clear there is much we can learn from activists abroad. As this chapter is being written, plans are underway to bring a delegation from tsunami-affected areas of Thailand and Indonesia to the Gulf Coast to share strategies and insights with Gulf Coast activists. This is part of an ongoing exchange that could not have happened without the solidarity and hard work of the Asian Coalition for Housing Rights. Time and time again the coalition has asked—how can we help you? It is often difficult to identify specific actions that those outside the country can take to help those within it. But the first step is acknowledging that we need the help. The second is to understand that in our globalized world we really are "all in it together" in practical and concrete ways, and if we do not learn how to breathe life and give strength to the extraordinary vision and system that led to human rights laws, the world will be a much poorer, insecure, and difficult place where human development and dignity remain at risk.

CONCLUSION

The future of economic and social rights in the United States is more uncertain than ever. But the deepening commitment by activists and the show of solidarity across issues as well as borders create an inexplicable feeling of hope and wonder that current circumstances otherwise defy. This emerging movement is not sui generis, however. It owes deep debts to leaders from other movements outside the United States that have become mentors and models, as well as provided inspiration, for this work.

Examples include Dr. Paul Farmer, co-founder of Partners in Health and the strongest voice for economic and social rights in the global health movement today. Paul Farmer has become an inspiration for scores of young activists that have committed their lives to economic and social rights in many countries, including the United States, as a result of his work. Partners in Health has also been a groundbreaking example of community-based and participatory human rights work. Nobel Prize-winning economist Amartya Sen, while not having much of a direct link to the work in the United States, has deeply impacted many in the U.S. economic and social rights community by his brilliant and coherent analysis of development as a potential force for freedom. Both of these men also brought home that rights belong both in and beyond the province of law, and must be embedded in almost every sphere of human activity if they are to truly become real for those currently suffering the worst violations.

The international women's movement has been an important source of innovation and leadership for this work as well. Charlotte Bunch at the Center

for Women's Global Leadership has created some of the training ground for feminists entering the U.S. work. Similarly, Professor Rhonda Copelon's insistence on the importance of U.S. work for those focusing on international concerns, and the importance of human rights for those focusing on U.S. concerns has touched the lives of many activists. Additionally, Dorothy Q. Thomas and Larry Cox from Human Rights Watch and Amnesty International respectively are two examples of important leaders that have contributed to significant changes within the international human rights movement fueling both economic and social rights, and human rights in the United States.

The economic and social rights movement in the United States and around the world also owes a great debt both for intellectual leadership and political inspiration to the anti-apartheid movement in South Africa. The truly incredible leadership of that movement not only beat extraordinary odds but also wrote and developed one of the world's most respected constitutions with economic and social rights as an integral aspect of its vision. Speaking to doubts expressed by U.S. colleagues at a high-level roundtable discussion in 1993, which were still early days for the conversation on human rights in the United States, Albie Sachs, justice of the South African Constitutional Court and widely admired anti-apartheid activist commented:

> The rest of you have every right to be pragmatic, but we in South Africa are clinging to the right to be naïve . . . A pragmatic man in Nelson Mandela's position would have given up a long time ago and reconciled himself to second-class status in a racist society. *But Mandela was naïve, and Mandela was unpragmatic, and that is why he has attained so much.*
>
> In the new South Africa, it is one of our major tasks to hold to that essential faith in justice and rightness, to believe that even these poor international documents might help us transform our world. If I'm less skeptical than some others in this room, it is due to our strong grassroots movement and our strong public consciousness of rights. In South Africa, we are seeking the political mechanisms to realize our ideals; here in the United States, around this table, we are groping for ideals to give substance to our institutions. The twain ought to meet.[2]

Yes, the two ought to meet. Finally, those working today toward having our institutions meet our ideals are not the first within the United States to recognize the need for this vision. I cannot close this chapter without a final acknowledgement of the giants upon whose shoulders we stand—the many leaders, martyrs, and other participants in the various strands of the civil rights and labor movements that burst through the public consciousness in the twentieth century in the United States. We owe an ultimate debt to those movements and those who gave their lives to take us this far. We also owe them continuing the work. As Reverend Martin Luther King noted toward the end of his life and work:

> *I think it is necessary to realize that we have moved from the era of civil rights to the era of human rights.*

ACKNOWLEDGMENTS

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NOTES

1. Daniel J. Whelan, Working paper no. 26, "The United States and Economic and Social Rights: Past, Present . . . and Future?," p. 8, Graduate School of International Studies, University of Denver, presented at the 2005 International Studies Association Convention, on the panel "Human Rights as a Foreign Policy Goal: Rhetoric, Realism and Results," Saturday, March 5, 2005, Honolulu, Hawaii. Available online at www.du.edu/gsis/hrhw/working/2005/26-whelan-2005.pdf

2. "Economic and Social Rights and the Right to Health, An Interdisciplinary Discussion Held at Harvard Law School" (Human Rights Program Harvard Law School and the Francois-Xavier Bagnoud Center for Health and Human Rights Harvard School of Public Health, Cambridge, 1993), Section III. Transcript available online at www.law.harvard.edu/programs/hrp/Publications/economic2.html.

CHAPTER 3

First-Person Perspectives on the Growth of the Movement: Ajamu Baraka, Larry Cox, Loretta Ross, and Lisa Crooms

Catherine Albisa

This collection of interviews captures the experiences and voices of four important activists on the front lines of the U.S. human rights movement. These forward-looking visionaries helped to build, and continue to shape, the human rights landscape in the United States.

AJAMU BARAKA

Ajamu Baraka is the executive director and part of the founding committee for the U.S. Human Rights Network. He is a long-time racial justice and human rights activist and the former director of Amnesty International USA's Southern Regional Office.

How would you describe what formed you as an activist?

I came out of the tradition of the movement for black liberation, Third World liberation, and social justice in the 1960s. I joined people who wanted to continue the trajectory articulated by Malcolm X and Dr. King in the last years of his life, where it was clear that after having won various legislative and legal victories in the sphere of civil rights that the next level was to begin to address the structural contradictions and elements that perpetuate poverty and injustice. There was a great deal of repression in the late 1960s and early 1970s and the beginning of the right wing drift that culminated with the election of Ronald Reagan in the 1980s. Many of us involved still believed in the possibility of real change in this country, and were also aware that those engaged in social justice outside of the country were framing their struggles in human rights terms.

What did the human rights movement look like when you entered it?

When I formally entered the movement, in the sense of working with a traditional human rights organization, it was 1986, and I began as a volunteer for Amnesty International. But I was aware of the concept of human rights long before that. I was aware of the work that had been done in San Francisco in 1945 by the NAACP and others to ensure that human rights was part of the UN Charter in a way that would be relevant to all nations, including the United States. I was also aware of the effort to bring a petition to the UN on behalf of African Americans soon afterward, and the call that Malcolm X made in 1965 to elevate the struggle in this country for racial justice from civil rights to human rights.

I was a little frustrated that despite the activities of Jimmy Carter in the '1970s that helped legitimate the concept of human rights, and the work of Amnesty International and others, there was so little work in applying the human rights framework to the U.S. That was part of my motivation in getting involved with Amnesty International. That it was important that the organization live up to its ideals of impartiality and objectivity and speaking truth to power, and intensify its focus on the U.S.

Were you surprised with the lack of focus on the U.S.?

I was frustrated because I thought that the spirit of human rights was being undermined because the value of the idea is that it links up domestic concerns and the international arena. The global perspective and the idea that the principles were universal needed to be implemented in a manner that took into account issues in both the international and national arenas. My internationalism is what made me feel it was unconscionable and a deep contradiction to ignore domestic concerns.

You had done domestic work and were steeped in the history of human rights in the U.S., when did you feel you were able to make a contribution to addressing what you describe as this deep contradiction in the human rights movement?

The few of us that started to take up human rights in the U.S. in the 1980s, such as myself, Keith Jennings, Loretta Ross, Charles Henry—who was chair of the Board of Directors at AIUSA in the late 1980s—started to organize a series of events to bring this discussion home, to introduce people to the framework and engage in discussion about its applicability. We tapped into a series of regional conferences organized by the Southern Regional Office of Amnesty International in 1987 and 1988 and brought a number of domestic groups to these gathering to discuss these issues. In 1989, we organized a conference at Fisk University—a historically black university, and brought activists from across the country, although most of them were from the South. It was small, no more than fifty or sixty people, but a pivotal event. The conversation was very rich.

The thrust of the human rights discussion was how to reconstitute the African American problematic, and whether we wanted to use the language of the rights of national minorities. The thinking was that by reframing the continued oppression of African Americans in terms of national minorities, it would allow us to make certain appeals internationally. We were exploring what aspects of human rights law might be useful for the struggle of African Americans. There was also a conference at Howard in 1991 on this theme that focused on this foundational question of how to situate the African American struggle for human rights. We eventually moved away from this framing of the issues because that construction was too limiting for the diversity and complexity of the

African American reality, and didn't allow us to take full advantage of the range of human rights laws we could appeal to.

When did it shift from these periodic conversations on human rights to incorporating this perspective into the day-to-day work?

There was an initial stage that was rhetorical, and that of course was starting in the '1990s. A lot of people in those early discussions, and those they influenced, went to the World Conference on Human Rights in Vienna in 1993, and we entered the rhetorical stage where people who were utilizing the language of human rights within the U.S. context began to gather momentum. Then we had the World Conference on Women the following year in Beijing and that brought in the important recognition that all that we recognize as women's rights are human rights. There was a growing momentum in these years in the use of this language in their day-to-day work. All this was made far more possible because the human rights language was liberated—especially economic and social rights—from Cold War politics. This language was held hostage until 1991 to those politics and there was a chilling effect. But after 1991, there was more freedom and fewer constrains on using human rights. In fact, in 1993 the World Council on Churches organized a series of hearings on human rights violations in the U.S. all around the country, and I served on the education committee and helped to organize the hearing in Birmingham, Alabama.

This momentum continued to grow through 1996 and took an institutional form with the historic gatherings under the banner of the Southern Human Rights Organizers Conference (SHROC) that Jaribu Hill, a long-time activist in the black liberation movement, initiated when she relocated to Mississippi in 1996. Fortunately as the director of Amnesty International's Southern Regional Office, I was in a position to work closely with Jaribu and support the SHROC biannual conferences. There were really people from all over the country and they all ended up in Oxford, Mississippi. It was a very important event because it had a strong activist spirit and sense of an idea whose time had finally come. There was real desire on the part of many of the participants to seriously look at this human rights idea. Some of the leading lights in the movement were there at Oxford, and this was the first opportunity for many to engage in serious discussions round the human rights framework.

What was the impact from all these international and domestic gatherings?

People went back to their communities, jobs, and universities and started to do some study and deepen their understanding of human rights, its applicability to the U.S., and its global implications. There was also a growing consciousness that in this rapidly changing world in which the United States was developing policies that had detrimental impacts around the world, the U.S. activists had a responsibility to impress upon the authorities in this country that they had certain obligations under these global standards. There was clearly a possibility of connecting our domestic concerns and foreign policy concerns through this framework. The people at SHROC, for example, worked in the domestic arena but they all had a global perspective, which an understanding of human rights helped deepen.

How did all this reflection change the social justice movement in the United States?

Some of the people involved were ready to take it further, and there were still more important gatherings to come. There was an important meeting in Mill Valley, California, of women's human rights activists in 1999, which reflected a

lot of the development of the thinking on human rights among activists. This meeting was focused on how to structure, move forward, or institutionalize the need to apply human rights domestically in a holistic fashion. This was something taken up by women, which is often the case.

Mill Valley was part of a series of activities that helped make human rights more central. It happened at a time when people were raising questions around the death penalty as a human rights concern. People were also beginning to talk about and mobilize around race in a new way. The process preparing for the World Conference on Racism, Racial Discrimination, Xenophopia, and Related Intolerance in Durbin was also already underway. The Durbin meeting sparked serious conversations around huge issues such as slavery, internal colonialism, and issues of sovereignty and the very construction of the Americas. It helped people to make connections between their specific domestic issue and how that issue related nationally and globally.

Mill Valley was part of this growing global consciousness. All of this activity then led to the Leadership Summit at Howard Law School in 2002. This was another pivotal gathering. Not only because it was another great chance to bring people together for discussion, but because here there was a real commitment to have follow-up. There was a commitment to build a structure to allow this growing movement to at least be in contact with itself. This commitment reflected a mature understanding that single-issue politics was not going to advance our movement very well any more, and that the objective situation required that we figured out a way to concentrate our power and if we could not agree on a clear political direction, at least we could agree that we needed to be coordinated. And the structure we established, of course, was the U.S. Human Rights Network.

What were the early days of the U.S. Human Rights Network like?

We had a minimal program, a program that intended to build a mechanism that would facilitate communication among members and create the possibility of coordinated work. The challenge was how to structure that mechanism so we could transcend our single issues and locales and see new opportunities for collaboration. Because this was something new and uncharted waters, we had very real issues of learning how to work with one another and building trust. We didn't make the mistake of trying to get agreement on some sort of national coalition and program, but rather tried to create a vehicle to let the work evolve organically. I think we have been very successful in that regard. We put in place a good coordinating body which helped to build trust and confidence, and as a result of our outreach activities we have been able to bring in the fold in a coordinated fashion organizations from across the country caught up in this new momentum. The Network provides these very important services for the movement.

What is the way forward for the Network?

The Network will continue to facilitate the organic evolution of human rights work. One of the very important pieces of work that evolved was the Bringing Human Rights Home Coalition of 2005 and 2006. This was a coalition of organizations committed to taking advantage of the reporting requirements for the U.S. government on the Convention Against Torture and the International Convention on Civil and Political Rights. The coalition coordinated a series of shadow reports to the U.N. monitoring bodies that involved over 160 groups. That was a very important piece of work that might not have emerged if we did

not have a mechanism and environment in place were people understood the importance of collaboration and cooperation. I see more of the same in the future.

People recognize that we have an opportunity to really push this movement forward and bring about the kind of transparency and accountability from the U.S. government that we are looking for, and this human rights ideal is part and parcel of historic struggle in this country for participatory democracy, human rights and social justice.

How does the Network differ from other organizations that seek to coordinate the domestic work?

What makes the Network special is that the groups are operating from a human rights perspective and the rights framework is the centerpiece of the work. These groups are attempting to build a mass base of individuals who are inspired by the human rights idea. This work is helping to popularize the notion of human rights so it belongs to the people themselves. The only way that we can check the power of government is through the power of the people. We don't have a human rights army. It is the power of the people that can transform the cultural and ideological environment in such a way that government representatives will be respectful and responsive to human rights principles. This movement is special and different because it believes in this possibility and believes in this framework provides the tools we need to bring about the kind of structural and institutional changes necessary to ensure human rights.

What are the main obstacles and pitfalls?

There are other powerful forces that use the language of human rights and democracy for their own selfish purposes. George Bush talks about human rights and advancing democracy, so if we don't appropriate the language and redefine the meaning of it there is a possibility we could find ourselves on the defensive vis à vis the people of the world. We must inject meaning into the human rights ideals domestically or we will see that this framework can be used as an instrument of oppression in a politicized way even against our own people.

This has to be done by building a movement with the people themselves having a commitment and ability to defend human rights. There is a struggle even internally in the movement around the notion whether it is enough to engage only high-level political elites, or whether it is necessary to couple that kind of work with the only element that can ensure human rights, a belief and commitment by the people themselves. Those of us who believe we have to build a movement, also believe we have to address the issues of power to really address human rights.

Why do you think that the time is now for this movement?

When people are committed and inspired by the possibility of something new with more meaning that addresses their objective needs, and they pick up the mantle of struggle, they are almost unstoppable. We saw that in the desegregation movement in the 1950s and 1960s, in the women's movement, and in the opposition that gay, lesbian, and transgender people still face. If people are inspired by the notion of social justice and believe in the evolution of human society, they are going to continue to struggle and will prevail over those elements that want to perpetuate their narrow special interests. We have an opportunity to advance a new conception of what it is to be human. We see a global movement

from around the world speaking out about global injustice and demanding democracy, and at the center at those demands is a demand for people centered human rights. And the movement here is part of that. I do see these examples of people power developing in various parts of the world, and I see the real foundation of change being planted by this global movement for justice.

* * *

LARRY COX

Larry Cox was appointed executive director of Amnesty International USA (AIUSA) in January 2006. A veteran human rights advocate, he came to Amnesty after serving for eleven years as senior program officer for the Ford Foundation's Human Rights unit. His work there focused on international justice, advancing economic, social and cultural rights, and human rights in the United States.

Your bio describes you as a veteran human rights advocate, how would you describe the human rights movement when you first became a part of it?

I became involved in human rights in 1976. At that time, the human rights movement was exclusively focused on civil and political rights. In the context of Amnesty International USA, where I first started, there was also a specific restriction on working in the U.S. Not because there weren't violations, but because there was this strange rule that you had to work exclusively on other countries, and people in other countries were to work on the U.S.

This had incredible ramifications on the way that both people within Amnesty International, and people outside, perceived human rights. Human rights work seemed to be for affluent White people who had the luxury of worrying about other countries. I was not conscious of this at the time, but I was uncomfortable with this role. The main way I got around this strange rule was working on the death penalty—the one area that allowed us to work in the U.S.

The interesting thing about working on the death penalty in the U.S. is that one begins to understand how shallow the understanding of human rights was and is in our country. The argument for the death penalty in the U.S. was the same argument made in other countries. As in the case of torture today, some argued that certain people have no rights and in order to protect ourselves we have to impose punishment that is cruel. They also argue that the people we kill for their crimes deserve it.

I began doing a lot of thinking about attitudes in the U.S. on the death penalty and attitudes of people in other countries, and the similar threads in the way they justified the violations occurring around them. I made that point repeatedly in speeches and articles.

This is when the seed was planted that there was something odd about not being able to work on violations in your own country, and the ramifications of that position. Everyone thought that there was something wrong with that, but they couldn't figure out why. It seems impossible to imagine, but no one could figure out why it was problematic that an organization like ours was saying nothing about how this country was dealing with freedom and dignity.

These seeds lay dormant for several years, but they were ruminating and stayed with me until I got to the Ford Foundation.

When did you decide you knew why focusing exclusively outside the U.S. was a problem?

I spent five years working in London at the International Secretariat of Amnesty International. While there, as well when I was based in the U.S., I realized that the problem of what we now call U.S. "exceptionalism" affected not only people in this country, but the human rights movement around the world. I heard repeatedly that human rights were not universal, or at least not applied universally, and they were only a tool used by the strong to beat up the weak countries. The primary argument was that nobody held the U.S. accountable for its human rights violations.

Nonetheless, I was originally a bit skeptical whether people would find a need to use human rights domestically. But I was absolutely convinced that unless we found a way to hold the U.S. accountable for its violations, we would continue seeing the idea of human rights undermined globally. U.S. hypocrisy is so visible that it has pernicious results around the world.

What was your strategy to address U.S. "exceptionalism?"

When I arrived at the Ford Foundation I knew I had an opportunity to at least address the "exceptionalism" problem. I started by asking whether you could strengthen existing organizations in the use of human rights in the United States. Of course, this would only work if I could find organizations that applied the international human rights standards in some way to the domestic sphere. I was also looking for organizations that did economic and social rights work in the United States, because this was a set of rights the United States adamantly refused to recognize.

It is fair to say that almost none of this kind of work was being funded by the Ford Foundation. We had a separate program on what was called rights and social justice that dealt with domestic issues and did not use a human rights framework. The human rights program, where I was hired to be a program officer, was located in the international affairs unit. This assumed that human rights work was supposed to be focused on international, not domestic affairs. And I wanted to change that.

I remember talking about this with a program officer in the rights and social justice unit named Anthony Romero. I remember that he was a bit skeptical about whether human rights could have any relevance. Nonetheless, despite all the initial skepticism when the Ford Foundation restructured itself, it decided to combine the domestic and the international work and create one unit that would be called the Human Rights unit. I had a part in this, as did Anthony. We argued that it was a good thing, and that human rights applied everywhere, including in the U.S. Today Anthony is the Executive Director of the American Civil Liberties Union (ACLU) and he has established a cutting-edge human rights unit and is a strong leader in the human rights in the U.S. movement.

Initially, it wasn't an argument people found useful, but at the same time, but they couldn't disagree with it. After all, human rights really did apply everywhere, and the argument was aimed at facilitating the exploration as to whether you could use human rights in a practical way in the United States.

The big occasion for first trying this out was in 1998, which was the fiftieth anniversary of the Universal Declaration on Human Rights. I funded a project involving three organizations—the Center on Human Rights Education headed by Loretta Ross, Street Law, headed by Ed O'Brian, and the Center for Human Rights in Minnesota. They came together because I insisted that I would not fund them separately. They created a project called Human Rights USA.

The project attempted to reach out to other organizations through a conference. There was a lot of interest at that time in the labor movement in this idea. The labor movement leaders thought that the human rights community might be an important source of allies. But the truth of the matter was that the domestic human rights movement at that time was very weak and nascent. I think it is fair to say that this project was not a huge success in practical terms, but it demonstrated that there was tremendous potential.

There was an incredible upsurge in interest in this idea and a lot of the groups that were going to become important actors in developing this idea where present at the conference organized through this project—such as WILD for Human Rights, the Urban Justice Center, and the Kensington Welfare Rights Union. These groups represented movements working on the full range of human rights—civil, political, economic, social, and cultural.

Interest also increased in the Ford Foundation. Gradually more and more program officers working on issues that were seen as purely domestic—women's rights, HIV, economic, racial justice—were increasingly viewing their work as related to human rights. Some of the early skeptics, such as Anthony Romero (mentioned above) and Alan Jenkins, Executive Director of the Opportunity Agenda, are now major and important advocates for human rights in the U.S.

What were some of the major obstacles to a human rights approach domestically and how were they overcome?

The easy part was the theoretical part. People could accept that human rights were universal and they applied to every country. The main obstacle people raised was a cultural one. There was, and is, tremendous buy-in to U.S. "exceptionalism," and deeply imbedded assumptions that Americans would not accept that international standards applied to them. Therefore no matter how theoretically true, the argument went, it won't work. People will not "get it," will not understand it, and ultimately will not be interested in or use human rights.

I myself had some doubts about whether this argument was correct. But because of the international experience I had with Amnesty International, I knew this was not a new argument. People in every country in the world argued that international bodies and laws weren't needed in their country because they had their own laws and culture. Yet, this did not stop the use and effectiveness of human rights in those countries. Still, I had some real doubts as to whether this would be the case in the United States.

I had always seen the power of human rights, particularly in the way that it strengthened the people fighting for justice by making them part of a global movement. They worked with an understanding that the whole world recognized the value of what they were struggling toward and the deep wrong of what they were fighting against. This has tremendous power for the people who are suffering, and I couldn't understand why people in the United States who were suffering would not feel that way.

In fact, they did feel the same way. Even before we saw any changes in policy and practice, we could see that people in communities felt the power of human rights. They were hampered by lack of resources, the fact that they could not use human rights in the courts because of the legacy of U.S. exceptionalism, and the skepticism of the media, intellectuals, and donors who argued they should not be using this language. But they were not at all intimidated by that.

When you went to gatherings of the domestic human rights movement it was clear that this language, methodology, and these standards had tremendous power for communities. There have been long-standing arguments that people of color or other groups who were oppressed in this country were not interested

in human rights. But it turns out this was only the case when human rights were identified exclusively with people in other countries. Once communities suffering violations realized this was about their rights too, they took to it with great enthusiasm. This was very important because whatever the obstacles the U.S. government placed in the way of human rights, it was not because these rights and standards were not powerful. On the contrary, it was because those opposing justice realized how powerful human rights were for those who have been treated unjustly for centuries.

I had been working in human rights for thirty years before I understood the history of this issue and why the United States made it so difficult to apply these standards within a domestic context. Once I learned the history of it, thanks to Carol Anderson's book *Eyes Off the Prize* and others like it, it was a revelation. It all made sense and came together. It was also clear that we were on the right track and that we had an obligation not just in terms of my earlier argument that it was important globally, but we had an obligation because of what it could do domestically for groups in the United States. We had to endure a lot of skepticism, almost ridicule in some cases, but it isn't really worth talking about, because the evidence was overwhelming that this was a powerful weapon for justice to use in this country.

You have worked on issues of core civil and political violations for years including persecution of dissent, death penalty, and many others. This seems a large enough battle in itself; what made you so invested in fighting economic and social rights violations as well?

There is a personal element that one can't escape. I grew up in a family that was poor in the United States, and felt from an early age that it was not just a matter of bad luck, but that it was unfair. I was a child of a single parent that worked harder than anyone could work. But women at the time had no real opportunities.

My mother was barely able to make enough money to pay the bills, and constantly on the edge of disaster. My whole sense of justice before I ever got to human rights was grounded in this experience and a feeling that something was dramatically wrong.

I wasn't able to put the words "human rights violation" to what I was experiencing, but when the civil rights movement broke through the public's consciousness, I felt a strong sense of identification with it. This only grew as the movement more publicly recognized that poverty was related to civil rights violations. The Poor People's Campaign definitely resonated with me.

So what do you think the impact of this early work has been?

The rest is sort of history. This movement has continually grown, and so has the idea that human rights apply in the United States. When I started funding this work, I had to look for organizations to fund. Only a few, maybe half a dozen, were explicitly using a human rights framework to address domestic issues. I could fund them all with my budget. Some of them I would find had a pretty loose definition of applying human rights, and some were less explicit. There was a lot of skepticism in the unit about whether this could be useful.

Additionally, most of the large human rights organizations still kept a distance from this emerging, small, and underfunded domestic human rights movement, although they themselves were doing more than they had ever done in the United States. Both Human Rights Watch and Amnesty International USA had launched work on racial profiling, human rights violations in prisons, and other related work.

By the time I left the Ford Foundation there were more organizations than I could possibly hope to fund. They were growing, and the movement was growing. It was all growing way beyond the capacity of one funder. Victories were being won and there were series of conferences that brought together the smaller human rights groups to try and build connections among them. These conferences eventually led to the formation of U.S. Human Rights Network, with over 200 organizations in it now—including many of the large human rights organizations.

At this point, did you feel your work was done?

Absolutely not! We then had to move into a second stage of this work because unless we found additional funds for this movement, it was going to be choked of its potential by lack of resources. We had established a real demand, now we had to raise the resources to meet that demand.

We hired Dorothy Thomas to do a survey of donors asking whether or not they would fund this work and/or why. A small minority thought this was the worst idea ever, including some major foundations. Some were very enthusiastic, like the Mertz-Gilmore Foundation. But quite a lot had never thought about it or had questions, and were interested in learning more. This group wanted to see evidence that this would be an effective way to advance rights in the United States.

The survey results led to the creation of a series of case studies on human rights in the United States that were intended to demonstrate what is possible. All the groups profiled were Ford Foundation grantees. Some were long-standing, had done a lot of work and had developed the theory and practice. Others were in the beginning stages. It showed a body of work that was impressive. The publication had a positive impact in creating a collective of donors called the U.S. Human Rights Fund.

Were there any other factors at play fueling the U.S. human rights movement?

There certainly were. While this work was going on, the world was also changing. U.S. groups heavily attended a series of UN World Conferences that exposed them to international frameworks and to groups that were working on similar problems in their own country using human rights. The U.S. groups, which were primarily using a civil rights framework involving only a subset of human rights, became increasingly interested in seeing whether what was being done elsewhere could be done in the United States. International alliances between U.S. groups and groups in other countries began to form.

Then the attacks on 9/11, and the subsequent government reaction, showed that that the supposedly clear division between the United States and the rest of the world was dramatically false. In this new context, you just couldn't separate violations by the United States and violations by other countries. When the United States felt threatened, it would employ tactics that were strikingly similar to those employed by other governments when those governments felt threatened.

All of this led to a dramatic increase in attention paid to human rights violations in the United States and to those working on stopping them. I, myself decided to come back to one of the major human rights organizations, Amnesty International USA, because it had dramatically changed its rules and regulations about work on the country where it was located. It also has the kind of constituency that, if mobilized, could make a real difference on human rights violations in this country. Amnesty International USA is well positioned to make the link between human rights work at home and in other countries—that was one of the motivations for coming back.

What do you think the long-term value of this work will be?

There is a lot to be done before this work reaches its full potential. The obstacles in the United States have been carefully crafted and are not insignificant. We need to get courts to entertain arguments based on international standards, and there are huge battles going on just on that issue. We have surprising allies, even on the Supreme Court, but the backlash is fierce because there is an understanding that this could be a powerful weapon against unmerited privilege and injustice.

One has to do a lot of work to get the media to understand that even if the United States has not ratified a treaty or has placed reservations on the treaties it does ratify, the United States is still bound—as any other country—to basic human rights principles. When the United States reports to international bodies this needs to get publicized in this country because that is only source of power international bodies have on a practical level. Unless the media begins to publicize these international conversations, they will have a limited impact, if they have any impact at all. There is a tremendous amount of public education needed as well. For ages, the public has been told these international standards have no relevance to their lives—only to the lives of "others" living "somewhere else."

Nonetheless, you can already see the power of human rights in everything from battles around the right to health, the right to education, treatment of detainees, or labor victories such as the major agreements extracted from the fast food industry by the Coalition of Immokalee Workers. You can begin to see clear evidence that human rights can transform both lives and society, and also that the concept of human rights brings together very disparate, and even competing movements in this country and gives us a kind of unity we need if we are really going to transform society. There is enough evidence now that you don't have to speculate; you can point to examples. What we need now is the resources to build the capacity of this movement; every victory reinforces other struggles and is a step toward transforming the whole society.

You are credited by many people for being the man who enabled this movement to get off the ground, what do you think of that?

What happened in terms of my own role was almost an accident. The real catalyst was the groups that worked with very few resources against tremendous odds, and kept insisting that human rights standards should be applied in the United States.

I happen to have access to resources that helped these groups and organizations survive and get heard. It was an important contribution, but it was because I happened to be at Ford. The credit should really go to the Ford Foundation, which allowed me to do this work. The Ford Foundation was looking for a way to make human rights more meaningful for Americans, and it took a big risk to do so. I feel grateful that I had the chance, but I would not overestimate the contribution. It was just one part of the puzzle, and if you are a donor you get to take credit for lots of work other people do. Its one of the perks of being a donor!

I always felt that I was riding a wave that other people had created. It was the wave of human rights being applied everywhere in every society and it's a wave that is still growing.

So now that you are in an extremely important position as the Executive Director of Amnesty International USA, how do think you will be involved in applying human rights standards to the United States?

Amnesty International USA has the possibility of making a tremendous contribution. I don't think my organization should or will seek to replace this growing

U.S. human rights movement, but I think we have the ability to become an important part of it. We can build the capacity of other organizations in it. We can make the global connections between the human rights movement here and around the world. I think that we will accomplish these tasks, but also have a tremendous amount to learn as we move both into more work in the United States and work into economic and social rights that others have been doing long before we got to it.

So, we are also the organization that needs help from those already doing this work. We are very conscious that we benefit from building relationships with this growing domestic U.S. human rights movement, and from supporting it as well as having it support us.

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LORETTA ROSS

Loretta Ross is the founder of the National Center on Human Rights Education and the National Coordinator of SisterSong Women of Color Reproductive Health Collective.

What led you into doing social justice work?

Well, there were personal catalysts including teen pregnancy, incest, and being sterilized at age twenty-three. For obvious reasons I was very involved with the women's movement, in particular the women of color movement beginning in the 1970s. Through this movement I had a great deal of international exposure by participating in global conferences. And when you go global, human rights is the framework everyone is using. It was from the Mexico City first international UN conference for women in 1975 that I first heard the phrase, "Women's Rights are Human Rights" from Filipina activists. They used this framework to oppose the Marcos regime. But I had not yet thought about bringing human rights home.

After the Mexico City meeting, the UN launched the Decade for Women from 1976–1985, and there were global conferences in Copenhagen and Nairobi, and of course there was Beijing ten years later in 1995. Through engaging in these meetings, I was able to follow the trajectory and growth of the movement to end violence against women globally. This is one of the most successful global movements we have. You also build relationships as you see people over and over again, and we ended up with a global women's posse!

When did the idea of using human rights in the United States first emerge for you?

Well, interestingly enough one of my early influences was a White supremacist—a repentant one of course. I also worked for many years monitoring hate groups at the Center for Democratic Renewal (CDR). Floyd Cochran was a spokesperson for the Aryan Nations. One day he calls the CDR in 1992 and I pick up the phone. I literally said to him "*The* Floyd Cochran?" when he asked for Leonard Zeskind, our research director.

At first I thought it was going to be one of those phone calls to threaten us. It turns out Floyd had a child born with cleft lip palate and his Nazi "buddies" told him his child was defective genetically and should be put to the death. He obviously questioned that approach and was ultimately kicked off the compound. He told me his whole story about being homeless because he had an epiphany about these Nazis.

We started this traveling road show where he would apologize for all the violence he felt he enabled through recruiting young people who were skinheads into the Aryan nation and other incidents. At one point he had recruited some kids named Freeman who went back and killed their families in Pennsylvania. He felt particularly bad about that.

Part of his penitence was that he wanted to go around the country and tell people not to do this, so we went to a lot of community groups, the Klan-fighter and the former Nazi. While we were in the midst of this a couple of years later, he asked this really great question. "Where's the movement I can join? Now that I quit the Nazis, I am still a great speaker and I want to do something for my community." I took this question to Reverend C.T. Vivian who was Dr. King's national field director. Reverend Vivian, who was the board chair of CDR, said the answer for Floyd was the human rights movement.

This planted a seed, but I still didn't know where to take it. This was around the time of the Oklahoma bombing in 1995. To be honest, I was somewhat frustrated with the message we had at CDR. It was basically, "Just say no to intolerance." But this was inadequate. People wanted something to organize around, and if you organize around Klan marches, that means you have to wait for them to make their move in order to make yours. Human rights seemed like a way to inoculate communities against hate proactively.

When did you decide to commit yourself to human rights work in the United States?

It actually began in Beijing in 1995 at the UN World Conference on Women. I had occasion to work with Shula Koenig from the People's Decade for Human Rights. She had invited me to join her delegation to talk about human rights education around the world. There were twenty-two women from twenty-two countries, and I talked about human rights violations in the United States. A number of the women turned to me and said, "Well what are you going to do about it?"

I had never done human rights education. I had been monitoring hate groups, which is very different. Nonetheless, on January 1, 1996 I founded the National Center for Human Rights Education (NCHRE). Shula connected me to Professor Abdullahi An'Naim. He was a lawyer in Sudan who was imprisoned by the government and was freed by a campaign by Amnesty International. He now is a law professor at Emory. I met with him to say "I want to teach people about human rights, but I don't know anything about them, can you help me?" He said well, "I want to do more community work in Atlanta so if you organize a group, I'll teach the class." On January 7, 1996 we started to meet weekly.

At the time I was doing work with homeless groups and they came, they were the ones that most seized upon it. The Georgia Citizen's Coalition on Hunger was also very interested. We were supposed to meet every Wednesday for six weeks for three hours. But new people kept coming and we kept having to start over. As the word spread, the class kept going, and people were driving from around the state to attend. We continued this class for six months!

Afterwards, we realized we had to construct a program to take this out to the rest of the world. Reverend Vivian agreed to be the Board Chair for NCHRE. He was the one that told us the year before that Dr. King meant to build a human rights movement, not a civil rights movement. That was the missing piece of the history that hadn't become widely known until recently. He referred us to Dr. King's last Sunday sermon on March 31, 1968, and that was the part of the "I Have a Dream" speech that never got any play. To be honest, until Carol Anderson wrote *Eyes Off the Prize*, explaining the kind of

anticommunist backlash activists the civil rights movement faced in the 1950s because they pursued a human rights approach, and why it finally fell by the wayside, we never really understood why there was no U.S. human rights movement.

What was amazing to me about the founding of NCHRE is that it was a Baptist minister, a Muslim scholar, an Israeli-American Jew, and an atheist who sat together in my living room and dreamed of how we could launch NCHRE with our tagline, "Bringing Human Rights Home" that has now been adopted by many other groups in the U.S. human rights movement. We did not intentionally plan for that diversity, but there was something magical in that we came from so many different places and perspectives, including Africa and Israel, and agreed that the United States needed human rights education and it was our mission to help provide it.

What kind of program did you decide to construct given that NCHRE had no role models and was the only one of its kind?

Some of our first models came from women in other countries who had launched human rights education programs. We used manuals from South Africa, Argentina, Ethiopia, the Philippines, and other countries because we had no U.S.-based model to use. Shula helped us access these models and even provided our first funding to get us off the ground. We adapted their training manuals for ourselves until we were able to produce our own materials designed for audiences in the United States.

The Ford Foundation helped launched a project called "Human Rights USA" in 1996. This was a collaborative between the National Center for Human Rights Education, the Human Rights Educators' Network of Amnesty International, Street Law, and the University of Minnesota Center on Human Rights. The theory of the original formation is that the other three partners would do school-based human rights education, while NCHRE would do community-based education. The school-based effort never got off the ground, because of the institutionalized resistance of a lot of school systems to having their curriculum changed or challenged. On the other hand, the community-based human rights education caught fire.

One of the other things Human Rights USA decided to do in 1998 as part of the fiftieth anniversary celebration of the Universal Declaration of Human Rights (UDHR) was have Peter Hart and Associates do a survey of the public. This survey demonstrated that only 7 percent of the American public knew about and could name the Universal Declaration of Human Rights. We used this to prove our case that it was necessary to do human rights education.

We also were purchasing the little blue book with the Universal Declaration of Human Rights (UDHR) from the United Nations for twenty-five cents a piece. We handed out thousands of these. We used to go to the United Nations publications office, and take a big briefcase when our friends who worked there would let us take them for free. They thought it was wrong that we had to pay for them, and everyone there was supportive once they heard we were doing human rights education in America. We had to visit New York every few months with a big tote bag to get the booklets! Finally, we decided just to print our own UDHR, and we eventually did different booklets for different activist communities. We had a UDHR booklet with a rainbow for the LGBT community and a lavender booklet for the Convention on the Elimination of Discrimination Against Women. These pocket books were a tremendous resource.

One of our other tactics was to try to get people to establish human rights coalitions in their cities, and some of them still exist. St. Louis has one that

celebrates the anniversary of the UDHR on December 10th every year. And, then we had coalition in Atlanta that had a short life, it lasted about four or five years. One of the good outcomes was that the coalitions brought people into contact and working together from different issue areas who did not work together before.

We also worked with Jaribu Hill on the first Southern Human Rights Organizers' Conference to help get that off the ground, and supported the Kensington Welfare Rights Union. We were also asked to do training at the Urban Justice Center in New York. All these groups and efforts are ongoing today.

There isn't a U.S. human rights activist today who hasn't heard you speak, how do you feel about that?

We let a genie out of the bottle. It's like teaching slaves to read, you don't know what they are going to do with it, but can't help but be glad to do that intervention. Every time I hear someone use the phrase human rights in relation to Katrina, heath care, or a long range of issues, it really looks like we finally corrected a historical wrong. This should have been done in the 1950s, and I think that as a movement we have been set back fifty years.

We still have a lot of work to do. One of the issues is that there are still more people doing human rights work than claiming the framework, because a great deal of social justice work going on right now is human rights work. We also still need to organize school-based human rights education programs.

Why do you find it so important that social justice groups explicitly claim the human rights framework?

It is important because it ensures that they do their work in a way that is consistent with human rights—antiracist work cannot be done in a way that is homophobic and sexist, for example, and be consistent with human rights. A single-issue focus sometimes fails to deconstruct systems of oppression. Classic mistakes include the belief of many in the women's movement that solely getting women in the seats of power is going to create structural change.

My current work with Sister Song takes this approach. We have a collaboration between SisterSong, Ipas (an international reproductive health organization), and the National Gay and Lesbian Task Force to map all our issues in the United States—literally. You can click on a state and see where and how your human rights are protected or not by visiting www.MappingOurRights.org. Working together this way across issues and constituents is made possible by the human rights framework.

Now that you have left NCHRE, do you have any reflections to share on the significance of building that institution?

Well, most of all I'm glad I did it. I can think of many opportunities for growth that NCHRE couldn't take advantage of because there were no resources, but we accomplished a lot nonetheless. I remember going to countless foundations trying to convince them there were human rights issues in the United States, and that there was a desperate need for education. The new U.S. Human Rights Fund is an outgrowth of those early efforts. We were always starved for resources, and human rights education still is a stepchild of the movement.

We had to start at square one on human rights education. We actually did a training module on critics, naysayers, and skeptics. People who thought they knew human rights but didn't understand its potential for building a movement. They thought that you couldn't do anything without legal enforcement—what they called "justiciability." That was so short-sighted. We can, and must, still build political will and a moral basis. The legal system never catches up to

movements, it follows them. So we have to build the political and moral will first. The Black civil rights movement was working for 400 years before *Brown v. Board of Education*. So we must build a human rights movement that demands the ratification of treaties and the removal of reservations and declarations on the ratified treaties before we can see legal enforcement of our human rights.

I also keep insisting that the most important missing link is human rights education in the school system. We will not have sea change until people in the United States know their human rights as well as they know the Pledge of Allegiance. With the advent of technology and the Internet, however, I see young people working in a much more intersectional and interconnected way. They are primed for human rights because they see things in a universal and interconnected way. Taking it to young people is the next step, because this is the social justice movement they need to build—a human rights movement for the United States, like Dr. King asked for in 1968.

We also need to set standards in the field of human rights education. It's not enough to just use the words "human rights" and put it in a proposal. Those doing human rights education need to understand, in a serious way, how it has to transform their worldview and their work. And once you teach people their human rights, there needs to be a whole body of work on how to operationalize it. How do you transform your program? How do you deal with the naysayers? How do you work in an intersectional way while keeping focus?

What about your current work at SisterSong?

SisterSong, in part because I was one of the founders, always worked within a human rights framework beginning in 1997. It existed for its first seven years as a loose network of women of color reproductive health groups. After our national conference in 2003, we started thinking about establishing a headquarters. We put it on hold to work on the March for Women's Lives and that boosted our visibility. We were able to have an impact and even got the coalition to change the name from the March for Freedom of Choice. At first it was going to be a march only about abortion, but it was crucial to broaden the issues using the reproductive justice framework SisterSong had created based on human rights.

In March of 2004, right before the March for Women's Lives, I decided that my time at NCHRE was over. For the growth of the human rights education process it needed to move to a place I could not take it—into the religious community. I'm an openly known atheist, and I made the decision to hire a minister to lead NCHRE, and I returned to the women's movement. I thought I could do for SisterSong what I did for NCHRE, and now we are moving into our new offices.

We just finished our second national conference last week and over 1,000 women of color attended. What is increasingly happening is that people are taking reproductive politics beyond abortion. It is not just about abortion, it is about all the other human rights issues that trail a woman as she walks into the clinic. We use the language of reproductive justice, which is based on the human rights framework.

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LISA CROOMS

Professor Lisa Crooms is an activist legal scholar at Howard University Law School. Her work has been significant in bringing international standards

to domestic law and practice, and has helped to expand international norms to be more inclusive and responsive to women's rights and the intersectionality of poverty, racism, and gender discrimination.

When did you first start thinking about human rights?

Well, I can't remember ever not thinking about human rights. I won my first human rights award in the third grade. It was a poster contest sponsored by the Human Rights Commission of the Borough of Metuchen in New Jersey. And in some way it was always part of my consciousness, but my perceptions of what human rights actually mean for activism and for the way I, as an African American woman, relate to other people both within and outside of my identity group and movement, is something that has evolved over many years.

Can you tell us about your early work in social justice movements?

My work started before I went to law school in 1988. A lot of my activism during this period was colored by romantic ideas of the African diaspora, some of which remain important, but others which have shifted as I've evolved as a human rights activist. I worked within the Southern Africa solidarity movement, which included working on divestment and sanctions to counter South Africa's destabilization of the entire Southern Africa region. One important influence was Jean Sindab, my boss at the Washington Office on Africa. She was committed to human rights at home and abroad, as well as training a group of young activists and advocates. She gave me the space to grow and develop as an activist. I also became involved with the D.C. Student Coalition Against Apartheid and Racism. Afterwards, I was Research Director for the American Committee on Africa in New York.

I was deeply influenced by the Southern African activists I encountered. I specifically remember one conversation with Frank Chikane, who later became the head of the South African Council of Churches. He told me that while he appreciated the anti-apartheid work folks were doing, he also thought we had our own business to tend to. He thought about racial justice in human rights terms organically. For him, human rights was just the most logical way to understand the nature of rights, and the way to break free of limitations in any domestic system.

This was also an intense time domestically, right around when Howard Beach and Tawana Brawley happened in New York and Rev. Jesse Jackson made his first run for president. We were incredibly idealistic and energetic and put a lot of effort into founding a group called the National African Youth Student Alliance. We were organizing on and off college campuses, both above and below the Mason-Dixon Line. We organized huge rallies and learned how to do basic community organizing in places like Greensboro, Alabama, and elsewhere in the Black Belt. There was a lot going on, and much of our work was supported by the United Church of Christ Commission for Racial Justice.

What did law school teach you about social justice activism?

I had no idea how limiting the Constitution was until I actually got to law school. The limited scope of protection from discrimination, as well as the lack of any type of either power analysis or collective rights within antidiscrimination law were the types of things that made law school a challenge. My undergraduate training in economics made me particularly interested in economic and social rights, but the conventional law school curriculum only dealt with such rights in terms of property, and it rarely did so with an acknowledgement of the role the right to private property played in the original constitutional compromise

that accommodated and legalized slavery. This only made human rights more compelling as a framework. That was really what law school taught me.

Why did you decide to become an activist/scholar at Howard Law School?

I was in California in private practice when the Simi Valley verdict in the Rodney King beating occurred. That incident made me realize I needed an exit strategy from the law firm. A number of us formed a group called African American Attorneys against American Apartheid that linked domestic racial justice issues to international human rights. As I was thinking about these issues, an opportunity at Howard Law School emerged.

I wanted to have the time and space to think about if and how human rights could be useful. Could we begin to at the very least try to pick up some of the stuff Du Bois and Robeson had done? I was beyond the romantic diaspora thing, but I did feel there was something to the idea that being in the United States was not a justification for remaining isolated.

There also appeared to me to be an opportunity within our legal system, which has been borne out by some of the recent Supreme Court cases citing international law. The practitioners doing racial justice work didn't have the time or inclination to step outside of the domestic law framework and begin to think more creatively and globally. So I wanted to spend time doing that and analyze domestic issues in a human rights framework.

What shape did this work take after you arrived at Howard Law School?

My early attempts involved developing a human rights analysis of welfare reform in the United States. It was not exactly well received. I presented it at an expert consultation I was part of in Malaysia on women's human rights, and the notion got very little support. Truth is, I caught hell from the other women, including those from the United States. Only a handful of the U.S.-based human rights activists were responsive to the idea of calling the attempt to destroy the social safety net a human rights violation. The others weren't buying it and felt that I either misunderstood human rights or denigrated the seriousness of their work by suggesting that poor single women of color and their dependent children were having their human rights violated.

Far removed from these formal international consultations though, there was a growing conversation among poor women themselves about this. I had a tremendous experience at a Poor People's Economic Human Rights Campaign conference held at Temple University. I found that conference really interesting, especially after always trying to have a conversation with people who didn't get it or didn't want to get it. These people, they got it.

But maybe the thing I did that has resonated the most was the 1997 Howard Symposium on the Convention on the Elimination of All Forms of Racial Discrimination (CERD). Keith Jennings came to me in 1996 with this idea that the *Law Journal* should have a written symposium for publication.

The focus of the essay I wrote for the symposium was what women's rights had to do with CERD. Racial issues are usually conceptualized in male-centered terms and women experience violations differently. The essay pointed out that even if the United States decided to fully abide by CERD, women of color would still be left out in the cold. It opened up a conversation. It was particularly important to engage Gay McDougall who was on the CERD committee, which had not yet focused on the gender components of that work.

The symposium ended up being very important because a number of people read bits and pieces of it who had not necessarily thought about using CERD.

It also helped to support Gay's work to more fully engage the traditional civil rights activists and advocates in the United States in a conversation about the need to shift from a civil rights to a human rights framework. Ultimately, it led to CERD General Recommendation 25, which integrated gender issues into CERD. This was an important step in implementing the concept that human rights are indivisible, that is that you cannot protect one right, or set of rights, while ignoring or violating other rights. Rights had to be protected as a holistic package.

Given your work on CERD, what did you do around the 2001 World Conference on Racism, Racial Discrimination, Xenophobia, and Related Intolerance (WCAR)?

My work at WCAR came on the heels of a few years of involvement with what became the Black Radical Congress (BRC). I was disappointed with that effort because the gender politics turned out not to be as universal a principle as many of us thought. After I gave up on the BRC, I met Krishanti Dharmaraj, who was the Executive Director of WILD for Human Rights. Krishanti had read the pieces in the Howard symposium on CERD, and wanted to start trainings to organize a women's delegation to the WCAR. She asked Ali Miller at Columbia's Mailman School of Public Health and myself to do training, similar to that which we did for Amnesty International USA.

We had planned to train the delegates for an eighteen-month period prior to the WCAR to build the capacity of the members to engage based on a jointly created agenda. We wanted them to be prepared, not overwhelmed. The delegation involved fifteen to twenty people, and the common agenda was supposed to ensure that in every sphere in which the women engaged the principles of intersectional identity and indivisible rights would consistently be promoted. Our hopes were that that the Platform for Action would reflect or at least recognize those principles. We had expected the delegation to split up into their interest areas.

Did this strategy work?

The WCAR happened in a way that a number of women were just overwhelmed. There was nothing we could have done to prepare them. If you are used to meetings being fairly contained, well organized, and with people unified about overall objectives—this was not the meeting for you. Most of the women also went to the gender caucus, which defeated the purpose of the overall objective to disseminate the intersectionality message through all the issue areas.

But WCAR was challenging in general. The State Department originally announced they were going to send a high-level delegation, I think it was supposed to be headed by Colin Powell. The United States latched on to claims that some NGOs [nongovernmental organizations] were equating Zionism with racism as a way to brand the whole thing anti-Semitic and to avoid having to answer some very hard and pointed questions about slavery and the slave trade as a crime against humanity. Powell was supposed to be coming until three or four days into the conference, and then suddenly Powell was not coming.

The more mainstream NGOs chose to publicly distance themselves from the Zionism issue in order to avoid this criticism from the U.S. government. Criticisms of the alleged anti-Semitism prevented anyone from having any serious discussion about racism as a historical and contemporary matter. The point of the Conference was further obscured by the events of September 11, 2001.

Even if something useful came out of chaos at WCAR, at no point was there any conversation in the United States—it all got lost in the shuffle.

Was the experience in any way useful to you?

It was a learning experience for me. I think I originally underestimated the extent to which otherwise well-meaning people from the United States will go abroad and be ugly Americans and try to dominate conversations despite lack of expertise. Some conversational spaces that could have been useful were polluted by this. On top of that all the cultural black nationalists got together and they decided their struggle for reparations, including in the form of land, was the most important thing. This was troubling to me because there was a very legitimate critique of this claim by indigenous women who felt that any demands to redistribute land that really belonged to indigenous people were unjust.

This was contested space for paradigms, and it all came crashing together. It reflected how much work had to be done, and how many different centers there were. Human rights did not provide a mediating vehicle, but if more than a small number of people had been either seriously interested in using human rights or listening to those from outside the United States, it could have been a strong tool to mediate the various agendas.

The work leading to CERD General Recommendation 25 and the WCAR effort is a great example of pushing out into the international system, but when did you start pulling the standards back into the domestic system?

It's always been simultaneous. At the same time that I was working on General Recommendation 25, I was writing about a fatherlessness initiative at HUD in human rights terms. The Clinton administration was interested in a public housing policy that would reunite poor and working poor fathers with their families in public housing projects without critically examining the patriarchal nature of the manhood and fatherhood they were encouraging these men and their families to embrace. I was making an argument that the particular initiative violated the human rights of poor women living in public housing because the initiative and the reasoning behind it relied on sex and gender stereotypes prohibited by the Women's Convention.

I was also later involved in the Mill Valley meeting—a gathering of women's human rights activists in the U.S. What was satisfying about the Mill Valley meeting was that we were all on the same page about the importance of developing a domestically focused human rights analysis. What was more difficult, however, was working through the challenges of putting our institutional and personal interests aside to create something larger. At the end of that meeting, the group decided to reach out to other activist communities and break the conversation out of traditional silos like gender.

Moreover, after WCAR it was clear we needed a vehicle for a lot more conversation. The next step in creating this vehicle and the outgrowth of Mill Valley was the Leadership Summit on Human Rights that we held at Howard Law School. We thought carefully about how we were going to structure the meeting to encourage new conversations.

Those who weren't invested in a particular outcome made it exciting—it was an experiment, we went in without predetermined notions. The planning committee, of which I was a part, decided to structure the meeting so as to ensure that activists talked to each other across issues as well as sectors of work. In other words, we wanted the lawyers to be in conversation with the organizers, the policy advocates with the educators, etc. As well as, for example, the criminal

justice activists talking to the education activists. We decided to put this structure in place and just see what happens. It was a lot of fun. The meeting itself had its highs and lows, but it got a lot of people in the room who wouldn't have otherwise come to a human rights meeting in the United States.

In what direction did the Leadership Summit take your work?

Immediately after the summit, I had a Fulbright and bowed out for a year, six months of which I spent in Jamaica looking at the relationship between gender, violence, and law. This gave me an opportunity to continue working through some human rights issues and analysis, but outside of the United States. When I returned from my sabbatical in 2003, I became reengaged in the U.S. human rights work. By that time, the U.S. Human Rights Network had been founded as the final outcome of the Leadership Summit at Howard.

At this point I think that there are certain things that I can provide for the Network that other people have no interest in or don't have the freedom and flexibility to do. I'm currently interested in the language of human rights and figuring out how to ensure that community activists are speaking in the language the decision makers understand and respect. Because of my background as an activist and organizer, as well as a constitutional and international human rights law scholar, I think I have the ability to tell people that are skeptical or suspicious of this more formal language, I understand what you are saying, but I can't make any real decision that will make your life better. So if you are trying to figure out how to make those people who make those decisions hear you, we have to figure out how to put it in language they understand without any judgment about which language is better or worse. It all depends on context and this is about figuring out how to make the claims accessible regardless of the context in which they are raised.

Also, because of the fact that I'm at an academic institution oftentimes I am able to say things that others can't say. I think my role is to ask the very hard questions, and I'm equal opportunity in that respect—that's a role that I'm happy to play.

Haven't you also done substantive work for the U.S. Human Rights Network around the U.S. report to the U.N. Human Rights Committee?

When the United States was undergoing a review of its report to the U.N. Human Rights Committee on its compliance with the International Covenant on Civil and Political Rights in 2006, we knew the Network could play a positive role. I was tasked with helping coordinate all the reports, called shadow reports, the U.S. civil society groups wanted to send to the Human Rights Committee. These reports pointed out problems on the ground the U.S. government would normally fail to mention and challenge any inaccuracies in the U.S. report.

The coordinating effort was a much more satisfying activity than I expected. My job was to keep the big picture in mind, while coordinating 160 organizations each with their own issues. I had to keep my eye on the big picture and to frame the wide range of discrete issues accordingly. It was fabulous to sit in the room where the U.S. delegation was questioned about its treaty compliance and realize that, based on the types of questions the committee members asked, we had been heard. The NGO lobbying worked because people played by the rules. People played by the rules because they all benefited from it. Consequently, people are now more willing to coordinate for the U.S. report on the Convention on the Elimination of All Forms of Discrimination because they understand everyone's got something to gain from a coordinated effort.

What's next then?

We still have work to do. There are still definite challenges, but more people get it in a more than surface way. Some of the challenges are how to engage a much wider range of people and institutions. I also think that we've raised some legitimate questions about the agendas and perspectives of those who claim there is not now nor has there ever been a human rights movement in the United States. Our very existence and the strength of our growing numbers and voices attest to the selective vision and memory of those naysayers who have a difficult time paying attention to the work and struggles of those they seek to marginalize and who are most affected by the rights violations committed within the United States. This movement is about inclusive vision and the memory of those who worked so hard before us to do this.

And why fundamentally have you chosen to be a human rights activist?

I feel like I had to go through a period focused on the cultural nationalist perspective to get to where I am. During that period the only thing that was important was whether I shared an identity with someone. Were they also of African descent? But there were so many contradictions in this approach, and frankly the gender politics were terrible.

I started to read a fair amount of West and East African literature about abuses faced in that region. This made me think—well they are writing about folks who are just as corrupt if not more so, than the colonizers and those people are Black like the people they are oppressing—so cultural nationalism isn't going to work for me. Oppression isn't easier to stomach if your oppressors look just like you. In some ways, it seems to be more of an affront to have those you might otherwise expect to treat you better because you've experienced some of the same things decide your humanity can be jettisoned in the interest of their advancement or self-aggrandizement. This is not to say that identity is irrelevant. I fully embrace all aspects of my identity. In many respects, I am a race-woman, but I'm a race-woman who believes all people are entitled to certain rights for no other reason than the fact that they are human beings. As I have grown, I better understand that you have to make a decision based on politics, integrity, and values, rather than merely sharing a purported identity. That is where human rights has taken me.

CHAPTER 4

Human Rights and the Transformation of the "Civil Rights" and "Civil Liberties" Lawyer

Cynthia Soohoo

Over the past few years, clear signs indicate that the wall between domestic social justice and international human rights work is crumbling:

- In 2005, six of the nine Supreme Court justices indicated that international human rights sources were relevant in determining whether the juvenile death penalty violated the Eighth Amendment of the U.S. Constitution. The same justices endorsed the use of international sources in a case striking down the criminalization of consensual sexual contact between two people of the same sex.[1]
- In 2006, over sixty-five U.S. lawyers and activists traveled to Geneva to participate in a UN review of U.S. compliance with an international human rights treaty—the International Covenant on Civil and Political Rights. These individuals were drawn from more than 140 U.S. organizations that were involved in the review process.
- In fall 2006, Harvard Law School made headlines by requiring that first year law students take a course in international and comparative law. [2] Law students at the University of Michigan are also required to take a class in transnational law in order to graduate.[3]
- In 2004, the American Civil Liberties Union, the nation's largest civil liberties organization, officially created a human rights program.

As the world shrinks, domestic conversations on issues like the death penalty and the right to privacy are starting to include international human rights standards and consider information and experiences from abroad. Given improvements in communication wrought by the Internet and the

recognition of globalization in other areas such as education and business, the internationalization of discussions about fundamental rights and social justice is not surprising.

Yet, the law has long stood apart. Traditionally, U.S. lawyers arguing about, and judges interpreting, U.S. law did not see the need to look abroad. mong lawyers, "civil rights" and "human rights" were regarded as two distinct specialties. Civil rights lawyers worked in U.S. courts making arguments for social change in the United States based on U.S. law. Human rights lawyers used international human rights standards to make arguments for social change in other countries. These arguments were made in international forums such as the UN and regional human rights systems, but also involved documentation of human rights abuses through "human rights reports" designed to focus international attention and leverage "shame and blame" to change local conditions. Despite this historic division, in recent years domestic lawyers are increasingly turning to human rights strategies—defined here as appeals to international human rights bodies, use of international human rights and comparative foreign law in U.S. courts, and broader activism using international pressure. Contemporary domestic human rights advocates also recognize economic and social rights as fundamental rights of equal stature and interdependent with civil and political rights.

A growing number of domestic lawyers are incorporating international sources and human rights arguments into their work. These arguments are reflected in, and encouraged by, increased consideration of such sources in judicial decisions. And even as these international sources seep into U.S. courts, U.S. lawyers are stepping outside U.S. courtrooms, bringing claims of U.S. rights violations to international forums within the UN and the Inter-American human rights system. Lawyers are also adopting integrated strategies that combine litigation with grassroots organizing, documentation, and media work. At the beginning of the twenty-first century, U.S. lawyers and courts are reengaging and reinventing human rights strategies, both learning from international human rights advocacy strategies and expanding and adapting them to fit the domestic context.

The first part of this chapter examines progressive lawyers' early attempts to use human rights standards and international forums to promote social justice in the United States and the historic reasons that lawyers turned away from such strategies, creating a divide between domestic "civil rights" and international "human rights." The second part examines how contemporary human rights strategies emerged out of the work of a small number of lawyers in the 1970s and 1980s, who began to make human rights arguments in U.S. courts and international human rights bodies concerning issues such as the death penalty and indigenous and immigrant rights. Efforts in U.S. courts were aided by globalization, reflected in judges' increased familiarity with international sources and law schools' growing emphasis on international law. The third part of this chapter considers how the international human rights work of U.S. lawyers began to cross over into domestic work. Many of these "domestic international human rights" lawyers would become important bridges and translators of human rights strategies for the domestic civil rights/civil liberties community. Their efforts to transform legal attitudes

were aided by projects specifically designed to train and support domestic lawyers to use human rights and by the development of law school human rights clinics. The final part looks at how a changing legal and political environment made new approaches and forums more appealing to U.S. lawyers tackling domestic social justice issues. As U.S. lawyers faced growing conservatism and increased barriers to judicial relief at home, the international human rights system was both expanding to tackle issues of greater resonance to the United States, and building stronger mechanisms for accountability.

A LONG HISTORY OF HUMAN RIGHTS LEGAL ADVOCACY

As we try to understand the forces that drive the blurring of boundaries between civil and human rights, it is instructive to examine the historical roots of the divide. Following World War II, domestic lawyers, frustrated with the legacy of segregation and racial discrimination in the United States, were eager to use developing international human rights law. At the time, this may not have seemed novel. Many of the components of modern human rights advocacy could already be found in the U.S. legal system and in social justice activism. As discussed by historian Paul Gordon Lauren, international influence on U.S. conceptions of rights traces its roots back to the Declaration of Independence, and transnational advocacy played an important role in the abolitionist and women's suffrage movements.[4] A recent article by legal scholar Sarah Cleveland points out that the Supreme Court has traditionally understood constitutional interpretation to include consideration of international sources and that the practice of considering such sources dates back to Chief Justice Marshall.[5] Similarly as scholars and activists have written in recent works,[6] the modern human rights movement's recognition of social and economic rights can trace roots to FDR's Four Freedoms speech in 1941 and 1944 State of the Union Address, which both articulated a vision of social and economic rights for America.[7]

Given the context, it is not surprising that immediately following the creation of the UN, civil rights and civil liberties organizations like the ACLU and the NAACP saw the developing international human rights system as a vehicle for addressing rights violation in the in the U.S., especially segregation and the continuing discrimination against African Americans. However, in the 1940s and 1950s, opponents of progressive reforms were able to exploit the Cold War context by portraying appeals to international human rights standards and forums as un-American. Human rights advocacy was criticized as undermining U.S. interests and reputation, and demands for social and economic rights were linked to communism. As a result, human rights claims were effectively excised from the agenda of progressive U.S. legal organizations until recently.

1940–1950s: Early Attempts To Make Human Rights Arguments

Historian Carol Anderson writes that after World War II, African American leadership was interested in defining the struggle for equality as a fight for

human rights. Anderson explains that human rights documents articulated a broader rights framework, which included economic and social rights, and offered the potential of internationalizing the struggle for equality. "[O]nly human rights could repair the damage that more than three centuries of slavery, Jim Crow, and racism had done to the African American community [and] had the language and philosophical power" to go beyond political and legal inequities and address "the education, health care, housing and employment needs that haunted the black community."[8]

In 1947, the NAACP, the nation's oldest civil rights organization, filed a petition with the United Nations entitled "An Appeal to the World," which denounced Jim Crow and racial discrimination in the United States.[9] However, Cold War politics provided a convenient way to deflect attention from the merits of the NAACP's claims. The State Department criticized NAACP leadership for providing fuel for Soviet criticism of the United States, and even NAACP allies such as Eleanor Roosevelt would not support exposing domestic racial discrimination on the international stage. As chair of the UN Human Rights Commission, Roosevelt refused to even introduce the petition. She was able to prevail upon the NAACP leadership to abandon the petition in order to preserve the NAACP's relationship with the Truman administration.[10] Although the Soviet delegation proposed investigation of the charges, the UN Human Rights Commission refused to take action.

By the 1950s, NAACP leadership had essentially given up on international human rights advocacy, focusing instead on domestic civil and political rights claims. Any demands for economic and social rights were left to the black left. When the Civil Rights Congress (CRC) filed a petition with the UN in 1951 based on many of the same underlying facts as the NAACP petition,[11] it failed to gain the support of the black community, and many prominent African Americans, including NAACP leadership denounced it.[12] NAACP reticence to support the CRC may have had a basis. Anderson suggests that the CRC, which was closely tied to the U.S. communist party, was more concerned with furthering the communist cause than in the plight of African Americans.[13] Indeed, the CRC petition, titled "We Charge Genocide," appeared specifically calculated to inflame the international community and embarrass the United States. However, the NAACP's decision to adopt a course that would not expose it to accusations of communist or anti-American sentiment resulted, not only in a split with the black left, but also in a retreat from international advocacy and an economic and social rights agenda.

During the same period, U.S. lawyers also tried to incorporate international human rights law into legal arguments in U.S. courts. In a review of Supreme Court civil rights cases from 1946–1955, legal scholar Bert Lockwood found that lawyers frequently raised the U.S.'s human rights and antidiscrimination obligation under the UN Charter.[14] Briefs submitted by progressive legal organizations such as the ACLU, the U.S. government, and occasionally by the parties themselves, argued that the UN Charter evidenced the high principles to which the United States had subscribed including public policy against discrimination.[15] Some briefs went further contending, not only should the Court consider the UN Charter in determining the content of U.S. law and constitutional provisions, but also that U.S. courts were

bound to enforce the Charter's human rights provisions as a matter of law. The U.S. government briefs opposing segregation also frequently emphasized the negative impact that segregation had on world opinion.[16] For example, in a case challenging segregated dining cars on railroads, the United States argued that "in our foreign relations, racial discrimination, as exemplified by segregation, has been a source of serious embarrassment . . . Our position and standing before the critical bar of world opinion are weakened if segregation not only is practiced in this country but also is condoned by federal law."[17]

The high-water mark for judicial recognition of UN Charter obligations came in the 1948 Supreme Court case *Oyama v. California*, in which the Supreme Court considered a challenge to California's Alien Land Law. The law prohibited aliens ineligible for citizenship from owning agricultural land, and, at the time, Japanese citizens were ineligible for naturalization. Four Supreme Court justices (one less than a majority), in two separate concurring opinions, indicated that the law was unconstitutional and inconsistent with the human rights obligations the United States undertook when it ratified the UN Charter.[18]

However, in 1950, a California appellate court went too far. In *Sei Fuji v. State*, the court issued a decision overturning the Land Law based on the UN Charter's human rights and nondiscrimination provisions, stating that the treaty invalidated conflicting state laws.[19] By suggesting that the UN Charter imposed enforceable legal obligations superseding inconsistent state law, the *Sei Fuji* decision played right into the hands of opponents of the UN such as Frank Holman, a former president of the American Bar Association, and Senator John W. Bricker of Ohio. Holman portrayed the UN and human rights treaties as threats to U.S. sovereignty and tools to erode states' rights. He argued that human rights treaties were a plot to promote communism and impose socialism on the U.S.[20] *Sei Fuji* provoked an outpouring a criticism. Lockwood describes it as "the legal shot heard around the nation. Perhaps no other decision of a state appellate court received as much attention in the legal periodicals."[21] In 1952, the California Supreme Court responded by repudiating the appellate court's reasoning, stating that the charter "represents a moral commitment of foremost importance" but the human rights and nondiscrimination provisions relied on by the plaintiff "were not intended to supersede existing domestic legislation, and we cannot hold that they operate to invalidate the alien land law."[22]

The Bricker Amendment and Backlash Against U.S. Human Rights Treaties

The *Sei Fuji* case, the UN petitions, and opposition to U.S. ratification of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) fueled domestic backlash against the UN and human rights treaties in the 1950s led by Senator Bricker and Frank Holman.[23] Concerned about the potential of the UN Charter and future human rights treaties to impact domestic law, Bricker attempted to amend the Constitution to limit the president's power to ratify treaties. Although the amendments

proposed by Bricker concerned the division of power between the President and Congress and the state and federal government, as illustrated by contemporaneous debate, support for the amendment was fueled by concern that human rights treaties would be used to dismantle segregation, which was being defended as state prerogative.

The battle over U.S ratification of the Genocide Convention in the 1950s was a focal point for this struggle. In the aftermath of the Holocaust, one of the first items on the international agenda was the drafting of the Genocide Convention. Despite a context in which a convention denouncing genocide would appear a reasonable undertaking by the international community, Southern senators adamantly opposed U.S. ratification, because they feared it was a "back-door method of enacting federal anti-lynching legislation."[24] Holman belittled the Genocide Convention arguing that accidentally running over a "Negro child" could be grounds for an overseas trial for genocide and argued that the treaties could lead to the "nullifying of statutes against mixed marriages."[25]

The Bricker amendment was narrowly defeated in the Senate. In order to head off further criticism of and attacks on the president's foreign relations power, the Eisenhower administration agreed that it would not seek ratification of the Genocide Convention or any other human rights treaty.[26] The U.S. Senate did not take up ratification of human rights treaties until the waning days of the Cold War.

The Legacy of the Cold War and Senator Bricker

After World War II, the international community concluded that an international commitment to protect human rights was necessary to sustain peace and ensure fundamental rights. Progressive lawyers in the United States recognized the potential that the twin tools of universally recognized human rights standards and international pressure could have on social justice work in the United States, particularly on the issues of racial discrimination and segregation. In response to this threat to their interests, U.S. isolationists and defenders of a segregated South formed an effective alliance. In the context of the Cold War, they were able to both narrow the rights claims domestic activists could make and the venues in which they made them. As legal historian Mary Dudziak writes:

> The primacy of anticommunism in postwar American politics and culture left a very narrow space for criticism of the status quo. By silencing certain voices and by promoting a particular vision of racial justice, the Cold War led to a narrowing of acceptable civil rights discourse. The narrow boundaries of Cold War—era civil rights politics kept discussions of broad-based social change, or a linking of race and class, off the agenda.[27]

Further, "[u]nder the strictures of Cold War politics, a broad international critique of racial oppression was out of place."[28]

Bricker and the Cold War had a lasting effect on the U.S. human rights movement that continues today. It is no coincidence that the United States did not ratify any human rights treaties until the end of the Cold War. Although

the United States ratified the Genocide Convention in 1988 and the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention), and the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention) in the early 1990s, as Professor Louis Henkin writes, the ghost of Senator Bricker lived on in the reservations, understandings, and declarations ("RUDs") attached to the treaties as a condition of ratification which "virtually achieve[d] what the Bricker Amendment sought, and more."[29] Most notably, each human rights treaty was ratified with a declaration stating that the treaty is not self-executing, which has been interpreted to mean that individuals cannot sue to enforce treaty provisions without separate congressional legislation. Thus, human rights treaties were ratified in a manner that essentially makes them toothless in domestic courts.

Ironically, while Bricker and his allies bristled at the idea of the U.S. being held accountable to any international organization, in the post–World War II context, the U.S. government remained acutely concerned about how its domestic problems played abroad. As argued forcefully by Mary Dudziak, the same Cold War pressures that successfully neutralized domestic legal organizations' appeals to international forums made the United States particularly sensitive to world opinion. Dudziak chronicles that U.S. diplomatic posts from places as far-flung as Fiji frequently reported foreign press coverage of racial problems in the United States, all of which were eagerly exploited by Soviet propaganda.[30] As the United States competed with the Soviet Union to win allies among former colonies composed of Africans and Asians, treatment of racial minorities within the United States began to be a major foreign policy concern. In this context, civil rights reform became not only morally right, but also politically expedient. Dudziak argues that the same concern for international opinion expressed in U.S. government briefs submitted in major civil rights cases was also reflected in civil rights legislation and reforms championed by Presidents Truman, Kennedy, and Johnson.

While the confluence of domestic civil rights struggles and the Cold War in the 1940s and 1950s was a unique time in U.S. history, the period captures a continuing tension with the use of international human rights law in the United States. The UN Charter (and later the human rights treaties that would finally be ratified by the United States in the 1990s) created a legal and moral imperative for the United States to alter its conduct. In the 1940s and 1950s, this imperative was intensified as the world watched to see how the United States would respond as segregation was challenged by the civil rights movement. At the same time, anti-internationalist sentiment and fear of the erosion of domestic sovereignty made it difficult for courts and the public to accept claims that the United States was legally bound to domestically enforce human rights treaties. As a result, any influence on Supreme Court decisions was indirect. As Lockwood states, "Courts, disposed to move in the direction of correcting the American dilemma, were on firmer ground to buttress the change with a domestic constitutional cloak of legitimacy than to rely on such a radical notion as international human rights law."[31]

HUMAN RIGHTS STRATEGIES REEMERGE

As U.S. lawyers and courts reengage and reinvent human rights strategies today, they are profoundly influenced by the lessons learned from, and the constraints imposed by, the past. The legacy of the Cold War and the Bricker Amendments imposed real limitations on domestic legal strategies by reducing the UN Charter and subsequently ratified human rights treaties to the status of "non-self-executing" documents. When lawyers and activists began to rediscover human rights in the late 1990s, the RUDs forced them to develop different strategies, both forging new legal arguments within the courts and broadening the way they approached legal advocacy work. Similarly, while the end of the Cold War has helped to neutralize criticisms that any domestic application of human rights standards or appeal to international bodies are unpatriotic, opponents of such strategies still argue that they are aimed at undercutting American sovereignty.

Despite this legacy, since the end of the Cold War, three distinct factors have contributed to the resurgence of human rights strategies among U.S. lawyers: (1) globalization and increased familiarity and receptiveness on the part of at least some U.S. judges and lawyers to international and foreign law; (2) a decline in the effectiveness of traditional civil rights legal strategies, which has led to a new openness to new strategies; and (3) the growth and development of the international human rights advocacy model, which is now being adapted for the U.S. context. These factors have spurred an increased emphasis on international and foreign law and human rights in legal education, which in turn has reinforced the openness of the courts and Bar to international human rights law.

Even as lawyers begin to incorporate human rights strategies again, these strategies look somewhat different than those employed in the 1940s and 1950s. The non-self-executing status of treaties has meant that in U.S. courts, the most productive use of international sources (here defined as treaties, other sources of international law, and foreign law) has been in the comparative or interpretative context.[32] These sources are used to help interpret fundamental rights recognized by U.S. law rather than as part of arguments that they are independently binding. In this context, treaties are used as evidence of international consensus rather than as binding authority, and foreign law (the decisions of courts of other countries) also becomes relevant.

Second, based on the less-than-binding status of human rights treaties in domestic courts as well as a broader reassessment of the efficacy of social justice strategies that rely solely on litigation, progressive lawyers began to adopt broader human rights strategies that look beyond domestic litigation. Many of these strategies and forums were developed by human rights lawyers and activists working on issues in other countries, and are now being adapted to fit the U.S. context.

International Human Rights and Foreign Law in U.S. Courts

In the 2003 case *Lawrence v. Texas*, the Supreme Court struck down a Texas law criminalizing sexual conduct between two persons of the same sex.

In reaching its decision, the Court discussed and considered a case from the European Court of Human Rights and the laws of other countries, stating "[t]he right petitioners seek . . . has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[33] Similarly in the 2004 case *Roper v. Simmons*, striking down the juvenile death penalty, the Supreme Court invoked world opinion to confirm the Court's holding that the death penalty for juvenile offenders constituted disproportionate punishment. To support his conclusion that "the United States now stands alone in a world that has turned its face against the juvenile death penalty," Justice Kennedy considered the number of countries that have ratified treaties prohibiting the juvenile death penalty, the practices of other countries, and U.K. law.

Of course, *Lawrence* and *Roper* were not the first cases in which the Supreme Court has considered international sources.[34] In addition to the civil rights–era cases cited by Bert Lockwood, the *Roper* decision cites cases going back to 1958, which referred to the law of other countries as part of the Court's analysis of what constitutes "cruel and unusual punishments" under the Eighth Amendment. Legal scholars have shown that international law has historically played an important role in U.S. constitutional jurisprudence.[35] In a recent article conducting an exhaustive review of cases, Sarah Cleveland concludes "international law has always played a substantial, even dominant role, in broad segments of U.S. constitutional jurisprudence."[36] However, the two cases, along with an earlier death penalty case, seemed to signal a shift in which the Court appeared willing to expand its reliance on, and consideration of, international sources in cases concerning fundamental rights.

The use of international sources in *Lawrence* and *Roper* engendered heated debate among the justices and politicians. The political debate seemed to be fueled by the use of international sources in the controversial area of individual rights, especially since such sources were viewed as supporting more progressive interpretations of rights.[37] Indeed the reliance on international sources in *Roper* and *Lawrence*, two of the most controversial cases of their time, was not lost on conservative politicians. Following *Lawrence*, a House Resolution and bills in both the Senate and the House designed to curb judicial reliance on international or foreign sources were introduced.[38] In a press release, Congressman Tom Feeney of Florida, sponsor of the House Resolution, stated "[t]he sovereignty of our nation is jeopardized when justices seek the laws of foreign nations to justify their decisions rather than the original intent of the Constitution." Rhetoric around the legislation from lawmakers and conservative Web sites went so far as to threaten judges who cite international materials with impeachment. In spring 2006, Justice Ginsburg revealed that she and Justice O'Connor received death threats following Internet postings criticizing their references to international sources as threats to "our Republic and Constitutional freedom" and urging that if patriots take action "those two justices will not live another week."[39]

These criticisms are reminiscent of the statements made by Senator Bricker and Frank Holman, but they are surprising given that the Supreme Court is well aware of the outcome of the Bricker debate and the fact that the United

States ratified human rights treaties to be "non-self-executing." Current Supreme Court references to international sources do not suggest that U.S. courts are bound to comply with the decisions of foreign courts or with human rights treaty provisions, but instead merely take them into account in interpreting the Constitution.[40] In *Roper,* Justice Kennedy states, "the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation of our own conclusions."[41] Similarly, while the United States has ratified the ICCPR, which explicitly prohibits the juvenile death penalty, U.S. RUDs specifically reserved the right to execute juveniles and stated that the treaty was not self-executing, essentially making it unenforceable in U.S. courts.[42] Thus, the *Roper* decision cites the ICCPR as evidence of world opinion, rather than as law binding the Court's decision. Despite this, conservatives continue to protest that "[t]he American people have not consented to being ruled by foreign powers or tribunals."[43]

The Courts: Transjudicial Dialogue

As discussed above, the Supreme Court's recent references to international sources may be more accurately characterized as an interest in engaging in a dialogue with other legal systems about the contours of fundamental rights rather than a capitulation to international standards. For many decades, the U.S. Supreme Court had been a legal exporter and the source of inspiration for constitutional courts around the world. The increased receptivity of the Supreme Court to consider foreign and international sources suggests a new openness to a two-way "transjudicial dialogue." Justice O'Connor has stated that, "American judges and lawyers can benefit from broadening our horizons." Justices Breyer and Ginsburg have made similar statements recognizing that many nations face the same issues as the United States and the value of looking to other jurisdictions as "offering points of comparison" and to see what they "can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups."[44]

Former Chief Justice William Rehnquist also expressed the value of judicial dialogue. At a 1989 at a symposium in Germany, Justice Rehnquist stated:

> For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.[45]

Commentators on transjudicial dialogue agree that the Supreme Court's move to consider the opinions of other jurisdictions can be traced to the development and growth of strong independent judiciaries in other countries. Thus, the dearth of such references in the past can be explained by a historical

lack of relevant peers rather than a conscious decision not to look outside the United States. This process has been aided by increasing interaction between judges, which has made it easier to be aware of key decisions in other countries. U.S. Supreme Court justices, in particular, have attended numerous conferences with judges from the constitutional courts of other countries as well as the European Court of Justice and the European Court of Human Rights.[46] At the same time, the Internet has made foreign and international materials more easily available.

The Supreme Court's interest in international and foreign law is also reflected in and, encouraged by, a marked increase in international law courses and non-course opportunities in law schools in the mid-1990s. In addition to adding new international law courses, some schools are making them mandatory, and others are integrating them into the sacred first year curricula.[47] In 2007, *U.S. News and World Reports* added an "international law" ranking to its category of specialty ratings for law schools, reflecting the increasing relevance of international law for domestic legal practitioners and the demand for international training from law schools.

In a 2000 article, law professor and civil rights litigator Martha Davis predicted a change in the Supreme Court's treatment of international sources "within the next five years."[48] Davis's prediction was based on purely pragmatic reasons, linking the Court's consideration of international and foreign sources to its own legitimacy. Noting increasing globalization, she wrote, when the United States's policies on issues such as affirmative action "are now 180 degrees apart from worldwide trends, the explanation 'because this is the United States' is not sufficient." Although the Court should not "second-guess the United States' failure to ratify widely accepted treaties and abide by international norms. . . . judicial legitimacy is a separate issue, which the Court can address by consistently recognizing the persuasive value of comparative and international law, and explaining its reasoning in that context."[49] Recognizing the limitations placed on judicial reliance on human rights treaties following the Bricker era and the ratification of human rights treaties with RUDs, she added

> This change will be much less than the wholesale incorporation of international law that many internationalists have argued for. . . . [C]ourts will not override [the non-self-executing limitations on human rights treaties] by permitting private rights of action in domestic courts directly under international instruments. . . . But domestic courts, and particularly the Supreme Court, will begin to view international law in much the same way that social science data was first viewed by courts during the Progressive era—as useful and potentially persuasive authority outside of the narrow framework of precedent.[50]

In an interesting echo of executive branch policy supporting civil rights reform during the Cold War to further U.S. prestige abroad and ultimately foreign relations objectives, proponents of transjudicial dialogue are making similar foreign policy claims today. U.S. allies have become vocal critics of U.S. human rights violations. In particular, the European Union frequently intervenes and files amicus briefs in U.S. death penalty cases.[51] Reflecting this concern, briefs submitted in death penalty cases by former U.S. diplomats

argue that the practice of executing juveniles and individuals with mental retardation in the U.S. "strains diplomatic relations, increases America's diplomatic isolation, and impairs important U.S. foreign policy interests."[52] Others argue that the Supreme Court's explicit consideration of international opinion in *Roper* will have a positive impact on U.S. foreign relations and that showing the Court takes world opinion seriously in a context where the United States is becoming increasingly isolated "is bound to help our image around the world."[53]

As we discuss the Supreme Court's new receptivity to consideration of international sources, it would be remiss to suggest that it occurred in a vacuum. In a 2003 speech to the American Society of International Law, Justice Breyer noted what he called the "chicken and egg problem":

> Neither I nor my law clerks can easily find relevant comparative material on our own. The lawyers must do the basic work, finding, analyzing, and referring us to, that material. . . . The lawyers will do so only if they believe the courts are receptive. By now, however, it should be clear that the chicken has broken out of the egg. The demand is there.[54]

The next section addresses the lawyers who first broke out of the egg.

The Lawyers: Supreme Court Anti–Death Penalty Litigation

As Justice Breyer notes, the Court's current references to international sources could not have occurred but for the efforts of a small but determined group of lawyers who continued to cite such material even when courts appeared uninterested, and on occasion, openly hostile. The use of international norms by progressive lawyers reemerged in the in the 1970s, primarily in death penalty cases.

Lawyers for the NAACP Legal Defense Fund and capital defense attorneys presented evidence of international norms in a series of death penalty cases in the 1970s and 1980s, joined on occasion by Amnesty International and the International Human Rights Law Group (IHRLG, now known as Global Rights).[55] The particular appeal of international standards in death penalty cases can be explained by several factors. First, the constitutionality of the death penalty is based on the Eighth Amendment standard of evolving decency, and in the 1950s, the Supreme Court had indicated that international practice was relevant to Eighth Amendment analysis. Second, as world consensus against the death penalty, especially as it applied to juveniles and people with mental retardation, grew, the clear disparity between international norms and U.S. practice made references to international sources more appealing to anti–death penalty advocates. Finally, as domestic avenues to challenge the death penalty dwindled, death penalty activists were increasingly willing to try new strategies. Despite these efforts, the Supreme Court took little notice, failing to reference international sources except for statements that international standards were "not irrelevant" in footnotes in two cases considering whether the death penalty was an appropriate punishment for rape and felony murder.[56]

Two death penalty cases in the late 1980s foreshadowed the current controversy within the Supreme Court over the use of international sources. In the 1988 case *Thompson v. Oklahoma*, which involved the juvenile death penalty for defendants fifteen years old or younger, Justice Stevens moved references to international norms out of a footnote, citing countries that abolished the juvenile death penalty, into the text of the plurality opinion finding the execution of fifteen-year-olds unconstitutional.[57] In a footnote in his dissent, Justice Scalia characterized the "plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries . . . totally inappropriate as a means of establishing the fundamental beliefs of this Nation."[58]

One year later, Justice Scalia, now in the majority, authored a decision upholding the juvenile death penalty for defendants sixteen and older. His decision emphasized that "it is American conceptions of decency that are dispositive."[59] These views were echoed in Justice Scalia's majority decision in a 1997 federalism case in which he criticized Justice Breyer's consideration of the Europe system, stating, "[w]e think such a comparative analysis inappropriate to the task of interpreting a constitution."[60]

Justice Scalia's decision in *Stanford* appeared to quell the Court's reliance on international human rights standards, and lower courts followed.[61] Although international sources appeared out of favor, international law groups such as the IHRLG and Human Rights Advocates, law school human rights clinics and international law scholars continued to file international law briefs and even expanded the subject matter beyond the death penalty to include discrimination and women's rights issues in the 1980s through 2002.[62] "Human rights" amicus briefs also continued to be filed in cases involving the rights of immigrants in immigration proceedings.[63]

Changing Judicial Attitudes

Between 2002 and 2004, legal activists' efforts to use international sources finally began to bear fruit. As discussed above, the attitude of Supreme Court justices appeared to shift, with international sources being cited in *Roper* and *Lawrence* in addition to two other death penalty cases and a case involving affirmative action.[64] In 2004, the Supreme Court also considered and rejected a challenge to cases under the Alien Tort Statute, which allows foreign nationals to sue for violation of human rights law in U.S. courts. In doing so, it affirmed that international law is part of U.S. law and in certain circumstances can be applied by U.S. courts. Finally, as cases challenging the U.S. actions in response to terrorism post-9/11, especially the treatment of detainees at Guantánamo Bay, have wound their way up to the Supreme Court, the Court has begun to deal with issues of human rights and humanitarian law on a more regular basis.

Appeals to International Human Rights Forums

At the same time that U.S. courts are citing international sources with greater frequency, there is a growing engagement of U.S. lawyers in international

human rights forums such as the United Nations and the O.A.S. human rights system. The next two sections discuss the evolution of U.S. advocacy in these forums from the 1970s to the present.

U.S. Cases in the Inter-American Human Rights System

The filing of cases involving the U.S. with the Inter-American Commission on Human Rights, the only O.A.S. body empowered to hear human rights claims from the United States, is not new. However, recent years have marked significant increases in both the number and the types of U.S. cases brought before the Commission. In an article looking at U.S. cases before the Commission, law professor Rick Wilson found only seven decisions in contentious cases concerning the United States in the 1970s and 1980s. Most of the cases had an international aspect to them, such as the treatment of aliens in the United States.[65] In 2006, seventy-five new U.S. cases were filed with the Commission involving a wide array of domestic issues.

The increase in U.S. cases before the Commission started with death penalty cases in the 1980s.[66] According to Wilson, these cases resulted from a conscious strategy choice on the part of death penalty lawyers at the NAACP Legal Defense Fund, who were looking for "new directions." [67] By the 1990s, death penalty cases constituted the majority of the Commission's U.S. cases, but other types of domestic cases slowly began to appear on the Commission's docket. Many of these cases reflected lawyers' frustration with the limitations of domestic law and the hope that a favorable decision from the Commission would increase political pressure for change. For instance, in the 1990s, the Indian Law Resource Center brought a case challenging the seizure of tribal lands after U.S. courts had rejected their claims. Other cases filed in the 1990s argued that 1996 welfare reforms violated economic and social rights and that the lack of Congressional representation for D.C. residents violated rights to equality and political participation.

Favorable rulings and publicity around several of these cases as well as a 2002 case challenging U.S. detention policies on Guantánamo Bay have increased the Commission's profile among U.S. lawyers, expanding both the number and diversity of cases filed. Current cases involve a wide range of issues, including domestic violence, juvenile justice, environmental justice, and labor and worker rights issues.

U.S. Issues in UN Forums

A lack of interest in international forums among domestic lawyers and a dearth of UN forums in which to address country-specific issues combined to result in little UN advocacy in the 1970s and 1980s. In the 1970s, several American Indian tribes tried to utilize procedures that allowed the UN Human Rights Commission to examine patterns of human rights violations,[68] but the complaint failed to lead to concrete results. Other UN efforts during this period included the work of the National Conference of Black Lawyers (NCBL), which raised the issue of U.S. racism in UN forums addressing apartheid and decolonization in the 1970s,[69] and Human Rights Advocates, which included United States practices in its work before the UN Human

Rights Sub-Commission on migrant workers rights in the 1980s and the juvenile death penalty in the late 1990s.[70]

Additional avenues for advocacy opened up in the late 1990s when the United States ratified three major UN human rights treaties: the ICCPR, the Torture Convention, and the Race Convention. Although RUDs preclude direct enforcement through a private right of action in U.S. courts, each treaty requires that ratifying countries participate in periodic reviews conducted by a committee of UN experts. The committees actively encourage input from civil society, creating an opportunity to expose U.S. human rights violations and engage in advocacy around treaty compliance.

In the 1990s, the ACLU collaborated with Human Rights Watch on a joint submission to the UN for the U.S.'s first review under the ICCPR in 1995.[71] Several other domestic groups contributed to a separate report. However, at the time, neither the ACLU, nor the other domestic groups, had prior experience submitting material to a UN treaty body or in advocacy before the UN. Once the review was over, little was done with the shadow reports or the "concluding observations and recommendations," issued by the UN experts.[72] The United States also underwent reviews for compliance with the Torture Convention and the Race Convention in 2000 and 2001.

The United States would not file its next report on ICCPR compliance (which triggers the review process) until October 2005. By then, both the number and the sophistication of U.S. groups involved in the process had greatly increased. In 2006, over 140 civil society groups participated in the ICCPR review and approximately 65 of them attended the formal review in Geneva. Participants varied from international NGOs to national civil rights and liberties groups to local activists focusing on issues specific to their communities. According to UN officials, the amount of participation, the quality of the intervention, and the level of coordination was unprecedented. Activists who traveled to participate in the reviews actively engaged the media, and the proceedings garnered good press coverage. Following the review, U.S. lawyers have incorporated the committees' concluding recommendations into legal briefs, op eds, education and training work.

CHANGING DOMESTIC LEGAL ATTITUDES AND THE ROLE OF DOMESTIC INTERNATIONAL HUMAN RIGHTS LAWYERS

As discussed above, during the 1970s, 1980s, and 1990s, a small group of U.S. activists were engaged in UN and Inter-American human rights forums. However, involvement drastically increased in the twenty-first century just as arguments raising human rights law and international standards in U.S. courts started to gain some traction. The change in arguments in U.S. courts can be partly explained by indications of increased receptiveness from courts, especially the Supreme Court. Steve Shapiro, ACLU legal director, comments that in *Roper v. Simmons* international and comparative law arguments "struck a chord with the Supreme Court." Lawyers "want to make arguments the Court pays attention to and it became clear that they were paying attention."[73]

Lawyers' increased engagement in international human rights forums can be partly explained as a reaction to the limitations on domestic court strategies resulting from the growing conservatism of federal courts, the changes in the advocacy environment post-9/11, and the increasing globalization of U.S. society. These factors are discussed later in this chapter.

However, characterizing the shift in advocacy strategies solely as a response to external factors ignores the impact of the growing involvement of U.S. lawyers in international human rights work. The next two sections discuss the experiences of domestic lawyers with international human rights, the crossover of human rights standards and forums into domestic work, and the conscious efforts of individual and organizational trailblazers to engage their colleagues in a larger effort to "bring human rights home."

A. U.S. Lawyers and International Human Rights Work

The involvement of domestic lawyers in international human rights work has played an important role in bridging the gap between human rights and civil rights. In the 1970s through the 1980s, a large number of U.S. civil rights lawyers became involved in international human rights work and cases challenging U.S. foreign policy abroad. For some, human rights work simply reflected a personal commitment to human rights with no immediate or visible connection to their domestic work. For others, particularly in the black activist community, there was a greater awareness of the inter-connection between struggles at home and abroad.

African Liberation and Anti-Apartheid Struggles

In the 1960s, Martin Luther King and Malcolm X often articulated domestic racial justice issues in human rights language that included a demand for economic and social rights. Malcolm X in particular advocated internationalizing the struggle for equality and utilizing UN and international forums. However, these calls would go largely unheeded in the 1970s as "no genuine and concerted mobilization around a human rights agenda and strategy" emerged among black activists.[74] The Cold War "set the stage for narrow-nationalism and centrist attitudes in the Black community,"[75] but it is important to note that a small but significant group continued to link the fight for international human rights and racial struggles in the United States. According to human rights and civil rights lawyer Gay McDougall this group "identified with the politics of the African liberation struggle," because it "thought we could learn something there that would be of relevance here." Included in this group was the NCBL, which promoted a U.S. social justice platform that included economic and social rights and actively linked UN anti-apartheid and decolonization work to racial justice issues in the United States in the 1970s.[76]

Irrespective of whether they recognized a link between domestic and international issues, according to McDougall, when "the steam started to roll out of the civil rights movement . . . a lot of black Americans who were in the movement started to look at the emerging struggles in Africa and turned

towards Africa."[77] For instance, in the late 1960s, personal connections between an attorney at the Lawyers Committee for Civil Rights Under Law and a South African lawyer led to the founding of the Southern Africa project at the Lawyers Committee. The project involved domestic lawyers in supporting the defense of political prisoners and brought cases in U.S. courts challenging economic ties to South Africa. During the transition from apartheid, U.S. lawyers would serve as experts on civil rights issues, monitor elections, and assist in the drafting and negotiation of the South African and Namibian Constitutions.

Anti-apartheid advocacy played an important role in engaging domestic civil rights lawyers in international human rights work and issues. Gay McDougall, who started with the NCBL as a "civil rights lawyer" in the early 1970s, became director of the Lawyers Committee's Southern Africa Project in 1980. McDougall would continue as a prominent activist on Southern African issues through the early 1990s and become an international human rights expert, holding many prominent positions at the UN.

Struggles in Latin America

Other domestic civil rights lawyers worked on international issues involving Vietnam and later Central America. The Center for Constitutional Rights (CCR) was founded in 1966 to defend civil rights activists in the South, but its docket quickly expanded to include both domestic civil rights and liberties cases and cases in U.S. courts challenging rights abuses abroad. Starting in the 1970s, the Center became involved in cases challenging U.S. foreign policy in Vietnam and later in Central and South America. These cases typically involved legal challenges to U.S. foreign policy or the defense of individuals who dissented from, or challenged, such policies.

In addition to constitutional claims, many of these cases included international law and human rights arguments. CCR's commitment to using international law arguments in these cases was heavily influenced by Peter Weiss, an attorney who began working with CCR in the 1970s and was deeply committed to international law and the Universal Declaration of Human Rights as the "ultimate setter of standards for the whole world." Weiss's family left Austria during the Holocaust, and law professor and civil rights lawyer Rhonda Copelon speculates that this experience had a powerful impact on Weiss's early orientation toward human rights.[78]

In the 1970s and 1980s, CCR attorneys and other civil rights lawyers became involved in Latin American human rights issues. CCR brought several cases that questioned U.S. involvement in human rights abuses in Central America. Copelon, who worked at CCR during that time period, describes the cases as "solidarity cases" in which "we were doing something to stop our government and to reveal and draw attention to and try to stop U.S. lawbreaking under domestic and international law."[79] CCR attorneys and prominent civil rights lawyers, such as Paul Hoffman, who served as the legal director of the ACLU of Southern California and an Amnesty International USA board member in the 1980s, also represented U.S. religious organizations that granted "sanctuary" to Central American refugees who fled political repression in Guatemala and El Salvador.

Other U.S. lawyers became directly involved in challenging human rights abuses in Latin America. Rick Wilson began his career as a domestic criminal defense lawyer. Research on Nicaragua under the Sandinista government in the mid-1980s led him to start a human rights clinic at American University Law School in 1990 where he became an expert in human rights litigation in the Inter-American human rights system. In 1991, Wilson was approached by Amnesty International USA to bring a U.S. death penalty case before the Inter-American Commission for Human Rights.[80] Since then, Wilson has been actively involved in U.S. death penalty advocacy both before the IACHR and the U.S. Supreme Court.

Alien Tort Statute

In 1980, another important link was made between domestic litigators and international human rights work. That year, CCR won a significant victory in the Second Circuit in the case *Filartiga v. Pena-Irala*. *Filartiga* was brought on behalf of the family of a Paraguayan citizen who was tortured to death by a Paraguayan police officer under the Alien Tort Statute, a federal statute (formerly known as the Alien Tort Claims Act), which dates back to 1789. In *Filartiga*, CCR established that non–U.S. citizens could use the statute to sue for damages for violations of international human rights law in U.S. federal courts. Since then, a significant number of cases have been brought under the statute concerning human rights abuses committed abroad, and the cases have been expanded to include human rights claims against U.S. corporations that are complicit in human rights abuses occurring outside the United States.

In the 1980s and 1990s, a few ATS cases were filed against U.S. local and federal officials, but most concerned actions that occurred outside the United States.[81] Additional cases against U.S. officials for acts occurring both within and outside the United States have been filed post-9/11. A number of procedural hurdles and defenses have made it difficult for lawyers to prevail in ATS cases against U.S. officials. Although the ATS has yet to have a significant impact in holding U.S. officials accountable for human rights violations, ATS cases concerning human rights abuses abroad have required federal judges to apply (and thus learn about) international human rights law. The cases have played an important role in educating U.S. lawyers and judges about international human rights law and building case law on which they can rely.

Rhonda Copelon credits her work on ATS cases at CCR with making her aware of international human rights standards and precedents to incorporate into her domestic work. Although she initially worked on both international human rights cases and civil rights cases without connecting the two, in the 1980s as the Supreme Court issued decisions rejecting government obligations to assist in the exercise of fundamental rights or prevent private acts of violence, it occurred to her that international human rights law might offer a helpful alternative vision.[82] Since the 1980s she has been using international human rights law on domestic women's rights and social and economic rights issues.

Struggles for Immigrants' Rights

Another area in which U.S. lawyers historically were involved in human rights issues involves the treatment of immigrants and non-citizens. Unlike the issues addressed above, these matters typically involve domestic cases concerning individuals in the United States. In the immigration context, human rights law generally came into play in interpreting U.S. international obligations to protect refugees and in assessing conditions in other countries to determine whether an immigrant was entitled to political asylum or withholding of deportation. Although for the most part, such cases involve determination of whether human rights violations are taking place outside of the United States, the cases have involved U.S. lawyers in exposing and identifying rights violations in other countries as well as developing U.S. law on the meaning of torture.

In the 1990s, U.S. lawyers began to use human rights law to challenge U.S. immigration policy. In 1993, a case argued that U.S. policy of interdicting and returning Haitian refugees at sea violated human rights treaties protecting refugees. Cases in 2001 and 2003 argued that certain U.S. immigration detention practices violated human rights standards prohibiting arbitrary detention.[83] Because of limited protections under U.S. law available to immigrants, U.S. lawyers also began to bring claims for human rights violations under the ATS and to international forums. In 1997, an ATS case challenged conditions and treatment in an immigration detention center in Elizabeth, New Jersey.[84] More recently, ATS cases have been brought on behalf of immigrant domestic workers who have been forced to work under slave-like conditions. Lawyers have also actively engaged the Inter-American human rights system in addressing discrimination against immigrant workers.

Conscious Efforts to Bridge Civil Rights and Human Rights

By the 1990s many "domestic international human rights" lawyers began integrating human rights into their work in the United States. In addition to developing and adapting human rights strategies for the domestic context, these lawyers played a crucial role in training and engaging their peers. Their efforts were aided by an increased investment in and emphasis on international law in U.S. law schools, including the development of human rights clinics, a growing human rights consciousness in the United States, and a new generation of public interest lawyers committed to "bringing human rights home."

Organizational Change: the ACLU

Even as individual lawyers became intrigued by the possibilities of incorporating human rights strategies within their domestic work, they often faced the skepticism of their peers and internal institutional battles. By the late 1990s, several civil rights and civil liberties organizations had begun to incorporate human rights into their domestic work, including NOW Legal Defense Fund under legal director Martha Davis and the National Law Center for Homelessness and Poverty.[85]

Perhaps the most striking change occurred at the ACLU. With a network of affiliates in all fifty states, the ACLU is the nation's oldest, largest, and most well-known civil liberties organization. Historically, the ACLU has focused on domestic civil rights and civil liberties issues, with very limited connections to international human rights work. In 2003, the ACLU announced its commitment to human rights by hosting a three-day human rights conference in Atlanta. In 2004, the ACLU created a Human Rights Working Group at its national offices.[86] The working group quickly solidified its position within the organization, building support from ACLU board members and actively engaging its affiliates to become a full program of the ACLU national office. Although the changes at the ACLU appeared sudden, they emerged out of decades of work by internal human rights supporters such as Paul Hoffman, as well as changing attitudes among public interest lawyers about human rights.

The ACLU experience is instructive because many of the concerns about incorporating human rights initially expressed by ACLU lawyers reflected the attitudes of the larger civil rights and civil liberties communities. When Paul Hoffman began to push for integration of human rights standards into domestic legal work at the ACLU in the mid-1980s, he was a voice in the wilderness.[87] The ACLU had a policy dating back to 1973 that permitted general references to international law in ACLU cases, but most lawyers were unconvinced that international human rights standards actually improved upon domestic law or could lead to different results in the cases they were litigating. Steve Shapiro recalls the debates, stating that at the time "I was skeptical as a matter of tactics. When you are a litigator with 50 pages in a brief, why devote 10 pages on an argument that won't succeed?" Because the United States had ratified such a limited number of treaties and international sources were not legally binding on the United States, lawyers had difficulty seeing their value.[88] A wholesale embrace of human rights also posed problems in cases where international human rights law was inconsistent with ACLU policy, such as international prohibitions on racial hate speech, and in areas such as social and economic rights, which fell outside the ACLU's historic mission as a civil liberties organization.[89]

Undeterred, Hoffman continued to push a human rights agenda. In 1991, he became the National Coordinator of the ACLU's International Human Rights Task Force and created the ACLU International Civil Liberties Report. The report summarized developments in human rights law and became an important resource for domestic public interest lawyers. From the mid-1980s through the 1990s, Hoffman faithfully organized panels and spoke about the integration of human rights into the ACLU's work at its national biannual conferences.[90]

In the 1990s, Hoffman noted increased support for human rights. During the presidencies of Ronald Reagan and George H.W. Bush, ACLU members had become more knowledgeable about human rights, and many were also members of Amnesty International. According to Hoffman, there was a sense that there were "opportunities that weren't being taken advantage of."[91] Also instrumental in the changes at the ACLU were the attitudes of new lawyers like Ann Beeson, who joined the ACLU in 1995 after a fellowship at

Human Rights Watch, and pushed for greater integration of human rights strategies at the ACLU's national office.

In 2001, just four days before the terrorist attacks of September 11, Anthony Romero, the former Director of Human Rights and International Cooperation at the Ford Foundation, became the new ACLU Executive Director, and Hoffman and Beeson had the champion they needed. Romero appointed Beeson the head of a new Human Rights Working Group, and she set out to hire a staff to bring human rights to the ACLU. Although the ACLU has yet to endorse economic and social rights and continues to oppose restrictions on hate speech, it has become a leader in domestic human rights work concerning civil and political rights. Since 2003, the ACLU has devoted significant resources and institutional support to the integration of human rights strategies into the work of its national office and local affiliates and has become an important provider of human rights training to the broader domestic legal community.

While the transformation of the ACLU provides an important insight into changing attitudes at civil rights and civil liberties organizations, institutional change at other organizations has been slower. In particular, traditional identity-based civil rights organizations have been more circumspect about embracing and integrating human rights strategies than organizations like the ACLU or CCR. This reticence has been linked to a deeper internalization of the post–Cold War distinction between civil rights and human rights[92] and concerns that the universality of human rights may "suggest a retreat from a deep engagement with the persistent and differential experience of discrimination."[93] Irrespective of ideological differences, the ability of civil rights and civil liberties groups to embrace new strategies requires the commitment of its leadership and the interest of its staff (or the ability of leadership or peers to engage the staff), but also depends on available resources. Post-9/11, ACLU membership has expanded from 200,000 to 600,000 members with a corresponding growth of financial resources.[94] In contrast, many civil rights organizations are struggling financially and are unable to devote significant resources to developing new strategies.[95]

Engaging and Training Domestic Human Rights Lawyers

Since the mid-1990s, there has been a steady growth of projects and programs to encourage and train domestic lawyers about human rights. These initiatives were both sought out by domestic lawyers looking for new strategies and encouraged by pioneers of domestic human rights work. For instance, NAACP LDF lawyers interested in human rights as a new strategy pushed to include presentations at annual death penalty litigators meetings at Airlie House, Virginia, starting in the mid-1990s. Lawyers who had already begun to use human rights in their own work began to seek out opportunities to speak about the strategies to their peers at conferences and other gatherings.[96]

In addition to these informal ad hoc trainings, several projects were created to engage, train, and support domestic lawyers in a more sustained and deliberate manner. One of the first projects was started by Gay McDougall at Global Rights (formerly the International Human Rights Law Group).

When McDougall became the executive director of Global Rights in 1994, she changed its mission to focus on developing partnerships with local activists and building their capacity to use international human rights mechanisms. In an unusual move for an international human rights organization, Global Rights included U.S. activists in its work, creating a U.S. program in 1998.[97] In creating the program, McDougall was able to draw on her deep connections to both the international human rights and domestic civil rights communities, and quickly formed a program advisory committee which included the heads of many of the major civil rights organizations.[98]

During the three-year period leading up to the UN World Conference on Racism in Durban (WCAR) in 2001, Global Rights worked closely with coalitions of civil rights groups such as the Leadership Conference for Human Rights and the Lawyers Committee for Civil Rights Under Law and also reached out to smaller grass roots groups. Through these efforts, U.S. civil rights lawyers became involved in setting the conference's agenda and participated in the negotiation of the conference outcome document, ensuring that it would speak to racial justice issues in the United States. Global Rights also did outreach and coordination around the United States's first review for compliance with the Race Convention. As a member of the UN expert committee that reviewed compliance with the Race Convention, McDougall organized a day-long meeting at which U.S. civil rights leaders briefed the committee about particular issues of concern.[99]

By the late 1990s, other human rights activists from diverse backgrounds began discussing building a domestic human rights movement. Domestic lawyers played an important role in these discussions, but the potential movement was much broader, seeking to bring together activist work across different issue areas and methodologies, under a unifying human rights framework. These efforts, which led to the founding of the U.S. Human Rights Network (USHRN) in 2003, are beyond the scope of this chapter and are chronicled in other chapters in this volume. However, the USHRN, and conferences that led to its founding at Mill Valley, California, in July 1999 and Howard Law School in July 2002, provided important opportunities to bring lawyers and grassroots human rights activists together to develop common strategies and approaches.

Recognizing the need for domestic lawyers to discuss and develop human rights strategies across issues, Catherine Powell, a former lawyer with the NAACP LDF, founded the Human Rights Institute at Columbia Law School in 1998 and created the Bringing Human Rights Home Project (BHRH) soon thereafter.[100] Since 2001, the program has convened a network that brings together domestic lawyers working on civil rights and social justice issues with international human rights lawyers and law school human rights programs. Over time the network has emerged as a place for attorneys to monitor each others' cases, to get and give feedback and guidance, and to coordinate and develop joint projects. In 2006, BHRH, Global Rights and the USHRN collaborated on outreach, coordination and technical support for U.S. groups involved in the UN review of U.S. compliance with the ICCPR and Torture Convention.

BHRH, Global Rights, the USHRN, and the ACLU have also been actively involved in providing in-depth human rights training. Significant legal human rights trainings have also been provided by organizations specializing in particular issues and law school human rights programs.[101] And, perhaps a more significant indication of the mainstreaming of human rights approaches into domestic legal advocacy, international human rights panels have been included in countless legal conferences discussing issues ranging from criminal defense work and racial justice work to health law.

Human Rights Clinics

Human Rights Clinics have also emerged as a major force in training and developing domestic human rights lawyers. In a 2003 article on human rights clinics, law professor Deena Hurwitz wrote, "Ten years ago, only three law schools offered clinical programs in human rights. Today, there are about a dozen human rights clinics and over twenty human rights centers in law schools across the country."[102] Four years later in 2007, a list of over forty human rights clinics, existing or in formation, was compiled following a conference for human rights clinical faculty at Georgetown Law School. The young lawyers coming out of these programs are helping to change the culture of domestic public interest organizations and educating their supervisors, who as law school graduates of ten or fifteen years ago, had little training in human rights or international law.

Not only are human rights clinics training students in human rights law, unlike international human rights NGOs, which have only recently included U.S. work as part of their missions, many human rights clinics actively engage in U.S. cases and have played a significant role in developing domestic human rights strategies. When law professor Harold Koh and CCR attorney Michael Ratner founded the Lowenstein International Human Rights Clinic at Yale Law School in 1989, their initial focus was on suing foreign government officials for human rights abuses committed abroad. In 1992, the clinic became involved in a case challenging the U.S. government's repatriation of Haitian refugees.[103] The highly publicized case marked a shift in the clinic's work to include cases involving the United States. Since then the Yale clinic has emerged as a major player in developing domestic human rights legal strategies, authoring several important human rights amicus briefs to the Supreme Court.

Other pioneering clinics founded in the early 1990s by Rick Wilson at American University, Washington College of Law, and Rhonda Copelon at CUNY Law School also include U.S. cases in their docket.[104] While the AU clinic has focused on the death penalty and cases involving civil and political rights, the CUNY clinic has brought ATS cases and filed amicus briefs concerning domestic violence, mistreatment and abuse of immigrant domestic workers and social and economic rights. Newer human rights clinics continue to be involved in domestic cases, including Columbia's Human Rights Clinic, which has devoted a significant part of its docket to domestic human rights work since its founding in 1998.

CHANGING ATTITUDES ABOUT ADVOCACY

As discussed in the preceding sections of this chapter, several factors have contributed to the current interest in human rights strategy among progressive lawyers. Lawyers and institutions committed to the development of domestic human rights strategies have emerged as key bridges, promoting and supporting domestic human rights work. Their efforts have been aided by changes in judicial attitudes toward international sources, globalization, and a new emphasis on international law in domestic law schools. However, interest in human rights strategies has also resulted from a changed advocacy environment. As progressive lawyers face increasingly conservative courts, the wisdom of relying on traditional litigation strategies is being challenged. As U.S. lawyers look for new tactics, human rights strategies, which have been significantly developed and strengthened since the 1940s, have become much more appealing.

The Changing Advocacy Environment in the United States

As discussed above, when U.S. lawyers began to reengage with human rights law, their strategies had to shift to take into account the RUDs attached to human rights treaties, which precluded direct enforcement of the treaties in U.S. courts. In part, their willingness to reconsider human rights resulted from the narrowing of other options. As discussed in other chapters in this series, in the 1980s and 1990s, the Rehnquist Court and lower federal courts were rolling back civil rights protections as Congress was cutting legal aid funding and limiting access to the courts for prisoners, immigrants, and other vulnerable groups. Changes in the composition of the federal judiciary made lawyers more open to consider non-legal strategies. Tanya Coke, a civil rights lawyer, describes the 1990s as a difficult time. "Lots of doors were being closed as courts became more conservative. It has become much more difficult to find a case to litigate that you can win and that will have a large impact. This is driving an interest in other norms, standards and venues."[105] Even as there was a growing consensus that traditional litigation strategies were being undermined by political changes, others questioned the inherent limitations of the litigation model. Chandra Bhatnagar, a staff attorney with the ACLU's Human Rights Program, notes that historically judgments in civil rights cases have been difficult to enforce and that legal doctrines, including governmental immunities and courts' refusal to address issues that involve political questions or state secrets often preclude U.S. courts from reaching the merits of whether a human rights violation has occurred.

The sense that there was a need to develop new strategies intensified post-9/11. The Bush administration's arguments that torture abroad and prolonged arbitrary detention were justified (or at least not illegal) under U.S. law clearly exposed the fact that the U.S. legal system might prove insufficient to protect rights that many had taken for granted. As Wendy Patten writes post-9/11, "international human rights law became a key bulwark against the erosion of fundamental rights."[106] Responses to the Bush administration's "anti-terrorism" policies became an important "teaching moment" for U.S. lawyers

about human rights and humanitarian law. After 9/11, the Center for Constitutional Rights launched a program to enlist private attorneys to represent Guantánamo Bay detainees and has trained and coordinated over 500 pro bono attorneys.

Domestically, the immigrant community was perhaps hardest hit by the Bush administration's post-9/11 anti-terrorism measures. The failure of U.S. courts to protect the rights of non-citizens led Karen Narasaki, executive director of the Asian American Justice Center, to conclude that human rights standards provided "a better place to try to nail down rights for immigrant communities."[107] However, the immigrant rights community's interest in human rights predates 9/11, tracing its roots both to the erosion of immigrants' rights over time and the resonance of human rights language within immigrant communities.

Post-9/11, a second area in which U.S. legal protections have fallen short is the U.S.'s treatment of non-citizens abroad including suspected terrorists and "enemy combatants." As U.S. behavior increasingly became a target for international criticism, the American public gained greater exposure to international human rights and humanitarian law and the international forums that sought to uphold them. Use of human rights standards also became important to invoke international pressure on the United States. Steve Shapiro notes that post-9/11, bilateral diplomatic pressure has been a particularly effective tool in gaining the release of individual Guantánamo Bay detainees, but if U.S. lawyers hope to engage international support, they need to adopt a human rights vocabulary. "The European public doesn't respond to constitutional arguments. They respond to human rights arguments."[108]

And, it is not just Europeans who respond to human rights. Many domestic social justice activists are interested in human rights language because of its resonance with growing segments of the U.S. population. The turn to human rights is not simply a reflection that domestic courts aren't working says Narasaki. "Human rights" has more resonance for "the younger generation" who are used to thinking about problems in a global way and the "immigrant generation," who think of fundamental rights in terms of human rights and not civil rights.[109]

The Development of International Human Rights Strategies and Forums

As legal, historical, societal, and strategic changes have started to encourage U.S. lawyers to reconsider human rights strategies, "human rights in the twenty-first century" looks quite different from the 1940s.[110] In the intervening – fifty-plus years since the UN Human Rights Commission asserted that it did not have the power to take action on the NAACP petition, much has happened on the human rights front. The UN and Organization of American States have taken great strides to establish and build human rights institutions to enforce human rights norms. In addition to adopting procedures for examining gross or consistent patterns of human rights violations in the late 1960s and early 1970s, the UN Human Rights Commission created new mechanisms, working groups and experts (special rapporteurs) to investigate

and report on human rights violations.[111] International and regional human rights fora, such as the UN treaty bodies and the Inter-American Court and Commission, were developed and strengthened. This process continued with the establishment of the UN High Commissioner for Human Rights and the creation of new procedures for civil society involvement in the 1990s.[112]

The 1970s marked the rise of a new player in the global fight for human rights with the development of international human rights non-governmental organizations or "NGOs."[113] Designed to "globalize" struggles against human rights abuses, NGOs like Amnesty International and Human Rights Watch used public and international pressure and scrutiny to combat rights abuses. Often working in countries that may not have ratified human rights treaties or in which the judiciary failed to enforce fundamental rights, these international NGOs eschewed local judicial remedies. Instead, they developed a "shame and blame" strategy that was as much moral and political as legal. Rather than focusing on domestic litigation, international NGOs produced detailed "human rights reports" documenting and exposing human rights abuses. The reports used human rights standards, drawn from treaties and other international documents, to articulate a standard of behavior against which to measure a country's treatment of its citizens and residents, relying on public opinion and political pressure for change. As credible outside experts, the work of these organizations played an important role in exposing and substantiating abuses. International human rights NGOs also became regular and repeat players in advocacy before the developing international and regional human rights bodies.

Given the different context in which they were operating, human rights lawyers and activists working for international human rights NGOs necessarily developed a different advocacy model from the domestic civil rights lawyer. Law professor Deena Hurwitz writes, "Relatively little of what human rights lawyers actually do looks like traditional legal practice. . . . [H]uman rights law . . . exists as a set of standards by which to measure state practices and seek to 'enforce' norms or hold actors accountable—often by means that are as much political as legal."[114] Even when human rights lawyers "litigate" cases or matters before international bodies, the decisions are often unenforceable or difficult to enforce in domestic courts and require the additional components of political pressure or mobilization to ensure compliance.

After international and regional human rights forums were strengthened and advocacy strategies were developed by NGOs and "human rights" lawyers in the 1970s, a further shift took place which made human rights standards and forums more relevant to U.S. issues. In the 1970s, human rights violations related to apartheid or the abuses of dictatorships—torture, political assignations, summary execution, and disappearances—took center stage for the international human rights community. Many of these issues were of great concern to people living in the United States, but the public did not perceive them to be related to domestic issues. According to Rhonda Copelon, with the exception of the European Court of Human Rights, it was largely in the 1990s, after the fall of many dictatorships and the end of the Cold War, that international human rights mechanisms were pressed to tackle "the seriousness

of everyday violations apart from states of exception." The subsequent reinvigoration of the UN mechanisms protecting women's rights and economic and social rights and a reorientation of the IACHR to consider "what human rights mean for a democratic society," made human rights a more compelling strategy for U.S. social justice lawyers.[115]

A Second Look at Human Rights

At the beginning of the twenty-first century, U.S. civil rights lawyers became frustrated with the limitations of the U.S. legal system and took a second look at human rights standards and advocacy strategies. As lawyers began to look beyond domestic legal avenues, it became clear that human rights strategies could play an important role in advocacy work. Tanya Coke, who has worked both as a civil rights lawyer and funder of social justice work, emphasizes the significance of human rights as "an integrated strategy." She notes, "American rights advocates tend to work in one way or another, but single note strategies are less effective. Litigation and even legislation don't give you a long term win unless people on the ground are invested in the reform and will police and protect it."[116]

Of course, a more holistic approach to advocacy that looks beyond litigation is not limited to human rights work. "Human rights did not invent integrated advocacy, but the lawyers who understand integrated strategies are more open to human rights," says Ann Beeson. During her tenure as director of the ACLU Human Rights Program, she noted that within the organization some lawyers had a very narrow litigation focus and others naturally had a "more of a campaign style strategy. Many ACLU lawyers were already doing organizing and legislative work. The natural allies for human rights weren't necessarily those with knowledge about human rights, but those who were open to new and innovative strategies."[117]

Although many progressive U.S. lawyers have historically engaged in community education, media outreach, fact-finding, and reporting in addition to litigation, such non-litigation work is integral to human rights advocacy precisely because human rights activists cannot rely on judicial enforcement. Coke adds that human rights strategies stress the participation of those who are most affected in a way that other advocacy work has not.[118] Another way that human rights strategies go beyond other integrated strategies is the international nature of the enterprise. Rick Wilson comments that it is not just that lawyers are looking beyond litigation strategies, but also that they "are seeing their mission in more global terms, and using broader international strategies that include an international and domestic component, as well as litigation and non-litigation aspects."[119]

Lawyers using integrated human rights strategies are just beginning to understand their potential. By their very nature, such strategies often are complex and indirect, involving interaction between different legal systems and forums and transnational advocacy. Lawyers often simultaneously work in different forums or move between forums. Chandra Bhatnagar describes working with local activists in Texas concerned about a sheriff who decided

to implement immigration laws by racial profiling and "pulling over people of color asking for immigration papers." In addition to local advocacy efforts that included protests and meetings with local officials, the ACLU brought concerns to the UN committee reviewing U.S. compliance with the ICCPR. When committee members began questioning U.S. officials about the situation, the headline in the local paper declared that the sheriff was being denounced at the UN for human rights abuse. Statements from the UN proceedings were read into the record during a state assembly meeting. The resulting pressure from state legislators and the mayor forced the sheriff to voluntarily suspend the program. Bhatnagar describes the interaction between the international and local forums as an "echo chamber" in which the efforts in one forum are reflected and magnified in the other ultimately building pressure for change.[120]

Similarly, Maria Foscarinis, executive director of the National Law Center on Homelessness and Poverty describes herself as a "do it yourself lawyer" who works on the international level to develop and expand international human rights standards and then incorporates the standards in her domestic advocacy. Rhonda Copelon describes women's rights activists as trying to "work everywhere to establish rights internationally and then bring them home."[121]

Unlike traditional litigation strategies, which take for granted that a victory or settlement will lead to an enforceable judgment, lawyers cannot assume that successful advocacy in international forums will result in a change in domestic law, policy, or conditions. Instead, they must learn to effectively leverage such victories in U.S. courts, but also in the media, as part of legislative strategy, as a way to exert international or diplomatic pressure or as part of an organizing or educational campaign. Successful political mobilization requires that U.S. lawyers work in coalition with organizers, activists, and those most affected. To be effective the "do it yourself lawyer" cannot be a "do it on your own lawyer." The ability of domestic lawyers to work with communities will be a major factor in the success of domestic human rights strategies.

According to Steve Shapiro, the indirect nature of integrated human rights strategies often make their effects hard to quantify. "We are still trying to learn how to use international forums effectively. We are at a preliminary stage and still struggling about how you make any of it matter. However, in another 20 years, civil rights law in the U.S. is going to be deeply engaged in international human rights issues, and it will not be possible to be a civil rights lawyer without knowing about international human rights."[122]

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NOTES

1. *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003).

2. Available online at www.law.harvard.edu/news/2006/10/06_curriculum.php.

3. Deena R. Hurwitz, "Lawyering For Justice and the Inevitability of International Human Rights Clinics," *Yale L. J. Int'l Law* 28(2003): 505–506. However, international and comparative law courses are still not required in most other law schools. Vicki C. Jackson, "Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on 'Proportionality,' Rights and Federalism," *U. Pa. J. Const. L.* 1 (1999): 583, 592.

4. Paul Gordon Lauren, "A Human Rights Lens on U.S. History: Human Rights at Home and Human Rights Abroad," in Cathy Albisa, Martha F. Davis, and Cynthia Soohoo (eds.), *Bringing Human Rights Home*, vol. 1 (London: Praeger, 2008), pp. 1–30.

5. Sarah Cleveland, "Our International Constitution," *Yale L. J.* 31 (2006): 1, 12, 88.

6. Cathy Albisa, "Economic and Social Rights in the United States: Six Rights One Promise," in *Bringing Human Rights Home*, vol. 2, pp. 25–48 (see n. 5); Hope Lewis, "'New' Human Rights: U.S. Ambivalence toward the International Economic and Social Rights Framework," in *Bringing Human Rights Home*, vol. 1, pp. 103–144 (see n. 57); Cass Sunstein, *The Second Bill of Rights* (New York: Basic Books, 2004).

7. Sunstein argues that U.S. Supreme Court decisions were moving toward a greater recognition of such rights until Nixon's Supreme Court nominees turned back the march toward social and economic rights in a series of decisions in the 1970s. Ibid., pp. 162–171.

8. Carol Anderson, *Eyes Off the Prize* (Cambridge: Cambridge University Press, 2003), p. 2. Excerpts from *Eyes Off the Prize*, © 2003 by Carol Anderson. Reprinted with permission of Cambridge University Press.

9. For an in-depth discussion of the petition, see Carol Anderson, "A 'Hollow Mockery': African Americans, White Supremacy, and the Development of Human Rights in the United States," in *Bringing Human Rights Home*, vol. 1, pp. 75–102 (see n. 5).

10. Anderson, *Eyes Off the Prize*, p. 150 (see n. 8). According to Anderson, part of the reason the NAACP abandoned the petition was to preserve its ability to influence the Truman administration on the drafting of the Universal Declaration and the documents that would eventually become the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Excerpts from *Eyes Off the Prize*, © 2003 by Carol Anderson. Reprinted with permission of Cambridge University Press.

11. Ibid., pp. 179–180.

12. Ibid., pp. 186–187, 192.

13. Ibid., pp. 166, 167, 182–183, 185–186.

14. Bert B. Lockwood Jr., "The United Nations Charter and United States Civil Rights Litigation: 1946–1955," *Iowa L. Rev.* 69(1984): 901, 918; Judith Resnik, "Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Points of Entry," *Yale L. J.* 115(2006): 100, 136–145.

15. Lockwood, *The United Nations Charter*, pp. 932–948 (see n. 14).

16. Thomas Borstelman, *The Cold War and the Color Line* (Cambridge, MA: Harvard University Press, 2001), p. 57.

17. Brief of the U.S. Government at p. 60, *Henderson v. United States*, 339 U.S. 816 (1950), cited in Lockwood, *The United Nations Charter*, p. 941 (see n. 14).

18. The justices expressed their views in two separate concurring decisions. *Oyama v. California*, 332 U.S. 633 (1948), Black, J. concurring at pp. 649–650, Murphy, J., concurring at p. 673. See Lockwood, p. 919–921 (see n. 14).

19. *Sei Fuji v. State*, 217 P.2d 481, 486–488 (Cal. Dist. Ct. App. 1950).

20. Natalie Hevener Kaufman, *Human Rights and the Senate: A History of Opposition* (Chapel Hill: University of North Carolina Press, 1990), pp. 16–18.

21. Lockwood, *The United Nations Charter*, p. 927 (see n. 14).

22. *Sei Fuji v. State*, 242 P.2d 617, 622 (Cal. 1952). Interestingly, the court noted that other provisions of the Charter were self-executing. Ibid., p. 621.

23. For more detailed accounts of the history of the Bricker Amendment see Carol Anderson, *Eyes Off the Prize*, pp. 218–230 (see n. 8); Natalie Hevener Kaufman, *Human Rights and the Senate*, pp. 9–36 (see n. 20); Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," *Am. J. Int'l Law* 89 (1995): 341; Resnik, *Law's Migration*, pp. 145–151 (see n. 14).

24. Anderson, *Eyes Off the Prize*, pp. 180, 253 (see n. 8). Excerpts from *Eyes Off the Prize*, © 2003 by Carol Anderson. Reprinted with permission of Cambridge University Press.

25. Kaufman, *Human Rights and the Senate*, pp. 18 (see n. 20).

26. Anderson, *Eyes Off the Prize*, pp. 230 (see n. 8). Excerpts from *Eyes Off the Prize*, © 2003 by Carol Anderson. Reprinted with permission of Cambridge University Press.

27. Mary Dudziak, *Cold War Civil Rights* (Princeton, NJ: Princeton University Press, 2000), pp. 13.

28. Ibid., pp. 11 (see n. 27).

29. Henkin, *U.S. Ratification*, p. 349 (see n. 23).

30. Dudziak, *Cold War Civil Rights*, p. 29 (see n. 27).

31. Lockwood, *The United Nations Charter*, pp. 930–931 (see n. 14).

32. Both foreign law sources (statutes and cases from other countries) and international law can be used as comparative authority by U.S. courts. International law can also be used as a tool of statutory construction. The Supreme Court has held that courts should interpret U.S. law to avoid conflicts with international law whenever possible. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

33. *Lawrence v. Texas*, 539 U.S. 558, 572–573, 576–577.

34. Prior to *Roper* and *Lawrence*, international human rights and foreign law were increasingly cited in footnotes, concurring decisions and dissenting opinions. *Atkins v. Virginia*, 536 U.S. 304, n. 21 (2002) (footnote in majority opinion noting that the execution of mentally retarded was "overwhelmingly disapproved" within the world community); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (concurrence decision citing the Race Convention and the Convention on the Elimination of All Forms of Discrimination Against Women for the proposition that affirmative action must end when its goals are achieved); *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J. dissenting) (dissenting opinion opposing denial of review in death penalty case citing European Court of Human Rights, British Privy Council and foreign court decisions).

35. Resnik, *Law's Migration*, 109, 159 (see n. 14).

36. Cleveland, *Our International Constitution*, 6 (see n. 5).

37. Interestingly, Sarah Cleveland notes that historically international law has been used to expand government authority and to restrict individual rights. Ibid., 9 (see n. 5).

38. H.Res. 568, S.2323, S.2082, H.3799, 108th Congress.

39. Available online at www.cnn.com/2006/LAW/03/15/scotus.threat/.

40. Attacks on the use of international sources ignored that fact that Supreme Court use of such sources was not new. As Professor Sarah Cleveland testified before Congress "reliance on international and foreign sources is fully part of the American Constitutional heritage." House Judiciary Subcommittee on the Constitution, *H. Res. 97 and the Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 109th Congress, 1st sess., July 19, 2005, pp. 38–41.

41. *Roper*, 543 U.S. at p. 578.

42. For a discussion of *Roper* and U.S. death penalty cases raising the ICCPR see Sandra Babcock, "Human Rights Advocacy in United States Capital Cases" in *Bringing Human Rights Home*, vol. 3, pp. 91–120 (see n. 5).

43. Available online at www.cc.org/content.cfm?id=142.

44. Ruth Bader Ginsburg and Deborah Jones Merritt, "Affirmative Action: An International Human Rights Dialogue," *21 Cardozo L. Rev.* 253, 282 (1999).

45. William Rehnquist, "Constitutional Courts-Comparative Remarks" (1989), reprinted in Paul Kirchhof and Donald P. Kommers (eds.), *Germany and its Basic Law: Past, Present and Future-A German-American Symposium* (Baden-Baden, Germany: Nomos, 1993), pp. 411, 412.

46. Michael Dorf, "The Hidden International Influence in the Supreme Court Decision Barring Executions of the Mentally Retarded," *Findlaw*, June 26, 2002. Available online at writ.news.findlaw.com/dorf/20020626.html.

47. John A Barrett Jr., "International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society," *Am. U. J. Int'l L. & Pol'y* 12 (1997): 975, 991–993. Both Harvard Law School and the University of Michigan require that students take courses in transnational law. Columbia and NYU law schools offer electives on international and comparative law to its first year students, and Washington College of Law at American University recently added a first year elective course specifically on international law in U.S. courts.

48. Martha F. Davis, "International Human Rights and the United States Law: Predictions of a Courtwatcher," *Alb. L. Rev.* 64 (2000): 417, 420.

49. Ibid., 427.

50. Ibid., 420.

51. Available online at www.eurunion.org/legislat/deathpenalty/deathpenhome.htm#ActiononUSDeathRowCases.

52. These practices were struck down by the Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005) and *Atkins v. Virginia*, 536 U.S. 304 (2002).

53. David Fontana, *Foreign Exchange*. Available online at www.tnr.com/doc.mhtml?i=w050228&s=fontana030305.

54. Justice Stephen Breyer, "The Supreme Court and the New International Law" (remarks at the American Society of International Law 97th Annual Meeting, April 4, 2003).

55. For a further discussion of briefs submitted by lawyers for the NAACP LDF in *Furman v. Georgia*, 408 U.S. 238 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976), *Coker v. Georgia*, 433 U.S. 584 (1977), and *Enmund v. Florida*, 458 U.S. 782 (1982) and defense counsel in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) and *Stanford v. Kentucky*, 492 U.S. 361 (1989), see Babcock, "Human Rights Advocacy," (see n. 5). Amnesty International filed briefs in *Gregg v. Georgia* and *Thompson v. Oklahoma*, and *Stanford v. Kentucky* and the IHRLG filed briefs in *McClesky v. Kemp*, 481 U.S. 279 (1987), *Thompson* and *Stanford*.

56. *Coker v. Georgia*, 433 U.S. 584, 596 n. 10 (1977); *Enmund v. Florida*, 458 U.S. 782, 796–797 n. 22 (1982).

57. *Thompson v. Oklahoma,* 487 U.S. 815, 830–831 (1988).

58. Ibid. at p. 869 n. 4.

59. *Stanford v. Kentucky*, 492 U.S. 361, 370 n. 1(1989) (emphasis in original).

60. *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997).

61. In a survey of cases Supreme Court cases in which human rights briefs were filed from 1995 through 2000, Silla Brush found that human rights briefs were filed in eleven cases, and the Supreme Court only cited international and comparative law in two cases involving the treatment of immigrants and refugees. Silla Brush, "Globalized Advocacy in U.S. Courts" (senior thesis, April 5, 2004), p. 60.

62. The IHRLG filed an amicus brief in *Bob Jones University v. United States*, 461 U.S. 574 (1983) (challenging tax exempt status for private schools with racially discriminatory admission policies). Human Rights Advocates filed amicus briefs in *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (defending a California statute that provided leave and reinstatement provisions for pregnant employees). International Law Scholars filed an amicus brief in *Morrison v. United States*, 529 U.S. 598 (2000). The Lowenstein Human Rights Clinic at Yale Law School filed an amicus brief on behalf of U.S. diplomats in *McCarver v. North Carolina*, 531 U.S. 1205 (2002).

63. *Zadvydas v. Davis,* 533 U.S. 688 (2001); *DeMore v. Kim*, 583 U.S. 510 (2003),

64. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Ginsburg, J., concurring); *Atkins v. Virginia*, 536 U.S. 304 (2002).

65. Rick Wilson, *A Case Study: The United States in the Inter-American Human Rights System, 1971–2002*, p. 13. Two cases involved the treatment of aliens. The other two involved Cuban nationalists charged with trying to overthrow the Cuban government and Spanish-speaking U.S. citizens asserting land grant and political claims. Wilson, *A Case Study*, pp. 14–15.

66. In the 1980s, the Commission also issued a decision stating that the "right to life" under the American Declaration of does not extend to protect an unborn fetus from abortion. *White and Potter v. United States*, Case 2141, Inter-Am. Ct. H.R. 25, OEA/Ser. L/V/II.54.doc.rev, (1980).

67. Rick Wilson, in email discussion with the author, May 8, 2007.

68. Steven Tullberg, "Securing Human Rights Of American Indians And Other Indigenous Peoples Under International Law," in *Bringing Human Rights Home* (see n. 5), vol. 3, pp. 53–90.

69. Gay McDougall, in discussion with the author, May 3, 2007.

70. Connie de la Vega, in email discussion with the author, April 16 & 25 April 2007.

71. Available online at www.skepticfiles.org/aclu/12_14_93.htm.

72. Steve Shapiro, in discussion with the author, April 18, 2007.

73. Ibid.

74. Clarence Lusane, "Changing (Dis)course: Mainstreaming Human Rights in the Struggle Against U.S. Racism," *Black Scholar* (Fall 2004): 5.

75. American Civil Liberties Union, "Proceedings of Ending the Cold War at Home: A National Conference," (Washington Plaza Hotel, Washington, D.C., Winter 1991), available online at www.skepticfiles.org/aclu/ending_c.htm.

76. Gay McDougall, in discussion with the author, May 3, 2007.

77. Ibid.

78. Peter Weiss and Rhonda Copelon, in discussion with the author, May 9, 2007, May 11, 2007.

79. Rhonda Copelon, in discussion with the author, May 11, 2007.

80. Rick Wilson, in email discussion with the author, May 8, 2007.

81. For instance, in the 1980s, the Center for Constitutional Rights brought an ATS case against President Reagan and other federal defendants arising out of U.S. support of the contras in Nicaragua, and in the 1990s, Paul Hoffman brought an ATS case against the Los Angeles police department for its involvement in the arrest and detention of a Mexican national by Mexican police in Mexico. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985); *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998); *Jama v. United States*, 22 F. Supp.2d 353 (D. N.J. 1998).

82. Copelon was counsel in both the *Filartiga* case and *Harris v. McRae*, a Supreme Court case upholding Medicaid restrictions on abortions. 448 U.S. 297 (1980). Following the Supreme Court's decision in *Harris*, Copelon filed a motion for reconsideration citing a 1979 European Court of Human Rights case, *Airey v. Ireland,* 32 Eur. Ct. H.R. Ser A (1979), holding that meaningful access to a right may require affirmative obligations on the part of the government, as persuasive authority. The Supreme Court denied the motion. Rhonda Copelon, in discussion with the author, May 11, 2007.

83. *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) (challenging U.S. interdiction and return policy); *Zadvydas v. Davis,* 533 U.S. 678 (2001) (challenging practice of indefinitely detaining certain immigrants who could not be deported); *DeMore v. Kim*, 583 U.S. 510 (2003) (challenging mandatory detention of deportable "criminal aliens" pending deportation without an individualized determination of whether they constitute a flight risk).

84. Penny Venetis, "Jama v. United States: A Guide for Human Rights Litigation," *ACLU Civil Liberties Report.*

85. For a more in-depth discussion of the NLCHP's work, see Maria Foscarinis and Eric Tars, "Housing Rights and Wrongs: The U.S. and the Right to Housing" in *Bringing Human Rights Home* (see n. 5), vol. 3, pp. 149–172.

86. Scott L. Cummings, "The Internationalization of Public Interest Law" (Research paper No. 06-41, University of California, Los Angeles-School of Law, 2006). Available online at ssrn.com/abstract=944552, p. 62.

87. Paul Hoffman, in discussion with the author, February 7, 2007.

88. Chandra Bhatnagar, in discussion with the author, May 24–25, 2007.

89. Steve Shapiro and Chandra Bhatnagar, in discussions with the author, April 18, 2007, May 24–25, 2007. Although the ACLU has not historically defined itself as an economic and social justice organization, a significant amount of its work has a social and economic component, including work on reproductive rights, housing, and immigrant and workers' rights.

90. Paul Hoffman, in discussion with the author.

91. Ibid.

92. Chandra Bhatnagar, in discussion with the author, May 24–25, 2007.

93. Cummings, "The Internationalization," pp. 88 (see n. 86).

94. Chandra Bhatnagar, in discussion with the author, May 24–25, 2007.

95. Tanya Coke, in discussion with the author, April 9, 2007.

96. Rick Wilson, in email discussion with the author, May 8, 2007.

97. Cummings, "The Internationalization," p. 64 (see n. 86).

98. Gay McDougall, in discussion with the author, May 3, 2007.

99. Ibid.

100. In 2001, the author joined the Institute to run the Bringing Human Rights Home Project. The author has also served on the planning committee for the Howard Conference and on the Coordinating Committee and Board of the U.S. Human Rights Network.

101. It is impossible to list all the organizations that have been involved in human rights training targeting or including U.S. lawyers. However, groups that have been

actively involved include the National Economic and Social Rights Initiative, the National Law Center on Homelessness and Poverty, the Center for Constitutional Rights, Penal Reform International, the Center for Human Rights and Humanitarian Law, American University, Washington College of Law, and the Program on Human Rights and the Global Economy at Northeastern Law School.

102. Hurwitz, *Lawyering for Justice*, p. 527 (see n. 3).

103. Brandt Goldstein, *Storming the Court* (New York: Scribner, 2005), p. 34.

104. Hurwitz, *Lawyering for Justice,* p. 549 (see n. 3).

105. Tanya Coke, in discussion with the author, April 9, 2007.

106. Wendy Patten, "The Impact of September 11th and the Struggle Against Terrorism on the U.S. Domestic Human Rights Movement," in *Bringing Human Rights Home*, vol. 2, pp. 153–186 (see n. 5).

107. Karen Narasaki, in discussion with the author, May 8, 2007.

108. Steve Shapiro, in discussion with the author, April 18, 2007.

109. Karen Narasaki, in discussion with the author, May 3, 2007.

110. Kenneth Cmiel, "The Emergence of Human Rights Politics in the United States," *The Journal of American History*, 86(3) (December 1999). "Human rights has a long intellectual pedigree, yet the contemporary human rights movement only took off in the 1970s."

111. Thomas Buergenthal, *International Human Rights* (St. Paul, MN: West Publishing, 1988), pp. 88–89. In 2006, the Commission was replaced by the UN Human Rights Council. William Korey, *NGOs and the Universal Declaration of Human Rights* (New York: Palgrave, 1998).

112. Margaret Huang, " 'Going Global'—Appeals to International and Regional Human Rights Bodies," in *Bringing Human Rights Home*, vol. 2, pp. 105–126 (see n. 5).

113. Kenneth Cmiel, "The Emergence of Human Rights Politics," (see n.110).

114. Hurwitz, *Lawyering for Justice*, p. 513 (see n. 3).

115. Rhonda Copelon, in discussion with the author, May 11, 2007.

116. Tanya Coke, in discussion with the author, April 9, 2007.

117. Ann Beeson, in discussion with the author, May 20, 2007.

118. Tanya Coke, in discussion with the author, April 9, 2007.

119. Rick Wilson, in email discussion with the author, May 8, 2007.

120. Chandra Bhatnagar, in discussion with the author, May 24–25, 2007.

121. Rhonda Copelon, in discussion with the author, May 11, 2007.

122. Steve Shapiro, in discussion with the author, April 18, 2007.

CHAPTER 5

"Going Global": Appeals to International and Regional Human Rights Bodies

Margaret Huang

> [B]efore we learned about human rights, we looked for laws in the U.S. that could provide protection for people who live, work, play and worship in places that are also sites for polluting industrial facilities and waste dumps. But we recognized that [U.S.] laws really do not support the fundamental human rights to life, health and non-discrimination.[1]

Since the early 1990s, a growing number of domestic social justice groups have turned to the international human rights system to challenge inequities and rights violations in the United States. While previous attempts had been made by civil rights leaders to engage the United Nations in the fight against racism and segregation,[2] it is only in the last decade that activists have expanded their efforts to utilize international human rights mechanisms in a range of domestic advocacy issues. Today, U.S. human rights advocates are taking their struggles to the United Nations, to the international treaty bodies, and to the regional human rights system at the Organization of American States (OAS). There are several reasons for this increasing interest in the international human rights system: a rising frustration with unresponsive domestic institutions and laws; changes within the international institutions making them more accessible to U.S. advocates; and a growing awareness among social justice advocates of what the international system has to offer coupled with increased support and resources from institutions committed to building a human rights movement in the United States.

The growing dissatisfaction with domestic institutions felt by many U.S. activists has been discussed in earlier chapters.[3] This broad frustration has given impetus to efforts to find new venues and procedures that might offer justice to victims where domestic remedies have failed. For example, when a victim has been denied the right to file a case in U.S. courts, it can be empowering

for the victim to tell her or his story before an international tribunal. Or, when U.S. laws do not recognize a violation of human rights, it can be reaffirming for a victim to have her or his rights recognized under international law.

Over the last decade, international institutions have also adopted new methods of procedure to facilitate civil society participation in human rights mechanisms. For example, in 1996 the United Nations Economic and Social Council adopted a resolution governing the "consultative relationship between the United Nations and non-governmental organizations" to encourage the participation of civil society groups in UN activities, including the Commission on Human Rights.[4] Similarly, in 1999 the Organization of American States adopted new guidelines for the participation of civil society groups in its activities.[5]

Also in the last ten years, the UN Commission on Human Rights established a number of new special procedures to monitor particular human rights problems, such as the denial of the right to housing and violations of the rights of migrants. Of the twenty-eight United Nations special procedures that currently exist, seventeen have been established since 1997.

Perhaps the most important impetus for increasing U.S. activists' engagement of the international human rights system has been the growing number of organizations committed to providing training, technical assistance, and other resources toward building a domestic human rights movement. Many of the organizations or programs providing training and technical assistance have been established only in the last ten years, including the U.S. Program at Global Rights, the Mississippi Workers Center for Human Rights, the National Economic and Social Rights Initiative, the National Center for Human Rights Education, the Human Rights Project at the Urban Justice Center, and the Bringing Human Rights Home Project at Columbia Law School. These efforts were given further momentum by the 2003 launch of the U.S. Human Rights Network (USHR Network), a new initiative linking organizations and individuals from around the country to hold the U.S. government accountable for human rights protections. The USHR Network offers monthly training conference calls, skills-building workshops, and also disseminates weekly announcements about activities and resources offered by organizational members around the country.

Finally, there are a number of private foundations that have committed funding to support human rights work in the United States, as reflected by the establishment of the U.S. Human Rights Fund in 2005. The Fund is a collaborative effort to provide strategic support to the U.S. human rights movement, emphasizing training and education, networking, communications, and strategic advocacy. Many of the current members of the Fund also provide direct grants to civil society organizations working on human rights in the United States.

WHAT IS THE INTERNATIONAL HUMAN RIGHTS SYSTEM?

The international human rights system is a complex arena, including actors at the regional and international level. There are essentially three categories

of international human rights institutions accessible to U.S. advocates: those created by the United Nations Charter and/or subsequent resolutions adopted by the UN member states (also known as the Charter-based bodies); those established through the adoption and ratification of international human rights treaties (also known as the treaty-based bodies); and those established by regional institutions, such as the Organization of the American States (known as the Inter-American human rights system). In this section, I will provide an overview of some of the key human rights mechanisms in each of these categories, as well as a brief analysis of the relevance and importance of these mechanisms to U.S. activists. In the next section, I present specific examples where U.S. advocates have engaged these procedures.

United Nations Charter-Based Institutions

The United Nations was established with the adoption of its Charter at the San Francisco Conference in June 1945. In early proposals for the international organization, the United States and the other leading Allies of World War II sought to limit references to individual rights, hoping to preserve national sovereignty and limit interventions into domestic affairs.[6] But a concerted response led by governments from smaller, often former colonial countries and nongovernmental organizations won the day.[7] Citing the failure of the Treaty of Versailles signed after World War I to prevent further bloodshed, and motivated by the horrors and devastation wrought by World War II, human rights advocates succeeded in their demands that the UN Charter emphasize the protection and promotion of human rights. As Paul Gordon Lauren has noted, "The U.N. Charter explicitly drew a connection between human well-being and international peace, reiterated support for the principle of equal rights and self-determination, and committed the organization to promote universal respect for, and observance of, human rights and fundamental freedoms without discrimination—'for all.'"[8]

To carry out this important duty of protecting human rights, Article 68 of the UN Charter required the UN Economic and Social Council (or ECOSOC) to "set up commissions . . . for the promotion of human rights," resulting in the creation of the UN Commission on Human Rights (UNCHR or Commission) in 1946. In its earlier years, the Commission focused on drafting and adopting international treaties to elaborate human rights standards.[9] But the UN soon began receiving formal complaints from victims of human rights violations, including representatives of the National Association for the Advancement of Colored People (NAACP) and other groups in the U.S., forcing the Commission to resolve the question of whether or not it could take action in individual cases.[10] Reflecting the general reluctance of its member states to allow the international community to get involved in matters of national concern, the ECOSOC adopted a resolution in 1947 stating that the Commission had "no power to take any action in regard to any complaints concerning human rights."[11] This resolution was gravely challenged in the 1960s by a series of petitions regarding apartheid in South Africa, and the Commission was pressured into establishing a procedure to allow public debate on specific countries and their human rights records.[12]

After that time, the Commission established a range of special procedures to examine particular human rights problems, submit regular reports, and offer expert advice. These procedures are examined in greater detail later in this section.

U.S. domestic advocates have been active participants in the UNCHR for many years, particularly since the late 1990s. For instance, in 1999 the National Coalition to Abolish the Death Penalty took its campaign to the Commission, calling for international pressure to end the practice of executions in the United States.[13] During that same session, advocates from Louisiana made the first formal intervention on environmental racism as a human rights violation before the Commission, highlighting the failure of the U.S. government to protect its citizens from grave human rights violations of the right to health and other abuses.[14] In 2000, advocates fighting racism in the criminal justice system, including the National Association of Criminal Defense Lawyers and the NAACP Legal Defense and Education Fund, participated in a delegation to the Commission.[15] Since that time, many other U.S. organizations have asked the Commission to examine issues including poverty in the United States, violence against women, the right to housing, and discrimination against migrant workers.

In 2005, UN Secretary-General Kofi Annan laid out a vision of reform for the UN's human rights system.[16] Because of political disputes and the actions of some member states seeking to prevent the Commission from addressing critical human rights violations, Annan proposed to replace the UNCHR with a new body, the Human Rights Council (HR Council), which would serve as a subsidiary body to the General Assembly. (In UN terms, the Council is considered more important than the Commission because it reports to a higher department—the General Assembly rather than ECOSOC.) After several months of negotiation, and despite U.S. government objections, the General Assembly approved the creation of the HR Council in April 2006.[17]

The new HR Council is a significant departure from its predecessor in several ways. First, unlike the UNCHR which met for only one session per year, the HR Council will meet at least three times per year for a total of ten weeks, with the option of requesting additional sessions as needed. This reform enables the Council to consider time-sensitive issues as they arise. Second, the HR Council will undertake a universal periodic review of the human rights situation in every member state of the United Nations. Unlike the Commission, whose members frequently sought to avoid scrutiny of their own records, the HR Council will start its review by examining its members first. Third, the method by which states are now elected to the HR Council differs. Unlike the UNCHR, for which countries were nominated by their regional groups (Asia, Africa, etc.) and approved without question by the ECOSOC, election to the HR Council requires an affirmative vote by an absolute majority of the UN's 191 members.[18]

Because the HR Council is still new, U.S. activists (along with their counterparts around the world) are still exploring how best to engage this new mechanism. Because the United States government did not apply to be a member of the HR Council, its human rights record will not be examined

among the first universal periodic reviews. But it is important to remember that the HR Council does have the mandate to consider human rights violations in *any* member state. As the members of the HR Council complete their negotiations on the details of how the new body will function (scheduled to be completed by June 2007), U.S. advocates will be better able to assess how best to engage this mechanism to promote human rights at home.

Many of the rest of the UN's Charter-based institutions fall under the purview of the Office of the High Commissioner for Human Rights (or OHCHR). Established by the 1994 General Assembly Resolution 48/141, the High Commissioner for Human Rights was a direct response to a recommendation emerging from the 1993 World Conference on Human Rights in Vienna, Austria. The mandate of the High Commissioner is to serve as the UN official with principal responsibility for United Nations human rights activities, including providing advisory services and technical assistance to UN member states, engaging in a dialogue with governments to secure respect for all human rights, and coordinating all human rights activities within the UN system.[19] The High Commissioner oversees a staff of more than 500 in offices around the world, with the great majority working at the headquarters for the UN's human rights system in Geneva, Switzerland.

Under the current High Commissioner, Louise Arbour of Canada, the OHCHR provides support to several Special Procedures, or human rights experts, which are currently divided into two categories: One group of experts holds thematic mandates, such as the use of torture or violence against women, while the second group is tasked with monitoring the human rights situation in a particular country or territory. Special Procedures can have different designations, including "Special Rapporteur," "Independent Expert," or in some cases a "Working Group" which usually has five members representing the five regions recognized by the UN (Asia, Africa, Latin America, Eastern Europe, and "Western Europe and Others"—where the United States is represented). Each of the Special Procedures submits an annual report to the United Nations, documenting violations covered by her or his mandate and making recommendations to member states and UN officials on how to stop or remedy the violations.

In the last several years, U.S. activists have worked with several of the UN Special Procedures, including participating in the official visits of several experts to the United States:

- In 1997, the Special Rapporteur on extrajudicial, summary, or arbitrary executions undertook a mission to the United States to investigate reports of "discriminatory and arbitrary use of the death penalty and a lack of adequate defense during trial and appeal procedures."[20]
- In 1998, the Special Rapporteur on the question of religious intolerance visited several sites across the country and made a number of recommendations on how the government could improve protection of religious rights, particularly for indigenous peoples.[21]
- The Special Rapporteur on violence against women visited the United States in 1998 and drafted a report about violence against women in state and federal prisons.[22]

- In 2001, the Special Rapporteur on the right to education visited the United States in order to examine issues of discrimination in the protection and promotion of the right to education.[23]
- The Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights also visited the United States in 2001, in order to learn more about the laws, policies, and practices of the United States.[24]
- In 2005, the Independent Expert on the question of human rights and extreme poverty visited the United States to examine the impact of extreme poverty on the exercise of human rights in the wealthiest country in the world.[25]
- Most recently, in May 2007 the Special Rapporteur on the human rights of migrants spent three weeks examining the situation of migrants in the United States and recommended that the government take actions to ensure that federal, state, and local authorities are all in compliance with international human rights law in the treatment and protection of migrants.[26]

For each of these official visits, U.S. activists provided information, data, and recommendations to the UN experts. Civil society groups also arranged interviews with victims of human rights violations and encouraged official meetings with state and federal officials. More important, advocates used the experts' visits and reports to push for policy and legislative action. For example, during the visit of the independent expert on human rights and poverty in November 2005, activists from Louisiana and Mississippi used his official meetings with local and state government representatives to demand that the needs of the poorest victims of Hurricane Katrina not be forgotten during the reconstruction effort.

It is important to note that the role of the UN Special Procedures is currently under debate in the negotiations over the methods of work for the new Human Rights Council. While many observers have predicted that the special procedures with thematic mandates will continue under the new structure, there is some concern that the expert positions with country mandates might be eliminated and that the independence of all of the rapporteurships might be compromised.

United Nations Treaty-Based Institutions

During the last sixty years, UN member states have negotiated and adopted nine core human rights treaties to protect and promote human rights around the world:

- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- The International Covenant on Civil and Political Rights (ICCPR);
- The International Covenant on Economic, Social and Cultural Rights (ICESCR);
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);

- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- The Convention on the Rights of the Child (CRC);
- The International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families (ICRMW);
- The International Convention for the Protection of All Persons from Enforced Disappearance (not yet in force); and
- The Convention on the Rights of Persons with Disabilities (not yet in force).

Among these treaties, the U.S. government has ratified only three: the ICCPR in 1992, and the ICERD and the CAT in 1994. U.S. activists played a significant role in achieving the ratification of all three treaties, and many continue to push for ratification of the other ones. (The United States and Somalia are the only two countries that have not ratified the CRC, and the United States is the only industrialized country in the world not to have ratified CEDAW.)[27]

Once a country has ratified a treaty, the government is required to submit periodic reports on its compliance with the treaty's obligations to the treaty monitoring body—a committee of independent human rights experts. For U.S. activists, the reporting process offers an important opportunity to highlight the human rights situation in the country and to demand policy and legal reforms that would bring the U.S. government into compliance with its international legal obligations. Since May 2005, the U.S. government has filed periodic reports with the three UN committees responsible for the treaties it has ratified: the Committee against Torture, the Human Rights Committee (which monitors compliance with the International Covenant on Civil and Political Rights), and the Committee on the Elimination of Racial Discrimination. As part of the official reviews of each of these reports, civil society groups have collaborated to submit "shadow reports" to the UN Committees. Shadow reports are information, analysis, and recommendations provided by nongovernmental organizations about specific human rights abuses in the country being reviewed.

For example, in May 2006, U.S. advocates presented information to the UN Committee against Torture (CAT) about police brutality and the use of torture by law enforcement and prison guards; the conditions of incarceration in "super-max" prisons; the placing of children in long-term isolation while in detention; the sexual abuse and rape of women by law enforcement agents; and the use of electroshock weapons against unarmed individuals. Advocates also provided ample evidence of the use of torture and the ill treatment of those detained as part of the U.S. government's "war on terrorism" in Iraq, Afghanistan, Guantánamo Bay, and in secret CIA detention centers. The members of the CAT responded to U.S. civil society activists by issuing a series of recommendations to the U.S. government addressing all of these concerns.

In July 2006, sixty-five U.S. activists participated in the formal review of the U.S. government's report to the UN Human Rights Committee (HRC). More than twenty issue-based, collaborative shadow reports were submitted

to Committee members on a broad range of issues including the rights of American Indians; the rights of lesbian, gay, bisexual, transgender, and intersex people; the criminalization of dissent; the failure to prohibit propaganda for war; the human rights of migrants; the failure of government to protect the victims of Hurricane Katrina; and violations of the right to vote and participate in democratic processes of governance. Similar to the response of the Committee against Torture, the expert members of the HRC incorporated the information from U.S. advocates into their recommendations to the U.S. government.

Once the treaty bodies released their recommendations to the U.S. government, activists immediately incorporated them into their respective domestic advocacy campaigns. For instance, organizations seeking to end the practice of felon disenfranchisement publicized the Human Rights Committee's recommendation on that issue in ballot initiatives in the 2006 election cycle. The authority of the treaty bodies to interpret U.S. legal obligations under the international human rights treaties lends strong credibility to advocacy efforts with both legislators and the general public. Activists are now preparing a similar shadow-reporting process for the Committee on the Elimination of Racial Discrimination, which is expected to review the U.S. government's latest report in March 2008.

The Inter-American Human Rights System

Founded in 1948, the OAS is a regional forum to facilitate multilateral cooperation and discussion among the countries of the Western Hemisphere. With thirty-five member states (though Cuba has actually been suspended from participation since 1962), the OAS works to promote democracy, protect human rights, and confront problems such as terrorism, poverty, corruption, and the illegal trade in drugs.[28] The OAS has two primary mechanisms for protecting human rights: the Inter-American Commission on Human Rights (the Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court). The Inter-American Commission is based in Washington, D.C., and the Inter-American Court is housed in San Jose, Costa Rica. Under the OAS Charter, all member countries are bound either by the provisions of the *American Declaration of the Rights and Duties of Man* or the *American Convention on Human Rights.* Because the U.S. government has not ratified the *American Convention on Human Rights,* it is not subject to the jurisdiction of the Inter-American Court. U.S. advocates have therefore primarily focused their advocacy efforts at the Inter-American Commission which is granted jurisdiction over all member states through the American Declaration and OAS Charter.

The Inter-American Commission is composed of seven independent human rights experts, elected to serve by the General Assembly of the OAS.[29] Commission members carry out fact-finding missions to OAS member states, investigate individual complaints of human rights violations, and monitor the general human rights situation in the countries of the Americas. Similar to the UN system, the Inter-American Commission has the authority to appoint special procedures, each with a mandate to examine a particular human rights

problem such as the Special Rapporteurship on the Rights of Persons Deprived of their Liberty and the Special Rapporteurship on the Rights of Afro-Descendants. Civil society advocates from across the region, including the United States, work with the special procedures to bring attention to rights violations in their country and to pressure governments to take action.

Over the last several decades, U.S. activists have brought a number of petitions to the Inter-American Commission, many of them focused on death penalty sentences. But since the 1990s, cases have been reviewed on a much wider range of issues, including the indefinite detention of Cubans sent to the United States in the Mariel boatlift of 1980; the interdiction of Haitians seeking asylum in the United States; the U.S. military invasions of Grenada and Panama; the rights of indigenous peoples to their tribal lands; the voting rights of the residents of the District of Columbia; violations of the rights of the poor through welfare reform initiatives; the rights of undocumented migrant workers; and the practice of sentencing juveniles to life without parole.[30]

Additionally, the Inter-American Commission has adopted a new procedure of holding "thematic hearings," not to be used for individual cases but rather to educate the Commission members about a pattern or increasing trend in human rights violations. U.S. activists have used this procedure to request a number of hearings on issues specific to the United States, including racial disparities caused by mandatory minimum sentencing practices, the failure of the government to protect victims of Hurricanes Katrina and Rita, and the gross exploitation of migrant workers in the reconstruction efforts after the hurricanes in the Gulf region; and increasing racial segregation in the public education system.

THE CHALLENGES AND ADVANTAGES OF THE INTERNATIONAL MECHANISMS

In considering the three categories of international human rights institutions discussed in the proceeding section, it is useful to consider the advantages—and disadvantages—offered by each to U.S. advocates. On the one hand, the UN Human Rights Council offers U.S. activists the opportunity to network with human rights organizations around the world in one time and place. The Council also facilitates advocacy with foreign governments, as representatives of forty-seven countries are simultaneously accessible to U.S. activists. On the other hand, the Council has an enormous agenda with many issues and countries competing for the attention of the member states. Additionally, the fact that the Council meets three times each year in Geneva is all too often a financial challenge for U.S. activists (as well as advocates from other parts of the world). Travel to and accommodations in Geneva are quite expensive, and without staff on the ground, many organizations are unable to effectively participate in the Council's deliberations.

The UN treaty bodies offer a different set of advantages and disadvantages. The Committees generally welcome substantive input from civil society groups, and in some cases they actively seek information on particular issues of interest. Because the Committees are mandated to focus on the compliance of an

individual country, they give more attention to specific issues and devote more time to the discussion of the situation in that country. A challenge to activists' effective use of the treaty reporting process, however, is the reporting record of the U.S. government. Since ratification of three treaties in the early 1990s, the U.S. has filed only two reports with each treaty body, precluding activists from using the shadow-reporting process more than once each decade. Also, the treaty bodies tend to issue their recommendations to governments in "UN-speak"—diplomatic language that may not arouse the public's attention to a serious human rights violation.

The Inter-American Commission offers individuals petitioners who have been denied access to U.S. courts the opportunity to have their case heard by an official body. For many victims of human rights violations, the Inter-American Commission process offers the only formal acknowledgement of their experience. The thematic hearings before the Commission also offer the opportunity to raise interest in a particular human rights violation, which can be used in education and media outreach efforts. But it is important to note that the U.S. government usually does not accept the jurisdiction of the Commission and refuses to comply with any decisions taken against it. Because of the government's refusal to accept the legal authority of the Commission, advocates must have clear and limited expectations about what a Commission decision can actually accomplish.

There are also some general advantages and disadvantages that all of the international institutions offer to U.S. activists. On the positive side, unlike the legal institutions in the domestic judicial system, advocates do not have to be lawyers to engage the international procedures. For instance, several of the activists participating in the shadow reporting processes with the treaty bodies were grassroots organizers and community-based leaders, working on issues such as racial profiling and prison conditions. Their information was vital to the Committee members, who consistently requested the views of local activists on specific issues. The result was a democratization of the advocacy process, with national and local organizations sharing information and working collaboratively to influence the reporting process.

Another advantage of the international human rights mechanisms is that they provide access to the international community, which can add pressure to demands for domestic policy changes. The National Campaign to Abolish the Death Penalty, an organization dedicated to ending capital punishment in the United States, began campaigning at the United Nations Commission on Human Rights in the late 1990s, seeking to win the support of other countries for efforts to ban the death penalty in the United States.[31] Later, anti–death penalty advocates expanded their advocacy to the European Union and the Organization of American States, particularly the Inter-American Commission on Human Rights. This outreach through various international institutions was successful in attracting attention from several countries—particularly in Europe and Latin America—to the U.S. practice of sentencing the mentally disabled and juveniles to death. Widespread censure of these practices was demonstrated by diplomatic interventions, public petitions, and even intercessions by the Pope of the Roman Catholic Church.[32] The campaign to end the practice of executing the mentally disabled and juveniles was

successfully won in 2002 with the Supreme Court decision in *Atkins v. Virginia* and in 2005 with the Supreme Court decision in *Roper v. Simmons*.[33] Although international condemnation alone would likely not have achieved these victories, the Supreme Court decisions did make reference to international legal standards and the practices of other governments around the world.[34]

U.S. advocates have also gained from participating in international human rights meetings by connecting to the broader international human rights movement. Whether in Geneva at the UN Human Rights Council, or in Washington before the Inter-American Commission, U.S. groups have learned from the experience of activists from other parts of the world. By hearing about the similar struggles and successes of human rights advocates in other countries, U.S. activists gain a new arsenal of tools and strategies for combating human rights violations at home. Equally important, U.S. advocates have the opportunity to build solidarity with their counterparts across the globe.

Finally, one other advantage of the international human rights mechanisms is the opportunity that they offer survivors of human rights violations to tell their own stories. When victims are denied the chance to see their cases prosecuted or to seek legal remedy in domestic courts, submitting a petition to an international mechanism gives them a platform to demand accountability and to be heard. Many of the international institutions provide victims with the opportunity to testify, to share their experiences in their own voices, and to gain recognition from the international community of the violation of their rights. Such opportunities demonstrate to victims that they are not alone in their struggle and inspire them (and others) to continue the struggle for justice at home.

On the negative side, U.S. advocates are generally unfamiliar with the international human rights system, and they often require training and technical assistance on how to engage the international mechanisms. Organizations may have to commit significant resources to international human rights work including staff time, the costs of training, the costs of participating in international meetings, translation or interpretation costs, and other expenses. Another disadvantage for U.S. civil society groups is the skepticism of members, boards of directors, and other key constituencies who are also unfamiliar with the international human rights system. Activists may have to commit additional time and energies to persuading their primary stakeholders of the value of this work. Finally, U.S. advocates must confront a significant obstacle in the attitude of the U.S. government, which frequently considers itself unbound by international legal obligations. This challenge is discussed in more detail in a later section.

CASE STUDIES: U.S. ACTIVISM IN THE INTERNATIONAL HUMAN RIGHTS INSTITUTIONS

During the last decade, U.S. advocates have engaged a range of international organizations and procedures in their efforts to hold the government accountable for human rights violations. These efforts have usually been undertaken

in support of existing campaigns for social justice, complementing other activities and contributing new forms of pressure for policy or legal change. Activists consider international advocacy strategies for different purposes—to change the discourse (and therefore public sentiment) about a particular problem; to seek a remedy for a victim who cannot or has not received justice under domestic laws; or to bring international pressure to bear on government officials who are unresponsive to community demands. This section explores the experiences of U.S. advocates working on different issues and campaigns, and how they have utilized the international human rights mechanisms to promote their causes.

Environmental Racism at the UN Commission on Human Rights

During the 1990s, a group of activists from "Cancer Alley" in Louisiana struggled to end the pollution produced by corporations operating petrochemical facilities and oil refineries in their communities. Calling for an end to "environmental racism," these advocates emphasized that the people who suffered disproportionately from this corporate pollution were African American, Latino, and other poor minority communities.[35] After years of attacking the problem through lawsuits and community organizing demanding action from the Environmental Protection Agency and other regulatory bodies, the activists became frustrated by the lack of response from governmental institutions. In 1998 they started to look toward the international human rights system for inspiration.[36]

In 1999, a delegation of community activists from Louisiana traveled to Geneva to testify before the UN Commission on Human Rights (Commission or UNCHR) about environmental racism. This was the first time that the issue of environmental racism was addressed in the Commission.[37] In addition to formal written and oral interventions, the activists also met with UN human rights experts and conducted a briefing for member states of the Commission on the problems of environmental racism in the United States. A key objective of the delegation's participation in the Commission was to invite the UN Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights to visit the United States. This effort was successful, and the Special Rapporteur visited the United States in December 2001, including a stop in the affected Louisiana communities.[38] Although her report did not focus on the issue of environmental racism in great detail, advocates used the Special Rapporteur's visit to raise the visibility of their struggle, winning attention from both the media and members of the U.S. Congress.[39]

After the visit by the UN Special Rapporteur, activists stepped up their campaigns targeting the corporations responsible for the pollution. Having linked up with activists fighting similar battles in Nigeria and Ecuador through their international advocacy efforts, Louisiana advocates went after corporate parent companies in the United Kingdom and the Netherlands. After years of struggle, U.S. activists finally won a major settlement with a petroleum

company, which agreed to purchase homes from community members affected by its operations in Cancer Alley.[40] While the victory was not achieved through international advocacy alone, using the international human rights mechanisms did change the terms of the debate between community members and corporate representatives. By using international activism and publicity to call attention to environmental racism as a human rights violation, activists succeeded in shaming the corporations to do the right thing. Advocates were also able to link their struggle with similar battles taking place in other parts of the world, reinforcing the message that human rights must be protected for all people.

International Treaty Compliance: Chicago Police Torture

From 1972 to 1991, approximately 135 African American men were tortured by former Police Commander Jon Burge and detectives under his command at Areas 2 and 3 police headquarters in Chicago, Illinois.[41] A veteran of the Vietnam War, Burge used similar techniques to the ones he had employed against enemy combatants in the war—electric shock, suffocation with a plastic bag, mock executions, and beatings with telephone books and rubber hoses. The torture was systemic and racist in nature, inflicted to extract confessions from the suspects, many of whom are still incarcerated today in 2007.[42] At least eleven decisions in both federal and state courts have acknowledged the practice of torture by Burge and his men, and officials of the City of Chicago have also admitted to widespread knowledge of the torture during and after this period.[43] Despite this overwhelming evidence, not a single officer or member of the chain of command has been prosecuted for torture or for conspiracy to obstruct justice by covering up these crimes. Many of the officers responsible for the torture have subsequently been promoted and allowed to retire with their full pensions.[44]

Activists in Chicago formed an ad hoc coalition to push for justice in the Burge cases. While they achieved some victories in the campaign (the firing of Jon Burge, the pardoning of some innocent victims of the torture, the settlement of a few civil cases brought by victims, and the appointment of a special prosecutor to investigate the case), advocates were not able to achieve justice on behalf of all the victims nor were they able to win official recognition of the systemic and racist nature of the torture.[45] After waiting more than three years for special prosecutors appointed in April 2002 to finish their investigation of the Burge cases, the coalition decided to take their campaign to the UN treaty bodies. In May 2006, they presented evidence and recommendations to the UN Committee against Torture, and in July of the same year, they made the same case before the UN Human Rights Committee. In response to the advocacy of U.S. activists, the Committee against Torture in its *Concluding Observations* cited its concerns about the lack of investigation and prosecution in regard to allegations against the Chicago Police Department and called for an immediate and thorough investigation into all allegations of torture by law enforcement personnel.[46] The Committee also requested that the U.S. government provide further information about prosecutions related to the Burge cases.

The recognition by an international human rights institution was incredibly empowering for the victims of Jon Burge. Not only was it an acknowledgement of the violations that they had suffered, but it lent further authority to their demands for action by the government. Equally important, there was substantial media coverage of the UN Committee's concern about the Burge cases in the Chicago area. Newspapers, radio programs, and the major television stations all carried stories reporting on the UN Committee's recommendations. Advocates in Chicago credit this media attention with the decision by the special prosecutors to finally release their report on the Burge cases. In July 2006 after a four-year investigation, the special prosecutors concluded that torture had indeed taken place and that Burge and his men committed criminal acts in violation of Illinois laws "beyond a reasonable doubt."[47] However, the prosecutors also declined to issue indictments against any of the individuals involved on the grounds that the statute of limitations for these crimes had run out. Outraged, the coalition of advocates in Chicago responded with *A Report on the Failure of Special Prosecutors Edward J. Egan and Robert D. Boyle to Fairly Investigate Police Torture in Chicago*, issued in April 2007. The group has also filed a supplemental report to the UN Committee against Torture, calling for a federal investigation and prosecution of all those responsible for the torture and its cover-up.[48]

Petitioning the Inter-American Commission on Domestic Violence

One of the most fundamental human rights is a right to a remedy for those whose rights have been violated. Whether a person is a victim of police brutality, of corporate malfeasance, of medical malpractice, or of discriminatory treatment or harassment, that person should be able to get a remedy through criminal prosecution, civil litigation, or mediation and settlement. If a person is denied a remedy for a rights violation, then her or his rights are violated again. Advocates for human rights victims in the United States are increasingly turning to international human rights mechanisms when domestic institutions fail to recognize their claims. While the international procedures are generally unable to provide a direct remedy for the human rights violations, they do offer activists an opportunity to highlight the lack of remedy within the domestic legal system. These mechanisms can also provide a forum to create a public record of the violation and give the victim her or his "day in court."

On June 22, 1999, Simon Gonzales abducted his three daughters from their mother's home in Castle Rock, Colorado, directly violating a court-issued temporary restraining order.[49] Jessica Gonzalez (now Jessica Lenahan), who had filed for divorce earlier that year, quickly called the local police department and requested the immediate enforcement of the restraining order against her estranged husband. Despite Colorado's mandatory arrest law which requires police officers to "use every reasonable means to enforce a protection order," the police department ignored Ms. Lenahan's repeated calls and never took any steps to locate Mr. Gonzalez or to enforce the order.[50] At 3:20 A.M., Mr. Gonzalez arrived at the police station and opened

fire with a handgun. Police responded by shooting him dead, after which they discovered the bodies of his three children in his truck, killed that same evening.

Following this tragedy, Jessica Lenahan filed a lawsuit against the City of Castle Rock for failing to enforce her protective order. The case was heard by the Supreme Court, which ruled against her in June 2005, stating that Ms. Lenahan had "no personal entitlement to police enforcement of the order."[51] Having lost her case in the highest domestic court, Ms. Lenahan was left without any remedy by the domestic judicial system. She decided to turn to the international human rights system, hoping to keep her case alive and to prevent other victims of domestic violence from suffering the same violation of their rights. She and her lawyers filed a petition with the Inter-American Commission on Human Rights (Inter-American Commission). In her petition, she requested monetary compensation for the violations of her rights, as well as the adoption by the U.S. government, and particularly the State of Colorado, of necessary measures to deter future domestic violence crimes. Ms. Lenahan also requested an advisory opinion from the Inter-American Court of Human Rights regarding the nature and scope of U.S. government obligations under the *American Declaration of the Rights and Duties of Man* to prevent and prosecute domestic violence. It is significant to note that, even if the Inter-American Commission were to recommend that Ms. Lenahan receive monetary compensation for her claims, such a decision will likely not be enforceable in U.S. courts. However, such an award would be a clear recognition of the harm she has suffered and serve as a strong critique of the failure of the U.S. system to protect her rights.

In March 2007, Ms. Lenahan told her story in a formal hearing before the Inter-American Commission. It was the first time that she was allowed to personally testify in an official proceeding, as U.S. courts had rejected her claims on procedural grounds and prevented any consideration of the merits of her case. For Ms. Lenahan, the acknowledgement of her suffering and the recognition of the violation of her rights were a form of remedy that she had been denied by domestic courts. Although Ms. Lenahan may not win her individual case before the Inter-American Commission, the petition also serves to advance the advocacy efforts of activists fighting domestic violence. These advocates hope to use the publicity around her petition—and the final decision of the Inter-American Commission—to pressure government officials to pass legislation that requires enforcement of protective orders. Thus, the role of the Inter-American Commission is to complement ongoing domestic advocacy and to enhance efforts to enact meaningful reforms.

U.S. GOVERNMENT ENGAGEMENT WITH THE INTERNATIONAL BODIES

Despite its claims to leadership of the international human rights system, the U.S. government works very hard to avoid accountability for its international legal obligations. This position of U.S. "exceptionalism"—claiming that the rules and laws that apply to everyone else do not apply to the United

States—is well documented within the international human rights institutions. Such exceptionalism is reflected in the U.S. government's refusal to ratify other human rights treaties, such as the Convention on the Rights of the Child which has been nearly universally accepted by governments around the world.[52] It is also demonstrated by the U.S. government's decisions to withdraw as a signatory to the International Criminal Court Treaty in 2002[53] and to reject international consensus around the Kyoto protocol in 2001.[54] More recently, in 2005 the U.S. government withdrew from an international legal protocol that grants the International Court of Justice (ICJ) oversight of U.S. protection of foreign nationals' consular rights.[55] The withdrawal took place after the ICJ ruled in 2004 that the cases of fifty-one Mexican nationals sentenced to execution in the United States should be reopened because U.S. authorities failed to notify the Mexican government about their cases. Perhaps the clearest example of U.S. exceptionalism is the failure of the U.S. government to publicize its reports to UN treaty bodies or even to educate the public about its human rights treaty obligations. By keeping quiet about these obligations, the United States seeks to avoid accountability for the same rights it demands be protected in other countries of the world.

The U.S. government is usually represented by the State Department in activities at the international human rights institutions, though other federal agencies have also played a role in reporting on U.S. compliance with international legal standards. This odd arrangement makes the foreign affairs agency responsible for providing information about domestic policies and state laws. Such a practice is not unusual—most countries are represented before international institutions by their foreign ministry officials. But in the United States, it has created serious challenges for the federal government to meet its obligations efficiently and effectively. For example, the Office of the Legal Advisor at the State Department is responsible for drafting compliance reports to the various treaty bodies. But much of the information on how the United States is meeting its obligations actually originates with the Departments of Justice, Defense, Health and Human Services, and Homeland Security, as well as the governments of the fifty states.

Recognizing the need to coordinate among the federal agencies to gather information and report to the UN treaty bodies, in 1998 the Clinton administration issued Executive Order 13107 on the *Implementation of Human Rights Treaties*.[56] The order established an Inter-Agency Working Group on Human Rights Treaties, which was tasked with coordinating reporting efforts as well as with developing plans for public education about the treaties. A re-worked, but less active, version of the Inter-Agency Working Group continues in this function under the Bush II administration, but it has not resulted in widespread understanding of U.S. obligations under the treaty. In fact, in a series of meetings with U.S. government officials in early 2007, civil society advocates learned that representatives of the Department of Justice, the Department of Homeland Security, and the Federal Emergency Management Agency had never heard of the human rights treaties and were unaware of any obligations that these treaties placed on their departments.[57] Even more disturbing, a number of state attorneys general responded to U.S. Department of State requests for information by asking "which state" the Department

was representing.[58] The government's failure to educate even public officials about their international legal obligations is itself a violation of the human rights treaties.

In addition to its responses to the UN treaty bodies, the United States has also been ambivalent in its engagement with other international human rights mechanisms. In litigation at the Inter-American Commission, for example, the government is usually very active in responding to petitions brought against the United States. However, it also consistently denies the legitimacy of any decision taken against it by the Commission and posits that the *American Declaration of the Rights and Duties of Man* is not binding.[59] When UN special procedures have requested to conduct fact-finding missions to the United States, the government has usually accommodated these requests but has rejected any subsequent criticism documented in the mission reports.[60]

Beyond the executive branch, Congress and the judiciary also have roles to play in upholding U.S. human rights obligations. First and foremost, the Senate is responsible for ratifying human rights treaties signed by the president, and the ratification process is assigned to the Foreign Relations Committee. However, there has been no committee assigned to monitoring treaty implementation. In early 2007, a new subcommittee on Human Rights and the Law was formed under the Senate Judiciary Committee. It is not clear whether the leadership of this new subcommittee will undertake to examine issues of treaty compliance as part of its jurisdiction, though activists are working hard to persuade Committee members to take on this important task. There is also a Congressional Human Rights Caucus with members in both the Senate and the House of Representatives, but its work has focused almost exclusively on the human rights situation in other countries, not in the United States.

In the judicial branch, there is an increasing awareness of international legal obligations, particularly reflected in recent decisions by the Supreme Court.[61] While the references to international human rights law are usually considered persuasive rather than authoritative in court decisions, the trend does offer hope to activists that international human rights might someday be enforceable in U.S. courts. On the other hand, international law references have also spurred a highly negative reaction from conservative activists and some members of Congress, who have called for the impeachment of any judge who cites "foreign law" in an opinion.[62] The backlash against the citing of international law could easily produce a "chilling effect" that would deter judges and lawyers from using international human rights laws when appropriate.

The common theme through all of these points is that the U.S. government adamantly rejects international criticism of its own human rights record, even while it is publicly condemning other governments for their human rights violations. Because human rights objectives are often cited as primary factors in the making of U.S. foreign policy (consider Sudan or North Korea or the justifications for the war in Iraq), the United States cannot completely abandon the international human rights regime. But it works hard to limit its engagement with the international human rights institutions, a position that U.S. activists must confront as part of their international advocacy strategies.

CONCLUSIONS

As the number of U.S. activists using international human rights mechanisms grows, there are more and more opportunities to impact domestic policy with these strategies. The more that government officials—whether legislators or judges—are exposed to international human rights treaty obligations, the more open they might become to applying these standards in their work. This possibility highlights the need for more resources—both personnel and financial—dedicated to supporting activists' engagement of the international human rights mechanisms. More education of the general public and the media is also needed to build and support the constituencies demanding human rights protection in this country. Human rights strategies alone may not accomplish the objectives of the social justice movement, but they can certainly lend strategic value to ongoing efforts while also bringing some form of remedy to the victims of human rights violations.

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57. Nongovernmental organizations' meeting with State Department officials, January 19, 2007; nongovernmental organizations' meeting with Department of Justice officials, March 29, 2007.

58. Nongovernmental organizations' meeting with State Department officials, January 19, 2007.

59. Rick Wilson, "A Case Study: The United States in the Inter-American Human Rights System, 1971-2002" (see n. 30), pp. 11–12.

60. See, for example, Reed Brody, "American's Problem with Human Rights," Third World Network (May 1999), available online at www.twnside.org.sg/title/1893-cn.htm.

61. See, for example, the Supreme Court decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005).

62. See, for example, "The Constitution Restoration Act of 2005" (introduced in the U.S. House of Representatives and the U.S. Senate, March 2005), available online at www.thomas.gov/cgi-bin/bdquery/z?d109:SN00520:@@@L&summ2=m&.

CHAPTER 6

Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights

Martha F. Davis

Mayors, governors, city councils, and state legislators are not usually associated with foreign affairs. The United States Constitution states that the federal government has the power to make treaties, and it has been widely accepted that this authority encompasses a more general "foreign affairs power." A large share of that power rests with the executive branch. While the Constitution also reserves some residual powers to be exercised by the states or "the people," the argument that the nation must speak with one voice on issues of international concern has reinforced the idea that there is little role for the divergent perspectives of individual states and cities in the world of international relations.

This constitutional bedrock, however, is not impervious to cracks, fissures, and even earthquakes. History provides many examples of state and local involvement in foreign affairs as notions of states' rights ebb and flow, and as activists pressure their local governments to stake out positions on the important global issues of the day. The relationship between the subnational and national governments in the United States is dynamic, as it must be to preserve such a complex union. Catherine Powell has called this give and take between locally and federally driven international policy perspectives a "dialogue" between different levels of government.[1] Alternatively, states and localities might be viewed as laboratories of foreign affairs, testing policies before initiating full-blown national programs. Such approaches may, at the very least, "trickle up" to the federal level over time. Or in some instances, states and localities may be simply exercising their own sovereignty, without concern about how their constituent-driven local policies might play on the national or international stage.

Whatever characterization is most apt, in the area of international human rights, many states and localities in recent years have used their position within the federal system to promote human rights approaches both abroad and at home. Their actions (for example, in addressing global warming or divesting from South Africa) often make a practical difference in their own right, while also pushing the nation toward greater involvement in both the informal and formal mechanisms of international human rights. Despite some significant setbacks, particularly in the courts, grassroots activists as well as states and localities themselves continue these efforts, creatively taking advantage of the gray areas of federalism that leave some space for local involvement in foreign affairs.

A BRIEF HISTORY OF STATE AND LOCAL FOREIGN AFFAIRS

Historically, state and local engagement in foreign affairs has fallen into three general categories: (1) direct engagement with foreign governments on issues of mutual concern; (2) symbolic statements, such as resolutions, intended to influence national and international policies; and (3) local adoption and implementation of international standards, including human rights standards, that may or may not have been endorsed by the federal government. State and local activity is explicitly circumscribed by constitutional requirements that prevent states from entering into treaties. But subnational governments continue to test their boundaries in areas where the respective responsibilities of federal and state governments are less clearly delineated.

In terms of direct engagement, since the beginning of the republic, states and cities have responded to the expectations and demands of their citizens by interacting directly with foreign governments, with or without federal support and approval, and often with profound effects on federal policy. There are many examples. As early as 1793, when President Washington proclaimed the United States's neutrality in the Franco-British War, the governor of South Carolina took sides and allowed a British ship to be prepared in Charlestown. A few years later, residents of Boston raised $125,000 to build two frigates for the British forces.[2]

In the twentieth century, subnational governments continued their direct involvement in international affairs, driven initially by efforts to improve their international trading positions. In 1959, for example, the governor of North Carolina headed a business delegation to Europe, hoping to yield more direct investment in the state. In the early 1960s, states began opening their own offices abroad. (By 2006, thirty-eight states operated more than 200 offices around the world.)[3] Pursuing a more bilateral approach, the state of Louisiana reached out to Quebec in 1965 in an effort to establish a closer cultural relationship between the two former French colonies. U.S. cities have also pursued economic and trade measures across international boundaries. For example, the City of Denver's Mayor's Office of Economic Development and International Trade maintains offices in Shanghai and London.

And since the late 1950s, cultural and technical exchanges have been the norm in hundreds of U.S. cities that have sister-city relationships around the world.[4]

Regional relationships between state and local governments and foreign nations are also common. For example, as early as 1966, representatives of states along the southern United States border met with their Mexican counterparts to establish a cooperative arrangement to promote education, commerce, and tourism. By 2006, one of the most sophisticated transnational regional alliances in North America was the Pacific Northwest Economic Region (PNWER). Its members—British Columbia, Alberta, Yukon, and the states of Alaska, Idaho, Montana, Oregon, and Washington—cooperate on issues relating to the environment as well as common economic concerns.

In addition, shared concerns about a variety of global issues are leading states to play a greater role on the international stage more generally, transcending regional groupings. For example, in July 2006, the state of California entered into a historic agreement with the United Kingdom to collaborate on climate change and promote energy diversity. Frustrated by federal foot-dragging, California Governor Arnold Schwarzenegger announced that, "California will not wait for our federal government to take strong action on global warming." While careful not to call the agreement with the United Kingdom a treaty (since only the federal government can bind the United States in that particular way), Governor Schwarzenegger opined that "California has a responsibility and a profound role to play to protect not only our environment, but to be a world leader on this issue as well."[5]

In addition to this direct engagement, state and local governments have often engaged in more symbolic actions directed at influencing foreign affairs at home and abroad. For example, spurred by grassroots activists exercising influence on the local level, in the 1960s city governments began to directly and formally challenge U.S. foreign policy in Vietnam. From 1966 to 1968, seven U.S. cities—San Francisco, California; Beverly Hills, California; Dearborn, Michigan; Cambridge, Massachusetts; Lincoln, Massachusetts; Madison, Wisconsin; and Mill Valley, California—held local referenda condemning the Vietnam War.

Though clearly symbolic, these municipal forays into foreign affairs were not without controversy. The Cambridge resolution, on the ballot in the 1967 municipal elections, asked residents to vote on whether they favored a "prompt return home" of U.S. troops. Before election day, however, the city solicitor refused to let the referendum proceed, arguing that it was "not a fit matter for city business." The Cambridge Neighborhood Committee on Vietnam sued to keep the referendum on the ballot and the Middlesex Superior Court ruled that it could proceed, in part because the City Council had already passed three prowar resolutions, setting a precedent for city activity on the issue.[6]

Like most of the other municipal referenda on Vietnam during this period, the antiwar forces lost the vote in Cambridge, with only 39 percent of the voters favoring withdrawal. However, this multicity referendum campaign did serve as an early endorsement of such municipal engagement in foreign affairs. Indeed, in the Dearborn, Michigan, referendum, nearly 78 percent of

the people voting in the midterm election weighed in on the Vietnam issue, suggesting broad acceptance of the idea of submitting these issues for local consideration.[7]

By the 1970s, the attention of many activists had turned to South Africa and the scourge of apartheid. Not satisfied with the more symbolic actions of the Vietnam era, these activists sought to implement human rights standards opposing apartheid in corporations, municipalities, and states. Initially, concerned individuals focused on curtailing private investment in South Africa, mounting an apartheid divestment campaign. Many believe that the movement began in 1970 when Caroline Hunter and her husband, Ken Williams, started the Polaroid Revolutionary Workers Movement, a ragtag band of Polaroid employees who risked their jobs by protesting when they found that the Polaroid company's equipment was used to create the passbooks and identification cards necessary to apartheid's enforcement. The Polaroid group was, according to Willard Johnson, a political science professor at the Massachusetts Institute of Technology, the "first case in which someone actually challenged their own employer and organized workers around the divestment issue."[8]

By 1978, the divestment movement—framed as an issue of international human rights—had spread to other U.S.-based companies and $40 million had been withdrawn from the South African economy. Students took up the call as well, and private universities across the country slowly began to divest. By the early 1980s, local governments had joined in. Continuing to operate on the level of rhetoric and symbolism, many state and local resolutions condemned apartheid and urged the federal government to take decisive action against it, including trade sanctions.

But other state and local proposals went even farther, seeking to adopt and implement international human rights standards as a matter of local law and policy. For instance, building on the foreign trade expertise and infrastructure that states and localities had established over the past decades, twenty-three states, fourteen counties, and eighty cities in the United States enacted either divestment or procurement legislation to limit their own investment and procurement from companies doing business with South Africa's apartheid regime. Under these laws, local governments were required to divest public holdings of stocks in firms that did business with South Africa, or to restrict procurement opportunities when the bidder for a government contract did business with South Africa. When the apartheid regime finally toppled in 1991, most viewed the cumulative effect of such local laws and their impact on United States federal policies and on South Africa itself as a significant factor, though at least one report—by the South African de Klerk Foundation—argued that the economic burdens caused by sanctions actually slowed the pace of progressive reform.[9]

Within the United States, however, activists cheered the South African divestment and procurement laws as a successful intervention by both grassroots groups and local policymakers to influence national priorities and to advance human rights in the international arena. The campaign's apparent success was not lost on others who were looking to use the United States's huge commercial and financial interests to leverage an expansion of human

rights in other parts of the world. At the same time, many activists knew that there was another shoe waiting to drop.

Though states and localities had historically, and frequently, engaged in activities that might be characterized as foreign affairs, there was little clarity about how far they might go. The anti-apartheid movement brought this issue into clear focus. From the beginning of cities' and states' involvement with the anti-apartheid campaign, scholars had been writing about the constitutional limitations on this expression of "municipal foreign affairs." Views were divided. In the Virginia Law Review and the op ed pages of the Wall Street Journal, then–law student Peter Spiro called for immediate judicial and legislative action to curb municipal human rights activism. Cautioned Spiro, "[a]llowed to act untrammeled for the time being, cities and states may grow accustomed to their new-found role and resort to it more frequently on a broader range of issues."[10] Georgetown Professor John M. Kline responded in a letter to the editor that "Mr. Spiro's narrow and legalistic discussion misses the fact that, since the mid-1970s, international forces have penetrated the domestic U.S. economy so deeply that they overlap traditional and legitimate state economic power." Kline concluded, "these activities give states a direct stake in foreign-policy matters and a potential influence on them."[11]

Clearly, as Spiro argued, there was a case to be made that the local antiprocurement laws were unconstitutional based on the federal government's supremacy in controlling the nation's foreign affairs. Yet only a single legal challenge was brought against an anti-apartheid divestment ordinance. The case, filed against Baltimore, Maryland's ordinance by the trustees of the city's pension funds and two employee beneficiaries, was unsuccessful. Maryland's Court of Appeals, its highest court, ultimately upheld the ordinances in September 1989, concluding that the divestment requirements did not violate the city's fiduciary duty to invest the pension funds prudently.[12]

With only one case generated against the anti-apartheid policies sweeping the country, the real-world impact of the heated scholarly debate was virtually nonexistent. There was little to no interest by the Reagan administration in interfering with "states rights" on this issue. Attorney General Edwin Meese even issued an opinion concluding that state and local South African laws were constitutional exercises of states' rights to spend and invest their own funds as "guardian and trustee of [their] people."[13] So, as Professor David Caron writes,

> [a]lthough the literature tended to be quite confident of the law (one way or the other), [the absence of litigation] . . . made the extensive analysis seem oddly irrelevant. No cases . . . were brought, although industry and the federal government were most certainly aware of the arguments to be made. Everyone conceded that Congress could explicitly preempt local action, but that did not occur either . . . Given this separation of law from practice, the literature seemingly had nowhere to go. For the most part, it was set off in a circle referencing itself and piling on to one side or the other.[14]

Instead of becoming embroiled in these tail-chasing theoretical debates, activists and other engaged citizens were eager to build on the success of the anti-apartheid movement. Likewise, local governments were apparently

willing to see what how far they could go in responding to international human rights initiatives. New human rights campaigns moved in to fill the void when apartheid ended. One of the most prominent and successful of these campaigns was the effort to influence events in Burma, also known as Myanmar.

ACTIVISTS LOOKING OUTWARD: THE BURMA LAW

In 1994, Simon Billenness of Boston, Massachusetts, a coordinator for the New England Burma Roundtable and analyst with the socially responsible investment firm Trillium Asset Management, approached State Representative Byron Rushing of Boston about the situation in Burma. In a pro-democracy uprising in 1988, the Burmese government had slaughtered 3,000 civilians. Since then, human rights organizations like the Roundtable and other allied Free Burma organizations and activists continued to document human rights violations, including restrictions on speech and the extended house arrest of Nobel Laureate and political leader Aung San Suu Kyi. Rushing, who represents several diverse Boston neighborhoods, had been a key supporter of the Massachusetts laws sanctioning South Africa for apartheid. Would he, Billenness asked, be willing to adapt the South African anti-apartheid law to Burma?

Rushing agreed and the two "dusted off the state's earlier South African selective purchasing law and replaced every South Africa mention with 'Burma.'"[15] The new bill generally barred state entities from buying goods or services from any business organization identified on a "restricted purchase list" of those doing business with Burma. It was introduced in spring 1994. During the next two years before the Massachusetts legislation was signed into law, a growing list of progressive municipalities of increasing size and significance enacted selective purchasing laws targeting Burma, including Berkeley, Madison, Santa Monica, Ann Arbor, San Francisco, and Oakland. Massachusetts was the first state to join the list when Governor William Weld, a Republican who wanted to burnish his progressive credentials in a Senate race against incumbent Democrat John Kerry, signed the Burma legislation into state law in June 1996.

The Free Burma movement continued to grow. Los Angeles, Portland (OR), Vermont, and New York City joined the list of states and municipalities with Burma selective purchasing laws. State legislation was also introduced in California, Connecticut, and Texas, though none of these bills became law. In September 1996, even the federal government joined in when Congress passed a statute barring all new investment by U.S. companies in Burma, and authorizing the president to impose further sanctions in the event of continued violence and abuses in the country.[16] In May 1997, President Clinton invoked his authority under the law, issuing an Executive Order that banned new investments in Burma because of the country's repression of human rights and democracy.[17] While it differed in many respects and did not go as far as the Massachusetts law, activists hailed the presidential order as a significant breakthrough. As Byron Rushing told the *Boston Globe*, "Suddenly,

putting pressure on companies to get out of Burma is not a harebrained idea. It is an idea that has been discussed seriously by people doing foreign policy on the federal level. They have agreed with Massachusetts that this makes sense."[18]

Still, without a groundswell of deep popular support nationwide—and the traction that the South African divestment campaign had among civil rights activists in the United States—the Burma laws were vulnerable to political and legal attack. The international business community showed little reluctance to undermine the law. The Japanese government and the European Commission, representing many multinational corporations in their countries doing business with Burma, openly threatened to challenge the Massachusetts law before the World Trade Organization (WTO); the European Union also asked for a WTO consultation on the law, a precursor to filing a complaint. Similarly, whereas domestic business and trade groups had not wanted to risk the appearance of supporting apartheid, they were less concerned about political fallout from opposing the Burma laws. In April 1998, the National Foreign Trade Council, a consortium of more than 500 United States transnational corporations, initiated a test case challenging the constitutionality of the Massachusetts law in federal district court. The district court struck down the law, and that decision was upheld on appeal by the First Circuit Court of Appeals. The Massachusetts attorney general, defending the law, then requested Supreme Court review and the Court agreed to hear the case.

The case, *Crosby v. National Foreign Trade Council*, became a forum for fighting out the constitutional question that had long been simmering just beneath the surface of the myriad campaigns to enact municipal and state human rights laws, i.e., did state and municipal governments impinge on federal authority when they used government procurement restrictions to put economic muscle behind their views of international human rights? Amicus briefs supporting the Massachusetts Burma law were filed by dozens of organizations, as well as seventy-eight members of Congress and twenty-two state attorneys general. They argued that the states and municipalities could properly enter the arena of foreign affairs so long as they did not directly contradict official U.S. foreign policy. In this instance, they pointed out, the Massachusetts law was entirely consistent with the anti-Burma thrust of the federal Executive Order. Further, in a classic states' rights argument, Massachusetts argued that it had a right to apply the moral standards of its own state citizens to the state's spending decisions.

Appearing before a conservative Supreme Court that often found favor with states' independence from federal constraints, defenders of the Massachusetts law expected to find some support among the justices. Instead, the Court unanimously ruled to strike down the state law. Interestingly, it was the Free Burma movement's own success that sealed the Massachusetts law's demise. Noting President Clinton's 1997 Executive Order, the Supreme Court ruled that the federal government had preempted the state's sanctions law. Justice David Souter, himself a former state attorney general for New Hampshire, wrote for the Court that, "The state act is at odds with the president's intended authority to speak for the United States among the world's

nations in developing a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma."[19] Even though both the Massachusetts law and the federal law took similar steps to impose economic pressure and condemn the Burma government's human rights abuses, once the federal government had articulated the national position on the matter, Massachusetts could go no further.

Simon Billenness and the other activists who had crafted the Massachusetts Burma law, along with Representative Rushing, put a brave face on the loss. Even before the decision came down, Billenness anticipated the outcome and told the press, "We will come out with a new generation of selective purchasing bills which conform to the court's ruling, while making sure they have as much teeth as possible and put as much pressure as possible on those who want to do business in Burma."[20] State Representative Rushing was similarly combative, saying that he was "now ready to push the House and Senate to pass a bill that would ban the investment of state pension funds in firms that do business with Burma."[21] Such funds were solely within the purview of the state and arguably beyond the reach of the federal authority.

Indeed, after the Supreme Court's decision, Minneapolis passed a new measure focused solely on municipal investments in companies doing business with Burma. Byron Rushing also introduced a new Burma bill in Massachusetts that focused restrictions on the Commonwealth's investments instead of its procurement. But even the most progressive communities were now newly concerned with the legal risks involved with their foreign affairs activism.

Even before the Supreme Court issued its opinion, the lower court decisions had an immediate effect on the similar measures being considered by state and local governments. As early as 1997, activists in both Amherst, Massachusetts, and the state of Maryland backed away from proposed selective purchasing laws aimed at Nigeria, concerned that such measures would leave them open to a lawsuit.[22] After the decision, new municipal and state legislation slowed to a trickle, and then virtually ceased. Representative Rushing wryly observed that "[i]f selective purchasing had been banned 10 years ago, Nelson Mandela might still be in prison today."[23] In *Crosby*, Justice Souter acknowledged the issue, but sidestepped it, writing that "[s]ince we never ruled on whether state and local sanctions against South Africa in the 1980s were preempted or otherwise invalid, arguable parallels between the two sets of federal and state Acts do not tell us much."[24]

Nevertheless, the Burma selective purchasing laws undoubtedly had a major impact on national policies. Dozens of companies withdrew from Burma, several citing state and local Burma laws as the reason. And significantly, in a dramatic example of the potential for policies to trickle up from states and municipalities to the federal level, in 2003, Congress enacted the Burmese Freedom and Democracy Act that banned all U.S. imports from Burma.

HUMAN RIGHTS ACTIVISM CLOSE TO HOME: SAN FRANCISCO CEDAW AND ITS PROGENY

While activists intent on using United States economic power to improve human rights in faraway places struggled to go beyond symbolism and find a

new wedge in the face of constitutional limitations and economic opposition, another group of human rights activists in San Francisco was simultaneously looking for ways to "bring human rights home." Their goal was to use international human rights standards to reduce the gender-based discrimination that they saw in their own communities.

In September 1995, Krishanti Dharmaraj and Wenny Kusuma of San Francisco joined more than 20,000 other country representatives and activists from around the world at the Fourth United Nations World Conference on Women: Action for Equality, Development, and Peace, convened in Beijing, China. Attending the unofficial forum for nongovernmental organizations, Dharmaraj and Kusuma began to consider how they could "bring Beijing home," using their experiences at the conference to begin changing policies in the United States.

Within a year after their return to the United States, they founded a new organization, Women's Institute for Leadership Development for Human Rights—known as WILD for Human Rights. Then, working with the local Amnesty International staff and the San Francisco Women's Foundation, they hit upon a strategy: They would launch a campaign to enact the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in their hometown, San Francisco. Sixteen states and dozens of cities and counties had passed resolutions calling on the United States to ratify CEDAW—largely symbolic actions. But no state or local government had actually adopted CEDAW as its own law.

There were good reasons why prior local and state government actions had taken the form of resolutions. Treaty ratification is an activity reserved to the federal government, not available to the states. State and local resolutions typically urged federal action consistent with these constitutional parameters. In contrast, adopting CEDAW as municipal law would move toward implementation of the treaty. Such local implementation might be necessary if an international treaty had been previously ratified by the federal government; some areas of government activity such as welfare and family are left to the states, and treaty obligations touching on those areas must be implemented by the states in order to be effective. But when a treaty is unratified, there is no such obligation to implement. In that instance, state and local activity to implement the treaty begins to look more like a renegade action to circumvent federal prerogatives and to set foreign policy in the face of federal opposition.

Of course, unratified treaties may be the ones most in need of domestic implementation. It was no accident that WILD's focus turned to CEDAW, one of the international human rights treaties that the United States has not ratified despite the convention's acceptance by 170 other nations of all stripes. The opportunity to fill that gap and send a strong message to Washington, D.C., was one of the things that attracted both the activists and members of San Francisco's city government.[25] Indeed, at the time he signed the ordinance, San Francisco Mayor Willie Brown Jr. commented "the United States is the only industrialized country in the world that has yet to ratify CEDAW . . . We want to set an example for the rest of the nation because it is long overdue."[26] But while the activists were well aware of the federal government's

posture, they were also directly responding to developments in their own state and local community. As Dharmaraj recalls, "At the time of WILD's founding, there were many bad propositions in California, including the erosion of minimum standards for welfare. In contrast, human rights principles had minimum standards for what people were entitled to, what they must have."[27]

WILD began its work on a local CEDAW in late 1996, starting with an intensive coalition-building effort. Few local activists were familiar with international human rights principles, and even fewer people in city government had considered a human rights agenda. For more than a year leading up to the local CEDAW's passage, WILD and its coalition partners focused on training and information sessions. "We trained economic justice groups, violence against women groups, reproductive rights groups, disability groups, and not just the grassroots, but people working on every level of the community," recalls Dharmaraj. "We had to show why they needed to use a human rights framework to address gender discrimination. It was slow, because people were just 'not there' in their thinking about this kind of proactive legislation."[28]

After enlisting the San Francisco Commission on the Status of Women, a municipal agency, as part of their coalition, the CEDAW activists were ready to begin contacting the Board of Supervisors, the city officials who would ultimately vote on the proposal. As Sonia Melara, former head of the Women's Commission recalls, "We did not go first to the most liberal Supervisor. Instead, we went to the most conservative, Barbara Kaufman, who was also the President of the Board of Supervisors. She felt strongly that for the legislation to be viable, the primary issue to address was economic."[29] The coalition responded to that suggestion, focusing on economic issues along with violence and health when they staged a large public hearing on the CEDAW proposal. Similarly, the CEDAW ordinance itself, drafted by the Commission on the Status of Women, the office of Supervisor Kaufman and the San Francisco City Attorney, focused on nuts and bolts economic issues facing women.

In April 1998, the nearly two years of groundwork paid off. The Board of Supervisors passed the CEDAW ordinance in a unanimous vote and it was signed into law by Mayor Brown. Tracing CEDAW's language exactly, the enacted legislation broadly defines discrimination against women and girls as any

> distinction, exclusion or restriction made on the basis of sex that has the effect or purpose or impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[30]

By incorporating distinctions with a discriminatory effect, this definition goes further than the definitions of equality recognized under the U.S. Constitution or most state constitutions.

In other respects, however, the San Francisco CEDAW ordinance is tailored to municipal goals in ways that reflect the spirit, but not the precise text,

of CEDAW. For example, under the ordinance, selected city departments are required to undergo an extensive gender analysis to identify areas of gender discrimination in their internal practices and service delivery. Further, all city departments must participate in periodic human rights trainings. Notably, the new ordinance did not give individuals the right to sue the city for CEDAW violations, but rather it put the onus on city government to affirmatively assess its compliance with human rights standards and to proactively address problems.

Further, in 2000, the ordinance was amended to incorporate principles of the International Convention for Elimination of All Forms of Race Discrimination (CERD); unlike CEDAW, CERD has been ratified by the United States. As discussed above, as a ratified treaty, subnational governments have an obligation to implement CERD.

Implementation of San Francisco's CEDAW has at times been rocky, and the results have not always been dramatic. With an initial budget of only $100,000, the task force set up to implement the CEDAW ordinance could not possibly hope to evaluate the entire city's practices. Instead, the task force focused in on a handful of city agencies, with the intention of gradually phasing in gender analyses at all of the agencies over time. After the task force was legislatively dissolved in 2002, ongoing monitoring is now handled by a committee of the Women's Commission with a budget allocation from the city to support staffing.

To date, six city agencies have completed a gender analysis. Despite San Francisco's progressive reputation, it has often been slow going. Just because the Board of Supervisors approved the legislation did not mean that the San Francisco CEDAW had the unequivocal support of city agencies. Ann Lehman, the analyst at the Women's Commission who staffed the implementation effort reports that the initial reaction from city departments was "you've got to be kidding." As she recalls, there was even some hostility, particularly from the city's Department of Public Works, and many of the agencies "saw it as just one more group looking over their shoulders and telling them what to do."[31]

However, once the agencies began conducting gender analyses—that is, breaking down the sex, parental status, age, and so on of the people they served, and then analyzing their internal and external practices in light of that information—there were some gradual changes in perspective. Lehman notes, for example, that the Art Commission was initially resistant to the idea that there were gender issues in the administration of its program. "Though primarily male artists were funded for large public art projects," Lehman says, "the Commission said it was due to societal imbalances rather than their own practices."[32] The CEDAW gender analysis process provided the Commission with the means to conduct strategic planning in a way that they never had before, with a gender perspective. Once they went through the process, says Lehman, "they found that the street artist program, which was a lottery to get spots to sell wares, was set up in a way that made it difficult for people with children to get in. So they changed the program."[33]

In fact, many of the changes generated by the CEDAW ordinance are so small and limited that, according to one report, "few residents are even aware that the city adopted the treaty."[34] For the individuals relying on specific city

services, however, the changes could make a significant difference. For example, the Juvenile Probation department was initially very resistant to the gender analysis approach. Says Lehman, "they already had a Task Force on Girls in the Juvenile Justice System, and they didn't see the need for more attention. But their own process of beginning to look at gender issues was pushed along by CEDAW."[35] Using the gender analysis, the task force found that the Juvenile Probation Department was not providing services that young women needed, such as sexual assault counseling and pregnancy prevention services. According to Patricia Chang, president and CEO of the San Francisco Women's Foundation, "girls' needs were considered something extra." San Francisco's CEDAW shifted their orientation. "By changing the agency's standard from boys to both boys and girls," says Chang, "we were able to move to more of a true notion of equity in city services."[36] And the process happened more quickly, adds Lehman, because of the city's CEDAW ordinance.

Similar issues were identified by other agencies. The Department of Public Works found that women often felt unsafe in the city at night because city lights were spaced too far apart. The department changed the spacing between lights in certain areas of the city. The city's rent-control board now gathers data on women minorities who use affordable housing, rather than misleadingly categorizing its constituents as either women or minorities. Further, the board found that many of the landlords it served were elderly women, leading it to reassess some of its own practices.

In the area of economics that was so important to the ordinance's initial passage, the law has provided a framework for evaluating the city's hiring practices, among other things. Sonia Melara reports that during the gender analysis phase, "family issues kept coming up in every department."[37] In each instance, agencies found that workers faced hard choices between providing child care or caring for an elderly relative, and obligations to their job. Sometimes, the task force found, city policies unnecessarily exacerbated these problems. For example, some employees at the Department of Public Works punch in at 6 A.M., but day care rarely starts before 8 A.M., putting these jobs beyond the reach of most single parents. It is no surprise, then, that data collected from the Department also showed that 98 percent of the skilled craftsmen were men; aside from societal pressures that keep women from these jobs, the department's own policies discouraged their participation. In response to this finding, according to the department's personnel manager Jim Horan, the agency has been open to more flexible schedules for employees with children and has increased job-training courses intended to support women's entry into nontraditional positions.[38]

San Francisco's innovative approach to incorporating human rights laws into domestic legislation has spawned similar efforts in other U.S. states and cities. Most of these remain "works in progress." For example, on December 19, 2003, the Los Angeles City Council unanimously passed an ordinance to provide for local implementation of CEDAW. The ordinance designated the Los Angeles Commission on the Status of Women as the implementing agency. After a slow start, the Commission staff is now going forward to develop agency-level gender analyses inspired by San Francisco's approach.

In 2004, a state-level CEDAW modeled on the San Francisco law was also passed by the California Assembly, but was vetoed by Governor Schwarzenegger.[39] In his veto statement, the governor cited a range of antidiscrimination laws already on the books, and asserted that a state CEDAW "is duplicative of existing policy and unnecessary,"[40] despite the clear evidence that San Francisco's law led to new changes in city policies that existing laws had not achieved.

A few municipalities, such as Chicago, have enacted CEDAW ordinances but have made little headway toward actual implementation. Several others, including Santa Clara, California, Eugene, Oregon, and New York City are still in the throes of the legislative and organizing process.

As home to the United Nations and as America's most cosmopolitan city, New York would seem to be a natural place for local implementation of international human rights standards. Yet activists in New York have faced more bumps in the road than their counterparts in San Francisco. The New York City effort—called the Human Rights in Government Operations Audit Law (Human Rights GOAL)—began in 2002, when representatives of New York–based advocacy groups including the Urban Justice Center, Amnesty International, and the American Civil Liberties Union met in the offices of the NOW Legal Defense and Education Fund to discuss the possibility of "bringing human rights home" to New York. Unlike the West Coast campaign, the proposed New York City ordinance from its outset addressed local implementation of both CERD and CEDAW. In other respects, however, the New York campaign drew directly on the San Francisco model. One of the group's first initiatives was to invite Krishanti Dharmaraj to speak to the New York City coalition. Following her advice, the New York activists then engaged in the same kind of extensive public education initiative that preceded the successful adoption of the ordinance in San Francisco, ultimately lining up more than ninety coalition members in the community to endorse the proposed ordinance.

Like the San Francisco initiative, the New York City proposal draws on international human rights law for inspiration and basic standards, while tailoring the provisions to local implementation needs. For example, the Human Rights GOAL, as introduced before the New York City Council in 2005, called for creation of a Human Rights Advisory Committee comprised of both public and private citizens. Interestingly, advocates report that this was the first time that a city council bill had mandated such a public/private partnership, with community members included alongside public administrators in the oversight of city agencies' compliance. The proposed ordinance further mandated that city agencies take a proactive approach to monitoring inequities and preventing discrimination by, among other things, conducting compliance audits similar to those utilized in San Francisco. The bill did not create any new cause of action to enforce its provisions, but instead provided various avenues for public pressure and transparency to ensure agency accountability.

At the end of the city council's 2005 legislative session, the proposal had thirty-five cosponsors in the fifty-one-member council. Proponents of Human Rights GOAL, such as former New York City Mayor David Dinkins,

argued that the law could prevent discrimination and save tax dollars by "identifying potentially harmful policies in advance."[41] The city's existing Human Rights Law is reactive, said Dinkins providing redress for discrimination only after a lawsuit is filed and the damage is done.[42] Further, advocates pointed out, the proactive approach might be the only way to address the cumulative effects of unintentional biases in city decision making—effects that are often beyond the reach of litigation, but that have a significant effect on the participation of women and minorities in the life of the city.

Yet New York City Mayor Bloomberg has suggested that he will veto the bill should it ever be approved by the city council. His objections, delivered during a city council hearing, are apparently not based on concern about New York City's potential encroachment on federal foreign affairs. Instead, like his West Coast counterpart Governor Schwarzenegger, Bloomberg objects to the breadth of the proposal's mandates and its overlap with existing civil rights enforcement mechanisms. In general, the mayor's office called for a more "realistic approach to governing," ignoring the real-world lessons from San Francisco.[43]

In the face of this standoff, local organizing to promote the Human Rights GOAL continues as activists try to solidify and expand support among city council members. After failing to gain approval during its initial consideration, the bill was reintroduced before the city council in 2007. Using an approach particularly suited to New York City, advocates have made efforts to enlist support from the many international human rights leaders who pass through the city. For example, when the city council held a hearing on the proposed law, Mary Robinson, former UN High Commissioner for Human Rights, submitted a written statement supporting the bill. An announcement on a United Nations Web site also urged international visitors to attend in person and, in doing so, connected the dots between this local effort and human rights initiatives around the world:

> The hearing will provide an exciting opportunity to witness democracy in action, learn why good governance is contingent upon core human rights and anti-discrimination principles, and hear some of our city's most eloquent scholars, politicians and social justice advocates make the case for why human rights are as important, relevant and necessary in New York City as they are in Baghdad, Kabul and Beijing.[44]

THE OPPOSITION FROM WITHIN: CALIFORNIA'S SHORT-LIVED CERD

Opposition to local human rights implementation can arise from substantive disagreements as well as disputes over turf and political viability. The short-lived California CERD is a case in point.

On August 9, 2003, California Governor Gray Davis signed Assembly Bill 703, "An act to add Section 8315 to the Government Code, relating to racial discrimination." This modest provision, which had passed through the legislature with little attention or debate, effectively overturned Proposition 209, the controversial provision adopted through a 1996 state referendum that

barred state-sponsored affirmative action programs. AB 703 provided that for purposes of construing California law, the relevant definition of the term "racial discrimination" is the definition set out in CERD. Proposition 209 did not include a specific definition of discrimination, but its clear intent was to outlaw affirmative action. In contrast, the CERD definition specifically permits the use of "special measures securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection," and indicates that these affirmative measures shall not be considered racial discrimination.

AB 703 was itself part of the backlash to Proposition 209. Among the state institutions most affected by Proposition 209 are California schools, particularly the state's flagship university system. Dr. J. Owens Smith, a member of the faculty at California State University and head of the Black Faculty Association of the California University system, did the background research and drafting for AB 703. He was keenly aware that there was a David and Goliath quality to his effort. On the one hand, he notes, opponents of affirmative action had "an obscene amount of money to fight civil rights." On the other side—on his side—he felt, was "nothing."[45] So he turned to international human rights law.

State Assemblyman Mervyn Dymally, a progressive African American representing the city of Compton, introduced the bill in the California legislature.[46] According to Smith, it was Dymally's legislative skills that got the bill through the process with little to no opposition. One critical factor was clearly the element of surprise. State legislators simply didn't expect to see references to CERD appearing in state legislation and didn't take the time to educate themselves about its significance. Says Smith, "International law is complicated and not a lot of people understood it, so they just said 'we are not going to vote either way.' "[47] With no organized opposition, and with strong support from the NAACP and the Mexican American Legal Defense Fund as well as some state agencies and unions, the bill passed handily.

Once it was on the books, however, AB 703 started to get attention. Upon the bill's passage, Dymally's office notified the heads of state agencies and state universities that affirmative action was now permissible. Eager to defend their long-standing affirmative action programs and maintain diversity in their agencies, progressive city governments soon started using the new provision in court. Notably, the initial reliance on AB 703 came in a suit filed by the conservative Pacific Legal Foundation attacking the Berkeley, California, school district's racial diversity policy. Berkeley defended its program by citing AB 703. In dismissing the Pacific Legal Foundation's charges and upholding the school district's affirmative action policy, the Alameda County Superior Court cited AB 703's definition of racial discrimination.[48]

The forces that had backed Proposition 209 so effectively did not stay in the background for long. Ward Connerly, the wealthy developer and activist who had spearheaded the Proposition 209 campaign, began by filing a lawsuit challenging AB 703's constitutionality. He pointed out that the new law attempted to use a statute to override the constitutional changes made by Proposition 209; the judge ruled that Connerly did not have standing to

bring the suit.[49] Another lawsuit, however, was ripe for resolving the question of AB 703's constitutionality.

Beginning in 1988, years before the campaign that ended affirmative action in California, the Sacramento Metropolitan Utility District (SMUD) declared that it intended to provide national leadership in affirmative action programs.[50] Responding to intervening U.S. Supreme Court opinions narrowing the permissible scope of such programs, in 1993 SMUD conducted disparity studies to justify its continued use of race-based goals to be utilized by minority businesses. After Proposition 209's passage in 1996, SMUD conducted another study and revised its affirmative action program, but it did not abandon affirmative action altogether.

The Pacific Legal Foundation represented C&C Construction, a company which did not meet the definition of a minority-owned business and therefore did not benefit from SMUD's affirmative action program. C&C sued to challenge SMUD's continued use of affirmative action criteria in awarding contracts.

In considering the case, the court began by examining the threshold question: Does SMUD's minority preference program constitute racial discrimination? Under Proposition 209, any racial classification is discriminatory, even if the classification is made with the intention of ameliorating the effects of discrimination. But under AB 703, an affirmative action measure such as SMUD's program would be covered by the CERD definition that permits affirmative measures.

The court, however, never reached the merits of this issue. Instead, in an opinion issued just thirteen months after AB 703 was enacted, the court concluded that the legislature had overstepped its bounds by enacting legislation to define a term—"discrimination"—in the California Constitution. Instead, the court determined, the California Supreme Court "is the final authority on interpretation of the state Constitution"—not the legislature.[51] According to the court, "Assembly Bill No. 703 amounted to an attempt by the Legislature and the Governor to amend the California Constitution without complying with the procedures for amendment. This attempt was manifestly beyond their constitutional authority."[52] The Sacramento authorities sought review by the California Supreme Court, but the court turned down their appeal.

California's routine use of propositions to amend its state constitution is not the norm in other states. Substantively similar legislation in another state jurisdiction might have been able to overcome the legal hurdles that scuttled AB 703. But legal hurdles are not always separable from political hurdles. The anti–affirmative action forces have amassed considerable financial and political support. Reliance on international law alone will not be enough to change that dynamic, as the California CERD experience teaches.

Professor Smith, however, still has ambitions to use international law in defending affirmative action in the long run. The problem, he argues, is that that the California court got it wrong because it focused narrowly on the status of the state legislation instead of its international origins. "The state constitution should be subordinate to the human rights treaty," says Smith,

and not the other way around. "The CERD definition, the Supreme Law of the Land, should have trumped the state law."[53]

DO STATES AND MUNICIPALITIES HAVE A ROLE TO PLAY IN BRINGING HUMAN RIGHTS HOME?

Despite its singular status as the only major U.S. state or local government that has both adopted and implemented an international human rights treaty, San Francisco is not alone. Around the world, subnational governments are flexing their muscles in the international human rights arena. Canadian provinces regularly submit reports to augment the national reports that Canada presents to United Nations monitoring bodies.[54] Indeed, the United Nations Human Rights Committee expressed regret that the United States's 2006 report on its compliance with the International Covenant on Civil and Political Rights (ICCPR) provided "only limited information . . . on the implementation of the Covenant at the state level."[55]

Representing local governments, a new organization, United Cities and Local Governments (UCLG) was created in 2004 to serve as the "voice of local government before the international community."[56] A successor to the venerable International Union of Local Authorities, founded in 1913, the UCLG's priority areas include developing close links with the United Nations. Toward that end, the UCLG established the United Nations Advisory Committee of Local Authorities (UNACLA), the first formal advisory body of local authorities to be attached to the United Nations.[57] Further, following a meeting between a UCLG delegation and then-United Nations Secretary General Kofi Annan, the secretary general expressed interest in expanding cities' role in the United Nations. It is a direction that the United Nations has already begun to pursue with its sponsorship of a series of World Urban Forums addressing issues facing cities worldwide.

Some countries, particularly those in Europe, are well represented in the UCLG, which boasts membership of over 1,000 cities representing half of the world's population. However, U.S. cities are notably missing. On the list of eleven U.S. cities, the only major population centers are Washington, D.C., Santa Fe, New Mexico, and Indianapolis, Indiana. No other major U.S. cities or states participate in the UCLG; indeed, the U.S. list is rounded out by cities like Northglenn, Colorado (pop. 36,000), a self-proclaimed "city of the future," and towns such as Gulf Breeze, Florida, population 6,129.

U.S. municipalities have been more active in organizations focused on particular substantive issues, such as the International Council for Local Environmental Initiatives (ICLEI), established in 1990 to help local governments "think globally, act locally."[58] Of the organization's 500 members worldwide, 109 are U.S. municipalities, including Chicago, New York City, and Los Angeles. The ICLEI began working on the issue of global climate change in 1991, when it launched urban carbon dioxide reduction initiatives in fourteen cities worldwide, including Dade County, Florida, Denver, Colorado, Minneapolis and St. Paul, Minnesota, and Portland, Oregon. More

recently, in 1999 the ICLEI spearheaded a "Mayors and Local Officials Statement on Global Warming," signed by more than 570 municipal officials in the United States.[59] Led by Mayor Greg Nickels of Seattle, Washington, 132 U.S. mayors have pledged to have their cities meet the standards set out in the Kyoto Protocol on global warming, openly embracing an international agreement rejected by the Bush administration.[60] California's recent agreement to collaborate on international environmental issues with the United Kingdom continues down this path of local leadership in the global environmental movement.

Significantly, the international focus of these state and local initiatives is not necessarily in tension with the accepted notion that foreign affairs power rests with the federal government. Even within the United States, the federal government has recognized a role for states and cities in implementing the United States's international obligations. The starting point is the U.S. Constitution, which provides that ratified treaties such as CERD are not just relevant to the federal government, but constitute the "Supreme Law of the Land" binding on the "Judges in every State."[61] Further, the U.S. government has repeatedly observed that state and local authorities have an independent role in implementation of ratified treaties. According to the statements made by the U.S. Senate in ratifying CERD (1994), the ICCPR (1992), and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1994),

> the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.[62]

In short, the federal government takes responsibility for implementing human rights treaties only so far, and leaves the rest to state and local authorities.

But what, then, are the areas over which state and local governments properly exercise jurisdiction? The United States offered its view in 1994 when it submitted its first report to the UN Human Rights Committee detailing its compliance with the ICCPR. According to the federal government, its authority did not extend to those areas where state and local governments exercised significant responsibilities, including "matters such as education, public health, business organization, work conditions, marriage and divorce, the care of children, and exercise of the ordinary police power."[63] Again, the United States reiterated that it would "remove any federal inhibitions to the abilities of the constituent states to meet their obligations" under the ICCPR.[64] Nevertheless, the United States's most recent reports to the UN Human Rights Committee describing implementation of the ICCPR were virtually silent on the issue of state implementation.[65] However, the United States's 2007 report to the CERD Committee does address state implementation more directly, a development which may signal that the government is

finally heeding the appeals from international bodies for more comprehensive reporting.

Even within the parameters set by the federal government, jealous of its foreign affairs power, there would seem to be ample room for states and localities to adopt policies designed to effectuate their own and the nation's international human rights obligations. In the area of education, state courts and legislators might read the United States's obligations under CERD to, as Professor Smith has suggested, trump state-based limitations on affirmative action—at least to the extent that those restrictions (such as Proposition 209) go farther than is required under the U.S. Constitution. Exercising their authority over public health, state and local actors might also adopt comprehensive sex education programs in recognition of both international public health and education obligations under the Beijing Platform of Action, despite federal grant programs favoring abstinence-only-until-marriage. Implementing their primary responsibility for marriage and divorce, states and municipalities might permit same-sex marriage in order to fulfill United States' obligations to provide basic equality under the ICCPR. Certainly, it would seem that city agencies could conduct gender audits, adjust work schedules, and shift the distances between lampposts—all under the rubric of the state's regulation of work conditions—in the name of international human rights without running afoul of federal principles.

Whether states' positions on politically controversial issues like same-sex marriage and sex education might cause the federal government to reassess the respective legislative responsibilities of federal versus subnational governments is a different matter. When political concerns are paramount, the federal government has not shied away from redrawing the lines between federal and state responsibilities. Meanwhile, there is certainly no federal preemption issue in those areas where the federal government has not acted, or where its actions are intended to simply create incentives rather than set standards—such as the abstinence grants.

THE FUTURE OF STATE AND LOCAL HUMAN RIGHTS IMPLEMENTATION

Local activists are understandably not wholly satisfied by encouraging local governments to shift lamppost placements. "Bringing human rights home" should, many believe, lead to more profound and comprehensive changes in the relationship between the individual and their representative government.

Yet "bringing human rights home" is a process like any other legislative effort that must build over a period of time. Several states have enacted legislation that takes tentative steps in this direction but still stops short of providing the teeth necessary for real changes. For example, the Massachusetts Commission on the Status of Women is statutorily charged with conducting "an ongoing study of all matters pertaining to women," guided by the tenets of the Beijing Platform for Action.[66] But reflecting the exigencies of real-world politics, the Massachusetts Commission has reworked its mission statement to omit any reference to the Beijing Platform.[67] In Pennsylvania, a

human rights–minded legislator succeeded in creating a statewide commission to review state law's compliance with the Universal Declaration on Human Rights.[68] The resulting hearings contributed to public education and organizing around issues facing the poor, but without any additional state funding the ultimate recommendations are all too likely to gather dust at the Pennsylvania Statehouse.[69]

Having already achieved some modest results under CEDAW, however, San Francisco is in a position to go further. Building on their earlier successes, San Francisco activists are now mounting a campaign to secure adoption of the principles of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as municipal law.

The United States ratified the ICCPR in 1992, subject to a number of reservations on issues such as the death penalty, and it has participated in the treaty-monitoring process by filing a series of compliance reports with the UN Human Rights Committee. However, the ICESCR, concluded in 1966, has not been ratified by the United States. Among other things, the ICESCR outlines rights to shelter, food, and education. These economic and social rights are not foreign to the United States. In fact, they were anticipated in President Roosevelt's famous Four Freedoms speech to Congress in 1941. Sandwiched between the first two freedoms of speech and of religion, and the fourth, freedom from fear, was "freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world."[70] Rights to education and welfare appear in the majority of state constitutions, though the U.S. Supreme Court has repeatedly found that such rights are beyond the scope of the federal constitution. Nevertheless, the economic, social, and cultural rights protected by the ICESR are often subject to vague questions about their "American-ness" as well as the capacity of United States judges to enforce these rights since their realization often involves courts in reviewing legislative allocations and priorities.

Undaunted by the apparent difficulty of their task, WILD for Human Rights launched its latest local human rights campaign in 2004 with a series of community-based briefings.[71] Two years later, while the law has not yet been formally introduced, it is being circulated far and wide in draft form. The sticking points between WILD and the San Francisco city attorney principally concern the implementation mechanisms in the law. Stung by the erratic process for CEDAW implementation at the city agency level, WILD's Maria Catoline explains that this time, "we want community-based monitoring and accountability, with a formal implementation body."[72]

One of the implementation processes that WILD proposes is a "Human Rights Impact Screen" (HRIS), modeled on the Environmental Impact Statements required before a government takes action that might have environmental repercussions. Human rights impact statements are not a new idea; the United Nations secretary general proposed the preparation of such statements in 1979 in conjunction with new development projects that might affect human rights. The United Nations Committee on Economic, Social, and Cultural Rights subsequently endorsed the suggestion in its General

Comment 2 on International Technical Assistance Measures.[73] Since then, it has been bandied around in places as far-flung as the United Kingdom, Australia, and Seattle, Washington, as a possible approach to quantifying human rights impacts of governmental policies.

WILD's proposal is, however, not merely a sunshine law designed to reveal human rights impacts to the wider public. Instead, the proposed human rights impact assessment document would be implemented by the city comptroller's office. It would apply to city agencies as well as independent contractors. For the agencies, their budgets would be contingent on meeting certain human rights performance measures. For contractors, their continued financial relationship with the city might be jeopardized by an unfavorable human rights assessment.

The Burma laws used similar mechanisms for screening potential contractors, with criteria focused on external trade practices, i.e., the extent of a corporation's business in Burma. To clearly fall within permissible boundaries of local human rights implementation, San Francisco's screening questionnaire would presumably focus on issues such as domestic partnership benefits, health insurance, and wages—issues of family, welfare, and work—rather than foreign trade. Yet the impact on the companies could well be the same. And like the South Africa and Burma divestment laws, if dozens of states and hundreds of localities imposed similar human rights criteria, it would certainly have an impact on the practices of both private and public institutions nationwide. Perhaps, as the U.S.-focused activists envision, a human rights culture would begin to trickle up to the federal government.

Among activists looking outward, seeking to use the United States' influence to curb human rights abuses abroad, the work also continues. The *Crosby* decision in 2000 was just the first bump in the road. In 2003, the U.S. Supreme Court decided the case of *American Insurance Association v. Garamendi*, striking down a California law that required any insurer doing business in California to disclose information about all policies sold in Europe between 1920 and 1945, setting up a scheme of regulatory sanctions. Several other states had passed similar measures.[74] The goal of these laws was to facilitate identification of misappropriated Holocaust-era assets. However, by applying sanctions to companies that failed to comply, California and the other states acting in this arena went further than the voluntary measures adopted by the federal government.

Writing for the Supreme Court, but this time with only a bare majority of justices in agreement, Justice Souter's opinion echoed his conclusions in the *Crosby* case. "There is, of course, no question," he wrote, "that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy."[75] Resolving Holocaust-era insurance claims is within the executive's foreign affairs responsibility, Souter opined, and the federal government's actions in this area preempt any state authority.

If even state disclosure laws like California's Holocaust assets law interfere with foreign affairs, what's left, activists asked? In the wake of the Supreme Court's decision in *Crosby*, Georgetown Law School Professor Robert

Stumberg had outlined five areas in which he believed state and municipal governments could still act. Now only four remain:

1. municipal and state pension funds could divest stocks of companies that violate human rights;
2. local pension funds could use their stock to engage in shareholder advocacy;
3. cities and states could engage in political speech, passing resolutions that urge Congress or the Administration to take action; or
4. local governments could continue to explore restrictions on their own procurement.[76]

But while the number of viable state and local approaches appears to be dwindling, the next wave of campus activists focused on deterring and redressing human rights abuses is fully engaged and forging ahead. Divestment remains a powerful human rights tool, and a growing student movement is urging campus divestment from Sudan, which has engaged in a series of massive genocidal campaigns and human rights abuses in the sub-Saharan region of Africa. In March 2006, the University of California Regents voted to divest not only primary holdings but also indirect holdings in companies doing business with Sudan.[77] Other campuses, both public and private, are following suit.

Shareholder advocacy and municipal resolutions continue to be popular and viable ways of organizing and speaking out on these issues, though the results of those approaches are harder to quantify. For example, for many years the New York City comptroller has sponsored resolutions calling for shareholder votes on human rights issues.[78] Vermont's Burma law explicitly encourages the Vermont state treasurer to support shareholder resolutions at companies that focus on trade with Burma.[79]

More than a dozen states have gone even farther and enacted laws to limit their state pension funds' investment in Sudan, with additional states considering similar measures.[80] And just as state's human rights procurement policies were challenged in the past, the actions to limit pension fund investment are being challenged in court as exceeding state authority, with some initial success.[81]

Meanwhile, with their proposals for municipal adoption of international treaties and implementation of Human Rights Impact Screens as a part of city contracting, San Francisco activists are aggressively pushing the boundaries that the Supreme Court has erected between the foreign and the domestic. There may be many questions. Does the United States's failure to ratify the ICESCR constitute a preemptive action, or does it leave economic, social, and cultural rights open for subnational engagement? Does the United States's ratification of the ICCPR, but without specific federal implementation, preempt local implementation as well? Is domestic implementation of international treaties an aspect of foreign affairs that is properly under the federal government's control, or is it—as the United States has previously stated—a domestic activity open to subnational governments' leadership?

If businesses begin to feel the sting of having to comply with human rights standards in their domestic business practices, history suggests that some

group or other will come forward to challenge the approach, arguing that the state or municipality has overstepped its bounds. While the outcome of such a challenge is not entirely clear, past statements from the federal government and the courts continue to suggest that there is an important leadership role that states and municipalities should play, by virtue of the federal system itself, in certain substantive areas such as family, economic and health issues addressed in international human rights treaties. Some also argue that state and municipal procurement restrictions that rest on moral grounds are protected First Amendment speech. While Justice Souter is undoubtedly correct that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy," that point is a moving target in an era in which states and cities have starring roles on the international stage.

It is risky to predict the ultimate outcome of San Francisco's next stage of human rights implementation, but it seems clear when one traces the story from the American Revolutionary War to the Franco-British War, to the Vietnam War, to the South Africa divestment campaign, to the Free Burma movement, to San Francisco, that grassroots activists as well as states and municipalities will not back down when they feel that the federal government's approach fails to adequately implement human rights principles. Rather, activists as well as state and municipal actors will continue to look for the cracks and fissures in the edifice of federalism that will allow a human rights culture to grow in small places close to home.

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CHAPTER 7

The Impact of September 11 and the Struggle against Terrorism on the U.S. Domestic Human Rights Movement

Wendy Patten

The terrorist attacks of September 11, 2001 and the government policies implemented in their aftermath had an important impact on the way in which U.S.-based social justice groups used international human rights in their advocacy in the United States. As the Bush administration put in place new measures to fight terrorism, basic rights to liberty, due process, nondiscrimination, and humane treatment were put under a new kind of pressure. The public debate took shape as one of a tradeoff between rights and security in a post-9/11 world, with the administration justifying its actions as necessary to prevent future terrorist attacks and protect American lives.

The Bush administration's war on terror created an urgent need for new strategies to defend the rights of people in the United States. Many U.S. social justice groups—civil rights, civil liberties, immigrant rights, and other legal advocacy organizations—found that traditional forms of advocacy, such as appeals to U.S. courts and the Congress, were not sufficient in the new post-9/11 climate. As social justice groups looked for ways to protect and promote rights placed at risk in the name of fighting terrorism, they increasingly began to use international human rights strategies in their domestic advocacy in the United States. Thus they expanded the framework of rights advocacy to include international human rights alongside civil and constitutional rights.

This chapter explores why and how U.S.-based social justice groups used international human rights to address certain key U.S. policies that violated basic rights in the fight against terrorism. It argues that these policies shifted the nascent U.S. domestic human rights movement away from its focus on economic and social rights and toward civil and political rights. Whether this

shift is a temporary exigency in response to the Bush administration's counterterrorism policies, or whether it will work a lasting change on the direction of the movement, is difficult to predict. What is clear, however, is that the advocacy movement's response to post-9/11 counterterrorism policies has helped to bridge the gap between international human rights and civil or constitutional rights as a way of framing and defending rights in the United States.

This chapter also suggests that the post-9/11 counterterrorism policies have had a catalyzing effect on the process of bringing human rights home to the United States, even as it sometimes complicated the process as well. International human rights law became a key bulwark against the erosion of fundamental rights, such as the prohibition on torture and detention without charge, which were put into play by the Bush administration's conduct and its new legal theories. In this climate, many U.S. social justice groups became more open to using international human rights language, standards, and mechanisms as a component of their advocacy work in the United States. Still, efforts to mount a broad-based movement to counter these policies were not without their challenges. Even as the counterterrorism policies brought an unprecedented level of attention to the human rights practices of the U.S. government, they sometimes reinforced the domestic-international divide among U.S. social justice groups. Many of the Bush administration's counterterrorism policies targeted noncitizens held outside the United States, whether at Guantánamo,[1] in secret detention sites abroad, or in Afghanistan and Iraq. With some notable exceptions, international human rights groups generally took the lead on these issues, which in turn reinforced the long-held view that human rights were principally about people in other countries, while civil rights dealt with the rights of people in the United States. Despite this challenge, international human rights and domestic social justice groups increasingly collaborated and strategized across the divide of geography and citizenship. They began to find ways to build links between efforts to challenge U.S. conduct abroad and rights abuses at home.

These issues could be discussed by examining responses to many different counterterrorism policies with important implications for human rights. This chapter focuses on two sets of issues: First, the detention of noncitizens in the United States on immigration grounds in the weeks and months after the September 11 attacks, and, second, U.S. detention and interrogation policies for terrorist suspects held outside the United States.

A SHIFT IN FOCUS TO CIVIL AND POLITICAL RIGHTS

The aftermath of the September 11 attacks ushered in a renewed focus on civil and political rights for U.S. social justice groups. This focus stemmed not so much from a conscious decision among domestic rights groups to favor civil and political rights over economic, social, and cultural rights in an effort to bring human rights home to the United States, but rather was driven by the actions of the Bush administration. The administration's policies on investigation, surveillance, detention, and interrogation called into question fundamental rights that had been largely considered "won" in the United

States. U.S. constitutional law prohibits detention without charge and inhumane treatment and ensures equal protection of the laws. While there were persistent and often serious problems in ensuring these rights were respected in practice prior to September 11, 2001, there was no serious debate over whether torture was legal, or whether people could be imprisoned without charge. Because U.S. constitutional law guaranteed these rights, there was little impetus to invoke international human rights law to protect these rights in the United States.

In the aftermath of the September 11 attacks, however, government policies began to undercut longstanding civil and political rights protections under U.S. law. Both U.S.-based international human rights groups and domestic social justice groups were concerned that U.S. constitutional and statutory law, long seen as largely adequate to protect civil and political rights, might be fundamentally altered by the government's counterterrorism policies and the legal battles over them. They feared that Congress and the Supreme Court might redraw the basic lines of rights under U.S. law, putting rights at risk in a new way. U.S. law and practice was falling below international human rights standards, as the Bush administration began to pursue policies that looked more like governments that historically have been far less protective of basic rights.

U.S. social justice advocates needed new legal and advocacy strategies to protect rights. Much like human rights advocates elsewhere, they began to draw on international human rights language, standards, and mechanisms. They began asking themselves the same questions that lawyers from other countries sometimes asked U.S. advocates. Why is it that many U.S. lawyers view human rights as principally concerned with other people's suffering in far away places? Why don't U.S. lawyers look to international human rights standards to understand and defend the rights of people in the United States? Do people in the United States see themselves as having human rights as well as civil rights?

These questions lurked beneath efforts to protect the rights of persons targeted by counterterrorism measures. The constitutional versus international human rights debate sat on shifting terrain. The erosion of certain core civil and political rights after September 11 brought those fault lines into sharper relief. Confronted with a pressing need to defend rights that were suddenly called into question, U.S. social justice advocates mounted efforts to bridge the divide between the two ways of framing and protecting rights for people living in the United States. They talked about civil *and* human rights, looked to international human rights law as a source of obligation for U.S. conduct, and undertook more concerted efforts to use international human rights strategies and mechanisms alongside their traditional forms of advocacy to effect change in U.S. policy and practice.

U.S. COUNTERTERRORISM POLICIES: A POST-9/11 OVERVIEW

The terrorist attacks of September 11 created a climate of fear of another impending attack and a sense of vulnerability that required urgent action.

As the U.S. public sought to understand why these attacks had occurred and what could be done to prevent future acts of terrorism against the United States, the Bush administration moved swiftly to remake laws and policies to enhance its ability to detect, investigate, detain, and interrogate suspected terrorists. The administration undertook measures that targeted Arabs and Muslims in the United States based principally, if not wholly, on religion and national origin. It implemented policies that permitted prolonged detention without charge or due process both in the immigration context and for U.S. citizens and noncitizens alike whom it deemed "enemy combatants." In the fall of 2001, Congress passed the USA PATRIOT Act, which authorized new investigative powers that created widespread concern of an unchecked executive sifting through the private lives of ordinary people. In January 2002, the U.S. government opened a detention camp at Guantánamo Bay, Cuba, and insisted it could hold detainees there without charge beyond the reach of U.S. law and U.S. courts. By year's end, allegations of torture and inhumane treatment of detainees in Afghanistan had begun to surface.

As debates ensued about how to protect rights in the struggle against terrorism, social justice groups began looking not only to U.S. constitutional law but also to international human rights standards. In the early stages, advocates focused on the round-up of immigrants as well as the detentions at Guantánamo Bay. Over time, other Bush administration policies with serious human rights implications came to light, including secret detention sites for high-level terrorist suspects, the rendition (extralegal apprehension and transfer) of persons suspected of links to terrorists to countries where they are at risk of torture, the effort to reshape the rules of interrogation to skirt absolute legal prohibitions on torture and on cruel, inhuman, or degrading treatment, and warrantless domestic surveillance. The torture question took center stage after the revelation of the horrific photos from Abu Ghraib prison in Iraq in April 2004.

This chapter focuses on two major sets of issues that were especially important in encouraging domestic social justice groups to consider using international human rights as a frame of reference and action in defending rights in the United States. Noncitizens comprised the first major group to be subjected to new, harsh policies in the wake of the September 11 attacks. The Justice Department, which then included the Immigration and Nationality Service (INS), rounded up noncitizens, primarily Arab and Muslim men, detained them on immigration charges, and subjected them to a set of new, harsh policies that violated their rights. Advocacy to vindicate the rights of these detainees came to include greater use of international human rights language, standards, and methods alongside traditional strategies, long employed by civil and immigrants rights groups, that focused on defending and extending constitutional rights and other protections found in U.S. law. A second major development was the detention and treatment of terrorist suspects at Guantánamo Bay and locations abroad. Because these policies principally involved U.S. conduct outside the United States, they posed new legal and practical challenges that further galvanized efforts to bridge the gap between the human rights and civil rights frameworks, while at times also reinforcing that divide as well.

DETENTION OF NONCITIZENS IN THE UNITED STATES

In the weeks and months after September 11, 2001, noncitizens quickly became the primary target of measures taken by the Bush administration both to investigate the terrorist attacks and to prevent future incidents. The reasoning was simple: Al Qaeda had orchestrated the attacks and the nineteen hijackers were Muslim men from Middle Eastern or North African countries. The Justice Department, led by Attorney General John Ashcroft, embarked on a strategy to search through the haystack of immigrants fitting this extremely broad description in an effort to find the proverbial needle.[2] The Bush Justice Department used its substantial discretionary powers over immigration enforcement, combined with the public perception that immigrants had fewer rights, to eviscerate the basic human rights of noncitizens. Senior Bush administration officials helped foster this perception of two levels of rights through comments such as those by Vice President Cheney, who defended the newly authorized military commissions by arguing that noncitizens accused of terrorism "don't deserve the same guarantees and safeguards" that the U.S. justice system affords U.S. citizens.[3] Still fearful of another al Qaeda attack, the U.S. public generally did not question the government's approach or raise concerns about the rights of noncitizens who were subject to these new policies.

The targeting of noncitizens in the campaign against terrorism posed serious challenges for immigrant rights groups, who were well established and included both national policy advocacy organizations and local organizations with deep ties in their communities. With immigrant communities feeling under siege, immigrants rights groups were at the forefront of the advocacy response. So too were U.S.-based international human rights groups, such as Human Rights Watch, Amnesty International USA, and Human Rights First. As the detentions grew in number, these groups explored a variety of advocacy strategies to contest them, both individually and collaboratively.

Use of Immigration Law to Detain Noncitizens

In the aftermath of the September 11 terrorist attacks, the Bush administration began to detain noncitizens under U.S. immigration law. The "special interest" detainees—so called because they were considered to be of special interest to the investigation into the September 11 attacks—were men largely of Arab or Muslim backgrounds. Indeed, a 2003 report by the Justice Department's Inspector General found that nearly half of the detainees were from two countries: Egypt and Pakistan.[4] Often, the men who became special interest detainees were targeted for questioning or detention based on little more than their religion or national origin. Some detainees were arrested after neighbors or members of the public reported an "Arab" who seemed suspicious. In November 2001, for example, an Indian man was detained along with three Pakistani men in Torrington, Connecticut, after a resident reported that he had heard two "Arabs" talking about anthrax. Although the man was legally in the United States, the INS detained him for eighteen days.

The person who called the police later failed a polygraph test.[5] Others were detained following a random encounter with law enforcement, such as one man who asked a police officer for directions at the Newark train station. The police officer asked him where he was from and he replied, "Egypt." After questioning him about his immigration status, the police officer took him into custody and he was later deported.[6] In assessing the classification process for the special interest detainees, the Justice Department's Inspector General would later conclude that the FBI and INS made little attempt to distinguish between those noncitizens who were the subject of a lead in the investigation and those who had no connection to terrorism but were encountered coincidentally.[7] In the end, no special interest detainee was ever charged with involvement in the September 11 attacks. By late 2002, only 6 of the 765 special interest detainees remained in detention, as the FBI had cleared the rest of any links to terrorist activity and they had been either released or deported.

Throughout fall 2001, the Justice Department released to the public the number of persons, including noncitizens, whom it had detained inside the United States. Once the number reached 1,182 in early November, the department announced it would no longer give a running total. It also closed all immigration hearings involving special interest detainees to the public, the press, and even family members. The secrecy that surrounded these detentions hindered public accountability and contributed to the abuses suffered by those who were detained and designated as special interest detainees.

While it is routine to apprehend noncitizens who are out of immigration status, the treatment of the special interest detainees was anything but routine. The Justice Department used the immigration laws to detain noncitizens and keep them detained while it investigated them—without probable cause—for possible involvement in criminal activity. The government's strategy was to use the more permissive immigrant enforcement regime to investigate and detain non-citizens whom it suspected, often with little or no basis, of terrorist involvement. It then changed the rules governing immigration procedures, using its considerable discretion in implementing immigration laws to give itself vastly expanded powers to hold noncitizens in detention and even block their deportation from the United States in order to continue to investigate them after the immigration proceedings were completed. In short, the Justice Department used the immigration laws to facilitate an end run around the due process requirements of the criminal justice system that apply to the government's powers of arrest and detention.

The Justice Department violated the rights of detainees in five principal ways. First, it subjected them to prolonged detention without charge, in some cases up to four months. Second, it interfered with their right to counsel in various ways, including through a several-week communications blackout at the Metropolitan Detention Center (MDC) in Brooklyn, where the majority of special interest detainees were held. More generally, the lack of information about who was being detained and where made it difficult for lawyers to assist detainees and their families. Third, the Justice Department promulgated regulations that permitted its attorneys to override judicial decisions to release detainees on bond after a hearing. Fourth, the Department kept detainees in

U.S. custody for months after they had been ordered deported, continuing to investigate them for ties to criminal activity despite the lack of probable cause needed for detention on criminal grounds. Finally, detainees were subjected to extremely harsh conditions of confinement, including excessive use of solitary confinement and, in some cases, physical and verbal abuse. For example, detainees at the MDC in Brooklyn reported that correctional officers slammed their faces into walls, in one case loosening a detainee's front teeth.[8]

The government's handling of the right to counsel is a prime example of the blurring of the lines between criminal and immigration enforcement in ways that compromised rights guaranteed to defendants in criminal matters. In a criminal case, all defendants—regardless of citizenship or immigration status—have a right to counsel to assist them in mounting a legal defense to the charges against them. If they cannot afford a lawyer, the government will provide one for them. If they are in custody and are being questioned about a criminal matter, they have a right to have counsel present and must be informed of that right.[9] Under immigration law, because the proceedings are not criminal, noncitizens do not have a right to court-appointed counsel. Instead, they have a more limited right to the assistance of counsel if they are able to secure legal representation through their own efforts. U.S. immigration authorities are required by law to provide immigrants with a list of attorneys who are available to provide pro bono legal assistance. If noncitizens are able to retain counsel, their attorney will be allowed to represent them in their immigration case. If, however, they are not able to retain counsel, the case may proceed against them without representation.[10]

The Justice Department interfered with the right to counsel in two ways. First, it prevented immigration attorneys from meeting or talking to their clients, most prominently at the MDC in Brooklyn. There it instituted a total communications blackout that prevented attorneys from counseling their clients for approximately three weeks, and even prevented family members from learning the whereabouts of their loved ones who had been detained by the government. This blackout policy, which was criticized by the Justice Department's Inspector General in his report on the special interest detainees, infringed upon the right to access to counsel in immigration matters.

The Department also circumvented the right to counsel in criminal matters through its misuse of immigration laws to engage in conduct that is not permitted in a criminal investigation. FBI agents questioned special interest detainees, who were being held on immigration charges, about crimes related to the September 11 attacks without affording the detainees their right to counsel. In some cases, detainees were informed about their right to counsel only after the FBI interrogated them. For example, four Mauritanians were told of their right to counsel and given telephone access only after they had been in detention for four days and had been questioned by the FBI about the September 11 attacks.[11] In other cases, detainees were given Miranda warnings but their requests for a lawyer went unheeded. An Egyptian man, for example, was detained by the FBI and interrogated about the terrorist attacks. When he requested a lawyer, he was told one would be appointed later. They continued to question him for seven or eight hours and then sent him to INS for further interrogation. He was never assigned an attorney and

was subsequently ordered deported.[12] The government thus violated the right to counsel during custodial interrogations on criminal matters, a right which is enshrined in the U.S. Constitution. In this way, the Justice Department blurred the lines between immigration and criminal enforcement in order to circumvent key rights protections for persons suspected of involvement in a crime.

Enemy Aliens

The public perception of the enemy alien in our midst, who must be dealt with harshly and who has fewer rights than citizens, took on new life in the aftermath of the September 11 attacks. Longtime anti-immigrant politicians found common ground with Bush administration officials seeking new powers to detect and deter terrorist activity. They justified expansive immigration enforcement and control measures, as well as other policies that focused on Arab and Muslim immigrants, as necessary to fight terrorism. The targeting of noncitizens was more politically palatable than targeting U.S. citizens, so public concern about these policies was muted at best. Even in cases where particular policies could have been applied to citizens and noncitizens alike—such as the establishment of military commissions to try terrorist suspects—the Bush administration chose only to subject noncitizens to these new measures. While perhaps partly based on a legal calculus as to how the Supreme Court would ultimately judge the constitutionality of such action, it seems highly likely that the decision to subject only noncitizens to these new policies was also based on a political judgment about what the U.S. public would find acceptable.

The citizen versus noncitizen divide became a major fault line in the debate over rights in a post-9/11 world. The struggle against terrorism was framed in terms of "us/citizens" versus "them/enemy aliens" almost from the start, with profound consequences for rights protections.[13] Noncitizens in general, and Arab and Muslim noncitizens in particular, were portrayed as "other" and as outside the realm of rights protections that the United States sought to defend against foreign terrorists. By placing Arabs and Muslims on the other side of the rights divide, the violation of "their" rights was not seen as jeopardizing "our" rights, the rights of the vast majority of the U.S. public.

The dichotomy between "us/citizens" and "them/enemy aliens" in the post–September 11 world has posed a serious challenge to social justice groups in mobilizing a broad-based constituency to contest detention policies that targeted noncitizens of Arab and Muslim backgrounds. The Bill of Rights Defense Committees that formed to challenge the Patriot Act provide an instructive example. The public outcry over expanded government powers to obtain individuals' medical or library records—powers that could directly affect the rights of U.S. citizens—stands in sharp contrast to the relative lack of protest against detention of noncitizens in U.S. jails and detention centers, or rendition of suspects to governments widely known to engage in torture, or even to inhumane treatment of detainees held abroad. While there are various factors at work in shaping the public response to each of these

policies, a key difference is the perception on the part of many U.S. citizens that their rights were not likely to be affected by these latter policies. Where they could readily see how certain new powers could compromise their rights, such as the right to privacy and Fourth Amendment protections against warrantless searches, citizens were more likely to mobilize against the administration's policies. Where, however, government policies principally affected the rights of those perceived as "other" or as "enemy aliens," public concern was largely muted or fleeting.[14]

The Limits of Traditional Litigation Strategies

To protect the rights of immigrants, advocacy groups looked to mount legal challenges to new policies undertaken by the Bush administration. They hoped that by filing lawsuits in U.S. courts, they could win rulings that would invalidate the government's new measures and force a change in policy. Such litigation strategies were very familiar to the civil rights and civil liberties movement in the United States, which had successfully challenged many policies over several decades on the grounds that they violated constitutional or statutory rights.[15]

Several groups tackled the secrecy surrounding the special interest detentions in the weeks after September 11, filing three Freedom of Information Act (FOIA) requests seeking the names of those detained, along with related information such as dates of arrest and any charges against them. The Justice Department refused to disclose any information. On December 6, 2001, nearly two dozen civil rights, civil liberties, and human rights organizations brought suit in *Center for National Security Studies v. Ashcroft* to force the Justice Department to release the names.[16] In mid-2002, under the pressure of the lawsuit as well as a Senate Judiciary Committee hearing, the Justice Department released the names of 129 people detained and charged with criminal offenses, which were all unrelated to terrorism. It also revealed that it had detained 751 people on immigration charges, but refused to provide their names or any other information about them. Although the federal court rebuked the Justice Department and ordered it to release the names, the court of appeals overturned the decision, ruling that the government did not have to release the names or the other information requested. The Supreme Court declined to hear the case.[17]

In early 2002, two separate lawsuits filed by media organizations challenged the government's September 2001 decision to bar press and public access to immigration hearings for special interest detainees, yielding mixed results and leaving the issue unsettled.[18] The Third Circuit court of appeals ruled that the government's policy of blanket closure of hearings in special interest cases was lawful. In the Sixth Circuit, however, the appeals court struck down the blanket closure of hearings for special interest detainees, holding that the public has a First Amendment right of access to immigration hearings and that the government cannot close the hearings without providing justification in each individual case. When the government then stated that it was reconsidering its closure policy, the Supreme Court declined to hear an appeal of the Third Circuit's decision.

Litigation was also used to counter the special interest detentions themselves. In April 2002, the Center for Constitutional Rights brought a civil rights challenge to the detentions on behalf of a class of those who were detained. The action, *Turkmen v. Ashcroft,* alleges that the detainees were subjected to prolonged detention without charge in violation of the Fourth Amendment's ban on unreasonable seizure and the Fifth Amendment prohibition on deprivation of liberty without due process of law, subjected to discrimination based on their race, religion, and national origin in violation of the Fifth Amendment's guarantee of equal protection of the laws, and denied the right to counsel and subjected to inhumane conditions of confinement, including instances of physical and verbal abuse, in violation of their Fifth Amendment due process rights.

The results at the trial court level have been mixed thus far in this ongoing case. While the court allowed the challenges to conditions of confinement to proceed, it was unconcerned about the government's pretextual use of the immigration laws to detain noncitizens while investigating them for criminal activity without probable cause. As long as their eventual deportation was "reasonably foreseeable," the court found no due process or Fourth Amendment violation in their continued detention for months after they had been ordered deported. It also rejected their equal protection claim with respect to their prolonged detention, reading Supreme Court precedent to permit the government to single out nationals of particular countries and focus immigration enforcement efforts on them. Notably, the court asserted that such an "extraordinarily rough and overbroad" distinction would meet with great judicial skepticism if it were applied to U.S. citizens.[19]

A key limitation that these lawsuits confronted was the lack of robust rights protections for noncitizens in important areas of U.S. immigration law, particularly the substantive law and procedure governing deportation proceedings. As many legal scholars have described, the differences between the rights of citizens and noncitizens in the United States are not as great as is generally thought. Still, the Supreme Court's rulings on noncitizens' rights cut in two different directions, thus contributing to the widespread belief that the government can legitimately accord lesser rights to noncitizens. While the Supreme Court has generally affirmed that the Constitution protects the rights of noncitizens in the United States on equal footing with citizens (except for the right to vote and to run for federal elective office), it has taken a less rights-protective approach to the treatment of noncitizens in immigration matters, including detention. Although noncitizens can be deprived of their liberty and placed in detention centers much like jails or prison—indeed they are sometimes held in local jails alongside criminal suspects—these detentions are considered administrative rather than criminal. Thus, immigrant detainees who are being held for violation of the immigration laws while the government seeks to deport them do not have the rights and protections that the U.S. Constitution guarantees all persons charged with a crime, whether citizen or noncitizen.

The decisions in these lawsuits challenging the special immigrant detention policies reflect the limits of U.S. law in securing the rights of noncitizens in immigration proceedings. In *Center for National Security Studies*, the

advocacy groups prevailed in the trial court, but the decision was overturned by the court of appeals and the Supreme Court then refused to hear the case, letting the government's refusal to reveal the names of the detainees stand. In the media cases challenging secret hearings, the government's indication of a possible shift in policy averted Supreme Court review, but left in place conflicting circuit court opinions, one of which permits blanket closure of immigration hearings to the press and public in the three states that comprise the Third Circuit. In *Turkmen*, the trial court dismissed the challenges to prolonged detention and racial profiling, although it allowed claims regarding conditions of confinement to proceed.

Another limit of litigation strategies is time. The *Turkmen* case took too long to have a direct impact on those in detention, nearly all of whom had been released or deported by the end of 2002, well before the trial court issued its decision in June 2006. As with the Guantánamo detentions, however, the mere fact of a lawsuit prompted the government to rethink its policies. Faced with justifying its actions before a court of law and hoping to improve its position in the litigation, the Justice Department altered its policy on secret hearings (for example, affording the detainee at issue in the Sixth Circuit case an open deportation hearing) and released more complete information about at least some of the detainees—those held on criminal charges. Judicial scrutiny of executive branch conduct thus served to mitigate some aspects of the detention policies.

Human Rights Strategies

As advocacy groups sought effective means to defend the rights of the special immigrant detainees, they began to use international human rights language, standards, and mechanisms in their work in various ways.

Litigation Involving Human Rights Claims

International human rights language and standards factored into legal challenges to the special interest detentions not as central arguments, but as complementary arguments that helped buttress claims under U.S. law. Legal advocacy groups maintained their primary focus on U.S. law both because of questions regarding whether U.S. treaty obligations created a right on the part of individuals to bring claims in U.S. courts for violation of their treaty rights and because of the controversy over whether and to what extent international and foreign law could be used by U.S. courts. Still, lawyers used international human rights standards to reinforce a U.S. legal norm under attack. Whether the international standard was broader than or coextensive with the domestic standard, it served as a useful additional argument about the importance of the rights at stake, as well as another source of legal obligation. Lawyers also hoped that, over time, U.S. courts would become more accustomed to considering questions of U.S. obligations under international law.

In *Turkmen*, the legal advocacy groups argued that the special interest detainees were denied their right to seek assistance from their consulates under the Vienna Convention on Consular Relations. They also asserted a

claim under the Alien Tort Statute that the government had violated international legal prohibitions against arbitrary detention and cruel, inhuman, and degrading treatment. The court dismissed the international law claims for lack of jurisdiction, reasoning that these claims must proceed under the Federal Tort Claims Act, which recognizes claims that arise under state law rather than international law.

In *Center for National Security Studies,* several human rights groups joined the litigation as co-plaintiffs, bringing a human rights frame to public advocacy surrounding the case. While the legal arguments in the lawsuit were based on U.S. law, groups like Human Rights Watch articulated international human rights principles related to secret arrests and public hearings that supported the release of the names of the special interest detainees.

Documentation of Abuses

Documentation has long been central to the work of many international human rights groups. They conduct careful research to document human rights abuses and then present the factual information in widely disseminated reports. Documentation work enables human rights groups to bring abuses to light, convey their scope and impact in a compelling way, contest government denials and obfuscation, and create public pressure on governments to change their conduct.

Many domestic groups used the media to denounce rights abuses long before September 11, 2001. In the months and years thereafter, some groups began to integrate documentation work with public advocacy in a more focused way, making in-depth field research on rights violations the basis for denouncing government policy. For example, the Arab American Institute issued a report on the first anniversary of the September 11 attacks that contained a mix of policy analysis, individual perspectives, and factual information regarding Arab Americans who were affected by the backlash against their community.[20] Similarly, the ACLU collaborated with Human Rights Watch on a project to document the misuse of material witness warrants. Although the warrant was designed to secure the testimony of witnesses, the Justice Department began to use it as a way to detain terrorist suspects and deprive them of their rights. In 2005, the two organizations published a report entitled Witness to Abuse, which documented the use of the material witness statute against more than seventy-five people in the United States. The project combined research and reporting with subsequent litigation to challenge the Justice Department's novel and troubling use of this type of warrant as part of its counterterrorism policies.

Documentation work played a particularly important role in the efforts of U.S.-based advocates to respond to the special interest immigrant detentions. Human Rights Watch issued an in-depth report on the special interest detainees in August 2002, based principally on interviews with lawyers for detainees and with those detainees to whom it was allowed access by the Justice Department.[21] Through its report, Human Rights Watch was able to paint a powerful picture of the human rights abuses suffered by the detainees. Other groups, including Amnesty International USA and the ACLU, also engaged

in research and documentation work that underscored the severity of the problems with the government's handling of special interest detentions.[22]

While human rights documentation was not a new strategy in the United States, having been used notably by Human Rights Watch and Amnesty International, documentation work took on greater importance in light of the lack of access to information about the detainees and the government's treatment of them after September 11. The Bush administration's efforts to shield its policies from scrutiny through secret hearings, the refusal to release the names of those detained and resistance to judicial oversight made traditional avenues for protecting rights, such as litigation and in-depth press reporting, more difficult. In this climate, human rights strategies of documenting abuses and naming and shaming became critical to effective advocacy.

Indeed, the documentation work helped shape the government's own understanding of what happened to the special interest detainees. The report of an investigation by the Justice Department's Inspector General issued in June 2003 largely corroborates the findings of the Human Rights Watch report from the previous year. The Inspector General's Office could make use of information and leads contained in the reports by human rights groups in conducting its own independent investigation. When the Inspector General issued his report in June, the Justice Department's leadership was placed on the defensive. It could not dismiss a highly critical 198-page report containing twenty-one specific recommendations for reform by its own internal watchdog. Extensive press coverage followed, along with congressional hearings and a well-attended congressional staff briefing organized by a group of civil rights, immigrants rights, and human rights groups. Congress and the press then sought more information about the special interest detentions, while the Inspector General carried out his mandate to monitor the Department's response to his findings and recommendations.

Advocacy on special interest detainees led to a particularly important outcome in the cases of detainee abuse at the MDC in Brooklyn. In a supplemental report issued in December 2003, the Justice Department's Inspector General determined that officers slammed detainees into walls, subjected them to other forms of physical and verbal abuse, and punished them by keeping them restrained for long periods of time.[23] The Inspector General's findings on strip searches provide an illuminating example: "[M]any of the strip searches appeared to be unnecessary, and a few appeared to be intended to punish the detainees. For example, many detainees were strip searched after attorney and social visits, even though these visits were in no-contact rooms separated by thick glass, the detainees were restrained, and the visits were filmed."[24] The Inspector General found the detainees' allegations of abuse to be credible and largely consistent, while many officers at MDC gave blanket denials of mistreatment that the Inspector General did not find credible. Some officers, for example, denied taking actions that had been captured on videotape.[25]

The Inspector General recommended further investigation into these incidents of abuse and appropriate disciplinary action against those officials responsible for the mistreatment. Finally, in February 2006, the Federal Bureau of Prisons, which runs the facility, took various disciplinary actions

against eleven officers at MDC. Two officers were terminated, two received thirty days without pay, four received two or four days without pay, and three were demoted.[26] While many social justice groups maintain that more severe punishment was warranted, it seems clear that human rights documentation strategies called attention to the abuse of detainees at MDC and helped set in motion the Inspector General's thorough investigation of these abuses, resulting in corrective action by the Bureau of Prisons.

In sum, the use of human rights documentation strategies helped gather and analyze isolated facts and individual stories into a coherent whole, painting a compelling picture of systemic abuses that facilitated press coverage and public understanding. Reports by Human Rights Watch and other groups contributed to a substantial public record, which gave impetus to more robust congressional oversight, supported litigation efforts, and brought information to light on which the Justice Department's Inspector General could draw in its own investigation. As a result, the Bush administration took some corrective action and modified certain policies it had applied to the special interest detainees. For example, in 2004, the Department of Homeland Security, which is now responsible for immigration enforcement, issued guidance to improve the timeliness of decisions to charge a noncitizen with an immigration violation and to notify the noncitizen of the charges. This new rule, while still containing a troubling loophole in cases of a broadly defined emergency or extraordinary circumstance, represents an effort to set clearer default rules in order to prevent detainees from languishing in detention without charge.[27] While the special interest detention policies largely remain in place for use in another time of threat,[28] careful documentation of the abuses that occurred will likely make it harder for the government to abuse its authority to the same extent that it did in the wake of the September 11 attacks.

Use of International Human Rights Mechanisms

U.S. social justice advocates also began to use international human rights mechanisms to protect and promote the rights of noncitizens who were detained after September 11. This work was led largely by U.S.-based international human rights groups, who had experience in working with the machinery of international human rights institutions. A few domestic advocacy groups became involved in this work directly, while others were exposed to these efforts through listservs and other informal means of information sharing, which increased their knowledge of these mechanisms and their ability to consider using them in their own advocacy.

In June 2002, Global Rights, the Center for Justice and International Law, and the Center for Constitutional Rights filed a petition before the Inter-American Commission on Human Rights, a regional human rights body that hears petitions alleging human rights violations by member states of the Organization of American States. The groups challenged the Bush administration's policy of detaining noncitizens on immigration grounds after they had been ordered deported by an immigration judge or had agreed to leave the United States. They argued that once a person has been ordered

deported, the government must move expeditiously to deport the noncitizen, and in any event within the ninety days required by a U.S. statute. Instead, they claimed, the government was unlawfully keeping these noncitizens in detention in order to investigate whether they had any links to terrorism.[29]

In September 2002, the Inter-American Commission on Human Rights granted the petition and issued precautionary measures, requesting that the U.S. government take urgent steps to protect the fundamental rights of the detainees, including the right to liberty and personal security, the right to humane treatment, and the right of access to a court.

The decision of the Inter-American Commission against the United States did not garner much attention nor did it spur a public outcry against the treatment of the special interest detainees, which is likely attributable to three factors. First, lack of familiarity in the United States with the machinery of the Inter-American human rights system created a significant hurdle to communicating the import of this decision to the public at large. A critical ruling from the Inter-American Commission on Human Rights did not resonate with most people in the United States as a major setback for the Bush administration's policies in the way, for example, that a ruling from the Supreme Court did. Second, the Commission issued its decision after the vast majority of the special interest detainees had been deported or released, and therefore the decision received less media coverage than it might have when the detainees numbered over 700. Third, the public was less troubled by the abuse of the rights of noncitizens who had committed immigration violations than by other counterterrorism policies that infringed on basic rights.

Still, the petition to the Inter-American Commission resulted in increased scrutiny of U.S. conduct at a time when it was difficult to challenge the treatment of special interest detainees both in courts of law and in the court of public opinion. The petition pushed the U.S. government to respond publicly and formally to questions about its human rights record in the struggle against terrorism. In addition, legal advocacy groups such as the Center for Constitutional Rights cited language from the Commission's rulings in its litigation to challenge government treatment of detainees in U.S. courts.

Moreover, the petition was significant because it helped further awareness of possible international human rights remedies among domestic social justice groups. A number of these groups met with the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, raising the special interest immigrant detentions among a range of issues. Similarly, the UN Working Group on Arbitrary Detention reviewed the cases of a group of twenty special interest detainees. In all but one case, the detainees had already been released or deported by the time the Working Group considered their detention in 2004. In the one case, however, the UN Working Group found Benamar Benatta's detention arbitrary and asked the United States to remedy the situation.[30] The Working Group's opinion contributed to Benatta's eventual release from detention. His immigration attorney referenced the opinion in her submissions to the immigration court and in her negotiations with the government, which eventually decided to release him.

U.S. social justice groups used international human rights mechanisms to call attention to the plight of detainees. The ACLU filed a petition with the Working Group on Arbitrary Detention on behalf of thirteen detainees. Media was a key part of the group's strategy. The ACLU conducted simultaneous press conferences in Geneva and New York on the day it filed the petitions and published an accompanying report. Part of its media strategy was to highlight the effect of these detentions not only on the men detained but also on their families, dramatizing this impact through the participation of a family split apart on two continents at the press conferences. The use of this international human rights mechanism was a significant new development for domestic rights groups. The ACLU characterized its advocacy efforts as a fight on two fronts: domestic and international. In a report on these detainees, the ACLU wrote that "[t]oday, nations are linked more tightly than ever—through immigration and commerce. They should also, we believe, be encouraged to measure their democratic institutions against an internationally accepted standard of human rights."[31]

The momentum for using international human rights mechanisms to address U.S. counterterrorism measures continued to build. In 2006, over 140 U.S. social justice groups participated in sending information to the UN Human Rights Committee during its review of U.S. compliance with the International Covenant on Civil and Political Rights (ICCPR). In its concluding observations, the Committee expressed its concern regarding the special interest detainees, directing the United States to review its policies and practices to ensure that "immigration laws are not used so as to detain persons suspected of terrorism or any other criminal offences with fewer guarantees than in criminal proceedings."[32] It further directed the U.S. government to provide reparations to those who were improperly detained.

Reframing the Issue

Even more important, however, was the use of human rights language in public advocacy in order to reframe the debate about proper treatment of noncitizens held in U.S. jails and detention centers. There was a prevailing sense among many advocacy groups that it was strategically important to frame challenges to the administration's counterterrorism policies in terms of a collective American identity. Such language was intended to deflect charges that criticisms of counterterrorism policies were unpatriotic—a frequent tactic of the administration's defenders. Press statements, letters, and other public messages were often drafted using language that referred to the rights of "citizens," the protection of "Americans," or safeguarding "our" national security.

Despite the political judgment that such language would make the defense of basic rights more palatable, some advocacy groups insisted that this kind of language actually reinforced the us-versus-them divide by excluding noncitizens. To protect the rights of everyone in the United States, they argued, advocacy groups should speak not in terms of the rights of citizens but of the rights of all human beings. They argued that, notwithstanding the rhetorical use of "citizens" to dampen criticism of their message, rights language could

not be limited to citizens because language so often shapes public understanding of an issue. Speaking in terms of U.S. citizens would reinforce the idea that noncitizens had fewer rights, which would make it more difficult to challenge policies such as the treatment of noncitizens detained by the Justice Department. This debate played out frequently in the context of messaging around specific issues. By referencing fundamental rights that do not distinguish between citizens and noncitizens, international human rights language often became the common ground between immigrants' rights, Arab and Muslim groups, human rights groups, and civil rights and civil liberties groups.

The challenge of defending the rights of noncitizens in this climate was enormous. Long before September 11, noncitizens were typically perceived as having fewer rights than U.S. citizens. In the aftermath of the September 11 attacks, fierce anti-immigrant rhetoric on the airwaves often exaggerated the difference between the rights of citizens and noncitizens under U.S. law. As advocates struggled to find new ways to defend immigrants' rights, they found that international human rights standards could serve both as a way of emphasizing U.S. legal obligations and as a way of reframing the debate. Referencing due process rights under international treaties ratified by the United States, such as the International Covenant on Civil and Political Rights, gave immigrant advocacy groups a new way of talking about the rights of noncitizens in a difficult climate.

International human rights language also helped to reframe the debate about rights in order to make the case that the United States could not and should not compromise the rights of noncitizens in order to address the threat posed by international terrorism. Those who defended the detention of noncitizens often justified the administration's policies by arguing that the Constitution afforded lesser protection to noncitizens than to citizens. Advocates turned to international human rights language and standards to emphasize that all human beings, regardless of immigration status, have certain basic human rights. Framing the questions in terms of human rights, rather than constitutional rights, helped to emphasize the human dignity of all persons and to neutralize the power of the "enemy alien" narrative.

Similarly, advocates also used human rights language to convey the seriousness of the abuses suffered by the special interest detainees. Here they borrowed from some of the effective work done by other domestic advocates, such as those working on LGBT rights and workers' rights,[33] who used the message that the violence and discrimination against LGBT students in U.S. schools and impediments to workers' rights to form unions had risen to the level of human rights abuses. Indeed, advocates across these varied issues have felt that framing the problems in human rights terms gave them a new and powerful way of helping U.S. audiences understand the nature and scope of the rights abuses at issue.

In sum, human rights strategies have advanced advocacy efforts to defend the rights of noncitizen detainees. Contesting government policies that target Arab and Muslim immigrants is difficult given the widely held view that they are the "other"—enemy aliens entitled to fewer rights than U.S. citizens. The language of human rights has been helpful in shifting the debate away from

the differences in rights afforded to citizens and noncitizens under the U.S. Constitution. International human rights served as a way of leveling the playing field between citizen and noncitizen by emphasizing the common humanity and human dignity of all persons, regardless of their citizenship. Advocates began to include arguments based on U.S. obligations under international human rights law in their litigation efforts. They also expanded their use of international human rights mechanisms, both at the Inter-American and UN levels, to challenge the policies of the Bush administration, with modest results. Human rights documentation work helped to bring a pattern of abuses to light, which shamed the government into taking action against the worst of the abuses, including the incidents of physical abuse of detainees at the MDC in Brooklyn. Only time will tell, however, whether these advocacy efforts will result in a significantly different policy toward noncitizens should there be another emergency that causes the government to use its immigration powers to detain noncitizens suspected of involvement in terrorism.

TREATMENT OF TERRORIST SUSPECTS ABROAD: GUANTÁNAMO, RENDITION, AND TORTURE

The detention of more than 750 noncitizens inside the United States using special measures under immigration law was only a first step in the erosion of basic rights for noncitizens in the aftermath of the September 11 attacks. The Bush administration's lack of respect for rights considered largely "won"—civil and political rights such as torture and cruel, inhuman, or degrading treatment, indefinite detention, and other due process violations—continued and expanded with the opening of the Guantánamo detention camp in January 2002, the detention of high-level terrorist suspects in secret locations abroad, the use of torture and cruel treatment in the interrogation, and the rendition of individuals to countries where they were at risk of being subjected to torture.

The Bush administration justified its policies in national security terms, claiming they were necessary to gather intelligence, disrupt terrorist networks, and prevent another terrorist attack. A nervous public largely accepted such arguments. The secrecy that surrounded government conduct made it difficult to evaluate the administration's claims that its controversial policies were critical to the struggle against terrorism. To prevent the erosion of basic rights and to regain lost ground, social justice groups had to devise new strategies to contest the treatment of noncitizens detained abroad in a context that was either perceived literally as a war, or accepted as being sufficiently like a war to justify extraordinary measures.

The handling of foreign terrorist suspects—at Guantánamo, in secret locations abroad, and at Abu Ghraib prison in Iraq—became perhaps the most prominent symbols of the U.S. government's failure to uphold human rights in the struggle against terrorism. The detention and treatment of noncitizens abroad had a catalyzing impact on nascent efforts by U.S. domestic social justice groups to apply international human rights standards to U.S. conduct.

The fact that these policies implicated fundamental human rights violations galvanized U.S. advocates and encouraged them to press the Bush administration to uphold international legal standards. The Center for Constitutional Rights, the ACLU, and many pro bono attorneys challenged U.S. conduct abroad in court, represented Guantánamo detainees, and pressed the administration to release information about its policies and decisions. Their efforts complemented the work of international human rights groups, such as Human Rights Watch, Amnesty International USA, and Human Rights First. At the same time, because these policies involved treatment of noncitizens suspected of links to terrorism who were held outside the United States, the policies also tended to reinforce the domestic-international divide within the social justice movement in the United States. Many domestic advocates felt that these policies involved foreign issues that went beyond their mandate, thus leaving it to international human rights groups and a small number of other groups to contest them.

Detentions at Guantánamo Bay

In January 2002, the U.S. government opened the detention camp at the U.S. Naval Base at Guantánamo Bay, Cuba. The camp quickly became a prominent global symbol of the Bush administration's excesses in the struggle against terrorism. The number of detainees reached approximately 775 at its height. Many were captured in the conflict in Afghanistan, while many others were apprehended in places far from any battlefield. Despite the secrecy that surrounded the detainees, press reports and human rights documentation slowly yielded information about the nationality of the detainees and the circumstances of their capture. A handful of children under eighteen were held at Guantánamo, the three youngest of whom were separated from the adult detainees and eventually released in January 2004. Plans for military commission trials of the detainees, first announced in fall 2001, were put on hold as the U.S. government focused on interrogating detainees. The detentions wore on. The Bush administration dug in its heels, constructing more permanent prison facilities at the base and initiating proceedings before military commissions for six detainees in 2004. As of April 2007, more than five years after the camp opened and despite extensive international pressure, the U.S. government still held some 385 detainees at Guantánamo Bay.

The core of the Bush administration's detention policy at Guantánamo was its effort to place detainees beyond the reach of the law. Detainees were held largely incommunicado and without access to counsel or to the courts. The Bush administration's position was that detainees did not have a right to challenge their detention by the United States in U.S. courts. As lawyers filed initial habeas corpus petitions on behalf of detainees, the administration countered by arguing that U.S. courts lacked jurisdiction over claims filed by non-Americans held at the U.S. Naval Base at Guantánamo Bay, Cuba, which it claimed was outside U.S. territory. Although ultimately litigation in U.S. courts became pivotal in protecting the due process rights of detainees, initially the prospects for using traditional litigation approaches to challenge the Guantánamo detentions seemed very limited. It was far from clear how

the Supreme Court ultimately would rule on a case, and litigation was fraught with practical as well as legal challenges.

Early on, the total isolation of the detainees made it extremely difficult for them to communicate their interest in serving as plaintiffs in any lawsuit challenging their detention. Shortly after the U.S. government brought the first detainees to Guantánamo in early 2002, a group of clergy, lawyers, and professors filed suit in federal court in California, asserting the habeas rights of the detainees on their behalf because they "appear to be held incommunicado and have been denied access to legal counsel."[34] The court dismissed the case for lack of standing, finding that the petitioners could not represent the interests of the detainees without their assent. Advocates then turned to various international human rights bodies to make their case, including the Inter-American Commission on Human Rights (IACHR) and several of the UN special rapporteurs and the Working Group on Arbitrary Detention.

In February 2002, the Center for Constitutional Rights, the Columbia Law School Human Rights Clinic, and the Center for Justice and International Law filed a petition with the IACHR seeking to protect the rights of the approximately 300 persons then detained at Guantánamo. Given the lack of access to detainees, an IACHR petition was a logical choice because under IACHR rules, nongovernmental organizations have standing to assert claims on behalf of persons whose rights have allegedly been violated. In March, the IACHR issued the first of a series of decisions and requests for information that would continue over the next four years. The IACHR urged the United States to comply with the due process and humane treatment requirements of the American Declaration of the Rights and Duties of Man, as the U.S. government undertook to do when it joined the Organization of American States. This petition to the IACHR was significant because it was brought at a time when it was unclear whether U.S. courts would take up the issue of prolonged, arbitrary detention at Guantánamo. Even if a case did make its way to the Supreme Court, there was a real risk the Court would rule that U.S. courts had no jurisdiction over claims by Guantánamo detainees. The more permissive standing rules of the IACHR helped legal advocacy groups who, in the prevailing climate of secrecy surrounding the detention camp, lacked access to the detainees as well as information about who they were.

Human rights groups and a small number of domestic groups also appealed to UN bodies. Numerous groups provided detailed information to the UN Committee Against Torture and the UN Human Rights Committee, which in 2006 reviewed U.S. reports on its compliance with the Convention Against Torture and the International Covenant on Civil and Political Rights respectively. The Committees found the U.S. government in violation of its human rights treaty obligations at Guantánamo, particularly with regard to the lack of judicial review and legal safeguards, and urged prompt action to remedy the situation. The Committee Against Torture was especially strong in its criticism, urging the U.S. government to "cease to detain any person at Guantánamo Bay and close this detention facility, permit access by the detainees to judicial process or release them as soon as possible, ensuring that they are not returned to any State where they could face a real risk of being tortured, in order to comply with its obligations under the [Torture]

Convention."[35] Similarly, advocates engaged in dialogue with several UN special rapporteurs with human rights mandates, who continually raised concerns about Guantánamo with the U.S. government.

In June 2004, four UN human rights officials—the special rapporteurs on torture, the independence of judges and lawyers, and the right to the highest attainable standard of health, along with the chairperson of the Working Group on Arbitrary Detention—jointly sought permission to visit the Guantánamo detention camp. Although it was willing to discuss the possibility and terms of such as visit, the Bush administration, in a much-publicized response, would only grant them restricted access to the detainees. In October 2005, the U.S. government extended an invitation to only three special rapporteurs—those dealing with torture, freedom of religion, and arbitrary detention—for just a one-day visit. The UN human rights officials declined the offer to visit Guantánamo because they would not be allowed to meet with detainees privately. Despite this setback, they have continued to press the Bush administration on this issue. In a report issued in February 2006, they urged the U.S. government either to "expeditiously bring all Guantánamo Bay detainees to trial, in compliance with articles 9(3) and 14 of ICCPR, or release them without further delay."[36] They also called on the Bush administration to close the detention camp at Guantánamo.[37]

Even as they pursued these international human rights strategies, social justice groups continued to seek ways to mount legal challenges in U.S. courts, filing numerous habeas cases that eventually led to the Supreme Court's decision in *Rasul v. Bush* in June 2004, in which the Court held that U.S. courts had jurisdiction over habeas claims by Guantánamo detainees.[38] The *Rasul* decision opened the courthouse door to detainees, granting them access to U.S. courts to determine whether their continued detention was lawful. The decision ensured that the government could not hold people beyond the reach of the law and arrogate to itself the exclusive power to determine whether its own conduct was lawful. Courts would play their time-honored role in the U.S. constitutional scheme as the ultimate arbiter as to whether the executive branch was operating within the bounds of the law.

International legal issues played an important role in domestic litigation over detentions at Guantánamo Bay. While the cases turned on issues of U.S. constitutional and statutory law, the Geneva Conventions and international human rights standards formed part of the body of law that the Supreme Court considered in determining the rights of detainees. Numerous amicus curaie briefs filed in the *Rasul* case addressed international human rights and humanitarian law issues. While the case was decided principally on the basis of the federal habeas statute, the international legal standards pertaining to prolonged detention without charge and the due process rights of detainees under the laws of war loomed in the background. Later, in the *Hamdan v. Rumsfeld* decision handed down in 2006,[39] international human rights and humanitarian law factored more centrally in the Court's ruling. The Supreme Court held that the military commissions established by the Bush administration to try detainees at Guantánamo Bay were illegal under both the U.S. Uniform Code of Military Justice and the Geneva Conventions. The Court

found that Common Article 3 to the Geneva Conventions, which sets the baseline of fair and humane treatment for all persons regardless of status under the laws of war, applied to the armed conflict with al Qaeda. In a stunning reversal after four years of staunch resistance, the Pentagon acceded to the Court's command and reversed its position, declaring that it would apply this core international legal protection to all persons in Defense Department custody, which includes those detained at Guantánamo.

Rendition to Torture

In a *Washington Post* article in December 2002, reporters Dana Priest and Barton Gellman wrote about abuse of detainees held at a secret CIA interrogation center at Bagram Air Base in Afghanistan. Some detainees who do not cooperate, they reported, were handed over to foreign intelligence services whose use of torture is widely known. The article quoted one U.S. official with direct involvement in transferring detainees to third countries, who explained the understanding behind renditions: "We don't kick the [expletive] out of them. We send them to other countries so *they* can kick the [expletive] out of them."[40]

Rendition involves the transfer of persons suspected of links to terrorism to countries where they are at risk of being tortured. Sometimes called extraordinary rendition, these transfers most often occur without any legal process. Persons are simply apprehended and transferred in secret from one country to another, entirely outside of the legal system. Under international human rights law, the absolute prohibition on torture entails an equally absolute prohibition on transferring a person to a country where he or she is at risk of being subjected to torture. When the United States ratified the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment in 1994, it accepted without reservation the ban on such transfers contained in Article 3. Although the U.S. government had used the tactic of rendition prior to 2001, often in countries with which it lacked an extradition treaty, the suspects were typically transferred *to* justice—apprehended and brought to the United States to face criminal charges—whereas after the September 11 attacks the Bush administration used rendition to whisk suspects *away from* justice.[41]

To carry out secretive, extralegal transfers of suspects to countries with well-documented records of torture, such as Syria, Jordan, Morocco, and Egypt, the Bush administration developed a legal theory to evade the absolute prohibition on transferring persons to risk of torture. It argued that rendition did not violate Article 3 of the Convention Against Torture if the United States had obtained diplomatic assurances from the government of the country to which the person was transferred. Diplomatic assurances are promises, either oral or written, from governments widely known to engage in torture that they will not subject a particular detainee to torture. These unenforceable promises are simply a fig leaf on transfers that violate a fundamental human rights guarantee against torture. To transfer certain suspects for detention and interrogation abroad, the Bush administration has claimed that governments that routinely flout their binding legal obligation not to

torture could be trusted to honor unenforceable promises not to engage in the very same conduct.

Litigation to challenge renditions faced serious hurdles. It was difficult to uncover specific cases of rendition, owing to the extreme secrecy that surrounded both the transfers and the detentions. Most often, an individual had to be released and returned to a country where they could safely challenge the rendition in public, such as Maher Arar, who was rendered to Syria and released back to Canada, or Khaled el Masri, who was rendered to Afghanistan, released, and then returned home to Germany. Moreover, the administration has thus far succeeded in blocking legal challenges to its rendition policy, in part by using a state secrets defense. In response to a lawsuit filed by Maher Arar, the U.S. government asked the court not to allow the case to proceed because doing so would require the government to reveal state secrets, thereby harming national security. The federal district court dismissed Arar's lawsuit in early 2006. Although it did not reach the state secrets claim, the court found no cause of action against U.S. officials for his rendition to Syria and his treatment in a Syrian prison, relying on national security and foreign policy considerations in reaching this conclusion.[42] Arar's lawyers appealed the ruling to the Second Circuit in late 2006. El Masri's case was dismissed on state secrets grounds by the Fourth Circuit in March 2007.[43]

In such a secretive context, documentation of abuses became crucial. Human Rights Watch took up the issue, focusing not just on the United States but on comparative practices through its research and reporting on Sweden's rendition of two Egyptian asylum seekers to Egypt (a Swedish television program eventually uncovered that the CIA flew the plane from Stockholm to Cairo) and on efforts by the British government to use diplomatic assurances to send terrorist suspects in Britain to countries where they were at risk of torture. This research helped demonstrate the breadth of the problem and the commonalities in approach used by numerous governments in dealing with persons suspected of terrorist ties. Documentation strategies helped bring these cases to light and built a body of knowledge about how renditions worked, how they violated fundamental human rights, and how governments were using diplomatic assurances to circumvent their absolute legal obligation not to transfer people to torture. Research and documentation on the Sweden-Egypt cases, for example, enabled policymakers, legal advocacy groups, and the public to learn about the flimsy promises made by Egypt in regard to the treatment of the two men, the serious problems with Swedish monitoring of their treatment in prison in Egypt, and the due process flaws in the trial of one of the detainees in Egypt after his rendition.

Documentation and reporting on rendition led to three concrete advocacy outcomes that have helped increase pressure on the United States and other governments to change their policies. First, the Canadian government established an official commission of inquiry into the handling of Maher Arar's case, focusing on Canadian law enforcement and other officials and their interaction with U.S. officials. After extensive public and private hearings, the Commission issued a lengthy report in September 2006 that exonerated Arar, finding no evidence of any connection between Arar and terrorist activity. The Canadian government has since issued a public apology to Maher Arar

and offered him $10.5 million in compensation for his ordeal. The Canadian commission's work has pressured the U.S. government to justify its rendition of Arar to Syria, whose human rights record is perhaps most difficult of all rendition destination countries to defend. The subsequent decision by the Bush administration to maintain Arar on a U.S. terrorism watch list despite his exoneration by the Canadian commission of inquiry created a public disagreement between the two countries.

Second, documentation work and advocacy led to the introduction of legislation in the U.S. Congress in 2005 to ban rendition to torture. Led by Senator Patrick Leahy (D-Vermont) and Representative Ed Markey (D-Massachusetts), these bills sought to rein in the Bush administration's rendition policy largely by prohibiting the use of diplomatic assurances from countries with records of torture. While they were not enacted, the bills helped call public attention to the problem, and the surrounding advocacy put the administration further on the defensive regarding its practice of rendering suspects to countries that use torture. In March 2007, Rep. Markey reintroduced his bill, the Torture Outsourcing Prevention Act (H.R. 1352). Advocates continue to press for legislative action to ban rendition in the current Congress.

Third, U.S.-based human rights groups engaged in direct advocacy with the UN Special Rapporteur on Torture, raising the issue of use of diplomatic assurances to circumvent Article 3 of the Convention Against Torture based on their careful documentation of rendition cases. The special rapporteur reexamined the previous positions of his office on diplomatic assurances in light of this new information and determined that diplomatic assurances are unreliable and ineffective in the protection against torture and ill treatment and therefore may not be used in cases where there are substantial grounds for believing the person would be at risk of torture if transferred.[44]

Torture and Cruel Treatment of Detainees

The question about whether detainees in U.S. custody were being subjected to torture or ill treatment during interrogation first surfaced in Afghanistan in late 2002. These reports were followed by the horrific photographs of abuse at Abu Ghraib prison in Iraq in April 2004, as well as allegations of abusive treatment at Guantánamo and of water-boarding of high-level al Qaeda suspects in secret CIA detention centers. As more details emerged, they began to paint a picture of interrogation techniques involving the use of stress positions, prolonged exposure to extremes of heat and cold, sleep deprivation, and use of dogs.

The detainees who were subjected to ill treatment were not U.S. citizens and were being held outside the United States, so the Bush administration took the position that they had no constitutional rights. The U.S. government still had to grapple with its obligations under international human rights law. In an August 2002 legal memorandum by the Justice Department's Office of Legal Counsel, the Bush administration twisted the international definition of torture beyond recognition, attempting to limit it only to acts that cause the severity of pain associated with, for example, death or organ

failure.[45] The memo also asserted that the president could lawfully order torture by using his authority as commander in chief to override laws prohibiting torture.[46] Government lawyers also reinterpreted Article 16 of the Convention Against Torture, which prohibits cruel, inhuman, or degrading treatment. They invented a new exception to Article 16, asserting that it did not apply to noncitizens held outside the United States. Because certain federal statutes prohibiting torture governed the conduct of the U.S. military anywhere in the world, the principal effect of this reinterpretation of U.S. human rights treaty obligations was to give the CIA a free hand in its interrogation of noncitizens detained abroad.

The classic human rights strategy of naming and shaming governments through the media was effective in putting the administration on the defensive on torture, in no small part because the Abu Ghraib photos themselves generated such intense media and public interest. U.S. social justice groups used a variety of media and public campaigning strategies to press the administration to change its policies, repudiate the Office of Legal Counsel torture memo, and reverse its reinterpretation of its obligation under Article 16 of the Convention Against Torture. At the end of 2004, the government rescinded the torture memo, replacing it with a less radically narrow definition of torture and withdrawing, but not repudiating, the previous memo's assertion of the commander in chief's power to override laws prohibiting torture. The media scrutiny created great diplomatic pressure on the U.S. government as well as significant domestic public concern that was reflected in congressional efforts, albeit limited, to engage in oversight of executive branch policy. Reflecting this concern and spurred by targeted advocacy from social justice groups, Senator John McCain led the movement in the Senate to pass legislation to prevent the use of cruel, inhuman, or degrading treatment on anyone in the custody or effective control of the U.S. government, resulting in the enactment of the Detainee Treatment Act of 2005. While this law contains a harmful provision that strips the federal courts of jurisdiction over habeas petitions from Guantánamo detainees, the Act is still significant for its strong statement against ill treatment of noncitizen detainees abroad and its refutation of the loophole devised by Bush administration lawyers in U.S. obligations under the Convention Against Torture.

Litigation proved to be a helpful tactic in contesting the government's policies on torture and interrogation. In *Hamdan v. Rumsfeld*, the Supreme Court held that the laws of war, specifically Common Article 3 to the Geneva Conventions, governed the treatment of detainees captured as part of the armed conflict with al Qaeda. Common Article 3 mandates humane treatment for all detainees, regardless of whether they are prisoners of war or unlawful combatants. Faced with this clear rejection of its position by the Supreme Court, the Bush administration relented and declared that Common Article 3 applied to all detainees in Defense Department custody. Although the July 7, 2006 directive by the Pentagon does not extend to detainees in CIA custody, it is still an extremely important acknowledgement by the Bush administration that detainees in military custody are entitled to humane treatment as a matter of law, and not simply as a matter of policy that can be altered at will.

Similarly, the ACLU filed a Freedom of Information Act (FOIA) lawsuit that had a profound impact on efforts to challenge the treatment of detainees. The lawsuit was successful in forcing the Bush administration to disclose information regarding its interrogation policies and practices. The disclosures were critical in the public advocacy strategies used by a wide variety of international human rights organizations and domestic social justice groups. The FOIA action and the resultant disclosure of information also facilitated media coverage of detainee abuse, monitoring by international human rights mechanisms, and the filing of international law claims against the government by torture victims in U.S. courts. On the issue of torture and ill treatment, there was a symbiotic relationship between more traditional litigation strategies and the documentation and denunciation strategies that are central to human rights advocacy.

A Catalyzing Effect on the Use of Human Rights Strategies

The Bush administration's treatment of terrorist suspects abroad had a catalyzing effect on the movement to apply international human rights to U.S. government conduct. At perhaps the most basic level, the Guantánamo detentions, rendition, and abusive interrogation policies were widely understood to implicate fundamental human rights—the prohibition on torture and cruel treatment, the right not to be imprisoned indefinitely without charge or—even worse—in secret and without access to the outside world. The use of international human rights language, standards, and mechanisms seemed a natural fit for these issues, which the U.S. public largely associated with repressive regimes elsewhere in the world. The fact that the U.S. government was now implementing policies similar to that of governments known for their human rights abuses further encouraged the use of international human rights advocacy strategies to challenge these new policies.

The first contested issue was the law itself. When the administration made various arguments under U.S. law to claim that its policies were lawful, such as the commander-in-chief authority to set aside criminal statutes, advocates pointed to international human rights standards as a way to reject these arguments. With the Bush administration asserting that U.S. forces or agents could lawfully engage in these practices, international human rights law became a vital source of both legal obligation and moral authority in defending the prohibition on torture and cruel treatment and on prolonged, arbitrary detention. Advocates used the international standards to expose the Bush administration's effort to circumvent its treaty obligations by reinterpreting international legal standards in ways that twisted the law and undermined core rights protections.

Human rights language was also helpful because these policies involved individuals who were widely considered unsympathetic by the U.S. public. Perhaps the most glaring example involved the detainees held in secret prisons operated by the CIA. Those detained included senior al Qaeda operatives such as Khaled Sheikh Mohamed and Ramsi Binalshib. Reports of their abuse in interrogation, including the alleged water-boarding of Mohamed—an interrogation tactic widely recognized as torture—often were met with only

fleeting public concern. On the contrary, advocacy groups that defended their rights often received strident responses from members of the public decrying their defense of individuals who, in their view, deserved the treatment they received because of alleged links to the September 11 attacks. Given the challenge of defending the rights of these detainees, the use of human rights standards enabled advocates to emphasize basic human dignity for all, even those who may have committed heinous crimes.

Using the language of human rights to frame the debate over U.S. treatment of terrorist suspects abroad also lent itself to a comparative analysis of U.S. practices on a global scale. This advocacy strategy proved useful in contextualizing U.S. practices in order to persuade policy makers and the public of the severity of the abuses and the importance of the rights at stake. Human rights groups drew on the State Department's Country Reports on Human Rights Practices to compare the Bush administration's conduct to that of other governments the administration itself had condemned for human rights violations, such as Burma, North Korea, and Saudi Arabia. This approach was quite effective in painting a clear picture of just how far the U.S. government had moved in the direction of policies that violated basic rights. At the same time, this strategy held the U.S. government up to the light of its own expectations as an effective global champion of human rights. As such, it was in some ways an internationalized version of the strategy employed by civil rights advocates in the 1950s, when they worked to end racial segregation by forcing the courts, the government, and ultimately the country to confront the contradiction between core U.S. values of freedom and equality before the law and the reality of racial discrimination.

A useful example of comparative global advocacy involved the response to Maher Arar's rendition to Syria. Arar, a dual Canadian-Syrian national, was transiting New York on his way home to Canada when he was apprehended by U.S. immigration officials and sent by the U.S. government to Syria, where he spent nine months in a tiny prison cell. After Canadian officials pressed for his release and he returned to Canada, Arar provided a detailed and credible account of his torture and abuse at the hands of his Syrian captors, including beatings with an electrical cord. The government of Syria has been widely condemned for its human rights abuses, including by the U.S. government. Advocates undercut the credibility of diplomatic assurances, the lynchpin of the Bush adminstration's rendition policy, by emphasizing that the administration had accepted Syria's word that it would not subject Arar to torture. Yet this was a regime that the U.S. government had itself criticized for its use of torture. Because Arar's case involved rendition to Syria, it demonstrated only too well that diplomatic assurances from governments that engage in torture could not be trusted.

International advocacy was another strategy used by U.S. groups to contest the Bush administration's detention policies. They engaged in direct advocacy with foreign governments and in public advocacy designed to create pressure on other governments to press the U.S. government on its human rights record. Some of this work was bilateral, such as efforts to engage the British government on the issue of military commissions at Guantánamo. Other times, U.S. social justice groups focused on multilateral advocacy

efforts, such as the annual UN Commission on Human Rights (for example, the ACLU sent representatives to the Commission's session in 2005, joining traditional attendees such as Human Rights Watch and Amnesty International), work with UN special rapporteurs and working groups to strengthen international human rights standards and pressure the U.S. government to change its policies, and successful advocacy to urge the UN to create a special mechanism on counterterrorism and human rights. Similarly, U.S. advocacy groups provided information on renditions to the European Parliament in its investigation into CIA renditions and secret detentions in and through Europe.

Challenges Posed by Detainees Abroad to Bringing Human Rights Home

Even as the handling of detainees abroad helped galvanize the use of international human rights strategies by U.S. social justice groups, it also complicated these efforts at the same time. The extraterritorial nature of U.S. conduct tended to reinforce the domestic-international divide not only on the part of the general public, but also on the part of the social justice movement in the United States, albeit with some important exceptions. Because the policies concerned noncitizens held abroad, either in a war zone or in connection with the September 11 attacks, many domestic rights advocates tended to defer to international human rights groups in contesting these policies. While the treatment of detainees was considered unlawful and deeply troubling, it seemed to many domestic social justice advocates far afield from their missions and the communities they served.

When the government implemented a counterterrorism policy inside the United States (such as the Patriot Act, detention of noncitizens on immigration grounds, and domestic surveillance), social justice groups could often make the connection between the human rights and civil rights agendas. When the abuses took place against non-U.S. citizens on foreign soil, however, the connection often became too attenuated for many advocates. They would of course condemn the practices, but would continue with their efforts to defend the rights of persons in the United States as part of their longstanding agendas. In this way, the advocacy community's response to the U.S. government's treatment of noncitizens abroad largely tracked the constitutional law-international law divide and reinforced the notion that civil rights are for U.S. citizens and human rights are for others.

The challenge of connecting the human rights and civil rights perspectives on these issues was perhaps most evident in the debate over the nomination of Alberto Gonzales to serve as Attorney General. The positions taken or not taken on the Gonzales nomination, and the reasons why, shed light on the this domestic-international divide, even as some progress was made in drawing links between U.S. conduct abroad and rights protection at home. One widely respected thinker on civil rights and criminal justice, speaking about potential Supreme Court nominees in early 2005, said that, in terms of civil rights, Gonzales was one of the better people who could be nominated, notwithstanding his record on torture. While, somewhat to the speaker's

surprise, the remark was met with laughter, it is nonetheless quite telling. Torture of foreign detainees abroad by the U.S. government was seen as tangential to the U.S. rights agenda.

A few voices from both international human rights groups and domestic civil liberties and civil rights groups attempted to make the connection. They argued forcefully in coalition meetings that the powers claimed and the rationale offered by the Bush administration for its treatment of foreign terrorist suspects could easily justify significant incursions on the rights of U.S. citizens in the United States, not only in areas related to counterterrorism, but also in areas traditionally of concern to the civil rights community. For example, the Mexican American Legal Defense and Educational Fund, a Latino civil rights organization, emphasized the link between international human rights and domestic rights in explaining why it could not support Gonzales' confirmation: "[Gonzales'] association with memoranda setting aside the application of international war conventions . . . raises concerns about whether he may set aside constitutionally guaranteed due process protections in various domestic circumstances."[47] Months later, after Gonzales was confirmed as Attorney General, this point was driven home by the revelation of the NSA's warrantless domestic surveillance of U.S. citizens, justified by the same notion of a commander-in-chief exception to the Constitution that had been used to cast aside laws against torture and inhumane treatment.

Moreover, these few advocates argued, the administration's radical expansion of executive power entailed a concomitant reduction in the power of the judiciary. Its assault on judicial review should be of great concern to the domestic civil rights movement, which had long relied on the courts as guarantors of minority rights. Courts are central to rights enforcement and to ensuring that rights not only exist on paper but also have real meaning in people's lives. The administration's efforts to weaken judicial review of government conduct and its expansive claims of executive power should be seen as a threat to rights guarantees, not only in the context of the current debate over detainees held abroad, but also for its easy transformation into a justification for eroding "traditional" civil rights at home. In an effort spearheaded by the Leadership Conference on Civil Rights, eighteen domestic advocacy groups, together with nine human rights organizations, sent a joint letter to the Senate Judiciary Committee in November 2004 expressing concerns about Gonzales and urging careful scrutiny of his nomination. In the end, however, only a small number of domestic social justice groups joined the international human rights groups in opposing the confirmation of Alberto Gonzales to serve as Attorney General.

The social justice community's response to the Gonzales nomination suggests that rights advocacy movement itself is not immune to the domestic-international dichotomy. To be sure, there are many factors that account for an organization's decision to express concerns about a cabinet-level nominee, and especially to oppose his or her confirmation. However, the discussion within the advocacy community on the Gonzales nomination suggests that it was easier to link a policy or practice to the domestic rights agenda when the victims of the abuses were U.S. citizens or the abuses occurred in the United States. Still, a potentially unifying issue is the radical expansion of executive

authority to act without meaningful judicial review, legislative oversight, or public scrutiny. While this issue presents perhaps the greatest threat to the rule of law in the United States, it may also hold great potential for building links between international human rights–based strategies and constitutional or civil rights frameworks for action to protect the rights of people in the United States. Defending checks and balances, and in particular the vital role of courts in ensuring that the government operates within the bounds of the law, may ultimately help connect U.S. conduct abroad in the struggle against terrorism with domestic policies and practices that infringe on basic rights. In so doing, it may help further the development of a U.S. human rights movement that contests U.S. conduct at home and abroad using both constitutional and international human rights frames.

LOOKING AHEAD

U.S. social justice advocates expanded their use of international human rights language, standards, and mechanisms in the months and years following the attacks of September 11, 2001 as a way of challenging U.S. counterterrorism policies that infringed on basic rights. These policies implicated rights—such as detention without charge and the prohibition on torture and cruel, inhuman, or degrading treatment—that were considered firmly established in U.S. law. The Bush administration misused immigration laws to violate the rights of the special interest detainees and crafted novel legal theories to circumvent its legal obligations not to engage in torture, inhumane treatment, or prolonged detention without charge. The need for effective strategies to combat the erosion of rights in the struggle against terrorism was acute. The effect of September 11 and its aftermath was to shift the focus of efforts to apply international human rights standards in the United States from economic, social, and cultural rights to civil and political rights, such as detention, due process, and torture and ill treatment. Only time will tell whether the post-September 11 climate will usher in a permanent shift toward civil and political rights.

Even as the Bush administration's counterterrorism policies helped catalyze efforts by domestic groups to hold the United States to its commitments under international human rights law, important challenges remain in bringing human rights home. Advocates continue to confront the government's expansive claims of executive authority and resistance to judicial review and public scrutiny. Moreover, the domestic-international and us-other divides have influenced the way many domestic social justice groups responded to the treatment of noncitizen detainees held abroad. The remoteness of the abuses reinforced the tendency to see such matters, however troubling, as international issues to be addressed by international human rights groups. This tendency had the effect of reinforcing the old fault lines in U.S. rights advocacy—civil rights were for people in the United States and human rights were for those in other countries.

Still, more than five years later, groups have begun to look at issues in new ways and to link abuses by the U.S. government at home and abroad in a

human rights frame. U.S.-based international human rights groups and a growing number of domestic social justice groups have found common cause, using human rights strategies in varied and increasing ways. Some advocates worked directly on challenging specific policies such as torture or habeas rights for Guantánamo detainees, while in other cases groups collaborated on broader rights advocacy, such as the UN human rights treaty body review of the United States. In the latter case, social justice groups worked to bridge the gap between international human rights and domestic civil rights by recognizing similarities between, for example, prisoner abuse at home and abroad. They collaborated to convince the UN Committee Against Torture to address both in its findings. Ongoing efforts by U.S. social justice groups to integrate international human rights into their legal and other advocacy work suggest that this trend will continue and that the skills and strategies they have developed to respond to the erosion of civil and political rights since September 2001 will leave a lasting mark on rights advocacy more broadly in the United States.

NOTES

*The views expressed in this chapter are the author's and do not necessarily reflect the views of the Open Society Institute.

1. The Bush administration has maintained that the U.S. Naval Base at Guantánamo Bay lies outside of U.S. territory in order to justify its policy of seeking to deny detainees access to U.S. courts and the protection of the U.S. Constitution. While the Supreme Court rejected the administration's argument regarding access to the courts in *Rasul v. Bush* in 2004, the question of whether those held at Guantánamo can claim constitutional rights remains at issue.

2. A federal court described the Justice Department's strategy as a "crude" approach to unearthing information to prevent another attack, even as it found the approach sufficiently rational to warrant judicial deference to the government's choice to target noncitizens in this way. The court summarized the government's approach as follows: "In the immediate aftermath of [the September 11 attacks], when the government had only the barest of information about the hijackers to aid its efforts to prevent further terrorist attacks, it determined to subject to greater scrutiny aliens who shared characteristics with the hijackers, such as violating their visas and national origin and/or religion." *Turkmen v. Ashcroft*, no. 02-CV-2307 (2006), p. 79. Available online at www.ccr-ny.org/v2/legal/September_11th/docs/TurkmenOpinion_61506.pdf.

3. CNN.com, "Bush Officials Defend Military Trials in Terror Cases," November 15, 2001. Available online at http://www.cnn.com/SPECIALS/2001/trade.center/invest.stories.11.html.

4. U.S. Department of Justice, Office of the Inspector General, "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks," (April 2003), pp. 20–21.

5. Human Rights Watch, "Presumption of Guilt: Abuses of Post September 11 Detainees," (August 2002), p. 13 (citing Human Rights Watch telephone interview with attorney Neil Weinrib, New York, NY, January 28, 2002).

6. Ibid, p. 14 (citing Human Rights Watch interview with Osama Sewilam, Hudson County Correctional Center, Kearny, NJ, February 6, 2002; and his attorney, Sohail Mohammed, Clifton, NJ, November 5, and November 19, 2001.

7. Office of the Inspector General, p. 196 (n. 4)

8. *Turkmen v. Ashcroft*, Class Action Complaint and Demand for Jury Trial, April 17, 2002, pp. 25, 30.

9. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

10. See 8 USC 1229 (a)(1)(E) and (b).

11. Human Right Watch, Presumption of Guilt, p. 35 (citing Human Rights Watch telephone interviews with Bah Isselou, FL, November 6, 2001, and Dennis Clare, his attorney, Louisville, KY, October 23, and October 31, 2001.)

12. Ibid, p. 40 (citing Human Rights Watch interview with Osama Salem, Hudson County Correctional Center, Kearny, NJ, February 6, 2002).

13. See generally David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: New Press, 2003) and Leti Volpp, "The Citizen and the Terrorist," *UCLA Law Review* 49 (June 2002).

14. The United States is not alone is facing this dichotomy between the rights of citizens and noncitizens. In the United Kingdom, the public outcry over detention without charge of British citizens at Guantánamo Bay stands in sharp contrast to the lack of widespread concern over detention of noncitizens of Arab and Muslim background held primarily at a British prison called Belmarsh. Similarly, Canadian citizens protested the U.S. rendition of Maher Arar, a Canadian citizen, to Syria, during which time he reports he was beaten with an electrical cord. They have not, however, expressed a similar level of concern about efforts by Canadian immigration authorities to deport Arab and Muslim noncitizens to countries where they may face torture.

15. See, for example, *Brown v. Board of Education*, 347 U.S. 483 (1954).

16. *Center for National Security Studies v. Department of Justice*, Complaint for Injunctive Relief, December 6, 2001.

17. The district court decision can be found at *Center for National Security Studies v. Department of Justice*, 215 F. Supp.2d 94 (D.D.C. 2002). The court of appeals ruling can be found at 331 F.3d 918 (D.C. Cir. 2003), and the denial of certiorari by the Supreme Court at 124 S.Ct. 1041 (2004).

18. *Detroit Free Press v. Ashcrot*, 303 F.3d 681 (6th Cir. 2002) (secret hearings unconstitutional); *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3rd Cir. 2002) (secret hearings not unconstitutional), *certdenied*, 123 S. Ct. 2215 (2003).

19. *Turkmen v. Ashcroft*, p. 79.

20. Arab American Institute, "Healing the Nation: The Arab American Experience After September 11" (2002).

21. Human Rights Watch, "Presumption of Guilt: Abuses of Post September 11 Detainees," August 2002.

22. Amnesty International USA, "Amnesty International's Concerns Regarding Post-September 11 Detentions in the USA," AI Index: AMR 51/044/2002, p. 14–16 (March 2002). Available online at www.aiusa.org/usacrisis/9.11.detentions2.pdf; ACLU, "America's Disappeared: Seeking International Justice for Immigrants Detained After September 11" (Jan. 2004); ACLU, "Worlds Apart: How Deporting Immigrants After 9/11 Tore Families Apart and Shattered Communities" (Dec. 2004).

23. U.S. Department of Justice, Office of the Inspector General, "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York", December 2003, p. 28.

24. Ibid, p. 45.

25. Ibid, p. 46.

26. U.S. Department of Justice, Office of the Inspector General, "Report to Congress on Implementation of Section 1001 of the USA Patriot Act," March 8, 2006, p. 14.

27. U.S. Department of Homeland Security, Memorandum for Michael J. Garcia, Assistant Secretary, U.S. Immigration and Customs Enforcement, and Robert Bonner, Commissioner, U.S. Customs and Border Protection, Guidance on ICE Implementation of Policy and Practice Changes Recommended by the Department of Justice Inspector General, March 30, 2004.

28. By the end of December 2003, only a handful of special interest detainees remained in detention. Nearly all had either been deported or released. There is little doubt, however, that the Bush administration would consider using these measures again in similar circumstances in the future. When Michael Chertoff, former head of the Criminal Division at the Justice Department during the September 11 investigation, came before the Senate as the nominee for Secretary of Homeland Security in February 2005, he vigorously defended the government's use of immigration laws to detain noncitizens and investigate them without probable cause of involvement in a crime. While he criticized the mistreatment of detainees, he defended the overarching policy, testifying that all detentions were in accordance with the law and that the problems identified by the Inspector General were ones of implementation that could be addressed through better training and improved databases.

29. The request for precautionary measures is available online at www.globalrights.org/site/DocServer/IACHRPrecautionaryMeasures.pdf?docID=125. At the time of the filing, Global Rights was known as the International Human Rights Law Group.

30. Commission on Human Rights (61st Session), Civil and Political Rights, including the Question of Torture and Detention—Opinions Adopted by the Working Group on Arbitrary Detention, pp. 67–70 E/CN.4/2005/6/Add.1 (November 2004).

31. ACLU, America's Disappeared, p. 4. (n. 23)

32. Human Rights Committee, 87th Session, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant—Concluding Observations of the Human Rights Committee: United States of America, CCPR/C/USA/CO/3/Rev.1 p. 6 para. 19 (Dec. 2006).

33. See Human Rights Watch, "Hatred in the Hallways: Violence Against Lesbian, Gay, Bisexual and Transgender Students in U.S. Schools" (2001) and Human Rights Watch, "Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards" (2000).

34. Order Dismissing Petition for Writ of Habeas Corpus and First Amended Petition for Writ of Habeas Corpus, *Coalition of Clergy v. Bush* (February 2002). Available online at www.cacd.uscourts.gov. Accessed February 11, 2007) (citing petitioners Memo 7:20–23).

35. UN Committee Against Torture, 36th Session, Conclusions and Recommendations of the Committee Against Torture: United States of America, CAT/C/USA/CO/2, May 18, 2006, p. 6

36. UN Commission on Human Rights, 62nd Session, Situation of Detainees at Guantánamo Bay, E/CN.4/2006/120, February 15, 2006, p. 38.

37. Ibid.

38. *Rasul v. Bush*, 542 U.S. 466 (2004)

39. *Hamdam v. Rumseld*, 126 S. Ct. 2749 (2006).

40. Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities," *Washington Post* (December 26, 2002), p. A01.

41. For more information, see Wendy Patten, Human Rights Watch Report to the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, May 17, 2005 (available online at www.ararcommission.ca/eng/12i.htm).

42. Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

43. El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007)

44. UNGA, 60th Sess. (Aug. 2005), A/60/316, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, p. 13.

45. Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, August 1, 2002, p. 13.

46. Ibid., pp. 31–39.

47. Mexican American Legal Defense and Educational Fund, "MALDEF Statement on the Likely Confirmation of White House Counsel Alberto Gonzales to the Position of United States Attorney General," January 19, 2005 (available online at www.maldef.org/news/press.cfm?ID=249).

CHAPTER 8

Bush Administration Noncompliance with the Prohibition on Torture and Cruel and Degrading Treatment

Kathryn Sikkink

INTRODUCTION

In recent years, U.S. executive branch actions have led to the perception that it is particularly hostile to international law, especially in the area of human rights and humanitarian law. A series of high-profile U.S. decisions to try to withdraw its signature from the ICC Statute and make side agreements to undermine its application and to declare that the Geneva Conventions don't apply to the case of the conflict in Afghanistan, and thus to detainees in Guantánamo, have given the impression of a country not committed to the application of international law.[1]

On some other human rights issues, U.S. policy continues to adhere to international legal standards and the United States has provided leadership on global human rights. Bush administration policy makers have been at the forefront of pressures for world attention and action to the crisis in Darfur, Sudan. Some scholars have argued that the United States was careful to adhere to the norms of noncombatant immunity in the major combat phase of the 2003 war in the Iraq, and that the number of civilian casualties was as a result relatively low, given the ambitious nature of the war which required coalition forces to take Iraqi cities.[2] At the same time, the Supreme Court has brought U.S. practice more in line with international law on the death penalty by prohibiting the death penalty for juveniles and for mentally retarded individuals. Finally, on a whole series of issues, including women's rights and children's rights, the United States is generally in compliance with international law, even in cases where the Senate has failed to ratify the relevant treaties. So, for example, the United States has not ratified the Convention on the Elimination of All Forms of Discrimination against Women, even though it is substantially in compliance with most of its provisions.[3]

These are the mixed signals that the United States is sending to the world on human rights. But of the signals we send to the world, none are as important as our own human rights practices. And of the recent signals we have sent, none is as grave as U.S. practice of torture and cruel and degrading treatment in Abu Ghraib, Guantánamo, and Afghanistan. The United States was substantially in compliance with the prohibition of torture until late summer 2002, when the first known cases of ill treatment of detainees at Guantánamo occurred.[4] Starting in 2002 the United States has been in violation of the prohibition on torture and cruel and degrading treatment. In a 2004 memo, however, the Justice Department signaled a retreat from the most egregious forms of noncompliance. The McCain Amendment to the Detainee Treatment Act of 2005 prohibited cruel, inhuman, and degrading treatment of any individual in custody of the U.S. government. Finally, after the Supreme Court's decision in the *Hamdan v. Rumsfeld* case, in July 2006 the Department of Defense mandated that their policies and practice comply with Common Article 3 of the Geneva Convention, which calls for humane treatment of all detainees. The executive, however, still claims the right to engage in "extraordinary rendition" that is, the practice of turning U.S. detainees over to other states known to use torture, a practice in violation of international legal obligations. This chapter will explore why the United States first violated international law on torture and then eventually brought policy back in greater compliance with international and law.

Scholars of international relations and global civil society have long said that the real test of international law and the power of transnational human rights advocates will be their ability to limit the action of the most powerful states. In the short term, this case illustrates a central point of realist theory of international politics: Powerful states are able to disregard international rules at will. In the longer term, however, this case shows that even the United States is not above the reach of international human rights law that it itself helped build.

The individuals who instigated the policy of noncompliance with the prohibition on torture made some grave errors in perception and judgment. They have misread the political realities of the current world and in doing so have put themselves, the victims of their policies, and the legitimacy of the U.S. government at risk. Most tragically, their misjudgment had dire human consequences, not only for the victims of torture, but also for the young soldiers who were its direct perpetrators.

One of the basic tenets of the neoconservatives in the Bush administration is a disdain and skepticism for international institutions and international law.[5] But their ideological bias against the United Nations and international law led them to misunderstand the very nature of modern human rights law and particularly the law prohibiting torture. They believed it was voluntary and malleable. Second, they also discounted the possibility of significant international and domestic opposition to their policy, resistance that eventually made the policy so politically costly that it had to be altered.

International law prohibits torture absolutely. Under no circumstances may states engage in torture. In 1980, a U.S. federal court judge summed up the customary international law prohibition against torture, declaring

that the "the torturer has become—like the pirate and slave trader before him—*hostis humani generic,* an enemy of all mankind."[6] The Torture Convention also grants universal jurisdiction in the case of torture. That is, under the treaty any state has jurisdiction over a case of torture if the alleged torturer is present on its territory. Universal jurisdiction provides for a system of decentralized enforcement in any national judicial system against individuals who commit or instigate torture.[7] In other words, any country that has ratified the Torture Convention could in principle indict and try U.S. individuals reputed to be responsible for torture in Iraq or Guantánamo Bay. The British House of Lords recognized the universal jurisdiction in the case of torture when it allowed extradition proceedings against General Augusto Pinochet to go forward for torture that occurred in Chile during the Pinochet regime (1973–1990).[8] Universal jurisdiction for torture and the high-profile use of the universal jurisdiction in a handful of cases (such as the Pinochet case) have made it clear that some enforcement of the prohibition on torture is possible. U.S. policy makers have disregarded this possibility of decentralized international enforcement for the violation on the prohibition on torture.

By misunderstanding these political realities, the Bush administration gave the wrong advice and signals to operatives in the field. They led them to believe that they were operating under the cover of law when they were not. They led them to believe that the power of the U.S. government could protect them from retribution. The U.S. government can and will certainly try to protect individuals involved in torture from retribution, and it will succeed in many cases. But it is unlikely to succeed in all cases. In other words, the realists engaged in wishful thinking. They described a world as they thought it ought to be, not as it actually is, and in doing so, they put themselves, their victims, and the very legitimacy of the U.S. government in harm's way.

REALISTS, NEOCONSERVATIVES, AND INTERNATIONAL LAW

The foreign policy agenda of the Bush administration was guided by neoconservative intellectuals, often in reaction to what they perceived to be the failings of the realists such as Henry Kissinger. Neoconservatives critiqued realists for being inattentive to the internal politics of states, and in particular, for failing to be concerned with democracy and human rights. Also, contrary to the realists, neoconservatives believed that U.S. power could and should be used for moral purposes.[9] Realists on the other hand, believe that a "prudent" understanding of self-interest rather than morality should drive foreign policy.[10]

What these differences between the realists and the neoconservatives has tended to obscure, however, is that both realists and neoconservatives shared a common view about international law and international institutions. Both believe that international law is not an effective legal system and cannot be enforced against the wishes of a hegemon. Realists argue that because there is no central authority in the international system to enforce international law, enforcement will depend on political considerations and the actual

distribution of power in the international system. Thus, they conclude, international law exists and is complied with only when it is in the interests of the most powerful states to do so. Neoconservatives basically share these beliefs, and add to them an even stronger ideological bias against the United Nations, international law, and international institutions such as the International Criminal Court (ICC). Realists and neoconservatives believe that a great power can violate international legal obligations without significant cost. Realism leads its adherents to believe that while international law may be useful in dealing with other weaker countries, it does not bind hegemons, especially when their security is at stake. Thus, after 9/11, the United States believed that it did not need to heed international law and limit its discretion in interrogations. This position was recognized by an official involved in formulating Bush administration policy on detainees. "The essence of the argument was, the official said, 'it applies to them, but it doesn't apply to us.'"[11] A former CIA lawyer said, "There are hardly any rules for illegal enemy combatants. It's the law of the jungle. And right now, we happen to be the strongest animal."[12]

Neoconservatives in particular also believe in American exceptionalism, "the idea that America could use its power in instances where others could not because it was more virtuous than other countries."[13] Because neoconservatives see the United States as exceptional and benevolent, they did not believe that international law and international institutions could or should be used to constrain the United States. These ideas held by neoconservatives are an important part of the explanation for why the Bush administration felt able to violate international law on this issue.

In contrast to this realist and neoconservative view of international law, constructivist theories explore the role of ideas and norms in effecting political change. Constructivists believe that in today's world international norms and law, international institutions, and global civil society are part of the political realities of the modern world. Modern constructivists know that not all law is equal—some law is stronger than others. The prohibition against torture, however, is a clear example of strong law. Even for this strong law to be effective—it has to be backed up by some form of sanctions and implementation. Sanctions sometimes come from international bodies, but there are also more decentralized forms of sanctions, through domestic courts, for example. Global civil society has been very active is searching out tactics that will impose some form of sanctions of violators of international human rights standards. Constructivists pay attention to key developments in the political realities of the world that the realists and neoconservatives miss because they believe that power only resides with wealthy and militarily strong states.

Constructivism also reminds us that the key concept in the realist analysis—"national interest" isn't as obvious as the realists would have us believe. Our very understandings of national interest are about highly contested beliefs about who we are as a nation, and what constitutes our interests. Many of the arguments in the debate over torture in the United States revolve around contested notions of what constitutes the national interest. The realists acted as though the national interest was clear, but they encountered significant resistance,

not just from civil society but from within the security apparatus of the U.S. government itself.

U.S. COMPLIANCE WITH THE PROHIBITION ON TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT

A definition of compliance needs to include both what states do (behavior) but also what they say (are they aware of the norm and use it as justification for behavior).[14] Thus the examination of U.S. compliance with the prohibition on torture needs to look both at U.S. behavior, and U.S. explanations for and justifications of its behavior. What has made U.S. practice so unsettling is the *explicit* quality to its noncompliance. Not only was U.S. behavior not in conformity with the rules, but the justification of state officials made it clear that they didn't believe they were bound by international law. This explicit policy noncompliance takes the form either of direct repudiation of the law, or the form of justifying actions with such weak legal arguments that they must be considered "cheap talk," a rhetorical fig leaf of a sort to justify noncompliance with the law. In the case of the U.S. decision not to apply the Geneva Conventions to the conflict in Afghanistan, for example, even the legal advisor in the Bush State Department immediately signaled that the position was "untenable," "incorrect," and "confused."[15]

There are many reasons why we might expect a powerful state like the United States not to be in compliance with international law. As the only hegemon in the international system, it is difficult for other states to sanction the United States for flouting the law. The United States also has particularly difficult treaty ratification rules, and an ideological tradition of isolationism and skepticism about international institutions. As a federal system and a common law system, the United States may face additional difficulties with ratifying and implementing international law.[16]

But there are also reasons to believe that the United States might willingly comply with international human rights law. The United States also has a long liberal tradition of concern with human rights, a democratic regime that allows for checks and balances by the judicial and legislative branch on excesses of executive power, and a strong civil society, including many nongovernmental organizations working on human rights and civil rights. Oona Hathaway has argued democracies with these characteristics are more likely to face internal pressure to abide by their international treaty commitments, including lobbying, media exposure, and litigation. If these countries fail to comply, they are more likely to face sanctions from their domestic constituencies rather than from the international community. Thus these internal processes should lead democracies to have higher levels of compliance with their commitments.[17]

First, it is important to note that human rights change never comes easily or quickly in any country. Previous studies of human rights change in a wide range of countries around the world found that virtually all countries initially resist and reject international and domestic criticism and pressure for change

in their human rights violations.[18] For those who believe in "American exceptionalism," part of the story here is that the United States was not exceptional in its early reactions to international and domestic criticism and pressures. Similar to other cases in the world, the Bush administration first denied that any human rights violations were occurring, and tried to discredit those individuals and groups that brought attention the issue of torture.

Both international and internal pressures were brought to bear on the Bush administration and eventually did play a role in leading to some changes in policy. Internal pressures were particularly important, especially pressures from the judicial branch, and belatedly, from the U.S. Congress. Opposition also came from within the U.S. military itself, especially the legal professionals within the military. This kind of opposition from within the military is unprecedented and unique. No studies of human rights change in countries around the world have previously identified that military itself as a force for compliance with human rights law.

Any evaluation of compliance with the Torture Convention must look at state policies with regard to torture, the actual occurrence of torture, and state responses to reported incidents of torture. Policy change with regard to torture and cruel and degrading treatment did not occur voluntarily within the Bush administration, or as a result of confidential internal critiques. Rather it changed its policy as a result of relatively high-profile domestic opposition, particularly from the U.S. Supreme Court.

While there is evidence that the United States condoned torture in U.S. training programs in the past, there are important differences between the past and present practices and justifications.[19] Prior to 2002, high-level policy makers did not explicitly justify practices that can be considered torture and cruel, inhuman, and degrading treatment. In the 1970s, when members of Congress learned of accusations that U.S. personnel were complicit with torture in Brazil and Uruguay through an AID program called the Public Safety Program the executive agreed to close down the program.[20] In the 1990s, when critics found training manuals used at the Army School of the Americas that advocated the use of the torture, the Pentagon decided to discontinue use of the manuals.[21] But the Army did not discipline any of the individuals responsible for writing or teaching the lesson plans, nor were any students retrained.

Although the main pressure on the United States began after the publication of the photos of Abu Ghraib prison in April 2004, the use of torture and cruel and degrading treatment began in the detention center in Guantánamo Bay in 2002. Many official reports and secondary literature document the widespread practices of torture and cruel and degrading treatment directly by U.S. troops and personnel.[22] Perhaps never before in the history of debates over torture and cruel and degrading treatment has so much information been available about the different techniques used by specific individuals and units. Much of this information comes from sources within the U.S. government, but there are also numerous reports from international nongovernmental organizations.

When the photos were first released from Abu Ghraib prison, officials characterized it as isolated aberrant acts by a few low-level soldiers during a

short time period. However, since that time, reports from the Red Cross and a barrage of leaked reports from within the U.S. government reveal that the U.S. practice of torture and inhuman and degrading treatment is far more widespread and long-standing, occurring not only in Abu Ghraib, but also in other detention centers in Iraq, in Afghanistan, and in Guantánamo. A widespread practice in multiple locations implies an institutional policy, not human error.[23] The International Committee of the Red Cross (ICRC) visited Guantánamo in June 2004, and reported in a confidential report later made public that the military there had used coercion techniques that were "tantamount to torture." Specifically, the ICRC said its investigators found a system of "humiliating acts, solitary confinement, temperature extremes, use of forced positions." "The construction of such a system, whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture."[24] Continuing revelations of reports by FBI agents reveal ongoing use of practices that the FBI deems unacceptable, such as keeping detainees chained in uncomfortable positions for up to twenty-four hours.[25] There are still debates about exactly which techniques constitute torture and which constitute inhuman and degrading treatment, or about what the Geneva Conventions mean when they refer to humane treatment. But there is no doubt that the United States was not in compliance with its international legal obligations with regard to humane treatment at least from 2002 to 2006.

Bush administration officials began offering explicit justifications and authorization for torture to military and intelligence agencies, in a series of now-public legal memos and reports prepared by the Department of Justice and the Defense Department between August 2002 and September 2003. These memos offered general signals about the need for and acceptability of harsher interrogation techniques sent from high levels of the administration. These general signals were then "translated" on the ground into a wide range of techniques, some explicitly approved from above and many not explicitly approved from above. By circulating the memos and reports but not issuing executive orders, the top level of the administration was able to set policy while still retaining legal deniability about accountability for the effects of that policy.

In these memos and documents, the Bush administration made three main arguments that helped justify and authorize torture and cruel and degrading treatment. The first was the argument that the Geneva Conventions did not apply to the conflict in Afghanistan, and thus the detainees from that conflict would not be considered prisoners of war, but rather illegal combatants. This decision is problematic with regard to the laws of war, but it carried with it implications that opened the door to torture. The Geneva Conventions absolutely protect any detainee from torture. Thus, a decision that the Geneva Conventions don't apply to a conflict could be understood as saying that torture is therefore permitted. That some U.S. soldiers read these as signals is clear from some of their comments and testimony. "One member of the 377th Company said that the fact that prisoners in Afghanistan had been labeled 'enemy combatants' not subject to the Geneva Conventions had contributed to an unhealthy attitude in the detention center." "We were pretty

much told that they were nobodies, that they were just enemy combatants," he said. "I think that giving them the distinction of soldier would have changed our attitude toward them."[26] Military intelligence officials and interrogators at Guantánamo said that "when new interrogators arrived they were told they had great flexibility in extracting information from detainees because the Geneva Conventions did not apply at the base."[27]

The second argument Bush administration officials made was about the definition of torture. Rather than actually say that they supported the use of torture, they made strenuous efforts to reinterpret the definitions of torture and to redefine our obligations under the Geneva Conventions and the Torture Convention so that the United States could use the interrogation techniques it wanted. The Bybee memorandum of August 1, 2002, written at the request of Alberto Gonzales, attempts to use a definition of torture that is outside any standard definition. First, it suggested that "physical pain amounting to torture must be the equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of body function, or even death." Nowhere in the history of the drafting of the Torture Convention nor in U.S. legislation implementing the Convention does the idea appear that to be counted as torture, the pain must be equivalent to death or organ failure. Second, the Bybee memorandum said that in order to qualify for the definition of torture, "the infliction of such pain must be the defendant's precise objective."[28] The Bybee memorandum attempts to create such a narrow definition of torture that only the sadist (i.e., for whom pain is the "precise objective") that engages in a practice resulting in pain equivalent to death or organ failure is a torturer. In other words, the memo creates an absurd and unsustainable definition, a definition contrary to the language of the law and common sense.

The third argument was about the president's ability to order torture in certain circumstances. The memos relied on a controversial constitutional position about the president's role as commander in chief of the armed forces to argue that the president had the authority to supercede international and domestic law and to authorize torture. Again, this runs contrary to the plain language of the Torture Convention, which says that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture," and "[a]n order from a superior officer or public authority may not be invoked as a justification for torture."

Because these three arguments were so central to the government's case, one way to trace progress (or lack thereof) on U.S. compliance with the prohibition on torture is to trace the history of these three arguments or justifications: 1) non-applicability of the Geneva Conventions; 2) unconventional definitions of torture; and 3) the president's authority to authorize torture.

Bush administration policy makers decided to ignore the fact that the United States had clearly accepted a strong international legal obligation not to torture and had implemented that obligation in our domestic law. The United States had ratified two treaties that clearly state its international legal obligation not to engage in torture and inhuman and degrading treatment under any circumstances. Not only that, but the United States was deeply

involved in the process of drafting these treaties. U.S. delegates worked to make the treaty more precise and enforceable, and clearly supported treaty provisions on universal jurisdiction with regard to torture.[29] The administration of George H. Bush submitted the treaty to the Senate in 1990 and supported ratification. A bipartisan coalition in the Senate, including conservative Senator Jesse Helms, worked to ensure that the Senate gave its advice and consent for ratification. The Senate Foreign Relations Committee voted 10-0 to report the Convention favorably to the full Senate. When she spoke in support of ratification, Senator Nancy Kassenbaum, Republican from Kansas, said "I believe we have nothing to fear about our compliance with the terms of the treaty. Torture is simply not accepted in this country, and never will be."[30]

Despite this history, the memos written by Bush administration lawyers justifying the use of harsh interrogation techniques reveal no principled commitment to the prohibition on torture. The concern throughout is with how to protect U.S. officials from possible future prosecution, not about how to adhere to the principles of the law. The memos read like the defense attorney briefs for a client accused of torture, rather than expert advice on the generally accepted understandings about international law. It was not until twenty-nine months after the first memo, in a memo prepared explicitly for public consumption just before the confirmation hearing for Alberto Gonzales as attorney general, does the government state: "Torture is abhorrent both to American Law and values and to international norms."[31]

OPPOSITION TO BUSH ADMINISTRATION NONCOMPLIANCE WITH INTERNATIONAL AND DOMESTIC LAW

Opposition from Within the Executive Branch

The Bush administration could not persuade key legal advisors in its own State Department nor many legal experts within the branches of the U.S. military of its interpretations. Opposition to the decision that the Geneva Conventions didn't apply in Afghanistan and to the revision of interrogation techniques surfaced early. One day after the memorandum by Gonzales recommending that the administration not apply POW status under the Geneva Conventions to captured al Qaeda or Taliban fighters, Secretary of State Colin Powell wrote to Gonzales urging in the strongest terms that the policy be reconsidered. Powell argued that:

> It will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the rule of law for our troops, both in this specific conflict and in general. It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy. It will undermine public support among critical allies, making military cooperation more difficult to sustain.[32]

Despite Powell's misgivings, the Bush administration determined to move ahead with the policy on the Geneva Conventions in the face of the opposition

of the State Department. The State Department legal counsel made another effort to oppose it, in which he again echoes Powell's protest. In clear and firm language, he says that a decision to apply the Geneva Conventions to the conflict in Afghanistan would have been consistent with the "plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years . . . [and] the positions of every other party to the Conventions."[33]

Lawyers within the Bush administration did not only oppose the policy but warned of the possible legal consequences that administration officials could face if they insisted on these policies. In a memo dated January 11, 2002, State Department legal counsel William Taft IV wrote that "if the U.S. took the war on terrorism outside the Geneva Conventions, not only could U.S. soldiers be denied the protections of the Conventions—and therefore be prosecuted for crimes, including murder—but President Bush could be accused of a 'grave breach' by other countries, and prosecuted for war crimes." Taft also sent a copy of the memo to Gonzales, hoping it would reach Bush.[34] Alberto Mora, general counsel of the Navy, also warned his superiors of the possibilities of trials if they continued to disregard the prohibition on torture and cruel and degrading treatment, but his warnings were disregarded.[35] The Bush administration did not use these warnings as a reason to reconsider its policies. But this may explain why the following memos read more like a defense lawyer's briefs already defending their client against the charge of torture.

Other individuals associated with the military accused members of the Bush administration of "endangering troops," "undermining the war effort," "encouraging reprisals," or "lowering moral," not to mention "losing the high moral ground." Military sources criticized the administration for failing to ask the advice of the military's highest legal authorities, the Judge Advocates General (JAGs) of the various services.[36] Some retired military generals and admirals were so concerned about the positions taken by Gonzales that they wrote an open letter to the Judiciary Committee considering the nomination of Gonzales for attorney general. In it, they argued that military law has been ignored.

> The August 1, 2002 Justice Department memo analyzing the law on interrogation references health care administration law more than five times, but never once cites the U.S. Army Field Manual on interrogation . . . The Army Field Manual was the product of decades of experience—experience that had shown, among other things that such interrogation methods produce unreliable results and often impede further intelligence collection. Discounting the Manual's wisdom on this central point shows a disturbing disregard for the decades of hard-won knowledge of the professional American military.[37]

According to Brig. General Cullen, the White House and Justice Department memos created the policy which in turn "spawned" torture and abuse. The Army Field Manual has sixteen approved methods of interrogation.

> Mr. Gonzales embarked on a campaign to justify expanding those approved methods into areas that at least anyone would say are inhuman and degrading treatment. . . . when you are on that level and you speak you're carrying a lot

> more weight, you are sending signals to the field that have enormous implications. It is development of policy by winks and nods, and that is the last thing you want to do at that level.[38]

In the minds of some military legal experts, the problem was exactly that "political lawyers" not military lawyers, were in charge of this policy, and they cut military lawyers with operational experience, but also a central understanding of what they call "complex security interests," out of the policy formulation process. Retired Brig. General Cullen argued that the decision making process was "clearly stacked and the military lawyers were outvoted."[39]

Members of the military also argued that torture is ineffective. General Hoar argued that torture may be effective in the short term, but in the long term it undermines the war effort. "Nowhere was this more graphic than the French counter-insurgency operations in Algeria, where torture was used in extracting timely intelligence from recently captured insurgents. This practice may have helped the French in winning the Battle of Algiers, but in the process, the French army lost its honor and ultimately lost the war . . . "[40] People within the FBI also argued that torture was ineffective. Investigative journalist Jane Mayer said that "the fiercest internal resistance to this thinking has come from people who have been directly involved in interrogation, including veteran F.B.I. and C.I.A. agents. Their concerns are practical as well as ideological. Years of experience in interrogation have led them to doubt the effectiveness of physical coercion as a means of extracting reliable information."[41] The FBI complaints about harsh interrogation practices began in December 2002, according to released internal documents. In late 2003, an agent complained that "these tactics have produced no intelligence of threat neutralization nature to date."[42]

Opposition from International and Domestic Human Rights Groups

International and domestic human rights organizations responded almost immediately to evidence of U.S. noncompliance with the prohibition of torture and cruel and degrading treatment, and their positions were well reflected in key print media outlets. Transnational advocacy networks in the area of human rights emerged and became especially significant in the 1970s and 1980s.[43] They have continued to grow since that time. Initially the transnational advocacy networks did not work extensively on human right practices within the United States. One exception was Amnesty International, that had long had adopted prisoners of conscience in the United States, and had been especially active working on the issue of the death penalty. Although many groups like Human Rights Watch or Human Rights First are based in the United States, in the past they focused their efforts on international human rights issues and left the domestic human rights scene to civil rights organizations such as the American Civil Liberties Union or the NAACP. By the 1990s, however, this had become an untenable political position, as other NGO allies within the networks frequently asked why U.S.-based groups did not work on the human rights practices of their own government. In the

1990s, Human Rights Watch significantly increased its work on U.S. human rights and humanitarian law violations and in 2001 created its U.S. program, and many other human rights organization followed suit.

Nevertheless, U.S. violations of human rights in the wake of the 9/11 attacks led to a dramatic increase in the activities of the transnational human rights networks with regard to the United States. The emerging revelations of torture and degrading treatment at Abu Ghraib and elsewhere created more consternation and effort. Never before have transnational human rights advocacy organizations and networks turned their spotlight on U.S. practices as they have today. As with advocacy network work in the past, these efforts have been supported by private foundations and individual funders.

Human rights advocacy groups for the most part have not organized major mobilization in the streets, nor have they been able to persuade large number of U.S. voters to care enough about their issues. They have been very active in producing reports, publicizing their reports, lobbying Congress, and in some cases, filing lawsuits against Bush administration officials and requesting documents through the FOIA to document their charges. As with all campaigns by networks, their potential for effectiveness comes in the long term, not the short term. It is also enhanced to the degree that they are able to build coalitions outside and inside of governments. In the United States, the traditional international human rights groups have formed coalitions with the civil liberties groups such as the ACLU, social justice groups, or the scores of immigration law activists to carry forward their work. As Wendy Patten points out in her chapter in this volume, these domestic groups working alongside U.S.-based international human rights groups became more open to using the "language, standards, and mechanisms" of international human rights in their work.[44] They have also worked with people in government and the media. So, for example, the many leaks and releases of documents related to torture have been the result of dissatisfaction of individuals within government and the concerted efforts of groups outside of government. Most documents have been made available as a result of FOIA requests that the ACLU has made in reference to their lawsuits against the government. When retired military lawyers became increasingly disenchanted with the Bush administration policy on interrogations and the laws of war, it is interesting that they reached out to colleagues in the human rights organization in the United States, and collaborated on some joint activities.

Organizations including the American Civil Liberties Union, Human Rights First, and the Center for Constitutional Rights have filed lawsuits against Bush administration officials for human rights violations in the war against terror. Although the lawsuits filed by national and international human rights organizations against Bush administration officials have not yet achieved any judicial victories, they have communicated the importance of holding state officials even in powerful countries accountable for past human rights violations. In the past twenty years, there has been a dramatic increase in the world of domestic, foreign, and international trials for human rights violations.[45] It seems likely that this is not a passing trend but a deep structural shift toward accountability for past human rights. Many of these trials, perhaps the majority of them, are not of the actual soldiers who pulled the trigger or applied the

electric shocks, but of one of their superior officers in the chain of command for bearing responsibility for the actions of his subordinates. As a result, while in the past, most perpetrators of gross human rights violations could expect never to face any consequences for their actions, today, it is more likely that some perpetrators may face some kind of judicial process.

Foreign lawsuits against Bush administration officials for torture could prosper eventually because universal jurisdiction is written into the language of the Torture Convention. The United States ratified the treaty, and despite numerous reservations, understandings, and declaration, it did not reserve against universal jurisdiction. The abuses happened well after U.S. ratification. Thus the criteria used by the Law Lords in the Pinochet case are satisfied. In principle, any ratifying country could exercise universal jurisdiction over U.S. citizens in the case of torture. Some judicial proceedings against Bush administration officials have already been initiated in Germany. While many of these judicial processes will eventually stall or lead to dismissals or acquittals for political or legal reasons, at a minimum, they can endanger the peace of mind, financial security, or reputation of suspected perpetrators. In the next few decades, former Secretary of Defense Donald Rumsfeld and others who advocated the policy of explicit noncompliance with the Geneva Conventions and the Torture Convention at a minimum may find themselves in a difficult position when they travel abroad. Before they initiate any international trip they may need to make inquires about the state of trials in any country where they intend to travel.

Other International Pressures

International pressure in opposition to Bush administration policy on torture and cruel and degrading treatment has presented an inconvenience, at a minimum, to the fulfillment of other Bush administration policy goals. A *Washington Post* article in November 2005 reported that the CIA was holding detainees in secret prisons in Eastern Europe led to an uproar in Europe and to an investigation by the EU of secret detention centers in Europe and cooperation of European governments with the U.S. policy of extraordinary rendition. Despite such criticisms, Condoleezza Rice, traveling in Europe in December 2005, maintained a tone of denial by chastising European leaders for their criticisms and claiming that interrogation of these suspects helped "save European lives."[46] Rice simultaneously argued that "at no time did the United States agree to inhumane acts or torture," and continued to state that "terrorists are not covered by the Geneva Conventions."[47]

In February 2006, a UN-appointed independent panel released a report calling on the United States to close the prison in Guantánamo, where it claimed that U.S. personnel engaged in torture, detained people arbitrarily, and denied fair trials. In May 2006, the UN Committee Against Torture was critical of U.S. policy, and urged the United States to close down the Guantánamo Bay prison and to end the use of secret overseas detention centers. The United States was not totally indifferent to this body, as witnessed by the size of its delegation to the meeting, and the size of its supplemental report. While this suggests that the Bush administration was prepared to engage with

its international critics, in the meeting, the U.S. government did not move away from its most controversial positions on torture and cruel and degrading treatment.

Opposition from the U.S. Judicial Branch

The most effective opposition to Bush administration policies has come from within the U.S. Judicial Branch, and in particular from the U.S. Supreme Court. In a series of path-breaking decisions, the Supreme Court has upheld the rights of detainees to humane treatment and to the protections offered by the rule of law, both domestic and international. In June 2006, in the case *Hamdan v. Rumsfeld*, the Supreme Court gave a major rebuke to the Bush administration policy and legal interpretations. The Court ruled that the military commission system set up to try accused war criminals in Guantánamo Bay violated both U.S. laws and the Geneva Conventions. In what is now considered a landmark decision about the limits of executive power, the Court said that even during war, the president must comply not only with U.S. laws as established by Congress but also with international law.[48] In this sense, the Court directly contradicted the legal theories put forward by President Bush's legal advisors that the president has broad discretion to make decisions on war-related issues, which in turn they used to claim the president could authorize torture. In this sense, although *Hamdan* did not directly address torture, it addressed the legal claims of executive authority upon which the torture arguments had been based.

The development and evolution of the *Hamdan* case reveal the internal pressures that governments in democracies face to comply with international law. First, the Supreme Court acted as a true check on executive power. Second, both the military and civil society were actively involved in the case: Hamdan was successfully defended by his military-appointed defense lawyer, in cooperation with volunteer lawyers from both the academic world and private law firms, and some forty amicus curie briefs were filed in support of the Hamdan brief by human rights organizations, retired military officers, diplomats, and legal scholars.[49]

BUSH ADMINISTRATION RESPONSES TO INTERNAL AND EXTERNAL PRESSURES

Initially the Bush administration did not respond to the internal or international opposition to its policies. The worldview of the neoconservative was initially confirmed. There were apparently few domestic or international political costs to this position. The large negative publicity in the release of the Abu Ghraib photos was not sufficient to end the practices. The American public did not demand more accountability for the use of torture. Despite the fact that the graphic revelations of torture came in an election year, torture did not become a campaign issue.

Not only was the administration not deterred by domestic and international criticism of its practices, but it promoted many of the individuals

most associated with noncompliance of the prohibition on torture. Mr. Bybee, who wrote the first controversial "torture" memo was named to the Ninth Circuit Court of Appeals; White House Legal Counsel Alberto Gonzales, who solicited and approved the Bybee memorandum, was nominated and confirmed for the attorney general; and Michael Chertoff, who as head of the Criminal Division of the Justice Department advised the CIA on the legality of coercive interrogation methods, was selected by Bush to be the new secretary of homeland security.[50] John C. Yoo, one of the authors of controversial Bush administration memos on the Geneva Conventions, said that President Bush's victory in the 2004 election, along with the lack of strong opposition to the Gonzales confirmation, was "proof that the debate is over." He claimed, "The issue is dying out. The public has had its referendum."[51]

But, contrary to Yoo's prediction, the issue did not die out. In anticipation of the confirmation hearings of Gonzales, the Justice Department issued a memo that began to retreat from the Bush administration's most egregious position on torture. Some members of Congress have criticized Gonzales for his position on torture, and the administration wished to defuse any issue that might interfere with his confirmation, and avoid a possible public embarrassment or reversal.

The Justice Department memo of December 30, 2004 "withdraws" and supercedes the August 2002 memorandum and modifies important aspects of its legal analysis. The new memo says "we disagree with statements in the August 2002 Memorandum limiting 'severe' pain under the statute to 'excruciating and agonizing' pain, 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.'" The new memo rejects the earlier assertion that torture only occurs if the interrogator had the specific intent to cause pain. "We do not believe it is useful to try to define the precise meaning of 'specific intent' . . . In light of the President's directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture." And finally, though the new memo does not reject the president's authority to order torture, it says it is "unnecessary" to consider that issue because it would be "inconsistent with the President's unequivocal directive that United States personnel not engage in torture."[52] This is still problematic because it continues to ignore the legal obligation of the United States not to engage in torture under any conditions. Nevertheless, this new memo on torture was recognition that the administration had not been able to unilaterally redefine torture. The definitional attempts had been costly, or were going to be costly to the confirmation of the attorney general, and thus some had to be put to rest. As retired Rear Admiral John Hutson recognized during the Gonzalez hearing, the Justice Department memo was not an exoneration of Judge Gonzales, but an indictment. "It's an acknowledgment of error." Thus, by late 2004, U.S. policy had been moderated on one of the three issues discussed above. The administration backed down from the most egregious efforts to redefine torture in ways utterly inconsistent with international law.

During his confirmation hearings, Gonzalez faced criticism from nongovernmental organizations and legal academics, including those associated with the military. Retired Rear Admiral John Hutson who testified against the confirmation of Gonzales for Attorney General, said:

> Abrogating the Geneva Conventions imperils our troops and undermines the war effort. It encourages reprisals. It lowers moral. . . . Government lawyers, including Judge Gonzales, let down the U.S. troops in a significant way by their ill-conceived advice. They increased the dangers that they'd face. At the top of the chain of command, to coin a phrase that we've heard in the past, they set the conditions so that many of those troops would commit serious crimes.

Although Gonzales was confirmed without problems, the criticisms he faced signaled the beginnings of more assertive congressional actions on torture. William J. Haynes II, the Department of Defense chief legal officer who helped oversee Pentagon studies on the interrogation of detainees, faced opposition when he was twice nominated to the Fourth Circuit Court of Appeals, and President Bush eventually chose not to resubmit the nomination in the face of political opposition.[53]

In 2005, Senator John McCain introduced an amendment to the Department of Defense Appropriation Act that prohibited cruel and degrading treatment, and confined all interrogation techniques to those authorized by the U.S. Army Field Manual on Intelligence and Interrogation. Once again, the Bush administration continued to oppose these efforts to prohibit the use of abusive interrogation techniques. The Senate passed the amendment by a 90 to 9 margin, and the House by 308 to 122, and the amendment was incorporated into the Detainee Treatment Act of 2005.

Throughout the debate over the McCain amendment the White House sought to exclude the CIA from complying with the anti-torture legislation.[54] Even after President Bush was obliged to withdraw his veto threat and reached an agreement with McCain, the language of the signing statement still was couched in language that implied that president could override the ban if necessary. In other words, in early 2006, the administration continued to hold firmly to the third argument discussed above—that the president, facing a clear and present danger to national security, was not bound by the obligation to prohibit torture. It was not until the Supreme Court explicitly opposed this doctrine in the *Hamdan v. Rumsfeld* case in September 2006 that the Bush administration backed off its claim that the president could authorize the use of torture and cruel and degrading treatment.

Other provisions of this Detainee Treatment Act, however, undermine some of the protections offered by the McCain amendment, by stripping federal courts of jurisdiction over detainees in Guantánamo and implicitly permitting the Department of Defense to consider evidence obtained through torture. In addition, the Army Field Manual, previously publicly available, has now been rewritten to include ten classified pages on interrogation techniques.

In response to the Supreme Court's decision in *Hamdan v. Rumsfeld*, the Department of Defense finally issued a memo on July 7, 2006 that instructs recipients to ensure that all DOD policies comply with Common Article 3 of

the Geneva Conventions. In an important reversal of its earlier policy, the memo helped bring administration policy in line with the Supreme Court decision. But even as the administration appeared to accept Common Article 3, it asked Congress to pass legislation governing military commissions that would redefine Common Article 3, replacing its requirement that all detainees captured during armed conflict be treated humanely with a new "flexible" standard. The president sought to determine on a case-by-case basis whether treatment was cruel, inhuman, and degrading. Even after the failure of its repeated efforts to redefine the meaning of torture, the administration still persisted in its belief that it could redefine international law to suit its purposes. Fortunately, Congress rejected this proposal; the final Military Commission Act of 2006 (MCA) preserved the meaning of humane treatment under Common Article 3. But the MCA had other worrisome aspects as regards laws about torture and abuse. First, it makes it harder to prosecute those who commit war crimes, including torture, and it permits some evidence obtained under coercion to be used in military commissions. In summary, since 2005, the Congress has moved to limit executive noncompliance with the prohibition on torture and cruel and degrading treatment, but congressional action has fallen short of a full endorsement of international law on the subject.

Meanwhile, the Pentagon created a new Office of Detainee Affairs, "charged with correcting basic problems in the handling and treatment of detainees, and with helping to ensure that senior Defense Department Officials are alerted to concerns about detention operations raised by the Red Cross." A Human Rights First report concludes that "while the effect of this new structure is unclear, it has the potential to help bring U.S. detention policy more in line with U.S. and international legal obligations."[55] The Pentagon has also completed a series of investigations into abuses in detention centers and identified some of the possible causes of such abuses, including the failure to give meaningful guidance to soldiers in the field about rules that governed the treatment of detainees.

Since Abu Grahib, the U.S. military has also moved to hold some soldiers accountable for abuse of detainees. First, the military has initiated a series of investigations and courts-martial. A comprehensive summary of a project on detainee abuse and accountability found that at least 600 U.S. personnel are implicated in approximately 330 cases of detainee abuse in Iraq, Afghanistan, and Guantánamo Bay. Authorities have opened investigations into about 65 percent of these cases. Of seventy-nine courts-martial, fifty-four resulted in convictions or a guilty plea. Another fifty-seven people faced nonjudicial proceedings involving punishments of no or minimal prison time.[56] Although many cases were not investigated and no senior officers have been held accountable, this is not an insignificant amount of accountability and punishment. This reaffirms the fact that the U.S. government officials who asserted that certain practices were legal or desirable misunderstood the law and misguided personnel in the field. There is reason to believe that investigations into torture and cruel and unusual punishment have not yet ended, and that higher-level officials may someday also face accountability, if not in the United States, then perhaps abroad.

The definition of torture in the Torture Convention focuses on pain or suffering "inflicted by or at the instigation of or with the consent of acquiescence of a public officials or a person acting in an official capacity." In the drafting of the treaty, the United States itself proposed the language "or with the consent or acquiescence of a public official," that appears in the Convention.[57] To date, U.S. sanctions have focused only on torture committed "by" public officials, and have disregarded the issues of instigation, consent, or acquiescence of other higher-level public officials. Almost all (95 precent) of the military personnel who have been investigated are enlisted soldiers, not officers. Three officers were convicted by court-martial for directly participating in detainee abuse, but no U.S. military officer has been held accountable for criminal acts committed by subordinates.[58]

CONCLUSIONS

After 9/11 in the United States, there were deep disputes about the nature of the security threat and the proper response to them. What made torture possible was not the national security situation per se, but the neoconservative ideas held by a small group of individuals in power about the nature of the crisis and the appropriate response to it. If another group (for example, those associated with the position of Colin Powell) had prevailed in internal policy debates, it is plausible that the United States would currently be in compliance with the prohibition on torture.

Because this is an area of international law that is highly legalized and where the United States has ratified the relevant treaties and implemented them in corresponding national legislation, it is quite clear that the United States is in breach of existing legal obligations that it and the world community have long accepted. On this particular issue human rights advocacy groups and most legal scholars around the world are in agreement.

In the short term, this group of mainly political (not military) advisors closely associated with the president won the debate and prevailed with an argument that noncompliance with aspects of the Geneva Conventions and the Torture Convention was appropriate in the new circumstances. They justified their position with questionable international legal arguments that met opposition from the legal department of the State Department and the JAGs of the various military branches, not to mention human rights organizations, academics, and much of foreign legal opinion.

But although this group of neoconservative individuals won out in internal policy debates in the short term, their position was eroded in the longer term. In particular, the U.S. judicial system, both military and civilian, has provided some effective checks to the executive power. In addition, civil society organizations and some print media have denounced and worked against U.S. government abuse of detainees. Some international actors have also challenged U.S. practices of noncompliance. It would appear that domestic pressures have been more effective than international pressures in changing Bush administration practices. The Bush administration made changes in its policy on the treatment of detainees only as a result of concerted and public

opposition. The lesson we can take from this is common to most studies of compliance with human rights law around the world. Governments are usually unwilling to recognize that they have committed human rights violations and to make changes in policy necessary to bring their practices in accordance with international law. Only concerted, public, and costly pressures from a wide variety of both domestic and international actors lead to improvements in human rights practices. But despite the similarities between the U.S. case and other cases of human rights violations in the world, there are also some interesting differences. Human rights organizations responded very rapidly to the evidence of torture and abuse. Those charges were echoed by segments of the print media, including the *New York Times*, the *Washington Post*, the *New Yorker*, and the *New York Review of Books*, whose reporters also produced crucial investigative articles that gave impetus and evidence for the internal and international opposition. Perhaps most unique to the U.S. case was the fact that there was significant and sustained opposition within the military itself to the policy of noncompliance with the Geneva Conventions and the Torture Convention. Finally, the U.S. judicial branch, and particularly the Supreme Court, played a crucial role in restraining the worst excesses of executive power. As is common in the world of human rights, these responses and changes did not happen rapidly, and are still underway. As of mid 2007, it is not clear if the United States is now in compliance with domestic and international law on torture.

But the issue of U.S. noncompliance with the prohibition on torture has not gone away and has started to pose significant costs on the individuals associated with the policy as well as for the U.S. government. The policy has already been costly for U.S. soft power and claims to leadership in the area of democracy and human rights. In the future it is very likely that the policy of noncompliance will be costly in more concrete terms, such as lawyers' fees, compensation paid to victims, and in some cases, imprisonment.

The people whose positions carried the day within the administration misunderstood and misjudged the current nature of the international system on the issue of torture and mistreatment of detainees. They believe it to be a realist world where international law and institutions are quite malleable to exercises of hegemonic power. In the short term, their beliefs were confirmed. In the longer term, they will find that this misreading of the nature of the international system is personally and professionally costly to them, not to mention costly to the reputation and soft power of the U.S. government.

NOTES

1. Harold Hong Koh, *On American Exceptionalism*, *Stanford L. Rev.* 55 (May 2003): 5.

2. See Colin H. Kahl, "In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and U.S. Conduct in Iraq," *International Security* 32 (1) (Summer 2007).

3. The United States, for example, uniformly ranks high among countries for its level of "gender development" and "gender empowerment," as measured by the UN Development Program in its annual *Human Development Report*. Both are composite measures that reflect the enjoyment of many aspects of the rights enumerated in the CEDAW Convention.

4. The exception to this argument is that by sending detainees to Egypt in the "exceptional rendition" program, initiated in 1995, the United States has been in violation of Article 3 of the Torture Convention, which says state parties can not return detainees to states where there are substantial grounds to believe they will be subjected to torture. See Jane Mayer, "Outsourcing Torture," *The New Yorker*, February 14 and February 21, 2005.

5. See Francis Fukuyama, *America at the Crossroads: Democracy, Power, and the Neoconservative Legacy* (New Haven, CT: Yale University Press, 2006).

6. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

7. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988).

8. *5 R v. Bartle and Commissioner of Police for the Metropolis and others, ex parte Pinochet*, House of Lords, 24 March 1999.

9. Fukuyama, *America at the Crossroads*, (n. 5).

10. George F. Kennan, "Morality and Foreign Policy," *Foreign Affairs* 64 (1985/1986).

11. As quoted in article by Michael Isikoff, "A Justice Department Memo proposes that the United States hold others accountable for international laws on detainees; but that Washington did not have to follow them itself," *Newsweek*, May 21, 2004.

12. Quoted in Jane Mayer, "Outsourcing Torture," p. 123 (n. 4).

13. Francis Fukuyama, "After Neoconservatism," *New York Times* (February 19, 2006).

14. Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, *Michigan J. Int. L.* 19 (1998): 2.

15. As cited in Jane Mayer, "Outsourcing Torture," p. 82 (n. 4).

16. Beth Simmons, "Why Commit? Explaining State Acceptance of International Human Rights Obligations," forthcoming.

17. Oona Hathaway, "The Cost of Commitment," *Stanford L. Rev.* 55 (May 2003): 5.

18. See, for example, Thomas Risse, Stephen Ropp, and Kathryn Sikkink (eds.), *The Power of Human Rights* (New York: Cambridge University Press, 1999) which included chapters on international and domestic pressures to bring about human rights changes in Chile, Guatemala, Kenya, Uganda, South Africa, Tunisia, Morocco, Indonesia, Philippines, Poland, and Czechoslovakia.

19. Kathryn Sikkink, *Mixed Signals: U.S. Human Rights Policy and Latin America* (Ithaca, NY: Cornell University Press, 2004).

20. United States Congress. House, *The Status of Human Rights in Selected Countries and the United States Response; Report Prepared for the Subcommittee on International Organization of the Committee on International Relations of the United States House of Representatives by the Library of Congress*, Ninety-fifth Congress, first session, July 25, 1977 (Washington, DC: U.S. G.P.O., 1977), p. 2.

21. United States, Department of Defense, "Memorandum for the Secretary of Defense," "Improper Material in Spanish Language Intelligence Training Manuals," (March 10, 1992).

22. See "Article 15-6 Investigation of the 800th Military Police Brigade," (The Taguba Report); "Final Report of the Independent Panel to "Review DOD Detention Operations," (The Schlesinger Report) August 2004; "AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade," LTG Anthony R. Jones, "AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, MG George R. Fay," "Report of the International Committee

of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Convention in Iraq During Arrest, Internment and Interrogation," February 2004. All of these reports are available in the appendices to Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review Books, 2004).

23. See *By the Numbers: Findings of the Detainee Abuse and Accountability Project*, by Human Rights and Global Justice, Human Rights First, and Human Rights Watch, 2006.

24. Neil A. Lewis, "Red Cross Finds Detainee Abuse in Guantánamo: U.S. Rejects Accusations: Confidential Report Calls Practices Tantamount to Torture," *New York Times* (November 30, 2004): A1, A14.

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29. Burgers and Danilius, pp. 78–79, 58, 62–63 (n. 7).

30. *Congressional Record, Senate,* October 27, 1990, p. S17491.

31. U.S. Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, "Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. 2340-2340A," December 30, 2004.

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36. Statement by Brigadier General James Cullen, press conference by Human Rights First and Retired Military Leaders, January 4, 2005. Audio available online at www.humanrightsfirst.org. Transcription of remarks by author.

37. "An Open Letter to the Senate Judiciary Committee," January 4, 2005, signed by Brigadier General David M. Brahms (Ret. USMC), Brigadier General James Cullen (Ret. USA), Brigadier General Evelyn P. Foote (Ret. USA), Lieutenant General Robert Gard (Ret. USA), Vice Admiral Lee F. Gun (Ret. USN), Rear Admiral Don Guter (Ret. USN), General Joseph Hoar (Ret. USMC), Lieutenant General Claudia Kennedy (Ret. USA), General Merrill McPeak (Ret. USAF), Major General Melvyn Montano (Ret. USAF Nat. Guard), and General John Shalikashvili (Ret. USA).

38. Response by Brigadier General James Cullen during the question-and-answer session, press conference by Human Rights First and Retired Military Leaders, January 4, 2005. Audio available online at www.humanrightsfirst.org. Transcription of remarks by author.

39. Ibid.

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41. Jane Mayer, p. 108 (n. 4).

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56. "By the Numbers," pp. 3, 7 (n. 23).

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CHAPTER 9

Trade Unions and Human Rights

Lance Compa

Trade unionists and human rights advocates in the United States pursued separate agendas in the last half of the twentieth century. Labor leaders focused their demands on recognition from employers, collective bargaining, and a greater share for workers of growing national wealth. Tough organizing and hard bargaining were workers' immediate challenges. Trade unionists had little time for learning, invoking, and using international human rights standards to advance their cause. Besides, the United States for many years was such a dominant economic power that a purely domestic agenda sufficed to meet labor's needs.

Where trade union leaders took up international questions, it was mostly part of a Cold War dynamic. The Congress of Industrial Organizations (CIO) purged its left-wing unions in the late 1940s and went on to merge with the more conservative American Federation of Labor (AFL) in 1955.[1] The new AFL-CIO's international advocacy focused on building anticommunist unions in other countries.[2] Trade unionists' invocations of human rights were usually aimed at violations in the Soviet Union, not at home.

Earlier generations of trade unionists and their supporters developed notions of workers' rights linked to home-grown notions of "industrial democracy" and "Americanism," even among many immigrants who helped to build the labor movement.[3] In the 1930s, Senator Robert Wagner and other champions of collective bargaining argued that it would bring industrial democracy and civil rights into the workplace. Union leaders claimed that organizing and bargaining "was the only road to civil rights, civil liberties, and real citizenship."[4] Wagner's National Labor Relations Act (NLRA) contains a ringing declaration of workers' "right" to organize and to bargain collectively.

But once the 1935 Wagner Act became law and the labor movement tripled its membership in ten years, pointing to basic rights as a foundation for trade unionism faded in importance.

For its part, the modern human rights movement that emerged from the wreckage of World War II rarely took up labor struggles. Although workers' freedom of association and the right to decent wages—even the right to paid vacations—are part of the 1948 Universal Declaration of Human Rights and other international human rights instruments, many advocates saw union organizing and collective bargaining as strictly economic endeavors, not really human rights.

To be fair, human rights advocates had their hands full with genocide, death squads, political prisoners, repressive dictatorships, and other horrific violations around the world. Compared with these, American workers' problems with organizing and collective bargaining were not human rights priorities. Rights groups' leaders and activists might personally sympathize with workers and trade unions, but they did not see labor advocacy as part of their mission.[5]

In the 1990s the parallel but separate tracks of the labor movement and the human rights movement began to converge. This chapter examines how trade union advocates adopted human rights analyses and arguments in their work, and human rights organizations began including workers' rights in their mandates.

The first section, "Looking In," reviews the U.S. labor movement's traditional domestic focus and the historical absence of a rights-based foundation for American workers' collective action. The second section, "Looking Out," covers a corresponding deficit in labor's international perspective and action. The third section, "Labor Rights Through the Side Door," deals with the emergence of international human rights standards and their application in *other* countries as a key labor concern in trade regimes and in corporate social responsibility schemes. The fourth section, "Opening the Front Door to Workers' Rights," relates trade unionists' new turn to human rights and international solidarity and the reciprocal opening among human rights advocates to labor concerns. The conclusion of the chapter discusses criticisms by some analysts about possible overreliance on human rights arguments, and offers thoughts for strengthening and advancing the new labor-human rights alliance.

LOOKING IN

The Commerce Clause Foundation

Adopted by a progressive New Deal congress in 1935 at a time of widespread industrial conflict, the NLRA affirmed American workers' right to organize and bargain collectively. But the rights proclaimed in Section 7 were not really based on a foundation of fundamental rights. Senator Wagner and his legislative drafters thought (perhaps rightly for the historical moment in which they found themselves, without viewing longer-term consequences) that a still-conservative Supreme Court would strike down the act if they

based it on First Amendment freedoms or Thirteenth Amendment free labor guarantees. Instead, they fixed the law's rationale on the Constitution's Commerce Clause giving Congress the power to regulate interstate commerce.[6]

The act's Section 1, *Findings and Policies*, pointed to "strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce." Section 1 mentions "commerce" thirteen times and contains many other references to the "free flow of goods" and equivalents. There are three references to "rights" of workers. In short, the NLRA was based on the need to remove "burdens on commerce," not the need to protect workers' fundamental rights.

Business forces indeed challenged the NLRA's constitutionality. The Supreme Court upheld the law in its 1937 *Jones & Laughlin Steel* decision (301 U.S. 1), hanging its judgment on the economic hook of the Commerce Clause. The Court mentioned in passing that employees' self-organization is a "fundamental right," saying that, "employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents." But the court based its constitutional analysis on the Commerce Clause:

> It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. . . . The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement"; to adopt measures "to promote its growth and insure its safety"; "to foster, protect, control and restrain." That power is plenary . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

Trade union organizing and bargaining was now protected by law. Workers' struggles had brought passage of the NLRA; workers' organizing surged under protection of the NLRA. But their protection was rooted in unstable soil of economic policy, not solid ground of fundamental rights. As the Supreme Court said in its 1975 *Emporium Capwell* decision (420 U.S. 50), "These [rights] are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife . . ."

Workers' rights depended on economic policy choices, and the economic system enshrined private ownership and control of property, including the workplace. The Wagner Act itself contained a painful policy choice contrary to basic rights: excluding agricultural workers from its protection, a price for Southern Democrats' support.

Employers' Long March

After passage of the Act and the *Jones & Laughlin* decision, employers mounted a long march through courts, congresses, and administrations to claw back workers' organizing and bargaining space. Their counterthrust

began with an early but little-noticed prize. In the 1938 *Mackay Radio* decision (304 U.S. 333), the Supreme Court said that employers can permanently replace workers who exercise the right to strike.

Striker replacement was not the issue in the case. In fact, the union won the case, because Mackay Radio only replaced union leaders who led the strike, a clear act of unlawful discrimination for union activity. However, in what is called dicta—tangential asides in a court opinion not bearing on the legal issue—the Supreme Court said:

> Although section 13 of the act provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.

For many years afterward, the *Mackay Radio* decision had little effect. Labor advocates did not seek a legislative "fix" of the judge-made striker replacement rule. New organizing continued apace, and employers rarely tried the permanent replacement option when unions were strong and growing. Getting replacements was not easy when respect for picket lines was an article of faith among workers. Employers knew they had to live with their unions after a strike, and did not want to poison the relationship by replacing union members.

The permanent striker-replacement doctrine remained a relatively obscure feature of U.S. law until employers began wielding it more aggressively in the late 1970s and early 1980s. Many analysts attribute this development to President Ronald Reagan's firing and permanent replacement of 10,000 air traffic controllers in 1981 even though, as federal employees, controllers did not come under coverage of the NLRA and the MacKay rule. They were fired as a disciplinary measure under federal legislation barring strikes by federal employees. In fact, the use of permanent replacements began trending upward before Reagan's action.[7] But the air traffic controllers' example served as a signal to employers to use the permanent replacement option in several high-profile strikes in the 1980s and afterward, with intimidating effects on workers and unions.[8]

The permanent-replacement doctrine is not used only against workers' exercise of the right to strike. In almost every trade union–organizing drive, management raises the prospect of permanent replacement in written materials, in captive-audience meetings, and in one-on-one meetings where supervisors speak with workers under their authority. The permanent replacement threat appears at the bargaining table, too. An industrial relations researcher found that management threatens permanent replacement during collective bargaining negotiations more often than unions threaten to strike.[9]

In the 1990s, trade unions tried to get Congress to prohibit permanent replacements. A majority of the House and Senate supported such a move in the 1993–1994 Congress, when Bill Clinton was president. But a Republican

filibuster in the Senate blocked the needed sixty votes for passage.[10] When Republicans took control of Congress in 1995, hopes for reform faded.

Employer Free Speech

Another court-launched counterthrust to union organizing came with the 1941 *Virginia Electric Power* decision (314 U.S. 469) granting First Amendment protection to employers' anti-union broadsides. After passage of the Wagner Act, the National Labor Relations Board (NLRB) closely scrutinized and limited employers' ability to campaign openly and aggressively against workers' organizing efforts. The board reasoned that such fierce campaigning was inherently coercive, given the imbalance of power in the employment relationship. The Court said:

> The [National Labor Relations] Board specifically found that the [company's anti-union bulletin and speeches] "interfered with, restrained and coerced" the Company's employees in the exercise of their rights guaranteed by section 7 of the Act. The Company strongly urges that such a finding is repugnant to the First Amendment.
>
> Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made.
>
> • • •
>
> The Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone. . . . It appears that the Board rested heavily upon findings with regard to the bulletin and the speeches the adequacy of which we regard as doubtful.

The *Virginia Electric Power* decision set the stage for the conservative 1947 Congress to add a new Section 8 (c) to the NLRA, the so-called employer free speech clause insulating employers against any liability for anti-union "views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form . . . if such expression contains no threat of reprisal or force or promise of benefit." Since then, employers and consultants who specialize in combating unions have perfected a science of using captive-audience meetings, videos, props, letters, leaflets, one-on-one "counseling" by supervisors and other tactics to break up organizing efforts.

To take one example among thousands, at an Illinois restaurant where workers launched an organizing drive, the employer guaranteed that if the union came in he would be out of business within a year. In a tape-recorded speech in a captive-audience meeting, the owner stated "If the union exists . . . [the company] will fail. The cancer will eat us up and we will fall by the wayside. . . . I am not making a threat. I am stating a fact. . . . I only know from my mind, from my pocketbook, how I stand on this." In the 1983

NLRB v. Village X decision (723 F. 2d 1360), the federal appeals court found this to be a lawful prediction that did not interfere with, restrain, or coerce employees.

Other Taft-Hartley Thrusts

The employer free speech clause only began the anti-union assault in the 1947 amendments known as the Taft-Hartley Act. In a brilliant marketing ploy, a new clause called "right-to-work" allowed states to prohibit employers and unions from including in their collective bargaining agreement a requirement of dues payments (or a like sum from nonmembers, who can obtain a rebate for amounts not related to collective bargaining) from all represented employees receiving benefits under the contract. More than twenty states have adopted such "right-to-work" laws, which have nothing to do with rights or with work, but much to do with weakening workers' collective bargaining strength.[11]

In other provisions, the Taft-Hartley Act prohibited employees at supplier or customer firms from giving any solidarity support to workers on strike against a "primary" employer. This "secondary boycott" ban means that workers can never countervail employers' mutual support in the form of suppliers and customers continuing business as usual with a primary employer.

The Taft-Hartley Act added supervisors and independent contractors to the list of workers, like agricultural employees, "excluded" from protection of the NLRA. Excluded workers can be fired with impunity for trying to form unions. Since then, Supreme Court and NLRB decisions have amplified the "exclusion" clause, leaving taxi drivers, college professors, delivery truck drivers, engineers, sales and distribution employees, doctors, nurses, newspaper employees, Indian casino employees, "managers" with minimal managerial responsibility, graduate teaching assistants at universities, disabled workers, temporary employees, and others stripped of any protection for exercising rights of association. A 2002 government study found that more than 30 million U.S. workers are excluded from protection of freedom of association rights.[12]

Tectonic Shifts

As decades passed, the economic foundation of workers' organizing and bargaining rights became vulnerable to the shifting economic landscape. The implicit "social contract" and social cohesion of the New Deal and post–World War II era gave way to the "risk society" and winner-take-all inequality. In the 1930s, the lack of trade union organizing and collective bargaining was defined as a "burden on commerce" justifying the Wagner Act. But by the 1980s trade unions and collective bargaining had become burdens on a market-driven economy. Without a human rights foundation, workers' freedom of association was vulnerable to market imperatives.

New court decisions reflected the change. In 1981, a time of massive corporate "downsizing" and restructuring, the Supreme Court ruled in the *First National Maintenance* case (452 U.S. 666) that workers cannot bargain

over their livelihoods. Instead, employers can refuse to bargain over decisions to close the workplace because their right to entrepreneurial "speed" and "secrecy" outweighs workers' bargaining rights. Here is what the Court said:

> Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. . . . Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. . . . Management may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies . . . [Bargaining] could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions . . . We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision.

The Supreme Court could hardly have been more frank in asserting that the smooth functioning of capitalism is more important than workers' rights. In a similar vein, the Court ruled in the 1992 *Lechmere* decision (502 U.S. 527) that workers have no right to receive written information from trade union organizers in a publicly accessible shopping mall parking lot because the employer's private property rights outweigh workers' freedom of association rights. Except where employees are otherwise unreachable, as in a remote logging camp, employers can have union representatives arrested for trespassing if they set foot on even publicly accessible company property to communicate with employees.

In both *First National Maintenance* and *Lechmere*, the Supreme Court overruled NLRB decisions that favored workers and unions. Doctrinally, courts are supposed to defer to the administrative expertise of the NLRB. In practice, however, federal circuit appeals courts and the Supreme Court often make their own judgment on the merits of a case to overrule the NLRB. Professor Julius Getman has described the dynamic thus:

> The courts are notoriously difficult to replace or control. The notion that courts would simultaneously defer and enforce was unrealistic. So long as the courts had the power to refuse enforcement, it was inevitable that they would use this power to require the Board to interpret the NLRA in accordance with their views of desirable policy. . . . The judicial attitude towards collective bargaining has increasingly become one of suspicion, hostility, and indifference. . . .
>
> The reason for the courts' retreat from collective bargaining is difficult to identify, but it seems to rest on a shift in contemporary judicial thinking about economic issues. The NLRA, when originally passed, had a Keynesian justification. Collective bargaining, it was believed, would increase the wealth of employees, thereby stimulating the economy and reducing the likelihood of depression and recession. Today, courts are more likely to see collective bargaining as an interference with the benevolent working of the market, and, thus, inconsistent with economic efficiency most likely to be achieved by unencumbered management decision making.[13]

State Judiciaries and Workers' Rights

Some state courts have shown more sympathy to fundamental rights arguments in defense of workers' interests. For example, the New Jersey Supreme Court found fundamental rights in the 1989 *Molinelli Farms* case (552 A.2d 1003) involving farm workers, who are not protected by the federal NLRA. The court said:

> Article I, paragraph 19 of the New Jersey Constitution of 1947 provides in part that "persons in private employment shall have the right to organize and bargain collectively." This appeal concerns the rights and remedies available to migrant farm workers under this constitutional provision. . . . The constitutional provision is self-executing and that the courts have both the power and obligation to enforce rights and remedies under this constitutional provision. . . . Backpay and reinstatement are appropriate remedies to enforce the constitutional guarantee of Article I, paragraph 19 of the New Jersey Constitution.

California's Supreme Court championed workers' right to strike in its 1985 *County Sanitation District No. 2* decision (699 P.2d 835), saying:

> The right to strike, as an important symbol of a free society, should not be denied unless such a strike would substantially injure paramount interests of the larger community. . . .
>
> The right to form and be represented by unions is a fundamental right of American workers that has been extended to public employees through constitutional adjudication as well as by statute . . . whenever a labor organization undertakes a concerted activity, its members exercise their right to assemble, and organizational activity has been held to be a lawful exercise of that right. . . .
>
> If the right to strike is afforded some constitutional protection as derivative of the fundamental right of freedom of association, then this right cannot be abridged absent a substantial or compelling justification.

A concurring opinion said:

> It is appropriate that today's affirmation of the right to strike should come so soon after the tragic events surrounding the strike of Solidarity, the Polish labor union. The Solidarity strikers proclaimed that the rights to organize collectively and to strike for dignity and better treatment on the job were fundamental human freedoms. When the Polish government declared martial law and suppressed the union in December 1981, Americans especially mourned the loss of these basic liberties.
>
> The public reaction to the Solidarity strike revealed the strength of the American people's belief that the right to strike is an essential feature of a free society. In an economy increasingly dominated by large-scale business and governmental organizations, the right of employees to withhold their labor as a group is an essential protection against abuses of employer power.

But the California court's decision is far outweighed at the federal level by Supreme Court decisions insisting there is no fundamental right to strike; that strikes can be regulated based on economic policy choices. In its 1926

Dorchy v. Kansas decision (272 U.S. 306), the Supreme Court said (in a decision written by Justice Brandeis, generally considered a progressive):

> The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. . . .
>
> Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.

In a decision affirmed by the Supreme Court, a federal district judge ruled in the 1971 *Postal Clerks v. Blount* case (325 F. Supp. 879, aff'd. 404 U.S. 802):

> Plaintiff contends that the right to strike is a fundamental right protected by the Constitution, and that the absolute prohibition of such activity . . . constitutes an infringement of the employees' First Amendment rights of association and free speech and operates to deny them equal protection of the law. . . .
>
> At common law no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers. Indeed, such collective action on the part of employees was often held to be a conspiracy. When the right of private employees to strike finally received full protection, it was by statute, Section 7 of the National Labor Relations Act, which "took this conspiracy weapon away from the employer in employment relations which affect interstate commerce" and guaranteed to employees in the private sector the right to engage in concerted activities for the purpose of collective bargaining. It seems clear that public employees stand on no stronger footing in this regard than private employees and that in the absence of a statute, they too do not possess the right to strike.

Devil's Bargain?

In retrospect, setting the National Labor Relations Act on a commercial foundation rather than a foundation of fundamental rights was a bargain with the Devil. Perhaps it was strategically necessary at the time to evade a constitutional trap. But in the more than seventy years since passage of the Act, Congress, the courts, and successive administrations and labor boards based their rulings on the Act's economic premises, not on concepts of workers' basic rights. This meant that they made decisions reflecting views about what furthers the free flow of commerce.

The 1935 Congress had seen *denial* of workers' organizing and bargaining rights as obstructing commerce. Fast-forward to the twenty-first century, where legislative, judicial, and administrative rollbacks of workers' rights have brought the opposite view: organizing and collective bargaining are market-distorting and commerce-burdening activities that must yield to employers' property rights and unilateral control of the workplace.

Can we now rethink and refound American labor law on a human rights foundation, including what can be learned from international human rights and labor rights principles? This is the challenge for advocates of workers' rights as human rights. U.S. trade unionists and their allies are starting to

take up this call. Their efforts are discussed later in this chapter. First, however, a review is offered of how and to what extent U.S. labor law and practice have been influenced by international labor and human rights concerns.

LOOKING OUT

American Exceptionalism

"American exceptionalism" to international law is deeply rooted in American legal discourse and culture.[14] Indeed, this section could be subtitled "with blinders," because until recently U.S. labor law and practice rarely drew on international sources and counterparts. As in other legal fields, labor and employment law practitioners and jurists rarely invoke human rights instruments and standards.

Outside a small cadre of specialists interested in comparative and international labor law, most actors in the U.S. labor law system have no familiarity—if they even are aware of their existence—with labor provisions in the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social, and Cultural Rights; ILO Conventions and Declarations; OECD guidelines; trade agreements; and other international instruments. The United States has ratified only fourteen of the ILO's 186 conventions, and among these only 2 of the 8 "core" conventions.[15]

"Who needs it?" is a reflexive American response to suggestions that we can learn something about workers' rights from foreign sources. When the United States ratified the International Covenant on Civil and Political Rights in 1992, the then-Bush administration insisted that "ratification of the Covenant has no bearing on and does not, and will not, require any alteration or amendment to existing Federal and State labor law" and that "ratification of the Covenant would not obligate us in any way to ratify ILO Convention 87 or any other international agreement."[16] In its most recent report on the ICCPR, the State Department supplied nothing more than a few desultory paragraphs suggesting "general" compliance with Article 22, the ICCPR provision on workers' freedom of association.[17]

As Professor Cynthia Estlund noted:

> The official American view is that international human rights are endangered elsewhere, and that American labor law is a model for the rest of the world. The rest of the world may not be convinced that American labor law, old and flawed as it is, is a model for the modern world. But more to the present point, American legal institutions and decisionmakers have thus far been deaf to the claim that international labor law provides a potential model for American labor law, or even a critical vantage point from which to view American labor law.[18]

The United States and the International Labor Organization (ILO)

American ambivalence toward the ILO throughout the twentieth century signaled its aversion to international labor influences. The government of

Woodrow Wilson and the American Federation of Labor under Samuel Gompers actually played key roles in creating the League of Nations and the ILO after World War I. Gompers chaired the ILO's founding conference. But the U.S. Senate killed U.S. participation in the League, and the United States remained outside the ILO in its formative years. It finally joined in 1934 in the early months of the Roosevelt administration. Samuel Gompers is much better known today for his famous reply to the query "What does labor want?"—"More"—than his chairing the ILO conference.

The ILO was a forum for Cold War rivalry from the late 1940s to the 1980s. Labor movements from West and East saw each other as linked to capitalist exploiters and communist oppressors. The United States quit the ILO from 1977–1980 over ILO stands on the Arab-Israeli conflict and conditions of workers in occupied territories.

The Clinton administration brought a blip of prominence to the ILO in the 1990s. In 1998, Bill Clinton was the first American president ever to address the ILO's annual conference, and the United States was a strong supporter of the ILO's 1998 "core labor standards" declaration on freedom of association, nondiscrimination, and abolition of forced labor and child labor. The Clinton administration also pumped millions of dollars into ILO child labor programs.

Under Clinton, the United States for the first time acknowledged serious problems with U.S. labor law and practice on workers' organizing and bargaining rights under ILO standards. In its 1999 follow-up report to the core standards declaration, the U.S. government said:

> The United States acknowledges that there are aspects of this system that fail to fully protect the rights to organize and bargain collectively of all employees in all circumstances. . . .
>
> Representation elections as currently constituted are highly conflictual for workers, unions, and firms. This means that many new collective bargaining relationships start off in an environment that is highly adversarial. . . .
>
> The probability that a worker will be discharged or otherwise unfairly discriminated against for exercising legal rights under the NLRA has increased over time. . . . Roughly a third of workplaces that vote to be represented by a union do not obtain a collective bargaining contract with their employer. . . . Union representatives often have little access to employees at work, particularly when compared to employers' access . . .
>
> The injunctive relief currently available for illegal terminations that occur during an organizing campaign is "pursued infrequently . . . and is usually too late . . . to undo the damage done." . . . The NLRA does not provide for compensatory or punitive damages for illegal terminations. . . . Remedies available to the NLRB may not provide a strong enough incentive to deter unfair labor practices by some employers during representation elections and first contract campaigns.
>
> Other issues in U.S. law . . . include the lack of NLRA coverage of agriculture employees, domestic service employees, independent contractors, and supervisors. Additionally, there are varying degrees of protection for public sector workers with regard to collective bargaining and the right to strike.
>
> Under United States labor law an employer may hire replacement workers in an attempt to continue operations during a strike. . . . This provision of

> United States labor law has been criticized as detrimental to the exercise of fundamental rights to freedom of association and to meaningful collective bargaining.[19]

The Clinton administration's movement toward more openness to the ILO and willingness to engage in self-criticism under ILO standards ended with the Bush government. The Bush administration missed several obligatory self-reporting deadlines. The reports it finally sent reverted to an old formula, declaring that U.S. law and practice are "generally in compliance" with ILO norms and conceding no difficulties.

In 2005, the AFL-CIO filed a complaint to the ILO charging the administration with violating Convention No. 144 on tripartite consultation, one of the few ILO conventions ratified by the United States. Under the convention, the United States commits to regular consultations with employers' and workers' representatives on ILO matters. The AFL-CIO's complaint charged that functioning of the Tripartite Advisory Committee on International Labor Standards (TAPILS), a long-standing government-business-labor group that reviews ILO conventions for potential U.S. ratification, "has virtually ground to a halt during the last three years." The complaint pointed out that "For the first time since 1991 the U.S. Government did not convene a full meeting of the Consultative Group in preparation for the International Labor Conference."[20]

LABOR RIGHTS THROUGH THE SIDE DOOR

Workers' Rights in the Generalized System of Preferences

The United States has resisted external influence of international labor rights standards, but it has insisted on including "internationally recognized worker rights" (the statutory language) in trade laws and trade agreements affecting commercial partners. Labor rights clauses first appeared in the mid-1980s in trade laws governing developing countries' preferential access for their products exported to the United States, beginning with the Generalized System of Preferences (GSP). This program allows developing countries to send products into the United States free of tariffs and duties applied to the same products from more developed countries. The goal of the GSP program is to give poorer countries a commercial advantage to boost their economies. The European Union, Japan, and other industrial powers maintain similar GSP programs.

A 1984 amendment to the U.S. GSP plan requires countries to be "taking steps" to implement "internationally recognized worker rights" defined as:

1. the right of association;
2. the right to organize and bargain collectively;
3. a prohibition on the use of any form of forced or compulsory labor;
4. a minimum age for the employment of children; and
5. acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

In fact, this is a mishmash of international standards. They are not based on UN human rights instruments, ILO norms, or any other consensus international authority.[21] For example, conspicuous by its absence is the right to nondiscrimination at work, one of the ILO's defined "core" labor standards. There is no definition of "acceptable," nor of what constitutes "taking steps" for purposes of administering the statute. In fact, one court said exasperatedly:

> The worker rights provision . . . states that the President "shall not designate any country . . . (7) if such country *has not taken or is not taking steps* to afford internationally recognized workers rights." (emphasis added) . . .
>
> GSP contains no specification as to how the President shall make his determination. There is no definition of what constitutes "has not taken . . . steps" or "is not taking steps" to afford internationally recognized rights. Indeed, there is no requirement that the President make findings of fact or any indication that Congress directed or instructed the President as to how he should implement his general withdrawal or suspension authority.
>
> Given this apparent total lack of standards, coupled with the discretion preserved by the terms of the GSP statute itself and implicit in the President's special and separate authority in the areas of foreign policy there is obviously no statutory direction which provides any basis for the Court to act. The Court cannot interfere with the President's discretionary judgment because there is no law to apply.[22]

In spite of such flaws, labor rights provisions in the GSP clause had serious consequences for labor rights violators. In 1986 labor rights advocates filed petitions under the GSP labor rights clause challenging Chile's beneficiary status because of the military government's abuses against workers.[23] They worked closely with Chilean unionists and human rights monitors to amass the information supporting the charges of systematic labor right violations. The United States suspended Chile from GSP beneficiary status in February 1988.

The GSP cutoff jolted Chilean economic and political elites. Business interests formerly comfortable with military rule and suppressed labor movements now faced economic sanctions just when they hoped to expand their exports to the United States. Some joined calls by labor, human rights, and other democratic forces for an end to the dictatorship and a return to more democratic rule.[24] In a plebiscite in October 1988 the Chilean people voted to do just that, supporting a "No" vote when asked if they wanted General Pinochet to continue as the head of government.[25] In 1991, with a new, democratically elected government in place, the most abusive features of the labor code removed, and an end to physical violence against trade union activists, Chile's GSP benefits were restored.[26]

A dramatic turn of events in Guatemala made the GSP labor rights petition a pivotal issue for the future of constitutional order in that Central American country. On May 25, 1993 President Jorge Serrano dissolved the Guatemalan parliament and Supreme Court, and suspended constitutional rights.[27] He warned against "destabilizing" protest activity by trade unionists and grassroots organizations.

An impending decision on Guatemala's GSP status proved to be a critically important policy tool for the United States in pressing for the restoration of constitutional governance. The State Department issued a statement that "unless democracy is restored in Guatemala, GSP benefits are likely to be withdrawn."[28]

U.S. press analysis pointed out the leverage in the GSP decision:

> But perhaps more damaging to the local economy and Mr. Serrano's cause could be the call by US labor rights groups to revoke Guatemalan industry's tariff-free access to the US market for certain products. . . . Guatemala's labor practices are already under review by the US Trade Representative's office. . . . Given Serrano's suspension of the right of public protest and strikes, analysts expect US Trade Representative Mickey Kantor to consider terminating Guatemala's trade benefits.[29]

The *New York Times* also cited the impending labor rights decision as critical to Serrano's fate. It reported on the day before his abdication that "businessmen have panicked at a threat by the United States to withdraw Guatemala's trade benefits under the Generalized System of Preferences."[30]

Serrano's autogolpe collapsed. On June 5, the reconvened Guatemalan Congress elected Ramiro Deleon Carpio, who had been the independent human rights special counsel and a leading human rights advocate in Guatemala, as the new president of the country.[31] The following day, after Serrano's flight into exile, a *New York Times* analysis concluded:

> Why Mr. Serrano launched his palace coup in the first place . . . was never entirely clear. But the reasons for his downfall were clearer. Most important, it seems, was the concern of business leaders that Guatemala's rising exports to the United States and Europe could be devastated if threatened sanctions were imposed. Within hours of an American threat to cut Guatemala's trade benefits, business leaders who in the past had supported authoritarian rule began pressing government and military officials to reverse Mr. Serrano's action.[32]

Post-GSP Labor Rights Clauses in U.S. Trade Laws

The labor rights amendment in the GSP fixed into U.S. law and policy both the principle of a labor rights–trade linkage, and the practice of applying it. Passage of the GSP labor rights amendment in 1984 was followed by over a half-dozen other amendments where the United States injected labor rights conditionality into trade relationships with other countries:

- In 1985, Congress added a labor rights provision to legislation governing the Overseas Private Investment Corporation (OPIC), which provides political risk insurance for U.S. companies investing overseas. Under the new labor rights clause, such insurance can only be provided in countries "taking steps to adopt and implement laws that extend" internationally recognized workers' rights, using the five-part definition from the GSP law. Determinations made in the GSP petition and review process are also applied to OPIC beneficiaries.

- In 1988, Congress made the labor rights–trade linkage a principal U.S. negotiating objective in "fast track" legislation authorizing the president to undertake multilateral trade negotiations.
- In the same Omnibus Trade Act of 1988, a labor rights amendment to Section 301 used the five-part GSP definition to make systematic workers' rights violations by *any* trading partner an unfair trade practice against which the United States could retaliate with economic sanctions.
- In 1990, a Caribbean Basin Initiative renewal bill adopted the GSP labor rights formulation. The same clause was applied to the Andean Trade Preference Act of 1991.
- In 1992, Congress swiftly enacted a bill barring the Agency for International Development (AID) from expending funds to help developing countries lure U.S. businesses to countries where workers' right are violated. Passage of the AID labor rights bill followed hard-hitting exposés on TV newsmagazines shortly before the 1992 elections, in which producers posing as businessmen recorded U.S. AID officials touting anti-union blacklists and anti-labor repression as attractive features of the Central American *maquila* zones.
- In 1994, Congress turned labor rights attention to the World Bank, the International Monetary Fund (IMF), and other international financial institutions. Congressmen Bernard Sanders of Vermont and Barney Frank of Massachusetts secured an amendment to the law governing U.S. participation in those bodies that requires American directors to use their "voice and vote" to screen loan proposals for their effects on workers' rights.
- In 1997, Congress amended the Tariff Act of 1930, which already prohibited imports produced by prison labor, by adding a child labor provision. The new law declared that the same ban applies to products made by forced or indentured child labor.
- In 2000, Congress passed the African Growth and Opportunity Act (AGOA), which authorized the president to designate a sub-Saharan African country as eligible for trade preferences if he determines that the country has established or is making continual progress toward the protection of internationally recognized worker rights, using the GSP's five-part definition.

Trade Agreements

In 2002, Congress passed the Trade Act of 2002 specifying that provisions on "internationally recognized worker rights"—the five-part definition in the GSP labor rights clause and other U.S. statutes—are a "principal negotiating objective" of the United States in trade agreements with commercial partners. Congress tweaked the GSP formula, adding elimination of the "worst forms of child labor" to the child labor clause. However, Congress again failed to include nondiscrimination among the "internationally recognized worker rights."

Recent trade agreements with Jordan, Chile, Singapore, Morocco, Australia, and Central American nations require signatories, including the United States, to "effectively enforce" national laws protecting what the

United States calls "internationally recognized workers rights." Beyond that, though, they also incorporate the ILO core labor standards declaration with a "strive to ensure" obligation stating:

> The Parties reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Parties shall strive to ensure that such labor principles and the internationally recognized labor rights . . . are recognized and protected by domestic law.[33]

The most extensive subject matter treatment of workers' rights in trade agreements is contained in the North American Agreement on Labor Cooperation (NAALC), the supplemental labor accord to the North American Free Trade Agreement (NAFTA). Going beyond the five-part definition in other U.S. trade agreements and beyond the ILO's core standards formulation, the NAALC sets forth eleven "Labor Principles" that the three signatory countries commit themselves to promote. The NAALC Labor Principles include:[34]

- freedom of association and the right to organize,
- the right to bargain collectively,
- the right to strike,
- prohibition of forced labor,
- prohibition of child labor,
- equal pay for men and women,
- nondiscrimination,
- minimum wage and hour standards,
- occupational safety and health,
- workers' compensation, and
- migrant worker protection

The NAALC signers pledged to effectively enforce their national labor laws in these subject areas, and adopted six "Obligations" for effective labor law enforcement to fulfill the principles. These obligations include:[35]

- a general duty to provide high labor standards;
- effective enforcement of labor laws;
- access to administrative and judicial forums for workers whose rights are violated;
- due process, transparency, speed, and effective remedies in labor law proceedings;
- public availability of labor laws and regulations, and opportunity for "interested persons" to comment on proposed changes;
- promoting public awareness of labor law and workers' rights.

In all these initiatives, the United States's implicit assumption is that labor rights violations are a problem in *other* countries. They are a form of "social dumping" by foreign countries and firms gaining cost advantage by abusing workers, thus gaining a commercial edge against U.S.-based producers.

American firms reacted with shock and anger when trade unions and NGOs began filing complaints against them under the NAALC—against General Electric and Honeywell for violating workers' organizing rights in Mexico, against Sprint for violating the same rights of workers in the United States, against the Northwest U.S. apple industry for violating rights of migrant Mexican workers in Washington state, and many more.

U.S. corporate executives and attorneys think the Agreement has been hijacked by trade union radicals to attack company conduct throughout North America, and demand an end to contentious complaint procedures where unions and their allies brand companies as workers' rights violators. An executive of the Washington state apple industry said "unions on both sides of the border are abusing the NAFTA process in an effort to expand their power . . . NAFTA's labor side agreement is an open invitation for specific labor disputes to be raised into an international question . . . and could open the door to a host of costly and frivolous complaints against US employers."[36]

Corporate Social Responsibility and Codes of Conduct

Workers' rights as human rights also penetrated labor discourse in the United States in the 1990s through initiatives on corporate social responsibility and codes of conduct. As with trade-labor linkage, the focus was outward, on conditions for workers in supply chain factories abroad producing for U.S.-based multinational companies. But growing concern for workers' rights abroad inevitably prompted closer scrutiny of workers' rights at home.

Beginning in the mid-1980s, journalists and NGOs delivered conscience-shocking accounts of child labor, forced overtime, hazardous conditions, beatings and firings of worker activists, and other abuses in factories supplying Nike, Reebok, Levi's, Wal-Mart, and other iconic American retail brands. Such exposés shook executives away from their earlier, arrogant position that these problems were not their business because they occurred among subcontractors.

First, many brand-name companies developed their own "internal" codes of conduct. Reebok, Levi's, Nike, J.C. Penney, and others, for example, announced that supplier firms in their global production chain would have to abide by their internal company codes or face loss of orders. The brands said they would take responsibility themselves for monitoring and enforcing their codes.

Levi Strauss & Co. and Reebok Corp. were in the forefront of this movement for internal, corporate-sponsored codes of conduct. They reviewed the UN's Universal Declaration of Human Rights, ILO Conventions, and other international human rights instruments in formulating their codes. They established monitoring and enforcement systems with detailed questionnaires on practices in foreign supplier plants, surprise visits by auditors, and reviews by company officials charged with enforcing the code.[37]

Most of these company-sponsored codes refer to UN human rights instruments and ILO core conventions in defining their standards. Reebok, for example, calls its code "The Reebok Human Rights Production Standards"

and features the Universal Declaration of Human Rights on its Web site. It goes on to say, "The Reebok Human Rights Production Standards are based on the relevant covenants from the International Labor Organization and on input from human rights organizations and academics. . . . We post them in each factory, along with contact information for our local human rights staff."

Internal company codes have inherent weaknesses. Sourcing from hundreds, even thousands of factories around the globe, even the most diligent corporate socially responsible–conscious company could not guard against labor abuses in every one of its supplier factories. Critics could always find supplier plants with terrible problems. They argued that management would sooner cover up abuses than expose them to public scrutiny. The demand for independent monitoring and verification, independent of corporate control, became irresistible.[38]

A new generation of codes called "multi-stakeholder" initiatives emerged. Companies, unions, human rights groups, community and development organizations, and other NGOs participate in formulating a code of conduct. These multi-stakeholder codes of conduct on workers' rights contain provisions on monitoring, verification, certification of supplier factories, enforcement mechanisms, and transparency. Among the most prominent U.S.-based groups are the Fair Labor Association (FLA), Social Accountability International (SAI), and the Worker Rights Consortium (WRC).[39]

The FLA combines major United States apparel companies, many universities, and some NGO participants in its code of conduct, monitoring, and certification system. The FLA accredits external monitors and certifies companies that meet its standards, using a statistical sampling methodology. Social Accountability International (SAI) administers a code called Social Accountability 8000 (SA8000), with standards and a system for auditing and certifying corporate responsibility in supplier chain facilities.

The WRC grew out of the anti-sweatshop campaigns of United States university students concerned about conditions of workers producing apparel and other products bearing their universities' logo. The consortium verifies that university-licensed apparel is manufactured according to its code of conduct. The WRC operates a complaints-based monitoring system, responding to reports of workers' rights abuses in factories supplying the university-logo market.

Most of these stakeholder codes assert "rights" as their foundation. SAI, for example, went so far as to trademark a brand of its own: *Human Rights @ Work*™. Its declared goal is "Making Workplace Human Rights a Vital Part of the Business Agenda." SAI goes on to say, "Social Accountability International (SAI)'s mission is to promote human rights for workers around the world . . . to help ensure that workers of the world are treated according to basic human rights principles."

Sharp differences have arisen among these groups and their codes, including rivalries, jealousies, and criticisms aimed at one another. Under some plans, monitoring, verification, and certification are carried out by "social auditing" firms, some of them new divisions of traditional financial auditing companies like Price Waterhouse. In others, NGOs are involved in monitoring. The codes

have different degrees of transparency and public reporting of their findings. Some contain "living wage" provisions, while others do not. To overcome such problems, these and other stakeholder groups organized a unified program called the Joint Initiative for Corporate Accountability and Workers Rights (Jo-In), with a pilot project in Turkey.[40]

The Hypocrisy Gap

Labor rights in trade agreements and codes of conduct have had mixed results, reflecting serious problems of monitoring and enforcement. Analyzing these problems and results is not the point here. The point is, rather, that the focus on workers' human rights in labor clauses of trade agreements and in corporate codes of conduct injected more rights-consciousness into American labor discourse throughout the 1990s. The penetration was perhaps less in the labor movement itself. Many union activists condemn NAFTA and other trade agreements' lack of "teeth" to enforce workers' rights. Most unions also maintain an ambivalent attitude toward corporate social responsibility and corporate codes of conduct. They are concerned that these initiatives are meant to replace strong trade unions and effective government enforcement of labor laws.[41] But the codes of conduct movement awakened new sensibilities to workers' rights in many other segments of civil society that rallied to the labor rights banner.

In their "side door" campaigns for workers' rights in other nations, American trade unionists and their allies became more conversant and more comfortable talking about, and acting upon, workers' rights as human rights. The focus was on workers' rights overseas. But as the lens sharpened, the more it reflected back. What about workers' rights at home? Growing awareness and concern for labor rights in trade arrangements and in corporate codes of conduct inexorably widened a "hypocrisy gap" between official positions, both of the U.S. government and of U.S. business, and the reality of workers' rights violations in the United States. In turn, this gap created ample new space for human rights and labor rights advocates to put U.S. law and practice under a spotlight of international standards.

OPENING THE FRONT DOOR TO WORKERS' RIGHTS

Some Frame-Setting Cases

The most significant injection of international human rights principles into U.S. law came outside the labor context, in the Supreme Court's 2005 decision in *Roper v. Simmons* (543 U.S. 551). The Court ruled that the execution of minors (i.e., who committed capital crimes when they were below age eighteen) is unconstitutional under the "cruel and unusual punishment" clause of the Fifth Amendment. The Court said:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the

> juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet . . . It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. . . .
>
> It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

The challenge now is to bring a similar openness to international human rights standards to labor law and practice in the United States. Without trying to overstate the case, it is fair to say that international human rights law appears to be having a nascent "climate-changing" effect on American labor law, practice, and discourse, bringing them closer to a human rights framework.

A growing cadre of scholars and practitioners familiar with comparative and international labor law are bringing into U.S. discourse labor provisions in the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; ILO Conventions and Declarations; and other international instruments.

Human rights law started making inroads in U.S. labor-related jurisprudence first in litigation on behalf of workers in countries outside the United States. Human rights strictures against forced labor and ILO findings on forced labor in Burma were central elements of a lawsuit brought against the California-based Unocal Corporation in federal court. The case ultimately was settled before going to trial with millions of dollars in recompense to victims of forced labor violations.[42]

Once plaintiffs overcame procedural hurdles and the case moved toward trial before a jury, Burma was an easy case substantively. The Burmese military junta committed beatings, rapes, torture, and murder to force villagers to work on the pipeline project. Even for a U.S. court that rarely takes up international human rights law issues, defining these abuses as violations of universal human rights standards on torture and forced labor was no problem.

Whether workers' freedom of association in trade union activity rises to the same level is not so clear in U.S. law. This was the issue facing the court at the motions stage in a 2003 decision in the case of *Rodriguez v. Drummond Coal Co.*, (256 F. Supp. 1250). The case involved wrongful death claims by families of murdered Colombian mineworker union leaders under the Alien Tort Claims Act.

Called as an expert witness, Professor Virginia Leary, a long-time advisor to the ILO, supported the view that workers' freedom of association achieved the level of a jus cogens norm in international law. Her testimony helped convince a federal judge to move the case toward trial. The judge denied the U.S.-based coal company's motion to dismiss the case, saying:[43]

> Although this court recognizes that the United States has not ratified ILO Conventions 87 and 98, the ratification of these conventions is not necessary to

> make the rights to associate and organize norms of customary international law. As stated above, norms of international law are established by general state practice and the understanding that the practice is required by law. . . .
>
> This court is cognizant that no federal court has specifically found that the rights to associate and organize are norms of international law for purposes of formulating a cause of action under the ATCA. However, this court must evaluate the status of international law at the time this lawsuit was brought under the ATCA. After analyzing "international conventions, international customs, treatises, and judicial decisions rendered in this and other countries" to ascertain whether the rights to associate and organize are part of customary international law, this court finds, at this preliminary stage in the proceedings, that the rights to associate and organize are generally recognized as principles of international law sufficient to defeat defendants' motion to dismiss.

At this writing the Drummond case is still in litigation. But the judge's ruling contains the core principle that workers' rights in international human rights instruments are justiciable in U.S. courts.

The same principle arose in a mirror-image case making *American* workers' rights justiciable in a *foreign* court under international labor standards. In 2002, the Norwegian oil workers union (NOPEF) sought judicial permission under Norwegian law to boycott the North Sea operations of Trico Corp., a Louisiana company that allegedly violated American workers' rights in an organizing campaign in the Gulf Coast region. Trico's North Sea arm was the company's most profitable venture, and a boycott could have devastating economic effects.

A key issue in the case was whether U.S. labor law and practice conform to ILO norms. Under Norwegian law, compliance with ILO Conventions 87 and 98 was the hinge on which the boycott's legality turned. The Norwegian court's finding that U.S. law failed to meet international standards would let the NOPEF boycott proceed.

NOPEF and Trico's Norwegian counsel each called expert witnesses from the United States to testify whether U.S. law and practice violate ILO core standards on freedom of association. Just before the U.S. experts' testimony, NOPEF settled the case with Trico's promise to respect workers' organizing rights in Louisiana.[44] The boycott trigger was deactivated. Still, the Trico case signaled a remarkable impact of ILO core standards within the United States. Similar cases could arise in the future as trade unions increase their cross-border solidarity work.[45]

In an innovative class action lawsuit combining claims of workers in Wal-Mart supplier factories in China, Bangladesh, Indonesia, Swaziland, and Nicaragua with claims by American employees of Wal-Mart, the International Labor Rights Fund (ILRF) put workers' human rights standards before a California court. Here is how the ILRF fashioned the complaint on behalf of U.S. workers:

> The California Plaintiffs
>
> Plaintiff Kristine Dall was enjoying the pay and benefits attributable to her membership in Local 324 of the United Food and Commercial Workers Union (UFCW). She was working in an environment in which workers' basic rights were respected, and she was being paid a liveable wage. . . .

> Plaintiff Kristine Dall suffered a concrete reduction in her pay and benefits that is directly attributable to Wal-Mart's comparative advantage of being able to offer low prices because it produces, or causes to be produced, many of its products outside the United States under conditions that violate the local laws where the good are produced, generally accepted international norms, and the specific provisions of Wal-Mart's own "Code of Conduct.". . .
>
> The California Plaintiffs . . . are seeking to enforce important rights affecting the public interest . . . Defendant Wal-Mart's fraudulent and deceptive practices as alleged herein constitute ongoing and continuous unfair business practices . . . Such practices include, but are not limited to, the knowing use of suppliers who fail to adhere to minimum standards of labor and human rights . . . Wal-Mart has aggressively advertised that it has a code of conduct, that it complies with labor laws, international standards and its Code of Conduct, and that it generally treats its workers well. These statements and assertions were made to the general public by Wal-Mart officials and agents who knew that the statements and assertions were false.[46]

This case is still in procedural stages at this writing, but if Wal-Mart's motions for summary judgment and motions to dismiss are rejected and the case moves toward trial, the implications of international labor and human rights standards for U.S. workers will take on new significance.

Human Rights Organizations Make the Turn

Human rights organizations took the first step toward convergence with trade union advocates on an international labor rights agenda for American workers. For example, Amnesty International USA created a Business and Human Rights division with extensive focus on workers' rights. Oxfam International has broadened its development agenda to include labor rights and standards, and its Oxfam America group created a Workers' Rights program to take up these causes inside the United States. In 2003, Oxfam launched a "national workers' rights campaign" on conditions in the U.S. agricultural sector. In 2004 the group published a major report titled *Like Machines in the Fields: Workers Without Rights in American Agriculture*.[47]

Perhaps most notably, Human Rights Watch (HRW) published three path-breaking reports in 2000–2001 on workers' rights in the United States under international human rights standards. The reports covered child labor in American agriculture, conditions of immigrant household domestic workers, and U.S. workers' freedom of association.[48]

Fingers to the Bone declared:

> United States law and practice contravene various international law prohibitions on exploitative and harmful work by children, including standards set by the Convention on the Rights of the Child. The United States appears to be headed toward noncompliance with the 1999 ILO Worst Forms of Child Labor Convention as well, which will enter into force for the U.S. in December 2000. It requires that member governments prohibit and eliminate "the worst forms of child labor." The United States is off to a dubious start in this regard, having claimed that it is already in full compliance with the convention and that no change to law or practice is necessary.

Hidden in the Home said:

> Because changing employers is difficult if not impossible, workers often must choose between respect for their own human rights and maintaining their legal immigration status. . . . Many workers choose to endure human rights violations temporarily rather than face deportation. . . .
>
> The special visa programs for domestic workers are conducive to and facilitate the violation of the workers' human rights. The U.S. government has not removed the impediments that deter domestic workers with special visas from challenging, leaving, or filing legal complaints against abusive employers; has failed to monitor the workers' employment relationships; and has failed to include live-in domestic workers in key labor and employment legislation protecting workers' rights.

Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards forged new links with the American labor movement. This book-length HRW report garnered significant attention upon its release in August 2000. International, national, and local commentary featured the report's findings, based on exhaustive case studies, showing that the United States' fails to meet international standards on workers' organizing and bargaining rights.[49]

Most often cited were these passages:

> Workers' freedom of association is under sustained attack in the United States, and the government is often failing its responsibility under international human rights standards to deter such attacks and protect workers' rights. . . .
>
> Researching workers' exercise of these rights in different industries, occupations, and regions of the United States to prepare this report, Human Rights Watch found that freedom of association is a right under severe, often buckling pressure when workers in the United States try to exercise it. . . . Many workers who try to form and join trade unions to bargain with their employers are spied on, harassed, pressured, threatened, suspended, fired, deported or otherwise victimized in reprisal for their exercise of the right to freedom of association.
>
> Private employers are the main agents of abuse. But international human rights law makes governments responsible for protecting vulnerable persons and groups from patterns of abuse by private actors. In the United States, labor law enforcement efforts often fail to deter unlawful conduct. When the law is applied, enervating delays and weak remedies invite continued violations. . . . As a result, a culture of near-impunity has taken shape in much of U.S. labor law and practice.

After that initial response, *Unfair Advantage* shifted to sustained use as an authoritative reference point in U.S. labor law and human rights discourse, becoming the standard source for labor advocates reaching out to new constituencies in a language of human rights, not just labor-management relations.[50] For example, *Scientific American* published a feature on *Unfair Advantage* for its million-plus readership one year after the report came out.[51] At its National Convention in June 2002, Americans for Democratic Action (ADA) presented the first annual Reuther-Chavez Award to Human Rights Watch for its U.S. labor report.[52]

ADA called *Unfair Advantage* "an exhaustive analysis of the status of workers' freedom to organize, bargain collectively, and strike in the United States, written from the perspective of international human rights standards. It is the first comprehensive assessment of workers' rights to freedom of association in the U.S. by a prominent international human rights organization." In presenting the award, ADA noted that "Human Rights Watch, in preparing and releasing *Unfair Advantage*, has given us what we hope will be enduring evidence in the struggle to regain fair advantage for workers in the U.S."[53]

Unfair Advantage has also become a point of reference in the scholarly community. Many U.S. labor law teachers have added the book as a supplemental law school text. So have professors in human rights, political science, sociology, government, industrial relations, and other academic fields. The American Political Science Association gave a "best paper" award at its 2001 APSA Annual Meeting to "From the Wagner Act to the Human Rights Watch Report: Labor and Freedom of Expression and Association, 1935–2000."[54]

The *British Journal of Industrial Relations* devoted two issues of a Symposium to the Human Rights Watch report. Symposium editors Sheldon Friedman and Stephen Wood attracted contributions from leading labor law, labor history, and industrial relations scholars in the United States, Canada, and Britain. In the Symposium, University of South Carolina business school professor Hoyt. N. Wheeler said, "It is by explicitly taking a human rights approach that the Human Rights Watch report makes its most important contribution to the understanding and evaluation of American labor policy." University of Texas law school professor Julius Getman called *Unfair Advantage* "a powerful indictment of the way in which U.S. labor law deals with basic rights of workers."

McMaster University business school professor Roy J. Adams called publication of *Unfair Advantage* "an important event because of the new perspective that it brings to bear on American labor policy." University of Essex human rights professor Sheldon Leader termed the report "an important document . . . that should help us see what difference it makes to connect up the corpus of principles in labor law with the wider considerations of human rights law." K.D. Ewing, a law professor at King's College, London, said:

> In what is perhaps a novel approach for an American study, the report is set in the context of international human rights law . . . 'where workers are autonomous actors, not objects of unions' or employers' institutional interests' [quoting from the report] . . . The approach of the HRW report and the methodology that it employs have a universal application; they are particularly relevant for the United Kingdom . . . [55]

James Gross concluded:

> The report is about moral choices we have made in this country. These moral choices are about, among other things, the rights of workers to associate so they can participate in the workplace decisions that affect their lives, their right not to be discriminated against, and their right to physical security and safe and

> healthful working conditions. The choices we have made and will make in regard to those matters will determine what kind of a society we want to have and what kind of people we want to be. Human rights talk without action is hypocrisy. This report could be an important first step toward action.[56]

In 2005, HRW continued its program on workers' rights in the United States with a major report on violations in the U.S. meat and poultry industry. In 2007, a massive new report titled *Discounting Rights Wal-Mart's Violation of US Workers' Right to Freedom of Association* on workplace rights violations of Wal-Mart employees in the United States put that company under a human rights spotlight.[57]

Blood, Sweat and Fear made these findings on workers' human rights in the meat and poultry industry:

> Workers in this industry face more than hard work in tough settings. They contend with conditions, vulnerabilities, and abuses which violate human rights. Employers put workers at predictable risk of serious physical injury even though the means to avoid such injury are known and feasible. They frustrate workers' efforts to obtain compensation for workplace injuries when they occur. They crush workers' self-organizing efforts and rights of association. They exploit the perceived vulnerability of a predominantly immigrant labor force in many of their work sites. These are not occasional lapses by employers paying insufficient attention to modern human resources management policies. These are systematic human rights violations embedded in meat and poultry industry employment. . . .
>
> Health and safety laws and regulations fail to address critical hazards in the meat and poultry industry. Laws and agencies that are supposed to protect workers' freedom of association are instead manipulated by employers to frustrate worker organizing. Federal laws and policies on immigrant workers are a mass of contradictions and incentives to violate their rights. In sum, the United States is failing to meet its obligations under international human rights standards to protect the human rights of meat and poultry industry workers.

In both meatpacking and Wal-Mart, trade unions and activist communities seized on the reports as major resources in their campaigns to reform practices in those industries and companies. The United Food and Commercial Workers *Justice@Smithfield* campaign for workers at the Smithfield Foods hog-slaughtering plant in Tar Heel, North Carolina, makes extensive use of the report, and features it in a campaign video and on its Web site. Smithfield's violations of workers rights, including firings, beatings, and false arrests of union supporters, were a central case study in the HRW report.

New Initiatives and New Organizations

The new convergence of labor and human rights communities is reflected in a variety of new campaigns and organizations with a labor-human rights mission. The AFL-CIO has launched a broad-based "Voice@Work" project which it characterizes as a "campaign to help U.S. workers regain the basic human right to form unions to improve their lives." Voice@Work stresses international human rights in workers' organizing campaigns around the

country. In 2005, the labor federation held more than 100 demonstrations in cities throughout the United States, and enlisted signatures from eleven Nobel Peace Prize winners, including the Dalai Lama, Lech Walesa, Jimmy Carter, and Archbishop Desmond Tutu of South Africa supporting workers' human rights in full page advertisements in national newspapers.[58]

In December 2006, the AFL-CIO marked International Human Rights Day with a two-day Strategic Organizing Summit meeting for trade union organizers. Materials to participants declared that "International Human Rights Day is the anniversary of the ratification of the United Nations Universal Declaration of Human Rights, which recognizes as a basic human right the freedom of all workers to form unions and bargain together." The conference launched a campaign for passage of the Employee Free Choice Act (EFCA) in the Congress following Democratic gains in the 2006 midterm elections.

The EFCA would incorporate international labor rights principles into U.S. law on union organizing.[59] A key Senate sponsor said, "The right to organize and join a union is a fundamental right recognized in the United Nations Declaration of Human Rights. Yet, the United States violates this fundamental principle every day because our current laws don't adequately protect employee rights."[60]

Labor and community organizations created Jobs with Justice (JwJ) "with the vision of lifting up workers' rights struggles as part of a larger campaign for economic and social justice," as JwJ describes its mission. JwJ focuses on building local coalitions to protect workers' organizing efforts when local employers engage in union-busting tactics that violate workers' rights. A signature JwJ initiative is the creation of local Workers Rights Boards, usually composed of elected officials, religious leaders, civil rights leaders, and other respected figures who conduct public hearings exposing employers' aggressive interference with workers' organizing efforts. In recent years JwJ has broadened its work to campaign for national health care, local government accountability for economic development, and global workers' rights.[61]

In 2004, trade unions and allied labor support groups created a new NGO called American Rights at Work (ARAW). ARAW launched an ambitious program to make human rights the centerpiece of a new civil society movement for U.S. workers' organizing and bargaining rights. ARAW's twenty-member board of directors includes prominent civil rights leaders, former elected officials, environmentalists, religious leaders, business leaders, writers, scholars, an actor, and one labor leader (AFL-CIO President John Sweeney). The group's "International Advisor" is Mary Robinson, former United Nations High Commissioner for Human Rights.[62]

Less directly connected to organized labor, but with rights at work an important part of its agenda, the National Economic and Social Rights Initiative (NESRI) took shape the same year with the mission of incorporating principles of the UN Covenant on Economic, Social, and Cultural rights into U.S. law and practice. NESRI is devoted to "working with organizers, policy advocates and legal organizations to incorporate a human rights perspective into their work and build human rights advocacy models tailored for the U.S."[63]

Along with NESRI, the RFK Center for Human Rights has helped the Coalition of Immokalee Workers in campaigns stressing human rights for agricultural workers in Florida. The Coalition's efforts brought a series of successful slavery prosecutions against labor traffickers in the state, and won improvements in wages and working conditions for field workers in a sustained campaign against Taco Bell and its parent Yum Brands, Inc.[64] In general, many organizations are turning to international human rights arguments in defense of immigrant workers in the United States.[65]

The National Employment Law Project (NELP) includes an immigrant worker project under the rubric "workers rights are human rights—advancing the human rights of immigrant workers in the United States." NELP has been a leader in filing complaints on immigrant workers' rights violations in the United States to the Inter-American Commission and Inter-American Court of Human Rights.[66]

Working with Mexican colleagues, NELP sought an Inter-American Court Advisory Opinion on U.S. treatment of immigrant workers. The petition was prompted by the Supreme Court's 2002 *Hoffman Plastic* decision stripping undocumented workers illegally fired for union organizing from access to back-pay remedies. In its opinion, the Court said that undocumented workers are entitled to the same labor rights, including wages owed, protection from discrimination, protection for health and safety on the job, and back pay, as are citizens and those working lawfully in a country.

The Court said that despite their irregular status, "If undocumented workers are contracted to work, they immediately are entitled to the same rights as all workers. . . . This is of maximum importance, since one of the major problems that come from lack of immigration status is that workers without work permits are hired in unfavorable conditions, compared to other workers."

The Court specifically mentioned several workplace rights that it held must be guaranteed to migrant workers, regardless of their immigration status:

> In the case of migrant workers, there are certain rights that assume a fundamental importance and that nevertheless are frequently violated, including: the prohibition against forced labor, the prohibition and abolition of child labor, special attentions for women who work, rights that correspond to association and union freedom, collective bargaining, a just salary for work performed, social security, administrative and judicial guarantees, a reasonable workday length and in adequate labor conditions (safety and hygiene), rest, and back pay.

Finally, the Court declared that its consultative decision should be binding on all members of the Organization of American States, whether or not they have ratified certain Conventions that formed the basis of the opinion. It based its decision on the nondiscrimination and equal protection provisions of the OAS Charter, the American Declaration, the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the Universal Declaration of Human Rights. The United States has not acted on the Court's advisory opinion.[67]

Also advocating for rights of immigrant workers are nearly 200 "workers centers" throughout the United States. These are private, locally based service and education centers, often housed in or supported by churches.

They assist immigrants with problems of discrimination, nonpayment of wages, and other violations. Many stress the human rights nature of their efforts.[68]

The National Workrights Institute (NWI) was founded in 2000 by the former staff of the American Civil Liberties Union's National Taskforce on Civil Liberties in the Workplace. NWI describes itself as "a new organization dedicated to human rights in the workplace, with a declared strategy of selecting "a small number of issues where there is both the potential of creating substantial long range improvement in workplace human rights and a current opportunity for constructive engagement." The group focuses on electronic monitoring in the workplace, drug testing, genetic discrimination, lifestyle discrimination, and law and practice on wrongful discharge.[69]

Reaching out to the religious community, Interfaith Worker Justice (IWJ) is a national coalition of leaders of all faiths supporting workers' rights under religious principles. IWJ places divinity students, rabbinical students, seminarians, novices, and others studying for careers in religious service in union-organizing internships. Through a national network of local religious coalitions, it also sponsors projects for immigrant workers, poultry workers, home-care workers, and other low-wage employees. IWJ gives special help when religious-based employers, such as hospitals and schools, violate workers' organizing and bargaining rights.[70]

A new student movement that began against sweatshops in overseas factories has adopted a human rights and labor rights approach to problems of workers in their own campuses and communities, often citing human rights as a central theme. Students at many universities held rallies, hunger strikes, and occupations of administration offices to support union organizing, "living wage," and other campaigns among blue-collar workers, clerical and technical employees, and other sectors of the university workforce.[71]

This section could be amplified with yet more examples of new organizations, or new projects within long-established groups, taking up U.S. workers' rights as human rights. The point here is to affirm that the human rights and labor communities no longer run on separate, parallel, never-meeting tracks. They have joined in a common mission with enhanced traction to advance workers' rights.

Trade Union Human Rights Reports

The new human rights mission in the labor movement is reflected in the use unions are making of human rights reports in specific organizing campaigns. Trade unionists find that charging employers with violations of international human rights, not just violations of the National Labor Relations Act or the Fair Labor Standards Act, gives more force to their claims for support in the court of public opinion. The Teamsters union, for example, launched a human rights campaign against Maersk-Sealand, the giant Denmark-based international shipping company, for violating rights of association among truck drivers who carry cargo containers from ports to inland distribution centers. The company fired workers who protested low pay and dangerous conditions, and threatened retaliation against others if they continued their organizing effort.

The union's report said:

> The responsibility of multinational corporations to recognize international human rights is becoming an important facet of international law. . . . A review and analysis of recent actions by Maersk's U.S. divisions reveal a systematic pattern of reprisals against owner-drivers who seek to exercise basic rights of association. . . . Cases examined in this report arose across the length and breadth of the United States—Baltimore, Maryland, Memphis and Nashville, Tennessee, Houston, Texas and Oakland, California.
>
> Specific circumstances differ, but the underlying pattern is similar. Truck drivers dependent on Maersk's U.S. divisions . . . sought collective dialogue with Maersk companies. Company officials responded not with dialogue but with threats, harassment and dismissal of workers and leaders. These actions violate international human rights and labor rights norms for workers.

The report went on to present detailed case studies of Maersk's labor rights violations. It concluded:

> Maersk officials claim that as independent contractors, not employees, their drivers are not covered by the National Labor Relations Act and can be dismissed for union activity with impunity. The company also maintains that drivers are also subject to antitrust laws and can be threatened with lawsuits for violations.
>
> But the often artificial distinction between employees and contractors is irrelevant to a human rights analysis. The Universal Declaration of Human Rights says everyone has the right to freedom of association and the right to form trade unions. UN covenants and ILO conventions and declarations on freedom of association apply to *all* workers, not some workers.

Among the report's recommendations were these on human rights:

> Maersk and its U.S. divisions should undertake internal training programs for managers on international human rights and labor rights norms affecting workers.
>
> Through press statements, by direct written communications to Maersk drivers, and in meetings with all Maersk workers (without regard to legal distinctions as to employee or contractor status), Maersk should declare publicly its commitment to respect international human rights and labor rights standards, including a policy of non-reprisals against any workers who exercise rights of assembly, association and speech in connection with their employment. . . .
>
> Failing the implementation of these recommendations, the International Brotherhood of Teamsters and the International Transport Federation should consider filing complaints in one or more international human rights and labor rights venues, such as the International Labor Organization's Committee on Freedom of Association or the NAFTA Labor Commission; under the OECD's Guidelines for Multinational Enterprises, or with the European Court of Justice.[72]

This was not just a report that sat on shelves. The union printed thousands of copies for distribution to affiliates of the International Transport Federation (ITF), the global trade union for workers in the transport sector. In 2004, workers protested at the Danish embassy and at consulates around the United States, distributing copies of the report.[73] In 2005, union leaders went to the corporation's annual shareholders meeting in Copenhagen giving

copies to investors and to the Danish media, with significant attention.[74] In 2006, the union introduced a shareholders resolution, common at American companies' annual meetings but a novelty for Maersk, calling on the company to adopt international labor rights standards as official company policy.[75]

Similar violations by a large Catholic hospital chain in Chicago prompted a human rights report by the American Federation of State, County, and Municipal Employees (AFSCME) on how the employer's actions violated both international human rights standards and principles of Catholic social doctrine. This report said:

> The actions of RHC management demonstrate a systematic pattern of interference with workers' organizing rights and reflect a failure to meet human rights principles and obligations. . . . Management signals a fundamental misunderstanding of the nature of the rights at stake when it says that it respects "the right of unions to represent employees if employees so choose." This mistakenly defines "the right of unions" as the right in question, rather than the right of workers to freely form and join unions and to bargain collectively, which is the core international human rights standard.
>
> Focusing on union rights rather than worker rights is management's basis for launching an aggressive campaign of interference against RHC workers' organizing efforts. Management asserts that it is battling the union, not battling its own employees. However, workers are the ones who suffer management harassment, intimidation, spying, threats and other violations of rights recognized under international human rights law. . . .
>
> RHC workers have the right under international human rights law to freedom of association and organization by forming and joining a trade union to seek collective representation before management. RHC has a corresponding obligation to honor this right and respect its exercise. Instead, RHC has responded with an aggressive campaign against workers' organizing rights in violation of rights recognized under international human rights law.[76]

This report too served as a tool for union organizing in the workplace and for organizing support in local political, religious, and human rights communities.[77]

The Teamsters union and the Service Employees International Union (SEIU) collaborated to present a human rights report at the May 2006 annual general meeting of First Group PLC, a multinational British firm. The report detailed workers rights violations by its U.S. subsidiary, First Student, Inc., a school bus transportation company with a record of aggressive interference with workers' organizing efforts. Rather than quote from the report, this excerpt from a related news article reflects its use:

> The head of Britain's biggest transport company promised yesterday to "stamp out anti-union behaviour" by senior managers at a key U.S. subsidiary amid unrest among the organisation's shareholders.
>
> Martin Gilbert, the chairman of First Group, told the company's annual meeting the organisation was taking the issue "very seriously" after a number of institutional shareholders voted for a "human rights" motion in defiance of the board's wishes.
>
> First Student, which operates more than 20,000 yellow school buses in the United States, has been accused of harassing and intimidating union activists. . . .

> The group launched an investigation into the allegations of anti-union behaviour and will report back to shareholders in the autumn.
>
> Outside the meeting, members of the Transport & General Workers' Union handed out copies of a report on First Student's labour relations policies concluding that First Student violated international human rights standards on workers' freedom of association.
>
> A spokesman for First said the group was not anti-union and "never had been". The board believed its present code of ethics covered the points made in the motion which called for the company to abide by standards laid down by the UN's International Labour Organisation. However, directors would consider whether policies should be brought more in line with ILO principles.
>
> The group would ensure there were formal training programmes in place for U.S. managers to ensure they abided by group policies.[78]

Using International Instruments

The American labor movement's new interest in international human rights law is also reflected in its increasing use of ILO complaints and international human rights mechanisms. While recognizing that the ILO Committee on Freedom of Association (CFA) cannot "enforce" its decisions against national labor law authorities and courts, U.S. unions are turning to the Committee for its authoritative voice and moral standing in the international community. They believe that Committee decisions critical of U.S. violations of workers' organizing and bargaining rights can bolster movements for legislative reform to reverse anti-labor decisions by the NLRB and the courts.

In 2002, the AFL-CIO joined with the Mexican *Confederación de Trabajadores de México* (CTM) to file a CFA complaint against the Supreme Court's *Hoffman Plastic* decision. The Supreme Court's five-to-four ruling held that an undocumented worker, because of his immigration status, was not entitled to back pay for lost wages after he was illegally fired for union organizing. The five-justice majority said that enforcing immigration law takes precedence over enforcing labor law.

The four dissenting justices said there was not such a conflict and that a "backpay order will *not* interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent."

The union federations' ILO complaint said:

> The *Hoffman* decision and the continuing failure of the U.S. administration and Congress to enact legislation to correct such discrimination puts the United States squarely in violation of its obligations under ILO Conventions 87 and 98 and its obligations under the ILO's 1998 *Declaration on Fundamental Principles and Rights at Work*. From a human rights and labor rights perspective, workers' immigration status does not diminish or condition their status as workers holding fundamental rights. . . .
>
> By eliminating the back pay remedy for undocumented workers, the *Hoffman* decision annuls protection of their right to organize. The decision grants license to employers to violate workers' freedom of association with impunity. Workers have no recourse and no remedy when their rights are violated. This is a clear breach of the requirement in Convention 87 to provide adequate protection against acts of anti-union discrimination.[79]

In November 2003, the Committee on Freedom of Association issued a decision that the *Hoffman* doctrine violates international legal obligations to protect workers' organizing rights. The Committee concluded that "the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination."[80]

The ILO Committee recommended congressional action to bring U.S. law "into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the Hoffman decision."

In June 2005, the International Federation of Professional Technical Employees (IFPTE), together with the AFL-CIO and the global union federation Public Services International (PSI), filed a CFA complaint on behalf of locally engaged staff at the British Embassy in Washington, D.C., after embassy officials refused to bargain with employees' choice of IFPTE as their union representative.[81] The embassy said that it need not recognize the employee' choice because locally hired workers were "engaged in the administration of the state," taking them outside protection of ILO standards based on earlier Committee decisions. IFPTE argued:

> The Committee well knows that the definition of "public servants engaged in the administration of the state" does not reach locally engaged staff of an embassy. Locally engaged staff do not make diplomatic or equivalent policy. It is worth noting that most of the diplomatic staff posted to the Embassy are in fact represented by a UK public servants' union. *A fortiori*, locally engaged staff have the right to form and join a trade union for the defense of their interests under application of ILO principles and standards reflected in Conventions Nos. 87 and 98 as well as in the Declaration on Fundamental Principles and Rights at Work.

At this writing, the CFA is still considering the complaint, awaiting further information from the parties.[82]

In October 2006, the AFL-CIO filed a CFA complaint against the NLRB decision in the so-called *Oakwood* trilogy, in which the NLRB announced an expanded interpretation of the definition of "supervisor" under the National Labor Relations Act.[83] Under the new ruling, employers can classify as "supervisors" employees with incidental oversight over co-workers even when such oversight is far short of genuine managerial or supervisory authority.

In its complaint to the ILO, the AFL-CIO cited Convention No. 87's affirmation that

> Workers and employers, without distinction whatsoever, shall have the right to establish and . . . to join organizations of their own choosing without previous authorization. The federation argued that "In violation of the Convention, the NLRB's *Oakwood* trilogy creates a new distinction in U.S. labor law denying freedom of association to employees deemed "supervisors" under the new test for supervisory status.

In connection with Convention No. 98's requirement that "Workers shall enjoy adequate protection against acts of anti-union discrimination" the

AFL-CIO asserted that the NLRB's *Oakwood* trilogy "strips employees in the new 'supervisor' status of any and all protection. Employers may fire them with impunity if they do not relinquish union membership or if they participate in union activities. Employers can even force these employees, under pain of dismissal, to participate in management's anti-union campaigns."

The AFL-CIO complaint pointed to principles established by earlier CFA cases from other countries involving the status of workers deemed "supervisors":[84]

- The expression "supervisors" should be limited to cover only those persons who genuinely represent the interests of employers;
- Legal definitions of "supervisors" or other excluded categories of workers should not allow an expansive interpretation that excludes large numbers of workers from organizing and bargaining rights;
- Employees should not be "excluded" to undermine worker organizing or to weaken the bargaining strength of trade unions;
- Changing employees' status to undermine the membership of workers' trade unions is contrary to the principle of freedom of association;
- Even true supervisors have the right to form and join trade unions and to bargain collectively, though the law may require that their bargaining units be separate from those of supervised employees.

The AFL-CIO called on the Committee to "lend its voice and its moral standing to support workers' freedom of association in the United States," and concluded:

> Finally, we ask the Committee to send a direct contacts mission to the United States to examine the effects of the NLRB's *Oakwood* trilogy. Such direct contact with workers, union representatives, employers and their representatives, and labor law authorities will provide the Committee with "on the ground" understanding of the issues. Direct contacts will better inform the Committee's analysis by giving life to its review of documents in the case. A direct contact mission will have the added benefit of bringing dramatic public attention to the work of the Committee on Freedom of Association in a country and a labor law community that, lamentably, know little about the ILO and the authoritative role of the Committee on Freedom of Association.

The United Electrical, Radio, and Machine Workers of America (UE) is an independent union known for its progressive politics and internal democracy. Traditionally a manufacturing sector union, the UE began an innovative organizing campaign among low-paid public sector workers in North Carolina, a state that prohibits collective bargaining by public employees. Using state and local civil service procedures, the union has won several grievances and wage increases for workers.

In 2006 the UE convinced the International Commission for Labor Rights, a new NGO composed of labor lawyers and professors from around the world, to hold a public hearing in North Carolina to hear firsthand from union supporters about violations of their organizing and bargaining rights. Labor experts from Canada, Mexico, Nigeria, India, and South Africa joined the hearing.

The ICLR issued a report finding "significant violations of internationally recognized labor standards in the public sector in North Carolina, which were strongly correlated to the absence of collective bargaining rights."[85]

In 2006 the UE filed a complaint with the ILO Committee on Freedom of Association charging that North Carolina's ban on public worker bargaining, and the failure of the United States to take steps to protect workers' bargaining rights, violate Convention No. 87's principle that "all workers, without distinction" should enjoy organizing and bargaining rights, and Convention No. 98's rule that only public employees who are high-level policymakers, not rank and file workers, be excluded.

Alongside the ILO complaint, the UE turned to the Inter-American Commission for Human Rights with a request for a "thematic hearing" under IACHR procedures on the conflict between North Carolina's prohibition on collective bargaining and freedom of association protections in the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and the Inter-American Democratic Charter.[86]

Joined by twenty-four other unions in the United States, Mexico, and Canada, the UE also filed a complaint under NAFTA's labor side agreement in October 2006 arguing that North Carolina's ban on public employee bargaining violated NAALC labor principles on freedom of association. That was not the only use of NAFTA's labor accord to defend workers' rights in the United States. In 2001, supported by the NYU Law School immigration law clinic, the Chinese Staff and Workers' Association (CSWA), the National Mobilization Against SweatShops (NMASS), local worker support groups Workers' Awaaz and Asociación Tepeyac, and several individual workers filed a NAALC complaint on the breakdown of New York state's workers' compensation system. The complaint led to consultations among the U.S. and Mexican labor departments and New York state authorities on finding ways to accelerate claims processing, a key aspect of the complaint.[87]

In 2003, the Farmworker Justice Fund, Inc., and Mexico's Independent Agricultural Workers Central (CIOAC) filed a complaint under the NAALC on behalf of thousands of migrant agricultural workers in North Carolina holding H-2A visas for temporary agricultural labor.[88] The Farm Labor Organizing Committee (FLOC) was engaged in an organizing campaign among those workers, and a boycott of Mt. Olive Pickle Co., a major North Carolina agricultural employer. The complaint gained widespread support in Mexico and helped the union win a breakthrough collective agreement in 2004.[89]

In 2005, the Northwest Workers' Justice Project, the Brennan Center for Justice at NYU Law School, the National Immigration Law Center (NILC), the Idaho Migrant Council, the Northwest Treeplanters and Farmworkers United (PCUN), and six Mexican organizations filed a complaint for H-2B temporary migrant workers in the Idaho timber industry. The submission pointed to forced labor, subminimum wages, discrimination, safety hazards, and other violations of NAALC labor principles.[90]

As these cases and complaints suggest, the readiness of workers' rights advocates to use international labor instruments and mechanisms has expanded exponentially in the past ten years. Some unions are now laying the ground

for a next stage: using trade agreements signed by the United States to put U.S. workers' rights violations under international scrutiny in a trade context.

New Labor Scholarship

Another "climate-changing" effect is taking place among U.S. labor and human rights scholars. Many are incorporating human rights norms and ILO core standards in their analyses, not just domestic discourse based on the commerce clause and other economic considerations. Here are three examples involving workplace health and safety, labor arbitration, and the right to work (in its true sense, not the anti-union "right-to-work" fraud).

Many American analysts view occupational health and safety protections and workers' compensation for workplace injuries as strictly economic benefits dependent on a country's level of development or a company's ability to pay for them, not as basic rights. Professor Emily Spieler, a leading expert on worker health issues, noted:

> The apparent underlying assumptions are that working conditions, including occupational safety, are context driven, difficult to define, and contingent on local levels of economic development and productivity. . . . This approach relegates subminimum wages, excessive hours, and sometimes brutally dangerous conditions to a lower level of importance in human rights discourse; it ratifies the view that labor is a commodity that is fully subject to market forces, no matter how abusive the resulting working conditions.[91]

Professor Spieler pointed out that workplace health and safety was the subject of the first international labor rights treaty, a 1906 accord banning manufacture and export of white phosphorus matches deadly to workers who produced them. Since then, authoritative international human rights instruments include workplace health and safety and compensation for workplace injuries as fundamental rights. In a powerful analogy driving home her point, Professor Spieler argues:

> In view of the egregious health and safety hazards in some workplaces . . . postponing the improvement of health and safety until market forces can effect change is analogous to postponing the release of political prisoners who may die in prison until a despotic government is replaced through democratic elections. It is in fact the right to life that we are talking about when we talk about work safety.[92]

Professor Spieler's carefully constructed argument for workplace health and safety as a human right does not rest at the level of a general proposition. She focuses on three more detailed standards for affording the right:

- Workers' right to information on workplace hazards;
- Workers' right to be free from retaliation for raising safety concerns or for refusing imminently dangerous work;
- Workers' right to work in an environment reasonably free from predictable, preventable, serious risks.

According to Professor Spieler's analysis, "human rights violations occur when employers' deliberate and intentional actions expose workers to preventable, predictable, and serious hazards. The fundamental right to be free from these hazards should be guaranteed."[93]

As well as a renowned labor scholar—the leading historian of the National Labor Relations Board and analyst of workers' rights as human rights—Professor James A. Gross is a nationally prominent labor arbitrator. Among other responsibilities, he was a standing arbitrator for Major League Baseball and the Players' Union for many years.

Professor Gross has developed a creative proposal to bring international human rights jurisprudence into U.S. labor arbitration practice. He says:

> The focus of this article is on the application of human rights standards to labor arbitration in the United States. . . . A worker was discharged for refusing to work under a furnace that had several glass leaks and electrode cooling problems. . . . The arbitrator decided, "the Company has a business it must run in an efficient and productive manner . . . recognizing the dangers associated with any kind of maintenance work in a large facility of this nature, . . . the Company must be able to assign employees to such work."
>
> The proposition that management rights must take precedence over all else should not obscure a more humane value judgment, namely that nothing is more important at the workplace than human life and health. That is a human rights standard, not a management rights standard. . . .
>
> It is only recently that many union leaders and members have come to understand workers' rights as human rights. As unions come to perceive themselves as human rights organizations promoting and protecting such fundamental human rights as the right to freedom of association and collective bargaining, safe and healthful workplaces, and discrimination-free treatment, there will be a necessary carry-over to the grievance-arbitration process. . . .
>
> Unions can also pursue human rights clauses in contract negotiations with employers. Human rights clauses in collective bargaining agreements could become as common as management rights clauses. Since traditional labor arbitrators limit workers' rights to those set forth in collective bargaining agreements, they will have to consider workers' human rights if those rights are written into contracts. . . .
>
> There can be no true workplace justice without recognizing and respecting those rights of human beings that are more compelling than any other rights or interests at the workplace. That will occur only when U.S. labor arbitrators come to utilize human rights standards in their decision-making.[94]

Professor Philip Harvey argues compellingly for application of the UN's economic, social, and cultural rights covenant to the right to employment in the United States:

> The right to work is expressly recognized in Article 23 of the Universal Declaration [and] in the International Covenant on Economic, Social and Cultural Rights . . . domestic advocacy of the right to work has occasionally been quite strong in the United States, and federal legislation stemming from this advocacy has succeeded in imposing, with one significant difference, essentially the same substantive obligations on the United States government that would flow from ratification of international human rights agreements recognizing the right to work. The difference is that ensuring access to work is not recognized

as a human right in this legislation, but merely a desirable policy goal competing for attention with other policy goals. . . .

In sum, the United States has imposed a statutory obligation on itself to secure the right to work that is substantially equivalent to the obligation that would follow from ratification of the International Covenant on Economic, Social and Cultural Rights. The only significant difference is that the statutes establishing this duty do not expressly recognize access to work as a human right.

We shall see that important consequences may flow from this distinction, but at this point I merely want to emphasize that the right to work claim has achieved some recognition in American law, despite the United States' strong resistance to accepting international human rights obligations beyond those already mandated by the nation's Constitution. Whether this recognition will grow with time is difficult to predict, but participants in employment policy debates in the United States should feel some obligation to address the legal mandates that do exist in this area under both international and domestic law.[95]

CONCLUSION

Reason for Caution

None of this is meant to overstate the impact of the new labor–human rights alliance in the United States. In fact, some labor supporters caution against too much emphasis on a human rights argument for workers' organizing in the United States. They maintain that a rights-based approach fosters individualism instead of collective worker power; that demands for "workers' rights as human rights" interfere with calls for renewed industrial democracy; that channeling workers' activism through a legalistic rights-enhancing regime stifles militancy and direct action. Labor historian Joseph McCartin says:

Because it puts freedom ahead of democracy, rights talk tends to foster a libertarian dialogue, where capital's liberty of movement and employers' "rights to manage" are tacitly affirmed rather than challenged. Arguing in a rights-oriented framework forces workers to demand no more than that *their* rights be respected alongside their employers' rights. . . .

I am not suggesting that today's labor advocates should abandon their rights-based arguments. These have undeniable power, speak to basic truths, and connect to important traditions—including labor's historic internationalism. Rather, I am arguing that the "workers' rights are human rights" formulation alone will prove inadequate to the task of rebuilding workers' organizations in the United States unless we couple it with an equally passionate call for democracy in our workplaces, economy, and politics.[96]

Historian Nelson Lichtenstein argues:

Two years ago HRW published *Unfair Advantage: Workers' Freedom of Association in the United States Under Human Rights Standards,"* which is certainly one of the most devastating accounts of the hypocrisy and injustice under which trade unionists labor in one portion of North America. . . .

This new sensitivity to global human rights is undoubtedly a good thing for the cause of trade unionism, rights at work, and the democratic impulse. . . . [But]

> as deployed in American law and political culture, a discourse of rights has also subverted the very idea, and the institutional expression, of union solidarity. . . . Thus, in recent decades, employer anti-unionism has become increasingly oriented toward the ostensible protection of the individual rights of workers as against undemocratic unions and restrictive contracts that hamper the free choice of employees. . . . without a bold and society-shaping political and social program, human rights can devolve into something approximating libertarian individualism.[97]

Historian David Brody suggests that a human rights analysis too willingly accepts the view that collective bargaining is gained through a bureaucratic process of government certification rather than through workers' direct action. "That a formally democratic process might be at odds with workers' freedom of association," he writes, "seems to fall below the screen of 'human rights analysis.' "[98]

These are healthy cautions from serious, committed scholars and defenders of trade unions and workers' rights. They contribute to a needed debate about the role and effectiveness of human rights activism and human rights arguments in support of workers' rights. All three historians agree that human rights advocacy is important for advancing the cause of social justice; that one need not make an "either-or" choice.

Reason for Hope

Conditions have ripened for raising the human rights platform to advance workers' rights in the United States. International labor law developments are fostering new ways of thinking and talking about labor law in the United States—a necessary condition for changing policy and practice.

Arguing from a human rights base, labor advocates can identify violations, name violators, demand remedies, and specify recommendations for change. Workers empowered in organizing and bargaining campaigns are convinced—and are convincing the public—that they are vindicating their fundamental human rights, not just seeking a wage increase or fringe benefits enhancement. Employers are thrown more on the defensive by charges that they are violating workers' human rights. The larger society is more responsive to the notion of trade union organizing as an exercise of human rights rather than economic strength.

This is not meant to overstate the case for human rights or to exaggerate the effects of the human rights argument. Labor advocates cannot just cry "human rights, human rights" and expect employers to change their behavior or Congress to enact labor law reform. U.S. labor law practitioners need first to learn more about international labor standards. Then they have to make international law arguments in their advocacy work before the NLRB and the courts. The simple step of regularly including international labor law standards, citations, and arguments in their briefs will begin to educate labor law authorities and the judiciary on the relevance of international human rights law to American labor law.

Change will be incremental. Labor and human rights advocates still confront general unawareness in the United States of international human rights

standards and of the International Labor Organization's work in giving precise meaning to those standards. Advocates still have an enormous educational challenge of making them more widely known and respected.

Trade unions' use of international instruments and mechanisms and human rights groups' labor rights reporting contribute to this educational effort. At the same time, they change the climate for workers' organizing and bargaining by framing them as a human rights mission, not a test of economic power between an employer and a "third party" (employers' favorite characterization of unions in organizing campaigns).

A human rights emphasis also has alliance-building effects. Human rights supporters and human rights organizations are a major force in civil society, one that historically stood apart from labor struggles, seeing them not as human rights concerns but as institutional tests of strength. Now the human rights community is committed to promoting workers' rights, bringing an important addition to labor's traditional allies in civil rights, women's, and other organizations. We cannot foresee in detail how this new alliance will proceed, but it has surely succeeded in reframing the debate, redefining the problems, and reshaping solutions to protect workers' rights as human rights in the United States.

Labor advocates' human rights focus is still new. It is not a magic bullet for organizing or bargaining success; there are no magic bullets for workers in this society. Still, many unions are finding the human rights theme one that resonates and advances their campaigns: the UFCW in that hog-slaughtering plant in North Carolina, AFSCME in its hospital workers' organizing campaign in Chicago, Teamsters in the drive to help port truck drivers stand up to big container shippers; SEIU in its campaign to organize school bus drivers, and many others. Perhaps in years ahead, with some victories to show from a human rights base in its organizing and bargaining campaigns, the labor movement and its allies can advance a rights-centered public policy agenda raising economic and social rights under international human rights standards.

NOTES

1. For an account, see Ronald L. Filippelli and Mark McColloch, *Cold War in the Working Class: The Rise and Decline of the United Electrical Workers* (Albany: State University of New York Press, 1995).

2. See Hugh Wilford's study of CIA "front" operations during the early Cold War period, forthcoming from Harvard University Press.

3. See, for example, Leon Fink, *Workingmen's Democracy: The Knights of Labor and American Politics* (Champaign: University of Illinois Press, 1983); Joseph A. McCartin, *Labor's Great War: The Struggle for Industrial Democracy and the Origins of Modern American Labor Relations, 1912–1921* (Chapel Hill: University of North Carolina Press, 1997).

4. For this citation and a discussion of this period and its references to industrial democracy and rights, see Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton, NJ: Princeton University Press, 2002).

5. For a fuller discussion of the failure of labor and human rights activists to see each other's work as part of their own, see Virginia A. Leary, "The Paradox of Workers' Rights as Human Rights," in Lance A. Compa and Stephen F. Diamond (eds.), *Human*

Rights, Labor Rights, and International Trade (Philadelphia: University of Pennsylvania Press, 2003).

6. For extensive analytical treatment of this point, see James Gray Pope, "The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957," *Columbia Law Review* 102 (2002): 1.

7. See Michael H. LeRoy, "Regulating Employer Use of Permanent Striker Replacements: Empirical Analysis of NLRA and RLA Strikes 1935–1991," *Berkeley Journal of Employment and Labor Law* 16 (1995): 169.

8. For two gripping accounts of strikes broken by permanent replacement, see Jonathan D. Rosenblum, *Copper Crucible: How the Arizona Miners' Strike of 1983 Recast Labor-Management Relations in America* (Ithaca, NY: Cornell University Press, 1998), and Julius Getman, *The Betrayal of Local 14: Paperworkers, Politics, and Permanent Replacements* (Ithaca, NY: Cornell University Press (1998). See also Steven Greenhouse, "Strikes Decrease to 50-Year Low as Threat of Replacement Rises," *New York Times* (January 29, 1996), p. A1.

9. See Joel Cutcher-Gershenfeld, "The Social Contract at the Bargaining Table: Evidence from a National Survey of Labor and Management Negotiators," Industrial Relations Research Association, *Proceedings of the 51st Annual Meeting*, Vol. 2 (1999).

10. See Helen Dewar, Frank Swoboda, "Republican-Led Filibuster Kills Striker Replacement Bill in Senate," *The Washington Post* (July 14, 1994), p. A7.

11. Workers in right-to-work states earn on average $7,000 a year less than workers in states where employers and unions can agree to "union security" clauses. See Center for Policy Alternatives, "Right to Work for Less," *Policy Brief*, available online at www.stateaction.org/issues/issue.cfm/issue/RightToWorkForLess.xml.

12. See U.S. General Accounting Office, *Collective Bargaining Rights: Information on the Number of Workers with and without Bargaining Rights*, GAO-02-835 (September 2002).

13. See Julius Getman, "The National Labor Relations Act: What Went Wrong; Can We Fix It?" *Boston College Law Review* 45 (December 2003): 125.

14. For a collection of essays on this question, see Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton, NJ: Princeton University Press, 2005). See also Kenneth Roth, "The Charade of U.S. Ratification of International Human Rights Treaties," *Chicago Journal of International Law* 1 (Fall 2000): 347.

15. The United States has ratified Convention No. 105 on forced labor and Convention No. 182 on worst forms of child labor. The United States has not ratified Convention No. 29 on forced labor, No. 87 on freedom of association, No. 98 on the right to organize, No. 100 on equal pay, No. 111 on nondiscrimination, and No. 138 on child labor.

16. See Appendix B, Senate Foreign Relations Committee, Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 25 (1992), reprinted in 31 I.L.M. 645, 660 (1992).

17. See *Second and Third Report of the United States of American to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, October 21, 2005. The report did mention, without discussion, the Supreme Court's 2002 decision in *Hoffman Plastic Compounds v. NLRB*, discussed in detail below. A failure to mention *Hoffman Plastic* would have signaled either gross incompetence or deliberate omission.

18. See Cynthia L. Estlund, "The Ossification of American Labor Law," *Columbia Law Review* 102 (2002): 1527.

19. See International Labor Organization, Follow-Up Reports to 1998 Declaration on Fundamental Principles and Rights at Work, United States report, "Freedom of Association and the Effective Recognition of the Right to Collective Bargaining," 1999.

20. See AFL-CIO, "Comments of the AFL-CIO on the Report by the Government of the United States of America, in Accordance with Article 22 of the Constitution of the International Labor Organization, on the Measures Taken to Give Effect to the Provisions of the Tripartite Consultation (International Labor Standards) Convention, 1976," on file with AFL-CIO legal department.

21. For a critique on this point, see Philip Alston, "Labor Rights Provisions in US Trade Law: Aggressive Unilateralism?" in Lance Compa and Stephen F. Diamond (eds.), *Human Rights, Labor Rights, and International Trade* (Philadelphia: University of Pennsylvania Press, 2001).

22. See *International Labor Rights Education and Research Fund v. George Bush, et al.*, 752 F. Supp. 495, 1990.

23. See Petition to the United States Trade Representative, Labor Rights in Chile (1986); Petition to the United States Trade Representative, Labor Rights in Chile (1987)(filed by the UE and the AFL-CIO)(on file with USTR).

24. Paul Adams, "Suspension of Generalized System of Preferences from Chile — The Proper Use of a Trade Provision," *George Washington Journal of International Law & Economics* 23 (Winter 1990): 501.

25. Eugene Robinson, "Chile's Pinochet Beaten In Plebiscite on Rule; Voters Reject Bid for 8 More Years in Power," *The Washington Post* (October 6, 1988), p. A1.

26. This does not mean there are not still severe problems with Chilean labor law and practice. For a thorough analysis, see Carol Pier, "Labor rights in Chile and NAFTA Labor Standards: Questions of Compatibility on the Eve of Free Trade," *Comparative Labor Law & Policy Journal* 19 (1998): 185.

27. Tod Robberson, "Guatemalan President Seizes Decree Power, Dissolves Congress; Moves Follow Talk of Restive Military," *The Washington Post* (May 26, 1993), p. A21.

28. Jared Kotler, "Keep the Economic Heat on Guatemala's Leaders," *Miami Herald* (June 7, 1993), p. 11A.

29. Ibid.

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Portraits of the Movement

Edited by

Cynthia Soohoo, Catherine Albisa,
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Foreword

It is with pleasure that I introduce this set of volumes on human rights in the United States, the land of the Four Freedoms speech, a source of inspiration for human rights advocates throughout the world since President Roosevelt first delivered it in 1941.

As the United Nations High Commissioner for Human Rights, it is my duty to promote and protect the rights of all, the freedoms of all. To do so requires concerted efforts at the national level and hence, in recent years, we have devoted special efforts to developing closer links with local partners, national institutions, and organizations with a view to bringing human rights home. I am convinced that building national capacity is an important way to advance human rights protection where it matters most.

It is in this vein that the present set is most welcome. The three volumes offer the reader the opportunity to identify and examine not only the historical richness of the human rights movement in the United States, but its current strengths and challenges. In doing so, the wide array of chapters from scholars, lawyers, and grassroots activists offer diverse perspectives and insights, often through the lens of international human rights standards.

For the United Nations Human Rights System all rights deserve equal treatment and standing since they serve to "promote social progress and better standards of life in larger freedom," as proclaimed in the Universal Declaration of Human Rights. This publication exemplifies these principles, covering diverse topics—from torture to agricultural workers' campaigns to health care—that reflect the essential interdependence and indivisibility of economic, social, civil, political, and cultural rights. I specifically welcome the publication's inclusion of themes relating to economic, social, and cultural rights.

I perceive this as an area where the international community could benefit from greater American leadership.

The combination of case studies, analytical pieces, and testimonial chapters provides a thorough account of the ample spectrum of strategies and views that are currently contributing to the national debate. Moreover, this choice underscores the complexity of global challenges such as migration, security, and governance. For all nations, large and small, and for the United Nations Human Rights System, these issues pose threats and dilemmas of equal relevance, and require a commitment to protecting the rights of individuals while guaranteeing the rule of law.

The approaching sixtieth anniversary of the Universal Declaration in 2008 offers a great opportunity to look back at the many accomplishments of the past decades, in which the U.S. human rights movement has played a central role. Compilations such as this will offer the public a comprehensive review of the past, while shedding light on present and future challenges. I commend the editors and writers for their contribution to the central human rights debates of our time.

Louise Arbour
United Nations High Commissioner for Human Rights
August 2007

Preface

> Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. . . . Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.
>
> —Eleanor Roosevelt

In the early 1990s, the term "U.S. human rights" would have probably elicited vague confusion and puzzled looks. Contemporary notions of human rights advocacy involved the criticism of rights abuses in *other* countries, and claims of human rights violations were leveled *by,* not *at*, the U.S. government. Although human rights documents and treaties purported to discuss universal rights obligations that applied to all countries, the prevailing wisdom was that the American people did not need human rights standards or international scrutiny to protect their rights. Many scholars and political scientists, who described themselves as "realists," expressed doubt that international human rights law could ever influence the behavior of a superpower such as the United States.

Yet, segments of the American public have always believed that the struggle for human rights is relevant to the United States. One of the earliest uses of the term "human rights" is attributed to Frederick Douglass and his articulation of the fundamental rights of enslaved African Americans at a time when the United States did not recognize their humanity or their rights. At various times in U.S. history, the idea that all individuals have fundamental rights rooted in the concept of human dignity and that the international

community might provide support in domestic rights struggles has resonated with marginalized and disenfranchised populations. Thus, it was no surprise that U.S. rights organizations, including the NAACP and American Jewish Congress, played a crucial role in the birth of the modern human rights movement. Both groups helped to ensure that human rights were included in the UN Charter.

Following the creation of the UN, many domestic social justice activists were interested in human rights standards and the development of international forums. Human rights offered the potential to expand both domestic concepts of rights and available forums and allies for their struggles. In the late 1940s and 1950s, Cold War imperatives forced mainstream social justice activists to limit their advocacy to civil claims rights, rather than broader human rights demands for economic and social rights, and to forgo international forums or criticism of the United States. At the same time, isolationists and Southern senators, opposed to international scrutiny of Jim Crow and segregation, were able to effectively prevent U.S. ratification of human rights treaties that required U.S. compliance with human rights standards.

As a result of these pressures, by the 1950s, the separation between international human rights and domestic civil rights appeared complete. Human rights advocacy came to be understood as involving challenges to oppressive regimes abroad, and domestic social justice activists focused on using civil rights claims within the domestic legal system to articulate and vindicate fundamental rights. Recent scholarship by Mary Dudziak and others point out that during the 1950s and 1960s, the United States's civil rights agenda was strongly influenced by concerns about international opinion because Jim Crow and domestic racial unrest threatened to undermine U.S. moral authority during the Cold War. However, although international pressures may have encouraged and supported reform within the United States, the main engine for change was the domestic legal system. Federal civil rights legislation and Supreme Court cases ending *de jure* segregation, expanding individual rights and protecting the interests of poor people through the 1960s seemed to support the perception that the United States did not need human rights.

Soon after, however, the political climate slowly began to shift. Changes on the Supreme Court led to a retreat in domestic protections of fundamental rights. By the end of the 1980s, the assault on domestic civil rights protections was well underway, as illustrated by political attacks on affirmative action and reproductive rights. Political leaders undermined social programs. President Ronald Reagan demonized the poor, claiming that welfare recipients were primarily defrauding the system and women drove away from the welfare offices in Cadillacs. This image of the "welfare queen" created a foundation for further attacks on the rights of the poor in the years to come.

From the 1990s to present day, the deterioration of legal rights for Americans continued at a vigorous pace. Congress and increasingly conservative courts narrowed remedies for employment discrimination and labor violations and restricted prisoners' access to the courts. The legislature and executive branch over time also allotted fewer resources, and even less political will, to government enforcement of laws protecting Americans from job

discrimination, health and safety violations in the workplace, and environmental toxins. Funding for legal services was cut.

Simultaneous to the slow unraveling of the rights of the people in the United States, global events shifted dramatically with the end of the Cold War. Suddenly, the standard politicization of human rights no longer made sense. This opened an important window of opportunity for activists in the United States. Human rights—including economic, social, and cultural rights—could now be claimed for all people, even those within the United States, without triggering accusations of aiding communist adversaries.

As the relevance of international human rights standards grew for the United States, even the increasingly conservative federal judiciary took note. The Supreme Court issued a series of cases citing international human rights standards involving the death penalty and gay rights. These cases were sharply criticized by the most reactionary politicians and members of the Court itself. In 2002, Supreme Court Justice Clarence Thomas admonished his brethren not to "impose foreign moods, fads, or fashions on Americans." Reactionary pundits and scholars picked up on this theme arguing that compliance with human rights standards is antidemocratic because it overrules legislative decisions that constitute the will of the majority.

Nonetheless, the trend toward applying human rights in the United States continued to deepen slowly and quietly until a series of events jolted the American psyche. These events forced the mainstream public to consider what human rights had to do with us, while simultaneously engendering even more vigorous official opposition. As the nation began to recover from the terrorist attacks on 9/11, many were shocked by the anti-terrorism tactics of the Bush administration. To deflect criticism, the administration engaged in legal maneuverings to claim that torture and cruel and degrading treatment were legal under U.S. law, and that international law prohibitions on torture and cruel treatment were not relevant. Voices both within the United States and from the international community challenged the Bush administration, pointing out that torture is a human rights violation in any country.

In 2005, Hurricane Katrina also provided a stark illustration that poor, minority, and marginalized communities need human rights protections and that domestic law falls painfully short of even articulating, much less remedying a wide range of fundamental rights violations. This remains particularly true when affirmative government obligations to protect life, health, and well-being are involved. The government's abandonment of thousands of people too poor to own a car, and the resulting hunger, thirst, chaos, and filth they suffered for many days after the storm shocked the conscience of Americans. People around the world were incredulous to see how the richest nation in the world failed to respond to the needs of its own people. Given an opportunity to rehabilitate its image after the storm, government actions have instead deepened existing inequalities, oppression, and poverty of those affected. Katrina has served as a wake-up call for the region's activists who have collectively embraced human rights as a rallying cry.

Post-9/11 the Supreme Court has served to moderate the worst excesses of the Bush administration's war on terror and, in closely contested cases, brought the United States in line with peer democratic countries by abolishing the

juvenile death penalty and criminal restrictions on consensual homosexual conduct. However, the widening gap between U.S. law and international human rights standards was made brutally clear by the Supreme Court's 2007 decision striking down voluntary school desegregation plans in Seattle and Louisville. The decision effectively overturned a significant part of *Brown v. Board of Education* and signaled an abandonment of the Court's historic role as protector of the vulnerable and marginalized in society. In direct opposition to the UN Convention on the Elimination of All Forms of Racial Discrimination, which allows and in some cases requires affirmative measures to remedy historic discrimination, the Seattle and Louisville cases held that school desegregation programs voluntarily adopted by school boards constitute unconstitutional racial discrimination. In 2007, these cases appear as a harbinger of the battles yet to be fought on the much-disputed territory of human rights in the United States.

This three-volume set tells the story of the domestic human rights movement from its early origins, to its retreat during the Cold War, to its recent resurgence and the reasons for it. It also describes the current movement by examining its strategies and methods and considering advocacy around a number of issues. It is our hope that this book will provide greater understanding of the history and nature of the domestic human rights movement and in doing so respond to unwarranted criticism that domestic human rights advocacy is foreign to U.S traditions and that it seeks to improperly impose the views and morals of the international community on the American people.

Although the history of U.S. involvement in the birth of the modern international human rights movement is well known, the parallel history of the struggle for human rights within the United States has been overlooked and forgotten. Volume 1 reclaims the early history of the domestic human rights movement and examines the internal and external factors that forced its retreat. In order to aid the reader, many of the documents referred to in this set are included in the Appendix at the end of Volume 1. A list of the documents that are included appears at the beginning of the Appendix.

Through the chapters in Volumes 2 and 3, we hope to provide a clearer picture of current human rights advocacy in the United States. Human rights work in the United States is often misunderstood because those who search for it tend to focus on legal forums, forays into international institutions, and human rights reports written by international human rights organizations. While such work is critically important and continues to grow, human rights education and organizing tends to get overlooked. As we tell the story of human rights advocacy in the United States and come to understand the current depth and diversity of the movement and its embrace by grassroots communities, the hollowness of antidemocratic criticism becomes clear. Rather than encompassing a set of foreign values that are imposed upon us, the fight for human rights in the United States is emerging both from the top down and the ground up.

Acknowledgments

We want to express our deep appreciation to the activists profiled in this book, whose work continues to inspire us, and to the authors of these chapters for contributing their experience, insights, and hard work to this effort. Many thanks are in order to Hilary Claggett for encouraging us to pursue this project and to Professor Peter Rosenblum for his support and encouragement. We are also grateful to our publishers at Praeger, Shana Jones, Elizabeth Potenza, and Lindsay Claire.

During the initial stages of this project, we were fortunate to be able to convene two conferences at Columbia Law School in May 2005 and June 2006 to develop the content and themes for this book. Many conference participants became contributing authors or provided first person accounts. Other participants, including Clifford Bob, Ellen Chapnick, Rhonda Copelon, Jamie Fellner, Hadar Harris, the Honorable Claire L'Heureux-Dube, Garth Meintjes, Alice Miller, Judith Resnik, Peter Rosenblum, Amanda Shanor, and Steven Watt provided invaluable comments and suggestions, which helped to shape the direction of the project.

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I am greatly indebted to my colleagues in the Bringing Human Rights Home Lawyers Network for sharing their ideas and projects and providing a continuing source of inspiration. A collaborative project of this scope is by its nature difficult, but it can become an ordeal unless you are fortunate, as I was, to work with colleagues whom you like, respect, and upon whom you can depend. I am grateful to Cathy Albisa and Martha Davis, for their commitment, hard work, vision, and good humor throughout this project. Finally, a special thanks to Sarah and Thomas Creighton for their patience and support and to Daniel Creighton for making this project and everything else possible. —CS

Every social justice effort is by nature a collaborative one. I have many people to thank for making this book possible starting with my family, in particular my mother-in-law Dalia Davila and husband Waldo Cubero, for their steadfast support for my work despite sacrifices they endure as a result; my children, Gabriel and Dario, for being a constant source of inspiration and wisdom on what is clearly right and wrong in this world; my mother Gladys Albisa for her encouragement to commit myself to this work; Larry Cox and Dorothy Q. Thomas for their guidance, leadership, and inspiration; the extraordinary staff at the National Economic and Social Rights Initiative (NESRI) for the depth of their commitment and creativity; my co-founders Sharda Sekaran and Liz Sullivan for their leap of faith in creating NESRI; Laura Gosa and Molly Corbett for their work to ensure the completion of many of the chapters in this book; Tiffany Gardner for her optimism and commitment to carrying this work into the future; the contributing authors with whom I had the honor to work who made time in their impossible schedules to make a invaluable contribution; my board members Mimi Abramovitz, Rhonda Copelon, Lisa Crooms, Martha Davis, Dr. Paul Farmer, Patrick Mason, and Bruce Rabb for their leadership and support; NESRI's partner organizations that exemplify the U.S. human rights movement; our funders mentioned above as well as the Public Welfare Foundation that make the work possible; and most of all our extraordinary colleague Cindy Soohoo who quietly and modestly took on the biggest share of this project and generously allowed all of us to become a part of it. Thank you Cindy, this could not have happened without you! —CA

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Introduction to Volume 3

Cynthia Soohoo

Over the last few years, there has been growing interest in human rights strategies within the U.S. social justice community. Human rights strategies are being touted by groups that range from international lawyers and political science professors to grassroots activists and organizers. Although their reasons and methods may vary, all agree that adopting a human rights framework has the potential to transform the way the American public understands the most important issues of our time, from health care and the environment, to the treatment of children and immigrants, to incarceration and our response to terrorism.

This volume brings together eleven case studies looking at domestic human rights advocacy on a broad range of issues. The studies consider why activists became interested in human rights and examine the impact of human rights approaches on their work. As described below, a number of common themes emerge from the chapters.

WHAT ARE U.S. HUMAN RIGHTS STRATEGIES?

Before discussing the case studies, it is important to identify what we mean by "human rights strategy" or "human rights advocacy." The case studies in this volume encompass a broad range of methods. However, they all discuss the process of (1) identifying and describing an issue in human rights terms, and (2) using human rights tools of accountability to demand and create pressure for change.[1]

As an initial matter, describing an issue in human rights terms entails explicit reference to fundamental human rights concepts. Human rights recognize

the inherent dignity of all human beings and their entitlement to certain basic rights. These rights are universal, transcending national borders or individual status. Human rights are articulated in international law and standards, which provide a measuring stick against which to assess a country's law and practice was well as acts of individuals and corporations. Defining an issue with reference to these concepts and standards is a first step in human rights advocacy.

Human rights advocacy also utilizes human rights tools. The tools can vary greatly from documenting and publicizing abuse in a human rights report, filing a legal complaint, raising the abuse before an international human rights monitoring or enforcement body, or exposing abuse through education, organizing, and media work. Although the tools may vary, each is designed to expose the gap between human rights standards and actual practice to publicize, criticize, and mobilize for change.

THE NEED FOR HUMAN RIGHTS STRATEGIES: INADEQUACIES OF DOMESTIC RIGHTS PROTECTION

In each of these case studies, activists working on social justice issues in the United States became interested in human rights strategies because domestic laws and policies failed to recognize and protect fundamental rights. Lawyer and activist Monique Harden describes this as "break[ing] out of the chokehold of domestic law."[2] In some cases, international human rights standards were used to push for expansion of domestic understanding or application of rights already recognized under U.S. law. In others, human rights provided a different framework to conceive of and discuss issues in the United States.

Extending U.S. Legal Protections

Following the end of the Cold War, anti–death penalty activists were among the first U.S. activists to incorporate human rights strategies. Their work, discussed by Sandra Babcock in Chapter 4, was encouraged both by strong international condemnation of the death penalty (especially as it applied to juveniles and individuals with mental retardation) and the Supreme Court's 1976 decision that the death penalty did not constitute a per se violation of the Constitution. The clear disparity between domestic law and international human rights law created an advocacy opportunity for anti–death penalty advocates. Anti–death penalty lawyers were able to use the overwhelming international condemnation of the juvenile death penalty and execution of individuals with mental retardation to help convince the Supreme Court that the Eighth Amendment prohibition against cruel and unusual punishment should be extended to prohibit such executions. Other chapters in this volume discuss using human rights arguments in a similar way to extend judicial interpretation of existing protections under federal and state constitutions and statutes.

Failure to Protect Certain Groups

In some instances, U.S. law may recognize and provide strong protections for rights, but the protection may not be universal, and entire groups can

be excluded. For instance, although domestic law recognizes the right of workers to organize, more than 30 million workers, including agricultural workers, are excluded from protection under the National Labor Relations Act (NLRA). In Chapter 1, Greg Asbed explains how the lack of legal protections for the predominantly immigrant agricultural worker population in Florida combined with consolidations in the food industry (which created a downward pressure on wages and made growers impervious to any influences other than the demands of their large-scale food retailer and restaurant chain customers) to result in slavery and other severe exploitation of agricultural workers in Florida.

In Chapter 9, Wendy Pollack describes how immigrants, whether with legal status or undocumented, are frequent targets for exclusion from otherwise comprehensive laws. Noncitizens are often ineligible for government benefits and programs. Even where immigrants have rights, a lack of legal remedy may make the right more illusory than real. As Beth Lyon discusses in Chapter 2, a 2002 Supreme Court case held that undocumented workers have no right to a remedy if they are fired for organizing activities. In a race to the bottom, state courts have used the case to exclude undocumented workers who are injured on the job from workers compensation protection, and the Equal Employment Opportunity Commission (EEOC) has deemed them ineligible for remedies for workplace discrimination. In organizing work and advocacy before international forums, workers' rights activists have emphasized that employment law protections are fundamental human rights that must protect all employees, regardless of status or type of employment.

Similarly, legal and structural impediments may restrict disfavored groups' ability to access remedies, leaving them particularly vulnerable to abuse. In Chapter 5, Deborah Labelle discusses how procedural bars to legal claims, lack of funding for legal representation, and bias against prisoners' claims historically made it difficult for incarcerated women to realize their right to be free from sexual violence. These restrictions reflect societal attitudes that prisoners are less deserving of rights protections. In the prisoners' rights context, activists used human rights to refocus the debate on the right of all persons to be free from sexual violence and of prisoners to humane treatment.

Failure to Recognize Rights

Sometimes, although the U.S. legal system heavily regulates an area, the existing legal scheme fails to capture the rights, interests, and needs of those most affected. A human rights framework provides an opportunity to reframe the discussion, debate, and policy to take these rights into account.

Several chapters in this volume chronicle the United States' failure to recognize economic and social rights. Although, there is public support for access to basic health care, shelter, and social security,[3] the lack of a legal right to these basic necessities reflects conflicting societal attitudes about government responsibilities to ensure basic needs. Pollack relates the ways in which the American public simultaneously supports greater assistance for the poor while also subscribing to the belief that those who receive welfare have rejected the American Dream and core U.S. values of "independence and hard work."

In Chapter 6, Maria Foscarinis and Eric Tars describe how public discourse about the poor has become increasingly punitive, even resulting in criminalization of the homeless.

The public's views on economic and social rights are also influenced by discomfort with deviation from market allocation of goods and services. In Chapter 7, Alex Irwin, Leonard Rubinstein, Anne Cooper, and Paul Farmer argue that efforts to reform health care must counter "predominantly negative attitudes toward government [which create] resistance to health reform proposals that would expand government's role."

Although fundamental rights have been recognized under domestic law in the area of reproductive health, U.S. discourse has focused on the narrow and contentious issue of abortion rights. In Chapter 8, Theresa McGovern asserts that the failure to recognize a broader human right of access to reproductive health care has led to restrictions on sexual education and inadequate funding for, and access to, prenatal care and reproductive and women's health services.

Environmental justice activists are similarly using human rights to reframe discussions around pollution and the environment. In Chapter 10, Monique Harden, Nathalie Walker, and Vernice Miller-Travis discuss how environmental law in the United States is premised on technical controls to limit the number of pollutants instead of focusing on the human right of those affected by pollution to a healthy and safe environment. The failure to consider these human impacts leads to a system that "is blind to the devastating impacts suffered by communities, in particular communities of color, where regulated industries dump massive quantities of toxic pollution."

This same phenomenon was invoked following the government failure to protect the rights of persons displaced by Hurricanes Katrina and Rita. Gulf Coast survivors were initially unable to articulate the injustice of their treatment under existing U.S. law. In Chapter 11, William Quigley and Sharda Sekaran describe how human rights concepts of equality and dignity and the internationally recognized right of return "shed new light on their struggle and apparent abandonment by the government . . . [and] gave legitimacy to their demands for basic protections and resources."

While all the case studies in this volume present compelling instances where domestic law is inadequate to protect human rights, perhaps none is more stark than the experience of indigenous peoples. In Chapter 3, Steven Tullberg discusses the long history of discriminatory U.S. law toward Native Americans. Given the hostility of U.S. courts to the claims of Native Americans, indigenous leaders and activists turned to the international community and human rights frameworks for their advocacy.

HOW DO HUMAN RIGHTS STRATEGIES WORK?

Each of these case studies discusses how activists used human rights to change the dynamics of, and power relations around, particular issues. In some cases, the strategies directly influenced ongoing litigation, leading to a favorable decision or settlement. In others, activists worked to support new legislation,

a change in government policy, a favorable exercise of discretion in an individual case, or a negotiated agreement between private parties. In instances where a human rights perspective has little currency in domestic law and public consciousness, the strategies may initially focus on changing the discourse around an issue and educating and building a constituency. Indeed, all the actions discussed in these case studies, from organizing workers to filing a petition with the Inter-American Commission for Human Rights, need to be considered both in light of short-term objectives and long-term strategies that may span several decades.

Irrespective of whether these case studies focus on short-term changes or long-term movement building, several common types of strategic benefits emerge:

Changing Perceptions About an Issue

By emphasizing the common humanity of those most affected, human rights claims encourage decision-makers, stakeholders, and the public to look past the marginalized status of individuals belonging to disfavored groups. Current public discourse stigmatizes and blames the indigent, enabling society to tolerate poverty and homelessness, and denies disfavored groups, such as immigrants or the incarcerated, full protection from rights violations. Human rights also recognizes the special needs of vulnerable populations such as children and disadvantaged communities.

At the same time, by rooting claims in the fundamental rights of those most affected, human rights changes the stakes of the debate. Recognizing human rights helps to recalibrate the scales and provides a more unified vision for evaluating labor, health care, housing, and welfare policy, adding a rights perspective to discourses currently dominated by market-based commodity or charity models. A human rights perspective also requires analysis of the effect and outcomes of social policies on different communities, exposing inherent or underlying racism and sexism.

The articulation of rights violations in human rights terms also helps marginalized groups connect their issues to a broader framework, linking to other struggles that may be more familiar and sympathetic to the public. For instance, as Tullberg points out, indigenous people successfully linked their quest for recognition of indigenous rights to the more familiar international concept of "self-determination" for former colonized peoples. Similarly, by articulating their claims as the right to return, Gulf Coast hurricane survivors used the UN Guiding Principles on Internal Displacement (IDP Principles) as a baseline to assess governmental response to the disaster. Survivors were able to effectively contrast responses to disasters in other countries with far fewer resources than the United States with the response and reconstruction failures in the Gulf Coast.

Empowering Those Most Affected

In addition to changing the outside perception of an issue, framing a demand in human rights terms also can profoundly influence those most affected.

For marginalized communities, understanding a problem as a human rights violation is both straightforward and immensely powerful. A mother and activist living in southern Louisiana's heavily industrialized "Cancer Alley" explains "You know when your daughter struggles to breathe at night because of all the pollution, that her human rights are being violated." By recognizing and articulating their claims as part of a rights struggle for equality and dignity, human rights can provide a powerful organizing tool inspiring communities to demand change.

Several of the chapters in this volume discuss the impact that human rights had on organizing marginalized communities including the poor and communities seeking environmental justice. The Coalition of Immokalee Workers (CIW) provides a striking example of the use of a human rights framework to organize and empower agricultural workers in Florida. "Ethnically and linguistically divided, documented and undocumented . . . , highly mobile, dirt-poor, largely non-literate and culturally isolated from the mainstream community of Southwest Florida, the Immokalee farmworker community could not be more challenging to traditional organizers armed with traditionally organizing approaches." Instead of relying on more traditional organizing, however, the CIW adopted a human rights organizing strategy with roots in Latin America and the Caribbean. As Asbed explains, by identifying labor rights as human rights and placing the concepts of humanity and dignity at the center of its organizing, CIW was able to successfully organize agricultural workers to force concessions from a major fast food corporation.

Articulating claims as human rights also allows groups with different agendas and constituencies to connect their struggles. For instance, in the healthcare area, a human rights perspective focusing on the right of access to adequate health care could link advocates who are currently fragmented. By joining claims for equitable minority access to health care to women's health and reproductive rights and advocacy on behalf of people with AIDS, a common human rights demand could strengthen the communities' collective voice and help to counter the power of well-organized interest groups in the private healthcare sector.

Engaging International Human Rights Bodies

Engaging international human rights bodies and experts can be part of the process of changing public perception about an issue and empowering constituents. A public statement from a UN expert exposing forced evictions, the treatment of hurricane survivors, or abuse of women prisoners as a human rights violation instills a claim with greater credibility within the United States. The sheer act of filing a petition with the Inter-American Commission for Human Rights can be a newsworthy event within a local community and provide an organizing and educational opportunity. In addition to international human rights forums, workers' rights activists are bringing claims to the International Labor Organization and under labor provisions in international trade agreements such as the North American Free Trade Agreement and the North American Agreement on Labor Cooperation.

Although international human rights bodies seldom have authority to directly change domestic law, their inquiries, comments, and recommendations can shine a light on local abuses, creating pressure for change. Human rights bodies typically interact with the federal government, requiring the attention and occasional intervention of federal authorities into local issues. Forcing the government to account for its practices can encourage a change or reconsideration of policies.

In instances where U.S. law is hostile to a claim, international bodies can provide a forum to develop alternate theories and frameworks using the language of human rights to articulate rights and set standards and guidelines. Labelle explains how incarcerated women in Michigan used international human rights standards for the treatment of prisoners to convince corrections officials to agree to restrict cross-gender supervision—a new concept for domestic prisons. In addition to utilizing existing human rights standards, U.S. activists working on issues such as environmental justice, migrants' rights, and housing have become active participants in standard setting. Indigenous peoples also have used international forums to both develop international standards and to engage the U.S. government in a dialogue.

Building Alliances

Human rights advocacy creates new opportunities for building alliances with foreign governments, intergovernment organizations, international human rights organizations, and groups around the world struggling with similar issues. Many activists recognize this as a necessary step given increasing globalization. For instance, CIW explicitly links its work to "the growing debate over globalization, corporate responsibility, and human and economic rights," and built alliances with student, religious, and human rights groups. Similarly, organized labor has successfully used cross-border solidarity to threaten U.S. employers who fail to respect international labor law standards with boycotts of overseas operations.

Foreign governments and inter-governmental organizations, like the European Union (EU), can also be effective allies of domestic activists. Foreign governments and the EU frequently intervene in U.S. death penalty cases and filed a particularly important amicus brief in the Supreme Court decision prohibiting the juvenile death penalty. In instances where their nationals or national interest is involved, foreign governments also have instituted international legal proceedings against or involving the United States. Mexico, Germany, and Paraguay have brought cases against the United States before the International Court of Justice concerning foreign nationals on death row. Mexico also brought a case before the Inter-American Court of Human Rights challenging discrimination against migrant workers in the hemisphere. Foreign governments may also try to exert diplomatic pressure or support activists lobbying the UN on a particular issue. Indigenous rights activists successfully built alliances with former colonies and colonial powers to support international recognition of indigenous rights.

Finally, alliances with activists from other parts of the world have allowed Gulf Coast hurricane survivors and indigenous and environmental justice

activists to share experiences, strategies, and remedies. In addition to providing solidarity for isolated minority groups, these interactions have led to successful joint actions. For instance, the residents of Louisiana's Cancer Alley had been unable to get the U.S. subsidiary of Shell Oil to respond to complaints about pollution. Through work in Geneva, they met Nigerian activists dealing with similar problems of environmental racism and an unresponsive local Shell subsidiary. Together the activists were able to pressure Shell's Dutch parent company to adopt higher environmental standards and offer compensation and relocation expenses to the affected communities.

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There are of course many other case studies that could have been included in this volume, including issues such as domestic violence, racial profiling and law enforcement abuses, education, and the rights of persons with disabilities. The list only continues to grow. But it is our hope that these particular studies collectively provide a representative snapshot of what domestic human rights work looks like at the beginning of the twenty-first century. As the strategies in this volume continue to be developed, we hope that these case studies provide material for discussion, debate, and learning.

NOTES

1. Alice Miller, "A Methodological Framework for Applying 'A Human Rights Approach' to Advocacy on Women's Issue," Law and Policy Project, Mailman School of Public Health, Columbia University, cited in Deena Hurwitz, "Lawyering for Justice and the Inevitability of International Human Rights Clinics," *Yale J. Int'l L.* 28 (2003): 505, 517.

2. Larry Cox and Dorothy Q. Thomas, "Introduction," in *Close to Home* (New York: Ford Foundation: 2004), p.10.

3. Polls in 2007 found that 64 percent of the Americans believe that "the government should guarantee health care coverage for all," and 90 percent of New York City residents believe that everyone has the right to basic shelter (see chapters 6 and 7 in this volume).

CHAPTER 1

Coalition of Immokalee Workers: "*¡Golpear a Uno Es Golpear a Todos!*" To Beat One of Us Is to Beat Us All!

Greg Asbed

On November 20, 2003, as Coalition of Immokalee Workers (CIW) member Lucas Benitez stood before a packed room in the U.S. Capitol building, he told the audience that he was confused. The Robert F. Kennedy Human Rights Memorial had chosen Lucas and two of his fellow CIW members—Julia Gabriel and Romeo Ramirez—as the 2003 RFK Human Rights Award laureates for their work fighting modern-day slavery in U.S. fields and their leadership of the Taco Bell boycott. It was the first time in its twenty-year history that the RFK Memorial had selected a U.S.-based non-governmental organization (NGO) as the winner of its annual award.

Lucas began his speech to the hundreds gathered in the room that day for the gala award ceremony:

> I feel that I must tell you that today my compañeros and I feel a little disoriented, as if we were lost in a sort of dream world where you can no longer know just what is real. Just two days ago, we marched into downtown Miami surrounded by nearly 3,000 police in riot gear, mounted police, police on bicycles, police on foot, police in helicopters hovering above Miami's skyline, their propellers beating out the soundtrack to what seemed to us like a movie about martial law in the U.S.—all because we were there to call for fair trade that respects human rights, not free trade that exploits human beings. Yet today, we stand here in this historic city—in the heart of the U.S. government—receiving this prestigious award for our work in defense of human rights.
>
> Truth is, my compañeros and I **are** confused. It's hard for us to understand in which of the two worlds we actually live—in the world where the voice of the poor is feared and protest in defense of human rights is considered the gravest

> of threats to public security? Or in the world where the defense of human rights is celebrated and encouraged in the pursuit of a more just and equitable society?[1]

The question Lucas posed that day is certainly one of the most complex—and most important—questions we will face in this new century. And the answer remains anything but clear, as today this country is experiencing a dangerous and growing divide between those who continue to challenge the nation to live up to its great promise and those who increasingly seek to limit our rights in the name of security and corporate profits.

Despite the uncertain standing of human rights in the United States today—or, perhaps, precisely because of that uncertain standing—the CIW adds its voice to the chorus of those calling on the country to make real its promise of the full and equitable enjoyment of fundamental human rights for all people living within its borders. And we utilize the framework of human rights to do so because it is the only framework that adequately encompasses the full range of economic and social rights for which we fight, including:

- labor rights and economic justice in the fields;
- the right to work free of slavery everywhere;
- economic and political rights throughout the hemisphere in this new world of free trade policies and corporate-led development;
- immigrant rights in the United States, and the right to live a decent life in one's home country so that emigration is an option, not a necessity to survive.

The human rights framework is the only framework that does not modify the notion of rights as a set of rights specific to a particular sector of our society—immigrant, farmworker, and so on—but as fundamental rights to be respected across our entire society without exception.

A STEP BACK: WHY A HUMAN RIGHTS FRAMEWORK IN IMMOKALEE?

It would be wrong, however, to imply that the CIW "chose" the human rights framework as a strategic decision to advance our organizing work. Rather, how we came to define our work in terms of human rights was, in many ways, beyond our control. It was, instead, the organic product of the roots of the Immokalee farmworker community, on the one hand, and the extreme nature of exploitation in the world of U.S. farm labor, on the other.

"We didn't land on Plymouth Rock, Plymouth Rock landed on us,"[2] were the words of Malcom X, words he used to capture the oppression of African Americans in the United States and the inevitability of the struggle against that oppression. In order to best describe the relationship of the

human rights framework to the CIW and our work, we would paraphrase Malcolm X: "We didn't choose the human rights framework, the human rights framework chose us."

First, the exploitation experienced by farmworkers today can only be described as humiliating and inhumane. In fact, the vast majority of U.S. farmworkers find themselves facing conditions somewhere along a continuum from sweatshops to actual modern-day slavery. These conditions include:

- forced labor;
- sub-poverty wages;
- long hours without overtime pay when work is available; unemployment and transience when it is not;
- denial of break time, meal time, sick days, and holidays;
- denial of health care and pensions;
- physical abuse and fraud by growers, crewleaders, supervisors, and recruiters;
- damage to body and soul from back-breaking labor, exposure to pesticides, and lack of basic medical care;
- dilapidated, crowded, and indecent housing at exorbitant prices;
- discrimination against immigrants, women, and the aged;
- retaliation and blacklisting against workers who protest or organize to alleviate these inhuman conditions.

When we use the words forced labor or slavery, it is important to note that we do not mean "slave-like" or "resembling slavery"—rather, we are referring to conditions that meet the high standard of proof and definition of slavery under U.S. federal laws. In fact, the CIW alone has been involved in the discovery, investigation, and prosecution of six slavery operations in Florida since 1997 involving a total of well over 1,000 workers. These cases have been prosecuted by the U.S. Department of Justice Civil Rights Division either under laws forbidding peonage and indentured servitude passed just after the Civil War during Reconstruction (18 U.S.C. Sections 1581-9) or under the 2000 Victims of Trafficking and Violence Protection Act, which prohibits the "recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."[3]

In more concrete terms, the following is a summary of just three of the recent slavery operations that the CIW has helped bring to justice since 1997:

- In 2002, three Florida-based agricultural employers were convicted in federal court on slavery, extortion, and weapons charges and sentenced to a total of nearly thirty-five years in prison and the forfeiture of $3 million in assets. The men, who employed over 700 farmworkers, threatened

workers with death if they were to try to leave, and pistol-whipped and assaulted—at gunpoint—passenger van service drivers who gave rides to farmworkers leaving the area. The case was brought to trial by federal authorities from the Department of Justice (Civil Rights Division) after two years of investigation by the CIW.

- In 2000, a South Florida employer was prosecuted by the Department of Justice (DOJ) on slavery charges and sentenced to three years in federal prison. He had held more than thirty tomato pickers in two trailers in the isolated swampland west of Immokalee, keeping them under constant watch. Three workers escaped the camp, only to have their boss track them down a few weeks later. The employer attempted to run one of them down with his car, stating that he owned them. The workers sought help from the CIW and the police, and the CIW worked with the DOJ on the ensuing investigation.
- In 1997, two agricultural employers were prosecuted by the DOJ on slavery, extortion, and firearms charges and sentenced to 15 years each in federal prison. The slavers held over 400 men and women in debt bondage in Florida and South Carolina. The workers, mostly indigenous Mexicans and Guatemalans, were forced to work 10–12 hour days, 6 days per week, for as little as $20 per week, while under the constant watch of armed guards. Those who attempted escape were assaulted, pistol-whipped, and even shot. The case—which ultimately was one of the seminal cases leading to the passing of the 2000 Victims of Trafficking and Violence Protection Act mentioned above—was brought to federal authorities after five years of investigation by escaped workers and CIW members.

It is, of course, almost too obvious to state that the deprivation of liberty typical of agricultural slavery operations is the most extreme violation of human rights in the fields today. Captives recount feeling an almost total loss of control over their lives; workers who have escaped from captivity describe their journey from forced labor to freedom as being "re-born" or coming "out of the dark into the light."[4]

Given the sweatshop conditions and, in the worst cases, modern-day slavery so prevalent in U.S. fields today, it is no exaggeration to say that farmworkers face the daily and systematic violation of their human rights, including Articles 23, (3) and (4), and Article 24 of the United Nations Universal Declaration of Human Rights, articles that guarantee workers the right to fair wages and modern labor relations. Article 4 of the Universal Declaration, which prohibits slavery, is also violated in all too many cases. This reality of extreme exploitation has fundamentally shaped our organizing philosophy and language. It is the "Plymouth Rock" that greets so many of today's immigrants who, with their exploited labor, fuel this country's mammoth food industry.

But the material conditions in Immokalee alone do not explain why the human rights framework is so essential to our work. Rather, to fully understand the place of human rights in the CIW organizing approach, it is necessary to understand the organizing traditions from which many CIW members come, as well as the very distinct notion and social role of human rights in the home

countries of most CIW members as compared to the general understanding of human rights in the United States.

DIRECT FLIGHT: FROM THE HIGHLANDS OF LATIN AMERICA TO THE LOWLANDS OF SOUTHWEST FLORIDA

Today, the Southeastern United States is home to some of the most rapidly growing Latino and indigenous communities in the country. Almost without exception, employment has been the magnet drawing these new immigrants to communities throughout the region. From the carpet factories of Dalton, Georgia, to the poultry plants of Sand Mountain, Alabama, from the watermelon fields of Kennet, Missouri, to the tobacco farms of Clinton, North Carolina, recent immigrants from Mexico and Central America hold a growing majority of the local economy's back-breaking, low-paying jobs. But the list does not stop there. In construction, health care, landscaping, janitorial, and restaurant work and throughout the service sector—Caribbean, Guatemalan, Salvadoran, and Mexican immigrants are by far the fastest growing sector of the work force in today's low-wage South. Urban or rural, it's the same story.

Immokalee, the heart of Florida's tomato and citrus industries, and the place where the CIW was born, is no exception. And to understand the CIW—what it is and what it isn't—it is important to understand the community from which it emerged.

Immokalee is more a labor reserve than a town. It is an unincorporated place where the population nearly doubles (to somewhere between 20,000 and 30,000 people) during the nine months of the year from September to June that the agricultural industry needs workers. (From June through August, most farmworkers migrate north to states along the length of the East Coast for the shorter northern harvest season.)

The workforce is 85 to 90 percent male. The median age is twenty-four and falling (in fact, according to one local health official, the average age of Immokalee's farmworkers is closer to twenty-one). The vast majority of the young, single males living and working in Immokalee come from rural, farming communities in Mexico, Guatemala, and Haiti, in that order. Most are very recent immigrants, with many only a few days or weeks from having arrived in the country. And while Immokalee may be the first destination for many recent immigrants, many will not remain here for long. The turnover in our community is unparalleled, as workers are lured away daily by the call of higher wages and more favorable working conditions in just about any industry other than the fields.

In a cultural sense, Immokalee is one of the most cosmopolitan communities in the U.S. South, despite the fact that the town has only four traffic lights (all on Highway 29, the main road through town), and the biggest store in town is the Winn Dixie supermarket. Indeed, if you stand on just about any street corner in Immokalee you can easily hear four or five different

languages—Spanish, Haitian Creole, Mixtec, Kanjobal, Quiche, Tztotzil, and more.

In short, Immokalee is a crossroads between the rural poverty of the global South and the promise of a modern job paying a minor fortune in American dollars. It is an employer's dream, and an organizer's nightmare. Ethnically and linguistically divided, documented and undocumented (with many still in debt to their "coyotes," the people who lead undocumented immigrants across the border and across the country to Florida), highly mobile, dirt-poor, largely non-literate and culturally isolated from the mainstream community of Southwest Florida, the Immokalee farmworker community could not be more challenging to traditional organizers armed with traditional organizing approaches.

What's more, farm labor is excluded from the National Labor Relations Act, denying farmworkers the legal rights and protections that have made it possible for almost all other American workers to organize and join unions since 1935. Complicating matters yet further, the agricultural labor force in Immokalee is structured as one big labor pool, where thousands of people wake up at 4:00 A.M. every morning to beg for a day's labor at the central parking lot in town, and where workers pick up paychecks from as many as three or four different companies every Friday evening. This means that virtually none of the major agricultural corporations that operate in Southwest Florida has a fixed work force. There is no such thing as "Pacific Land Co.'s workers" or "Gargiulo's crews,"[5] there are only Immokalee workers and changing faces picking, planting, and pulling plastic in company fields on any given day. Put all this together, and you have a town where workplace organizing in any normal sense of the term is effectively impossible.

And that is why the country's worst-paid, least-protected workers remained unorganized for so long. Until, that is, about ten years ago, when a small group of workers with experience in organizing back home in Guatemala, Haiti, and Mexico, started to bring that experience to their lives as farmworkers here in the United States.

REVERSE TECHNOLOGY TRANSFER—NEW WAVE OF LATIN AMERICAN IMMIGRANTS BRINGS ORGANIZING EXPERIENCE, TOOLS TO BEAR ON U.S. AGRICULTURAL EXPLOITATION

In the early 1990s, Haiti was undergoing another wave of intense political unrest and violence. The presidency of Jean Bertrand Aristide, a former priest and fiery leader of the community-based movement to oust the twenty-eight-year dictatorship of the Duvalier family, had been overthrown by yet another military coup, and leaders of the grassroots democratic movement were being killed and jailed throughout the country. As a result, a new wave of Haitian "boat people" set out for the shores of Florida, among them many seasoned veterans of some of the most intense grassroots political organizing in this hemisphere's recent history.

Many of those new Haitian refugees made their way to Immokalee, as there was already a significant Haitian community established here during an earlier wave of immigration in the 1980s. Once in Immokalee, they joined Guatemalan and Salvadoran refugees fleeing war and human rights attacks against peasant organizations in their own countries, as well as an increasing influx of indigenous immigrants from southern Mexico, many of whom came from the soon-to-be-famous state of Chiapas and had participated in the rapidly evolving Zapatista movement.

A history of struggle united many of these new immigrants, but it was a history that, for the most part, people did their best to forget and leave behind as they scratched out a living in the harsh fields of Florida's tomato and citrus industries. And what immigrants found in those fields in the early 1990s was anything but refuge—instead they found conditions even crueler and more brutal than today. On top of the sub-poverty wages, decrepit housing, and humiliating labor relations that still characterize farm work today, workers also faced frequent violence at the hands of their employers and widespread wage theft. In the early days of the CIW, Immokalee was a vicious, dog-eat-dog world where each worker faced the full brunt of the forces arrayed against him on his own. No individual worker stood a chance against those forces, consquently survival meant finding a way out of the fields and out of town as quickly as one's ingenuity and familial connections would allow.

But not everyone had left their tools of struggle at home. A small group of workers, including Haitian peasant "animators" (trained organizers from the Mouvman Peyizan Papay, Haiti's largest peasant movement) and members of rural organizations from Guatemala, Mexico, and Haiti began meeting to discuss their new situation as immigrants. These workers were determined to find solutions to some of the most pressing problems facing the Immokalee farmworker community, and to do so they decided it would be necessary to finally "unpack" their organizing experience from their home countries and put it to use here in Florida. From a room borrowed from Immokalee's Catholic church, the workers launched an organizing process that drew directly from Latin American and Caribbean organizing traditions for both its methods and its overall, long-term strategy.

Specifically, these experienced organizers employed three key tools common to their organizing experiences at home to forge a movement for grassroots, democratic, worker-led change in the United States: (1) popular education, used to provoke participatory analysis of the problems facing farmworkers in Immokalee; (2) leadership development, to guarantee a constantly growing, broad base of leadership in the high-turnover worker community; and (3) powerful protest actions, both to serve as an additional tool for building awareness and leadership within the movement, and to create a growing pressure on the agricultural industry to negotiate fundamental changes for farm labor in the absence of the traditional organizing tools most other American workers have had at their disposal since 1935 to legally compel their employers to the table (signature cards, elections, the NLRB, etc.).

Popular education is a method of education and organization born in the countryside of Brazil and developed in struggles throughout Latin America and the Caribbean. Several of the CIW's original founders not only had experience with popular education but were trained practitioners of the approach through their community organizations at home. At its heart is the use of "codes"—drawings, theater, song, video, stories, and so on—designed to capture a piece of community reality and to present that reality for reflection in a group. The reflection process is usually led by a worker or team of workers with experience in facilitating participatory discussion.

The objective of popular education is to oblige workers to confront the problems in their community in a form that allows, and in fact actively encourages, even the most reticent workers to participate. It is an approach to what U.S. labor organizers tend to call political education that ties complex political issues to the concrete conditions of workers' lives through simple but compelling forms, with an emphasis on images, the best of which spark lively conversations that make their way almost effortlessly to discussion of how to address the problem presented in the image. By making political analysis understandable and facilitating the group reflection in a way that brings peripheral members to the center of the process, it challenges workers to abandon their apathy and isolation, to actively analyze their reality, and to redefine their relationship to the forces that shape their lives. It is *education for action*, and as such its effectiveness must ultimately be measured by the degree to which it moves the community to take action, fight for change, and win a degree of control over its collective destiny. It is a process of mutual education where the workers' own experience and insights drawn from life, not school learning, are central.

Leadership development as practiced in the CIW's work also draws its inspiration from the Latin American and Caribbean organizing experience. In Immokalee, farmworkers interested in sharpening their leadership skills and learning new tools for working with the community can participate in intensive workshops, lasting from one to five days, where workers study and practice everything from techniques of popular education to the history of the labor movement, labor and human rights, how to plan and run community meetings, the practice of popular theater, economic and political analysis, and even techniques of video production. Participation in the CIW leadership development process is self-selected and is open to any and all members, from the longest-term veterans to the most recently arrived workers, as one of its primary goals is to constantly broaden the leadership base of the organization. In that way, the CIW is best able to counter the erosion of that base caused by the movement of even the most dedicated leaders out of Immokalee toward better, more stable employment.

Participation in the CIW staff provides another invaluable opportunity for leadership development. CIW staff is composed of workers elected by their fellow workers at the annual General Assembly. Members are chosen, on the basis of their demonstrated committment to the CIW's struggle, to handle the daily functions of the organization. Staff members get hands-on training in important new skills and gain insight into the world of organizing in the United States, including the use of communications technology

(computer-based technology including email, Web site development, and video and audio media production programs, as well as radio technology through the CIW's community-run radio station, "*Radio Conciencia*," 107.9 FM), the ins and outs of the U.S. political system, press outreach, and fund-raising.

To guarantee that those elected to the staff remain rooted in farmworker reality, however, CIW members established several key organizational bylaws. Staff salaries are commensurate with farmworker wages, the staff structure is nonhierarchical, and staff members spend a significant amount of time every year working in the fields. The opportunity to work as part of the staff is another excellent form of leadership development open to all members, requiring only their active committment to the organization and their election by fellow members.

Through this constant emphasis on leadership development, the actual, practical leadership of the organization—in terms of such things as running meetings, planning strategy and developing campaigns, and representing the organization in public forums—is able to remain open and fluid, and is shared by any number of active, informed members. As a result, several CIW leaders—young immigrant workers, men and women—have been recognized nationally for their outstanding efforts over the past several years by a number of different institutions (including the U.S. Catholic Bishops Conference, the Robert F. Kennedy Memorial for Human Rights, the Mexican government, *Rolling Stone* magazine, the Freedom Network USA, and the National Organization for Women), and CIW members are profiled in several new books on emerging young activists. The CIW stands out in its extraordinary focus on immigrant, worker leadership from today's working class.

In a certain sense, it can be said that the CIW has made a virtue of necessity in two important ways, both of which result from the high turnover of the Immokalee community. Because every season—every month, even—brings a significant percentage of new workers to Immokalee, the CIW can never abandon the basic political education process (popular education) that informs and motivates workers to become active CIW members. And because even the most committed leaders inevitably move on to better work in distant states, or back home to their families in Mexico, Guatemala, and Haiti, the CIW must maintain a constant process of leadership development to grow and replenish its leadership base.

From this basis, the CIW has organized various high-profile, aggressive protest actions since 1995. Actions since 1995 have included three community-wide general strikes, a thirty-day hunger strike by six CIW members ended by the intervention of former president Jimmy Carter, a two-week 240-mile march across south and central Florida, and, most recently, the national boycott of Taco Bell, a campaign that generated several years of high-profile actions.

The centerpiece of the boycott was the annual cross-country bus and van tour from Florida to California by over 100 workers and students, with stops for rallies and protests in major cities across the way. The tours, named the "Taco Bell Truth Tour," would typically culminate in massive protests—bringing together allies from across the spectrum, including students and youth, labor, community, and religious organizations—in Los Angeles

and Irvine, California, home of Taco Bell's corporate headquarters. The final Truth Tour focused on Yum Brands' headquarters in Louisville, KY.

Because farmworkers are exempted from the NLRA, the CIW has had to carry on the tradition of high-profile actions that have become typical of farmworker organizing since the fasts and marches of Cesar Chavez and the UFW in the 1960s and 1970s. Without access to NLRB mediation and the more rational, democratic means of an election/appeals process to compel employers to the table, farmworkers have little choice but to use spectacular protests to bring public pressure to bear on the industry for the right to negotiate for better wages and working conditions.

But the CIW also looks at these actions as opportunities for further conscientization (conciousness raising) and leadership development, and thus strives to shape its actions so as to maximize those opportunities. As a result, the CIW tends to employ forms of protest that allow the broadest participation by CIW members possible, while favoring long-running, often radical actions that offer ample time and material for reflection and the concerted building of political awareness.

The hunger strike of 1997–1998, for example, was a historic, month-long political statement by six tomato pickers, supported by a committee of many other members that watched over the strikers twenty-four-hours a day. Today, many of the participants in that action remain central leaders in the organization. Similarly, CIW strikes have not been specific to one grower but have involved the entire community and have taken on the industry as a whole. This is in part due to the community labor pool structure of the labor market in Immokalee, but also to the CIW's casting of grievances in political as well as economic terms. Because CIW members generally understand and define strikes within the broader framework of human rights, strike actions tend to become events that galvanize the entire community and challenge the basic assumptions of agriculture's oppressive power structure. CIW marches also follow this pattern, with the routes covering several days or even weeks of ten- to twenty-mile stretches by day, followed by public meetings and internal reflections by night. The marches, like most CIW actions, have been radicalizing experiences that cement bonds between members and do much to counteract the forces that atomize the Immokalee community and contribute to its unequaled transience.

Even in the case of the Taco Bell boycott—a form of action that in the past has tended to shift limited organizational resources away from worker organizing to consumer education—the CIW sought to develop its strategy in such a way as to both ensure broad-based, long-term participation by its members and to contribute to the overall political education process that lies at the foundation of our work. The cross-country bus tour as a form of action is an example of the emphasis on long-duration, participatory tactics. Furthermore, the decision to explicitly link the boycott to the broader movement for global justice reflects the conscious effort on the part of the CIW to place the farmworkers' struggle firmly within the growing debate over globalization, corporate responsibility, and human and economic rights. For workers forced from their countries by economic and political conditions linked, in large part, to World Bank and IMF policies, workers who find themselves now in

the United States exploited by major multinational corporations that profit directly from their poverty, the leap from general strikes in the tomato fields to global mobilizations for economic justice like those in Seattle, Washington, and Genoa, is not a difficult one.

TWO LANDS, ONE MOVEMENT: HUMAN RIGHTS IN LATIN AMERICA AND IMMOKALEE

It is possible to define, as we did earlier in this chapter, the abysmal working conditions in Florida's fields as a series of violations of particular articles of the United Nations Universal Declaration on Human Rights, and the CIW does speak in those terms in certain organizing contexts.

But the use and meaning of human rights language in the CIW's overall organizing approach is in fact far broader than those narrowly defined legal terms. This broader use is central to our organizing success, both internally, organizing in the Immokalee community, and externally, organizing in the various communities of allies that have been so crucial to the success of the Taco Bell campaign and its aftermath.

Internally, the notion of human rights within the CIW organizing approach is very similar to its definition and role in the Latin American popular movements that inspired the CIW. In those movements, the idea of human rights is not viewed through a legalistic lens, dividing rights into economic, social, and political categories. Rather, it is a much more holistic idea that is rooted in a fundamental belief in the equality and dignity of all human beings. This idea informs both the movements' organizing objectives as well as their internal structures.

The late 1960s saw the emergence of strong social movements across Latin America that gave voice to the grievances of the region's desperately poor peasant and urban underclasses. Through adult literacy approaches that combined reading and writing with political and social analysis, peasant organizing that focused as much on economic justice as on economic development, and urban development efforts that questioned the authority of the region's many military and family dictatorships, a broad array of movements came to be known as one popular movement loosely united around the goal of winning human rights—the right to a dignified existence—for all.

The religious/political philosophy known as liberation theology provided those movements with a theological foundation and institutional credibility in the highly religious communities of the poor, the same communities that would send their sons and daughters to Immokalee to search for a better life. Together, church-based organizing driven by the tenets of liberation theology and popular organizing outside the four walls of the church helped spread the notion of human rights throughout Latin America and made the idea that we are all born with the equal right to lead a dignified life, a life free of degradation—in all the political, social, and economic expressions of that idea—the defining concept of those emerging movements. By the late 1980s, popular movements had grown into powerful social forces in countries throughout Central America and the Caribbean.

This broad notion of human rights was reflected not just in the objectives of popular organization in Latin America but in its practice as well. The structure and function of many of these organizations tended to emphasize broad-based participation and grassroots, nonhierarchical leadership—two very concrete expressions of the principle of equality in practice—in a way totally unfamiliar to traditional U.S. forms of organizing. In contrast, U.S. organizing approaches during this same period tended to focus on hierarchical structures, boards of directors, and incremental, measurable organizing goals, a la Saul Alinsky and his widely read "Rules for Radicals."[6]

Meanwhile, in Immokalee itself, where even Alinsky-style organization had never dared to tread, efforts to reform migrant farmworker exploitation had been dominated by the legal "advocate" model, driven primarily by a generation of attorneys inspired by the famous 1960 documentary "Harvest of Shame." In this model, the problem of farmworker exploitation is approached as a series of legal violations to be remedied, usually by legal action and occasionally, when the advocates were feeling frisky, by political or media pressure.

In the early 1990s, however, the workers who gathered to confront exploitation in Florida's tomato fields had never read "Rules for Radicals,"[7] nor had they much faith in the U.S. legal system. Rather, they came to Immokalee equipped with Latin American tools of struggle—many with direct experience in the powerful Latin American popular movements of the 1980s—and set about to work with a community that spoke the same organizing language.

To the workers that formed the Coalition of Immokalee Workers, ramshackle, overcrowded housing, for example, wasn't a distinct problem to be addressed by code inspectors, political pressure, and exposés in the press. Rather, it was a symptom of a much more profound violation of workers' human rights, one concrete expression of a system that locked farmworkers in poverty and fundamentally failed to recognize their dignity. The same could be said for the myriad conditions—from pesticide poisoning and dangerous transportation to wage theft and violence in the fields—of farmworker exploitation that for so many years had been addressed as particular legal violations to be attacked on an individual, case by case, basis. All the specific excesses of farmworker exploitation were understood by these new organizers as branches of the same condition, all rooted in the poverty and powerlessness that was their fate in their adopted country, in the denial of their fundamental equality and dignity as human beings—their human rights. The most effective way to address the many particular aspects of farmworker exploitation, from the perspective of these new immigrant organizers, was to attack them at their common root, that is, to redress the immense imbalance of power between farmworkers and their employers and so begin to win back the dignity and human rights that had been for so long denied farmworkers in this country.

This new perspective resulted in a shift in Immokalee from an extremely atomized, U.S.-style emphasis on specific farmworker legal rights to a more community-wide, Latin American–style, holistic understanding of human rights, and that shift gave birth to the CIW. It's the shift from suing in court to assure that workers receive the minimum wage guaranteed by law, to

fighting in the street as a community for a living wage; the shift from accepting as a given that farmworkers are excluded from the laws that protect the right to collective bargaining, to organizing general strikes demanding the right to bargain as a collective.

From this perspective, this new society in which Immokalee's workers found themselves in the early 1990s—much like the societies from which these peasant farmers-turned-farmworkers came—undervalued their labor and their contribution to the broader economy, locking them into a life of second class citizenship with no voice at work or in the community outside the workplace. To these immigrant workers/organizers, the underlying dynamics at work in the life of an immigrant farmworker could be seen through virtually the same critical lens as those at work in the life of a rural peasant—despite the obvious surface differences—and the same broad strategies of action could be brought to bear to bring about change.

FROM GENERAL STRIKES TO THE TACO BELL BOYCOTT: THE ROAD TO SYSTEMIC CHANGE IN THE U.S. FOOD INDUSTRY

Beginning in 1993, Mexican, Guatemalan, and Haitian workers—many of them peasant leaders in their home communities—began to meet regularly to reflect on the miserable working and living conditions in Immokalee and the causes of those conditions. For nearly the next two years, a core group of dedicated animators worked to undertake a process of "concientizacion" in Immokalee. (In practice, the CIW has carried over the Haitian term "animator," as it more fully captures the sense community leaders who both help their fellow community members critically question their conditions and organize to change them.) Through weekly meetings, drawings, street theater, and intensive week-long leadership training workshops—many of which were initially run by experienced trainers in popular education who traveled to Immokalee from Haiti and Mexico to facilitate training sessions—this expanding core of farmworker leaders engaged a growing number of workers that began to question their poverty in their new home and their relationship to the handful of huge agribusinesses and the numerous local crewleaders that the industry employs to hire and control labor.

Into this context of slow, careful base-building came a bolt out of the blue: a wage cut in November of 1995 by one of the tomato industry's largest employers, Pacific Land Co. For several years, many of the largest growers had taken to paying by a system dubbed "Day and a Dime," whereby workers were paid a combination of hourly pay and piecework. Specifically, workers picking at a Day and a Dime earned the minimum wage for eight hours plus ten cents for every bucket they picked. The Day and a Dime system was itself designed to cut pickers' pay from the traditional straight piece-rate system (e.g., a worker picking 200 buckets at the traditional rate of 40 cents per bucket would earn $80, while a worker picking the same 200 buckets by the Day and a Dime system would earn 8 hours at 4.25, or $34, plus $20 by the dime for a total of $54). But in 1995, Pacific Land Co. cut wages further by

reducing the floor day rate from the minimum wage of $4.25/hour to $3.85/hour. That cut was the trigger that led—in a winding, ten-year process—to the Taco Bell boycott victory and the first real hope for systemic improvement in human rights for Florida's farmworkers.

Of course, a lot happened between the Pacific wage cut and the settlement of the Taco Bell boycott. The popular education and leadership development that had been building slowly in Immokalee for nearly two years gave workers a base from which to respond to Pacific's wage cut, and in November 1995, Immokalee saw its first-ever general strike. For five days, thousands of workers stayed out of the fields, with citrus pickers joining tomato workers in solidarity to protest the exploitation endemic to all agricultural labor. The strikers occupied the "Pantry Shelf" parking lot, the central parking lot in town where for decades thousands of workers had gathered in the predawn hours to plead for work from dozens of local crewleaders. The crewleaders were Immokalee's small-time potentates—huge, overweight men driving late-model pick-ups and barking orders to workers who, often half their size, feared not only for their jobs but often for their lives if they didn't comply with the crewleader's demands. Recruitment in the Pantry Shelf had forever been a one-sided affair, where bosses offered employment at a fixed rate and chose workers as they needed, with absolutely no room for negotiation. To a worker looking for a job or awaiting his or her pay in the Pantry Shelf parking lot, all power was in the hands of the crewleaders.

Layered over the absolute economic power were the ethnic and cultural differences between crewleaders and their workers, differences that provided the local bosses yet further power over their workers. Crewleaders were most often Chicano or African American, citizens, and English speakers, with large local families and obvious, if not actually great wealth. Workers, on the other hand, were most often extremely poor, desperate for daily employment, non-English-speaking immigrants, with no local family members. The majority of workers, in the early 1990s, in Immokalee were of indigenous descent and were the object of ridicule for their short stature, dark skin, and use of indigenous language. Haitian workers, though able to establish a somewhat independent power base through their shared language and greater family ties and stability than their Mexican and Guatemalan counterparts, were nonetheless subject to racial discrimination from the crewleader community.

The power of control over employment mixed with the poison of racial animus created a toxic environment in Immokalee that made the most extreme human rights abuses commonplace. The Pantry Shelf parking lot, where workers were recruited and paid every day, was the center stage where the crewleaders acted out their absolute power and workers suffered daily humiliations.

So it was that when those same workers—led by young, immigrant, indigenous and Haitian workers, the very subject of daily ridicule—stood up, chased the bosses out of the Pantry Shelf, and occupied the parking lot night and day during those five days in November, a fundamental shift in power took place. Strikers called the occupation Immokalee's "Tiananmen Square," and the analogy rang true. A structure was shaken during those days in late 1995, and though the structure withstood that first blow, it was forever

weakened and was set on a path for gradual, but inevitable, reform. And in that moment when workers, who for decades had suffered their powerlessness in silence, overturned the tables and made themselves heard throughout Florida's agricultural industry, the Coalition of Immokalee Workers declared its existence for the first time.

Following that first strike, which succeeded in reversing the Pacific wage cut, the relationship to the lowest level of employers, the crewleaders, would never be the same. The unquestioned, absolute power of the crewleaders had been challenged and defeated, if even for only a few days. The following season, in 1996, a nighttime march by 400 workers to the house of a prominent crewleader family to protest the brutal beating of a CIW member in the fields drove the final nails into the coffin of crewleader omnipotence. The slogan workers chanted that night outside the crewleader's house while his clan—several brothers and cousins also employed as crewleaders—paced angrily behind the fence, protected by nearly thirty riot police, was clear: "*¡Golpear a uno es golpear a todos!*" To beat one of us is to beat us all. Farmworker powerlessness—the first line of which was maintained by the overwhelming power of the crewleader over the individual worker—was beginning to crumble, and with it were effectively eliminated some of the very worst forms of farmworker abuse, including violence in the fields and widespread wage theft. No longer did those abuses go unanswered, and no longer was humiliation a one-way street. With an active, committed farmworker organization responding to abuses against individuals as a community, the cost of those crewleader-linked abuses suddenly became prohibitive and their frequency dropped to insignificant levels.

The meetings that began under the local radar in a room borrowed from the local Catholic church now became a highly public, controversial new farmworker organization calling for fundamental change in the way the Florida agricultural industry relates to its labor. The workers that founded the CIW defined their new organization's objectives in the following terms:

> Together we fight for a fair wage for the work we do, more respect on the part of our bosses and a more powerful voice in the industries where we work, the right to organize without fear of retaliation, better and cheaper housing, and stronger laws and stronger enforcement against those who would violate workers' rights, with a particular focus on those employers who continue today to hold immigrant agricultural workers in debt bondage. (CIW Brochure)

And the workers discovered a great new efficacy in their organizing, as many of the most vexing human rights violations that had been ineffectually addressed through legal avenues for decades were virtually eliminated overnight through an approach that took aim at the underlying power relations, the roots of the violations.

The success of the initial organizing against exploitation at the hands of the local crewleaders encouraged CIW members and gave form to the continuation of our efforts, aimed after 1996 at the next level of power, at the growers. Here again, over the next several years, the Latin American roots of the CIW's organizing approach manifested themselves in every aspect of our work, from our demands to the very actions we employed to advance our campaign.

Our demands were captured in the name of the campaign that gave shape to the four years from 1997 to 2000: "Campaign for Dignity, Dialogue, and a Living Wage." Dignity was the overarching theme of our demands, tied to the idea of human rights as the universal standards by which a dignified existence is defined. This use of dignity in the U.S. organizing context is generally seen as too vague, far from the concrete, measurable demands typical of Alinsky-style organizing. But for workers in Immokalee, the denial of dignity, felt in virtually every aspect of relations with employers at work and with the powers that ruled community life, was the most humiliating condition of existence as a farmworker in the United States. Like the sanitation workers in Memphis who captured their struggle in the famous Civil Rights movement slogan "I Am a Man,"[8] workers in Immokalee chose "dignity" as the primary demand of their movement for human rights in the fields.

"Dialogue," like dignity, is also far too vague a term for most U.S.-style organizing. Collective bargaining has long been the gold standard of labor negotiation, and given the U.S. legal framework for labor organizing, the entire legal structure of union representation and recognition is set up with collective bargaining as its end. Dialogue, on the other hand, has no legal definition, and no structural mechanisms or institutional support to foster its practice.

But farmworkers are excluded from the National Labor Relations Act that gives unions the legal mechanisms necessary to compel employers to recognize the union as the collective bargaining agent for their labor. Consequently, not only can farmworkers be fired with no legal recourse if they attempt to organize or even ask for a raise, but farmworkers cannot access the National Labor Relations Board or any of its processes to compel their employers to bargain. What's more, Immokalee's function as a massive labor pool for dozens of agricultural employers makes workplace-specific organizing effectively impossible as virtually no workers have any lasting relationship to any particular employer.

Dialogue, therefore, is perhaps the closest that a community that is a labor pool for multiple employers, without the organizing rights and protections granted by the NLRA, can get to collective bargaining. Dialogue as a means to address the systematic, community-wide violation of human rights also has strong roots in the Latin American organizing experience, as community movements in Latin American often frame talks with authorities in terms of dialogue or "platicas." Dialogue also carries with it the implication of dignity, as its suggestion of talks among equals was an important reason for its choice as a frame for our demands.

But not only were our demands framed in terms familiar to veterans of the Latin American human rights experience, the actions that CIW members chose to promote our campaign were likewise clearly not the product of the U.S. organizing tradition. In the four years from 1997 to 2000, the CIW organized a number of high-profile actions, including two more community-wide general strikes, a thirty-day hunger strike by six CIW members, and a fourteen-day march across the state of Florida to the offices of the growers' lobbying association, the Florida Fruit and Vegetable Association.

The 1997 general strike led to the first-ever community-based wage negotiation in Immokalee's history, if not modern U.S. labor history. Following

two days of general strike the CIW was contacted by Gargiulio, Inc., the largest tomato producer in the United States. Gargiulio's representative agreed to meet with CIW members to discuss the call for a raise in the picking piece rate, and over two meetings at Immokalee's Catholic church, Gargiulio agreed to raise its piece rate by 25 percent, from forty cents per thirty-two-pound bucket to fifty cents, in two steps. The rate has remained at fifty cents in the nine years since that agreement.

By meeting with Gargiulo as representatives of the community from which Gargiulo drew its labor, but not of its particular workforce (as it had no particular workforce), the CIW effectively created a new form of labor negotiation, which can be termed "bargaining as a collective," a community collective, as opposed to collective bargaining. While the difference may seem one of semantics, it is in fact quite meaningful. The entire framework of bargaining as a collective is distinct from legally defined collective bargaining, from the process used to reach the table (community-wide general strikes versus workplace-specific actions or an NLRB-mediated election process) to the arrangements made when a final deal is struck (unsigned agreements enforced by power relations versus legally binding contracts enforced in the courts). It restored to farmworkers in Immokalee the fundamental human right to negotiate their working conditions where that right had been denied farmworkers in U.S. labor law for decades. Through collective action, it brought about significant, lasting change where workers had been mired in a static, one-to-one, passive relationship with their employers for decades. While both forms of negotiated change have their advantages (a legally binding contract, for example, is in many cases preferable to a verbal agreement that must be enforced by organized action if breached), bargaining as a collective was indisputably preferable to what had been the de facto alternative in Immokalee since large-scale farming took root in the area.

The thirty-day hunger strike resulted in the extension of the raise won during the general strike across the industry, though where Gargiulo consented to a 25 percent raise, the remaining larger growers raised their piece rates only five cents, or about 13 to 15 percent, depending on the company. The hunger strike was a totally foreign idea to the Florida agricultural industry, and to the state of Florida generally. But to workers in Immokalee it was a perfectly viable tool in the organizing tool kit, one not used as a first option but as a demonstration of the overwhelming frustration felt by those who are truly powerless. It was perhaps the strongest indication to date for the growers that this new organization was not like anything they had ever seen in the past but a force, while resource poor, that was capable of totally unpredictable and extreme protests.

The hunger strike was also the first time that the CIW had taken its organizing and its human rights message to parties external to the agricultural industry, to the public of Southwest Florida and state political leaders. While the strike garnered impressive support from the public—with tremendous participation by local and national religious leaders, as well as supportive public statements by then Governor Lawton Chiles and former president Jimmy Carter—that support ultimately failed in pressuring the growers to accede to dialogue or any improvements in working conditions.

One more general strike in 1999 and the two-week march across the state in 2000 followed, but both were met by stubborn, unified resistance from the Florida agricultural industry. Even several high-profile criminal prosecutions of violent modern-day slavery operations during the same four-year period didn't shame the growers into making, at the very least, superficial reforms. By 2000, it had become clear that, though direct action organized against the growers could lead to some limited gains, such as the piece rate increases of 1997 and 1998, the growers were so effectively insulated from pressure that they could withstand virtually any assault that a dirt-poor community like Immokalee could muster. Between the exemption for agricultural workers from the NLRA, denying farmworkers the rational organizing mechanisms of the NLRB, and the fact that Florida's growers don't sell directly to the public but rather sell their products wholesale to the large food retail supermarkets and restaurant chains, the growers were immune to both union-style labor organizing and to any form of consumer or political pressure. As such, any approach that depended on the ability to organize pressure directly against the growers—even the most creative, challenging actions that a popular movement–style approach could generate—would prove, ultimately, an exhausting exercise in futility.

If further gains for human rights in Florida's agricultural industry were to be won, workers in Immokalee would have to locate the growers' Achilles heel, the one unprotected point of entry in their armor, to press their campaign and win further improvements in their lives.

THE TACO BELL BOYCOTT AND HOPE FOR REAL FARM LABOR REFORM

Though information on who buys the tomatoes sold by the major growers in and around Immokalee is difficult to nail down—client portfolios are proprietary information, and none of the growers are publicly held, which further obscures the details of their business—packinghouse workers knew that the major fast-food companies were important buyers. Supervisors would hover a little closer, color and quality would grade a little tighter, and special packing trays would be rolled in on stacks when Burger King, for example, was making a purchase. And eighteen-wheelers with the familiar McDonald's food scenes on the sides would roll up to the docks to haul away their loads. But without some kind of more quantifiable confirmation of those purchases, it was impossible to know just how important those clients really were.

But around the same time that dozens of CIW members returned to Immokalee from one more frustrating march on Governor Bush's mansion in Tallahassee, information on those relationships started to trickle out through a number of articles in the industry journal *The Packer*. The new information revealed increasingly close, often contractual ties between local growers and major, consolidated retail food companies, with many of the largest fast-food brands and supermarket chains buying their tomatoes directly from major Immokalee area growers.

Through a series of reflections with CIW leaders, beginning with an evaluation upon our return to Immokalee from that march in Tallahassee, we came to incorporate a far broader vision of the industry in which we work into our analysis of the causes of farmworker exploitation, a vision that reached well beyond the crewleaders and growers that had been the frontier of our thinking since we started organizing in the early 1990s. It became increasingly clear that the companies that purchase the tomatoes picked in Immokalee had been undergoing a tremendous consolidation over the past thirty years. There had sprung up companies like Yum Brands (the largest restaurant company in the world and parent company of five major chains—Taco Bell, KFC, Pizza Hut, Long John Silvers, and A&W Restaurants), Wal-Mart, and McDonald's that had replaced a patchwork of smaller regional chains and local retailers and had come to dominate the food market as never before. We came to understand that the roots of exploitation in Immokalee—and the road to its solution—ran all the way to these new megacorporations, with headquarters in places like Irvine, California, Oak Brook, Illinois, and Bentonville, Arkansas.

The importance of these buyers to the Florida growers—and therefore the influence of these buyers over the growers—was great and growing greater, as the retail end of the food industry grows only more consolidated every day. To keep these clients loyal and happy, growers would cut off their smaller customers in order to maintain a steady flow of tomatoes to these new mega-buyers when farms were hit with freezes, hurricanes, or floods and supplies were tight. Growers would even gear their business, setting aside acreage, to produce tomatoes that fit the specifications these particular giants demanded. The steady, high-volume purchases these clients brought to the table were just that valuable. Though growers were insulated from consumer pressure and did not have to listen to politicians and Nobel Laureates like Jimmy Carter, they did have to consider the concerns of these key clients. Achilles was not invulnerable, after all.

Of course, the high volume came at a price—a low price, to be exact—as corporations like Yum Brands were able to leverage their immense buying power to demand the lowest possible prices. This created a downward pressure on prices at the farm level that continues today. An Oxfam study released during the Taco Bell boycott revealed that the "marketing gap," the percentage of the ultimate retail price of a product that goes to the producer, had fallen in tomatoes from 41 percent in 1990 to 25 percent in 1999. At the same time, the companies that sell inputs to agriculture—companies like Monsanto (chemicals, seed) and John Deere (machinery)—were likewise growing increasingly powerful, and input costs were on the rise. Growers were caught between corporations on either end of the food market that were literally thousands of times larger than they—consequently those companies were able to wield their negotiating power over the growers to effectively dictate prices. The resultant cost/price squeeze forced growers to look to the one cost they could control—labor—to maintain their ever smaller margins.

Downward pressure on tomato prices, therefore, translated directly into downward pressure on wages, and three decades of deepening farmworker

poverty tracked the three decades of food market consolidation. Workers in Immokalee realized that the major chains, like Yum Brands, Wal-Mart, and McDonald's, were not only profiting from farmworker poverty in the form of artificially low prices, but were actually helping keep farmworkers poor by leveraging their volume purchases to extract those impossibly low prices from growers, who in turn paid workers sub-poverty wages.

And so, the Taco Bell boycott was born. There is not enough space here for a thorough account of the tumultuous four-year campaign, but a campaign that began on Martin Luther King Day 2001, with a tiny press conference outside a Taco Bell restaurant on Highway 41 in Ft. Myers, Florida, ended four years later with a massive press conference in Yum Brands headquarters in Louisville, KY, on 8 March 2005. At that press conference, Yum Brands vice president Jonathan Blum and Lucas Benitez of the CIW announced a "partnership for social responsibility," establishing several key new principles designed to address the price imbalances in the food market and the human rights violations that existed in the shadows of that market for so long.[9]

The CIW-Yum agreement—a signed agreement, enforceable in court—set several important precedents, including:

- The first-ever direct, ongoing payment by a fast-food industry leader to farmworkers in its supply chain to address substandard farm labor wages (nearly doubling the percentage of the final retail price that goes to the workers who pick the produce);
- The first-ever enforceable Code of Conduct for agricultural suppliers in the fast-food industry (which includes the CIW, a worker-based organization, as part of the investigative body for monitoring worker complaints);
- Market incentives for agricultural suppliers willing to respect their workers' human rights, even when those rights are not guaranteed by law;
- 100 percent transparency for Taco Bell's tomato purchases in Florida (the agreement commits Taco Bell to buy only from Florida growers who agree to the pass-through and to document and monitor the pass-through, providing complete records of Taco Bell's Florida tomato purchases and growers' wage records to the CIW).

The surprising victory can be attributed to a number of factors. Student participation in the boycott was absolutely critical to its success. The Student/Farmworker Alliance's decentralized, fast-spreading "Boot the Bell" campaign removed or blocked Taco Bell restaurants from twenty-one campuses across the country during the four-year boycott. The powerful student role in the campaign owed much of its strength to the years of hard work invested in building awareness around overseas sweatshops in the apparel industry that laid the foundation for organizing in alliance with farmworkers in Immokalee. Religious support and participation in the boycott was likewise vital to securing such an unprecedented victory. Numerous national denominations played key roles in the campaign, led by the Presbyterian Church (U.S.A.), which put real resources behind its endorsement and helped, through its commitment and strategic support, build a truly impressive voice for religious allies in the boycott.

Indeed, the boycott was able to weave together a remarkably diverse and decentralized—yet highly coordinated—national network of alliances, due, in large part, to the unique nature of the campaign in the field of consumer boycotts. Unlike many antisweatshop or consumer campaigns, the Taco Bell boycott stood out for the simple fact that the very workers whose labor conditions were the subject of the boycott were the unquestioned and ever-present leaders of the campaign. The Taco Bell boycott was rooted in years of hard-fought organizing in Immokalee, spearheaded by workers whose leadership and vision was forged in those battles on the streets of Immokalee, and given life by the participation of thousands of workers over the four-year campaign who protested from Florida to California, marched in the snow of Chicago and the heat of Miami, sat in hunger strike, signed petitions, lent their soiled work clothes and pictures of their dirt-stained hands in an unending stream of powerful images of exploitation, and filled the campaign from beginning to end with their presence, spirit, and consciousness.

The CIW's leadership was not only crucial to maintaining the coordination of such a wide-flung campaign with such diverse allies, but also to establishing the legitimacy of the campaign that attracted allies in such impressive numbers. The CIW's political analysis reinforced this relationship, as workers cast the campaign as a genuine alliance bringing together different sectors around their common interest in a more just, more transparent, food industry. Students, who as consumers were themselves exploited by fast-food advertising that sorely underestimated their capacity for critical analysis, and people of faith, whose understanding of faith challenged them to question their participation as consumers in an industry so dependent on exploitation, found the space to play active roles in a campaign that looked to them not as passive "supporters" but as true allies fighting with their own resources and for their own interests, alongside workers from Immokalee in a horizontal relationship. The respect inherent in that relationship of alliance, and reinforced by the shoulder-to-shoulder presence of workers and allies in major campaign actions, was crucial to the boycott's success.

And running throughout the boycott as the thread that tied it all together was the theme of human rights. The CIW's framing of the campaign as a struggle of human rights versus corporate profits—not simply a struggle for farmworker rights—provided the broader analytical context that made the notion of alliance, as opposed to the more traditional and vertical solidarity, possible. The CIW's history of struggle for human rights both in Immokalee and beyond the level of farmworker grievances gave that frame legitimacy. And, indeed, if there was a turning point in the campaign—a moment when, looking back, it became clear that it was no longer a question of *if*, but of *when*, the boycott would be successful—that moment was defined in terms of human rights.

During the ten-day hunger strike in February 2003, at the foot of Taco Bell's headquarters (an imposing black glass skyscraper in the corporate heart of Irvine, California), fasting workers, including one worker who had escaped a slavery operation and helped put his employer behind bars, asked Taco Bell executives one question: "Can Taco Bell guarantee its customers that the tomatoes in its tacos were not picked by forced labor?" The trajectory of

Taco Bell's response to that question traces the final stages of the campaign, and the beginnings of hope for a sustainable solution to not just slavery but sweatshop conditions in the fields.

At the time of the hunger strike, Taco Bell's spokesperson was apparently totally unaware of the several recent slavery prosecutions that had emerged from Florida's fields, or of the presence among the hunger strikers of a worker who had been held against his will by his employer. The spokesperson's response, to a radio reporter from Madison, Wisconsin, was flippant: "Slavery was abolished in this country two hundred years ago, Mike, in case you didn't know." Later that year, in an April 2003 *New Yorker* magazine article, Yum's senior vice president Jonathan Blum's response to the reporter's questions about another slavery operation effectively recognized the existence of the abuse but failed to understand its connection to the end buyers of produce picked in conditions of forced labor. Blum was quoted, saying, "My gosh, I'm sorry, it's heinous, but I don't think it has anything to do with us."[10] Later, in 2004, with the boycott gaining steam on campuses across the country, Yum Brands unilaterally added a prohibition against forced labor to its Supplier Code of Conduct, though there was no indication of any actual mechanism for monitoring or enforcement of the prohibition. And finally, on March 8, 2005, at the press conference announcing the end of the boycott and the launch of a new "partnership for social responsibility" with the CIW, Jonathan Blum declared that Yum Brands and Taco Bell would institute a "zero tolerance" policy prohibiting slavery in its supply chain and would work with the CIW to enforce that prohibition.[11] The arc was complete, from denial to recognition, from the rejection of any relationship with the farmworkers at the bottom of the food industry to a new partnership that, with real resources and mechanisms, would lay the foundation for industry-wide reforms.

Slavery and sweatshops in Florida's fields had finally found a place in the food industry that depended on the good will of its consumers to survive and so couldn't afford to ignore public awareness of those conditions behind its products. And from that starting place, more and deeper changes at the industry level are sure to come.

SUMMARY: "CONSCIOUSNESS + COMMITMENT = CHANGE"

"Consciousness + Commitment = Change" is one of the CIW's fundamental organizing principles, and it has been crucial—at all levels of our work—to our ability to bring about positive, material change in the human rights situation in Florida's fields.

In Immokalee, popular education and leadership development provide the tools for building consciousness in the farmworker community. That consciousness forms the basis of the kind of commitment necessary to undertake the extreme protest actions that have become the CIW's calling card over the past decade—actions which have led to unprecedented change in Florida's agricultural industry.

In the world outside of Immokalee, we have put tremendous effort into building awareness among consumers, awareness that has allowed us to weave together a powerful, national network of allies committed to struggling shoulder-to-shoulder with farmworkers. That alliance of consumers and workers has already laid the groundwork for an important new movement dedicated to achieving the full respect of human rights in this country's trillion-dollar food industry.

NOTES

1. "Remarks by RFK Human Rights Award-Winner Lucas Benitez, Coalition of Immokalee Workers," *Oxfam America* (June 21, 2007). Available online at www.oxfamamerica.org/newsandpublications/news_updates/archive2004/art6769.html

2. "Quotes by Malcolm X," *The Official Website of Malcolm X* (June 21 2007). Available online at www.cmgworldwide.com/historic/malcolm/about/quotes_by.htm.

3. 18 U.S.C. Sections 1581-9.

4. CIW interviews with workers in Immokalee, Florida, freed from forced labor and slavery.

5. These are examples of large growers in Florida.

6. Saul Alinsky, *Rules for Radicals* (New York: Random House, 1971).

7. Ibid.

8. See, e.g., Steve Estes, *I Am a Man* (Chapel Hill: University of North Carolina Press, 2005).

9. See www.ciw-online.org.

10. "Nobodies: Does slavery exist in America?," *New Yorker* (April 2003).

11. See www.ciw-online.org.

CHAPTER 2

From Sanctuary to Shaping International Law: How Unauthorized Immigrant Workers in America Are Advocating Beyond U.S. Borders

Beth Lyon

> Talking about human rights and about migration are two things that go together completely. Nowhere is it said that people who are migrants do not have human rights; neither is it said that if you are in a different country from the one you were born in, that you have no human rights. In fact, all human beings have human rights, wherever they may be, whether they have papers or not.
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> —Statement by Mariza Ibarra, El Comité de Apoyo a los Trabajadores Agrícolas, to the UN Conference of NGOs with Consultative Status to the UN's Committee on Migration[1]

Virtually every country relies to some extent on foreign workers, be they professionals, service industry workers, or blue-collar laborers. Foreign labor migration is an established fact in the world economy, but the laws of the United States force the vast majority of blue-collar foreign labor migration underground. Driven out of their local economies by extreme poverty and drawn to the promise of better-paid work (or any work at all), the foreign poor are willing to take physical risks, violate immigration laws, and endure life as nonpersons and exploitable laborers. At least 7.2 million[2] people hold the status of unauthorized immigrant worker in America today, constituting roughly 4.9 percent of the civilian labor force.[3] They are liable to detection and deportation at any moment, making them easy prey to employers who wish to pay less than fair market value, or even less than minimum wage, for their labor. They are more likely to be harassed or fired if they are injured on the job, if they decide to engage in legal union activity, or if they seek to remedy discriminatory or unsafe working conditions. Meanwhile, federal and state employment laws only deepen the exploitation built into the foreign labor visa regime by denying several key workplace protections to people based on their immigration status.

Workers and their advocates in America have reached out to international institutions and foreign governments and used international law in their battle for social justice. International law mandates that unauthorized immigrant workers have equal workplace protections and equal remedies for workplace rights violations. To work for reform in the United States and to shape international law so that it will comprehend the situation of unauthorized immigrant workers in this country, advocates have communicated with a wide range of international institutions, including United Nations treaty bodies, the Inter-American human rights system, and ad hoc international gatherings. Unauthorized immigrant worker advocates from the United States have successfully shaped international law and attracted international attention to the situation of unauthorized immigrant workers in this country. They are now finding opportunities for importing these standards into their domestic advocacy.

WHEN GOVERNMENT GOES UNDERGROUND: CHALLENGES FOR UNAUTHORIZED WORKERS

Like most countries in the world, the United States does not have a realistic scheme for regulating blue-collar migration, which has led to an underground economy. Most industrialized countries do have in place elaborate visa regimes to facilitate and regulate the entry and exit of professional and formally educated service, or white-collar, foreign workers.[4] At the same time, however, those visa systems do not create proportionate numbers of visas for foreign low-income workers.[5]

Why the United States Refuses to Regulate Blue-Collar Labor Migration

Seven-point-two million workers represent a serious rule of law concern for the United States. The presence of so many unauthorized immigrant workers directly challenges implementation of immigration law, seriously impacts the administration of tax, employment, and social security laws, and indirectly affects regimes such as drivers licensing, banking, and local police enforcement. As the number of undocumented immigrants in America grows, municipalities are increasingly invoking criminal laws to punish unauthorized work, charging unauthorized immigrant workers with identity theft and fraudulence.[6] Some industries heavily and publicly rely on unauthorized immigrant workers. For example, the U.S. Department of Agriculture reports that 52 percent of all farmworkers are unauthorized,[7] and growers report much higher percentages.[8] Growers freely admit that without unauthorized immigrant workers, their crops will not be picked or even planted.[9]

Why does the United States permit this situation of "excessive illegality?"[10] The answer lies in the general public's fear and suspicion of low-income immigrants and industry's desire to obtain labor in the most inexpensive and flexible possible way. Providing blue-collar worker visas or status regularization is seen as being proimmigrant, and enforcing the restrictive immigration laws

against employers is viewed as antibusiness. Standing at the intersection between these broad political impulses, the U.S. government has delivered the electorate a legal regime which, on paper, keeps foreign blue-collar laborers out by denying them visas, but which, in reality, does little more than make their physical entry into the United States dangerous. Enforcement efforts are heavily concentrated on border security and deportation, which is at best ineffective.[11] The U.S. government's efforts to enforce immigration rules against employers themselves have been much less comprehensive,[12] although experts argue that this is a tactic that would have a greater effect by targeting demand rather than supply.[13] The result is an unrealistic visa regime that forces the sizeable flow and pool of foreign laborers underground, and a barely existent enforcement regime that turns a blind eye to the massive, ongoing violations of the law.

"The Three Ds": Dirty, Difficult, and Dangerous Work

The human consequence of this unsuccessful legal regime is that unauthorized immigrant workers, many of whom have incurred debt and survived an extremely harsh passage into the United States, endure difficult conditions once they are here. Unauthorized immigrant workers are heavily concentrated in the work categories that the International Labour Organization calls the "three D's": "dirty, difficult and dangerous."[14] Unauthorized immigrant workers are found throughout the United States in construction, extractive operations, and agriculture, two of the most dangerous occupations in America.[15] According to a 2000 report by the U.S. Bureau of the Census, Hispanic workers, who make up at least 51.6 percent of the unauthorized immigrant worker population, suffer 61.2 percent of on-the-job fatalities.[16] According to the Bureau of Labor Statistics, between 1996 and 2000, the number of foreign workers increased by 22 percent, but the number of workplace fatalities suffered by foreign workers increased by 43 percent. During the same period, the number of workplace fatalities decreased by 5 percent among the general workforce in the United States.[17] Additionally, unauthorized immigrant workers commonly experience wage theft, below-minimum wages, harassment, physical abuse, wrongful termination and other forms of retaliation, and outright slavery.[18]

Although they face some of the most significant workplace violations taking place in this country, unauthorized immigrant workers constitute an extremely pliant workforce: They are unfamiliar with and most are beyond the reach of U.S. law, advocates, and courts. Moreover, they are always afraid of deportation. As Greg Asbed states in Chapter 1, agricultural workers in Immokalee, Florida, are "an employer's dream, and an organizer's nightmare."

Negative Impacts on U.S. Workers and Businesses

Nor is the current system beneficial for authorized and American workers.[19] A system that permits a rapidly growing underclass of unauthorized

immigrant workers creates downward pressure on wages, workplace rights, and regulation. Moreover, the employers who are singled out for surprise immigration enforcement actions—and admittedly, there are relatively few of these—experience major disruptions.[20] Moreover, changes in border enforcement, for example the post-9/11 crackdown, create labor shortages across whole industries.[21]

The Fourth "D": Discrimination

Unauthorized immigrant workers experience discrimination on several levels. First is the general impact of the current visa regime, owing to the identity of the people whose presence and/or work is thereby rendered illegal. Once in the workplace, unauthorized immigrant workers are more vulnerable to discriminatory harassment owing to both their personal characteristics and their reluctance to seek redress for inappropriate workplace treatment.[22] Finally, despite this population's vulnerability, U.S. employment laws give systematically less protection to unauthorized immigrant workers than to all other similarly situated workers.

The human consequences of the disproportionate worker visa regime overwhelmingly fall upon poor people and people from the global south. Meanwhile, the benefits of the blue-collar worker visa shortage overwhelmingly accrue to northern consumers, informal northern employers such as homeowners and parents who are virtually below the radar of all employer laws, including immigration laws,[23] and large industries that profit immensely by keeping wages low, but which can afford to amortize the risk of random enforcement action over large operations.[24]

While there appears to be no published systematic survey of unauthorized immigrant worker experiences with workplace discrimination, general reports on unauthorized immigrant workers are replete with stories of harassment.[25] In six years, the author's small law school–based farmworker clinic has handled numerous cases in which employers routinely referred to unauthorized immigrant workers with racially derogatory names and refused them employment not because of immigration status, but because of their age or gender. One client was told that he was experiencing pain because indigenous Latinos have "thin skin."

There are two general lines of argument about how the employment laws of this country should treat unauthorized immigrant workers. The first line relates to whether unauthorized immigrant workers deserve protection. Unauthorized immigrant workers are clearly among the most vulnerable people in the workplace who make easy targets for criminal employer practices, while at the same time they are by definition lawbreakers. The second line of argument relates to the policy implications of offering workplace protections to unauthorized immigrant workers. The question here is whether offering equal or enhanced workplace protections to unauthorized immigrant workers *discourages* illegal migration by decreasing the savings to employers of hiring the unauthorized.

Another view is that offering equal—or special—workplace protections to unauthorized immigrant workers increases the likelihood of illegal migration

by making the workplace that much more attractive to potential illegal entrants. The U.S. Supreme Court recently endorsed the latter view. In an opinion handed down in the 2002 case of *Hoffman Plastic Compounds v. National Labor Relations Board,* a bare majority of five justices stated their opinion that giving the full protection of the law to unauthorized immigrant workers who engage in union activities would encourage illegal immigration.[26] The four-justice dissent countered with the view that giving equal protection to unauthorized immigrant workers would prevent illegal immigration by creating a disincentive to employers who might be tempted to hire the unauthorized because they would be less likely to form or join a union.[27]

Since *Hoffman Plastic Compounds,* unauthorized immigrant workers are not entitled to the lost-pay monetary remedies for violations of their right to engage in union activity[28] nor can they claim the lost-pay monetary remedy for work place discrimination.[29] Additionally, many states exclude unauthorized immigrant workers who are injured on the job from workers' compensation protection.[30] Although they are required to pay taxes, unauthorized immigrant workers are not entitled to recover their contributions to the social security fund, let alone participate in social security.[31] Moreover, unauthorized immigrant workers are not permitted to receive any assistance from federally funded legal service attorneys to seek their workplace rights.[32] Many judges and insurance companies refuse to help workers who have left the jurisdiction, failing to recognize the reality of unauthorized immigrants' lives.[33] Finally, many unauthorized immigrant workers are barred from obtaining services that are critical to most work, such as drivers' licenses, automobile insurance, and banking.[34]

The core problem is that these domestic laws and institutions all fail to take into account the transnational nature of this issue. The result is that, instead of mitigating the humanitarian impact of the current visa regime, the rules that affect unauthorized immigrant workers once they are in and working in the United States only exacerbate the situation. Moreover, the current trend in these laws is toward less rather than more protection.[35] As this chapter goes to press, Congress's most recent attempt to reform immigration law is struggling amid controversy and inability to compromise.[36] The proposed statute offered limited improvements, only partially addressing the immigration situation of some undocumented immigrants, and failing to improve workplace protection for unauthorized immigrant workers. The failure to achieve compromise eliminated the medium-term prospects for a change in status of undocumented immigrants.[37]

INTERNATIONAL HUMAN RIGHTS LAW CONTRASTS WITH AMERICAN LAW FOR UNAUTHORIZED IMMIGRANT WORKERS

A growing body of international law standards specifically protects unauthorized immigrant worker rights.[38] There is a good deal of overlap between international standards on unauthorized immigrant worker rights and U.S.

law, and there are also differences. Beginning with a 1975 International Labour Organization treaty,[39] international law has singled out unauthorized immigrant workers for special protection owing both to their transnational nature and to their negative humanitarian situation.[40] Meanwhile, as described above, U.S. law has recently moved toward less protection. The two major differences between international and U.S. laws are that international law establishes (1) a right to equal employment law protection and even (2) the right to special protections in the workplace.

Right to Equal Employment Law Protections

The norm of equal workplace treatment for the unauthorized has found expression in several noteworthy international law sources. The U.S. Supreme Court decision in *Hoffman Plastic Compounds* alone sparked two important international law rulings issued in 2003, one from the Inter-American Court of Human Rights (Inter-American Court) and another from the International Labour Organization Committee on Freedom of Association. The Mexican government was openly critical of the decision in *Hoffman Plastic Compounds*,[41] which had involved a Mexican unauthorized immigrant worker who was fired because he engaged in union activity.[42] Mexico went to the Inter-American Court, the highest human rights court in the Americas. The Mexican government asked the Inter-American Court for an advisory opinion on whether governments can condition employment and labor rights on immigration status.

The Inter-American Court ruled that under the international right to equality before the law, unauthorized immigrant workers should have the same workplace rights as all other employees. The opinion stated that "the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature. When assuming an employment relationship, the migrant acquires rights that must be recognized and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed[.] These rights are a result of the employment relationship."[43]

Also in 2003, the International Labour Organization decided a complaint filed by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Conference of Mexican Workers (CTM).[44] The AFL-CIO and the CTM argued that by conditioning the full enjoyment of labor rights on immigration status in *Hoffman Plastic Compounds*, the United States violated the workers' right to freedom of association. The ILO Committee on Freedom of Association agreed, concluding that "the remedial measures left to the National Labor Relations Board in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination."[45] The Committee made the following recommendation:

> The Committee invites the Government to explore all possible solutions, including amending the legislation to bring it into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of

> anti-union discrimination in the wake of the Hoffman decision. The Government is requested to keep the Committee informed of the measures taken in this regard.[46]

Thus the United States, by limiting unauthorized immigrant worker rights, inadvertently contributed to the development of international law on the rights of unauthorized immigrant workers. Several other international law sources support these recent cases by guaranteeing rights for unauthorized immigrant workers. The International Labour Organization's Migrant Workers (Supplementary Provisions) Convention (ILO 143) states that the unauthorized immigrant worker shall "enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits . . . [i]n case of dispute about the rights referred to in the preceding paragraph, the worker shall have the possibility of presenting his case to a competent body, either himself or through a representative."[47] The United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families guarantees a series of fundamental human rights for unauthorized immigrant workers, and also establishes that unauthorized immigrant workers "shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration . . . other conditions of work . . . [and] other terms of employment."[48]

While there is considerable overlap between U.S. law and international standards, there are important differences in addition to the *Hoffman Plastic* restriction on labor rights condemned by the Inter-American Court and the ILO. Following are some of the unauthorized immigrant worker rights these international standards protect and the status of those rights in U.S. law:

- the prohibition on involuntary labor and the right to "fair wages for work performed"[49]

  Protections from involuntary servitude, peonage, and slavery exist in U.S. law. The Fair Labor Standards Act and state laws protect unauthorized immigrant workers' right to minimum wage and to pay for the agreed-upon amount.
- union and organizing rights[50]

  Unauthorized immigrant workers have the right to form and join unions and engage in collective bargaining, but remedies for violations are severely restricted under Hoffman Plastic Compounds. *Agricultural workers, most of whom are unauthorized immigrant workers, have no union rights at all in most states.*
- social security benefits or the right to regain social security contributions[51]

  Unauthorized immigrant workers and their employers have an obligation to pay social security taxes, but the workers have no right to claim benefits nor to recover their contributions into the system.
- overtime and "a working day of reasonable length," "weekly rest [and] holidays with pay"[52]

  U.S. overtime provisions apply to most unauthorized immigrant workers, but the Fair Labor Standards Act excludes agricultural workers, most of whom are unauthorized, from the right to overtime pay.

- "adequate working conditions," including safety and health protections.[53]

On paper, these protections are not conditioned on immigration status. Some Occupational Health and Safety Act regulations do not apply to agricultural workers. By a rider attached to each successive Department of Labor appropriations bill, federal inspectors are forbidden from enforcing the Occupational Health and Safety Act against smaller farms.[54]

Right to Special Protections in the Workplace

Another important international human rights principle for unauthorized immigrant workers is the need for governments to do more than simply grant them rights on par with others in the workplace. For unauthorized immigrant workers, the playing field is clearly not level. In fact, the assumption of most experts familiar with unauthorized immigrant worker dynamics is that they will work long hours in dangerously substandard conditions at often illegally low pay, and that government has little incentive to monitor their conditions or to enforce workplace protections for them. The international law response to this reality is to require that governments provide special protection for such workers. In its 2003 advisory opinion, the Inter-American Court made the following statements demonstrating both its focus on the vulnerability of unauthorized immigrant workers and its acknowledgement of the practical difficulties of enforcing laws that protect them:

> States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations . . . the State has the obligation to respect and guarantee the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationships established between private individuals (employer-worker). The State must not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards. [W]orkers, being possessors of labor rights, must have all the appropriate means to exercise them. Undocumented migrant workers possess the same labor rights as other workers in the State where they are employed, and the latter must take the necessary measures to ensure that this is recognized and complied with in practice.[55]

The UN Migrant Worker Convention underscores this principle, stating that, "States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle [of equal workplace treatment] by reason of any irregularity in their stay or employment."[56]

These words have great importance in the United States. While the U.S. government does have programs designed to assist unauthorized immigrant workers, these efforts are generally viewed as seriously inadequate.[57] The visas available through these programs are limited both in number and in the

circumstances allowing unauthorized immigrants to apply for them.[58] In 2002, the U.S. Government Accounting Office (GAO) released a report criticizing the way the government monitors the working conditions of day laborers. The GAO stated that most day laborers are migrants, at least some of whom are undocumented, and expressed its concern that the agencies responsible for protecting day laborers are not doing so because of "limited data, traditional procedures, and difficulty in determining coverage" that hampers the agency.[59]

The GAO report and numerous criticisms by advocacy groups paint a picture of a government that does not view the improvement of working and living conditions for unauthorized immigrant workers as a "special obligation." The GAO report lays out a series of recommendations which, in the five years since the report was released, have been partially implemented.[60] A serious response by federal, state, and local government to the international law challenge would involve a coordinated effort that specifically identifies unauthorized immigrant workers as deserving of targeted monitoring and assistance that takes into account their precarious situation. To undertake such an effort would also have the effect of assisting other deserving U.S. workers, because the presence of high numbers of unauthorized workers is a sign of a weakened and vulnerable workforce.[61]

One way of measuring U.S. compliance with this "special obligation" to take "all appropriate measures" to ensure equal workplace treatment is an international law concept known as "progressive achievement." Progressive achievement is a standard that gained international endorsement when the United Nations decided to distinguish between civil and political rights, on the one hand, and economic, social, and cultural rights on the other. When the United Nations was crafting the system's foundational human rights treaty, because of Cold War politics, it decided to create two treaties instead of one. The first, the International Covenant on Civil and Political Rights (ICCPR),[62] lays out the type of rights that appear in the U.S. Bill of Rights, such as the right to free speech and the right to vote. The ICCPR lists the rights it protects without any words about when governments that ratify the treaty have to comply with the treaty terms, which is taken to mean that governments are expected immediately to come into full conformance with the treaty. The United Nations International Covenant on Economic, Social, and Cultural Rights (ICESCR),[63] on the other hand, covers rights that are generally less familiar in the United States, such as the right to work and the right to adequate nutrition.[64] By the terms of this treaty, "[e]ach State Party . . . undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[65] This language is generally viewed as a softening of the treaty, making it easier for governments to plead that they lack the resources to conform with their human rights obligations.[66] At the same time, the concept of progressive achievement does provide a way to evaluate a government's response to a special obligation to tackle a complex problem that needs not only better

funding but better coordination. Using this concept, it is possible to use the government's own past record to measure improvement, and deliberate retrenchment is liable to be cited as a human rights violation.

U.S. ADVOCATES FOR UNDOCUMENTED WORKERS ARE USING HUMAN RIGHTS STANDARDS AND APPROACHES TO BROADCAST RIGHTS VIOLATIONS AND TO SHAPE INTERNATIONAL LAW

Unauthorized immigrant workers and their advocates have a strong recent record of reaching out to international law and institutions in their advocacy work. They have built relationships with United Nations monitors, the Inter-American Human Rights regime, and many ad hoc intergovernmental gatherings, shaping international law to address the concerns of unauthorized immigrant workers in America. The Mexican government has been an especially important force in this process, pressing international institutions to monitor conditions for their nationals and to establish international standards that challenge United States law and practices. Although U.S. advocates are not currently employing these new standards in their domestic legal advocacy, the Supreme Court's recent citations to international human rights law to enhance civil rights protections underscore existing opportunities for using international law in U.S. advocacy.

Motivations for Turning to International Law

There are many reasons why unauthorized immigrant workers and their advocates turn to international law. First, because they are low income, have no right to vote, and are scattered across the United States, unauthorized immigrant workers lack political power and they are unable to achieve consistent attention to longstanding issues. Domestic political processes and courts are unlikely to address the significant differences between U.S. law and practice and the international mandates discussed above. Second, being by definition foreign nationals, and coming from countries with relatively higher levels of awareness of international law and intervention by international institutions, reaching out to international law and institutions is something of a natural fit for this community.

The post-9/11 rights scale-backs and the existing political obstacles to reform provide a strong incentive for unauthorized immigrant workers and their advocates to turn to international law. Because unauthorized immigrant workers have no vote, their ability to influence domestic law is relatively limited. Past legal reforms viewed positively by many unauthorized immigrant workers, such as the cancellation of the Bracero temporary worker program, the California Agricultural Labor Relations Act, the establishment and expansion of the Agricultural Worker Protection Act, and the 1986 immigration amnesty arose from political moments created by media spolights on negative conditions, or resulted from the sheer press of numbers of undocumented people raising broader popular awareness. These temporary moments cannot

compare with the constancy of public concern about national security and border control. In this political context, unauthorized immigrant workers and their advocates cannot seriously rely on the domestic laws and the legislative process to change the underlying dynamics that result in large numbers of unauthorized workers, nor to improve their workplace conditions. The twenty-two years that have elapsed since the last immigration amnesty and the repeated, failed attempts to achieve a legislative "fix" of the *Hoffman Plastic Compounds* decision are recent proofs of this political reality.[67] The result is that zealous advocates search for additional ways to improve the situation. According to Cathleen Caron, executive director of Global Workers Justice Alliance, "Using international law broadens our sense of place in the world. When domestic norms are out of sync with international standards, it is empowering to reach beyond one's national boundaries to show that many other countries have subscribed to the principles that you are struggling to achieve."[68]

The preferences of unauthorized immigrant workers themselves also give international law and institutions a familiarity and legitimacy that these sources may not enjoy in the United States. Most unauthorized immigrant workers come from countries in the global south[69] where international and regional institutions play a larger role than within the United States. For example, in many countries in the global south, the International Monetary Fund, the World Bank, and various United Nations and regional agencies, such as the Inter-American Development Bank, the Pan American Health Organization, or the Inter-American Commission on Human Rights are on the ground and affecting governance. An unauthorized immigrant worker may or may not agree with the actions taken by these entities, but their name recognition and power to sway events in many countries is undisputable.[70] Moreover, in many immigrant-sending countries, human rights is a more salient concept than employment law or civil rights.[71] An often-overlooked point of human rights history is that the founding international human rights documents, such as the Universal Declaration and the American Declaration of the Rights and Duties of Man, drew strongly on Latin American and Catholic Social Teaching principles, such as social and economic rights and "the dignity of work."[72]

El Comité de Apoyo a los Trabajadores Agrícolas (The Farmworker Support Committee, or CATA) is a grassroots farmworker membership organization in New Jersey and Pennsylvania. CATA first became involved with the United Nations when some of its members attended the World Conference Against Racism in 2001.[73] CATA went on to participate in many of the groundbreaking UN discussions on migrant workers that have taken place since 2001.[74] On the International Day of Migrants, December 18, 2006, a CATA board member who is an immigrant worker presented to the UN Conference of NGOs with Consultative Status to the UN's Committee on Migration, a statement that is quoted at the beginning of this chapter.[75]

CATA has worked to overcome some of the unique obstacles that it faces in working with the United Nations. Driving to hearings at the United Nations in New York is relatively affordable from the northeast, but longer trips are hard to fund and the migration advocates are in the process of educating

the United Nations about the need to offer support to southern migrants living in the north as well as to advocates in the global south. Travel abroad is impossible for undocumented immigrants, and even domestic flights are no longer considered safe for the undocumented. In the past the organization has attempted to identify members who are already back in their home country who can safely fly back and forth to Europe.[76]

CATA participates in the United Nations not because it believes that it will change international law, but because it offers a unique voice to the proceedings, and because working at the international level is an organizing tool that energizes the membership. CATA has surmounted obstacles to working with the UN in order to form global networks and to energize its base.

Shaping International Law and Broadcasting Violations in the United States

As recognition of migrant worker rights has grown internationally, U.S.-based unauthorized immigrant workers and their partner advocates have increasingly reached out to transnational institutions. Working with both international and regional intergovernmental institutions, advocates are shaping the new international law norms to respond to the particular concerns of unauthorized immigrant workers in the United States, and they are also sharing information about their situation at the international level. These interactions and activities have been extensive, and this chapter will describe only a few in detail, in order to provide examples of several types of activities and the advocacy opportunities associated with pursuing them.

UNAUTHORIZED IMMIGRANT WORKER COMMUNICATION WITH UNITED NATIONS MONITORS

International Labour Organization

Originally formed in 1919, the International Labour Organization became a specialized agency of the United Nations in 1946. The ILO is dedicated to setting global standards for worker rights and to offering technical assistance on worker rights issues. It is unique in that it has a tripartite structure, with governments, employer organizations (from the United States, the U.S. Chamber of Commerce), and trade union organizations having formal participatory standing. Historically, U.S. advocates have not given high priority to the ILO; indeed, it is the only UN agency from which the United States has ever withdrawn, a decision taken by the Nixon and Carter administrations largely because of the AFL-CIO's concerns that the organization had been captured by the Soviet Union.[77] This situation has reversed itself, however. Since the United States rejoined the ILO in 1980, U.S. government and civil society have made more serious use of the ILO. President Clinton was the first U.S. president ever to address the ILO, and his administration was heavily involved in brokering the Worst Forms of Child Labour

Convention (ILO 182),[78] which the United States ratified upon its promulgation in 1999.[79] U.S. civil society participated in negotiations around the treaty,[80] and a group of domestic and international U.S.-based organizations has monitored the treaty since it was ratified.[81] The ILO sets formal worker right standards by promulgating Conventions and Recommendations. Seven ILO instruments have a direct bearing on immigrant workers,[82] and three of them explicitly include unauthorized immigrant workers for protection.[83]

U.S. advocates have also begun to participate more actively in the ILO's monitoring functions. Most significant was the 2002 joint complaint of the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO), and the Confederation of Mexican Workers to the ILO Committee on Freedom Association about the *Hoffman Plastic Compounds* decision. As noted above, the Committee ruled that the United States is bound by the right to freedom of association, and that the decision in *Hoffman Plastic Compounds* violated this country's international obligations.[84] In 2004, the Committee expressed regret that the United States was not implementing its recommendations.[85] However, the AFL-CIO widely advertised the decision and continues to make use of this international mechanism. Ana Avendaño, associate general counsel and director of the Immigrant Worker Program of the AFL-CIO, views international law as a vibrant advocacy tool:

> International law has become an increasingly important source of protections for workers, both in the U.S. and around the world. Thousands of airport screeners in the U.S., for example, will likely soon regain their collective bargaining rights as a result of a decision from the ILO's Committee of Freedom of Association, which noted that the Bush Administration violated international labor law when it stripped the screeners of collective bargaining rights in 2003. The promotion and enforcement of international labor standards is a key part of the AFL-CIO's mission of bringing economic and social justice to working people in the US and around the world.[86]

United Nations Treaty-Monitoring Bodies

U.S. organizations have also raised unauthorized immigrant worker rights concerns with several of the UN committees that monitor international human rights treaties. Two of these, the Human Rights Committee and the Committee on the Elimination of Racial Discrimination (CERD), monitor treaties that the United States has ratified.[87] The United Nations Committee on Migrant Workers (Migrant Worker Committee) monitors the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[88] Each of these treaty bodies has received extensive input from U.S. advocates,[89] and the Committees have responded. For example, in 2006 the Human Rights Committee issued a report on U.S. compliance with the International Covenant on Civil and Political Rights, recommending that the United States take steps to improve the situation of undocumented immigrants.[90] In 2007, as this book went to press, a national working group of migrant worker advocates was preparing to make migrant

worker rights issues a highlighted issue in the upcoming examination of U.S. practices by the CERD. Eric Tars, one of the U.S. advocate coordinators of the response to the government's appearance before the Committee, reported that, "we expect migrant workers' issues to once again be at the top of the agenda before CERD." He reported that that U.S. migrant worker rights organizations "hope to use the shadow reporting process to influence the immigration debate on Capitol Hill and across the country by broadening the discussion beyond 'security vs. economics' to take into account the human rights of these workers, which shouldn't be dependent on their migration status."[91]

In addition to attracting the United Nations's attention to problems in the United States, U.S. advocates have also successfully influenced the way UN monitors approach international standards. For example, in December 2005, the U.S.-based Global Workers Justice Alliance presented at a "General Day of Discussion" before the Migrant Worker Committee. The organization was the only participant to raise the concept of "portability of justice,"[92] arguing that international law should require governments to assist migrant workers to vindicate their legal rights in the country of employment, either before or after their return to their countries.[93] The following summer, the Migrant Worker Committee submitted a report to the General Assembly's High Level Dialogue on Migration and Development that highlighted this issue and made four recommendations for government action to correct it, including the following: "States should consider entering into bilateral agreements to ensure that migrants who return to their country of origin have access to justice in the country of employment to claim unpaid wages and benefits."[94] These U.S. groups are successfully influencing international action on unauthorized immigrant worker rights.

United Nations Rapporteur on Migrant Worker Rights

In spring 2007, Dr. Jorge Bustamante, the United Nations Rapporteur on the Human Rights of Migrants, conducted a two-and-a-half week fact-finding mission to document conditions for migrant workers in the United States.[95] The American Civil Liberties Union (ACLU) and the National Network for Immigrant and Refugee Rights coordinated the mission.[96] The ACLU issued a statement that, in its view, "Country visits are considered a particularly important means by which to highlight human rights violations in a particular country and in placing pressure on the government to remedy the situation. . . . It is important for the ACLU to participate in the visit of the S.R. to the U.S. to hold the government accountable for human rights violations and to send a message to the rest of the world that abuses against migrants within the United States will not be tolerated."[97] Dr. Bustamante's mission report had not been released as this book went to press, but during his time in the United States he was quoted as stating that "the violations of human rights in the U.S. are quite rampant on the part of government officials and by parts of American society that are going very anti-immigrant . . . I'm very surprised by the things I'm seeing in the U.S."[98]

UNAUTHORIZED IMMIGRANT WORKER COMMUNICATIONS WITH THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Inter-American Court of Human Rights, an agency of the Organization of American States, is the highest regional human rights forum in the Americas. Its advisory opinion establishing a regional norm of nondiscrimination in all workplace rights set a global high-water mark for unauthorized immigrant worker rights.[99] As discussed above, the Mexican government initiated the request for the advisory opinion, and vigorously pursued it through all stages of the process. U.S. advocates were also extremely active in the formation of OC-18, through the mechanism of oral presentations to the Court and the submission of briefs amicus curiae.[100] The vast majority of the U.S. advocates urged the Court to issue an expansive ruling,[101] which, as noted above, it did. U.S. advocates immediately acted on OC-18, making two extensive filings with the Inter-American Commission on Human Rights on U.S. violations of the American Declaration of the Rights and Duties of Man as interpreted by OC-18.[102] The Commission has also held two hearings to take testimony from U.S. advocates on this issue.[103]

AD HOC INTERGOVERNMENTAL GATHERINGS

World Conference Against Racism

The 2002 World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (WCAR) was the third global UN-sponsored conference on the topic of racism.[104] The Conference itself experienced widespread criticism because of clashes around and anti-Semitic actions that arose in connection with the Conference, and the U.S. government withdrew from the conference before it concluded its final documents.[105] What received less attention, however, was that there was a two-year process leading up to the conference, in which U.S. NGOs participated vigorously, as they did in the conference itself.[106] In terms of migrant worker rights, one important outcome of the conference was to reinvigorate the push for ratifications of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, a push that, within two years after the conference, gained enough ratifications to put the Convention into force,[107] and in the five years after the Conference, nearly doubled the number of ratifications.[108]

The WCAR also produced a final document that proved to be a historic opportunity for U.S.-based migrant worker groups to gain international support. Then-UN high commissioner for human rights Mary Robinson and secretary-general of the World Conference Mary Robinson stated that the final document, the Durban Declaration and Programme of Action, is "the best text internationally on migrants."[109] The Durban Declaration asserts that "xenophobia against non-nationals, particularly migrants, refugees and

asylum-seekers, constitutes one of the main sources of contemporary racism," and urges governments to "take concrete measures that would eliminate racism, racial discrimination, xenophobia and related intolerance in the workplace against all workers, including migrants, and ensure the full equality of all before the law, including labour law." The Durban Declaration also "urges States to give special attention, when devising and implementing legislation and policies designed to enhance the protection of workers' rights, to the serious situation of lack of protection, and in some cases exploitation, as in the case of trafficked persons and smuggled migrants, which makes them more vulnerable to ill treatment such as confinement in the case of domestic workers and also being employed in dangerous and poorly paid jobs."[110]

Fully one-third of the 10,000 advocates who attended the conference were from the United States.[111] One U.S. coalition, the Farmworker Health and Safety Institute, of which CATA is a member, described many ways that World Conference advanced its work: "Through presentations, meetings and informal discussions, we conveyed the situation of discrimination against farmworkers in the United States both educating others about this issue as well as establishing international alliances around our common concern of environmental racism. We also visited a community in Swaziland where we shared and listened to each others struggles."[112] In the words of one scholar, the ability of migrant workers and other minority groups to influence the final document of the World Conference represented "a long struggle from obscurity to recognition, facilitated by the political opportunities offered by the WCAR and its preparatory processes."[113]

The Key Role of the Mexican Government

An interesting aspect of the U.S. unauthorized immigrant worker experience with international law is the role of the Mexican government. Mexico is committed to developing international law and utilizing international institutions around the issue of immigrants' rights, although it is itself a major migrant-receiving nation. Mexico's motivation is understandable: Remittances from abroad constitute 2 percent of Mexico's gross domestic product exceeding US$25 billion in 2006,[114] giving expatriates a powerful role in domestic politics. As noted above, Mexico initiated the OC-18 Inter-American Court advisory opinion, and it has actively used the international human rights system to assist its nationals on death row in the United States.[115] In addition, Mexico is, to date, the only significant immigrant-receiving nation to ratify the Migrant Worker Convention.[116]

Opportunities to Begin Importing International Standards

Although they have been comparatively active internationally, U.S. advocates rarely utilize the new international standards and decisions in their domestic work.[117] For example, in the recent domestic case decisions rolling back unauthorized immigrant worker rights, neither side briefed international law.[118] As the migrant worker rights community gains more international exposure, however, domestic strategies have begun to shift.

Arguably, the most important domestic impact of these standards to date is the affirmation they provide both to advocates and to the workers who have taken the opportunity to cooperate with each other in international fora. For example, a forthcoming article by Rebecca Smith, coordinator of the U.S.-based National Employment Law Project Immigrant Worker Project, notes that testimony before the Inter-American Commission by African American and unauthorized immigrant workers from the Katrina-affected region helped the two movements to improve a fragile relationship and to collaborate going forward.[119]

In addition, there are real opportunities to begin using the new international standards in a more formal way. U.S. courts sometimes look to international law and the practices of other countries for guidance in interpreting U.S. law.[120] It is arguable that some of these standards, such as the Inter-American Court advisory opinion interpreting regional human rights law, and the ILO decision, are binding on the United States. Experience does show that U.S. courts are more likely to respond to these standards if other countries have adopted them into their own internal laws.[121] The U.S. Supreme Court has used foreign law as a kind of spectrum within which to place the United States, using phrases such as "the overwhelming weight of international opinion" (in the course of banning the imposition of capital punishment for criminal acts committed by juveniles).[122] The majority in *Atkins v. Virginia* discussed the "overwhelming disapprov[al]" of the "world community" when it disallowed executions of mentally retarded defendants.[123] Without information about how unauthorized immigrant workers are treated in other legal regimes, bare international standards may be less persuasive.

At the same time, however, the immigrant worker context is uniquely suited to influence by international standards: *Hoffman Plastic Compounds*, and many of the state court decisions that cited *Hoffman Plastic Compounds*, were split decisions that turned on the vote of one justice or judge.[124] Although unauthorized immigrant workers are by definition breakers of immigration law and they are certainly vilified in the press, the wide application of employment protection to workers in most categories is a bedrock principle in American jurisprudence.[125] It is arguably a serious intrusion on that principle to single out a new category of roughly 7.2 million workers for exclusion from long-standing worker protections, which is why the recent cases on unauthorized immigrants' workplace rights have almost invariably been split decisions. International law and emerging foreign government practice may have more importance for adjudicators faced with such a dilemma.

CONCLUSION

Unauthorized immigrants and their advocates in the United States face unusual political challenges that are reflected in the recent weakening of protections for this vulnerable class of workers. They have responded by supporting the growing international interest in the human rights of migrant workers. Recent treaty provisions and international case decisions offer standards that are more protective than U.S. law: Increasingly the standards

require that as a matter of equal protection, unauthorized immigrant workers must enjoy the same legal protections on the job as do their workplace counterparts. As new standards emerge, shaped by the experiences of the unauthorized in this country, the next step for advocates will be domestic implementation. The language of international human rights can be unifying and meaningful for immigrants coming from countries with a different orientation to international law and institutions. As Rebecca Smith of the National Employment Law Project writes, "[i]t is not [my] contention that use of human rights framing and human rights litigation is a silver bullet that will result in immediate changes in U.S. policy. Rather, the human rights paradigm is a means to develop a shared vision of human rights, expand the body of international law and to build leadership and unite communities of workers on the ground."[126] In addition, international standards, even those that the United States has not ratified or domestically implemented, can be the basis of persuasive authority for decision makers in the U.S. legal system. Into the future, U.S.-based workers and their advocates will continue to benefit from increased international attention to the situation of unauthorized workers.

NOTES

1. See Mariza Ibarra, "Protection of the Rights of Migrants: Opportunities and Challenges after the High Dialogue and Preparations for its Follow-up," (presentation by CATA's Board of Directors, December 18, 2006), available online at www.cata-farmworkers.org/english%20pages/Mariza%2012-18-06English.pdf with "The Protection of Migrants' Rights: Opportunities and Challenges in the Wake of the High Level Dialogue and the Preparations for its Follow Up" (presentation at An Observance of International Migrants Day: Co-sponsored by the NGO Committee on Migration and the United Nations Development Fund for Women [UNIFEM]: December 18, 2006), available online at www.ngocongo.org/index.php?what=events&id=10381.

2. Jeffrey S. Passel, Pew Hispanic Center (March 2006) *Size and Characteristics of the Unauthorized Migrant Population in the U.S. Estimates Based on the March 2005 Current Population Survey*, available online at pewhispanic.org/reports/report.php?ReportID=61 [Herein 2006 Passel Report].

3. An unauthorized immigrant worker is a foreign national whose employment violates U.S. immigration law. This chapter is not about people whose work is illegal because it violates criminal law, for example because it involves prostitution or drug smuggling. This chapter is about people who are working in legal occupations for pay, but because of the nature of their immigration status they are not permitted to work in this country.

4. See Nikos Papastergiadis, *The Turbulence of Migration: Globalization, Deterritorialization and Hybridity* (Oxford: Polity Press, 2000), pp. 41–44 (describing "skilled transients" "who frequently move between country with little restrictions").

5. See ibid., p. 43 ("the right of labour to cross boundaries has become more restricted").

6. See Nicole Gaouette, "Six Meat Plants Are Raided in Massive I.D. Theft Case; Swift & Co. Workers Are Accused of Immigration Violations and Using Stolen Social Security Numbers," *Los Angeles Times* (December 13, 2006); Dianne Solis, "ID Theft Charges Mount in Swift Immigration Raids: 53 from Texas Plant Face Counts; Union

Seeks Counsel for Detainees," *The Dallas Morning News* (Texas) (December 15, 2006).

7. Department of Labor, Office of the Inspector, *Evaluation of the North Carolina Growers Association,* Office of the Assistant Secretary for Policy, U.S. Department of Labor, Research Rep. No. 8, *Findings From the National Agricultural Workers Survey (NAWS), 1997–1998: A Demographic and Employment Profile of United States Farmworkers* (2000), available online at www.dol.gov/asp/programs/agworker/report_8pdf.

8. See Julia Preston, "Short on Labor, Farmers in U.S Shift to Mexico," *N.Y. Times* (September 5, 2007) (reporting up to 70 percent of farmworkers are illegal) available online at http://www.nytimes.com/2007/09/05/us/05export.html?_r=1&oref=slogin, and also U.S. Department of Labor, *Findings from the National Agricultural Workers Survey (NAWS) 1997–1998* (2000), available online at www.dol.gov/asp/ptrograms/agworker/report_8.pdf, and also Anthony DePalma, "A Tyrannical Situation: Farmers Caught in Conflict Over Illegal Migrant Workers," *N.Y. Times* (October 3, 2000), p. C1.

9. See Gil Klein "Growers, Workers Wonder; Facing an Uncertain Future, Some Fear for Agriculture in South," *Richmond Times Dispatch* (June 10, 2007); and also "Fruit Farmers Worry: Will Workers Show?; Immigration Laws in Flux; Labor Shortage Possible," *Grand Rapid Press* (Michigan) (April 14, 2007) (discussing farmers fears about decreasing supply of workers due to government regulation).

10. Daniel Rothenberg, " 'With These Hands'—The Life and Law of Migrant Farmworkers," (presentation at The Association of American Law Schools Annual Meeting, Washington, D.C., January 5, 2007).

11. See Jason Ackleson, Fencing in Failure:Effective Border Control is Not Achieved by Building More Fences, available online at http://www.ailf.org/ipc/policy_reports_2005_fencinginfailure.asp. See also Philip Martin and Susan Martin, Immigration and Terrorism: Policy Reform Challenges (2001), available online at http://migration.ucdavis.edu/ceme/more.php?id=21_0_5_0 (noting that stepping up border controls has raised the cost of migration but stating that "There is as yet no evidence to suggest that especially young men have been discouraged from attempting unauthorized entry.")

12. See *Immigration and Nationality Act* § 247A(a) (2006), and also *Immigration and Naturalization Service, U.S. Dep't of Justice, Handbook for Employers: Instructions for Completing Form I-9 13* (1991) (on file with the author), 8 U.S.C. § 1324a9(b)(1)(A) (2000), and also M. Isabel Medina, "Wal-Mart and Immigrant Workers and the U.S. Government – A Case of Split Personality?," *Conn. L. Rev. 39* (May 2007): 1443, 1446-47.

13. *See* Megan L. Capasso, "An Attempt at a 12 Step Program: President Bush's Comprehensive Strategy to Rehabilitate California and Mexico's Addiction to Illegal Immigration: Does It Strike the Correct Societal Balance?" *W. St. U. L. Rev.* 34 (2006): 87, 107.

14. International Labour Organization Report, *Migrant Workers, Labour Education 2002/4 No. 129*, p. 9, available online at www.ilo.org/public/english/dialogue/actrav/publ/129/129.pdf.

15. 2006 Passel Report, supra note 2, pp. ii.

16. See U.S. Bureau of Labor Statistics, U.S. Department of Labor, Number and Rate of Fatal Occupational Injuries, by Industry Sector, 2006, available online at http://www.bls.gov/iif/oshwc/cfoi/cfch0005.pdf.

17. Katherine Loh and Scott Richardson, Foreign-Born Workers: Trends in Fatal Occupational Injuries, 1996-2001 *Monthly Labor Review* (June 2004): 42, 45, Table 2. (citing U.S. Bureau of the Census, March 2000, the Bureau of Labor Statistics).

18. Alexandra Villareal O'Rourke, "Embracing Reality: The Guestworker Program Revisited," *Harv. Latino L. Rev.* 9 (2006): 179,182 (citing Congressional investigations).

19. See Beth Lyon, "When More 'Security' Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers," *U. Pa. J. Lab.& Emp. L.* 6 (2004): 571, 593.

20. One example is a recent Immigration and Enforcement Commission operation which resulted in the arrests of 361 workers in a Michael Bianco leather-working factory in New Bedford, Massachusetts. The workers arrested represented more than 70 percent of the factory's workforce. Shane Harris, "Immigration Enforcement Raid Sparks Outcry," *National Journal* (April 2007), available online at www.govexec.com/dailyfed/0407/041307nj1.htm. Another example is an operation involving Swift & Co. slaughterhouses that spanned six states. In those raids, 1,297 workers were arrested as of March 20, 2007. Yvonne Abraham, "As Immigration Raids Rise, Human Toll Decried," *The Boston Globe* (March 20, 2007). Available online at www.boston.com/news/nation/articles/2007/03/20/as_immigration_raids_rise_human_toll_decried/?page=1.

21. See Klein "Growers, Workers Wonder," and "Fruit Farmers Worry," supra note 9.

22. See The U.S. Equal Employment Opportunity Commission, *EEOC Issues Guidance on Remedies for Undocumented Workers Under Laws Prohibiting Employment Discrimination* (October 26, 1999), available online at www.eeoc.gov/press/10-26-99.html (quoting then-EEOC chairwoman Ida Castro's statement that "Unauthorized workers are especially vulnerable to abuse and exploitation") [Herein *EEOC Guidance on Remedies*].

23. See generally *Domestic Worker's Rights in the United States: A report prepared for the U.N. Human Rights Committee in response to the Second and Third Periodic Report of the United States*, available online at www.ohchr.org/english/bodies/hrc/docs/ngos/Domestic%20Workers%20report-%20FINAL.pdf.

24. Sarah Cleveland, Beth Lyon, Rebecca Smith, "Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status," *Seattle J. Soc. Just.* 1 (Spring/Summer 2003): 795, 810-811 [Herein Amicus Brief: The U.S. Violates Int'l Law].

25. See Mexican American Legal Defense and Education Fund, *Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since Hoffman Plastic Compounds v. NLRB,* available online at www.maldef.org/publications/pdf/Hoffman_11403.pdf (documenting numerous stories of discrimination).

26. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 151 (2002).

27. See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 154 (2002) (dissenting opinion).

28. See Ibid., pp. 151–152.

29. See *EEOC Guidance on Remedies*, supra note 22.

30. See, e.g., Wyo. Stat. Ann. § 27-14-102(a)(vii) (2003); *Foodmaker, Inc. v. Workers' Comp. Appeals Bd.*, 78 Cal. Rptr. 2d 767 (Cal. Ct. App. 1999); *Tarango v. State Indus. Ins. Sys.*, 25 P.3d 175, 179 (Nev. 2001); *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 810 A.2d 99, 108 (Pa. 2002); *Sanchez v. Eagle Alloy*, 658 N.W.2d 510 (Mich. Ct. App. 2003); *Joseph W. Little et al., Worker's Compensation: Cases and Materials 97* (4th ed. 1999); Thomas R. Lee and Dennis V. Lloyd, "Review of worker's compensation coverage of illegal workers," (July 19, 2007) available online at www.workingimmigrants.com/2007/07/review_of_workers_compensation.html.

31. See Francine J. Lipman, "The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation," *Harv. Latino L. Rev* 9 (2005): 1, 24–25.

32. See 45 C.F.R. §§ 1626.1 (2003) (stating "[t]his part is designed to ensure that recipients provide legal assistance only to citizens of the United States and eligible aliens.").

33. See Cathleen Caron, "Portable Justice, Global Workers, and the United States," *Clearinghouse Review of Poverty Law and Policy* (January–February 2007): 549, 553–554.

34. See National Employment Law Project, *More Harm than Good: Responding to States' Misguided Efforts to Regulate Migration* 4 (2007), available online at www.nelp.org/docUploads/More%20Harm%20than%20Good%20final%20020807%2Epdf (regarding drivers' licenses); National Immigration Law Center, *Overview of States' Driver's License Requirements*, available online at www.nilc.org/immspbs/DLs/state_dl_rqrmts_ovrvw_2007-01-31.pdf; National Immigration Law Center, *The Tennessee "Driving Certificate": Not a Model Policy* 1-2 (2005), available online at www.nilc.org/immspbs/DLs/TPs_TN_driving_certif_0305.pdf; David Marzahl et al., "Letter from Consumer Advocates, Civil Rights Organizations, Free Tax Preparation Programs, and Immigrant Rights Advocates to Administration Officials" (Oct. 2003), available online at waysandmeans.house.gov/hearings.asp?formmode=view&id=4739 (noting the effect on access to banking of proposals to increase information-sharing between the IRS and immigration authorities); Calvin E. Bellamy, *Perspectives on Immigration: Serving the Under-Served: Banking for Undocumented Immigrants* (2007), available online at www.ailf.org/ipc/2007_march_perspective.shtml (describing obstacles to providing banking services to the undocumented).

35. See generally Beth Lyon, "Tipping the Balance," *U. Pa. J. Int'l. L.* 1(forthcoming 2007).

36. See Carl Hulse, "Kennedy Plea Was Last Gasp for Immigration Bill," *New York Times* (June 9, 2007).

37. O'Rourke, pp. 190–194 (analyzing proposed plans for immigration statute), supra note 18.

38. See generally Connie de la Vega and Conchita Lozano, "Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers' Rights in the United States," *Hastings Race & Poverty L.J.* 3 (Fall 2005): 35.

39. See Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975) (ILO No. 143), 1120 UNTS 323 (in force 9 December 1978).

40. See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, U.N. Doc. A/RES/45/158 (1990), at Preamble [Hereinafter UN Migrant Worker Convention].

41. Press Release, Embassy of Mexico, "The Embassy of Mexico is Concerned About the Consequences of a U.S. Supreme Court Ruling, Washington, D.C." (April 1, 2002) (on file with author).

42. *Hoffman,* 535 U.S., p. 140.

43. Advisory Opinion OC-18/03, Legal Status and Rights of Undocumented Migrants, Inter-AmCtHR, para. 6, 8, 157 (September 17, 2003) [Hereinafter OC-18].

44. *Case No. 2227 (United States): Report in which the Committee Requests to Be Kept Informed of Developments*, Complaints Against the Government of the United States presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), in *332nd Report of the Committee on Freedom of Association* , GB.288/7 (Part II),

288th Session (November 2003) 142, available online at www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/gb-7.pdf [Herein *ILO Decision on Hoffman Plastic*]. See also *Case No. 2227(United States),* in *335th Report of the Committee on Freedom of Association,* GB.291/7, 291st Session (November 2004) 18, at www.ilo.org/public/english/standards/relm/gb/docs/gb291/pdf/gb-7.pdf (expressing regret at the United States's failure to report on its implementation of the 2003 ruling).

45. *ILO Decision on Hoffman Plastic* at para. 610. In a similar ruling against Spain in 2002, the Committee stated that "[t]he only permissible exception to Convention No. 87 [Freedom of Association and Protection of the Right to Organise Convention] is that set out in Article 9 concerning the armed forces and the police. Thus, in the Committee's opinion, Convention No. 87 covers all workers, with only this exception." *Case No. 2121 (Spain): Definitive Report,* Complaint against the Government of Spain presented by General Union of Workers of Spain (UGT), in *327th Report of the Committee on Freedom of Association,* International Labour Office Governing Body, GB .283/8, 283rd Session (March 2002) 164 [Herein *ILO Decsion on Spanish Labor Exclusions*], at para. 561.

46. *ILO Decision on Hoffman Plastic,* supra note 44, at para. 612.

47. ILO 143, art. 9.

48. UN Migrant Worker Convention, supra note 44, arts. 25–26.

49. See OC-18, supra note 43, at para. 157; see also UN Migrant Worker Convention, at art. 11 and 25; Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, adopted by the International Labor Organization June 24, 1975, C143, art. 9.

50. See OC-18, supra note 43, at para. 157; UN Migrant Worker Convention, supra note 40, at art. 26; *ILO Decsion on Spanish Labor Exclusions*, supra note 45, *ILO Decision on Hoffman Plastic,* supra note 43.

51. OC-18, supra note 43, at para. 157; UN Migrant Worker Convention, supra note 40, at art. 27(1) and (2); ILO 143 at art. 9.

52. See OC-18, supra note 43, at para. 157; UN Migrant Worker Convention, supra note 40, at art. 25(1)(a); ILO 143, supra note 39, at art. 9.

53. UN Migrant Worker Convention, supra note 40, at art 25(1)(a); OC-18, supra note 43, at para. 157; ILO 143, supra note 39, at art. 9.

54. See, e.g., P.L. 109–149, 119 Stat. 2833, 2839–2840 (stating that "none of the funds appropriated under this paragraph shall be . . . expended to . . . enforce any standard . . . which is applicable to any person who is engaged in a farming operation which does not maintain a temporary labor camp and employs 10 or fewer employees"); see also Human Rights Watch, Fingers to the Bone 231 (2000), available online at www.hrw.org/reports/2000/frmwrkr/frmwrk006-05.htm#P915_169645.

55. See OC-18, supra note 43, at para. 104, 9, 10.

56. UN Migrant Worker Convention, supra note 40, art. 25(3).

57. Lyon, "Tipping the Balance," supra note 35.

58. See, e.g., April Rieger, "Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States," *Harv. J. L. & Gender* 231, passim (2007). There is an annual limit of 5,000 T-visas created by the Victims of Trafficking and Violence Protection Act. Additionally, they are only available to victims of severe trafficking, who must meet a number of other requirements, including participation in the prosecution of their victimizers. There are also 10,000 U-visas a year available to victims of crime or those who have information about a crime. However, in order to qualify, the government must determine that the immigrant is needed for a criminal investigation. See 22 U.S.C. 7101; National Immigration Law Center, "Congress Creates New "T" and "U" Visas For Victims of Exploitation," *Immigrants' Rights Update*, 14(6) (October 19, 2000), available online at

www.nilc.org/immlawpolicy/obtainlpr/oblpr039.htm; Sasha L. Nel, Victims of Human Trafficking: Are They Adequately Protected in the United States?, 5 JICL 3, 23–28.

59. General Accounting Office, *Worker Protection: Labor's Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance* 3,13 (2002) [Hereinafter GAO Report].

60. Information Provided by General Accounting Office Official to Kristin Waller, author's Research Assistant (June 15, 2007) (on file with author).

61. See Lyon, "U.S. Laws That Disadvantage Unauthorized Workers," supra note 19, at 605.

62. December 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976). United Nations High Commissioner for Human Rights, United Nations Treaty Collection, Declarations and Reservations, available online at 193.194.138.190/html/menu3/b/treaty5_asp.htm.

63. Office of the High Commissioner for Human Rights, Adopted for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance w/with article 27, available online at www.unhchr.chhtml/menu3/b/a_cescr.htm.

64. Matthew C.R. Craven, "The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development 7" (1998).

65. ICESCR, art. 2(1).

66. Craven, supra note 64, pp. 150–152.

67. See Laura J. Cooper and Catherine L. Fisk (ed.), "The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants," in *Labor Law Stories* (New York, NY: Foundation Press, 2005), p. 388.

68. Email from Cathleen Caron to Beth Lyon dated June 7, 2007 (on file with author).

69. The Pew Hispanic Center Reports that 78 percent of the undocumented population is of Latin American origin, 13 percent is from Asia, 3 percent is from Africa and "other," and only 3 percent is of European or Canadian origin. See 2006 Passel Report, supra 2, p. 5.

70. See, e.g., Antony Anghie, "Time Present and Time Past: Globalization, International Financial Institutions, and the Third World," *N.Y.U. J. Int'l L. & Pol.* 32, passim (2000): 243 (discussing the effect of international financial institutions on domestic political arrangements); Thomas Buergenthal, "The Evolving International Human Rights System," *Am. J. Int'l L.* 100(2006): 783, 796 (discussing the impact of an Inter-American Commission report on Argentinian politics); Namita Wahi, "Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability," *U.C. Davis J. Int'l L. Pol'y* (2006): 331, 334 (discussing the impact of the IMF and World Bank on the domestic situation in developing countries).

71. See Rebecca Smith, "Human Rights at Home: Human Rights As an Organizing and Legal Tool in Low-Wage Worker Communities," *Stanford Journal of Civil Rights and Civil Liberties* 3 (forthcoming 2007).

72. See Mary Ann Glendon, "The Sources of 'Rights Talk': Some are Catholic, Commonweal (October 12, 2001); see also Mary Ann Glendon, "The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea," *Harv. Hum. Rts. J.* 16 (2003): 27, 36.

73. Telephone Interview with Richard Mandelbaum, CATA staffmember (June 11, 2007).

74. See CATA, "Work at the UN," available online at www.cata-farmworkers.org/english%20pages/unitednations.htm. CATA has also worked with UN mechanisms dealing with indigenous rights on issues that affect its membership. Ibid.

75. See Ibarra presentation, supra note 1.

76. Mandelbaum Interview, supra note 73.

77. Walter Galenson, *The International Labor Organization: An American View* (Madison: University of Wisconsin Press 1981), p. 3, 4, 8, 11.

78. See International Labour Organization, "President Clinton Addresses International Labour Conference: Press Release" (June 16, 1999), available online at www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_007941.

79. See Convention No. C182 was ratified by 163 countries, available online at www.ilo.org/ilolex/cgi-lex/ratifce.pl?C182.

80. See International Labour Office, Report VI (2): **Child labour**: Sixth item on the agenda, available online at http://www.ilo.org/public/english/standards/relm/ilc/ilc86/rep-vi.htm#SUMMARY%20OF%20REPLIES%20RECEIVED%20AND%20COMMENTARIES (noting participation by the U.S. government and U.S. civil society).

81. See Child Labor Coalition, "Groups Promote Meaningful Action in U.S. Against Worst Forms of Child Labor," available online at www.stopchildlabor.org/USchildlabor/groupspromote.htm.

82. See C.97 Migration for Employment Convention (Revised), 1949, R.86 Migration for Employment Recommendation (Revised), 1949, C.143 Migrant Workers (Supplementary Provisions) Convention, 1975, R.151, Migrant Workers Recommendation, 1975, C.118 Equality of Treatment (Social Security) Convention, 1962, C.157 Maintenance of Social Security Rights Convention, 1982, and also R.167 Maintenance of Social Security Rights Recommendation, 1983 (collectively, these instruments provide rights to: information about living and working conditions, regulated recruitment, employment contracts, assistance in relocation, medical attention, payment for traveling, workers' rights such as minimum wage, collective bargaining, etc., job security, promotion, health and safety standards, access to courts, job training, freedom of movement, transfer of funds to home countries, family reunification, social services, and the right to return home). See also International Labour Organization, South-East Asia Advisory Team, ILO Asia-Pacific Regional Symposium for Trade Union Organizations on Migrant Workers Protection, International Norms and ILO Migrant Workers Standards by W.R. Bohning director South-East Asia and the Pacific Multidisciplinary Advisory Team, December 6–8, 1999 Petaling Jaya, Kuala Lumpur, Malaysia, available online at www.ilo.org/public/english/region/asro/mdtmanila/speeches/mistanda.htm.

83. C.97 (rights to remuneration, social security, employment taxes, dues or contributions, and legal proceedings regarding these matters); C.143 and R.151 (assuring that basic human rights are not denied on the basis of undocumented status).

84. *ILO Decision on Hoffman Plastic*, supra note 44.

85. Case No. 2227 (United States), supra note 44.

86. E-mail from Ana Avendaño to Beth Lyon dated June 15, 2007 (on file with author).

87. These treaties are the International Covenant on Civil and Political Rights, ratified by the United States in June 1992, and the International Convention on the Elimination of all Forms of Racism. See www.cirp.org/library/ethics/UN-covenant/ and Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1), available online at www.ohchr.org/english/law/cedaw.htm.

88. See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families New York, December 18, 1990, available at

www.ohchr.org/english/countries/ratification/13.htm (listing thirty-seven countries that have ratified the Convention).

89. See, e.g., United Nations Human Rights Committee Eighty-Seventh Session, Report on the United States' Compliance with the International Covenant on Civil and Political Rights paras. 66–86 (May 2006), section on migrant worker rights available online at www.ushrnetwork.org/pubs/13_%20Violations%20of%20the%20Rights%20of%20Aliens.pdf; Committee on the Protection of the Rights of all Migrant Workers and Members of their Families Third Session, Summary Record of the 25th Meeting, CMW/C/SR.25 (December 22, 2005) (chronicling statements by Sarah Paoletti of American University Washington College of Law and Cathleen Caron of the Global Workers Justice Alliance to the Committee).

90. See Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United States of America, para. 29 CCPR/C/USA/CO/3/Rev.1 (December 18, 2006) (expressing "regret" "that it has not received sufficient information on the measures the State party considers adopting in relation to the reportedly nine million undocumented migrants now in the United States," "concern" "about the increased level of militarization on the southwest border with Mexico," recommending that the United States government "provide the Committee with more detailed information on these issues, in particular on the concrete measures adopted to ensure that only agents who have received adequate training on immigration issues enforce immigration laws, which should be compatible with the rights guaranteed by the [Civil and Political Rights] Covenant.")

91. E-mail from Eric Tars, Human Rights Staff Attorney, National Law Center on Homelessness & Poverty (June 11, 2007) (on file with author).

92. E-mail from Cathleen Caron, Executive Director of Global Workers Justice Alliance, June 11, 2007 (on file with author).

93. "Global Workers Require Global Justice: The Portability of Justice Challenges for Migrants in the USA" (October 30, 2005), available at www.ohchr.org/english/bodies/cmw/docs/global.pdf.

94. See Contribution by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families to the High-Level Dialogue on Migration and Development of the General Assembly, in Protecting the Rights of All Migrant Workers As a Tool to Enhance Development: Note by the Secretary-General, Sixty-First Session, Item 54 (b) of the preliminary list, Globalization and Interdependence: International Migration and Development, at para. 16 and 17 (July 3, 2006).

95. American Civil Liberties Union, United Nations Special Rapporteur on the Human Rights of Migrants Visits U.S., available online at www.aclu.org/immigrants/gen/humanrightsofmigrants.html.

96. Casey Woods, "*U.N. Expert: Fla. Migrants' Tales 'Worse Than Expected*,'" available at MiamiHerald.com (May 10, 2007) (accessed June 10, 2007).

97. American Civil Liberties Union, "FAQs: United Nations Special Rapporteurs," available online at www.aclu.org/immigrants/gen/29537res20070429.html (accessed June 10, 2007).

98. Casey supra note 96.

99. See Beth Lyon, "The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18," *N.Y.U. Rev. L. & Soc. Change* 28 (2004): 547, 552 (hereinafter Lyon, Comment on OC-18).

100. See ibid., pp. 569–570. Of the eleven universities that intervened in the case as amicus curiae, seven were U.S. schools. Ibid., p. 569. Of the roughly fifty-seven nongovernmental organizations that intervened in the case, approximately fifty-four

of them were U.S.-based. Ibid., pp. 569–570. One of the two private law firms that intervened was a U.S. firm. Ibid., p. 569.

101. Ibid., pp. 585–586; but see Memorial Amicus Curiae of the Center for International Human Rights of Northwestern University School of Law, Request for Advisory Opinion OC-18, Submitted by the Government of the United Mexican States, at 13, 39–40 (2003) (arguing that the state of evolution of international law in 2002 did not support the expansion of nondiscrimination protection to encompass the rights of unauthorized workers).

102. See *Petition Alleging Violations of the Human Rights of Undocumented Workers by the United States of America* (2006), available online at www.nelp.org/docUploads/FinalPetition%2Epdf; *Employment Rights are Human Rights Stories of Undocumented Workers: The Denial of Employment Rights due to Immigration Status*, available online at www.nelp.org/docUploads/workersrights1205%2Epdf.

103. See Smith, (note 71); *Annual Report of the IACHR 2006*, "Chapter II, Legal Bases and Activities of the IACHR During 2006," para 19, available online at www.cidh.org/annualrep/2006eng/Chap.2.htm#124th.

104. See World Conference Against Racism: Basic Information: Equality, Justice, Dignity, The World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, available online at www.un.org/WCAR/e-kit/backgrounder1.htm.

105. See, e.g., Tom Lantos, "The Durban Debacle: An Insider's View of the UN World Conference Against Racism," *Fletcher Forum* 26 (2002): 31–48; Gay McDougall, "The World Conference against Racism: Through a Wider Lens," *Fletcher Forum* 26 (2002): 135–136.

106. See McDougall, ibid. pp. 136–137.

107. International Convention of Migrant Workers (Art. 2, para. 1), adopted by General Assembly resolution 45/158 of I 8 December 1990, available online at www.ohchr.org/english/law/cmw.htm.

108. Office of the United Nations High Commissioner for Human Rights, Chart of Signatories and Parties and Dates of Actions Regarding International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, available online at www.ohchr.org/english/countries/ratification/13.htm.

109. Kareem Faheem, "The Education of Mary Robinson: A Conversation With the UN's High Commissioner for Human Rights," *The Village Voice* April 24-30, 2002).

110. World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Declaration and Programme of Action The World Conference Secretariat published on January 3, 2002 (A/CONF.189/12), para. 16 and 105, p. 29.

111. John A. Powell, "Post-Durban Implications for the US Civil Rights Agenda," *Poverty & Race* (January/February 2002).

112. *The Farmworker Health and Safety Institute: A Decade of Accomplishments*, available online at workers.org/english%20pages/FHSIAccomplishments.pdf.

113. Corinne Lennox, "Transnational Mobilisation of Minority Groups: Using International Human Rights to Achieve National Multiculturalism," (paper presented at Workshop on Multiculturalism and Moral Conflict, Durham University, England, 21–23 March 2007) (on file with author).

114. Roberto Coronado, "Workers' Remittances to Mexico: Bus. Frontier (Issue 1, 2004)," available online at www.dallasfed.org/research/busfront/bus0401.pdf; *CIA World Factbook, Mexico*, available online at www.cia.gov/cia/publications/factbook/geos/mx.html.

115. See Inter-American Court of Human Rights, Advisory Opinion OC-16/99, of October 1, 1999, requested by the United Mexican States, "The Right to

Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law," available online at www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004,* p 12, available online at www.icj-cij.org/docket/files/128/8188.pdf#view=FitH&pagemode=none&search=%22avena%22.

116. See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families New York, 18 December 1990, available online at http://www.ohchr.org/english/countries/ratification/13.htm (listing thirty-seven countries that have ratified the Convention); see also Beth Lyon, "New International Human Rights Standards on Unauthorized Immigrant Worker Rights: Seizing an Opportunity to Pull Governments Out of the Shadows," in Anne F. Bayefsky (ed.), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton* (Martinus Nijhoff, 2005).

117. De la Vega, supra note 38, pp. 72–73.

118. Lyon, "Tipping the Balance," supra note 35.

119. Smith, supra note 71.

120. See, e.g., *Roper v. Simmons,* 543 U.S. 551, 578 (2005); *Lawrence v. Texas,* 539 U.S. 558, 576–577 (2003) (characterizing *Bowers v. Hardwick,* 478 U.S. 186, 193–195 (1986) as having "relied on values shared with a wider civilization"). Justice O'Connor concurred in the opinion in *Lawrence* but did not incorporate international or foreign law into her analysis. See ibid., p. 579; *Atkins v. Virginia,* 536 U.S. 304, 316, n. 21 (2002) (referring to the "overwhelming[] disapprov[al]" of the "world community"); see also Harold Hongju Koh, *The United States Constitution and International Law: International Law as Part of Our Law, Am. J. Int'l L.* 98 (2004): 43.

121. Smith, supra note 71; Lyon, "Tipping the Balance," supra note 35.

122. *Roper v. Simmons,* 543 U.S. 551, 578 (2005).

123. See *Atkins v. Virginia,* 536 U.S. 304, 316, n. 21 (2002).

124. *Reinforced Earth,* 570 Pa. 464; *Sanchez,* 254 Mich. App. 651; *Medellín v Cashman KPA, et al.,* Board No. 03324300, Massachusetts Dept. of Industrial Accidents, Reviewing Board Decision (December 23, 2003).

125. *Hoffman*, 535 U.S, at 160 (dissenting opinion).

126. See Smith supra note 71.

CHAPTER 3

Securing Human Rights of American Indians and Other Indigenous Peoples Under International Law

Steven M. Tullberg

In recent decades, indigenous peoples of the United States—American Indians, Native Hawaiians, and Alaska Natives—have intensified their long-standing efforts to secure their human rights under both national and international law.[1] They have primarily used the United States justice system to challenge United States law that perpetuates racially discriminatory doctrines and has served to create and justify the widespread insecurity, social problems, and poverty that are present in Indian country today. Frustrated by the lack of progress in their law reform efforts at home, America's indigenous peoples have increasingly directed their attention to the international level where they are developing a new, nondiscriminatory international law of indigenous rights.

Their immediate goal is very familiar to human rights advocates: to encourage, shame, and pressure the United States and other governments into conforming their national laws to the highest standards of international human rights law. The ultimate goal is a secure, peaceful, and prosperous future for the indigenous peoples of the United States and for all of the other indigenous peoples of the world. To develop and strengthen international law and to enhance their ability to enforce it, the indigenous peoples of the United States have built alliances with other indigenous peoples, human rights groups and other nongovernmental organizations, friendly governments, and international institutions.

This chapter will discuss why and how American Indians and other indigenous peoples took up the challenge of international human rights work and will also report on early results. Indigenous peoples throughout the world seek the restoration of many of the rights and freedoms that they enjoyed as

independent nations and tribes before the era of domination by Europeans and other foreign powers. The vast majority is demanding self-determination and autonomous self-government in their indigenous territories within legal and political frameworks of the states where they now live. A very small number of indigenous peoples may decide to pursue complete independence and statehood within the modern international system, but they face very restrictive international legal standards that favor the territorial integrity of existing states. The march for indigenous rights in the United States and elsewhere is under the banner of self-determination.

There is much legal, historical, and political literature on all of these matters, and there is a very long paper trail in the files of the many international organizations that have been working on indigenous human rights issues over the past several decades.[2] This brief chapter cites only a few of the voluminous published works, court decisions, and laws. It is a very selective introduction and overview.

THE RECENT TURN TO INTERNATIONAL ADVOCACY OF INDIGENOUS RIGHTS

When American Indian leaders and other indigenous rights activists began making their plans for a new international human rights effort in the mid-1970s, it was uncertain how the international human rights community would respond to their demand for both collective and individual rights. Although the global indigenous population of some 370 million has been mired for centuries in poverty and subjected routinely to grave human rights abuses, indigenous peoples had little significance for the modern human rights movement in its early years. An international law scholar notes that the 1948 Universal Declaration of Human Rights "utterly failed to encompass the circumstances and worldviews of indigenous peoples . . . To put it bluntly, the plight of indigenous and minority peoples was virtually invisible as an international issue when the United Nations was founded, and remained so for twenty-five years thereafter."[3] Most human rights groups also were slow in addressing the issue of indigenous rights.

Notwithstanding this neglect, there were some human rights advances for indigenous peoples in the early decades of the modern human rights movement. One early advance in international human rights law is the important principle that persons belonging to racial minorities, including indigenous persons, are entitled as individuals to due process of law and equal protection against racial discrimination. The development of the international law against genocide is another achievement that was especially welcomed, for obvious reasons, by American Indians and other indigenous peoples.

Yet American Indians and other indigenous peoples remained very troubled by the fact that their collective rights were generally ignored and that they were being treated simply as members of minority populations with only individual rights. "We are not a minority within our own nations, within our own land," said Chief Oren Lyons of the Onondaga Nation when he addressed Indian rights attorneys participating in a 1979 Washington, D.C., conference on

U.S. Indian law. "When you talk about client relationships, you're talking about the future of nations. It's a great responsibility."[4]

By the early 1970s, the human rights community had begun linking the violation of collective rights of indigenous peoples to the violation of their individual rights. Pioneering human rights reports by the Inter-American Commission on Human Rights, for example, documented that the expropriation of indigenous lands and resources in Central and South America led to summary killings and disappearances of many indigenous people, and that surviving indigenous communities were subjected to dislocation, dissolution, and extreme poverty. Some human rights experts began to urge the creation of new international laws and policies to guarantee the cultures and collective land rights of indigenous peoples and thereby guard also against the violation of their individual rights.

There were other experts, however, who questioned whether the rights of indigenous peoples fit within the human rights framework that strongly emphasized individual rights. Some suggested that indigenous rights issues might be handled more appropriately by the UN bodies responsible for decolonization. Indigenous representatives have frequently acknowledged that the struggle for indigenous rights is part of the unfinished business of decolonization. Like other colonized peoples, indigenous peoples have suffered under the dominion of settler populations who denied them self-government, suppressed their cultures, languages, and religions, expropriated their lands and resources, and impoverished them. Indigenous peoples often state that they, like others subjected to colonial-style rule, are primarily concerned about securing their collective rights, especially their right of self-determination. They would not agree, however, that indigenous collective rights are divorced from other human rights or conflict with individual rights.

The American Indian representatives who in the 1970s initiated the modern-era international advocacy decided that there would be more opportunity in the dynamic arena of international human rights law, notwithstanding its past failure to give due respect to their collective rights. That decision would require the reform of international law, so that it fairly upholds all indigenous rights. They decided not to pursue indigenous rights through the United Nation's decolonization process and trusteeship system because they had largely run their course at the time, as most of the colonized peoples of Africa and the Caribbean had secured their right of self-determination, and the European colonial empires had largely been disestablished by the end of the 1960s. For indigenous peoples, the substance and institutions of international human rights seemed to be the most vibrant and hopeful.

The decision to build indigenous rights within the human rights framework proved to be wise. The international human rights community soon became very involved in indigenous rights work. There was a rapid increase in indigenous legal studies and in reports on human rights abuses suffered by indigenous peoples. By the 1990s, annual UN working group meetings on a new indigenous rights declaration attracted 700 or more participants from governments, indigenous peoples, nongovernmental organizations, and academics, making it one of the largest and most well-attended UN human rights forums. Following suit, the Organization of American States, the World Bank,

the Inter-American Bank, and other multilateral institutions initiated their own indigenous rights standard-setting processes. Representatives of indigenous peoples used those opportunities to educate the international community about their histories and current problems and to promote their human rights agenda. They challenged polarizing Cold War habits and sloganeering that pitted the West's focus on individual rights against the Eastern Bloc's claim that group rights were all that really mattered. They steadily advanced the position that the human rights of indigenous peoples will be secured only when both their collective and individual rights are guaranteed.

Today, over 500 years after Columbus and after several decades of sustained international advocacy, the rights of American Indians and other indigenous peoples are comfortably within the mainstream of international human rights. Intergovernmental organizations and international human rights bodies have been drafting new indigenous rights standards and adjudicating indigenous legal claims. Indigenous representatives have played a major role in the drafting of the UN Declaration on the Rights of Indigenous Peoples that was approved by the UN Human Rights Council in 2006 and approved by the General Assembly in 2007. An Inter-American declaration on indigenous rights is also being prepared through the joint efforts of indigenous peoples and states at the Organization of American States. Many public and private organizations promoting economic development and environmental protection have adopted their own indigenous rights standards and policies. Indigenous representatives and representatives of UN member states participate together in the leadership of the new UN Permanent Forum on Indigenous Issues, which first assembled in 2002 and meets annually to consider a broad range of political, social, economic, and cultural issues, including human rights. This new international body was created in the context of UN resolutions highlighting the need to respect indigenous rights and proclaiming the first international decade for the world's indigenous peoples.

So after long being ignored, indigenous representatives now sit regularly with governmental and nongovernmental representatives at international tables where indigenous rights and interests are at stake. This human rights progress has begun to pressure state governments, international institutions, and nongovernmental organizations to respect indigenous rights and interests in national and international decisions about development, trade, environmental protection, education, health, public services, and other matters that have an impact on indigenous peoples and their territories.

AN UNCERTAIN FUTURE FOR U.S. INDIAN LAW AS THE UNITED STATES CONTINUES TO OPPOSE IMPORTANT INDIGENOUS RIGHTS ADVANCES

As in all other human rights work, indigenous peoples want the benefit of just and universal standards guaranteed by national and international law. They want the protection of existing human rights law and the reform of all international and national laws that still condone discrimination against indigenous peoples. And they want nondiscriminatory international indigenous

rights standards incorporated into national laws and thereby applied routinely by national legal systems. Because the United States and most other countries that have indigenous peoples within their borders have similar discriminatory laws, indigenous peoples worldwide subscribe to the same basic law reform agenda.

The United States and many other countries are still resisting key elements of that indigenous rights agenda, particularly the rights of indigenous peoples to self-determination and to ownership of their lands and resources. But other countries, international institutions and nongovernmental organizations have been much more receptive to indigenous claims and proposals. Their growing support was shown, for example, in the historic 2006 vote of the UN Human Rights Council approving a new UN indigenous rights declaration, a vote that was overwhelmingly endorsed by indigenous peoples and also supported by Amnesty International and other human rights groups. When the declaration was considered by the UN General Assembly, the United States opposed it. Here, as in other areas of human rights, the United States is increasingly seen as an obstacle to progress.

American Indians have not backed down in the face of that opposition. They seem resolved to carry on their international human rights efforts with the same tenacity that they have shown in centuries-long struggles to secure their rights in other settings and contexts. Before discussing in more depth how American Indians and other indigenous peoples are pursuing their international indigenous rights agenda, it is important to ask why. The answer to that question begins with a closer look at the history of Indian treaty-making and of the long and persistent discrimination against Indians under U.S. law.

THE LONG HISTORY OF INDIGENOUS INTERNATIONAL AFFAIRS

American Indian relations with the United States are historically rooted in international affairs and international law. The young government of the United States recognized that Indian nations and tribes had their own governments. That is evidenced by the many Indian treaties that the United States adopted as part of its constitutional "supreme law." The country's early dealings with Indians, in war and in peace, were largely considered foreign affairs. Indians had not been invited to subscribe to the Constitution or to become United States citizens, and all but a small fraction of them lived in their own territories where they were citizens of their own Indian nations. As the United States increased its military power in the early nineteenth century, its Indian policy steadily shifted from treaties based on mutual agreement to one-sided plenary power over Indians and Indian property. To justify that result, the U.S. Supreme Court relied upon the international law of discovery that authorized colonial dominion over indigenous peoples. After initially benefiting from the respectful international law of treaty-making nations, Indians soon found themselves being subjected as 'dependent savages' to the discriminatory international law of discovery that was developed in the era of European slave-trading, empire-building, and colonialism.

The long history of the international affairs of American Indians has profoundly impacted the modern-era effort to secure indigenous rights. For most Americans, the discussion of human rights generally concentrates on the relatively short historical period of the past two centuries, from the Declaration of Independence and the Bill of Rights to the 1948 Universal Declaration of Human Rights to the present. For American Indians, the discussion of the history of their rights usually begins at much earlier time, at the arrival of Columbus or at the time of other initial encounters with Europeans. Some of those early encounters notoriously involved horrible conflict and bloodshed. But many Indian nations and tribes celebrate the treaties that were made in their early relations with Europeans.

A beautiful beaded belt called the Two-Row Wampum Treaty Belt created by the Haudenosaunee (Six Nations Iroquois Confederacy) to commemorate a treaty made with Dutch traders in the early seventeenth century illustrates the historical perspective and modern aspirations that many indigenous people bring to international human rights work. The name "two-row" is explained by the two dark purple bands that run parallel on a white background along its four-foot length.

Every year the Two-Row Wampum Treaty Belt is displayed and its history and meaning are recounted as it is held and 'read' by Mohawk, Oneida, Cayuga, Seneca, Tuscarora, and Onondaga leaders in various meetings and ceremonies at the traditional longhouses of the Haudenosaunee nations in upstate New York and Canada. The white background is said to be the river of life. It signifies purity, good minds, and peace. One of the purple bands is a channel of water with the canoe of the Haudenosaunee carrying their customs, beliefs, and laws. The boat that travels in the other purple band carries the customs, beliefs, and laws of the Europeans. The Indians and the people who came from Europe must always travel side-by-side as equals. They must not try to steer each others' vessels as they move forward together in the stream of life. Their pathways will remain parallel forever, and the treaty will be renewed.

That early Indian treaty reminds us that American Indians have long insisted on maintaining their status as distinct and self-governing nations. Europeans presented a powerful new challenge, but the objective of establishing harmonious relations through negotiations and agreement was not new to indigenous nations. Before the arrival of Europeans, the indigenous nations had carried on their own diplomatic relations to settle disputes among themselves about boundaries, resources, trade, and war. Soon after the arrival of Europeans, Indian treaty-making developed a unique American style, incorporating Indian and European traditions, both wampum and signed legal instruments. The principles confirmed in the Two-Row Wampum Treaty are the basis of subsequent Haudenosaunee treaties, including treaties with the British and the 1794 Treaty of Canandaigua involving President George Washington.

About 350 Indian treaties are officially recognized by the United States today. Like other treaties, Indian treaties are legal contracts between distinct nations or peoples. It is not difficult to appreciate why most Indian treaties are revered in Indian communities as high-water marks of relations between

Indians and the United States. Although some treaties were coerced and many were honored only in their breach, treaties ideally stand for the principle of respectful and peaceful relations between distinct peoples based on mutual agreement. Treaties affirm for the benefit of nations and peoples a human rights principle that is regularly asserted for the benefit of all individuals: No nation or people should unjustly impose its will on another, just as no government should have unchecked authority to impose its will on individuals within its domain. Democratic governments that uphold human rights espouse these principles in their domestic and international affairs.

The early Indian treaties had the same status under international law as other treaties. Officially recognized Indian treaties are part of a much larger number of treaties, agreements, and conventions that comprise the documents of American Indian diplomacy. A collection of such documents for the period of 1775–1979 covers 1500 pages of a recent two-volume publication.[5] There are many more such treaties and diplomatic documents that chronicle relations with the various European countries that preceded the United States.

THE DISCRIMINATORY FOUNDATION OF U.S. INDIAN LAW

The Discovery Doctrine

The U.S. Constitution requires that "all treaties" shall be part of "the supreme Law of the land." Yet in the early 1800s the actual legal status of Indian treaties and of Indian tribes as independent nations began to be downgraded by the U.S. Supreme Court, even though the Constitution's treaty clause has never been changed.

In 1831, the Supreme Court rejected the Cherokee Nation's argument that it could bring a lawsuit as a "foreign nation" under the Constitution. Chief Justice John Marshall ruled that American nations and tribes are "domestic dependent nations" with diminished rights. In the course of several Indian law decisions, the Supreme Court decided that the United States has exceptional powers over all Indians and owns the ultimate title to all Indian land. Indian title was soon deemed to be only a right of occupancy that the government may readily extinguish. This top-down legal framework is irreconcilable with the legal structure of treaties. As American Indians were downgraded in the law from the status of treaty-making nations and tribes to the status of dependent natives with effaceable title to their land, all of their collective and individual rights were put in jeopardy.

The underlying legal rationale propping up these rulings was the doctrine of discovery, a doctrine of "the law of nations" as international law was called in John Marshall's time. The discovery doctrine had been developed primarily by European jurists and imperial theorists to justify and regulate the competitive global trade and empire-building of European powers. It provided a legal rationale for the dominion over foreign lands and native peoples that Europeans asserted as they carried out their slave trading in Africa and the

Americas and their colonialism around the world. The discovery doctrine was said to accomplish a guardianship or trusteeship over indigenous peoples for the beneficial spread of civilization and Christianity.[6]

There were two basic legal interpretations of the discovery doctrine. In its most favorable light, discovery was meant to be a first-comer-gets-monopoly rule that gave exclusive European trading rights to the first European power that found and occupied new foreign lands. Under that interpretation of the discovery doctrine, the native peoples were required to enter into trade and land transactions only with the European nation that was deemed to have discovered their lands. The natives' title to their traditional land was in theory to be protected, and the discovering nation could acquire that title—variously called "aboriginal title," "original title," "Indian title," or "aboriginal occupancy and possession"—only by purchase or through conquest after a just war.

A much more hostile strain of the discovery doctrine held that the discovering European power immediately became rulers over the indigenous peoples and owners of all of the indigenous peoples' land. The indigenous peoples could occupy their homelands until they were dispossessed, and the natives would have to give way in due time to European settlement. The indigenous nations, tribes, and peoples who had been the prior owners of the "discovered" land became in essence tenants-at-will whose title could be extinguished at the whim of the European discovering nation. This version of discovery clearly subjugated indigenous peoples and denied their right of self-government. In short, the more hostile meaning of the discovery doctrine gave Europeans and their descendents virtually unlimited power over indigenous peoples and their lands.

The law of discovery was applied inconsistently by European powers and by the United States. In its earliest Indian law decisions the Supreme Court wrestled with both meanings of the discovery doctrine.[7] Chief Justice John Marshall seemed more inclined in his final years to support the less hostile interpretation. And one early Supreme Court decision even stated that the Indians' right of occupancy is "as sacred as the fee simple of the whites."[8] That quickly proved to be an empty promise. The Supreme Court rapidly subscribed to its own hostile and discriminatory version of the discovery doctrine, and that is still the prevailing rule in U.S. Indian law today.

Indian Removal

The legal dispute over the discovery doctrine and its impact on Indian treaties and other Indian rights first came to a head as the United States implemented its Indian Removal policy. The Indian Removal Act of 1830 authorized the relocation of all Indian nations and tribes from U.S. territory east of the Mississippi to western lands, primarily Oklahoma, far beyond the young country's borders. The policy of Indian Removal would be denounced as ethnic cleansing in today's human rights terminology.

In the context of Indian Removal, the Cherokee Nation became embroiled in a very notorious political and legal fight against the State of Georgia's systematic efforts to uproot and drive them from their aboriginal and

treaty-guaranteed homeland. Chief Justice John Marshall dismissed their 1831 lawsuit, *Cherokee Nation v. Georgia*,[9] on the ground that they were a "domestic dependent nation in a state of pupilage" and were not a "foreign nation" authorized by the Constitution to bring such a case. Some white missionaries to the Cherokees then brought their own case against the State of Georgia while the Indians anxiously watched from the sidelines. In 1832 Chief Justice Marshall's Supreme Court raised Indian hopes when he decided that the Georgia's oppressive anti-Indian laws were unconstitutional because they violated federal law.[10]

In sharp reaction, President Andrew Jackson reportedly stated that he would not enforce Marshall's ruling. And no effort was made, either by the missionaries or by the Court itself, to enforce the Court's judgment. Instead, the missionaries accepted a Georgia pardon that effectively made the case moot. The federal government deployed the U.S. military to round up the Cherokees, incarcerate them in internment camps, and forcibly remove them to Oklahoma. Thousands of Cherokees died on that infamous Trail of Tears. Removal also caused the death of many other Indians and devastated many Indian nations, mostly in the Southeast. Altogether some 90,000 Indians were forcibly removed, and most of their expropriated homelands were soon acquired by whites.

As Indian nations and tribes suffered from Indian Removal, the law failed them completely. Equally troubling, the Supreme Court established a legal rationale based in the discovery doctrine that set the stage for more devastating Indian policies in the years to come.

Indian Allotment and Plenary Power

Continuation of the policy of Indian Removal made little sense as whites rapidly settled the West and as the Mexican-American War and Manifest Destiny shifted the western U.S. border to the Pacific. So in the latter half of the nineteenth century, U.S. Indian policy shifted at first from removal to military conflict and treaty-making with western tribes. At the same time, Congress began gearing up a new policy of Indian Allotment. In 1871 it passed a law that forbade the president from making any more Indian treaties, and the allotment of Indian lands was well underway when the new Indian policy was codified in the General Allotment Act of 1887.

Allotment was an Indian land privatization scheme. The government typically handed out individual allotments of 160 acres of Indian reservation land to each male Indian head of an Indian household. Individual Indian landholders were to be assimilated as 'yeoman farmers,' a national ideal at that time. The Indian lands left over after allotment were declared 'surplus trust lands' and acquired by whites. The law made individual Indian allotments inalienable for a short period, but shortly thereafter many of the allotments also were acquired by whites through foreclosures, fraud, distress sales, and misappropriation by government agents. In the period of about fifty years from the time that the allotment policy began until it formally ended in 1934, two-thirds of the lands held by Indians before allotment passed out of tribal hands and into the hands of whites. Compounding that harm, allotment

'checker-boarded' Indian reservations and delivered a crippling blow, as had been intended, to tribal societies and tribal governments.

It is a half step at most from the discovery doctrine to the doctrine of 'plenary power' that provided the legal rationale for allotment. The overarching doctrine of plenary power over Indians gives the United States government virtually absolute power over Indians, Indian lands, and Indian resources. It has no grounding whatsoever in the text of the Constitution. Plenary power was made from whole cloth in Supreme Court decisions like *United States v. Kagama* (1886),[11] which held that the government has legal power to usurp the criminal jurisdiction of Indian nations over their own people. The sovereignty of Indian tribes was no barrier, the Court ruled, because the Constitution recognizes only federal and state sovereignty. All of "the soil and the people" including Indians, the Supreme Court said, are under the political control of either the federal or state governments. Congress may take away the jurisdiction of Indian governments over their own Indian people, because "Indian tribes are the wards of the nation. . . . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power." United States treaty obligations *toward* Indians were thus twisted into plenary power *over* Indians.

A case closely related in both time and outcome is *Lone Wolf v. Hitchcock*,[12] in which the Supreme Court decided in 1903 that Congress has plenary power to abrogate Indian treaties: "The power exists to abrogate the provisions of an Indian treaty . . . Indians are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress. . . . [F]ull administrative power was possessed by Congress over Indian tribal property." The Supreme Court gave Congress a completely free hand to abrogate Indian treaties: "We must presume that Congress acted in perfect good faith in the dealings with the Indians. . . . In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation." The Supreme Court's central message is that political power, not law, shall govern Indian affairs.

The racial bias infecting these and other Indian law decisions was even more starkly exposed in a lecture delivered in the District of Columbia in 1889, during the heyday of Indian Allotment, by Supreme Court Justice John Marshall Harlan. Justice Harlan participated in both the *Kagama* and *Lone Wolf* cases. He was a distinguished justice who envisioned an utterly hopeless future for American Indians and for all others who were not Anglo-Saxons: "In a hundred years you will probably not find one [Indian] anywhere, so the clause of the Constitution about regulating commerce with the Indian tribes will amount to nothing. This is not the only race that is disappearing. . . . To my mind, to my apprehension it is as certain as fate that in the course of time there will be nobody on this North American Continent but Anglo-Saxons. All other races are steadily going to the wall."[13] Justice Harlan's belief in Manifest Destiny and the Social Darwinian triumph of white people over all other races—a common belief in his time among educated elites—exposes the mindset of the Supreme Court as it established the plenary power doctrine and imposed a boundless and unaccountable trusteeship over Indians and their lands.

Armed with raw political power unfettered by legal restraint, President Theodore Roosevelt proudly predicted at the beginning of the twentieth century that Indian Allotment would be 'a might pulverizing machine to break up the tribal mass.'[14] By the time that the Indian Allotment policy's assault on the collective rights of Indian nations and tribes formally ended in 1934, the government had indeed caused enormous harm to Indian nations and tribes. Not coincidentally, it also accomplished the transfer of some 138 million acres of Indian land to whites.

The Indian Reorganization Act and the Indian Claims Commission

For a brief time under the New Deal of President Franklin Delano Roosevelt, Indians were encouraged by the 1934 Indian Reorganization Act (IRA) to rebuild and strengthen their nations and tribal governments. But that breathing space for Indian rights was only partially liberating because the Interior Department maintained broad supervisory powers over Indian governments and Indian resources. But even that partial gain did not last long. By the mid-1940s, powerful members of Congress called for repeal of the IRA and began passing anti-Indian legislation, setting the stage for the policy of Indian Termination.

On a separate but related policy track, Congress established in 1946 the Indian Claims Commission (ICC), a quasi-judicial body that was empowered to resolve a wide variety of Indian claims. There were conflicting motives for the creation of this new quasi-judicial Indian claims body. On the one hand, some members of Congress had warm feelings about the outstanding contributions of American Indian soldiers in World War II and wanted to reward them and also to relieve Congress of the burden of managing multiple Indian claims bills. In a number of cases, the ICC made monetary awards that helped right festering wrongs against Indians.

But the ICC was used by the government in other cases to extinguish Indian title to land that had still belonged to the Indians when they filed their claims for redress, even though the ICC had no jurisdiction to rule on disputes about Indian land title and could award only money damages. At first, the government assured Indians that the ICC's money awards could not harm existing Indian land titles. Later, the government completely reversed its position and successfully argued in court that payment of those awards completely discharged the government from all related claims about the wrongful taking of Indian lands. So the payments of ICC awards have in effect extinguished Indian title to many thousands of acres of their lands. A legal challenge against such extinguishment of Indian title in modern times is the subject of an international human rights case, discussed below, that Western Shoshone petitioners won against the United States.

Indian Termination

While Indians were first deciding how to respond to the Indian Claims Commission and still trying to take advantage of the Indian Reorganization Act,

Congress made the U.S. Indian policy pendulum swing back decisively against Indian rights. In 1953, it formally launched its policy of Indian Termination. Like Removal and Allotment, Indian Termination concentrated on the destruction of the collective rights of Indian nations and tribes. It intended to abrogate all Indian treaties and to terminate all federal-tribal relations. It would extinguish collective Indian title and open reservation lands to purchase and settlement by non-Indians. Some government officials involved in the early discussions about this new policy had called for the "liquidation" of Indian tribes. In deference to sensitivities about the Holocaust, the name of the policy was changed to "termination."

A total of 109 American Indian tribes were terminated, the last one in 1966. Those Indian nations and tribes most severely impacted by termination suffered great harm. As a result of termination, Indians lost over 1.3 million more acres of their homelands. There were subsequent acts to restore terminated tribes, but they have faced the daunting task of rebuilding their tribal societies and governments on badly fragmented reservations.

It is noteworthy that the policy of Indian Termination was initiated only two years before the Supreme Court's decision in *Tee-Hit-Ton Indians v. United States* (1955), a case fully in stride with termination. The *Tee-Hit-Ton Indians* decision reaffirmed in modern times the hostile meaning of the discovery doctrine. It declared that Indian title is only "permission from the whites to occupy" and not legally protected property within the meaning of the Constitution. In so ruling, the Supreme Court offered Indians no legal protection against the evils of Indian Termination, just as it had failed to protect Indians against Indian Removal, Indian Allotment, and the unilateral abrogation of Indian treaties.

The crushing burden of Indian Termination and the specter of its possible return still cause much anger and trepidation in Indian country. Termination is regularly seen today, for example, in Congressional bills that threaten to strip Indian nations and tribes of economic or jurisdictional advantages that have upset their non-Indian neighbors. The threat of termination-style powers also appears from time to time in judicial opinions. One example is a 1978 opinion by Justice Thurgood Marshall in which he ruled in favor of the Indian parties but gratuitously remarked that Congress has plenary power to extinguish the very Indian rights that his decision upheld: "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[15] The legal authority he cited for that proposition is the 1886 *Kagama* plenary power decision in which Justice John Marshall Harlan had joined. It is telling commentary on the sad state of U.S. Indian law that Thurgood Marshall, a distinguished African American Justice, gave this bow, without elaboration, to the century-old doctrine premised on discriminatory concepts of Manifest Destiny and Social Darwinism.

Indian Self-Determination

The U.S. Indian policy pendulum swung again in 1970, this time for the better, when President Richard Nixon formally renounced the failed policy of

termination and instituted a new Indian policy of "self-determination without termination" that was promptly codified in the Indian Self-Determination Act.[16] The policy of Indian Self-Determination offered renewed respect to tribal societies and tribal governments, and tribal sovereignty was again affirmed by U.S. government officials.

Every president since Nixon has given at least nominal support to Indian Self-Determination, and the policy has much bipartisan congressional support. The Self-Determination Era—from 1970 to the present—is the longest sustained period in 200 years during which the official U.S. Indian policy has not been designed to inflict systematic human rights abuses on Indians by denying their collective rights as nations and tribes.

Yet many government officials from across the political spectrum have been also content to maintain their plenary power over Indians. Notwithstanding the obvious conflict, the plenary power doctrine has not been supplanted by the right of Indian self-determination. Like a capricious coin flip, the government and the courts may decide to support either Indian sovereignty or raw political power over Indians, whichever suits their pleasure in a particular dispute. The Indian right of self-determination under U.S. law is not guaranteed as an inherent right that may not be extinguished by Congress, and it is not a right anchored in the Constitution. Rather, it is a completely revocable grant from the government that can be abridged or extinguished by the next Congress that decides to use its plenary power to extinguish some or all of the rights of Indian nations and tribes.

Because of that ever present threat, Indians today are apprehensively looking over their shoulders for the next damaging legislative proposal, court decision, or swing of the U.S. Indian policy pendulum. Whether poor or whether they have made economic gains from their casinos and other businesses, American Indians are virtually defenseless under U.S. law against Congressional acts that would either diminish or strip away their tribal sovereignty. At the same time, they are diligently exercising their abridged right of self-determination in order to strengthen their cultures, tribal governments and tribal economies.

The hopeful news is that the policy of self-determination has been providing opportunity for significant economic progress on many Indian reservations. Harvard's Project on American Indian Economic Development and other studies have found that increasing indigenous self-governance reduces unemployment and contributes to higher per capita incomes and general economic progress. The policy of self-determination with its expansion of the authority of Indian governments (and constriction of the authority of the Interior Department) has apparently contributed much to these advances. Modern theories of democracy and self-governance would predict this positive trend.

It is perhaps only a historical footnote that the term "self-determination" had previously been used almost exclusively in the international arena, first by President Woodrow Wilson in his call for the freedom of subjugated peoples of Eastern Europe and then in Third World struggles for decolonization. Self-determination is incorporated in international law and human rights

through the UN Charter and the two international covenants on human rights that the UN adopted in 1966. Although self-determination under U.S. Indian law does not have the same reach and force as self-determination under international law, domestic incorporation of the terminology of self-determination echoes, however faintly at times, the promise of freedom and dignity of all peoples under international human rights law. In that sense Indian Self-Determination seems to be an early example of international human rights law positively influencing U.S. law.

Continuing Indian Poverty and Social Ills

Notwithstanding the policy of Indian Self-Determination, progress in Indian country is halting, very uneven and insecure under current U.S. law. The harmful economic and social consequences of the long history of deep-seated bias and lawlessness in U.S. Indian affairs are readily apparent in Indian country. On every scale of economic and social well-being, America's indigenous communities still rank at the very bottom. A very small number of the more that 550 U.S. Indian and Alaska Native tribes have prospered with casinos and other businesses, but the vast majority of American Indians, Alaska Natives, and Native Hawaiians continue to experience disproportionate poverty and social ills as described in the report of President William Jefferson Clinton's 1998 Initiative on Race:

> On virtually every indicator of social or economic progress, the indigenous people of this Nation continue to suffer disproportionately in relation to any other group. They have the lowest family incomes, the lowest percentages of people ages 25–34 who receive a college degree, the highest unemployment rates, the highest percentage of people living below the poverty level, the highest accidental death rate, the highest suicide rate. . . .
>
> Deeply entrenched notions of white supremacy held by European immigrants were applied to American Indians and Alaska Natives, who were regarded as inferior and "uncivilized." Therefore, access to opportunities has been limited, and American Indians and Alaska Natives have experienced exclusion and isolation from rights and privileges often taken for granted by most white citizens. They have become America's most invisible minority.[17]

The same report underscores the importance of respecting Indian sovereignty: "The significance of sovereignty to American Indians and Alaska Natives cannot be overstated." It reinforces that conclusion with the words of an Indian leader who contributed to the study: "[T]he most virulent and destructive form of racism faced by Indian people today is the attack on our tribal sovereignty."

The part of the Indian economy that is directly managed by the U.S. government is also unsound and in need of urgent repair. The government's extensive trusteeship control over Indian land and resources has been debilitating in many ways and has often produced returns for Indians that are below the market rate. At its worst, it has been a national disgrace, as seen in the government's failure to account for billions of dollars in royalties from natural resources leases on individual Indian allotments that the government

has mismanaged for a century.[18] U.S. Indian law is heavily loaded with government trusteeship powers over Indians, but there are very few trusteeship duties that are legally enforceable.

In short, the policy of Indian Self-Determination ended many of the extreme abuses of the policies that preceded it. It has helped better the condition of Indian nations and tribes, and a small number of them have prospered in recent years. But the debilitating racism of the discovery doctrine, plenary power, and unaccountable trusteeship is still firmly embedded in U.S. Indian law and threatens the future of all Indians, Alaska Natives, and Native Hawaiians. It contributes in many ways to the woeful lack of economic development and general well-being that are pervasive problems in Indian country today. In the words of an Indian law scholar, it "lies about like a loaded weapon" threatening to extinguish Indians' most basic rights.[19]

The Failure of U.S. Courts to Protect Indian Rights

In 1886, the Supreme Court acknowledged that the Constitution "is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders."[20] More recently, Supreme Court Justice Antonin Scalia dismissed the argument that the Indian tribes surrendered their sovereign immunity in the Constitution, because "it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties."[21] In fact, Indians surrendered *none* of their rights in the Constitution. Indians were not even granted U.S. citizenship until 1924. But why, one might ask, have American Indians turned to the international community rather than to our own Supreme Court for relief from discriminatory U.S. Indian law? Certainly the Supreme Court must be aware of the deep-seated discrimination in that law. Why not concentrate on a domestic Indian law reform movement modeled after the civil rights movement?

The Supreme Court could indeed reform much of U.S. Indian law simply by construing it in harmony with the constitutional guarantees of equal protection and due process that it developed in civil rights, women's rights, and other areas. Australia's highest court initiated such a reform of its country's indigenous law by overturning the doctrine of terra nullius, a variant of the discovery doctrine which had denied property rights of Australian Aborigines through the legal fiction that their lands were uninhabited and could be taken freely by white settlers. The Australian court held that antiquated doctrine to be in violation of modern Australian laws prohibiting racial discrimination.[22] In contrast, the Supreme Court's discriminatory cases like the Cherokee cases, *Kagama*, *Lone Wolf,* and *Tee-Hit-Ton Indians* are still considered 'good law' and are frequently cited as authoritative precedents. Unfortunately, the Supreme Court has shown no inclination to take up the challenge of Indian law reform.

Even more disappointing, the Supreme Court has become increasingly hostile to Indian rights. Indians lose the overwhelming majority of their cases. The Supreme Court regularly upholds sweeping government powers over Indians that are completely outside of the normal rules of constitutional

interpretation. The Court still blesses Congress's plenary power and, in apparent frustration with congressional inaction, makes highly political decisions against Indians in disputes that would normally be handled by the political branches of government. Either way, the Indians usually lose. The many unresolved conflicts in its Indian law decisions are ignored or papered over, including the fundamental conflict between Indian self-determination on the one hand and plenary power over Indians on the other. Indian law experts criticize the Supreme Court's decisions as highly irregular, poorly reasoned, and even as a "schizophrenic approach to Indian rights."[23] Consequently, frustrated and anxious Indian leaders and Indian rights attorneys have tried for several decades to keep controversial Indian rights cases from being heard by the Supreme Court for fear of the harm that will likely result to the Indian litigants and to Indian rights in general.

Justice Clarence Thomas recently wrote an opinion that candidly highlighted some of the core problems and contradictions in Indian law that the Supreme Court has failed to address, and he made his own call for Indian law reform:

> [T]he time has come to reexamine the premises and logic of our tribal sovereignty cases. It seems to me that much of the confusion reflected in our precedent arises from two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members.
>
> [T]he Court fails to confront these tensions, a result that flows from the Court's inadequate constitutional analysis. I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the 'metes and bounds of tribal sovereignty.' I cannot locate such congressional authority in the Treaty Clause.[24]

These are stirring and hopeful words, but a long string of hostile decisions in Indian cases have given Indian leaders and other Indian rights advocates reason to believe that neither Justice Thomas nor other members of the Supreme Court are truly interested in undertaking principled reform of Indian law.

History suggests that in-depth law reform by the Supreme Court often is made in conjunction with the demands that disaffected groups make through the media, at the polls, and in the streets. Because of their small numbers, remote geography, unique history and aspirations, cultural barriers, and many pressing problems on their home reservations, Indian nations and tribes have not generated enough public attention and social pressure to foster law reform. They continue, of course, to defend their rights in Congress and in the courts when their rights are in jeopardy or when litigation is fairly noncontroversial or cannot be avoided. That domestic legal effort consumes far more of their time and resources than their international effort. It is mostly a holding action to protect past Indian rights gains from decisions that would erode or overturn them.

With this stationary dark cloud hanging over their legal rights at home, and having essentially exhausted their domestic legal remedies, Indians are

turning to the international community for relief. They intend to build international support and leverage that will bolster their right of self-determination, proscribe Congress' plenary power to extinguish Indian rights, and persuade the United States to reform its Indian law so that it guarantees for Indians all of the political, civil, economic, cultural, and social rights of international law. Today as in the past, that international human rights objective is first and foremost about the collective right of all indigenous peoples to maintain their own ways of life in their own homelands. It is campaign for today's international right of self-determination and also for the traditional principles of the Two-Row Wampum Treaty Belt.

THE "RED INDIANS" FINALLY ARRIVE IN GENEVA

The advent of the modern era of international indigenous human rights is marked by a number of significant international events and developments in the twentieth century, some of which occurred before the 1948 Universal Declaration on Human Rights. In 1923, for example, a Cayuga Indian leader named Deskaheh traveled to the League of Nations in Geneva to present a petition on behalf of Haudenosaunee (Six Nations Iroquois) nations in Canada and New York requesting international support for Haudenosaunee treaties and for the survival of Indian nations. At about the same time, a similar journey was made from the other side of the world by an indigenous Maori religious leader, T.W. Ratana, from New Zealand who traveled to England and to the League of Nations to protest violation of the 1840 Treaty of Waitangi. These indigenous representatives were not granted the access and support that they sought, but they made benchmarks in international indigenous rights advocacy that have inspired the following generations. In 1940, countries of the Americas, including the United States, established the Inter-American Indian Institute, which became a specialized agency of the Organization of American States. In 1948 Bolivia recommended a UN study of indigenous social problems that was not approved. In 1957, the International Labour Organization, a UN specialized agency, adopted the Indigenous and Tribal Populations Convention (ILO Convention 107), the first modern-era treaty addressing indigenous rights.

These and similar developments kept indigenous rights issues from being ignored completely, but they produced few concrete results. The Inter-American Indian Institute and ILO Convention 107 were established with little Indian involvement. Both gave some attention to the rights of Indians and their lands, but they were strongly biased in favor of assimilation of indigenous people into the dominant societies of the states where they live and were largely discredited in the eyes of most indigenous peoples.

In 1970, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities instituted a comprehensive study on the global problem of discrimination against indigenous populations. International news coverage of Indian rights protests in the United States and elsewhere contributed much to the growing interest in indigenous rights that led to that study. American Indians and other indigenous peoples collaborated in

that study over the following decade, an educational activity that began to open more space for indigenous peoples in U.N. human rights activities.

The UN International Nongovernmental Organizations Conference on Discrimination Against Indigenous Populations in the Americas

On the opening day of the International Nongovernmental Organizations Conference on Discrimination Against Indigenous Populations in the Americas in 1977, Geneva school children were given a special holiday to see the visitors who had come to town for the first time: "Red Indians" of the Americas walking in a procession to the UN. It was the first such indigenous peoples meeting at the UN and the first such international human rights gathering of indigenous representatives in the modern era. It was front-page news in European papers, even in the international-minded city of Geneva which had grown very accustomed to seeing many people of different nationalities and races in their midst. (By 1977 the number of United Nations had grown to 149 member states, three times the number of original UN members.)

The Indians were greeted warmly by the Geneva school children and other spectators who applauded their arrival. The message from UN officials was also very friendly: Welcome, they said. We have been expecting you. At last all of the peoples of the world are represented here.

Indigenous representatives from the United States and many other countries in the Americas met each other for the first time in Geneva. They discussed their reasons for traveling to Geneva in public sessions and in private gatherings that continued late into the night, and they quickly realized that they shared common aspirations and faced similar human rights problems in their home countries. They became the nucleus of an informal global network of indigenous representatives who would work together on international indigenous rights in Geneva, Washington, and elsewhere over the following decades.

The United States and other governments sent their own representatives to the conference to greet the indigenous representatives and to defend their countries against expected criticisms. Indians from the United States were surprised to learn that the State Department had hastily recruited an American Indian lawyer for its official delegation. It appeared that the United States and other countries with indigenous populations were eager to give the impression that indigenous human rights were already being fairly managed at the national level and did not require international oversight.

But some of the government representatives of European and Third World countries proved to be surprisingly understanding and receptive to indigenous concerns. As indigenous representatives recounted their reasons for traveling to Geneva, it soon became apparent that the indigenous human rights grievances in the Americas were very similar to the grievances of the colonized peoples of former European powers in Africa, Asia, and elsewhere. As colonial powers, Great Britain, France, Belgium, Portugal, and other European countries also had claimed title to indigenous lands on the basis of the discovery

doctrine. They too had asserted trusteeship powers over the native peoples and the natives' lands and natural resources, always of course for the good of the natives and for the advancement of Christianity and civilization. In the decolonization era, which reached its apex in the 1950s and 1960s, those assertions had been discredited as racially discriminatory. Experience with colonialism and the wrenching process of decolonization helped many UN member states—particularly those that were former colonies and former colonial powers—to recognize the colonial-style discrimination that the indigenous representatives complained about in the laws of countries throughout the Americas, including the United States.

Indigenous representatives were discouraged that the United States and a number of countries adopted a generally defensive posture, signaling that they would be very resistant to advances in international indigenous rights or to reforms of their domestic Indian laws and policies. But overall the indigenous participants were heartened to see that many UN member states and many UN officials had already shed the discriminatory baggage of colonialism and were open to discussion of indigenous demands for the development of international indigenous rights.

The 1977 UN conference did not happen in isolation, of course. The presence of representatives from the Americas was made possible by significant work to organize Indian nations and tribes and to secure human and financial resources. Churches and charitable foundations helped support the Indian leaders and nonprofit Indian rights organizations who led the organizing effort for the conference, including among others the American Indian Treaty Council and the Washington-based Institute for the Development of Indian Law, whose international work was soon carried forward by the Indian Law Resource Center. Participants who traveled to Geneva from the United States included representatives of the Haudenosaunee, Hopi, Lakota Sioux, and other U.S. Indian nations and tribes.

Pressure for Indian rights reforms had been building and sometimes boiling over inside the United States, which helped strengthen the cause of the American Indian representatives in Geneva. Public interest and concern grew out of the militant activism of the American Indian Movement (AIM) and Indian rights protests at Alcatraz, Washington, Pine Ridge, and elsewhere. That pressure was augmented by the self-determination advocacy of better educated and increasingly effective leaders of U.S. tribal governments, by a rich new literature on Indian history and politics, and by Indian rights lawyers who were committed to the legal fight in the United States and at the international level.

Political developments in the United States also strengthened the indigenous rights struggle. The civil rights movement increased the public's awareness of discrimination against all racial minorities, including Indians. The Poor Peoples Campaign of Martin Luther King Jr. and War on Poverty of President Lyndon Johnson shed light on the severe problem of Indian poverty. President Nixon also played a significant role by launching the policy of Indian Self-Determination. "The time has come," he said in 1970, "to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[25]

Although Indian leaders were still facing enormous economic and social problems that kept them tied down in their home communities, the Indian Self-Determination policy relieved some of the most severe restraints that they had been under and opened more political space for tribal leaders to get involved in international rights advocacy.

Elsewhere in the Americas and throughout the world there were comparable developments. Indigenous peoples were steadily building their own organizations and establishing new alliances with human rights organizations and other social justice groups even as many of them were suffering severe human rights abuses under military regimes and other undemocratic governments.

Support for the indigenous rights cause was also being developed through other human rights activities at the international level. Many people were learning about human rights abuses suffered by indigenous peoples around the world. The rapidly maturing nongovernmental human rights movement helped generate global public concern, sympathy and political pressure to advance the rights of indigenous peoples. ILO Convention 107 and the Inter-American Indian Institute of the OAS also contributed to international dialogue on indigenous rights issues, notwithstanding their pro-assimilation bias. Especially important was the work of the Inter-American Commission on Human Rights of the Organization of American States. In the early 1970s it issued public reports making groundbreaking criticisms of the widespread denial of equal protection for indigenous peoples in the Americas. It also began monitoring national legislation and judicial decisions on indigenous rights and set the stage for its later contributions to standard setting and jurisprudence on indigenous rights.

The success of the civil rights movement, the decolonization movement, the growing human rights movement, and the tireless efforts of Indians themselves had lanced and begun to drain the rationale of white racial superiority that had long infected relations between many indigenous peoples and states. This created an unprecedented opportunity for fresh thinking about the proper legal and political grounding of those relations.

Declaration of Principles for the Defense of the Indigenous Peoples of the Western Hemisphere

With a new sense of hopeful empowerment, the indigenous representatives who met in Geneva passed by consensus a Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere.[26] The draft of that seminal document of thirteen short paragraphs had been produced by American Indian leaders in consultation with their own lawyers. It was finalized after consultation with all of the indigenous representatives. It declared that all indigenous peoples must be recognized as distinct indigenous nations and peoples and as subjects of international law, and that their treaties and other agreements must be accorded the same international law protection as all other treaties and never abrogated. The indigenous representatives asserted jurisdiction over their own indigenous territories and peoples, and they declared the right of self-determination for all indigenous peoples.

Their declaration also renounced any state claim to indigenous territory unless the indigenous lands have been acquired "by valid treaty or other cession freely made." It called for fair and "mutually acceptable" procedures for the settlement of indigenous disputes with states, and it underscored the urgent need for protection of their national and cultural integrity and for protection of the environment. It asserted the "the sovereign power of an indigenous nation or group to determine its own membership." In the declaration's concluding paragraph, the indigenous representatives stated that all of the rights and obligations of the declaration "shall be in addition to all rights and obligations existing under international law," thereby affirming that the full panoply of individual rights and collective rights must be respected.

This 1977 declaration became the unofficial first draft of the UN Declaration on the Rights of Indigenous Peoples and of the OAS Declaration on the Rights of Indigenous Peoples that would be extensively debated and elaborated over the following three decades.

UN Working Group on Indigenous Populations

After the 1977 Geneva conference, American Indian representatives successfully lobbied for creation of the UN Working Group on Indigenous Populations, which had its first annual meeting in 1982. It was the first indigenous rights forum established in the United Nations. The Working Group was instructed to review developments regarding the promotion and protection of the human rights and fundamental freedoms of indigenous populations, and to give special attention to the evolution of standards on the rights of indigenous populations. It also had the task of facilitating dialogue between governments, indigenous representatives, nongovernmental organizations, international organizations, and scholars.

American Indian leaders participated in every annual session of the Working Group over the following two decades. Most of them worked with U.S.-based Indian rights organizations which included, among others, the Indian Law Resource Center, the American Indian Law Alliance, the Inuit Circumpolar Conference, Na Koa Ikaika o Ka Lāhui Hawai'i, the International Indian Treaty Council, and the Native American Rights Fund. As interest in the international work increased, more Indian leaders and tribes gave their support, and there was increasing involvement of the National Congress of American Indians, the largest association of Indian nations and tribes with some 250 members.

When the Working Group began to meet in 1982, the United States and many of the other countries that had indigenous leaders attending the Working Group sessions sent representatives from their UN missions to participate and respond to criticisms. This began a dialogue between government officials, UN officials and indigenous representatives that was at times intense, rancorous and painful, but that grew more respectful, high-minded, and educational for all parties involved.

The Working Group soon began drafting a new UN declaration on indigenous rights. This was the first time since the treaty era that American Indians and U.S. government officials sat together to prepare an international legal

instrument. An international indigenous rights declaration would not have the binding legal force of a treaty, but it is a foundation stone for international human rights law. A declaration proclaims rights and principles to guide the behavior of states. Those rights and principles may become part of international customary law, and they may later be incorporated in a binding treaty, covenant or convention. Progress on drafting the declaration was very slow at first, but as the years passed the participants produced a principled declaration of indigenous rights.

This progress was greatly facilitated by a vital change in UN procedures that indigenous peoples won in the very first Working Group session in 1982. Indigenous participants took the position that they could not comply with the traditional UN rule that allowed only nongovernmental organizations (NGOs) with official credentials to speak and exchange documents with state representatives in UN meetings. They insisted that indigenous peoples should not be treated as nongovernmental organizations, because as nations, tribes, and distinct peoples they have governments and collective rights, including rights founded in treaties with state governments. Indigenous leaders explained that their peoples had instructed them to present their positions directly to the Working Group. It would be discriminatory, they said, to require indigenous peoples to speak through intermediaries, whether NGOs with UN credentials, missionaries, anthropologists, lawyers, or government officials who manage indigenous affairs.

Faced with these compelling arguments and a threatened breakdown of the Working Group process, the UN officials overseeing the Working Group decided that indigenous representatives would be allowed to speak and circulate documents in the names of their indigenous peoples. This very important change in the procedural rules assured indigenous participants that they would be fairly heard and respected. It upheld an important element of the indigenous right of self-determination, and it set a precedent that would be followed in most international forums.

Other International Forums

American Indians, in collaboration other indigenous peoples, also asserted their rights in many other international settings where the issue was human rights, the environment, development, trade, religion, and other economic, social, and cultural rights. These educational and advocacy efforts generated a flurry of resolutions, declarations, formal plans of action, new policies, and other statements that endorsed indigenous rights. Although sometimes informal and usually nonbinding, such international affirmations of rights influence the behavior of states and international institutions and also contribute to the creation of international customary law and the development of formal international standards. In response to indigenous criticism, the International Labour Organization invited indigenous participation in the redrafting of ILO Convention 107. That resulted in a new ILO convention on indigenous rights, ILO Convention 169 (1989), which excised the most offensive assimilationist elements of the prior convention, but yet failed to recognize

fully the rights demanded by indigenous peoples to self-determination, land and resources.

Indigenous peoples were very active in international meetings preparing for the 1992 Rio Earth Summit, and they won recognition of indigenous intellectual property rights in the Convention on Biological Diversity. Their rights are also promoted by Agenda 21, the statement of principles on sustainable development that the Convention is intended to implement. They promoted the creation of new indigenous policies in the World Bank, the Inter-American Development Bank, and the International Finance Corporation. And they persuaded economic development organizations and environmental groups working at the international and national level to improve their relations with indigenous peoples and to develop indigenous rights policies of their own.

Indigenous peoples also championed their rights at the 1993 World Conference on Human Rights in Vienna, the 1994 Summit of the Americas, and a number of other international summits. There were watershed moments for indigenous rights at these international meetings. At the Vienna conference, indigenous representatives and human rights allies protested the use of the term indigenous 'people' instead of 'peoples.' They displayed protest signs that had only 'S' printed on them, which signified support for the indigenous demand to be respected as self-determining peoples, not only as a minority 'people' or 'population.' Through these protests, the international human rights community supported the indigenous demand for fair and equal treatment based on common Article 1 of the international human rights covenants which states: "All peoples have the right of self-determination."

A more disruptive protest took place in a Santiago, Chile, preparatory meeting for the 2001 UN World Conference Against Racism. Offended by the opposition of governments (including the United States) to use of the term "peoples" in the conference report, indigenous representatives led by Mapuche leaders from Chile took the microphone from the president of Chile, accused the participants of perpetuating racism, and led a walkout of indigenous representatives and their supporters from a plenary session. With tape across their mouths, they displayed to the television cameras their protest signs that declared: "SOMOS PUEBLOS, NON POBLACIONES" (We Are Peoples, Not Populations). Those who joined in the protest walkout included indigenous representatives from Central and South America, the Caribbean, Canada, and the United States, including representatives of Native Hawaiians, Alaska Natives, American Indian nations and tribes, and Indian rights organizations including the International Indian Treaty Council, Inuit Circumpolar Conference, National Congress of American Indians, National Congress of American Indians, Native American Rights Fund, and Indian Law Resource Center. In solidarity, leaders from prominent U.S. civil rights groups also joined in the walkout.

The protest led the evening TV news and was on the front page in Santiago and other Latin American countries the following morning. It undermined the opposition, and 'indigenous peoples' was used in the meeting's final report.

During the Santiago protest, American Indian representatives and U.S. civil rights leaders lodged strenuous protests at the White House and the State Department about the hostile indigenous rights positions that U.S. representatives had asserted. That protest resulted in the Clinton administration, in its final days, making a positive, though only partial, reform of U.S. policy on international indigenous rights. The terms "indigenous peoples" and "self-determination" could henceforth be used, but there were caveats and later qualifications developed during the George W. Bush administration which showed that the United States would still oppose the use of any indigenous rights terminology that arguably goes beyond what United States Indian law currently provides.

STRENGTHENING INDIGENOUS RIGHTS STANDARDS IN THE ORGANIZATION OF AMERICAN STATES

American Indian representatives were involved at the same time in a parallel effort to develop international indigenous rights standards through the Organization of American States in Washington. The countries of the Western Hemisphere are members of the OAS, which has a human rights system to promote compliance with its own human rights declaration and convention.[27] Its Inter-American Commission on Human Rights pioneered reporting on human rights abuses against indigenous peoples, and in the 1980s the Inter-American Commission urged the OAS General Assembly to take action to protect indigenous rights.[28] As indigenous peoples protested plans to celebrate the Columbus Quincentenary, and as the OAS became apprehensive about the United Nations taking the lead on indigenous rights issues for the Americas, the General Assembly resolved in 1989 that the Inter-American Commission should prepare a new juridical instrument on indigenous rights.

For most of the following decade, the Inter-American Commission received little indigenous support on this standard-setting project because some OAS member states blocked free and open participation by indigenous peoples. "If we stir up the ants nest," one of the officials reportedly said to his OAS colleagues, "who will put them back in it?" The Indian Law Resource Center, the National Congress of American Indians, and other indigenous representatives regularly testified in support of indigenous participation at the Inter-American Commission's annual meetings.

A first draft of an OAS indigenous rights declaration was prepared with only marginal input of indigenous representatives. As the twentieth century was coming to a close, the OAS announced that it was organizing a closed meeting of experts to review the draft declaration. In response, American Indian leaders and Indian rights groups organized an ad hoc group, the Committee of Indigenous Peoples of the Americas, representing indigenous peoples from all regions of the Americas. Its purpose was to achieve full participation by indigenous peoples in the preparation of the OAS declaration on indigenous rights. It was adamant that any new declaration on the scope and meaning of indigenous rights would not be dictated by states without indigenous participation and concurrence. The indigenous representatives also

insisted that an Inter-American declaration on indigenous rights must complement and not undercut the UN declaration on indigenous rights.

Many Latin American countries were equally adamant about maintaining the rule that only governments could participate in OAS meetings, especially a meeting on the volatile issue of indigenous rights. Some of the most adamantly opposed state representatives expressed concerns that indigenous representatives would engage in disruptive behavior and embarrass the OAS. The ad hoc Committee of Indigenous Peoples of the Americas met with top OAS officials and key member governments to build support for indigenous participation. The secretary general, the United States, and some other countries pledged to support indigenous participation. The Ambassador of the Caribbean country of Antigua and Barbuda went much further and told the indigenous representatives that his country would not accept token indigenous participation. He said that the people of his country had fought to overcome slavery and colonialism, and that he was very aware of the continuing problem of racial discrimination against people of African descent and indigenous peoples throughout the Americas and inside the OAS. To underscore his country's commitment to indigenous rights, he offered representatives of the ad hoc Indian committee complete and uncensored participation in the experts meeting as his government's official delegation. Needless to say, the indigenous representatives were very moved by this generous display of trust and solidarity.

At the meeting, indigenous representatives sat at the OAS members' table and spoke in the name of the government of Antigua and Barbuda on each of the provisions of the draft declaration that the government representatives discussed. Faced with this unprecedented challenge by a fellow OAS member, the majority of the state representatives realized that they would no longer be able to prevent full participation of indigenous representatives. Soon thereafter, the procedural rules were changed to permit indigenous representatives to participate freely, in the name of their own indigenous peoples, as work on the OAS declaration went forward.

An OAS Working Group was created for further review and elaboration of the draft declaration. This was the first time in the fifty-year history of the OAS that the rights and interests of 40 million indigenous people of the Americas were being addressed by their own indigenous leaders and representatives. The dialogue in the Working Group was sometimes tense, particularly in the early meetings. There was an angry boycott by indigenous representatives of one early meeting when it appeared that their full participation was being threatened, but after initial tensions were overcome, the indigenous and state representatives entered into a respectful and generally high-level discussion of their relations and aspirations.

Indigenous peoples and member states of the OAS made fairly steady progress in their search for mutual agreement within the framework of a new human rights instrument. A number of states showed increasing understanding and flexibility in their positions on the especially contentious issues of indigenous self-determination, definition and use of the term "indigenous peoples," and indigenous rights to land and resources. In a few years, the Working Group produced a forward-looking and broadly supported new draft

Declaration on the Rights of Indigenous Peoples that is still under discussion. In due course it will be presented to the OAS General Assembly for adoption. But even in draft form the OAS declaration on indigenous rights has contributed to reform of national laws in some Latin American countries, and it has been cited in formal legal proceedings—including a human rights case against the United States—as a persuasive though nonbinding statement of rapidly evolving international standards on the human rights of indigenous peoples of the Americas.

LITIGATING AMERICAN INDIAN HUMAN RIGHTS AT THE INTERNATIONAL LEVEL

Advances in civil rights and civil liberties within the United States have traditionally involved both legislation and litigation. Both the Civil Rights Acts and *Brown v. Board of Education* were needed to break the back of racial segregation under the law. Women's rights advocates also used a proposed constitutional amendment to press for their rights and to strengthen their hand in legislative and judicial law reform efforts.

The standard-setting declarations on indigenous rights that are being considered in the United Nations and Organization of American States are the international equivalent of domestic legislation. The hope is that they will eventually be codified in formal conventions and other binding international instruments. The international litigation of indigenous rights takes place in human rights tribunals and in international bodies that perform an adjudication function as they oversee the implementation of specific treaty obligations. One important duty of the "treaty bodies" is to review complaints and to issue interpretive rulings about state obligations under the treaties. In that capacity, treaty bodies develop human rights jurisprudence that integrates other human rights law as well.

An early human rights complaint was filed in the late 1970s by American Indians—traditional Hopi, Sioux, Western Shoshone, and Haudenosaunee Indians—against the United States under the 1503 complaint procedure of the UN Human Rights Commission. The petitioners were represented by the Indian Law Resource Center. Under the UN rules, the complaint proceeding was confidential, and at the end there was no concrete remedy for the indigenous plaintiffs. Although the UN procedure proved to be inadequate, it did contribute to the education of UN officials about human rights problems that Indians are facing in the United States, and that helped encourage UN standard-setting studies and drafting.

The Inter-American Human Rights System

Litigation of indigenous rights complaints has been more successful in the OAS Inter-American Commission on Human Rights and the OAS Inter-American Court of Human Rights. In a series of decisions against a number of countries of the Americas over more than twenty years, those human rights bodies have developed an impressive jurisprudence on indigenous rights.[29]

The Inter-American Commission's decisions uphold the right of indigenous peoples to their traditional lands and resources under the property rights provisions of the Declaration on the Rights and Duties of Man and the American Convention on Human Rights. They affirm the collective rights of indigenous peoples and require that states respect indigenous rights of equal protection and due process as guaranteed under international law. They uphold the rights of indigenous peoples to their culture, to prior informed consent to the exploitation of their resources, and to environmental protection. The number of such indigenous human rights cases has been steadily increasing as a new generation of indigenous rights lawyers becomes more familiar with the inter-American human rights system and procedures.

One of the indigenous rights cases litigated in the Inter-American Commission was against the United States: *Mary and Carrie Dann and the Dann Band (Western Shoshone) v. United States.*[30] The Western Shoshone plaintiffs were represented in the trial and enforcement phases of that case by attorneys affiliated with the Indian Law Resource Center, the Indigenous Peoples Law and Policy Program of the University of Arizona, and the Western Shoshone Legal Defense Project. Some of those U.S.-based attorneys also represented indigenous peoples in human rights cases filed against other governments in the Americas, and that litigation established precedents that contributed to the favorable result in the *Dann* case against the United States.

The Western Shoshone plaintiffs alleged that the United States had effectively extinguished Western Shoshone land title through deceptive proceedings of the quasi-judicial Indian Claims Commission (ICC).[31] The ICC's ostensible purpose was to remedy past wrongs against Indians, but in the Western Shoshone case and similar cases it compounded past wrongs by making money awards that undermine present Indian land rights. The ICC awarded the Western Shoshones pennies on the acre, without interest, for many thousands of acres of aboriginal and treaty-guaranteed land in Nevada. The United States took the position that the "payment" of the ICC award money (which the Indians had not actually accepted) constituted a final lawful taking of the Western Shoshone land and discharged their legal claims to recovery of their lands. Needless to say, such an irregular taking of land would not be countenanced under the Fifth Amendment to the Constitution that strictly governs the use of the government's eminent domain taking power for all non-Indian property rights.

Much of the disputed Western Shoshone lands at issue are now being despoiled by cyanide-heap-leach gold mining, extraction of massive quantities of ground water, geothermal power development, the planned storage of nuclear waste, and military activities. Even more noteworthy, some Western Shoshones still live, as they have for generations, on the very land to which Indian title has supposedly just been extinguished. The lead petitioners in the Inter-American Commission case were Mary and Carrie Dann, elderly Western Shoshone women who resided and made their living on a ranch on traditional Western Shoshone lands that was passed down from their father. Because of the ICC decision and money award (which was not accepted by the Danns), they have been treated as trespassers and billed by the U.S. Bureau of Land Management for exorbitant grazing fees and penalties. They have protested

and refused to pay anything, asserting that their Western Shoshone lands are guaranteed by aboriginal right and by the Treaty of Ruby Valley, and are not for sale. On several occasions the BLM has staged surprise raids by armed officials who seized and sold much of the livestock on which the Dann family depends for its living.

Twenty years of litigation in the lower federal courts and the Supreme Court had failed to win the Western Shoshones a fair hearing on the merits of their claim that they are the lawful present owners of their lands. Citing the racially biased law of *Tee-Hit-Ton Indians v. United States*, the U.S. courts upheld the denial of Western Shoshone land rights. In short, the Western Shoshone petitioners are in a desperate fight against the U.S. government's application in modern times of the discovery doctrine and plenary power.

Before it made its ruling, the Inter-American Commission invited the parties to enter into settlement discussions. The Western Shoshone petitioners welcomed that invitation, but the United States was not interested. In its legal argument, the United States took the position that there are no binding international human rights standards that the Inter-American Commission could apply against the United States.

In a lengthy decision, the Inter-American Commission concluded that the United States had violated its legal obligations under the American Declaration on the Rights and Duties of Man by failing to respect indigenous property rights and by denying the Western Shoshones judicial protection and due process of law. The Commission determined that indigenous peoples have the right to legal recognition of their traditional forms of use and ownership of the territories and property that they have historically occupied, and that the taking or transfer of the title to indigenous property requires the informed consent of the indigenous peoples.

The remedial part of the Inter-American Commission's decision called on the United States to (1) provide an effective legal remedy to the Western Shoshone plaintiffs, including legislative or other measures that may be necessary, and (2) review its laws, procedures, and practices to ensure that the property rights of indigenous peoples are protected in accordance with the human rights standards of the American Declaration. In other words, in order to meet its obligations under international human rights law, the United States must reform its U.S. Indian law so that it no longer permits the extinguishment of Indian property rights without Indian consent and without notice, public purpose, and fair compensation.

Before discussing the aftermath of the *Dann* decision, it is important to understand a little more about the Supreme Court's 1955 *Tee-Hit-Ton Indians* decision that was so directly challenged by the Inter-American Commission. *Tee-Hit-Ton Indians* was decided at the height of the Termination Era. Indians from Alaska made a legal claim for compensation from the United States for timber taken from their aboriginal homeland challenging a 1947 law that extinguished the Indians' title to the land, without their consent or compensation. The Indians sued for compensation under the Fifth Amendment to the Constitution, which requires fair-market compensation for all government takings of property.

The Supreme Court ruled that Indian title to land is not a property right protected by the Constitution. Rather, Indian title is only "permission from the whites" for Indians "to occupy" their traditional territories. The Supreme Court said that Indian title has no constitutional protection as property unless Congress passes a law explicitly recognizing that the Indians have a *permanent* right to the land. Only such "recognized" permanent Indian title becomes property protected by the Fifth Amendment, and even that constitutional protection is somewhat abridged for takings from Indians. Takings of nonrecognized Indian land is "not compensable under the Fifth Amendment," the Supreme Court said, but Congress could of course give "gratuities" to the Indians for the taking of their land and timber. "It is to be presumed," the Court said as it washed its hands of responsibility, "that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race." Those inflammatory discriminatory words were borrowed from a Supreme Court decision of 1877.

Only Indian title stands so nakedly unprotected before the law. In sharp contrast, for example, the common law of adverse possession gives full, constitutional property rights to non-Indians who openly occupy land and assert ownership for a period of just twenty years or so. For Indian nations and tribes, even uncounted generations of their use, occupation, and asserted ownership of land do not suffice to establish property rights protected by the Constitution.

How could such disrespect for Indian rights to land and resources be justified by the Supreme Court in the 1955 heyday of civil rights law and only one year after the landmark case of *Brown v. Board of Education* outlawing racial segregation? The *Tee-Hit-Ton Indians* decision provides one part of the answer: "This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained." In support of that proposition, the Supreme Court cited an international law treatise, 1 Wheaton's International Law, c. V. That reaffirmation of the discredited and racially biased discovery doctrine of colonial-era international law ensured that it will be used against Indian land claims today.

The *Tee-Hit-Ton Indians* decision held that political power of Congress "is supreme" when it comes to the question of extinguishing Indian title based on aboriginal possession. "The manner, method and time of such extinguishment raise political, not justiciable, issues," the Court said, "No case in this Court has ever held that taking of Indian title or use by Congress required compensation." Due process and equal protection of the law are not pertinent. Adding insult to injury, the Court in *Tee-Hit-Ton Indians* closed its decision with an ignorant and insulting statement about the history of United States relations with Indian nations and tribes: "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land." So much for the long history of Indian treaty-making.

The United States has not diminished its support for the *Tee-Hit-Ton Indians* decision in the wake of its loss in the *Dann* case in the Inter-American Commission on Human Rights. To the contrary, it has thumbed its nose at the Inter-American Commission's ruling and has flatly refused to provide any of the remedies.[32]

UN Treaty Bodies

Undaunted, the Danns and other Western Shoshone petitioners have continued to pursue relief under the procedures and developing indigenous rights jurisprudence of the UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination. These treaty bodies oversee the implementation of human rights treaties that have been ratified by the United States. They have concluded in their official reports and recommendations that treaty-based human rights guarantees of self-determination, cultural integrity, and racial equality require all ratifying countries, including the United States, to provide fair and equitable legal protection for the traditional lands and natural resources of all indigenous peoples.

The jurisprudence of the UN Human Rights Committee, which oversees state compliance with International Covenant on Civil and Political Rights, addresses land rights of indigenous peoples within the self-determination provision, Article 1:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

After examining the arguments of the United States and the counter arguments lodged by American Indians, the Committee reaffirmed earlier jurisprudence that the extinguishment by governments of inherent indigenous rights to lands and resources is "incompatible with that treaty obligation."[33] The Committee specifically called on the United States to "review its policy towards indigenous peoples as regards the extinguishment of aboriginal rights on the basis of plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-indigenous population." In addition, the Committee decided the United States "should take further steps in order to secure the rights of all indigenous peoples under articles 1 [self-determination] and 27 [right to culture, religion and language] of the Covenant to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture."[34]

In parallel treaty-body jurisprudence, the Committee overseeing the Convention on the Elimination of Racial Discrimination (CERD Committee) used its Early Warning and Early Action Procedure in 2006 to address the

issues that had been raised by Western Shoshone leaders and several federally recognized Western Shoshone tribes. The CERD Committee's decision concluded that the United States had failed to meet its obligations as a ratifying party to the Convention on Elimination of Racial Discrimination "in particular the obligation to guarantee the right of everyone to equality before the law in the enjoyment of civil, political, economic, social and cultural rights, without discrimination based on race, colour or national or ethnic origin." The CERD Committee reaffirmed its earlier conclusions upholding "the rights of indigenous peoples, in particular their right to own, develop, control and use their communal lands, territories and resources."

The CERD Committee's decision calls on the United States to cease all discriminatory activities that threaten the environment or disregard the spiritual and cultural significance that the Western Shoshones give to their ancestral lands. It urges the United States to enter into a settlement dialogue with Western Shoshone representatives. It specifically urges the government to freeze all transfers of Western Shoshone lands to private interests or to extractive industries and energy developers, to desist from all natural resource activities on those lands that are carried out without consultation with Western Shoshones, and to stop grazing fees, trespass and collection notices, livestock impoundments and other threats.

The Continuing Refusal of the United States to Respect the International Human Rights of American Indians

The United States has refused to comply with the CERD Committee decision just as it has refused to comply with the decision of the UN Human Rights Committee and the Inter-American Commission on Human Rights. The unyielding nature of the United States's opposition is underscored in a report dated October 21, 2005 that it orally presented on July 17, 2006 to the UN Human Rights Committee.[35] In that report the United States argues that that it is in full compliance with its obligations under the International Covenant on Civil and Political Rights, notwithstanding its refusal to comply with the Human Rights Committee's recommendations. The U.S. report restates the Committee's recommendations in bold and follows each recommendation with a statement of the United States response:

> 15. Committee Recommendation: **That steps be taken to ensure that previously recognized aboriginal Native American rights cannot be extinguished**. The term "recognized aboriginal rights" does not have a meaning per se in U.S. Indian law and practice. Moreover, under U.S. law recognized tribal property rights are subject to diminishment or elimination under plenary authority reserved to the U.S. Congress for conducting Indian affairs.
>
> 21. Committee Request: **Discuss any restrictions or limitations even of a temporary nature imposed by law or practice on the enjoyment of the right to self-determination**. Under U.S. law, tribes enjoy self-determination regarding issues that have an impact on them or have a nexus with their endeavors, affairs, operations, members, etc. U.S. law, however, makes tribal sovereignty subject to the plenary power of Congress.

Here the United States's disrespect for international human rights law and practice is on full display as it offhandedly reaffirms its plenary power to extinguish Indian land rights and to restrict the meaning of indigenous self-determination to the narrow and controlled version provided by U.S. law. Stated more bluntly, when discriminatory U.S. Indian law is challenged by international law that upholds indigenous rights of equality, due process, property, and self-determination, the United States responds by brushing aside all criticisms with the back of its hand and by saying in effect that U.S. law is the way it is, so just get over it.

Because the United States has continuing obligations to make compliance reports under the International Covenant on Civil and Political Rights and the Convention on the Elimination of Racial Discrimination, Western Shoshones and other Indian nations and tribes will have more opportunities to petition the UN Human Rights Committee and CERD Committee for relief. As these human rights proceedings continue, American Indians are bolstering their cases by citing the rapidly developing international right of indigenous peoples to free, prior, and informed consent to the exploitation of their lands and resources, and by evoking the emerging right of indigenous peoples to permanent sovereignty over their natural resources.

The United States's disrespect for international human rights has also been displayed in the standard-setting activities for the UN and OAS indigenous rights declarations. There too, the United States has often shown its interest in maintaining the plenary power that it asserts over American Indians under U.S. law and in preventing the development of any international indigenous rights law that goes beyond U.S. law.

In the OAS Working Group there have been many private discussions, public debates and occasional sharp exchanges about indigenous rights issues between American Indian representatives and State Department officials. The most contentious issues are about indigenous collective rights, "peoples" versus "populations," self-determination, state identification of indigenous peoples versus indigenous peoples' self-identification, and indigenous ownership and control of land and resources. Behind the scenes, Interior, State, and Justice Department officials occasionally have had their own internal discussions and debates. Some disputes within government circles became heated, because not all U.S. lawyers and officials wanted to subscribe to the narrow positions that State Department officials assert. Indian leaders have tried to exploit such differences among government officials in order to encourage advances in the drafting process, but the most pinched and rigid positions of the State Department's lawyers have usually prevailed at the end of the day.

In the UN indigenous declaration process, the United States, New Zealand, and Australia made a joint statement in late 2006 explaining the reasons for their vote against the declaration.[36] First, they argued that approval process in the Human Rights Council had not allowed enough discussion and that the declaration should have been adopted by consensus, not by a divided vote. Then they put forward a list of substantive objections: (1) The declaration uses the self-determination language of Article 1 of the International Covenants, and this "could be misrepresented as conferring a unilateral right

of self-determination and possible secession," (2) "The text also appears to confer upon a sub-national group, a power of veto over the laws of a democratic legislature," and this "could be discriminatory under the Convention on the Elimination of Racial Discrimination," (3) The provisions on indigenous lands and resources are "unworkable and unacceptable," and appear "to require the recognition of indigenous rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous," (4) Unspecified provisions of the text "are potentially discriminatory" because individual rights are a "secondary consideration in this text" and "one group cannot have human rights that are denied to other groups within the same nation-state," (5) Provisions for redress are "unworkable and contradictory," and (6) The lack of a definition of indigenous peoples in the text means that, "separatist or minority groups, with traditional connections to the territory where they live—in all regions of the globe—could seek to exploit this declaration to claim the right to self-determination, including exclusive control of their territorial resources."

Lawyers might characterize this style of argument as a "parade of horrors." Politicians might call it a "domino theory," a worst-case prediction that the recognition of indigenous rights will undermine the territorial integrity of states and cause widespread international disorder. Indian rights advocates tend to see it as a delaying tactic and another obfuscating assertion of state plenary power over indigenous peoples. In collaboration with Canada, New Zealand, Australia, Russia, and some African states, the United States blocked a formal vote on the indigenous rights declaration by the UN General Assembly. Officially, the United States abstained and let Namibia, Canada, Australia, and New Zealand lead the opposition. But it was very apparent that the United States had worked behind the scenes to help engineer the blocking vote, which fortunately proved to be only a setback and not a defeat of the declaration.

In September 2007 the UN General Assembly approved the declaration with a few amendments and with the broad concurrence of indigenous representatives. A total of 143 states voted in support, and only 4 states voted against, with 11 abstaining. The states voting in opposition included the United States, Australia, Canada and New Zealand. The final amendments re-affirm the purposes and principles of the UN Charter and also re-affirm the Vienna Declaration and Programme of Action of the 1993 World Conference on Human Rights. There was also new language recognizing that the varied situations of the world's indigenous peoples should be taken into consideration. Most significant, a new provision states that the declaration may not be construed in a manner that would undermine the territorial integrity or political unity of sovereign and independent states. This conforms to settled international law which holds that the principle of self-determination of peoples and the principle of territorial integrity and unity of states coexist, notwithstanding the tension and conflict that may arise between them. Yet the United States stood in isolated dissent against the consensus vote and voiced a broad array of strenuous objections against the declaration, calling it a "flawed document" that "is not clear, transparent or capable of implementation." The United States rejected "any possibility that this document is or can

become customary international law. . . . This declaration does not provide a proper basis for legal action, complaints, or other claims in any international, domestic, or other proceedings."[37] In other words, the United States will fight on every front to prevent the UN Declaration on the Rights of Indigenous Peoples from becoming international law that might be applied against the United States.

None of the United States's substantive objections to international indigenous rights is new, and all of them have been raised and debated at great length in the previous twenty-four years of drafting of the indigenous rights declarations in the UN Working Group and in the OAS Working Group. On one occasion the United States even had made the preposterous argument that a strict definition of indigenous peoples is needed to prevent a Hells Angels motorcycle gang from calling itself an indigenous people and using the indigenous rights declaration to its advantage.

The United States has lost much of its human rights credibility in the course of the indigenous rights discussions, but it still wields much power in the world. It has demonstrated that it can impede the progress of indigenous rights standard-setting. On the other hand, the United States has not been very persuasive and has not been able to dictate the results. Work on the indigenous rights declarations has often gone forward over U.S. objections, because it protests too much and too unpersuasively. Although poor preparation and presentation of positions by indigenous peoples has also sometimes worked against their interests, the net result of the give and take of standard-setting discussions is that there is now much better informed international scrutiny of the human rights problems that American Indians face at home. This has created new opportunities in the near term and long term for American Indian advocacy of international indigenous rights.

One cannot predict with any certainty, of course, whether the international human rights pressure for indigenous rights will continue to grow or when it might eventually persuade the United States to reform its Indian law and policy. But it has already served to expose a sharp conflict between U.S. Indian law and international human rights law of indigenous rights. That is an ongoing challenge to the federal judiciary, to every new administration in Washington, to every new Congress, and to all Americans.

CONCLUSION

American Indians have moved the issue of indigenous rights to the very cutting edge of international human rights activities. They have made historic advances in the development of both international indigenous rights standards and jurisprudence. An international law scholar concluded in 2000 that the "mobilization of indigenous peoples within the United Nations has reshaped standards and the overall normative climate, in which it is now widely agreed that indigenous groups qualify as a 'people' within the legal meaning of the right of self-determination."[38] But that important achievement of indigenous peoples has not yet overcome the intransigence of the United States, which asserts the same exceptionalism and impunity that have become so problematic

in other human rights areas as well. As the government refuses to respect human rights at home, a human rights standoff has developed between American Indians and the government.

History suggests that the United States is on the losing side of a fight for rights that is, at its heart, an extension of the global struggle for decolonization which restored a large measure of freedom and human dignity to 1 billion colonized people and must be ranked as one of the greatest human rights achievements of the twentieth century. An integrally related lesson of the modern era is that captive nations and peoples do not readily die, disappear, or surrender their right of self-determination, even when oppressed for generations.

The opposition of the United States to key indigenous rights demands raises the following questions among many others: In the hierarchy of law, is it not the rule that international human rights law is a universal and higher standard that is expressly intended to overcome discriminatory national law? When the United States argues that international human rights standards for indigenous peoples must conform to its national laws, is that not an invitation to all other countries to follow suit and assert the primacy of their national laws? In other words, should human rights standards be relegated to the lowest common denominator of state behavior?

There is also a question that highlights the continuing failure of U.S. political leadership, both Democratic and Republican, in the area of indigenous rights: If the Nixon administration could lawfully renounce the discriminatory policy of Indian Termination in 1970 and commit the United States to the more progressive policy of Indian Self-Determination, what prevents the U.S. government today from renouncing the discriminatory doctrines of discovery, plenary power, unaccountable trusteeship, and Indian treaty abrogation and adopting strong UN and OAS indigenous rights declarations? The simple answer is that the lack of political will is solely responsible for the government's failure to support the declarations or to comply with the indigenous rights decisions of the Inter-American Commission on Human Rights and the UN treaty bodies.

As international pressure for reform of American Indian law continues to grow, there is a concrete though unquantifiable human rights gain that American Indians have already won. Their successful international advocacy and development of international alliances have made it very likely that there would be an international uproar should the United States government again swing the Indian policy pendulum from Indian Self-Determination back to some version of Indian Termination or Indian Allotment. The United States government will never again be able to quietly carry out gross and systematic human rights abuses against American Indians as an exclusively domestic matter, because American Indians are now well connected to global networks of indigenous peoples and human rights organizations that would offer their support and strengthen the Indian rights fight at home.

Although much work remains to be done to establish a solid body of international indigenous rights law that is regularly enforced in the United States and in all countries, we are reminded in these difficult times that human rights progress is often slow and uncertain. Even monumental human rights

achievements like the Geneva Conventions can be put in jeopardy by powerful states. But we also read the good news that advances in international human rights law are not easily reversed, and indigenous peoples have already made major advances of their own.

American Indians, Alaska Natives, and Native Hawaiians will decide over time how much of their energy and limited resources will be devoted to international human rights advocacy, just as they will decide whether to invest in legal and political battles for new statutes, a constitutional amendment, a new litigation strategy, or other measures to reform U.S. Indian law. An informed human rights community should be prepared to support the law reform decisions that they make. An example of such collaborative support is Amnesty International's report of April 2007 titled "Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence In the USA," which calls on the government to restore the jurisdiction of tribal governments and tribal courts over major crimes committed against Indian women on Indian reservations.[39] As discussed above, that self-governing authority of Indian nations and tribes was usurped by Congress in a law upheld by the Supreme Court in the infamous *Kagama* case of 1886 at the height of the Allotment Era. Amnesty Internantional's report urges Congress to reform U.S. Indian law in harmony with international human rights law. That law reform will be accomplished when the United States is finally persuaded to renounce its discriminatory Indian law doctrines and to uphold the human rights of America's indigenous peoples to self-determination, property, culture, due process, and equal protection of the law.

As we contemplate the tenacious fight for survival, freedom, and basic human rights that American Indians have carried out in recent decades and over hundreds of years, we should also look to the future and reflect on the well-known traditional Indian principle that important decisions should be made for the seventh generation to come.[40] It is a safe bet that American Indians and other indigenous peoples are committed to a very long fight to secure their human rights under both national and international law.

NOTES

1. The first peoples of the United States, sometimes called Native Americans, are most commonly known as American Indians, Alaska Natives, and Native Hawaiians. They and similarly situated peoples of the world are "indigenous peoples" in the parlance of international law and human rights. Most indigenous peoples do not capitalize "indigenous," and the term "people" (without 's') is strongly disfavored because of its negative implication with respect to their collective rights as nations, tribes, and communities. In this chapter, the terms "American Indians," "Indians," and "Indian nations and tribes" will sometimes be used to refer to all indigenous peoples of the United States. American indigenous leaders frequently adopt this shorthand terminology. They named their largest representative organization the National Congress of American Indians. Modern-era human rights issues are generally the same for American Indians, Alaska Natives, and Native Hawaiians, although they have distinct histories and some distinct elements in their legal and political relations with the United States. Indigenous peoples from throughout the United States have

generally been working together to advance the international human rights of all indigenous peoples.

2. The leading legal treatise is by S. James Anaya, *Indigenous Peoples in InternationalLaw*, 2nd ed. (New York: Oxford University Press, 2004).

3. Richard A. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (New York: Routledge, 2000), pp. 51, 131.

4. Oren Lyons, "When You Talk About Client Relationships, You are Talking about the Future of Nations," *Rethinking Indian Law* (New York: National Lawyers Guild, 1982), pp. iv, v.

5. Vine Deloria Jr. and Raymond J. DeMallie (eds.), *Documents of American Indian Diplomacy: Treaties, Agreements and Conventions, 1775–1979* (Norman, Okl.: University of Oklahoma Press, 1999).

6. Philip D. Curtin, *Imperialism: A Documentary History of Western Civilization* (New York: Harper and Row, 1972).

7. Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of their Lands* (New York: Oxford University Press, 2005).

8. *Mitchel v. United States*, 34 U.S. 711, 748 (1835).

9. 30 U.S. 1 (1831).

10. *Worchester v. Georgia*, 31 U.S. 515 (1832).

11. 118 U.S. 375 (1886).

12. 187 U.S. 553 (1903).

13. "Lectures on Constitutional Law," John Marshall Harlan Papers, Library of Congress Manuscript Division ,1:11 (reel 8) (January 8, 1898), pp. 12–13.

14. Message of President Theodore Roosevelt to Congress, December 3, 1901.

15. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

16. President Nixon's lawyer Leonard Garment led this important Indian policy reform. See Leonard Garment, *Crazy Rhythm* (Cambridge, MA: DaCapo Press, 1997), pp. 223–243.

17. *One America in the 21st Century; Forging a New Future*, The President's Initiative on Race, the Advisory Board's Report to the President (September 1998), pp. 38–40. See also: "*The Four Great Steps*," the 2006 State of Indian Nations report of the National Congress of American Indians, available online at www.ncai.org; "*We the People; American Indians and Alaska Natives in the United States*," Census 2000 Special Reports, U.S. Census Bureau (February 2006).

18. Available online at www.indiantrust.com

19. Robert A. Williams Jr., *Like A Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: Univeristy of Minnesota Press, 2005); See also Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, Harv. L. Rev. 119 (2005): 431; Joseph William Singer, *Double Bind: Indian Nations v. The Supreme Court, Harv. L. Rev.* 119 (2005): 1.

20. *United States v. Kagama*, 118 U.S. 375, 378 (1886)

21. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991)

22. *Mabo v. Queensland*, 166 C.L.R. 186 (High Court of Australia, 1988)

23. Robert A. Williams, n. 21, supra.

24. *Lara v. United States*, 541 U.S. 193 (2004)

25. President Richard M. Nixon, Special Message to Congress on Indian Affairs, July 8, 1970.

26. Reprinted in the report of the Study of the Problem of Discrimination Against Indigenous Populations by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. E/Cn.4/Sub.2/476/Add-5/Annex IV.

27. The United States subscribed to the American Declaration on the Rights and Duties of Man (1948) which was adopted six months before the Universal Declaration

of Human Rights. The United States has not ratified the American Convention on Human Rights. The Inter-American Commission on Human Rights and Inter-American Court of Human Rights promote compliance and adjudicate disputes.

28. Indigenous peoples of Latin America are at the bottom of every ranking of economic and social well-being. "The data show evidence of structural discrimination that takes the form of marginalization, exclusion and poverty and places indigenous people systematically in the lowest income quintiles in each country." *Social Panorama of Latin America 2006*, UN Economic Commission for Latin America and the Caribbean (December 2006) LC/G.236-P/I.

29. Fergus MacKay, *A Guide To Indigenous Peoples Rights In The Inter-American Human Rights System* (Copenhagen: International Working Group for Indigenous Affairs, 2002).

30. Inter-American Commission on Human Rights, OAS, Report No. 113/01, Case No. 11.140 (2002).

31. Ibid., pp. 19–20.

32. *U.S. Observations and Note on the Inter-American Commission on Human Rights, Petition on Mary and Carrie Dann* (December 17, 2002). Available online at www.state.gov/s/l/38647.htm.

33. Concluding Observations of the Human Rights Committee: Canada, CCPR/C/79/Add.105, para. 8 (April 7, 1999); Concluding Observations of the Human Rights Committee: USA, CCPR/C/USA/CO (July 2006), para. 37.

34. Available online at www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/25eeac288211bee9c1257181002a3cfb/$FILE/G0641251.pdf.

35. Available online at www.state.gov/g/drl/rls/55504.htm#intro.

36. *Statement by H.E. Ambassador Rosemary Banks, On Behalf of Australia, New Zealand and the United States, on Item 64 (a) The Declaration on the rights of the Indigenous Peoples, in the Third Committee of the 61st UN General Assembly* (October 16, 2006). Available online at www.un.int/usa/06_294.htm. The UN Human Rights Council approved the Declaration earlier in the same year, over the objection of the United States and a handful of other countries. Available online at daccessdds.un.org/doc/UNDOC/LTD/G06/125/71/PDF/G0612571.pdf?OpenElement; See also John R. Crook, *United States Joins Australia and New Zealand in Criticizing Proposed Declaration on Indigenous Peoples' Rights*, *Am. J. Intl. L.* 101 (January 2007): 211.

37. http://www.usunnewyork.usmission.gov/press_releases/20070913_204.html

38. Richard Falk, Human Rights Horizons (see note 3), at 142.

39. Available online at web.amnesty.org/library/print/ENGAMR510352007/ and www.washingtonpost.com/wp-dyn/content/article/2007/04/24/AR2007042401063.html.

40. This is a principle of the Great Law of Peace of the Haudenosaunee (Six Nations Iroquois Confederacy) that is also espoused by other Indian nations and tribes.

CHAPTER 4

Human Rights Advocacy in United States Capital Cases

Sandra Babcock

INTRODUCTION

The death penalty has long been on the forefront of international human rights campaigns. Capital punishment was debated by diplomats in San Francisco in 1948 during the drafting of the Universal Declaration on Human Rights, and continued to occupy the thoughts of world leaders as they formulated the "right to life" provisions of the twentieth century's major human rights instruments. Prompted in part by a vigorous abolitionist campaign by the nations of Western Europe, dozens of nations have decided to eliminate the death penalty over the last two decades. In addition to Europe, virtually all of Latin America and many African countries have ended state-sponsored executions, making abolition seem all but inevitable. At the cusp of the twenty-first century, there is a rapidly growing consensus that the death penalty is an archaic punishment that has no rightful place in the criminal justice systems of modern democracies.

The abolitionist trend, however, is by no means universal. The United States, Japan, China, and the majority of Asian and Middle Eastern nations show no signs of ending state-sponsored executions in the near future. These retentionist nations have generally viewed the death penalty as a matter of domestic penal policy. In the United States, where most crimes are punished by state law enforcement agencies that rarely interact with the international human rights community, capital punishment is viewed by many state legislatures as a legitimate measure to protect local communities from violent criminals.

Human rights organizations and anti–death penalty lawyers have been instrumental in "internationalizing" the debate over the U.S. death penalty.

Undoubtedly, efforts to "bring human rights home" in U.S. death penalty cases have been aided by the existence of a powerful international abolitionist community that includes foreign governments and intergovernmental organizations such as the European Union, which has gently but consistently pushed the United States government, the judiciary, and local politicians to acknowledge that the death penalty—or its application in a given case—can run afoul of international human rights norms. Abolitionist sentiment in the rest of the world has become stronger with each passing year, and international human rights bodies have imposed increasingly greater restrictions on the permissible use of the death penalty.

By contrast, U.S. courts have consistently upheld death sentences that would be viewed as contrary to established human rights principles. Moreover, both state and federal legislatures passed a series of draconian laws in the mid-1990s that imposed severe limitations on the scope of appellate review of capital cases. Thus, just as U.S. courts and legislatures were narrowing the grounds on which death row inmates could avoid execution, the international community was developing a progressive jurisprudence that was increasingly critical of the manner in which death sentences were carried out. The existence of a clear gap between international law and U.S. law, and the increasing desperation of lawyers seeking to prevent executions, inspired many to look abroad for help. Perhaps for these reasons, anti–death penalty lawyers and activists began to adopt a human rights framework in their advocacy years before such strategies were widely utilized by U.S. lawyers seeking vindication of other civil, political, and economic rights.

This chapter focuses largely on the evolution of human rights advocacy through litigation. The emphasis on litigation, as opposed to other human rights strategies, is in part attributable to my experience as an attorney engaged in representing individuals facing the death penalty in the United States. But focusing on litigation strategies makes sense for another reason, as well. By reviewing written documents filed by attorneys representing death row inmates and the opinions of state and federal judges, it is possible to gain a perspective on how the legal culture has responded to developing human rights norms on the death penalty. At the same time, I have tried to give due regard to the efforts of nongovernmental organizations and foreign governments, who have often partnered with anti–death penalty lawyers in their attempts to persuade state and federal judges to halt executions, to seek clemency or commutation of death sentences, and to work for legislative and policy reform.

THE INCORPORATION OF HUMAN RIGHTS DISCOURSE IN THE CONTEMPORARY STRUGGLE AGAINST THE DEATH PENALTY: LITIGATION STRATEGIES

Until recently, most capital defense attorneys viewed international human rights law as exotic and impractical, with little relevance to the defense of a prisoner on death row in the United States.[1] The vast majority of criminal

defense lawyers have received no training in the application of international law, which is not a required subject in most U.S. law schools. The average criminal defense attorney would no sooner raise an argument founded on international law than an argument based on the federal tax code. This disregard for international law is understandable, perhaps even excusable. After all, national trainings for capital defenders did not include sessions on international law until the mid-1990s. And the United States Supreme Court held in 1989 that international law was irrelevant to determining whether the death penalty violated the U.S. Constitution.[2]

Gradually, these attitudes have shifted. There are several factors that led some practitioners to reconsider the relevance of international human rights law, and over time, their work has built precedent and inspired other lawyers to consider human rights arguments and approaches. First, the United States ratified the International Covenant on Civil and Political Rights (ICCPR) on June 8, 1992. Article 6 of the ICCPR places restrictions on the application of the death penalty and encourages states parties to move toward abolition.[3] For example, Article 6 of the ICCPR prohibits the execution of offenders who were below the age of eighteen at the time of the offense—a provision that, until March 2005, directly conflicted with the practice of several states that allowed for the execution of offenders who were as young as sixteen at the time of the crime.[4] The divergence between Article 6 and U.S. practice led practitioners and academicians alike to speculate whether the ICCPR provided individuals under sentence of death with new, enforceable rights.[5] Not long thereafter, defense lawyers began to argue that U.S. death sentences violated the right to life under Article 6, the prohibition on cruel, inhuman, or degrading treatment or punishment contained in Article 7, the due process safeguards elaborated in Article 14, and the equal protection provisions of Article 26.[6]

Second, over the last several years, foreign courts and international tribunals have issued a set of influential opinions criticizing death row conditions under international law. In 1989 the European Court on Human Rights issued its landmark decision in the *Soering* case, holding that prolonged incarceration on Virginia's death row constituted cruel, inhuman, or degrading treatment or punishment.[7] The Judicial Committee of the Privy Council of the United Kingdom reached the same conclusion in the 1993 case of *Pratt v. Attorney General for Jamaica*.[8] These opinions prompted defense lawyers in the United States to mount new legal challenges to their clients' death sentences, arguing that their lengthy confinement on death row violated the Eighth Amendment, customary international law, and the International Covenant on Civil and Political Rights.

Third, U.S. lawyers have benefited greatly from the assistance of intergovernmental organizations such as the European Union, foreign governments such as Mexico, and a plethora of nongovernmental organizations (NGOs) and other advocates in Europe that strongly oppose the death penalty. These actors view the death penalty through the prism of human rights and have done much to educate U.S. advocates regarding helpful decisions from international tribunals. Similarly, the existence of international regional bodies, such as the Inter-American Commission on Human Rights, have provided a

forum for death penalty activists to develop alternate theories and to use the language of human rights to analyze the legality and morality of the death penalty. Foreign governments and international NGOs have also authored amicus curiae briefs on various aspects of international human right law in recent cases. The advent of the Internet has greatly increased the effectiveness of these partnerships.

Fourth, practitioners have observed that international legal arguments can slow the progress of their clients' cases, since prosecutors and judges are generally unfamiliar with the application of treaties and the relevance of customary international law. International law also is also attractive in that it involves complex, unsettled legal questions. It is one of the few sources of law that can still be used to mount broad, systemic challenges to the application of the death penalty—unlike arguments based on domestic constitutional principles, most of which have already been rejected. In addition to raising complicated questions about the relationship between domestic and international law, human rights also presents U.S. lawyers with new ways of conceptualizing rights and legal theories. For example, international law allows lawyers to conceive of the death penalty as a violation of the "right to life," rather than a criminal penalty for murder.

Fifth, the imposition of death sentences on foreign nationals—many from countries with strong abolitionist sentiments—provided unique opportunities for U.S. lawyers to incorporate international law into domestic legal arguments. For example, in the 1990s several foreign governments protested the executions of their nationals based on the failure of U.S. authorities to advise the condemned nationals of their right to contact consular officials at the time of their initial detention. It has since become clear that the vast majority of foreign nationals on death row were never advised of this right. Yet the United States has ratified a treaty—the Vienna Convention on Consular Relations—that requires local authorities to notify detained foreign nationals, without delay, of their right to have their consulate notified of their detention.[9] The United States's uncontested violation of the Vienna Convention in capital cases resulted in unprecedented litigation by petitioners as well as foreign governments in domestic and international tribunals.

Finally, and most important, following practitioners' consistent citation of international sources for several years, the Supreme Court of the United States has recently acknowledged the relevance of international law and the practices of other nations in seminal cases restricting the application of the death penalty. In 2002, the Court considered the opinion of the "world community" in concluding that the execution of mentally retarded offenders violates the Eighth Amendment.[10] And in 2005, the Court reviewed the practices of other nations and relevant treaty provisions in ruling that the death penalty could no longer be applied to juvenile offenders.[11] Although the Supreme Court's citation of international law in those two cases was controversial, a majority of the Court's current justices believe that international law is relevant to their evaluation of whether the application of the death penalty in a given case constitutes "cruel and unusual punishment" in violation of the Constitution's Eighth Amendment. This view is understandable in light of the nature of the Court's Eighth Amendment jurisprudence, which calls for

an assessment of whether a given punishment is consistent with "evolving standards of decency that mark the progress of a maturing society"[12]—an amorphous concept that invites comparative analysis. Indeed, the Court cited international practice in several death penalty cases decided in the 1970s and 1980s.[13]

While it is still too soon to say that the presentation of arguments based on international human rights law is the norm for lawyers representing death row inmates, the work of a small but dedicated group of capital defenders to develop human rights arguments and forums has made litigation of such claims far more widespread than it was even ten years ago. And over time, the litigation strategies employed by both defense counsel and nongovernmental organizations in these cases have both developed, and evolved in response to, the treatment of human rights arguments by both the state and federal judiciary.

Human Rights and the Death Penalty in the United States Supreme Court

In the capital defense community in the 1970s and 1980s, international law was little known and rarely discussed. In a series of important challenges to the death penalty, however, practitioners began to make use of international norms to support arguments under the Eighth Amendment to the United States Constitution.[14] The growing momentum of the abolitionist movement abroad provided the impetus for these early efforts by litigators, who justified their invocation of international practice by citing the Supreme Court's 1958 decision in *Trop v. Dulles*.[15] In *Trop,* the Court struck down a federal law providing that an individual convicted of deserting the armed forces during times of war would lose his rights of citizenship. Declaring that a challenged punishment must be measured against "the evolving standards of decency that mark the progress of a maturing society," the Court reviewed the practices of other nations in concluding that denationalization amounted to cruel and unusual punishment under the Eighth Amendment. The reasoning in *Trop* was key to the arguments advanced by capital litigators, since the death penalty had unquestionably been viewed as consistent with the Eighth Amendment in the past. As Anthony Amsterdam, a lawyer for the NAACP Legal Defense Fund and lead counsel in many seminal death penalty cases, explained, "Our only hope of getting the death penalty declared unconstitutional lay in arguing that something had changed."[16] *Trop* allowed Amsterdam and others to argue that the death penalty was an outmoded punishment that was inconsistent with contemporary values. Abolitionist trends in Europe and Latin America lent strong support to that view.

Consistent with *Trop*, international law or the practices of other nations were cited in these landmark cases as evidence that the death penalty—or its application to a discrete group of individuals—was inconsistent with "evolving standards of decency." In other words, while defense attorneys cited international trends in favor of the abolition of the death penalty as a factor the Court could consider in its constitutional analysis, they rarely argued that international law, standing alone, gave rise to binding legal obligations.

For example, in the landmark cases of *Furman v. Georgia*[17] and *Gregg v. Georgia*,[18] where the Court grappled with the constitutionality of the death penalty in the United States, lawyers for the NAACP Legal Defense Fund presented evidence of international practice in an attempt to persuade the Court that the death penalty was an archaic and inhumane punishment inconsistent with evolving standards of decency. Citing *Trop*, they presented extensive documentation of an emerging worldwide trend toward abolition. In both cases, however, the justices of the Court largely ignored the evidence of international norms.[19]

One year after the Supreme Court decided *Gregg*, NAACP lawyers challenged the death sentence of a Georgia man who had been sentenced to death for the crime of rape in the case of *Coker v. Georgia*.[20] Counsel argued that the imposition of the death penalty for rape constituted cruel and unusual punishment. Although the argument did not figure prominently in their brief, counsel argued that on an international level, "the death penalty for rape has atrophied dramatically, to the point of virtually universal abolition among civilized nations." In support of this conclusion, counsel cited a survey published by the United Nations Department of Economic and Social Affairs.[21] This time, the Supreme Court took note. Writing for the majority, Justice White noted: "It is not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue." The Court concluded that the sentence of death for rape was "grossly disproportionate and excessive punishment" forbidden by the Eighth Amendment.[22]

Defense lawyers once again presented evidence of international norms in *Enmund v. Florida*, a case involving a defendant sentenced to death under the "felony-murder" rule.[23] Enmund's legal team—which included the same lawyers who had represented the petitioners in Furman, Gregg, and Coker—argued that the "climate of international opinion" was "strongly opposed" to death as a sanction for unintentional homicides.[24] Adopting the petitioner's arguments in its opinion, the Court noted that international norms were "not irrelevant" to its analysis, observing that the doctrine of felony murder had been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and was unknown in continental Europe.[25]

The next major challenge to the administration of the death penalty came in a case brought to the Supreme Court in 1985. In *McCleskey v. Kemp*,[26] lawyers argued that capital sentencing procedures in Georgia were racially discriminatory, relying upon an exhaustive statistical analysis of Georgia's sentencing procedures. Although McCleskey's lawyers failed to cite international law in support of their contentions, the International Human Rights Law Group ("IHRLG") filed a brief as amicus curiae, arguing, for the first time, that racial discrimination in capital sentencing violated a "peremptory norm of international law."[27] The IHRLG's brief marks the first occasion in which the Court was urged, in a capital case, to consider whether international law gave rise to individual rights distinct from those guaranteed by the United States Constitution. It is worth observing that the IHRLG—now known as "Global Rights"—was a human rights organization with no specific

mandate regarding the abolition of the death penalty, but whose advocacy principally focused on the enforcement of international human rights norms. As such, it was willing to advance an argument that McCleskey's counsel believed the Court would be unwilling to accept.

The IHRLG argued that the Court was required to construe the Georgia death penalty statute in a manner consistent with international law, and that customary international law created individual rights enforceable in United States courts. Since customary international norms forbade discrimination on the basis of race, the IHRLG reasoned, the Georgia sentencing scheme violated international law and should be struck down.[28] In the alternative, the IHRLG urged the Court to interpret the Eighth Amendment in light of international norms of nondiscrimination—a more conservative argument similar to that raised by the petitioners in *Coker*. The Court declined the invitation, and failed to even acknowledge the existence of international norms on the subject. By a five-to-four vote, the Court rejected McCleskey's arguments and upheld Georgia's capital sentencing scheme.

One year later after the *McCleskey* decision, the Court decided *Thompson v. Oklahoma*.[29] Thompson had been sentenced to death for a crime committed at the age of fifteen. His lawyers, this time joined by both Amnesty International and the IHRLG as amici, argued that the imposition of the death penalty on a fifteen-year-old offender violated contemporary standards of decency. Thompson's counsel, following the pattern established in *Coker* and *Enmund*, argued the Court should take into consideration the "emerging consensus" of the international community rejecting juvenile executions.[30] Amnesty International followed a similar course in its amicus brief, pointing to a "nearly universal consensus of the international community that the execution of juvenile offenders is not only offensive to contemporary international norms of moral decency but also violates internationally recognized legal standards."[31] Amnesty urged the Court to consider this consensus as one factor in its Eighth Amendment analysis.

The IHRLG went one step further. Structuring its brief along the lines of its amicus in *McCleskey*, the IHRLG argued that states such as Oklahoma were obligated, under the Supremacy Clause of the United States Constitution,[32] to respect international law, *including* customary international law. Since customary international law forbade the execution of juvenile offenders the state of Oklahoma could not execute Thompson without violating the Supremacy Clause.[33]

The briefs in *Thompson* presented the Court with the most extensive discussion of international law the Court had ever received in a capital case. Justice Stevens's plurality opinion accordingly focused on international law slightly more than the Court had in previous cases, citing extensively to Amnesty International's amicus brief.[34] This prompted sharp criticism from the dissenting justices, led by Justice Scalia, who characterized the plurality's reliance on Amnesty International's account as "totally inappropriate."[35] Nevertheless, Thompson's death sentence was vacated, and the Court held the death penalty could not be applied to any offender aged fifteen or below at the time of the crime.

One year later, the Court reached the opposite conclusion in the case of sixteen- and seventeen-year-old offenders.[36] The petitioner, Amnesty International, and the IHRLG all filed briefs, and made substantially the same arguments as they had in *Thompson*. Writing for the majority, Justice Scalia emphatically rejected the notion that international norms were relevant to the Court's Eighth Amendment analysis: "We emphasize that it is *American* conceptions of decency that are dispositive."[37]

For thirteen years following *Stanford v. Kentucky*, only two Supreme Court justices occasionally referred to decisions from international tribunals, and only in opinions dissenting from denial of certiorari.[38] During that time, the lower federal courts repeatedly cited *Stanford* in rejecting claims based all or in part on international law. Within the capital defense community, many lawyers grew convinced of the futility of international legal arguments opposing the death penalty. Others, however, began to develop new litigation strategies (discussed later in this chapter)—particularly after the U.S. ratification of the ICCPR in 1992.

The Execution of Juvenile Offenders

In the 2002 case of *Atkins v. Virginia*, the Supreme Court signaled that it was once again willing to consider international norms in evaluating the legality of capital punishment. In *Atkins,* the Court determined that the execution of mentally retarded offenders violated the Eighth Amendment. Buried in a footnote, the Court cited an amicus brief filed by the European Union and noted that the "world community . . . overwhelmingly disapproved" of the execution of mentally retarded offenders.[39] Although it was a passing reference, it prompted Justice Scalia to respond in his dissenting opinion that "the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people," were irrelevant. But it was not until the Supreme Court once again confronted the question of juvenile executions that it squarely rejected Justice Scalia's opinion in *Stanford* and embraced the notion that international norms were relevant to its Eighth Amendment analysis.

More than any other aspect of capital punishment, the execution of juvenile offenders has been nearly universally condemned. Article 6 (5) of the ICCPR expressly prohibits the application of the death penalty to individuals who were under the age of eighteen at the time of the offense. Other treaties, such as the Convention on the Rights of the Child, the American Convention on Human Rights, the Fourth Geneva Convention, and the African Charter on the Rights and Welfare of the Child all prohibit the execution of juvenile offenders. Only seven nations have executed juvenile offenders since 1990—Iran, Nigeria, Pakistan, Yemen, the Democratic Republic of the Congo, Saudi Arabia, and the United States.

In order to safeguard its right to execute juvenile offenders, the United States entered a reservation to Article 6 of the ICCPR at the time it ratified the treaty. There was much academic debate over the validity and effect of that reservation, however, and in 1999 an enterprising public defender from Nevada filed a petition for writ of certiorari with the United States Supreme Court in *Domingues v. Nevada*, arguing that the U.S. was bound to comply

with Article 6(5) notwithstanding its reservation.[40] In addition, he argued that the prohibition against executing juvenile offenders had become so entrenched that it was jus cogens, a peremptory norm of international law from which the United States could not derogate. Upon receipt of the petitioner's appeal, the Supreme Court invited the United States Solicitor General to submit a memorandum expressing the views of the United States. This highly unusual order caused a ripple of excitement in the community of death penalty lawyers, many of whom believed the time was ripe for the Supreme Court to revisit its decision in *Stanford*.

The Clinton administration, however, urged the Court to reject Domingues's petition. The United States informed the Court that the Senate's reservation to Article 6(5) of the ICCPR was valid as a matter of domestic constitutional and international law, and that the treaty provision was therefore not binding. With regard to customary international law, the United States argued that it had persistently objected to the asserted rule of customary international law, and was therefore not bound to refrain from executing juvenile offenders. Finally, the United States argued that there was no authoritative judicial decision that "illuminates in any way the question of whether a jus cogens norm against capital punishment for sixteen-year-old offenders has developed."[41] Accordingly, the United States suggested the Court should refrain from deciding the issue.

After receiving the United States's brief, the Supreme Court denied Domingues's petition. But the fact that the Court had expressed interest in the issue encouraged dozens of lawyers to file similar petitions.[42] Six more years passed, however, until the Supreme Court finally decided to review the constitutionality of executing juvenile offenders in the case of Christopher Simmons, who was only seventeen when he committed the murder that landed him on death row.

Inspired by the *Atkins* footnote, Simmons's legal team invited the European Union and the Human Rights Committee of the Bar of England and Wales to submit amicus briefs arguing that the execution of juvenile offenders violated international norms. Alone among the amici, the Human Rights Committee of the Bar of England and Wales was the only amicus to argue that the prohibition on executing juvenile offenders was a peremptory norm of international law from which the United States could not derogate. The European Union, joined by Mexico, Switzerland, Norway, and other nations, submitted a brief describing the "international consensus amongst nations against the execution of persons under the age of 18 at the time of the offense," but did not go so far as to argue that this consensus amounted to a binding norm of jus cogens. The Simmons legal team adhered to the same strategy adopted by petitioners in earlier Supreme Court cases. They intentionally refrained from arguing that the United States was bound to comply with international norms prohibiting the execution of juvenile offenders, believing that such arguments would not attract the support of a majority of the Court. Instead, they described the overwhelming international consensus against the execution of juvenile offenders as support for their principal argument; namely, that the juvenile death penalty violated the Eighth Amendment to the U.S. Constitution.

In its 2005 decision, the Court cited both briefs in a lengthy discussion of the treaty norms and international practice relevant to its decision to strike down the death penalty for sixteen- and seventeen-year-old offenders. Justice Kennedy's majority opinion emphatically reaffirmed the role of international law as "instructive" and "significant" in interpreting the contours of the Eighth Amendment.[43] The Court cited state practice, noting that only seven countries in the world had executed juvenile offenders in recent history, as well as international instruments such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, in determining that the "overwhelming weight of international opinion" was opposed to the juvenile death penalty.[44] The Court concluded its analysis by observing that

> [o]ver time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.[45]

Justice Scalia issued a scathing dissent, excoriating the majority's citation of international norms:

> Foreign sources are cited today, *not* to underscore our "fidelity" to the Constitution, our "pride in its origins," and "our own [American] heritage." To the contrary, they are cited *to set aside* the centuries-old American practice—a practice still engaged in by a large majority of the relevant States—of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources "affirm," rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.

Notwithstanding Justice Scalia's ire, a current majority of the Supreme Court believes that international law, whether expressed in binding treaty obligations or in a consistent state practice, is relevant in determining whether the application of the death penalty violates the Eighth Amendment. At the same time, the Court has taken pains to emphasize that it is not *bound* by international law.

In the wake of *Roper v. Simmons,* the debate over the citation of international (and foreign) law by U.S. courts has become especially heated. At the confirmation hearings of new Supreme Court Justices Roberts and Alito, each were asked their opinion as to whether the citation of international law was appropriate. Each replied that it was not. Whether the Supreme Court

continues to consider international law in its death penalty jurisprudence largely depends on who replaces the next justice who retires (or expires).

Broadening the Use of International Human Rights Law in the Lower State and Federal Courts

Today, capital defense lawyers are also raising international legal arguments in the lower state and federal courts, in cases that receive no publicity and, as a result, go largely unnoticed. Many of these arguments are based on the provisions of the ICCPR. In 1999, for example, lawyers in South Carolina argued that the prosecution's attempt to seek the death penalty against Chavis Miller, an African American man, and its corresponding failure to investigate white suspects, was both arbitrary and discriminatory in violation of Articles 2, 6, 14, and 26 of the Covenant.[46] In Arizona, lawyers argued in 2001 that the imposition of the death penalty in the case of Fredi Bladimir Flores Zeveda, a Mexican national, would violate Article 6 of the ICCPR, since he had neither killed nor intended to kill the victim.[47] Bladimir's lawyers reasoned that since Bladimir was merely present at the scene, he had not committed a "most serious crime" and the imposition of the death penalty would be impermissibly arbitrary.[48] And in dozens of cases, lawyers have argued that long-term incarceration on death row, or "death row phenomenon," constitutes cruel, inhuman, or degrading treatment or punishment in violation of Article 7 of the ICCPR.[49]

This last argument is not a novel one for U.S. courts. In 1960, defense counsel for Caryl Chessman argued that Chessman had been subjected to cruel and unusual punishment by virtue of his eleven and one-half years on death row. However, after rejection by the Ninth Circuit, the argument was largely abandoned by U.S. capital defenders. But the 1989 decision of the European Court on Human Rights in *Soering v. United Kingdom* and the 1993 decision of the British Privy Council in *Pratt and Morgan* provided capital litigators with new ammunition.[50] Beginning with the case of Clarence Lackey in Texas, and followed closely by the cases of Duncan McKenzie[51] and others, lawyers sought to persuade the courts to follow Europe's lead. Although the lower federal courts have thus far been unreceptive, two Supreme Court justices, citing *Soering* and *Pratt and Morgan*, have expressed concerns that lengthy stays on death row could violate the Eighth Amendment.[52]

In the 1995 case of Clarence Lackey, Justice Stevens opined that "[p]etitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study."[53] And in the 1999 cases of *Knight v. Florida* and *Moore v. Nebraska*, Justice Breyer wrote a lengthy dissent from the Court's decision to deny review of petitioners' claims.[54] Relying in part on *Pratt and Morgan*, *Soering*, and decisions by the Supreme Courts of India and Zimbabwe, Justice Breyer observed:

> Both of these cases involve astonishingly long delays flowing in significant part from constitutionally defective death penalty procedures. Where a delay, measured

> in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one. I believe this Court should consider that claim now.[55]

In addition to raising claims under the ICCPR, capital defense attorneys are increasingly relying on customary international law in their efforts to prevent executions. Customary international law is often called the "law of nations." Customary international law arises from the behavior of states: Generally speaking, a norm of customary international law results when states follow a general and consistent practice because they feel legally obligated to act a certain way (for example, by refraining from engaging in particular behavior). To ascertain whether a norm has attained the status of customary international law, jurists look to state practice, which they determine by reference to sources such as state legislation, international and national judicial decisions, treaty ratifications, the practice of international and regional governmental organizations, and domestic policy statements. Customary law gives rise to binding legal obligations in much the same way as a treaty. In fact, a state that is not a party to a treaty cannot be bound by that treaty, but it can be bound by customary international law that derives from the rules of the treaty.

Advocates have turned to customary international law because of the nearly insurmountable problems they have encountered in enforcing the provisions of the ICCPR and other human rights treaties in U.S. courts. When the United States Senate ratified the ICCPR and other human rights treaties in the 1990s, it declared that individuals could not seek judicial remedies (such as new trials, or civil damages) for violations of their rights under the ICCPR. The courts have consistently upheld these limitations on the application of the ICCPR, effectively preventing individual defendants in capital cases from obtaining judicial relief for violations of the ICCPR's provisions. Customary international law is not burdened by such problems, although it can sometimes be difficult to establish that a customary norm exists.

There are two ways capital defense lawyers have utilized customary international law when litigating in U.S. courts. First, they have argued that international customary law is an independent body of law binding on U.S. courts. For example, in the New Jersey case of *State v. Nelson*,[56] defense lawyers argued that the expansion of the death penalty in that state to reach additional crimes violated a norm of customary international law.[57] Defense counsel in *Kansas v. Kleypas*[58] argued, along similar lines, that the reinstatement of the death penalty in Kansas after it had been abolished violated customary international law. In both cases, the arguments were summarily rejected.[59]

Practitioners have also begun to argue that courts should look to customary international law as a guide to interpreting U.S. law, even where the court rejects the notion that international customary law has binding force.[60] This invocation of customary international law is similar to in many respects to the NAACP's citation of international practice in the death penalty cases reviewed earlier in this chapter. By pressing for judicial recognition of customary international norms, practitioners have continued to educate the courts regarding a source of international law that has largely been ignored by U.S. courts,

with the notable exception of federal courts considering complaints filed under the Alien Tort Statute. For example, there is strong support for the notion that lengthy confinement on death row violates a customary international norm prohibiting cruel, inhuman, or degrading treatment or punishment, *in addition* to violating Article 7 of the ICCPR. While the courts have not yet accepted this argument, there is a growing body of foreign and international precedent that may yet prove persuasive in the right case.

Litigation Before International Tribunals

Whereas domestic courts are frequently unfamiliar with or hostile to human rights–based arguments, international human rights tribunals are often far more receptive. For this reason, a number of capital defense attorneys, aided by human rights practitioners in law school clinics, have taken their human rights arguments to international tribunals. Litigation before these tribunals provides opportunities to further expand and develop favorable human rights law. The main challenge in litigating before human rights tribunals, however, is persuading U.S. courts or state clemency authorities to abide by the rulings of international jurists.

The Inter-American Commission on Human Rights

While the United Nations has established committees to monitor the enforcement of the ICCPR and the Torture Convention, the United States has not accepted their jurisdiction to hear individual complaints of treaty violations. As a result, there is only one human rights commission that is empowered to hear individual complaints in capital cases in the United States: the Inter-American Commission on Human Rights (IACHR). The IACHR was established by the Organization of American States, a regional, intergovernmental organization comprising the nations of North, Central, and South America. Pursuant to the IACHR's statute, it is authorized to receive and review complaints regarding alleged violations of the American Declaration of the Rights and Duties of Man.[61] If it determines that the rights of the complainant have been violated, it typically issues recommendations calling upon the member state to provide some form of relief.

For many years, capital cases have made up the bulk of the IACHR's docket in the United States. The IACHR has issued at least a dozen decisions in U.S. death penalty cases calling upon the U.S. government to vacate individual death sentences. Frequently, however, those decisions have been issued only after the prisoner has already been executed. This situation arises because of the IACHR's "exhaustion" rule, which requires that petitioners appeal to domestic courts before bringing a case to the IACHR. As a result, death row inmates are frequently compelled to file petitions with the IACHR on the eve of execution. In those cases, the IACHR will typically request that the United States refrain from carrying out the prisoner's execution until it has had an opportunity to review his claims. But the U.S. government has consistently taken the position that it is not bound by the IACHR's requests, and has refused to take any measures to halt executions in death penalty cases under consideration by the IACHR.

Frustrated by the U.S. government's stance, death penalty attorneys have begun to file petitions with the IACHR well before their clients have been scheduled for execution. And in at least three recent cases, the IACHR has been able to issue final recommendations before the prisoners were executed.[62]

The first and most highly publicized of these three cases was that of Juan Raul Garza, who was one of the first prisoners executed by the federal government since it reinstated the death penalty. At Garza's trial, federal prosecutors had introduced evidence of four unadjudicated homicides that had allegedly taken place in Mexico. Based in part on this evidence, Garza's jury recommended that he be sentenced to death. At the Commission, Garza's lawyers argued that the prosecutors' reliance on crimes allegedly committed in a foreign country, for which he had never been tried, and against which he could not adequately defend himself, violated his due process, equal protection, and fair trial rights under the American Declaration.[63]

After receiving written submissions and hearing oral argument, the Commission concluded that the United States would perpetrate a "grave and irreparable violation of the fundamental right to life under Article I of the American Declaration, should it proceed with Mr. Garza's execution."[64] The Commission accordingly urged the United States to provide Garza an effective remedy by commuting his sentence.[65]

The United States refused to comply with the Commission's request. The Secretary of State responded that the United States did not agree with the Commission's conclusions. Moreover, the United States stated that the Commission had no authority to issue precautionary measures, and that the Commission's request was nonbinding.[66]

Garza's lawyers next petitioned the federal district court to enforce the Commission's decision. The district court dismissed the case for lack of jurisdiction. Garza appealed, but the Seventh Circuit affirmed the decision, noting that the American Declaration was "an aspirational document which . . . did not on its own create any enforceable obligations."[67] Following the Fourth Circuit's lead in *Roach v. Aiken*,[68] the court held that the IACHR's decisions were not binding.[69]

The second case was that of Michael Domingues—the juvenile offender whose case was discussed earlier in this chapter. The IACHR agreed to review the case only after the Supreme Court turned down Domingues's petition. After conducting a thorough review of state practice and the provisions of international treaties prohibiting the execution of individuals under the age of eighteen, the IACHR determined that Domingues's death sentence violated established norms of international law amounting to jus cogens. Three years later, the IACHR's decision was cited by the petitioners and several amici in *Roper v. Simmons* as evidence that the execution of juvenile offenders was inconsistent with contemporary standards of decency.

The third case was that of Roberto Moreno Ramos, a Mexican national condemned to death in Texas. In November 2002, after he had exhausted all of his appellate remedies in U.S. courts, but *before* the state of Texas had scheduled his execution, Moreno Ramos filed a petition with the IACHR. The IACHR requested that the United States refrain from executing Moreno Ramos until

it had an opportunity to review his claims. This time, a Texas judge agreed to defer the execution until the IACHR had considered Moreno Ramos's petition. The local prosecutor agreed not to seek an execution date after he was informed of the IACHR's mandate, provided that defense attorneys would do nothing to delay the proceedings before the IACHR. The IACHR issued its decision in October 2003, and recommended that Moreno Ramos's death sentence be vacated as a remedy for the human rights violations that had taken place during his capital murder trial. Moreno Ramos's attorneys cited the IACHR's decision in subsequent litigation in the Texas Court of Criminal Appeals. At the time of this writing, the Texas court has not yet issued a decision, and Moreno Ramos is still alive—more than four years after he first petitioned the IACHR.

Attorneys have had little luck convincing U.S. judges that the recommendations of the IACHR are binding. Nonetheless, as the above cases demonstrate, there are a number of ways in which litigation before the IACHR can increase the chances that a death sentence will not be carried out. First, attorneys can seek to bring international law claims to the IACHR in an attempt to establish a body of international jurisprudence that will eventually affect U.S. decision makers. This was precisely what the attorneys achieved in Domingues. Although it is nearly impossible to measure the effect of the IACHR's decision in Domingues, it is noteworthy that the petitioners and several amici relied on the decision as support for their arguments in *Roper v. Simmons.* Second, attorneys have begun to file petitions with the IACHR earlier in the appellate process, with the hope that they can forestall their clients' executions as in the case of Moreno Ramos. In the field of death penalty litigation, obtaining a stay of execution is considered a victory in itself, even if it only succeeds in prolonging the life of a prisoner by months or years. Finally, attorneys have sought to persuade parole boards and governors to grant temporary reprieves or commute death sentences to life imprisonment in accordance with the requests of the Inter-American Commission. So far, these attempts have been unsuccessful, in part because so few prisoners have obtained final decisions from the IACHR prior to being executed.

The International Court of Justice

The execution of foreign nationals in the United States has created international controversy and has strained U.S. relations with its closest allies. It is not merely that many foreign nationals are from countries that no longer have a death penalty. Rather, foreign governments have objected to the failure of U.S. authorities to advise their nationals of their rights to seek consular assistance, pursuant to Article 36 of the Vienna Convention on Consular Relations. There are approximately 120 foreign nationals on death rows around the country, and most were never advised that they could call upon their consulates for critical assistance during their capital murder trials. As a result, certain foreign governments—most notably Canada, Mexico, Germany, and Paraguay—have filed diplomatic protests and have sought legal remedies for their nationals in both domestic and international tribunals.

Since 1998, Paraguay, Germany, and Mexico have all brought cases to the International Court of Justice involving foreign nationals sentenced to death in the United States. In each case, local authorities had failed to notify the foreign detainees of their rights to consular notification and assistance under Article 36 of the Vienna Convention on Consular Relations (VCCR). It is beyond the scope of this chapter to review the extensive litigation in each of these cases, but a very brief synopsis of the arguments is necessary for context. In essence, Paraguay, Germany, and Mexico contended that if their nationals had been advised of their consular rights, consular officers would have been able to provide material assistance that would have changed the outcome of their capital murder prosecutions. Among other things, they contended that consular officers would have been able to gather critical evidence and act as a cultural bridge between their nationals and their lawyers. For that reason, each government took the position that the United States was required to provide a meaningful legal remedy for the treaty violation.

The International Court of Justice (ICJ) is the judicial arm of the United Nations and arguably the most prestigious and well-respected of all the international tribunals. The ICJ is not a human rights tribunal per se. The cases it has decided range from disputes over territorial boundaries to the legality of armed aggression. The ICJ has the power to issue advisory opinions upon the request of certain organs or specialized agencies of the United Nations. In cases involving disputes between nations, only governments can bring cases to the court, and only on the condition that both parties to the litigation have consented to the ICJ's jurisdiction. In the VCCR cases brought by Paraguay, Germany, and Mexico, all parties (including the United States) had signed an Optional Protocol to the VCCR, which provides that the ICJ has jurisdiction to resolve disputes over the interpretation or application of the treaty's provisions.

The VCCR is not a human rights treaty, and it could be argued that a discussion of the ICJ's jurisprudence in this area has no place in a chapter regarding the application of human rights norms in the anti–death penalty movement. But the arguments of Germany and Mexico, in particular, were closely intertwined with their view that their nationals had been subjected to inequitable and unjust treatment in the U.S. criminal justice system. Mexico expressly argued that the right to consular assistance was indeed a human right, consistent with its position in an earlier case it had argued before the Inter-American Court on Human Rights. Likewise, attorneys litigating Vienna Convention violations in domestic death penalty cases have frequently argued that the right to seek consular assistance is a fundamental due process right. But irrespective of whether the VCCR is a human rights treaty, the ICJ cases have played a critical role in efforts to internationalize the domestic debate over the death penalty.

Paraguay was the first to bring a suit against the United States under the Optional Protocol to the VCCR. On April 3, 1998—eleven days before Paraguayan national Angel Breard was scheduled for execution—Paraguay filed suit in the ICJ and requested that the ICJ order the United States to stay Breard's execution. On April 9, the ICJ issued an order requesting that the United States "take all measures at its disposal to ensure that Angel Francisco

Breard is not executed pending the final decision in these proceedings." The Supreme Court refused to stay the execution and denied Paraguay's appeal.[70] Paraguay later dropped its case before the ICJ.

Less than a year later, the state of Arizona was preparing to execute Karl and Walter LaGrand, two German nationals on Arizona's death row who had never been advised of their rights to consular notification and access. When Germany's diplomatic overtures failed to persuade Arizona officials to stop the executions, Germany filed an application in the ICJ on March 2, 1999, and, like Paraguay, requested an order from the ICJ directing the United States to stay Walter LaGrand's execution.[71] On March 3, 1999, the ICJ requested that the United States take all measures at its disposal to prevent the execution of Walter LaGrand. As in the case of Angel Breard, the United States refused to heed the ICJ's order and Walter LaGrand was executed. Nevertheless, Germany pressed the ICJ to determine whether legal remedies were required for VCCR violations. In June 2001, the Court answered this question in the affirmative, rejecting the United States's argument that the only remedy available for a violation of the treaty was a diplomatic apology.

Meanwhile, the government of Mexico had become increasingly concerned about the numbers of Mexican nationals on death row in the United States. The great majority of these nationals had never been advised of their rights to consular notification and access. In December 1998, Mexico sought an advisory opinion from the Inter-American Court on Human Rights regarding the application of Article 36 of the VCCR. The Inter-American Court received briefs and heard oral argument from eight nations—including the United States—and eighteen nongovernmental organizations, academics, and individuals appearing as amici curiae. After analyzing the text of the treaty, the intent of the parties, and its application in capital cases, the court issued its opinion on October 1, 1999.[72] The court observed that Article 36 provides one of the "minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial"—a right embodied in Article 14(3)(b) of the ICCPR. The court concluded that the execution of an individual who had been afforded no opportunity to exercise his rights to consular notification and access would be contrary to international law.[73]

Armed with the new precedent established by the Inter-American Court, the Mexican Foreign Ministry established the Mexican Capital Legal Assistance Program in September 2000. Staffed by experienced capital defense attorneys, the program was designed to provide assistance to hundreds of Mexican nationals facing the death penalty around the United States. Since September 2000, Mexico's lawyers have filed amicus briefs raising violations of international human rights norms in well over a dozen death penalty cases. Among other topics, those briefs have addressed violations of the VCCR, the due process provisions of the International Covenant on Civil and Political Rights, international customary law regarding the execution of juvenile offenders, and disparate treatment of Mexican nationals sentenced to death as a violation of the Convention on the Elimination of all Forms of Racial Discrimination. In a California case, Mexico argued that a court's refusal to

grant a change of venue violated the defendant's right to an impartial tribunal under Article 14 of the ICCPR.[74] In a postconviction case in Illinois,[75] Mexico argued that its national's death sentence was the result of disparate treatment, in violation of Article 26 of the ICCPR and Articles 5 and 6 of the Convention on the Elimination of All Forms of Racial Discrimination.[76] In yet another case where the defendant's confession was procured through the coercive tactics of police officers in El Paso, Texas, Mexico has filed an amicus brief raising arguments under the Torture Convention and Article 7 of the ICCPR.[77]

Despite the resources that Mexico poured into the defense of its nationals facing the death penalty, it was unable to prevent the execution of Mexican national Javier Suárez Medina on August 14, 2002. Like Breard and the LaGrand brothers, Suárez Medina had never been informed of his consular rights. Although the ICJ and the Inter-American Court had each determined that the United States was obligated to provide a legal remedy in such cases, and although an unprecedented number of foreign nations filed an amicus brief in the U.S. Supreme Court urging the Court to grant review of the case, Suárez Medina lost his appeals.

In January 2003, Mexico brought a case to the ICJ on behalf of the remaining fifty-four Mexican nationals on death row across the United States. Unlike Paraguay and Germany, Mexico filed its initial application with the ICJ at a time when no Mexican nationals were scheduled for execution. Nevertheless, three Mexican nationals were nearing the end of their appeals, and Mexico feared they could receive execution dates before the ICJ was able to rule on the merits of Mexico's claims. Accordingly, Mexico asked the ICJ for an order preventing the United States from carrying out the execution of any Mexican national pending the outcome of the ICJ proceedings. After hearing argument from the parties, the ICJ directed the United States to take all measures necessary to prevent the execution of three Mexican nationals—two in Texas, and one in Oklahoma.

Attorneys for the government of Mexico and for the affected nationals immediately informed prosecutors in Texas and Oklahoma of the ICJ ruling. Somewhat surprisingly, all three prosecutors agreed not to request an execution date until the ICJ had issued its final judgment. The Oklahoma attorney general went so far as to file a motion with the Oklahoma Court of Criminal Appeals, asking the court to refrain from setting an execution date for Osbaldo Torres out of comity to the ICJ. None of the affected Mexican nationals have yet been executed.

The ICJ issued its final judgment in March 2004. In brief, it concluded that fifty-one Mexican nationals on death row were entitled to judicial hearings to determine whether the fairness of their trials was undermined by the consular rights violations. Although the ruling was modest in scope, it was immediately repudiated by the Texas governor. Attorneys representing the fifty-one nationals began to file legal briefs citing the ICJ judgment and demanding hearings. The courts were divided over how to respond to the ICJ judgment. The conservative Oklahoma Court of Criminal Appeals complied with the judgment and ordered a hearing—the first and only court in the United States to have done so. A federal court of appeals in Louisiana refused

to follow the judgment. Soon the issue was before the United States Supreme Court in the case of José Ernesto Medellín Rojas.

As the Supreme Court was poised to hear the case of Medellín, the U.S. government abruptly decided to comply with the ICJ judgment. President Bush signed an executive determination that the state courts would give effect to the ICJ's decision—in effect granting every affected Mexican national the right to a judicial hearing in state court. Texas immediately contested the authority of the president to order compliance with the ICJ's judgment. The Supreme Court dismissed the case in light of the president's determination, and Medellín's lawyers headed back to Texas to seek their day in court. In November 2006, the Texas Court of Criminal Appeals held that the president had "exceeded his constitutional authority by intruding into the independent powers of the judiciary," and refused to grant Medellín a hearing.[78] The case will shortly return to the Supreme Court.

The majority of attorneys representing Mexican nationals across the United States have already requested hearings in accordance with the ICJ judgment. In Oklahoma and Arkansas, attorneys were able to obtain commutations for their clients as a direct result of the ICJ decision. Much will depend on whether the state courts decide to comply in good faith with the ICJ judgment. If so, it is highly likely that other Mexican nationals will win new trials or sentencing hearings in the years to come.

THE ROLE OF AMNESTY INTERNATIONAL AND THE EUROPEAN UNION: CLEMENCY CAMPAIGNS AND POLITICAL PRESSURE

Amnesty International's Campaign Against the Death Penalty

Anti–death penalty advocates and the human rights community have never had an easy alliance. Whereas human rights organizations are frequently dedicated to serving the rights of victims, capital defense attorneys represent violent offenders who have committed horrific crimes of violence. Although the "victims' rights" movement is not monolithic, the dominant voices for victims' rights in the United States have lobbied for legislation curtailing the due process rights of criminal defendants and have opposed any restriction on the types of offenses for which prosecutors may seek the death penalty. As one of the first international human rights organizations to unequivocally oppose the death penalty, Amnesty International deserves tremendous credit for sensitizing millions of people to the human rights dimensions of capital punishment.

But even among Amnesty's membership, opposition to the death penalty has been a contentious issue. When Amnesty was debating whether to adopt an anti–death penalty campaign, some members objected that the campaign would absorb resources that would be better devoted to nonviolent prisoners of conscience. In 1973, however, Amnesty expressly linked the death penalty to the human right to be free from cruel, inhuman, or degrading treatment or punishment.[79]

Amnesty quickly became a leading voice for the abolition of the death penalty in the United States. The strategies it employs in individual death penalty cases are in many ways similar to its efforts on behalf of political prisoners.[80] When it learns of an impending execution, Amnesty distributes information about the case to its members through "Urgent Action" newsletters (now disseminated through the Internet), encouraging them to write letters to parole boards or governors in support of commutation requests. In high-profile cases, clemency authorities often receive thousands of letters from Amnesty members around the world. Capital litigators frequently discount the importance of these letter-writing campaigns, and it is indeed difficult to measure the effect they have on state politicians (or the political appointees who typically make up parole boards). Nevertheless, Amnesty International's press releases, case summaries, and newsletters often succeed in raising the profile of individual cases with the media. And by linking domestic death penalty cases with specific human rights norms, Amnesty has contributed enormously to the effort to persuade U.S. politicians that the death penalty is not purely a matter of domestic penal policy.

Other anti–death penalty organizations have begun to "internationalize" their campaigns against the death penalty. In recent years, the National Coalition to Abolish the Death Penalty (NCADP), one of the largest grassroots organizations opposed to capital punishment in the United States, has sent a representative to Geneva to lobby the members of the United Nations Human Rights Commission. NCADP now lists "Human Rights Advocacy" as one of its key strategies, in order to "spotlight the death penalty as a violation of human rights and gain the support of the global community to abolish the U.S. death penalty."[81] In 2005, a domestic anti–death penalty organization called Murder Victims Families for Reconciliation spawned a separate organization called Murder Victims Families for Human Rights (MVFHR), an international NGO that defines its mission by reference to the Universal Declaration of Human Rights. MVFHR explains its use of a human rights framework in the following terms:

> By definition, human rights cannot be either granted or denied by a government. By framing the death penalty as a human rights issue rather than a criminal justice issue, we are saying that whatever form of government a nation has, whatever the assumptions or policies of its criminal justice system, it should not be allowed to take the lives of its own citizens. Thinking of the death penalty this way takes it out of the realm of specific criminal justice systems and places it in the realm of international human rights standards, which transcend national borders and are based in our common humanity across the globe.
>
> MVFHR believes that the anti–death penalty movement in the United States can draw strength from this international human rights framework and from solidarity and partnership with those who are working against the death penalty in other countries—and not just in countries that no longer have the death penalty, but also in countries that still retain it. In viewing the issue this way, we are building upon the work of human rights, anti-death penalty, and victims' activists in this country and around the world.[82]

MVFHR's efforts are particularly significant in light of the defining role of the victims' rights movement in the debate over the death penalty. Perhaps

because the victims' rights lobby is so strong and well organized, and because the majority of those sentenced to death have committed crimes of extreme violence, death penalty opponents have hesitated to characterize death row prisoners as "victims" of human rights violations. Many anti–death penalty advocates also believe that state legislators are unlikely to care about human rights. For that reason, legislative campaigns have focused less on human rights, and more on issues such as the cost of the death penalty and the incidence of wrongful convictions. This is an area in which local activists may need to adjust their approach as state legislators become increasingly sensitized to the relationship between international human rights and state law.

Other domestic organizations have also adopted an "internationalist" approach to their efforts to abolish the use of the death penalty. The NAACP Legal Defense Fund, for example, sponsors seminars for capital defense attorneys on an annual basis in which training is offered on human rights litigation strategies. The American Bar Association's Moratorium Project, which has pressed for a suspension of all executions nationwide, has developed networks with human rights attorneys around the globe. The Death Penalty Information Center, which maintains an excellent Web site devoted to information and news relating to the death penalty, posts extensive materials on international legal developments. As the international abolitionist movement grows in strength, it is inevitable that other organizations will likewise increase their use of a human rights framework to advocate for abolition of the death penalty in the United States.

The European Union's Diplomatic Protests

Earlier in this chapter, I described the important role of foreign governments such as Mexico, Germany, and Paraguay in litigating violations of the Vienna Convention on Consular Relations in the International Court of Justice. It is important to recognize, however, that foreign governments and intergovernmental organizations have also engaged U.S. federal and state authorities in an ongoing dialogue about the death penalty. In particular, the European Union (EU) has played a key role in highlighting the human rights dimensions of the death penalty by lobbying state and federal clemency authorities in individual cases. The EU's website sets forth its official position on the death penalty:

> In countries that maintain the death penalty, the EU aims at the progressive restriction of its scope and respect for the strict conditions set forth in several international human rights instruments, under which the capital punishment may be used, as well as at the establishment of a moratorium on executions so as to eliminate the death penalty completely.[83]

The EU has formed a committee to review the pleas of death row inmates, and has formulated specific guidelines for EU intervention in those cases.[84] Where a death sentence is deemed to violate minimum human rights standards, the EU sends letters to governors and parole boards requesting that death sentences be commuted. After many advocates pointed out the futility of such pleas, the EU has begun to submit amicus curiae briefs in select death

penalty cases that have a clear international human rights component. To date, the EU has submitted amicus briefs in at three death penalty cases: the case of Daryl Atkins (involving the execution of mentally retarded offenders), the case of Christopher Simmons (involving the execution of juvenile offenders), and the case of José Medellin (involving the application of the Vienna Convention on Consular Relations).

EU member states, like many abolitionist nations throughout the world, also express their opposition to capital punishment by refusing to extradite suspects to the United States if they are facing the death penalty. In the so-called war on terrorism, European countries have stood firm in their refusal to extradite suspected terrorists to the United States in the absence of assurances that death will not be imposed.

These actions are more than symbolic. Pressure from foreign governments has succeeded in influencing the decisions of state and federal prosecutors as well as governors and clemency boards. In the course of a capital murder prosecution, there are many points at which discretionary decisions are made that determine whether an individual will be sentenced to death. Prior to trial, prosecutors have virtually unfettered discretion to seek the death penalty or opt for a lesser sentence. But in dozens of cases involving defendants who are foreign nationals, consular representatives and foreign diplomats have succeeded in persuading prosecutors to refrain from seeking the death penalty.

Likewise, pressure from foreign governments, intergovernmental organizations, and human rights organizations has been instrumental in clemency campaigns. For example, in the case of Alexander Williams, a mentally ill juvenile offender sentenced to death in Georgia, the Georgia Board of Pardons and Paroles received letters from the European Union, the Council of Europe, the governments of Mexico and Switzerland, Amnesty International, Human Rights Watch, the International Network on Juvenile Justice, the American Bar Association, the Child Welfare League of America, and the Juvenile Law Center, among others. Each of these letters made reference to international law or foreign practices relating to the execution of juvenile offenders. The Board commuted Alexander Williams's death sentence to life imprisonment on February 25, 2002—three years before the Supreme Court struck down the juvenile death penalty in *Roper v. Simmons.*

OBSTACLES TO THE IMPLEMENTATION OF HUMAN RIGHTS NORMS IN U.S. DEATH PENALTY CASES

In this chapter, I have attempted to demonstrate that anti–death penalty advocates have made modest but tangible progress in persuading courts to consider international human rights–based arguments in U.S. death penalty cases. Still, formidable obstacles remain.

First and foremost, most capital litigators are still unconvinced that it is important to raise arguments based on international treaties or customary international law. I have spoken at dozens of training conferences on this topic, and typically find that only a small handful of lawyers—those who are

most willing to be creative in their litigation strategies—are enthusiastic about learning how to effectively present such claims. Attorneys convince themselves that the arguments will never win, and therefore they don't raise them. In the Oklahoma case in which we succeeded in persuading the Oklahoma Court of Criminal Appeals to follow the ICJ Judgment, the local attorney on the case had informed me that "in Oklahoma, no one cares about international law." I later accompanied the same lawyer to a meeting with Oklahoma Governor Brad Henry, in which he peppered us with questions about the ICJ ruling and eventually decided to commute the death sentences of Osbaldo Torres.

Second, the parochial attitudes of many courts disincline them to entertain arguments founded on international law. Ordinarily, judges and their law clerks are uncomfortable doing international legal research, since they received no training in international law during law school. Moreover, among the judiciary there is a pervasive view that the United States has the "best criminal justice system in the world," and a corresponding belief that the United States has nothing to learn from the international community. Indeed, when lawyers representing the United States appeared before the ICJ in the case brought by Mexico, they argued that the violations of the Vienna Convention hardly mattered, since indigent defendants in the United States are protected by a panoply of due process rights.

Third, the United States's reservations to the ICCPR,[85] and its refusal to ratify the Optional Protocol to the ICCPR that would allow individuals to petition the Human Rights Committee, has made it virtually impossible to enforce the ICCPR's provisions in U.S. courts—at least where those provisions differ substantially from the laws of the United States. As noted above, when the United States Senate ratified the ICCPR, it attached numerous reservations, understandings, and declarations to the instrument of ratification. Many scholars have analyzed these reservations,[86] and it is beyond the scope of this chapter to do the same. It is sufficient to note that the Senate's reservations have—at least thus far—succeeded in preventing individual defendants in capital cases from obtaining judicial relief for violations of the ICCPR's provisions. The one exception is where the ICCPR is cited as evidence of an international consensus, as in *Roper v. Simmons.*

Finally, the efforts of anti–death penalty advocates to incorporate international human rights norms into their domestic advocacy strategies are hampered by the fact that many of these norms are only just emerging. Much like the U.S. Supreme Court, foreign courts continually look abroad to evaluate how other countries have treated legal challenges to the death penalty. But at this point, there is no uniform consensus on whether long-term incarceration on death row constitutes cruel, inhuman, or degrading treatment or punishment. Even those courts that have accepted the notion that extended confinement on death row is cruel and degrading hold differing views on the acceptable length of death row incarceration. There is a frustrating lack of jurisprudence defining the "most serious crimes" for which nations may impose the death penalty under Article 6 of the ICCPR. There are no clearly defined international standards regarding the execution of the mentally ill. These are questions that will continue to be debated by international jurists,

academics, and human rights advocates, as the world's nations slowly but surely inch closer toward the abolition of the death penalty.

NOTES

Portions of this chapter first appeared in Sandra Babcock, *L'application du droit international dans les executions capitals aux Etats-Unis: de la theorie à la pratique*, in *La peine capitale et le droit international des droits de l'homme*, ed. Gérard Cohen-Jonathan and William Schabas (Paris: Editions Panthéon-Assas, 2003).

1. See Martha F. Davis, "Lecture: International Human Rights and United States Law: Predictions of a Courtwatcher," *Alb. L. Rev.* 64(2000): 417, 418 ("[L]itigators . . . look at judges, and assess what they will find persuasive. International law has not fit that criteria. Indeed, some litigators have been concerned that citations to international law would signal an essential weakness in their case under domestic law.")

2. *Stanford v. Kentucky*, 492 U.S. 361, 370 n.1 (1989).

3. Article 6 provides, in relevant part:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant. . . . This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

4. The United States adopted a reservation to Article 6 providing that "the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

5. See, e.g., John Quigley, "Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights," *Harv. Hum. Rts. J.* 6 (1993): 59.

6. Article 7 provides, in relevant part: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 14 provides, in relevant part:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.

4. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
5. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

7. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

8. 4 All E.R. 769 (P.C. 1993) (*en banc*).

9. Vienna Convention on Consular Relations, art. 36, opened for signature April 24, 1963, 21 U.S.T. 77.

10. *Atkins v. Virginia,* 536 U.S. 304, n.21 (2002).

11. *Roper v. Simmons*, 543 U.S. 551 (2005).

12. See, e.g., *Trop v. Dulles,* 356 U.S. 86, 101–102 (1958).

13. See infra next section.

14. The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. Amend. VIII.

15. 356 U.S. 86 (1958).

16. Anthony Amsterdam, e-mail message to author, May 12, 2007.

17. 408 U.S. 238 (1972). In *Furman*, the United States Supreme Court struck down the death penalty statutes of Georgia and Texas, finding that the imposition of the death penalty in the petitioners' cases constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Only two justices held that capital punishment was unconstitutional per se. Three justices concluded the statutes at issue were unconstitutional as applied, but left open the question whether the death penalty could ever be imposed.

18. 428 U.S. 153 (1976). In *Gregg*, a different majority upheld the constitutionality of Georgia's newly amended death penalty statute, crushing abolitionists' hopes that the Court would find the death penalty unconstitutional per se.

19. Anthony Amsterdam, e-mail message to author, January 2, 2002. In *Furman*, the sole—and oblique—reference to international norms came from Justice Marshall,

who cited a United Nations report on capital punishment. 408 U.S. at 340, 353. Ultimately, in *Gregg,* the Supreme Court determined that the death penalty was not a per se violation of the Eighth Amendment.

20. *Coker v. Georgia*, 433 U.S. 584 (1977).

21. Brief Amicus Curiae of International Human Rights Law Group in Support of Petitioner, p. 49.

22. 433 U.S. at 596 n.10 (citing United Nations, Department of Economic and Social Affairs, *Capital Punishment* 40, 86 (1968), 592.

23. 458 U.S. 782 (1982). The felony-murder rule currently authorizes the imposition of the death penalty on individuals deemed to be "major participants" in certain felony crimes—for example, a robbery—even if they did not intend to kill anyone, and did not participate in killing the victim.

24. Brief Amicus Curiae of International Human Rights Law Group in Support of Petitioner.

25. 458 U.S. at 796–797 n.22.

26. 481 U.S. 279 (1987).

27. The IHRLG filed an amicus brief in support of McCleskey's Petition for Writ of Certiorari on July 8, 1985. When the Court subsequently granted review of the case, the IHRLG filed a second amicus brief on August 21, 1986. The IHRLG acknowledged that the international issues presented in its brief had never been presented to the courts below, nor had they been raised by McCleskey himself. Nevertheless, the group argued that the Court had the power to consider international law "in the interests of justice." Brief Amicus Curiae of International Human Rights Law Group in Support of Petitioner at 3, 8.

28. Ibid. at 15.

29. 487 U.S. 815 (1988).

30. Brief Amicus Curiae of International Human Rights Law Group in Support of Petitioner at 26.

31. Brief Amicus Curiae of Amnesty International In Support of Petitioner at 6.

32. U.S. Const. Art. VI, §2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.")

33. Brief for Amicus Curiae International Human Rights Law Group in Support of Petitioner at 6, 3–4. The IHRLG argued, in addition, that the United States was bound by treaties it had signed, but not ratified, prohibiting the execution of juvenile offenders:

> Under the Vienna Convention on the Law of Treaties and under customary international law, the United States is bound not to defeat their object and purpose pending ratification. Since execution is irreversible, such an act would defeat the object and purposes of the signed human rights treaties in the sense proscribed by the Vienna Convention.

34. 487 U.S. at 830.

35. Ibid. at 869 n.4.

36. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

37. Ibid at 370 n.1 (emphasis in original).

38. See, e.g., *Knight v. Nebraska*, 120 S. Ct. 459 (1999)(Breyer, J., dissenting from denial of certiorari); *Lackey v. Texas*, 514 U.S. 1045 (1995)(Stevens, J., respecting denial of certiorari).

39. *Atkins v. Virginia,* 536 U.S. 304, n.21 (2002).

40. 526 U.S. 1156 (mem.)(1999); cert denied 528 U.S. 963 (1999).

41. Brief Amicus Curiae for the United States at 7–11, 15–18, 19.

42. See, e.g., *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001); *Patterson v. Johnson*, 2001 U.S. Dist. LEXIS 14179 (N.D. Tex. May 14, 2001);

43. *Roper v. Simmons*, 543 U.S. 551, 577, 578.

44. Ibid. at 576-77.

45. Ibid. at 578 (citations omitted).

46. Motion to Dismiss Death Penalty Because these Arbitrary and Racially Discriminatory Proceedings Violate International Law, *State v. Miller*, Kershaw County, South Carolina (No. 99-5584). Prosecutors eventually agreed to waive the death penalty.

47. The Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. E.S.C. res. 1984/50; GA Res. 39/118, provide that the death penalty may only be imposed for intentional crimes. The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions considers that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." United Nations, *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions,* UN Doc. CCPR/C/79/Add.85, November 19, 1997, para. 13.

48. Motion to Strike the State's Notice of Intent to Seek the Death Penalty, *State v. Flores-Zeveda*, County of Maricopa, State of Arizona (99-06656).

49. See, e.g., *White v. Johnson*, 79 F.3d 432, 440 n.2 (5th Cir. 1996).

50. See *Chessman v. Dickson*, 275 F.2d 604, 607 (9th Cir. 1960). In *Soering* v. *United Kingdom*, the European Court found that prisoners in Virginia spend an average of six to eight years on death row prior to execution. The court determined that "[h]owever well-intentioned and even potentially beneficial is the provision of the complex post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." 11 Eur. Ct. H. R. (ser. A) (1989), at 42. In *Pratt and Morgan*, the Privy Council held that a delay of fourteen years between the time of conviction and the carrying out of a death sentence in the case of a Jamaican prisoner was "inhuman punishment." *Pratt v. Attorney General of Jamaica*, [1994] 2 A. C. 1, 33, 4 All E. R. 769, 773 (P. C. 1993). Both of these decisions have been the subject of extensive commentary. See, e.g., Dwight Aarons, "Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?," *Seton Hall L. Rev.* 29(1998): 147; Florencio J. Yuzon, "Conditions and Circumstances of Living on Death Row—Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the 'Death Row Phenomenon,'" Geo. Wash. J. Int'l L. & Econ. 30 (1996): 39; "Comment: America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law," *Cath. Univ. L. Rev.* 45 (1996): 481.

51. *Lackey v. Texas*, 514 U.S. 1045 (1995); *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995).

52. *See Knight v. Nebraska*, 528 U.S. 990 (1999)(Breyer, J., dissenting from denial of certiorari); *Elledge v. Florida*, 119 S. Ct. 366 (1998)(Breyer, J., dissenting from denial of certiorari); *Lackey v. Texas*, 514 U.S. 1045; 131 L. Ed. 2d 304 (1995)(Stevens, J., respecting denial of certiorari).

53. 131 L. Ed. 2d at 306.

54. 528 U.S. 990 (1999). The cases of Knight and Moore were consolidated for purposes of the Court's decision on certiorari. Knight had been twice sentenced to death and had spent nearly twenty-five years on death row. Moore had also been twice

sentenced to death, and had spent roughly nineteen years on death row. Ibid. at 993–994.

55. Ibid. at 993.

56. 715 A.2d 281.

57. Appellant's Brief (on file with author).

58. 2001 Kan. LEXIS 953 (December 28, 2001).

59. It is worth noting that in *Nelson*, the Court's "analysis" of the appellant's arguments was essentially limited to the following observation: "The United States of America has not subscribed to any international human rights accord that has invalidated the death penalty." 715 A.2d at 512. Nelson's lawyer, however, had not argued that New Jersey was bound by a treaty, but rather by the establishment of a norm of customary international law—a point the court did not seem to grasp.

In the Kansas case, the court merely noted: "The clear weight of federal and state authority dictates that no customary international law or international treaty obligation prohibits the State of Kansas from invoking the death penalty as a punishment for certain crimes." 2001 Kan. LEXIS at *333. None of the cases cited by the court, however, addressed the particular norm of customary international law cited by appellant's counsel.

60. *Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980), is a noncapital case in which petitioners used the latter approach, with positive results. The plaintiffs in *Lareau* challenged the conditions at the Hartford jail, citing the Eighth Amendment and various international treaties and standards, including the Standard Minimum Rules for the Treatment of Prisoners. Citing *Paquete Habana* and *Filartiga*, the Court found these standards "significant as expressions of [Connecticut's] obligations to the international community of the member states of the United Nations." Ibid. at 1187 n.9. Moreover, the court found that the standards were relevant to the "canons of decency and fairness which express the notions of justice" embodied in the Due Process Clause.

61. The American Declaration was adopted pursuant to OAS Resolution XX, Ninth International Conference of American States (Bogota 1948), and is reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V./II.82 doc. 6 rev.1 at 17 (1992).

62. *Domingues v. United States,* Case 12.285, Report No. 62/02, Inter-Am. C.H.R. (2002); *Roberto Moreno Ramos v. United States*, Case P4446/02, Report No. 61/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 457 (2003); *Garza v. United States,* Report No. 52/01, Case 12.243, Inter-Am Ct. H.R. (2001).

63. Report No. 52/01, Case 12.243, Inter-Am C.H.R. (April 4, 2001) at para. 2.

64. Ibid. at para. 120.

65. Letter to Secretary of State Colin Powell from Jorge E. Taiana, executive secretary of the Inter-American Commission for Human Rights, June 14, 2001.

66. Response of the Government of the United States Concerning IACHR Case No. 12.243 (Juan Raul Garza), June 15, 2001.

67. *Garza v. Lappin*, 253 F.3d 918, 923 (7th Cir. 2001).

68. 781 F.2d 379, 380-81 (4th Cir. 1986). See also *Workman v. Sundquist*, 135 F. Supp. 2d 871 (M.D. Tenn. 2001).

69. 253 F.3d at 925–926.

70. *Breard v. Greene*, 523 U.S. 371 (1998).

71. Karl LaGrand had already been executed by the time Germany filed its application with the ICJ. See generally *LaGrand Case(F.R.G. v. U.S.)*, 2001 I.C.J. (Judgment of June 27, 2001).

72. OC-16/99, Inter-Am. Ct. H.R. (October 1, 1999).

73. Ibid. at para. 7, 22.

74. Letter from Government of Mexico to California Supreme Court, *Ramirez v. Superior Court,* Kern County Superior Court No. SC 076259; Court of Appeal No. FO 37445).

75. Brief Amicus Curiae of the United Mexican States, *People v. Caballero*, No. 88784 (Il. Sup. Ct.).

76. 600 U.N.T.S. 195.

77. Brief Amicus Curiae of the United Mexican States in Support of Petition for Writ of Certiorari, *Fierro v. Johnson*, 530 U.S. 1206 (2000).

78. *Ex parte Medellín,* ___ S.W. 3d ___, 2006 WL 3302639 (Tex. Crim. App. November 15, 2006).

79. Jonathan Power, *Amnesty International: The Human Rights Story*, (New York: McGraw-Hill, 1981), p. 32.

80. Ibid. at 21.

81. Available online at www.ncadp.org/about_us.html.

82. Available online at www.murdervictimsfamilies.org.

83. European Union, "EU Policy and Action on the Death Penalty." Available online at www.eurunion.org/legislat/deathpenalty/deathpenhome.htm.

84. European Union, "Guidelines to EU Policy Towards Third Countries on the Death Penalty." Available online at www.eurunion.org/legislat/deathpenalty/Guidelines.htm.

85. "Senate Committee On Foreign Relations Report on the International Covenant on Civil and Political Rights," January 30, 1992, reprinted in 31 I.L.M. 645 (1992).

86. See, e.g., William A. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?," *Brooklyn J. Int'l L.* 21 (1995): 277; M. Christian Green, "The Matrioshka Strategy: U.S. Evasion of the International Covenant on Civil and Political Rights," *South African Journal of Human Rights* 10 (1994): 357; Lawyers Committee for Human Rights, "Statements On U.S. Ratification of the CCPR," *Human Rights Law Journal* 14 (1993): 125; Louis Henkin, "Comment: U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," *A.J.I.L.* 89 (1995): 341, 346.

CHAPTER 5

Ensuring Rights for All: Realizing Human Rights for Prisoners

Deborah LaBelle

When photographs depicted American soldiers, in the spring of 2004, degrading and torturing Iraqi citizens in the Abu Ghraib prison in Iraq, the actions garnered worldwide condemnation as human rights abuses. However, attempts by criminal justice advocates in the United States to parley this condemnation into recognition of the existence of human rights violations in prisons in the United States were largely unsuccessful. Despite the commonality of the abuse of prisoners in Iraq by American personnel—a number of whom had employment histories in U.S. prisons—with the abuse taking place in American prisons, the latter abuse has occasioned little censure, leading prisoners' rights advocates to decry the lack of recognition of human rights violations committed against American prisoners held in prisons and jails in the United States.

While reports of abuses in the United States have failed to elicit expressions of official outrage and disgust, Secretary of Defense Donald Rumsfeld responded to photographs revealing naked Iraqi prisoners shackled or hooded, with smiling American staff looking on, by characterizing the treatment as "fundamentally un-American," "blatantly sadistic, cruel and inhumane." Longtime advocate for humane treatment of prisoners and director of the American Civil Liberties Union National Prison Project Elizabeth L. Alexander pointed out to the media, in response to the disclosure of abuse of prisoners in Iraq, that, "Beating prisoners, sexually abusing prisoners all of those things go on in American prisons." In contrast to the official response that abuse of Iraqi prisoners constituted human rights abuses, the official response to allegations of similar abuse in state prisons in Michigan,

was to focus on the status of prisoners as warranting less humane treatment, asserting that:

> They [prisoners] should have thought before they robbed, raped, and killed people. I mean, that's what these prisoners have done. These aren't people who have human identity. They are prisoners . . . they have committed sins, cardinal sins, original sins, against Michigan's citizens.[1]

How is it that the mistreatment of prisoners who had officially been labeled as "enemy combatants" and "terrorists" was recognized as a human rights violation while the very concept of human rights for incarcerated American citizens has been routinely rejected based on their lesser status as prisoners?

By focusing on the status of the victim, and not on an objective standard of humane treatment, prison officials in the United States are all too often able to avoid adherence to a standard of care that is not mutable based on circumstances or the object of the abuse. In contrast, international human rights documents provide standards based on the nondefeasible humanness of the object of the challenged treatment. Despite the alleged "sins" of the prisoner, human rights treaties maintain the recognition of the individual as a human being entitled to basic dignity and rights accorded to all individuals based solely on their humanity.

Treatment of prisoners in the United States, in contrast, has always been diminished by the construct that in addition to losing civil and political rights occasioned by violating laws, those detained in jails and prisons, are reduced to a lesser human status. Having violated the social contract, they are regarded as diminished beings, not entitled to the rights that are accorded good citizens. The common official terms used are "inmate," "offender," "prisoner," or "criminal," never the designation of "incarcerated citizen" routinely used by the Canadian courts, for example, when analyzing claims of rights violations in Canadian prisons

Over 2 million people are held in prisons, jails, and detention facilities in the United States, and the last decade saw the prison population more than double. Many states' budgets for operating prisons, jails, and parole supervision systems now outstrip all but the general fund, and well exceed budgets for education and health services. The rising costs are a reflection of rising numbers of people detained for longer periods of time, not an increase in expenditures for humane treatment. Without a human rights framework creating a baseline for humane treatment, the increasing numbers of people who are incarcerated are at the mercy of the changing social doctrines on the origins of crimes and resultant manner of punishment, protected only by equally varying judicial interpretations of what constitutes the baseline for prohibited unusual cruelty.

The absence of applicable human rights doctrines also endangers the humanity of those who operate the prisons and jails, a growing workforce in the United States. Human rights doctrines contain the inherent recognition that a failure to recognize the humanness of the object ultimately degrades the humanity of those in control. As the military personnel captured on film in the Abu Ghraib prison in Iraq were ultimately viewed as having degraded

themselves and brought shame on the United States, abuses in United States' prisons demean the officers perpetrating the abuse. The impact of the abuse extends beyond the object to alter the lives of staff, prisoners' families, the system, and our own humanity. The oft quoted reminder by Dostoyevsky that, "the degree of civilization in a society can be judged by entering its prisons" encompasses both a recognition of the duality of human rights and a warning of the cost of ignoring its application to those regarded as least entitled to its shield.

The example of Abu Ghraib evidences that, while abuses in the United States are not commonly viewed through the lens of human rights obligations, nor has the language of human rights settled into our domestic justice lexicon, advocates have begun to recognize this duality and the value of demanding transparency and adherence to international norms. This chapter explores both the import of realizing human rights as the framework for ensuring humane treatment of prisoners in the United States and analyzes the impact this strategy has had when used to address the mistreatment of women prisoners and juveniles incarcerated in this country's prisons and jails.

PRISONERS' RIGHTS ADVOCACY IN THE UNITED STATES

Penitentiaries came into broad use in this country in the 1820s, with a goal of rehabilitation. Criminal activity was generally believed to be a result of a failure of upbringing or social influences. As crime increased through the nineteenth century, empathy waned and punishment replaced rehabilitation. Both the length of confinement and the harshness of conditions increased unabated as statutes enacted during the nineteenth century divested prisoners of civil and political rights on the theory that they ceased to exist as legal persons after their conviction. These "civil death" statutes prohibited persons convicted of a felony from bringing any civil action and prevented challenges to the conditions of their confinement or treatment while incarcerated.[2] Civil death statutes had a long reign, lapsing into desuetude a hundred years later with the concurrent rise of the prisoners' rights movement. Described by then as "archaic remnant(s) of an era which viewed inmates as being stripped of their constitutional rights at the prison gate,"[3] the elimination of the civil death statute and the rise of the prisoner's rights movement in the 1960s paved the way for prisoners acting as "jailhouse lawyers" and civil rights lawyers to address mistreatment in U.S. prisons through litigation alleging violations of the Constitution.

The Rise of the Prisoners' Rights Movement: 1960s–1980s

While most grassroots movements face organizational difficulties, building a prisoners' rights movement involved the additional difficulties of a community both disenfranchised and incarcerated. Prisoners' inability to communicate freely with each other and restrictions on their communications with the outside world made organization and movement building extremely difficult.

Challenges to these restrictions were consistently rejected by the courts, which upheld prison rules prohibiting prisoner unions, limiting meetings and petitions by prisoners, and restricting visitation with the outside world.[4] Throughout the early years of the movement, lawyers, who alone (with the exception of clergy) had ready access to prisoners, became major contributors to the movement and the call for humane treatment of prisoners.

Prisoners and their families worked with organizations such as the American Friends Service Committee (which included prisoners in its Quaker mission since its founding in 1917) and established CURE (Citizens United for Rehabilitation of Errants) in 1972. However, the revolution in prisoners' rights in the United States beginning in the 1960s through 1980s has traditionally been linked to a rising assertiveness of prisoners, particularly the black Muslims, and the development of the civil rights lawyer.[5] Prisoners and lawyers alike were influenced by the civil rights movement occurring in the free world, and the federal courts were becoming responsive to lawyer-assisted prisoner petitions, raising issues as diverse as freedom to practice religion in prison to freedom from corporal punishment. Prisoners, most notably with the riots at the Attica State Prison in New York in 1971, called attention to their abysmal treatment, which included long-term isolation in dungeon-like holes, beatings, inadequate food, racial discrimination, and rampant violence. Government legal services funding and private foundation money made it possible for lawyers to make expensive and time consuming legal challenges to violation of the rights of economically and socially marginalized persons. Armed with such funding, lawyers were able to go to court to argue the constitutional rights of prisoners.

Early legal victories by lawyers challenging conditions of confinement of prisoners were brought under the Federal Civil Rights Act, which enabled prisoners to sue for violations of their constitutional right to be free from cruel and unusual punishment under the Eighth Amendment. These victories paved the way for judicial intervention in the isolated and secretive prisons and jails of the United States, which had been operating with little oversight and less restraint. One of the early victories, brought initially by jailhouse lawyers on behalf of prisoners in Arkansas and fought by court-appointed counsel, concerned the constitutionality of the whip. While formal, authorized corporal punishment, as a response to minor prison infractions, had been on the wane in the 1960s, whippings still remained the primary ad hoc disciplinary tool in prisons where few privileges existed to take away and solitary confinement space was limited. In the 1968 case *Jackson v. Bishop*, a panel of three federal court judges held that use of routine whippings as a method of controlling prisoners violated the Eighth Amendment ban on cruel and unusual punishment.[6] The panel found the imposition of uncontrolled whippings to the bare skin of prisoners with a five-foot strap was inhumane and barbarous. The court rejected the claim that the punishment was necessary for discipline, noting that, "Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike."

The next ten years saw a series of legal challenges to the mode of punishment, mistreatment, and restrictions on the rights of prisoners reach the

United States Supreme Court. In 1978, the Supreme Court returned to the conditions of prisoners in Arkansas in *Hutto v. Finney.*[7] Prisoners who had been successful, ten years earlier, in ending the official use of electric shocks and physical beatings as methods of discipline and punishment now challenged their incarceration in eight-by-ten-foot windowless cells for indeterminate periods of time as violative of the Eighth Amendment's proscription against cruel and unusual punishment. Prisoners were successful in arguing that the Eighth Amendment prevents more than physically barbarous punishment. The Supreme Court found that the Eighth Amendment prohibits penalties that are grossly disproportionate to the offense, as well as those that transgress broad and idealistic concepts of dignity, civilized standards, humanity, and decency. Depending on the infraction, the length of time prisoners were kept in a hole and the conditions under which they were maintained, nonphysical punishment could contravene the Eighth Amendment's proscription against cruel and unusual punishment.

The *Hutto* case followed a series of decisions which recognized that while imprisonment necessarily made unavailable many rights and privileges of the ordinary citizen, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime and edged toward an understanding that prisoners were entitled to be treated in a nondegrading manner. In a talisman phrase, the Supreme Court in the 1974 case *Wolff v. McDonnell* opined that, "though his rights may be diminished by the needs and exigencies of the institutional environment, there is no iron curtain drawn between the Constitution and the prisons of this country."[8] In a series of cases from the late 1960s through the mid-1970s, the Supreme Court expanded prisoners' rights, recognizing prisoners' religious freedom, the right to access to the courts, and protection from invidious race discrimination. Prisoners were also advised they could claim the protections of the due process clause in circumstances depriving them of life, liberty, or property and could not be denied basic medical care.[9]

The general principle that prisoners do not forfeit all of their rights under the Constitution upon incarceration was now firmly established. But what rights remained and how to balance the rights of prisoners with their status and the needs of security remained to be carved out in a series of fact-dependant cases. The Supreme Court held that a prisoner retains the right to marry and some freedom of expression in the case of *Turner v. Safely.*[10] The same year the Court upheld a prisoner's' right to freedom of religion in *O'Lone v. Estate of Shabazz.*[11] However, both of these significant rulings were five-to-four decisions, presaging the retrenchment of prisoners' rights that was on the horizon. Many states continued to operate systems that were blatantly racist, with routine reports of beatings, rapes, and intolerable conditions of confinement. Before Supreme Court rulings issued in the 1970s and 1980s could take force or become institutionalized policy, the judicial pendulum began to swing the other way.

More Prisoners, Fewer Rights: 1990s Onward

Over the next ten years, just as the U.S. prison population began to soar, the Supreme Court retreated from protecting prisoners' rights. The Court

introduced new legal concepts that undermined Eighth Amendment protections. It also expressed concern about overinvolvement of the federal judiciary in the operation of states' prisons and showed increasing deference to prison officials. At the same time, previously effective mechanisms for challenging mistreatment were severely restricted by federal legislation and conservative courts.

In the 1990s, Supreme Court prisoners' rights cases largely deferred to arguments that punishments were necessary to maintain a correctional facility. Institutions' "penalogical objectives" of "security" and "order" became relevant concerns for determining whether the punishment being challenged was cruel or unusual. Taking their cue from the Supreme Court, many appellate courts overturned trial court remedial orders based on their lack of deference to prison authorities.[12] The decisions raised the specter of inmate violence and concerns for public safety should prison officials be constrained in the manner they operated prisons, including their ability to restrict prisoners' rights and the manner in which noncorporal punishment was meted out. Gone were the acknowledgments of the reality that cruel treatment begot violence and forgotten was the cause of the violence at Attica prison. Instead, it was opined that harsh treatment was necessary to prevent future violence.

The Supreme Court also failed to adhere to the Eighth Amendment as an objective standard for humane treatment in a civilized society. Instead, a new element crept into the analysis of whether punishment was cruel or unusual—whether prison officials, in meting out the challenged punishment, had a culpable state of mind. In the 1991 Supreme Court case *Wilson v. Seiter*,[13] Justice Scalia held that treatment which could objectively be characterized as abusive, inhumane, or degrading treatment would not violate the Constitution unless the punishment was implemented with a kind of knowingness—a deliberate and wanton infliction of unnecessary pain.[14] This opened the door to justifying punishment that would otherwise rise to the level of torture or other degrading treatment based on the motivations of the party inflicting the punishment or necessities of correctional management. With an increasingly narrow interpretation of what constituted cruel and unusual punishment, prisoners had little left with which to tether their challenges of inhumane treatment.

With one notable exception in the 2002 case of a prisoner in Alabama who challenged being handcuffed above his head to a hitching post in the sun without water or breaks for seven hours at a time as punishment for a rule infraction, following *Wilson v. Seiter,* the Supreme Court has found little to chastize as punishment that violates the Eighth Amendment in U.S. prisons. The hitching-post case also garnered a strong dissent, led by Justice Thomas who opined that the legitimate penalogical purpose of encouraging compliance with prison rules took the punishment out of the constraints of the Eighth Amendment. Justice Thomas's extreme position also advocates for restricting the Eighth Amendment's proscription against cruel and unusual punishment to the sentencing stage of the criminal justice process. He argues that the Eighth Amendment's protection is not applicable to claims of mistreatment or even torture during a prisoner's incarceration. Instead, he argues that cruelty within the context of confinement is best addressed by a

sort of capitalist system of human rights in which the states would naturally be concerned about real torture in prisons that lacked any legitimate penalogical purpose and regulate themselves.

Just as the Supreme Court became increasingly tolerant of ill treatment of prisoners, government funding for legal services declined overall, and prohibitions were placed on the remaining legal service organizations receiving federal funding that specifically forbade representation of prisoners or challenges to the conditions of their confinement. Foundation funding for direct legal challenges, never large, became increasingly hard to obtain. New federal statutes created barriers to both prisoners' and lawyers' ability to complain about conditions in America's prisons.

Edging back to the days of civil death, the conservative majority of the Supreme Court, in decisions like *Lewis v. Casey*,[15] limited the access of jailhouse lawyers to basic books and tools for litigation. In addition, the federal Prison Litigation Reform Act (PLRA) was past in 1996 to restrict prisoners' access to the courts to challenge their treatment. Contrary to its moniker, the PLRA was more akin to the civil death statutes of 100 years prior than the provision of reform. Its goal was to strictly limit prisoners' ability to file federal litigation challenging the conditions of their confinement, their sentencing, and their treatment by setting up onerous preconditions for filing lawsuits, dramatically limiting available remedies and judicial oversight, and creating disincentives to lawyers representing prisoners. Many states followed the federal legislation to enact their own state laws restricting not just challenges to conditions, but also challenges to sentences and denials of release, all the while increasing the length and severity of punishments.

With the loss of the courts as fair arbitrators of mistreatment of prisoners, many advocates began focusing on education, media, and legislative strategies, while understanding that the usual corporate concerns of cost-value analysis are often inapplicable where the issue involves both fears surrounding public safety and the rise of the prison industrial complex, which provided its own impetus for continued prison buildups and resistance to outside oversight.

Simultaneously, the rehabilitation corrections mode of the 1980s, which touted the use of vocational training and educational programs to rehabilitate prisoners, faded with the increasing numbers and costs of incarceration. It was replaced with the increased use of cold storage, super maximum facilities, and increased isolation from the outside world. Prisons in the United States had become a multibillion dollar industry. In 2006, the budget for state corrections facilities exceeded $50 billion per annum. It was this confluence of factors that created fertile ground for developing a human rights analysis to challenging inhumane treatment in U.S. prisons and jails.

Human Rights Response

International human rights documents and treaties establish basic principles for the treatment of individuals and encompass those incarcerated in prisons, jails, and detention centers around the world. The Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man (1948); the UN Standard Minimum Rules for the Treatment

of Prisoners (1957); the International Covenant on Civil and Political Rights (ICCPR) (1976); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) (1987) are the most frequently cited documents in human rights reports concerning the treatment of individuals in detention.

However, prior to the 1990s, those documentation reports, created by international human rights organizations, rarely included the United States in their worldwide investigations of prison conditions. Either as a consequence or perhaps as the rationale for their exclusion, international treaties and documents played little part in the advocacy in the United States for prisoners' rights, which was waged, largely, by attorneys and jailhouse lawyers.

In 1987, however, Human Rights Watch (HRW) began a project which enlisted several of its divisions in the investigation and documentation of the treatment of prisoners with the goal of issuing a global report. In 1991, HRW issued a breakout report titled *Prison Conditions in the United States* with the worldwide report, *Human Rights Watch Global Report on Prisons*, issued two years later. Similarly, Amnesty International began turning its attention to conditions in U.S. prisons in its investigation of compliance with international documents in the prison context.

In 1993 when the United States underwent its first UN compliance review following U.S. ratification of the ICCPR, another opportunity emerged to use human rights standards to examine U.S. prison conditions. HRW, and the traditionally American civil rights organization, the American Civil Liberties Union (ACLU), worked together to issue a report on U.S. compliance with the ICCPR, urging enforcement of the ICCPR's provisions with regard to prison conditions in United States courts. The report relied heavily upon federal judicial rulings, which had found many of the abuses also violated U.S. constitutional norms, undermining the report's assertion of the need for enforcement of the ICCPR. However, the report's concern with the federal court's tendency to diminish protections of prisoners based on their crimes and its call for recognition of a guarantee of humane treatment irrespective of the prisoner's crime, presaged the events of the next decade which heightened the need for a human rights framework to address abuse in United States' prisons.

The report contributed to a broader ongoing dialogue on the need to scrutinize the United States's compliance with international norms and address "U.S. exceptionalism" with particular emphasis on an area with diminishing protections under domestic constitutional instruments. The focus on criminal justice issues—with its emphasis on torture, and racial and gender discrimination of those in detention—provided a strong argument for the relevancy of human rights documents, which specifically set minimum standards for many of these issues. The report ushered in a series of reports in the late 1990s by Amnesty International and HRW on a number of prisoners' rights issues, including custodial sexual abuse of women prisoners in American prisons: *All Too Familiar* (1996), *No Where to Hide* (1998), and *Not Part of My Sentence* (1999);[16] the human rights violations against prisoners held in SHU's or super-maximum holding units examined in *Cold Storage: Super Maximum* (1997); and the violence endemic in men's prisons, *No Escape: Male*

Rape in U.S. Prisons (1998). Amnesty International addressed many of these issues in its 1998 report, *Rights for All.*

These reports created new opportunities for human rights organizations and activists to collaborate with U.S. litigators and criminal justice advocates on specific cases in a way that had not occurred previously in the United States, although consistent with collaborations in other countries. The documentation reports were a crucial vehicle for introducing advocates for prison reform, prisoners and their attorneys to human rights organizations and individuals working on the international stage and introducing a human rights language and framework to the issue. For prisoners and their counsel, who had rarely strayed from attempts to enforce "prisoners' rights" using U.S. laws that specifically limited the concept of rights to the diminished status of a prisoner, the introduction of international rights documents and the glimpse into other countries' systems provided a number of insights that were to be instrumental in integrating human rights documents into prison reform work.

By limiting themselves to the concept of "prisoners' rights," advocates in the United States had in some manner accepted a diminished status and standard of rights. This construct had also infected the actions of corrections officials who, viewing prisoners as lesser beings deserving a different standard of humane treatment, accorded prisoners a degraded treatment in direct proportion to prison administration's conception of prisoners as lesser beings.

With larger numbers of prisoners serving longer time and with less opportunity to challenge either their treatment or their sentence, prisoners' rights advocates from the critical resistance movement to lawyers and grassroots advocates began to recognize that a different approach was necessary. The issues being impacted by incarceration could not be encompassed within any one legal theory or expertise. Incarceration affected youths and educators, who challenged the school-to-prison pipeline, the disparate impact on children of color, and the loss of education funding which was being usurped by building and operating prisons; mental health professionals, prisoners, and family members, who recognized that prisons were increasingly incarcerating people who were mentally ill as opposed to providing treatment; and activists working on women's rights and violence against women, who viewed the cycle of abuse and self-medication as leading to incarceration and more abuse. Incarceration posed obvious issues of race discrimination in the administration of the criminal justice system and the perpetuation of discriminatory treatment inside and social and economic justice issues, including the impact that incarceration was having on poor people and immigrants in the system. It also raised concerns with violence targeting gays, lesbians, and transgender persons incarcerated in jails and prisons.

The common language and the umbrella available in which to have a dialogue for remedial relief existed not in domestic legal theories or case law, but in human rights treaties. With the recognition that large swaths of American citizens would spend some part of their life in a prison or jail cell, relying solely on diminishing "prisoners' rights law" to challenge inhumane treatment was neither appropriate nor tenable. The laws and treaties establishing baseline standards applicable to all persons took on a heightened relevance. Both the difficulties and value of utilizing a human rights framework for domestic

challenges to the mistreatment of prisoners in the United States is explored in the following two case studies involving the custodial abuse of women prisoners in a state prison in Michigan and the sentencing of juveniles serving life without possibility of parole sentences in American prisons.

HUMAN RIGHTS FOR WOMEN PRISONERS IN THE UNITED STATES

In 1995, the Fourth World Conference on Women was held in Beijing, and in April of that year, Felice Gaer of the U.S. delegation spoke the following words at the United Nations Conference on Human Rights: "Our task as nations is clear; we must make our global human rights machinery expand and adapt; we must shift from neglecting women's issues, to mainstreaming them; we must mobilize the will to stop the abuses facing women throughout the world, establish instruments of accountability and effective domestic remedies."

As the international community began focusing on the human rights of women, domestic remedies for issues facing the rising population of women prisoners in the United States were becoming progressively more difficult to come by, and the number of women prisoners was skyrocketing. In 1980 there were 12,300 women in prisons in the United States. This number had increased ten-fold, to 120,000, by the mid-1990s. By the year 2000, there would be over 1 million women either behind bars or under the control of the criminal justice system in the United States.

Groups with widely diverse interests began recognizing the toll on society resulting from the increase in the incarceration of women, the vast majority of whom were mothers and family caretakers. Incarceration of these women, largely for nonviolent property and drug offenses, increased not only the corrections budget but impacted foster care and social services as their children were placed in foster homes or agencies and chronically ill, disabled, or aged family members sought replacement services for their caretakers. There was also a growing awareness of the additional punishments inflicted on women prisoners in the form of sexual and physical violence and the ripple effect the resultant trauma had on their communities upon their release. Yet, there had been neither widespread exposure of the abuse nor significant legal challenges to mistreatment of women prisoners.

Traditional Equal Protection Litigation

Previously, major prisoners' rights litigation had focused on conditions for men, who formed the majority of prisoners. Litigation on behalf of women prisoners was limited to equal protection challenges to their denial of comparable educational and vocational training in prison and denial of gender-based health care. Throughout the late 1970s and 1980s, rehabilitation and correctional opportunities for prisoners largely benefited male prisoners with the provision of education, vocational training, and apprenticeships. Education and skills training were provided based on the belief that rehabilitation of

prisoners depended on their obtaining bona fide occupational skills and that such skills would best serve them to reintegrate into society thus decreasing recidivism.

This approach was not, however, applied equally to women prisoners based, in part, on a different rationale accepted for women prisoners' status as convicted felons. Historical explanations for female lawbreakers as gender aberrants lingered through the 1980s in the United States, and the belief that criminal behavior by women could be traced to a failed femininity guided the rehabilitation programs for women. While male prisoners were receiving skills dedicated to economic redemption, women prisoners were being schooled in home economics, parenting classes, and models of obedience to reclaim their femininity.

The disparity in opportunity led a group of women prisoners in Michigan to file the first class-action case on behalf of women prisoners. They argued that their right to equal protection under the United States Constitution was violated by the absence of similar rehabilitation opportunities as those being provided to male prisoners. Their 1979 lawsuit, *Glover v. Johnson*,[17] was successful, resulting in improved educational, vocational, and apprenticeship training for women prisoners. However, it tied women prisoners' future to the treatment of male prisoners.

The problem with reliance on an equal protection model became evident a few years later as programs for male prisoners were eliminated with the decline of a rehabilitative corrections model in the United States. Because their legal claim for rehabilitative programs was based on being treated the same as men, after a few brief years of parity, women prisoners were once again deprived of participation in any programming that would provide opportunity for rehabilitation. The legal strategy of using equal protection law and addressing the problems with treatment of women prisoners through a gender discrimination lens did not advance an independent model for the treatment of prisoners based upon respect for their dignity and value as human beings, concepts imbedded in human rights documents.

Moreover, some courts had taken aim at *Glover v. Johnson*, eroding its finding that women prisoners' equal protection rights were violated when women prisoners were provided inferior programming as compared to male prisoners. In *Klinger v. Dept. of Corrections,* upon review of an equal protection case in which women prisoners in Nebraska challenged their denial of equal rehabilitation opportunities, the Eighth Circuit Court of Appeals approved the existence of separate but unequal facilities for male and female prisoners, reasoning that women prisoners were not similar situated to male prisoners due to the different profile of women prisoners (being nonviolent) and their lesser numbers.[18] The court noted that women prisoners were generally single mothers with substance abuse histories, as compared to male prisoners who were most often incarcerated for violent crimes and not the custodians of children. The court used these gender differences as a basis to deny women prisoners equal educational and program opportunities, rather than creating a model of rehabilitative opportunity that addressed differences by enhancing rehabilitative program choices. The court, after finding the male and female prisoners to be different, rejected the women prisoners' equal protection

claims stating, "dissimilar treatment of dissimilarly situated persons does not violate equal protection." Basically, the court asserted that only if two people were identical and did not receive equal treatment could you challenge the lesser treatment of one individual. The ruling moved the analysis of constitutional based rights even further away from an inclusive model of human rights and dignity for all. As a final deterrent to relying solely on the Constitution as a basis for challenging inhumane treatment of women prisoners, the PLRA wound its way through the U.S. Congress to be signed into law in April 1996, further limiting prisoners' access to the courts.

Just as the limitations of the equal protection model and prisoners' rights litigation were becoming evident, human rights standards appeared to provide some models for the minimum standards for treatment of prisoners and also a new perspective on increasing concern with endemic custodial sexual abuse in women's prisons in the United States. In addition to protections in the ICCPR, the Convention Against Torture, and the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Declaration on the Elimination of Violence Against Women prohibited any "degrading treatment or punishment . . . and any gender based violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life," providing a framework based on universal values, which codified core values of human dignity and equality available to all individuals including prisoners. Human rights documents, based solely on one's status of as a human, provided a core set of entitlements that could not be truncated based upon incarceration, gender, or the changing perception of how to handle convicted felons in America.

Sexual Abuse of Women Prisoners

It was in this milieu that women prisoners in Michigan decided to file a class-action lawsuit seeking relief from years of sexual assaults, rapes, sexual harassment, and retaliation by male guards and staff employed by the Michigan Department of Corrections. In light of the impending implementation of the federal PLRA, cases were filed both in federal court and in state court under Michigan's Civil Rights Act in March 1996, arguing that sexual harassment, degrading treatment, and rapes of women and girl prisoners by male custodial staff in Michigan had become endemic. The complaints alleged hundreds of incidents ranging from prurient viewing of women while naked, routine groping of women's breasts and genitalia under the guise of security pat-down searches, the common and constant use of sexually degrading and demeaning language, and penetrative rapes. The lawsuits challenged the treatment under standard constitutional and civil rights frameworks and sought traditional remedies of injunctive relief and damages. Capitalizing on the recent domestic restrictions on the rights of those in detention, the state argued that both lawsuits should be dismissed because the federal suit was impermissible under the newly passed PLRA and the state civil rights act, which protected "all persons," should not be read to include prisoners. The lawsuits seemed destined to make the same arguments and follow a similar

trajectory as other women prisoners' rights cases until human rights standards and organizations began influencing advocacy around and within the lawsuit itself.

When the Michigan lawsuits were filed, Human Rights Watch was in the midst of conducting interviews in eleven state prisons for a report on the prevalence of sexual misconduct by male officers in authority over female prisoners. A year after the women prisoners filed suit, the United States Department of Justice joined the fray under its mandate to ensure the constitutional treatment of institutionalized persons. Thus, three different groups—the women prisoners themselves, the United States Department of Justice, and Human Rights Watch—were all on the field at the same time, all utilizing different frameworks from state to federal to international, to examine the abusive treatment of women held in detention in Michigan prisons. All three were to play central roles in the synthesis of the analysis and the resulting remedies for women prisoners, which, in the end, relied heavily on international standards.

While both uninformed and dubious of the ultimate value of HRW's focus on violations of international standards and treaties that appeared unenforceable, the women prisoners and their lawyers cooperated with both HRW and the DOJ by participating in interviews and responding to fact finding requests. The DOJ attorneys were wary of HRW's efforts because they did not want to appear to concede the legal applicability of the international standards because the international treaties HRW relied upon either had not been ratified by the United States or were ratified in a manner that limited their enforceability in U.S. courts. They also viewed domestic laws and statutes as adequate to ensure the humane treatment of the women prisoners.

Attorneys for the women prisoners, who were struggling to obtain positive results under familiar state and federal civil rights statutes and constitutional law, were also skeptical of the value of international human rights law in domestic courts. Historically, international human rights claims in U.S. courts had been brought primarily by foreign nationals for harms suffered on foreign soil, and there had been little development of international human rights law based upon incidents that occurred in the United States against domestic actors. In a climate where federal courts were increasingly unsympathetic to prisoners' claims challenging conditions of confinement under U.S. law, it seemed unlikely, at best, that the courts would be receptive to challenges based on international laws, treaties, and standards that had heretofore not been enforced in the domestic context.[19]

Impact of HRW Report on the Litigation

Human Rights Watch concluded its interviews and research after two and half years resulting in a documentation report released in December 2006 titled *All Too Familiar: Sexual Abuse of Women Prisoners in United States Prisons.* The report focused on five states including the state of Michigan. The report found extensive sexual abuse being perpetrated against women prisoners in U.S. state prisons. With regard to female prisoners in the Michigan system,

the report found widespread abuse including rape, sexual harassment, forced abortions, privacy violations, and retaliation, noting that:

> In the course of committing such gross misconduct, male officers have not only used actual or threatened physical force, but have also used their near total authority to provide or deny goods and privileges to female prisoners, to compel them to have sex or, in other cases, to reward them for having done so. . . . In addition to engaging in sex with prisoners, male officers have used mandatory pat frisks or room searches to grope women's breasts, buttocks and vaginal areas and to view them inappropriately while in a state of undress in the housing or bathroom areas. Male correctional officers and staff have also engaged in regular verbal degradation and harassment of female prisoners, thus contributing to a custodial environment in the state prisons for women which is often highly sexualized and excessively hostile.

The HRW report addressed the sexual abuse in Michigan as violations of the ICCPR (ratified by the United States in 1993), the Convention Against Torture (ratified in 1994), and the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Rights Convention) and made recommendations based on international standards, including that searches of women prisoners be conducted only by female staff and male officers announce their presence before entering women's housing units, toilet, or shower areas. These recommendations were echoed in Amnesty International's 1998 report *Rights for All* on human rights violations in the United States.

The HRW report garnered significant national publicity but little local attention. However, its value to the litigation became readily apparent to the women's attorneys. Although, the report was not conceptualized with domestic litigation in mind (indeed Michigan was the only state under review in which there was pending litigation), litigation with its judicial enforcement mechanisms was the most effective way to implement the report's remedial recommendations.

At the beginning stages of the litigation, the report, compiled by an independent international organization after extensive interviews with women prisoners and prison staff and documentation review, played an important role in developing factual support for both the state and federal litigation. The women's attorneys used the detailed factual findings to inform the court of the extent and range of abuses for purposes of demonstrating that there were enough women harmed to justify class-action certification in the state case. The validation of the complaint's factual allegations by an independent organization diminished the state's power to deny any problem and contributed to the federal courts' denial of the states' motions to dismiss. The detailed report and the media attention surrounding its release also made any dismissal of the suit by the court, based upon the state's mere denial, extremely unlikely.

In addition to providing factual support, the international standards referenced in the report also had a profound effect on the courts' view and treatment of the case, both in terms of the applicable standards in the case and the overall perception of the claim. While the complaints, at that time, contained only allegations of violation of the state and federal constitutions and civil

rights statutes, the HRW report raised the specter of violations of international treaties and standards. The federal judge was cognizant of the question of whether the United States domestic laws would prove to provide equal and sufficient protection of the rights of the women prisoners as those provided in international treaties and guaranteed by the majority of "peer" nation states such that the rights had reached the status of customary international law. Counsel also pointed out that if necessary, plaintiffs would seek to amend the complaint to add claims based on international law and that a number of the women prisoners were foreign nationals who might have a greater entitlement to the protections of the international documents signed and ratified by their nation states.

Federal and state judges are also, understandably, fiercely protective of the state and federal constitutions they have sworn to uphold. They often believe that the constitutions provide (or should provide) sufficient protections for the rights of all individuals, including prisoners. Judges are also not immune from the general American perception that we provide leadership and, until recently, are the standard bearer of civil and human rights around the world. To have an international human rights organization assert that the treatment of women prisoners violates international norms and standards and hold these violations up to the world, placed the domestic courts in a situation of either disregarding the findings of the report, or interpreting the United States Constitution to provide an adequate mechanism for remedying these violations.

The attorneys, by attaching the HRW report to court pleadings, also introduced an entirely new perspective on the treatment of women prisoners in Michigan. The report provided a glimpse of possible remedial measures both through the recommendations and through the opportunity to view best practices in other states and countries. Educating the court early on that there were jurisdictions that did not have the level of abuse that existed in Michigan's women's prisons significantly diminished corrections officials' standard second line of defense to challenges to conditions of confinement. After denying the problem, corrections officials often defend a challenged condition as an unavoidable consequence of housing dangerous felons and resisted remedial measures as incompatible with penalogical objectives and security concerns. Information that other countries and states have managed to house their women prisoners without pervasive sexual abuse by male guards allowed the court to disregard this defense without impermissibly failing to give deference to the expertise of corrections management. As discussed below, the information about international standards and practices also would have a profound influence on the shaping of remedies in the case.

The HRW report, as introduced by the plaintiffs in the federal and state litigation, also provided a more intangible but no less important benefit to the domestic litigation. The perception by the courts that this was not just another prisoner case seeking damages but, rather, a case of international human rights importance, had a lasting impact on both of the judges. The judges, who had sentenced some of the very clients that were now before them seeking protection, relief, and damages, were provided a different lens through which to view the women in the litigation, as well as the goals and potential impact of their rulings beyond this case.

The use of human rights as opposed to prisoners' rights became more than a semantic distinction in the case and began to inform the way participants viewed the issues. It is easier to disregard the statements of, as the defendant corrections department often refer to them (with a bit of redundancy), the "convicted female felon," the "prisoner inmate," or the "felony offender" than it is to disregard the human rights of an incarcerated woman. The language of humane treatment, degrading treatment of women, and human rights began to be repeated by the media as the case progressed, adopted by the women's attorneys and ultimately echoed by the court.[20]

Outside of the courtroom, but no less important for the success of the litigation, the HRW report was distributed to the women prisoners and proved to be an important organizing and solidifying tool for the class. The women saw a concrete result from their willingness to disclose the details of their abuse with an international agency that recognized them as humans entitled to be treated with dignity and respect. The report lifted the veil of isolation and despair that had descended upon a group of women who believed not only that no one was listening but that, even if they were heard, no one would care. It also introduced women to the existence of counterparts in other states, lessening the self-blaming guilt that was a constant companion for many of the women who had been raped by guards, and provided a new non-legalistic language in which to assert their entitlement to nondegrading treatment and basic human rights.

Continuing Human Rights Interventions

In 1998, two years after the litigation began and the HRW report, the United Nations Commission on Human Rights appointed a special rapporteur, Radhika Coomaraswamy, to investigate the treatment of women prisoners in the United States as part of her mandate to investigate the causes and consequences of violence against women. The reports of the international human rights organizations and the supporting documentation from the litigation were largely responsible for this mission. The State Department approved the visit and the special rapporteur prepared to visit Michigan's prisons along with six other states. However, on the eve of her visit, the then-governor of Michigan, John Engler, revoked his agreement to allow her to visit women prisoners and canceled her meetings with state representatives. The refusal was grounded in part on the governor's assertion that the United Nations both lacked authority and was being used as a tool of the litigation.

Nevertheless, the special rapporteur journeyed to Michigan to meet with lawyers, academics, former guards, and former prisoners. Despite the lack of cooperation, the conditions in Michigan women prisons were included in the 1999 United Nations Human Rights Commission report on Violence Against Women. The report detailed the credible allegations of both sexual abuse and retaliation and, recognizing the UN Standard Minimum Rules for the Treatment of Prisoners, as augmented by the Basic Principles for the Treatment of Prisoners,[21] stressed the need for gender-specific supervision of women prisoners.

In an act of reciprocity, plaintiffs' counsel for the women prisoners, made presentations both at the United Nations Crime Prevention and Criminal Justice Congress in Vienna and an ancillary meeting panel at a session of the United Nations Human Rights Commission in Geneva on the ongoing human rights violations occurring in Michigan's women prisoners.

The local media then picked up on the reports in the Geneva press, reinforcing the relevance of the human rights framework and the scrutiny the state was being subjected to, in part because of the governor's refusal to acknowledge the authority of the United Nations on this issue. The state's refusal to allow inspections subjected it to scathing comparisons with rogue countries with extensive human rights violations and a history of rejecting international oversight and investigations into their conduct.

In 1998, Human Rights Watch returned to Michigan to follow up on reports that the women prisoners' cooperation with the international organizations and participation in the litigation had resulted in severe retaliatory actions by staff against them, including physical assaults and abuse, incarceration in isolation cells for long periods of time, intensified threats of sexual abuse, threats to their family, denial of visits, and loss of paroles. The resulting report, titled *Nowhere to Hide*, highlighted the near-absolute power staff had over the women prisoners—controlling their access to the world and their freedom, the risks the women incurred in speaking out, and the difficulty of addressing the abuse in this punitive and secretive environment. The report also reflected the interactive synergy between the litigation and human rights documentation. The acknowledgment both of the impact of stepping forward and the price that women prisoners were paying heightened both the credibility of HRW among the women as well as confirming the need for the litigation to seek additional remedial measures with regard to the retaliation.

The Path to Settlement

Meanwhile, the litigation was continuing at both the state and federal levels. Hundreds of depositions were taken, and weekly motions were occurring in federal court to address discovery issues, retaliation, and ongoing abuse. While no formal claims for violation of human rights had been filed, the language of the litigation both in the court room and in media coverage began incorporating the language of the recommendations of the reports and the observations of the United Nations calling for ensuring the human rights of women prisoners in Michigan. Phrases such as degrading treatment and inhumane conditions had replaced domestic legalese terms, and the call for taking male correctional staff out of the housing units of the female facilities was taken up by the Michigan state legislature as well as editorials in the local newspapers.

The accumulated negative press and pressure of the international scrutiny and local and national media coverage, and the rejection of the state's attempt to characterize the litigation as frivolous or the result of isolated acts of a few rogue guards by both the courts and the press resulted in the parties beginning settlement discussions.[22]

During the litigation, the Department of Corrections had made changes in its operations, as part of a settlement with the DOJ, including changes in

some of its process for hiring, training, and investigation of staff and structural changes in the facilities. The women prisoners, however, insisted that any settlement of their claims must include adherence to the international norms prohibiting cross-gender supervision and searches. While this relief was never specifically requested in the original pleadings, plaintiffs had prepared an amended complaint to allege violations of customary international law and specifically request injunctive relief consistent with the applicable standards set forth in the Convention Against Torture, the Women's Rights Convention, and the UN Standard Minimum Rules for the Treatment of Prisoners should the settlement negotiations fail and trial on this issue be required.[23]

Ultimately, the federal litigation was settled for significant damages and remedial relief, including the commitment to remove male staff from the housing units, intake, and transportation areas of women's prisons in Michigan and to eliminate cross-gender patdowns. The HRW report played a key role in persuading the court and the Department of Corrections to agree to remove male staff. While traditional prisoners' rights cases typically include experts who provide reports and testimony on the best practices in other states and correctional standards, it is unlikely that global standards regarding the treatment of incarcerated women prisoners would have been provided to the court absent HRW's report and Amnesty International's subsequent report in 1998. The reports revealed that while cross-gender supervision was standard practice in the United States, it was contrary to international standards that the majority of the world had accepted as a minimum standard.

In Michigan, women prisoners were largely supervised by male staff who performed the vast majority of body searches and routinely viewed women nude and performing basic bodily functions. In many instances, the midnight shift at the women prisons would be comprised entirely of male guards with full access to the women. The unfettered access, prurient viewing, and constant touching all worked to create a culture of sexual abuse and degradation in the women's facilities. The state had steadfastly refused to consider gender-specific supervision, asserting it to be near impossible, inconsistent with standard correction practices, and unlawful. The DOJ also declined to consider the remedy of elimination of cross-gender supervision and body searches, both because the federal prisons utilized male staff in their female prisons and a concern for the constitutionality of gender-based staffing raised by DOJ attorneys in the employment division.

Yet, HRW and Amnesty International maintained that internationally accepted UN standards[24] for the treatment of prisoners as well as the Convention Against Torture, the Women's Rights Convention, and the ICCPR should be considered in determining the treatment of prisoners, including women in detention. In particular, the UN Standard Minimum Rules for the Treatment of Prisoners represented a global consensus for the standards applicable to women prisoners and included the requirement that male staff shall not enter the part of the institution set aside for women unless accompanied by a female officer; and that women prisoners shall be under the authority of and attended and supervised only by woman officers. Although the United States had, in 1975, indicated its full compliance with implementation of these standards, the United States had lapsed into noncompliance beginning in the 1980s.[25]

Although no domestic standards required female supervision, plaintiffs' counsel, who heretofore had had no basis upon which to assert the provisions as a remedy, now based on the HRW and Amnesty International reports, had the entire world.

Post-Settlement

The intertwining of human rights advocacy with the domestic litigation continued when a contingent of guards challenged the Department of Corrections's implementation of the terms of the settlement, claiming that the removal of staff, based on their gender, violated their constitutional rights to equal protection under the law.[26] The women prisoners sought and obtained the right to intervene to protect their settlement and ensure compliance with both their constitutional rights and international standards of treatment. The history, as well as the current practices, in the United States and in 'peer' countries was a prominent concern of the trial judge in the case, who contacted Canadian government officials to inquire about the standards in provincial facilities housing women prisoners, and admitted into evidence the HRW and Amnesty International reports, the report of the UN Commission on Human Rights, and *The Report of the Canadian Government, Cross-Gender Monitoring Project Third And Final Report,* dated September 30, 2000, which recommended enforcement of the requirements of female-only corrections officers in female prisons in Canada. Although the court considered pleadings that directly raised the argument that failure to implement the settlement agreement would violate women prisoners' rights under both the Constitution and customary international law, it failed to directly rule on the women prisoners' claims and rejected the gender-specific assignments relying only on an analysis of the equal protection rights of the guards.

The federal trial court was, however, reversed on appeal by the Sixth Circuit Court of Appeals, which upheld the women prisoners' settlement requirement of gender-specific supervision based on women prisoners' rights under the Constitution to privacy and safe and humane treatment.[27]

While much of the interaction between human rights and the constitutional challenge to protect women prisoners from abuse arose from unplanned circumstances, the lessons and values learned were intentionally applied in the following challenge to the State of Michigan's treatment of its incarcerated citizens in this case the imposition of a sentence of life in prison, without the possibility of parole, for children under the age of eighteen, which constituted a clear violation of their human rights.

CHILDREN TO THE WORLD, ADULTS AT HOME

If there is a group of people caught up in the criminal justice system in America that has less legal protection than women prisoners, it has to be the children. In 1997, it was estimated that less than 1 percent of the people in state prisons were under the age of eighteen. Two years later, youth under eighteen accounted for 2 percent of all new commitments to state prisons. In 2004, there were estimated to be over 200,000 children under the age of

eighteen incarcerated in adult jails and prisons in the United States. The number is estimated because no one knows for sure how many children are being held in captivity. The Department of Justice, Bureau of Statistics published a report in 2001 which attempted to identify the number children under eighteen held in adult jails and prisons in this country as well as the number held in both private and public juvenile detention facilities. However, many states do not maintain separate records of the number of children in their adult facilities, reasoning that once a child had been tried or sentenced as if they were an adult, their child or juvenile status does not follow them into the adult prisons, despite the realities of their age. Figures of youth held in county jails are not compiled by, or reported to, a central source, and separate entities altogether monitor children held in most states' juvenile facilities.

There is no federal statute or constitutional provision that provides a child special protection, or even protects a child's right to be treated consistent with their status as a child, and throughout the country state laws allow prosecutors to turn a blind eye to the chronological age and corresponding maturity of children, designating them as adults and subjecting them to adult prosecution, punishment, and incarceration.

In stark contrast, the Convention on the Rights of the Child (CRC) recognizes that the special status of children entitles them to special protection. It provides that children are to be incarcerated as a last resort, for the least amount of time possible with mandated rehabilitative efforts. Further, the CRC flatly prohibits sentencing children to life in prison without parole, stating in Article 37(a) that "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

This provision of the CRC has near universal acceptance. 192 of the 194 countries have signed, ratified, and not registered a reservation to the CRC's prohibition on life imprisonment without release for youth offenders. The United States and Somalia are the only two countries in the world that have not ratified the CRC, although both have signed it.[28]

Life imprisonment for juveniles also violates the clear language of the ICCPR, which was both signed and ratified by the United States. Article 10(3) requires that children (under the age of eighteen) be treated appropriate to their age and legal status as children. Article 14(4), which was cosponsored by the United States, mandates that criminal procedures for youth charged with crimes "take account of the age and the desirability of promoting their rehabilitation."[29]

The harshest punishment available for a crime, in states that do not have the death penalty, is the sentence of life imprisonment. In forty-two states, in the United States, it is also a permissible punishment for crimes committed by children.

Developing an Integrated Human Rights Strategy

Despite the clear problem of juvenile life without parole sentences, little was known of the number of youth serving this sentence in the United States. Given the positive, if somewhat serendipitous, impact of interweaving

documentation of the abuse of women prisoners by international human rights organizations with domestic litigation challenging their treatment, a joint documentation project was planned as the first step in an integrated advocacy strategy incorporating human rights to address juvenile life without parole sentences in the United States.

The coalition which would become known as the *Second Chances* coalition was spearheaded by the Juvenile Life Without Parole Initiative and began in the state of Michigan in 2003 with the sponsorship of the Michigan affiliate of the American Civil Liberties Union, the research assistance of the Institute for Social Research at the University of Michigan, and Columbia Law School's Human Rights Institute. The national ACLU, a domestic civil rights organization, had recently created a Human Rights Working Group to incorporate a human rights framework in certain litigation and advocacy work, and the work around juvenile life without parole, which combined that working group's concerns with human rights, racial justice, and criminal justice, quickly became part of the national initiative.

Documentation was conceptualized as a first step for several reasons. As in the prior work around sexual abuse of women prisoners, documentation by human rights organizations would identify, humanize, and give voice to the victims of the human rights violations. In addition, documentation was necessary because there was a dearth of knowledge on the extent of the use of this punishment in the United States. Fact-finding could also function to identify potential areas of litigation.

Documentation as a first step also made sense because direct legal challenges under domestic law appeared limited. The traditional challenge used to attack the juvenile death penalty was the Eighth Amendment's prohibition on cruel and unusual punishment. The U.S. Supreme Court stuck down the death penalty for juveniles under the age of sixteen in 1988.[30] Although the U.S. Supreme Court, at the time the documentation project was initiated in 2003, had not yet rejected the death penalty for sixteen- and seventeen-year olds, the challenge was well underway to argue that this punishment had also become sufficiently unusual to warrant a ruling on its unconstitutionality.

However, the U.S. Supreme Court had also held in general that life without parole sentences were constitutional, and the laws of forty-two states allowed life without parole sentences for juveniles, making a constitutional challenge that the punishment met the conjunctive requirements of cruel *and* unusual difficult on its face.

Federal appellate courts had also held that mandatory sentences of life without parole imposed on juveniles for murder convictions do not violate the Eighth Amendment, and where review has been sought by the United States Supreme Court, it has been declined. These courts also rejected arguments that the lack of consideration of the defendants' youth posed constitutional problems.[31]

In 2004, the Supreme Court finally forced the United States into compliance with the world's standards on criminal punishment of juveniles in the context of the death penalty in *Roper v. Simmons,* which struck down the death penalty for juveniles who committed their crimes under the age of eighteen as a violation of the Eighth Amendment. Much of the Court's reasoning

about the differences between juveniles and adults, the vulnerability of juveniles to negative influences and pressures, and other developmental realities apply equally to life without parole sentences. It was clear that the human rights communities' work on this issue contributed to the Court's interpretation of the Eighth Amendment,[32] and the same international authorities that condemned the juvenile death penalty instruct that the sentence of life without parole for juveniles also violates international law and is a rare punishment around the world.[33] However, while *Roper* struck down the juvenile death penalty, it left intact laws in forty-two states which sentence children to grow old and die in a prison cell for crimes committed when they were under the age of eighteen. With the practice remaining widespread in the United States, a challenge under the Eighth Amendment, which required a demonstration of both cruelty and unusualness, was still premature.

Similarly, state constitutional challenges were not promising, although many states, including Michigan where the documentation project started, had a disjunctive constitution requiring the proof of cruel *or* unusual punishment. The Supreme Court of Michigan had held that juveniles do not have a fundamental or constitutional right to special protection, and the state appellate courts had rejected a challenge to the life without parole sentences as cruel or unusual and held that children or juveniles had no constitutional right to be treated as juveniles. The lack of a right to special protection means that there is no fundamental right to certain procedures and standards for determining when children can be treated as adults.

An additional perspective contributed to a decision not to attempt domestic litigation as the first challenge to juvenile life without parole sentences. While litigation had been a significant tool in challenging human rights violations, its focus on the authority of the judiciary could, without care, disengage advocates, families, and the victims of the human rights violations themselves while the litigation wound itself through courts and appellate processes. Without an advocacy movement in place, a pure litigation strategy was insufficient for building a successful human rights framework.

The strategy then was to begin a challenge using a human rights framework, both substantively and procedurally using traditional human rights devices to begin the advocacy. The strategy would first create a documentation project, then join together domestic advocacy groups involved with children's rights and criminal justice issues together with international human rights organizations to develop both an advocacy campaign and a coordinated legal challenge incorporating human rights law.

Human Rights Documentation

In Michigan, the documentation project involved extensive interviews with juveniles serving the life without parole sentence; collateral interviews with families of the juveniles and victims' families; extensive review of trial transcripts and records of the juveniles, pre- and postconviction; interviews with judges and prosecutors; and data collection, in order to compile a broad understanding of the impact of the laws allowing life without parole sentencing of juveniles.

The data collections and the interviews proved the most challenging and enlightening. In order to obtain a nuanced view of the data, it was planned to collect data and obtain interviews from a minimum of fifteen states from different geographic areas that allowed life without parole sentences to be imposed on juveniles. While the data collected provided a wealth of information and the beginning of an understanding of the extent of the use of life without parole sentences for children, the diverse recordkeeping of various Departments of Corrections together with divergent rules on what constituted public documents, and a patchwork of laws left some gaps in the data.

The interviews, once permission was obtained, ranged from emotional discussions with youths who had not received a single visitor since they had been arrested and lacked knowledge of the terms of their sentence, to in-depth thoughtful discussions with mature men and women who spoke of their youthful selves almost as children from another era and identity, to youths who were deeply damaged and brought to visits from observation facilities after suicidal or self-mutilation incidents. Initial interviews led to follow-ups, letter writing, and phone calls and the emergence of a family advocacy network and a network of incarcerated youth who began their own documentation project to detail their lives.

When it became apparent that there was an impetus for seeking remedial action in Michigan, a breakout report was issued titled, *Second Chances*: *Juveniles Serving Life Without Possibility of Parole in Michigan's Prisons*, reporting that over 300 children in Michigan alone were serving the sentence of natural life without any possibility of parole.

After the publication and attendant publicity of *Second Chances*, Amnesty International and Human Rights Watch partnered together, for the first time, to complete and issue a national documentation report on juveniles serving life without possibility of parole in the United States. The report was able to utilize the data collected by the ACLU's juvenile life without parole initiative and take advantage of the findings compiled from focus groups and statewide polling conducted in Michigan on the issues. The report, titled *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, was issued in late fall 2005, and its unveiling at the ACLU offices of Michigan recognized the combined efforts of these three organizations to adopt a human rights framework approach to the challenge to juvenile life without parole in this country.

Infusing Human Rights Advocacy in Local Campaigns

The report garnered worldwide media attention, raising the consciousness of media and the public in the United States to the human rights violation involved in sentencing juveniles to life without parole, while concurrently raising the issue of the United States' violation of human rights with the worldwide body.[34]

Meanwhile, the documentation reports sparked an informal national coalition that included domestic advocacy groups, children's groups, legal academics, funders, additional domestic criminal justice advocacy groups, doctors and psychologists, and traditional human rights advocates to coordinate

national challenges to juvenile life without parole sentencing. The overarching issue and approach was to keep the human rights component alive in whatever strategies were most effective on a state-by-state and national basis. In Colorado, advocacy groups, in collaboration with Human Rights Watch, issued their own state documentation report titled *Thrown Away: Child Offender Serving Life Without Parole in Colorado*. California and Illinois began working with a private law firm to begin their own statewide documentation project in preparation for legislative and/or litigation challenges, drawing on the expertise of both Human Rights Watch and the ACLU. Mississippi, Louisiana, and Florida all began their own initiatives, again relying upon the assistance of the ACLU, Amnesty International, and Human Rights Watch in developing their state challenges.

In Michigan the documentation project continued and became more nuanced, able to address the racial injustice components of the life without parole sentence and engage advocacy groups to focus on this aspect of racial discrimination in the administration of the criminal justice system in the United States. The project also continued to weave human rights concerns with the domestic agenda, by working domestically to introduce legislation to eliminate the sentence, while filing a petition with the Inter-American Commission, with the assistance of the Human Rights Institute and clinic at Columbia Law School, directly challenging the illegality of their sentence under the American Declaration of the Rights and Duties of Man.

The media reports on all of these events often included specific reference to the fact that this practice violated international norms, treaties, and covenants, a perception not usually included in media reports of domestic sentencing issues involving the criminal justice system in America and impacting the language of the debate. The discussion was more about children's rights, human rights, and second chances for youth and less about violent predators/felons and hardened criminals (language used by the opposition).

Like the situation with women prisoners, the juveniles serving the life sentence together with their families and friends also embraced the human rights language and framework. The Second Chances coalition, which grew out of the grassroots organization of family, friends, and juveniles, created a Web site with links to the domestic legislation, the Inter-American petition, the documentation reports, and the international instruments which supported the assertions of human rights violations.

International Advocacy

In addition to local efforts, activists engaged in international forums to increase international pressure on the United States. Counsel for the juveniles in Michigan attended the UN Congress on Crime Prevention and Criminal Justice in Bangkok in 2005, on behalf of Human Rights Advocates to raise the issue of juvenile life without parole sentences in this international body as a prelude to addressing the issue with the UN Human Rights Committee.

In September 2006, the United Nations Human Rights Committee addressed the issue as part of its concluding observations on the United States's compliance with the ICCPR. After recognizing the documentation reports,

the committee observed that sentencing children to life sentence without parole is of itself not in compliance with Article 24 (1) of the Covenant (Articles 7 and 24) and recommended that:

> The State party should ensure that no such child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentences.[35]

Similarly, the UN Committee Against Torture included the issue in its recommendation on the United States's compliance with the Convention Against Torture, stating: "The State party should address the question of sentences of life imprisonment of children, as these could constitute cruel, inhuman or degrading treatment or punishment."[36]

The United Nations General Assembly also adopted a resolution calling for the elimination of this practice as violating the Convention on the Rights of the Child. This international attention, in turn, brought domestic media attention back to the human rights issues and violations, requiring state legislators to address the issues of the state's laws violating human rights norms, treaties, and conventions. Not everyone was impressed with the framework however. Alan Cropsey, the Republican chair of Michigan's Senate judiciary committee, who blocked hearings on the reform legislation, responded to the United Nations observations by asserting that "The UN is a laughing stock. They have no moral credibility." One journalist, however, noting the poor company the United States was keeping on this issue, mourned the United States's ebbing moral authority, coming full circle by connecting the abuses committed by military in Abu Ghraib with the culture of ignoring human rights obligations at home.

NOTES

1. Matt Davis, Michigan Department of Corrections spokesperson (press statement).

2. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

3. *Thompson v. Bond*, 421 F.Supp. 878, 882 (W.D. Mo. 1976).

4. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

5. Many chapters could be written on the confluence of events that resulted in what is known as the modern prisoners' rights movement. *The Autobiography of Malcolm X* was first published in the United States in 1965 and Eldridge Cleaver's *Soul on Ice* in 1968. These followed Caryl Chessman's 1950s exposure of death row (in)justice and were all widely read both inside prison and out, creating a symmetry of shared knowledge and consciousness raising on prison conditions in the United States.

6. *Jackson v. Bishop*, 404 F.2d. 571 (8th Cir. 1968).

7. *Hutto v. Finney*, 437 U.S. 678 (1978).

8. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

9. *Estelle v. Gamble*, 429 U.S. 97 (1976).

10. *Turner v. Safely*, 482 U.S. 78 (1987).

11. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

12. Because prison officials often prove to be recalcitrant even after courts have found the condition and treatment of prisoners unconstitutional, federal trial court

judges have the power to issue injunctive and remedial orders specifically ordering officials to take certain steps or adopt certain measures.

13. *Wilson v. Seiter*, 501 U.S. 294 (1991).

14. Significantly, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment provides that coercion based on discrimination which causes severe harm, whether physical or mental, constitutes torture. For an action to constitute cruel, inhuman, or degrading treatment or punishment it need not be shown to be committed for a particular purpose or with any specific intent.

15. *Lewis v. Casey*, 518 U.S. 343 (1996).

16. Amnesty International, *"Not Part of My Sentence": Violations of the Human Rights of Women in Custody in the United States* (Amnesty International, March 1999); Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (Human Rights Watch: December 1996); Human Rights Watch, *Nowhere to Hide: Retaliation against Women in Michigan State Prisons* (Human Rights Watch, July 1998).

17. *Glover v. Johnson*, 478 F.Supp 1075 (E.D. Mich 1979).

18. *Klinger v. Dept. of Corrections*, 31 F.3d 727 (8th Cir. 1994).

19. In the criminal justice context, attempts by prisoners to challenge their criminal convictions arguing international law in the context of habeas corpus petitions had consistently been rejected, as had challenges to capital punishment against juveniles, something that was clearly violative of a number of international treaties and customary international law.

20. Counsel for the women also attempted to reframe the language and status of their clients by including claims, in the federal litigation, of violations of the federal Violence Against Women's Act, and in the state case raising their central claims under the state's civil rights act which prohibits discrimination, including sexual-based harassment against women in all public services and facilities. Unfortunately, after the cases were filed, the federal courts struck down the Violence Against Women's Act as unconstitutional. When the Act was reauthorized, it excluded protections for women prisoners. Similarly, the state of Michigan amended the state's civil rights act to specifically deprive prisoners of the Act's protection against discrimination. This amendment was, however, later struck down as unconstitutional when challenged by women prisoners as violative of their constitutional and human rights. *Mason v. Granholm,* 2007 WL 201008, ED Mich, January 23, 2007.

21. UN General Assembly, *Basic Principles for the Treatment of Prisoners*, G.A. res. 45/111, UN Doc. A/45/11 (December 14, 1990).

22. A one-hour special was aired on national television which focused in large part on the conditions in Michigan and joined comments from Human Rights Watch, the counsel for the women prisoners, the Department of Justice, and state officials in evaluating the conditions of women prisons in the program titled *Women in Prison: Nowhere to Hide.* The special garnered an American Bar Association Silver Gavel Award and a Robert Kennedy award for broadcast journalism that year.

23. See Martin A. Geer, "Human Rights and Wrongs in our Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law: A Case Study of Women in the United States Prisons," *Harvard Human Rights Journal* 13 (Spring 2000): 71.

24. Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 UN ESCOR Supp. (No. 1) at 11, UN Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 UN ESCOR Supp. (No. 1) at 35, UN Doc. E/5988 (1977); UN General Assembly, Basic Principles for the Treatment of Prisoner.

25. Nick Pappas, *The Jail: Its Operation and Management* (Washington, DC: United States Bureau of Prisons, 1973), pp. 19, 71–72; UN Standard Minimum Rules. For a full history of the United States lapse into noncompliance, see Martin A. Geer, "Protection of Female Prisoners :Dissolving Standards of Decency," *Margins* 2 (2002): 209.

26. *Everson v. MDOC*, 222 F.Supp 2d 864 (E.D. Mich 2002). The male guards used Title VII of the Civil Rights Act Section 703(a)(1) and (2), which states:

(a) It shall be unlawful employment practice for an employer
   1. To fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment because of such individual's race, color, religion, sex or national origin; or
   2. To limit, segregate or classify his employees or applicants from employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

27. *Everson v. MDOC*, 391 F3d 739 (2004), cert. den. 126 S.Ct 364 (2005). For a good discussion of the case and the legal and social issues surrounding women prisoner abuse and privacy rights, see the work of Brenda Smith, "Sexual Abuse of Women in Prison, a Modern Corollary of Slavery," *Fordham Urb. L.J.* 33 (2006): 571; and Brenda Smith, "Watching You Watching Me," *Yale J.L. and Fem.* 15 (2004): 223.

28. The United States signed the Convention on the Rights of the Child on February 16, 1995 and Somalia signed on May 2, 2002, and while neither have since ratified it, Somalia lacks a formal government to effectuate ratification.

29. When the United States ratified the ICCPR, it attached a limiting reservation, providing that "the United States reserves the right, *in exceptional circumstances*, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14."

30. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J., concurring) (the court in holding that such a punishment has become unusual in the United States as part of our evolving standards of decency also noted the global rejection of the death penalty for youth offenders age sixteen or younger).

31. Although two state supreme courts have held that juvenile life without parole sentences were improper, the cases involved particularly troubling circumstances concerning a thirteen-year-old convicted of murder and a fourteen-year-old convicted of rape.

32. The Court specifically referred "to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments," and cited two documentation reports on the limited use of capital punishment of minors in the rest of the world. *Roper v. Simmons*, 125 S.Ct. 1183, 1198 (2005).

33. According to Human Rights Watch, Amnesty, and Human Rights Advocates, there were only a handful of youth in the rest of the world combined serving a life without parole sentence.

34. There was extensive coverage in both local newspapers in Michigan as well as worldwide coverage. For example BBC radio aired an interview with a juvenile serving LWOP in Michigan and the *New York Times* included the issue in a three-part series. The national report also helped fuel ongoing coverage and attention on Michigan with segments of National Public Radio and state journals focusing on Michigan's efforts to illuminate and eradicate this human rights violation.

35. See UN Human Rights Committee, 87th Session, *Consideration of Reports Submitted By Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/CO/3/Rev.1 (18 December 2006).

36. UN Committee Against Torture, 36th Session, *Consideration of Reports Submitted By Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee Against Torture: United States of America*, UN Doc. CAT/C/USA/CO/2, para. 34.

CHAPTER 6

Housing Rights and Wrongs: The United States and the Right to Housing

Maria Foscarinis and Eric Tars

The United States has faced an escalating housing crisis for the past several decades. One indication is the large and growing number of people living in public places: those who are visibly homeless. Many more homeless people are hidden from sight: living in shelters or other temporary accommodations, doubled up with others, or moving from place to place. Current annual estimates are that up to 3.5 million people experience homelessness, representing 1.3 percent of the total U.S. population and 9.6 percent of the poor population.[1]

Further along the spectrum of housing need are those who are precariously housed. According to a 2006 report by the Joint Center for Housing Studies at Harvard University, in 2004 15.8 million households spent over 50 percent of their income on housing; another 35 million spent over 30 percent. The overwhelming majority of these households are low income, although middle-income households are increasingly affected as well. The 2005 Gulf Coast hurricanes resulted in increases in homelessness and also worsened the shortage of affordable housing, destroying hundreds of thousands of affordable homes and leaving low-income people in the affected communities without housing.

Several intersecting causes contribute to the shortage of affordable housing. Housing costs in many private markets have increased while wages, particularly for lower income people, have remained stagnant or fallen in real terms. Existing low-income housing has been destroyed, either as a result of gentrification or by government programs that destroy blighted public housing but do not replace lost units. Income support and other public benefit programs have also been cut, leading to reduced real income for disabled and

elderly poor people and fewer resources to meet basic needs for low-income people in general. At the same time, funding for federal housing programs has been dramatically cut since the early 1980s.

The impact of the housing crisis is severe. Without affordable housing, low-income people risk homelessness and also compromise their ability to meet other basic needs, such as food, health care, and child care. For those who do become homeless, resources to meet immediate need for shelter are severely inadequate, even according to federal government reports, considered conservative by many advocates. Each year, dozens to hundreds die from exposure to heat or cold or, more recently, violence in the streets.[2] Across the country, people without any place to go are criminally punished for their presence in public places.

The impact is also far-reaching: Without stable housing, children suffer from slowed development, emotional problems, and educational underachievement. Homelessness can result in the removal of children from their parents by child welfare agencies. Legislation excluding many of those leaving prison and jail from federal housing assistance programs is creating a rapidly expanding group of persons with nowhere to go upon release and resulting in increased recidivism rates.[3] Without a utility bill or a lease, obtaining identity documents can be extremely difficult, further limiting access to education, employment, public benefits—and housing. As UN Special Rapporteur Miloon Kothari wrote in a preface to a report by the National Law Center on Homelessness and Poverty (NLCHP) on the right to housing in the United States:

> The right to adequate housing has to be seen as a congruent right along with the right to security of the person, the right to security of the home, the right to participation, the right to privacy, the right to freedom of movement, the right to information, the right to be free from inhumane and degrading treatment and the right not to be arbitrarily detained.[4]

U.S. advocates have taken a variety of approaches in addressing the crisis of homelessness and the shortage of affordable housing. This work has included the passage of federal legislation addressing homelessness,[5] resulting in federal funding for shelter, transitional and some permanent housing, as well as some legal protections for homeless people.[6] It has included advocacy for increased funding for low-income housing programs. It has included constitutional challenges to laws that criminalize homelessness, resulting in court decisions striking down laws that outlaw sleeping and other life-sustaining activities in public when it can be shown that there are insufficient shelter beds.[7] These strategies have made, and continue to make, a critical difference, but housing resources still fall far short of housing needs.

In contrast to those of many other countries, the U.S. Constitution does not include an explicit right to housing, and the U.S. Supreme Court has indicated an unwillingness to imply one.[8] A variety of federal, state, and local programs provide assistance for some categories of poor people, and some create "entitlements" that provide assistance to all who meet the eligibility criteria. But there is no requirement that the assistance be at sufficient levels

to meet basic needs such as housing. Nor is there a federal statutory entitlement to housing.

The federal housing act of 1949[9] included the expressly stated goal of a "decent home and suitable living environment for every American family"[10] as soon as feasible, echoing an earlier call by President Franklin Roosevelt for an economic bill of rights.[11] But this language was aspirational, stating a goal rather than a specific commitment to a number of units or level of funding. Indeed, while there have been some periods of considerable, though never sufficient, funding, housing programs have been cut very significantly over the past few decades.[12] Current estimates are that only one-fourth of all of those who are poor enough to qualify for federal housing assistance actually receive it, due to lack of resources.[13]

In 1996, a small group of advocates working to end homelessness in the United States, including one of the authors, participated in Habitat II, a UN conference on the human right to housing. The group played a role in drafting the conference document, adding language relevant to the U.S. housing crisis, and participated actively in the conference events in Istanbul. While the official U.S. government representatives opposed the inclusion of the right to housing in the conference document, fearing that U.S. public interest lawyers would file suit to enforce it, the advocates opposed this official stance and the language was included. Through their work on this event the group began to see an opportunity to fill the gap in U.S. policy by drawing on international human rights law. While U.S. law alone does not adequately protect housing rights, recognizing and implementing the human right to housing could help close that gap, ending and preventing homelessness and ending the housing crisis. Further, establishing housing as a right, as opposed to keeping assistance discretionary, would provide a measure of security for poor and less well-off people, and for anyone falling on hard times.

Toward that end, a human rights approach can help reframe public debate and perception and, eventually, affect actions. Public discourse about poverty has become increasingly punitive, as well as divisive, with poor people stereotyped as lazy, fraudulent, or otherwise not behaving appropriately. The impact of this public discussion is reflected in public policy at all levels, such as the repeal of the federal entitlement to welfare benefits, the exclusion of formerly incarcerated people from housing programs and other public benefits, and the criminalization of homelessness by cities. It is also reflected in private actions: homeless and poor people are in some cases beaten or murdered based on their status.[14] Human rights frameworks can cut through such divisions by positing that everyone has rights—regardless of status—simply by virtue of being human.

Human rights can also help frame advocacy and public policy agendas. Because human rights law expressly recognizes the right to housing and other economic and social rights, it has led to the development of a body of jurisprudence on what those rights mean and how they can be implemented. As such, it is a source of legal and policy models that can be incorporated into U.S. reform agendas. Similarly, countries that have implemented these rights offer practical examples that can serve as models for the United States.

International law, including human rights, also has significance and application in U.S. courts. Indeed, it is part of U.S. law, but its application and use in U.S. courts, federal or state, is not always straightforward or accepted. But some courts have relied on it and in certain kinds of cases its use is both appropriate and helpful.[15] Increasingly, judges are looking to international law as well as comparative practice of other countries. Indeed, several Supreme Court rulings have cited international law and practice, and a number of individual Justices have recently spoken about their importance and relied on them in their rulings.[16]

Human rights frameworks may also offer new venues for advocacy on domestic U.S. issues. Advocates may take their case to international and regional bodies, and a growing number of advocates have started to do so. These venues may also serve as a forum for directly affected communities to present grievances and have their voices heard by official bodies—which can help support and add force to organizing campaigns by such groups. They can draw attention to and publicize injustice, and help galvanize world opinion. Some international and regional bodies have oversight over the United States,[17] and they can make findings that can then be used by advocates before U.S. courts or legislative bodies, directly leading to change in the United States.

In the past few years NLCHP, together with an international housing rights group, the Centre for Housing Rights and Evictions, has hosted three national conferences and several regional training sessions focused on the human right to housing. The first, held in 2003, included strong participation by the group that had participated in the Habitat II conference. The event was extremely well received, and a core group coalesced for follow-up planning and work.[18]

In 2005 and again in 2006, NLCHP organized additional national forums, drawing broader and increased participation. Miloon Kothari, the UN Special Rapporteur on the Right to Adequate Housing, and the international community's highest-ranking expert on housing issues, spoke at and participated in the 2005 forum; his remarks and presence inspired attendees and demonstrated that U.S. housing conditions are taken seriously at the international level. In 2005, NLCHP also began organizing local and regional trainings. As of this writing, these include two events in Chicago, two in Los Angeles, an event in Minneapolis, and a statewide training in Florida. Each has been in collaboration with local partners interested in learning about and using the human rights approach in their communities. Additional trainings are planned.

A significant number of those who attended that and following events have been poor or homeless. They had no trouble grasping the concept of human rights, how it applies in the United States, and how it applies to them. In fact, learning about the human right to housing seemed to be tremendously energizing for all, but especially for those whose own rights were most directly affected. Indeed, human rights can play a crucial role in organizing affected communities in advocacy for their own rights, as well as in galvanizing broader public support.

This chapter will explore in more detail specific housing challenges facing poor people in America today—and how human rights approaches are being

incorporated into advocacy to address those challenges. In particular, the chapter discusses the lack of affordable housing; discrimination in housing; and the criminalization of homelessness as areas where efforts to incorporate human rights approaches are currently under way, giving highlights and examples of such efforts. The chapter then assesses the value of human rights in these efforts and reflects on prospects for the future.

CHALLENGE 1: LACK OF ADEQUATE HOUSING

Human rights law defines a right to adequate housing in several key documents. The Universal Declaration of Human Rights provides that "[E]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . housing."[19] The International Covenant on Economic, Social, and Cultural Rights (ICESCR) recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions."[20]

Human rights law defines the right to adequate housing as consisting of seven core components: legal security of tenure, availability of services and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy. Implementation of these rights may require the expenditure of resources, and under the human rights framework, the obligation on states (or countries) is to realize the implementation of the right progressively.[21]

Much of current housing need in the United States concerns the shortage of affordable housing, as outlined above, and advocates have focused much activity on this issue. At the same time, the loss of existing units of affordable housing raises issues of security of tenure for the residents of those units. Access to services is an issue for all, but it most specifically affects those in need of support as well as housing. This section reviews and analyzes advocacy campaigns using human rights frameworks and strategies to address the lack of adequate housing in the United States, focusing on those key components of the right to adequate housing.

Fighting for Security of Tenure in Chicago

The human right to housing provides that: "All persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."[22] Without this right, residents have no legal recourse when the government decides it prefers to do something else with the land that has fostered generations in a tight-knit community.

The residents of the Cabrini-Green public housing project in Chicago know something about the right to security of tenure, or the lack of it. This development was built starting in the 1940s and continuing into the 1960s. Today, with funding for federal housing programs drastically cut, these public housing units have fallen into disrepair. Despite, or perhaps because of the difficult conditions, the community has bonded closely.

Since 1999, under a federal housing program to tear down blighted public housing developments and replace them with mixed-income units, the Chicago

Housing Authority (CHA) has torn down over 14,000 housing units, displacing over 20,000 residents. Although some new low-income units will be replaced, less than 1,000 have been built so far, and a large net loss of low-income housing is anticipated. This loss is occurring in the context of a major affordable housing shortage in Chicago, with more than 51,000 families now on the waiting list for public housing in Chicago, with 7,000 and 30,000 more on county and state waiting lists respectively. The land on which these housing projects sit is one of the most valuable real estate markets in the country, less than a mile from Chicago's "Gold Coast."[23]

Although the goal of the housing destruction is to move families to new opportunities, a study has shown that over 90 percent are resegregated to high-poverty, high-crime neighborhoods.[24] Moreover, the *Chicago Tribune* conducted an investigation which further explained the chronic lack of security of tenure following their displacement. The *Tribune* reports that thousands of public housing residents have been rushed into horrible living conditions and many of them have had to move their families over and over again as a result of failed inspections. Repeated moves have been shown to have a detrimental effect on children's education and family stability. Moreover, homeless shelter data shows over 150 families moved directly from public housing to homelessness.[25]

The Coalition to Protect Public Housing (CPPH) is a network of public housing residents based at the Cabrini-Green public housing development and citywide support organizations including the Community Renewal Society, the Chicago Coalition for the Homeless, the Jewish Council on Urban Affairs, Americans for Democratic Action, and the University of Illinois Chicago Voorhees Center for Neighborhood and Community Improvement. Since its formation in 1996, CPPH has worked to protect the rights of Chicago's public housing residents and to ensure a future for public housing in Chicago and nationally across the nation. Its mission has been to better understand the impact in Chicago of the federal legislative public housing changes, to educate public housing residents and the general public about the impact of these changes, and to intervene in the decisionmaking process so that public housing residents will not be unduly harmed by these changes.

Activists began speaking in the language of human rights as they worked on their campaigns. CPPH's founder and president, Ms. Carol Steele, has been thinking along these lines for many years, and testified at the fiftieth anniversary of the Universal Declaration of Human Rights in New York City in 1998. In 2003, advocates from several members of CPPH attended the National Forum on the Right to Housing, acquired specific information and tools, and returned ready to begin an active campaign on the human right to housing. In January 2004, they held a workshop at the Chicago Social Forum on human rights and built on this at a retreat the following month, where they designated a Human Rights Committee to research and develop a strategic approach for using human rights in their campaign.

In March 2004, CPPH convinced the Cook County Board of Supervisors to pass a resolution endorsing the human right to housing. This resolution supported the passage of a state bill which provided for $14 million in rental subsidies to create 1,600 new affordable housing units for the residents of

Cook County. The bill ultimately passed, bringing all these additional resources to the county. By creatively linking the county's desire for state aid with the framework of human rights, CPPH was able to get one of the first official endorsements of the human right to housing in the country. In addition to the immediate resource allocation, having this right in the resolution provides the basis for future advocacy.[26]

On April 25, 2004 Miloon Kothari made a historic visit to the residents of Cabrini-Green as part of a national country visit. CPPH invited Mr. Kothari to learn about CHA's planned demolition of more than 20,000 units. In his discussions with Cabrini-Green residents, Mr. Kothari acknowledged that there is a human rights crisis in the forced evictions of public housing tenants from their units. CPPH and NLCHP continued to work closely with the Special Rapporteur, and in the spring of 2005 Mr. Kothari conducted an exchange of diplomatic letters with the United States government expressing concern over proposed elimination of the Section 8 Housing Choice Voucher program.[27]

Public housing residents and advocates filed legal challenges, but in April 2005, CHA announced its intent, in contradiction to previous legal settlements, to summarily close half of the development down in ninety days. The CHA did not offer any onsite replacement housing, nor did it give the soon-to-be displaced residents the opportunity to move into the hundreds of vacant units that would remain in Cabrini-Green.

CPPH responded to this attempt to destroy their community by filing a lawsuit and organizing residents to fight for their human rights. At the urging of the Cabrini-Green resident leadership, the lawsuit cited international legal standards. After several months of litigation, supported by a strong organizing campaign in Cabrini-Green, the federal judge ruled that any resident who wanted to stay in Cabrini-Green could do so until such a time as adequate replacement housing had been built. Although this was a major victory for the residents facing displacement and the destruction of their community, the fight is not over. The CHA has continually attempted to ignore this ruling and has yet to plan for any replacement housing for the units it has torn down. However, the resident leadership at Cabrini-Green has continued to fight and to increase their base of support.

Hundreds of families still remain in Cabrini-Green, fighting to realize their human right to housing. As will be detailed below, they also participated in hearings before the Inter-American Commission on Human Rights and other international bodies as part of their overall strategy to protect public housing in Chicago.

The Campaign for Habitability and Location in Louisiana

Housing codes, coupled with judicial recognition of an implied warranty of habitability, have made vast improvements in housing conditions in the United States. Tenants may sue their landlord or withhold rent if their conditions are uninhabitable. But its limitation to the individual landlord-tenant context still leaves it short of fulfilling the right. Moreover, underenforcement of code violations remains a problem.

Further, environmental racism—the deliberate placing of polluting or dangerous industries in minority neighborhoods—is not a crime under U.S. law. For example, in the Gulf Coast, an area called "Cancer Alley" lies north of New Orleans. According to advocates, oil refineries were deliberately sited in areas with high minority populations because corporations recognized that these communities did not possess the political power to stop them or to promote adherence to even basic environmental standards. Meanwhile, cancer and asthma rates in these communities skyrocketed.[28]

Some creative legal strategies had worked to deny permits to companies that would have polluted poor and minority communities, but by the late 1990s, advocates were being frustrated by revisions to the law, resulting in the regulation of fewer pollutants and the siting of facilities near residential areas. In 1997, a lawsuit filed by the Concerned Citizens of Norco (an area in Cancer Alley) against Shell Oil Corporation was dismissed after Shell argued there was a lack of evidence that the increased cancer rates were connected directly to their pollution. This led a coalition of groups to seek help by turning to international standards that granted them the protections they needed.

Global Rights (then the International Human Rights Law Group) trained the activists in international human rights norms, including those found in the Convention on the Elimination of All Forms of Racial Discrimination (CERD), a treaty the United States has ratified. CERD requires the government to eliminate all racially discriminatory effects of government laws and rules, including rules promulgated by regulatory bodies such as the Environmental Protection Agency. CERD also guarantees nondiscrimination in economic and social rights such as the right to housing that spoke to the violations the people knew they were experiencing, but had no framework to express under domestic law.[29]

In 1999, they brought their case to the UN Commission on Human Rights and held the first-ever international hearing on environmental racism. They then brought the pressure home even more with a visit to Cancer Alley by the UN Special Rapporteur on Toxic Waste and Human Rights. Through this combined pressure, they drew the attention of national media, a few Congressional representatives, and some nontraditional allies like the Dreyfus mutual fund company's socially responsible index. This pressure prompted Shell to offer residents a partial buy-out—those living in the blocks nearest the plant would be compensated for relocating. The residents rejected this offer, holding out until the whole community would be benefited.

Following on connections made at the Commission on Human Rights, members of the coalition began touring other sites of environmental racism around the globe. In Nigeria, they met a group who had been fighting largely the same battle with Shell as the residents of Louisiana. The Nigerian advocates had discovered that the Dutch parent company of Shell followed far higher environmental guidelines in Europe than it did in Nigeria (and the United States). The coalition members threatened that if Shell did not apply those same standards to its U.S. subsidiary, they would bring their case to the international spotlight at the UN World Summit on Sustainable Development, which would be taking place in 2002 in Johannesburg, South Africa. Faced

with this rising wave of domestic and international condemnation, the refinery officials finally agreed to enforce higher standards on these plants and to offer local residents compensation for the harm they had caused, and to pay their costs to move elsewhere.

Though they did not know at the beginning how these human rights tools would work, it was precisely this uncertainty that ended up working for the activists. As Monique Harden, one of the organizers, later said, "A new approach creates a lot of uncertainty, and what corporations and shareholders don't like in uncertainty. It depresses stock prices. It's hardly the cost of a settlement that worries the market, because once relief is paid, certainty is restored and stock prices recover. Our advantage was about keeping things uncertain." Once they were out of the domestic arena into the broad and developing world of international human rights where corporations have less influence, the activists were able to finally make their arguments on their own terms.

Following on the success of this campaign, Harden and other activists formed a new organization, Advocates for Environmental Human Rights (AEHR) to carry on the work. AEHR continues to play a leading role in bringing human rights into campaigns for fair and equitable housing in the Gulf Coast, particularly in the wakes of Hurricanes Katrina and Rita.

Los Angeles: On the Way to Recognizing the Right to Housing?

Using a comprehensive approach, activists in Los Angeles are seeking to make the right to housing a reality in L.A. County. The effort has been led by Beyond Shelter, a nonprofit service provider and housing developer that became involved in the right to housing movement at Habitat II, the United Nations Conference on Human Settlements held in Istanbul, Turkey, in 1996. At Habitat II, the agency helped to develop "right to housing" language for the Global Plan of Action and has continued to work closely with NLCHP to promote the right to housing movement in the United States. Founded in 1988, Beyond Shelter introduced an innovation in the field, the "housing first" approach to ending family homelessness. Based firmly on the human right to housing, the agency's efforts to promote "housing first" as a human right have impacted both public policy and practice on a national scale.

In 2004, Beyond Shelter and NLCHP convened a forum on the right to housing in Los Angeles, to introduce the concept to a broader audience. In 2005, with support from NLCHP, Beyond Shelter successfully campaigned to include the human right to housing as one of the seven guiding principles of "Bring L.A. Home," the official document providing the "framework" that will guide efforts to address homelessness in Los Angeles County over the next ten years. The opportunity to introduce the human right to housing presented itself when Beyond Shelter's President/CEO was appointed to the Mayor's Blue Ribbon Panel responsible for the development of the plan. Although the Panel members included elected officials and ecumenical, civic, and nonprofit leaders, the concept initially met with some resistance, primarily because people generally are not knowledgeable about the issue. The Panel

therefore authorized the development of a subcommittee to review the right to housing and to report back to the full Blue Ribbon Panel with recommendations. Despite initial resistance, consensus was reached to include the right to housing in the plan.

This principle reads:

> By reaffirming that housing is one of the basic human rights, the County of Los Angeles and cities have the opportunity to demonstrate true leadership on a national scale. By committing to the development of strategies and resources necessary to end homelessness in 10 years, the County of Los Angeles and cities commit to progressively realize this right.[30]

Most recently, following a full-day training session on the human right to housing in 2006, co-hosted by Beyond Shelter, NLCHP, and the Centre on Housing Rights and Evictions (COHRE), local groups including activists, government officials, and private entities formed a coalition to implement the right to housing in Los Angeles. At the time of this writing, the L.A. coalition is drafting local human rights legislation that would move the city from a rhetorical commitment to the right to housing toward more concrete action. This resolution would adopt the rights in the ICESCR for the city, and direct all city agencies to implement their policies accordingly.

The ICESCR includes not only the right to housing, but also the rights to health, education, and fair working conditions, among others. The L.A. coalition hopes that by taking this comprehensive approach, advocates will be able to show the interconnectedness of these rights and bridge traditional interest area boundaries to create a broad base of support from all organizations working on poverty issues.

If the resolution passes, activists will be able to use international language in their advocacy with city agencies to inform the creation of new housing policies for the city. It is too early to know how these strategies will bear fruit, but activists are committed to holding the city accountable for the right to housing, and to make a positive impact for the homeless and poor people of Los Angeles.

Taking the Case to the Regional Stage

In addition to UN treaties, regional documents such as the American Declaration of the Rights and Duties of Man also protect the right to housing and provide a forum for holding governments accountable. In 1999, three years after the enactment of the welfare reform act in the United States, the Poor Peoples Economic Human Rights Campaign (PPEHRC) and the Center for Constitutional Rights (CCR) filed a petition with Inter-American Commission on Human Rights (IACHR) alleging that these reforms, which changed welfare benefits from an entitlement to discretionary expenditures, violated the American Declaration. This petition was ultimately withdrawn for procedural reasons, but it led to a group effort, beginning in late 2004, to apply for a general hearing before the IACHR on the lack of health and housing benefits for many Americans and on the impact of welfare reform.

In early 2005, in response to the IACHR request, the group revised its request to focus only on the issue of adequate housing, and expanded its scope to include more countries in the Americas. The IACHR granted the request, and on March 4, 2005, PPEHRC, NLCHP, COHRE, and CPPH, together with activists from Canada and Brazil, presented testimony. They discussed the international framework of the right to housing, and its applications. The U.S. groups discussed homelessness, the lack of affordable housing, challenges facing people with disabilities, and poor housing conditions in the United States. They also explained how the federal government's cuts in spending on housing programs, and other retrogressive measures, constituted violations of the human right to housing. This was the first hearing that the IACHR had ever held on the right to housing.

The IACHR actively engaged with the participants, stated an interest in developing its jurisprudence on the right to housing, and expressly asked these groups to help it do so. The IACHR also invited the group to submit an individual petition, and this is a possible step for follow-up that the group is exploring. The testimony and work on the hearing contributed to the development of the right to housing within the Inter-American system and laid the groundwork for future advocacy before the Commission.

The significance of the hearing is difficult to measure but should not be underestimated. The hearing raised general awareness of the housing crisis in the three countries and brought into clear focus the human rights implications of the housing situation in the United States. It spurred the analysis of housing as a human right in the United States and has been cited in numerous publications since. Moreover, residents of public housing and homeless people—those directly experiencing violations of their rights—were able to testify at the hearing. Many traveled from Chicago, Philadelphia, and New York just to be at the hearing, and at a rally later held outside the building, called the occasion "historic." CPPH hosted a public forum on the IACHR hearing at the University of Illinois Chicago on March 19. The hearing was attended by over fifty public housing residents, attorneys, law students, members of community organizations, and members of the media. The March 4 hearing and the forum were covered by National Public Radio, the *Chicago Journal*, and the *Chicago Defender*. The groups involved in the hearing continue to coordinate and are exploring options to build on these efforts.

CHALLENGE 2: DISCRIMINATION IN HOUSING

Although housing problems in the United States affect a broad range of people, racial, gender, and disability discrimination create special impacts on certain populations. U.S. law generally sets a high bar for proving discrimination; it also makes affirmative action programs to remedy past discrimination difficult to enact. Under international human rights law, on the other hand, a showing of intentional discrimination is not required to prove a violation, and if discriminatory effects are present, the government must take special measures to improve conditions for the affected population. This creates opportunities in both the legal and public sphere for holding the government

accountable to a higher standard and reframing the terms of the debate about housing issues.

Racial Discrimination in Housing

Racial discrimination in housing takes many forms in the United States. Until the 1960s, federal, state, and local governments all actively endorsed housing segregation. Since then, while the endorsement has become less explicit, some discriminatory practices remain entrenched and continue to this day. These practices contribute to a specific deficit of affordable, adequate housing for people of color. Among the impacts is an urban homeless population that is disproportionately African American.[31]

In 2000, the government of the United States admitted to the Committee on the Elimination of Racial Discrimination that, "[w]hile the scourge of officially sanctioned segregation has been eliminated, *de facto* segregation and persistent racial discrimination continue to exist. The forms of discriminatory practices have changed and adapted over time, but racial and ethnic discrimination continues to restrict and limit equal opportunity in the United States."[32] In the same report, the government also admitted to "continued segregation and discrimination in housing, rental and sales of homes, public accommodation and consumer goods. Even where civil rights laws prohibit segregation and discrimination in these areas, such practices continue."[33]

However, under the narrow interpretation that is applied to the Constitution a finding of violation is limited to only those situations where one can point to intentional discrimination, thus de facto discrimination is not deemed unconstitutional. At the international level the direction is specific: Under both the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD), "discrimination" includes any act with discriminatory effects or impact. Moreover, such discrimination requires the government to provide a remedy, including special measures to overcome past discrimination.

Federal housing law is one of the few areas where the discriminatory impact standard is applied. For example, the National Fair Housing Alliance (NFHA) conducts tests in which white and nonwhite testers will call or visit mortgage lenders, real estate brokers, and rental authorities. If these testers can show a pattern of discriminatory treatment, whether through not giving the minority testers loan options available to whites, or by steering testers to racially homogenous neighborhoods, this pattern alone can provide the basis for a legal case.

However, the government is not adhering to the latter aspect of the international definition of discrimination, which requires specific programs to combat the long history of discrimination in this country. NLCHP and COHRE are engaged in an ongoing campaign to align the U.S. definition of racial discrimination with the international one. In 2006, these groups engaged in advocacy before the UN Human Rights Committee (HRC), which oversees implementation of the ICCPR. Following the submission of the U.S. government's report to the HRC, the groups submitted "shadow reports" highlighting issues of inadequate housing and homelessness and testified before

the Committee. As a result, during the hearings of the United States before the HRC, Panamanian Committee member Alfredo Castillero Hoyos questioned the United States on housing issues using information taken directly from the shadow reports.[34]

The Committee was clearly not satisfied with the U.S. government's answer that "steps are being taken," and in its Concluding Observations (the authoritative document coming out of the hearings) noted its concern that while African Americans constitute just 12 percent of the U.S. population, they represent 50 percent of homeless people. The Observations required the government to take "adequate and adequately implemented" measures to remedy this human rights abuse.[35]

NLCHP is currently working with the government to implement this Observation. There are difficulties in trying to bridge the gap between the Department of State, which traditionally handles the treaty-reporting process with the treaty bodies, and the domestic agencies such as the Department of Housing and Urban Development or the Department of Justice, which would have a role in implementing the Observations. The chief obstacle is that most of the domestic agencies are not aware of their role in implementation. NLCHP together with others held a joint meeting with the State Department and other agencies in January 2007 to start bridging this divide, and a follow up meeting with the Justice Department two months later. There is still a great deal of education to do, but groups are hopeful that their efforts will begin to build on one another. Additionally, NLCHP is working with congressional members to include language in future housing legislation that would endorse Congress's continuing role in implementing the rights under the treaties. NLCHP, COHRE, and hundreds of other organizations will be participating in a similar shadow reporting process under the CERD treaty in 2007 and 2008, adding yet another layer of accountability on the government for its treaty obligations.

Gender Discrimination

Under Title VII of the Civil Rights Act of 1964, also known as the Fair Housing Act (FHA), sex discrimination in housing is statutorily prohibited.[36] Under international law, the right to housing must incorporate a substantive understanding of women's equality rights and must be implemented in a way that ensures equal outcomes for women. The United States falls far short of both these measures. Women are frequently discriminated against because of their marital status, inadequate income support programs, and barriers to securing credit in trying to rent or purchase housing. When women do access housing, it is often inadequate or they have no control over household resources.[37] Most strikingly, women may lose their housing—and become homeless—when they flee domestic violence; they may also be denied housing or evicted from their homes based on the violent acts of their abusers. Because such practices so disproportionately affect women, and because they have an adverse impact based on sex, some advocates have argued and some courts have held that they in fact constitute a form of sex discrimination in housing.

In October 2005 in Washington, D.C., the United Nations Special Rapporteur on Adequate Housing, Miloon Kothari, held the fifth in a series of world consultations on women and the right to housing. Individual women from communities across the United States and Canada who had experienced housing rights violations gave testimony and received training about the effects of violence, displacement, and discrimination on their housing rights. The consultation was coordinated by a broad alliance of groups, including NLCHP, Amnesty International USA's Women's Human Rights Program, the American Civil Liberties Union (ACLU) Women's Rights Project, COHRE, Legal Momentum (formerly NOW Legal Defense and Education Fund), the National Alliance of HUD Tenants, the National Economic and Social Rights Initiative, the Poor People's Economic Human Rights Campaign, the Poverty and Race Research Action Center, and several national-level women's rights and housing advocacy organizations in Canada.

The consultation brought international recognition to the fact that women face multiple obstacles to overcoming homelessness and finding safe and affordable housing. The attention the UN Rapporteur brought highlights how women across the country and globe face similar problems. The results of the consultation were important in the scheme of international human rights law in focusing specifically on women's housing rights under international law, because until this point, much of the relevant international law had been developed without a gender perspective. It was also unique in examining women's housing situations from the regional perspective of North America, part of forming a comprehensive but nuanced global picture of women's rights in each region of the globe. Summaries of and conclusions from testimony presented at the consultation became part of the Special Rapporteur's final global report on Women, Housing, and Land, which he presented to the UN Commission on Human Rights in April 2006.[38]

This consultation also provided survivors of violence an opportunity to tell their story to an official, and international, audience. For example, "Linda" of St. Louis, Missouri, detailed her life of abuse and the active denial of help in getting out of her situation. Her boyfriend, Jim, repeatedly physically abused her and threw bricks at her window. Each time she reported these incidents, her property manager responded with notifications that Linda was in violation of her lease and was responsible for the repair charges for the windows. Linda obtained a court order and requested the property manager transfer her lease to a new apartment so that Jim could not find her. The manager refused, and a few days later, served Linda with an eviction notice. Only through the assistance of local attorneys was she able to finally force the Housing Authority to move her and compensate her for the money she paid for the windows. Linda said,

> I am very glad that I finally have been able to move to a new, safe home, but I can't help but think that so many of my problems could have been prevented if the management office had just moved me to a different apartment when I first asked them. I wouldn't have had to live in fear for months that the violence would escalate to the point where he would once again hurt me or, worse yet, my children. . . . It almost seems like the Housing Authority would have been

> happier if I had just stayed in the relationship with Jim and kept getting beaten, as long as I was trying to keep him from getting angry and causing trouble.[39]

While this story has a happy ending, similar situations play out every day across America, and without stop-gap enforcement by poverty lawyers, many violations go unaddressed and unpunished. New housing rights created by the reauthorized Violence Against Women Act move the United States closer to implementation of human rights standards. But international law requires the state to take a more active role in not only creating protective laws but also dedicating resources to their enforcement to ensure substantive equality for women.

Domestic violence advocates who were introduced to the human rights framework through this experience have continued to explore the field. In 1999, Jessica Gonzales had obtained a protective order against her abusive husband, but local police refused to enforce it, ultimately resulting in the death of her two daughters. In 2006, the Supreme Court dismissed Gonzales's case against the city, effectively saying that local police were under no obligation to protect her in her home. Gonzales and her lawyers at the ACLU have not taken this as the last word, however. Through a partnership between the ACLU's Women's Rights Division and its new Human Rights Division, Gonzales testified later that year before the UN Human Rights Committee and filed a petition with the Inter-American Commission on Human Rights, pressing for protections where there were none in domestic law. This campaign continues at the time of writing, but advocates are hopeful that they will win in these international forums and bring back those gains to help create new law domestically.

Disability Discrimination

Like racial and gender discrimination, discrimination against people with disabilities occurs all too frequently in the United States. Under the Americans with Disabilities Act (ADA) and amendments to the Fair Housing Act, disability is a category protected from discrimination. The ADA probably comes closest to reflecting international standards on discrimination, as it requires even private individuals and state and local governments to make reasonable accommodations for disabled people. However, as with the racial and gender discrimination provisions, adequate resources for enforcement of these terms are often lacking.

Internationally, the ICCPR provides protection for disabled people from discrimination under its catch-all "other status" category. This is important because the United States has indicated it will not sign or ratify the new Convention on the Rights of Disabled People (CRDP), opened for signature in early 2007. But despite this lack of federal recognition, activists in Florida are working toward local adoption of the CRDP's provisions. Members of the Florida Bar Disability Committee, together with assistance from NLCHP, are engaging in public education about the new convention with local advocates and government officials. It is hoped that this campaign will lead to more resources and more rights for disabled people.

One example of how disabled people can benefit from a right to housing is the successful campaign of the New York City AIDS Housing Network (NYCAHN) for a law guaranteeing housing for homeless people living with AIDS in the city. Starting in 2000, NYCAHN recruited volunteer "human rights monitors," many of whom were recently homeless themselves, to stand in front of the city's largest welfare center and document each case where homeless people with AIDS were denied emergency housing. Carried out over two years, the effort resulted in several hundred media articles and the recruitment of several hundred members.[40]

The campaign culminated in a successful lawsuit against the city. Mayor Giuliani and his welfare commissioner, Jason Turner, were found to be in violation of NYC Local Law 49 of 1997. The law establishes the city agency dedicated to serving the 30,000 low-income people living with AIDS, and it also guarantees the right to emergency housing the same day that people request it. The city then had to provide medically appropriate emergency housing to homeless people living with HIV/AIDS. However, the city had been using commercial single room occupancy (SRO) hotels, which were often filthy and unfit for the purposes of housing medically sensitive AIDS patients. As then NYCAHN lead organizer Joe Capestany, himself HIV positive and recently homeless, said: "We stood in the cold for two years and fought so hard and then went to the hotels where we successfully housed people and said, damn, we fought that hard for THIS? We got to get people into real housing."

Learning from the Urban Justice Center's Human Rights Project, NYCAHN educated itself about human rights language, theory, and practice. NYCAHN created the House Every One! campaign. The goal of the campaign was to convince the city council to pass legislation expanding on Local Law 49 of 1997 that would guarantee the right to housing by putting the onus on the city to move people out of the SRO hotels and into medically appropriate housing as quickly as possible. The organizers in fact wanted to create a right to housing for everyone, but did not believe they had the ability to achieve that goal at that time.

After several years of campaigning, NYC Local Law 50, guaranteeing a right to housing for homeless New Yorkers living with AIDS, passed unanimously through the city council and was signed into law in May 2005. The law states that the city must make a referral to medically appropriate housing within the first forty days of placement in emergency housing.[41] Homeless people living with AIDS may refuse a particular placement, after which the city has ninety days to provide another referral. As a result of the law, if a homeless person with AIDS walks into the housing assistance office, that person should be immediately housed in medically appropriate emergency housing and then transferred into permanent housing more quickly than the previous average three-year stay. The campaign also resulted in a $2.5 million funding stream to build more housing and created a database system allowing homeless individuals without phones or any way of receiving messages to call a welfare worker about the status of their housing application. This law is a model of what a right to housing might look like for all Americans.

CHALLENGE 3: CRIMINALIZATION OF HOMELESSNESS

In January 2007, St. Petersburg, Florida, police raided an encampment of homeless people living under a bridge, rousing people from this space and then slashing their tents with box cutters so the owners would not be able to use them as shelter again.[42] In 2006, Las Vegas and Orlando passed laws that restrict charitable organizations and individuals from sharing food with homeless or "indigent" persons in public parks, threatening violators with fines and even jail time.[43] And in Los Angeles, as in other cities, homeless people cannot even sit (or lie down) in public lest they be fined or sentenced to up to six months in jail.[44] Rather than proactively address the causes of homelessness, many cities turn instead to the criminal justice system.

Much of the criminalization of homeless populations is in fact discrimination on the basis of property and economic status. These are recognized as protected categories under the ICCPR, but not under U.S. law alone. Far from criminalizing aspects of daily living like sleeping or eating because they take place in public spaces, human rights law protects persons without housing from discrimination based on their status. Moreover, human rights law imposes an affirmative obligation on the state to address the reasons that people are living in public places, by requiring it to implement the right to housing as well as other basic economic and social rights that are essential to human life. [45]

Despite this, localities continue to pass these ordinances. In March 2007, St. Petersburg considered a bill to criminalize outdoor sleeping if shelter space was available anywhere in the county. NLCHP, Southern Legal Counsel, and the ACLU of Florida opposed the bill, including on the grounds that current and proposed shelters were located thirteen miles outside the city center, far from other services. Their arguments included the following:

> Under the International Covenant on Civil and Political Rights (ICCPR), a treaty signed and ratified by the U.S. and thus equivalent in force to a statute, the right to movement and the freedom to choose your own residence should only be breached by the least intrusive means necessary to keep public order. In ratifying this treaty, the U.S. Senate explicitly directs state and local governments to take steps to implement the treaty obligations. As described above, requiring homeless persons to travel 13 miles outside the city would place St. Petersburg in violation of its treaty obligations (internal citations removed).[46]

The ordinance passed, but these organizations plan to continue to use human rights arguments in current and future legal and public opposition.

Sweeps of homeless encampments, such as that in St. Petersburg, could also be considered cruel and unusual punishment in violation of the U.S. Constitution, and some courts have so held.[47] There is additional support in international law. The Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT) is another human rights treaty ratified by the United States.[48] Serbia and Montenegro were found in violation of this treaty when their police forces failed to protect a Romani settlement from slashing and burning by local villagers.[49] U.S.

courts have frequently looked to the CAT and other international standards in interpreting the Eighth Amendment's "cruel and unusual punishment" language, most recently in abolishing the juvenile death penalty.[50] It seems that the active involvement of police in sweeping homeless encampments is equally if not more violative of the treaty than merely standing by and watching others do it, and the CAT may offer an additional tool in future challenges to such sweeps.

CONCLUSION: IMPACT AND FUTURE PROSPECTS

The current status of housing rights and conditions in the United States is in many ways a portrait of housing violations. The cuts in federal funding for low-income housing and consequent loss of units constitutes a step back from the realization of the human right to housing. The loss of affordable housing in the private market to development, without provision for replacement, likewise is a step backward. Both are inconsistent with the requirements of the human right to housing. Housing discrimination, also a violation, remains significant. The criminalization of homelessness—an extreme form of discrimination based on the lack of housing—continues in many cities. Moreover, despite progress on some fronts, prospects for the housing rights of low-income Americans can be seen as dim. Indeed, in its most recent annual review of the status of the nation's housing, the Joint Center for Housing Studies at Harvard University described the prospects as "bleak."

Despite this discouraging landscape, however, a movement to promote the human right to housing in the United States and to incorporate human rights law and strategies in housing and homelessness advocacy appears to be growing and indeed gaining momentum. As gauged by the reception to the trainings that NLCHP and COHRE have conducted, and the requests for follow-up assistance in using human rights tools in their work, advocates across the country are increasingly interested in learning about and using these tools. The participation and interest of low-income people in particular is encouraging. Organizing efforts by directly affected communities to press for their housing rights appears to have potential, and has already had impact as demonstrated in Chicago and New York.

Moreover, at least some policymakers are responsive to such advocacy, as demonstrated by the adoption of public policies incorporating human rights standards in Chicago, Los Angeles, San Francisco, and New York. While this response has to date been primarily at the local level, there are indications of interest at the federal level as well. In 2003 and again in 2005, U.S. Representatives Charles Rangel (D-NY) and Jesse Jackson Jr. (D-IL) each introduced legislation to establish a federal right to housing. As of this writing, U.S. Representative Julia Carson (D-IN) is introducing legislation to address homelessness that includes a resolution endorsing the human right to housing. Moving any of these federal initiatives to enactment is almost certainly a long-term project. In part, the prospects for moving forward depend on the makeup of the Congress and the White House.

But more fundamentally, the prospects for such proposals depend primarily on political will. While party politics play some role, these issues are not

necessarily partisan ones. Rather, more important is election politics and the real or perceived influence of those advocating for such rights. In this regard, poll numbers are relevant. According to a 2007 poll, 90 percent of New York City residents believe that everyone has a basic right to shelter; 72 percent believe that as long as homelessness persists, the United States is not living up to its values; 85 percent approve of their tax dollars being spent on housing for homeless people; and 62 percent believe the city should increase spending on programs for homeless people.[51] A 2006 Seattle poll found that homelessness was the third most important public concern, and the majority of those polled felt that government should put more resources into solutions. A March 2007 national poll found that nine out of ten Americans believe that providing affordable housing in their communities is important, and fewer than half believe that current national housing policy is on the right track.[52]

On another front, the recent interest of the U.S. Supreme Court in human rights and international comparisons, as evidenced by the *Roper v. Simmons* and *Lawrence v. Texas* cases, suggests receptivity to incorporating these principles into U.S. legal analysis. These cases were concerned with civil rather than economic rights, and making the case for the latter rights, including the right to housing, is more difficult in the U.S. legal context, which traditionally is seen as protecting "negative" liberties, not "positive" rights. Nonetheless, the developments are a step forward, especially since there are some lower court decisions that do concern economic rights such as housing and welfare benefits for the poor that make reference to international human rights norms.

Global trends also provide some reason for optimism. In 2003, Scotland enacted legislation to establish the right to housing for all homeless people in ten years, and adopted an incremental approach toward this end. In early 2007, following months of widely publicized protests by activists with strong public support, France adopted national legislation establishing a right to housing. These laws, similar to the New York City AIDS housing bill described above but more broadly applicable, require the state to immediately provide temporary housing for any homeless applicant and then swiftly transition them into permanent housing with supportive services. The Scottish law makes explicit that though this may cost more in the short term, a high percentage of homeless persons had previously presented themselves to homeless agencies for assistance and were returning, so by providing the help they need the first time around, there would be efficiency savings in not having to reprocess these returning individuals.

These developments, in countries that are in many ways similar to the United States, can be powerful models, as well as indications that similar efforts in the United States are feasible. By examining these and other laws abroad, domestic advocates are finding positive alternatives to reframe the debate around treatment of homeless people. Such reframing need not start from scratch: there is some foundation laid in early national policy statements, if not in law, in the 1949 Housing Act and President Franklin D. Roosevelt's economic bill of rights. While adopting a human rights framework in the United States would signify a major shift, it is a shift in a direction that is not altogether foreign to U.S. policy goals.

But there is also a strong trend in U.S. politics (at least in some quarters) to disdain international bodies and norms. In this context, France's recent actions could conceivably hinder rather than help U.S. advocacy efforts. But the pendulum may swing other way, as it has in the past, and the overall trend of globalization will likely help that happen. Judges, policymakers, and advocates are increasingly in touch with their counterparts around the world and this is a trend that seems virtually certain to continue to grow dramatically.

The growth of the U.S. Human Rights Network (USHRN), made up of over 200 organizations working on human rights in the United States, is also significant. One of biggest challenges of U.S. antipoverty advocacy is the fragmentation of advocacy, which is divided by issue area and within issue areas as well. Because a basic human rights principle is the indivisibility and interdependence of all human rights, a human rights network has the potential to overcome this fragmentation, as the USHRN is doing. Bringing advocacy together under a united human rights agenda could significantly expand and strengthen efforts and impact for all human rights, including housing. Indeed, local advocates such as those in L.A. are already drawing on this feature of human rights to build an expanded coalition.

The universal nature of human rights also has this potential for unifying currently disparate groups, and thus building bigger coalitions that mobilize both directly affected and sympathetic people. Because of its centrality to the exercise of other rights, housing is particularly amenable to building such expanded support. Because the lack of affordable housing in the United States is increasingly affecting not only low- but middle-income people, making the case in universal terms now has particular resonance. The reciprocal nature of many human rights principles—defining or at least implying both rights and responsibilities—has potential to increase receptivity as well.

Evidence of the potential for an expanded and united coalition of U.S. advocates can also be found in participation of a record number of U.S. nongovernmental organizations (NGOs) in the July 2006 hearing before the UN Human Rights Committee, which was reviewing the United States for compliance with the International Covenant on Civil and Political Rights (ICCPR). NLCHP participated in this coalition, testifying before the committee and submitting a "shadow report" to the Committee, describing how U.S. policies that lead to homelessness, as well as the mistreatment of homeless people, violate the ICCPR. When the committee heard testimony by the U.S. delegation in Geneva, a committee member, reading from NLCHP's report, questioned the delegation. Wan Kim, the Assistant Attorney General of the Civil Rights Division of the U.S. Department of Justice, who was testifying for the United States at the time, stated: "Housing rights are basic important rights guaranteed at both the state and federal level. Every person is entitled to shelter as a basic need."[53]

Kim's statement was not made part of the official record, and it was almost certainly unplanned as part of the official government response. But it is nonetheless significant. It suggests an understanding of housing or at least shelter as something very fundamental, something basic to American values, apart from and perhaps regardless of human rights. Indeed, it is possible to construe the remark as a reflecting a view that shelter is fundamental to

American notions of human rights. From there, it is not so difficult to make the further assumption, as Kim apparently did, that it is also thus guaranteed under U.S. law.

Moving from the current conditions of housing crisis to the kind of America that assumes that housing is a basic right for all will be one of the biggest challenges in the coming decades. It will require working on different levels and pursuing a variety of strategies. Advocacy at the local level is needed, including policy work, organizing, and developing litigation strategies. Advocacy at the national level is also needed and is beginning to occur, as evidenced by proposals in Congress, as well as the work done before the Human Rights Committee. To succeed, such advocacy must reach out to and engage a much broader coalition, including not only activists and those directly affected but also a larger swath of the general concerned public. Those who are directly affected must be engaged and play leadership roles so that their voices are heard. As a potentially unifying and integrating force, human rights strategies, and advocacy for the human right to housing in particular, can help build and shape such a movement.

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CHAPTER 7

Fixing the U.S. Healthcare System: What Role for Human Rights?

Alec Irwin, Leonard Rubenstein, Anne Cooper, and Paul Farmer

> Of all the forms of inequality, injustice in healthcare is the most shocking and inhumane.
>
> —Martin Luther King Jr.

Among the issues with potential to fuel a movement for economic and social rights in the United States, health care appears simultaneously as one of the most promising and one of the more problematic. It is promising because health is a value that cuts across social categories and ideological divisions and a bedrock concern for all Americans. Even before the current health insurance crisis, public opinion polls going back to the 1930s consistently found large numbers of Americans, often a majority, sympathetic to the idea of health care as an entitlement to which the government should guarantee that everyone has access.[1]

But, in health care, what the American public wants and what the country's political leaders deliver are two very different things. Following World War II, while other industrialized democracies developed universal national healthcare systems based on rights guarantees, the United States maintained a market-dominated healthcare financing structure that treats health care primarily as a commodity. Piecemeal reforms through public programs, most importantly Medicare and Medicaid, were introduced over time to try and plug holes in healthcare coverage. Valuable as they are, such programs remain part of an incoherent healthcare patchwork that still leaves much of the population unprotected—in part because they lack the inclusive mandate a legally recognized right to health care would provide. Unfortunately, at watershed moments in the history of struggles for national healthcare reform in the United States, most recently under President Bill Clinton, top political

leaders have explicitly chosen *not* to frame their reform proposals in the vocabulary of human rights. For a host of reasons including pressure from powerful economic interests, the structure of the country's political institutions, and traditions in opposition to social and economic rights, the notion of health care as a human right faces an uphill battle in the United States.

Today, however, the number of U.S.-based organizations that think this battle is worth fighting appears to be on the increase. A small but growing number of groups are using human rights language in advocacy and action on health issues, and are committed to nurturing rights-based healthcare reform from the bottom up. Could this trend mark the first steps in a movement that might durably alter the politics of health care in this country? Some experts would answer a resounding no based on past failures. However, others express optimism that, while building a right to health care movement may require a multidecade strategy, current trends could signal the beginning of lasting change, in particular if advocacy efforts focus on communities and take root beyond the ranks of experts unlikely to alter the fundamental structures of health care.

This chapter examines the recent dynamics of U.S. healthcare policy and attempts to assess what potential rights discourse has for protecting health in light of the current healthcare crisis. Our first step is to provide some background on how the right to health is formulated in international legal instruments. While the right to health is far broader than just access to care, our primary focus will be on health care. Then we turn to the specifics of the U.S. healthcare system. We recall the history of previous health reform efforts, before describing the structural features and major problems of the healthcare system today. The third part suggests specific contributions a human rights approach might make to rethinking U.S. healthcare policy. In the final part of the chapter, we explore how rights-based thinking might be translated into action. We highlight selected aspects of current healthcare reform debates, then consider obstacles and opportunities for the construction of a right to health care movement in the United States.

I. HEALTH AND HUMAN RIGHTS: CONCEPTUAL BACKGROUND

The Constitution of the World Health Organization, the first major international agreement to enshrine the right to health, defines health as a "complete state of physical, mental and social well-being, and not merely the absence of disease or infirmity."[2] The WHO Constitution—drafted in 1946 and signed by all 192 WHO member states, including the United States—affirms that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic, or social condition."[3] This concept is subsequently echoed in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

UDHR Article 25 holds that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including

food, clothing, housing and medical care and necessary social services."[4] In ICESCR Article 12, states' signatories acknowledge "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and commit themselves to "the creation of conditions which would assure to all medical service and medical attention in the event of sickness."[5]

As Alicia Yamin has argued, formulating the right to health in terms of the "highest attainable standard" builds a reasonableness principle into the implementation of this right. The state is held to play a role in "leveling the social playing field with respect to health," though many factors that influence health are beyond the state's control. Furthermore, the "highest attainable standard" of health will necessarily evolve over time, under the influence of changing social and economic conditions, demographic and epidemiological factors, and developments in medical technology.[6]

The right to the highest attainable standard of health does not imply that any particular individual will actually *be* healthy, something clearly beyond the power of the state (or any other authority) to guarantee. Rather, the right to health under international law can most usefully be understood as a "claim to a set of social arrangements"—including institutions, laws, and public policies—that can best secure people's chances for good health.

Importantly, access to health care is only one feature of the "set of social arrangements" that influence people's health. Indeed, recent work in epidemiology has shown that factors such as socioeconomic position, housing conditions, nutrition, education, and employment status—referred to as "social determinants of health"—have, on average, a more powerful impact on health than does medical care.[7] This underscores the importance of connecting efforts to promote the right to health care with a broader economic and social rights agenda. Nonetheless, access to quality health care when needed remains a crucial requirement of the right to health.

Under international law, states assume a three-part obligation with respect to the right to health. They must: (1) *respect* the right to health by refraining from direct violations, for example discrimination against certain groups within the health system; (2) *protect* the right from interference by third parties, for example by ensuring appropriate regulation of polluting industries that could compromise the public's health; (3) *fulfill* the right by adopting policy measures to secure universal healthcare coverage and health-enabling conditions of life and work for the population.[8]

Human rights provide criteria to assess whether a country's political authorities are living up to their responsibility in ensuring adequate provision of health care. A human rights approach demands that health care be available, accessible, acceptable, and of good quality.

- **Availability**. "Functioning public health and healthcare facilities, goods and services, as well as programs, have to be available in sufficient quantity" to meet the needs of the whole population.[9] To fulfill this requirement, health services and programs and their necessary inputs must be at the disposition of all sectors of the population, not just selected groups. Gaps in geographical or social coverage of health services constitute a breach

of this human rights principle, even if those sectors that *do* have coverage enjoy services of high quality.

- **Accessibility**. Full accessibility of health facilities, goods, and services involves several dimensions: (1) nondiscrimination, meaning that health facilities and services must genuinely be open to all persons, in law and in fact; (2) physical accessibility, meaning that such facilities and services "must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations";[10] (3) economic accessibility (affordability), implying that payment for essential health services must be "based on the principle of equity," such that these services are genuinely affordable for all people and that poorer households are not "disproportionately burdened with health expenses as compared to richer households";[11] (4) accessibility of health-related information.
- **Acceptability**. All health facilities, goods, and services must be respectful of medical ethics and must be respectful of the culture of individuals and communities, in particular minority groups.[12] Additionally, they must be "sensitive to gender and life-cycle requirements, as well as designed to respect confidentiality and improve the health status of those concerned." Acceptable health care implies that people have a right to be treated by medical personnel in a way that respects their personal dignity and the integrity of their culture and way of life.
- **Quality**. Healthcare facilities, goods, and services must be scientifically and medically appropriate and of good quality. This requires, among other things, that healthcare facilities be staffed by skilled medical personnel and that such facilities be stocked with approved, unexpired drugs and sound medical equipment. Appropriate sanitation must be in place and appropriate hygiene maintained.[13]

The government's responsibilities under the right to health also encompass other dimensions, including nondiscrimination, accountability, and participation. Participation implies "providing individuals and communities with an authentic voice" in decisions that affect their health. This echoes a long-standing tradition in public health, which sees close links between health progress and the empowerment of communities to take an active role in shaping their own health.[14] Simultaneously, the right to health framework stresses state accountability for ensuring that the health needs of the population are met and creating conditions to enable genuine participation.

Though health care is only part of the right to health, our discussion in the remainder of the chapter will focus primarily on healthcare issues, given their social and political prominence in the United States, and the opportunity that may now exist to lay foundations for a broad-based right to health care movement in this country. Nonetheless, it should be underscored that significantly improving the health status of Americans, particularly those belonging to excluded social groups, will require action on factors beyond health care. To improve health for all people and reduce health disparities between social groups demands tackling underlying patterns of structural inequality, such as disparities in income, housing conditions, access to education, and

employment opportunities, compounded by the pervasive effects of racism in American society.[15]

THE U.S. HEALTHCARE MODEL

The United States is signatory to some of the key international agreements that articulate the right to health, including the WHO Constitution and the UDHR. Famously, these documents were inspired by President Franklin Delano Roosevelt's New Deal and drawn up under the leadership of U.S. diplomats and jurists at the end of World War II. However, U.S. political leaders have been unwilling or unable to incorporate a right to health care in domestic legislation. Today, the United States is the only wealthy democracy that does not guarantee a right to health care for all its people.

Several reasons for the resistance to a rights-based approach to health care in the United States have been identified. One is the particular understanding of rights in the Anglo-Saxon political and legal tradition. As Ian Shapiro has shown, this tradition tends to interpret rights in individualistic terms; to see rights as negative in character, i.e., as barriers protecting the individual from outside interference; and to view the state's main task as guaranteeing individual liberty—not providing people with the ingredients of well-being. The latter should be a matter of personal choice and individual responsibility.[16] A right to health care actively implemented under government authority is hard to fit into this framework.

Connected with this individualistic and primarily negative model of rights is a highly individualistic approach to health care in American society. As Audrey Chapman argues, where many other societies tend to consider health care as a social or public good, in this country health care has usually been treated more as a private good or a commodity.[17] Historically, this tendency has facilitated the development of market-oriented healthcare system—which in turn has reinforced the emphasis on health care as a private concern, to be resolved through a transaction between a "consumer" and a "provider." Actors including physicians, insurers, pharmaceutical companies, and for-profit healthcare corporations (the "medical-industrial complex") have strong economic incentives to resist the introduction of a rights-based healthcare model, and have thus far been successful in doing so.[18]

Historical Milestones in Healthcare Reform

Although the United States has failed to adopt a rights-based approach to national healthcare policy, the concept of a right to health care and proposals based on such a right for a national universal health insurance system are hardly foreign to U.S. domestic political debates. The platform adopted by Theodore Roosevelt's Progressive Party in 1912, for example, included a plan for a system of comprehensive social insurance that would have guaranteed "the protection of home life against the hazards of sickness, irregular employment and old age."[19] Beginning in 1915, a state-by-state campaign for compulsory health insurance led by the American Association for Labor Legislation gained significant support in many constituencies, before

collapsing when the American Medical Association (AMA) withdrew its initial endorsement of the plan.[20]

The national crisis of the Great Depression sparked new thinking on health care in the context of a bold reconceptualization of social rights. The "second bill of rights" proposed for all Americans by President Franklin Delano Roosevelt in his January 1944 State of the Union address listed fundamental conditions of human well-being that government must guarantee for all citizens, in order to lay the foundation for shared security and prosperity. Roosevelt's second bill included among its eight key entitlements "the right to adequate medical care and the opportunity to achieve and enjoy good health."[21]

Ironically, Roosevelt's model of social and economic rights, including the right to health care, deeply influenced the United Nations and the postwar international legal system, even as it was eclipsed in the domestic policy sphere.[22] During the second half of the twentieth century, intensive political lobbying by the AMA, the private insurance industry, pharmaceutical manufacturers, and other for-profit actors in the health field repeatedly turned back efforts to introduce rights-based, publicly funded universal healthcare coverage approaches in the United States. In 1948, for example, Roosevelt's successor, President Harry Truman, endorsed a national health insurance plan contained in the Wagner-Murray-Dingell bill, but a powerful mobilization by the AMA broke the momentum of the reform effort. To prevent pro-reform lawmakers from regrouping for another attempt, the AMA deployed a national campaign of targeted political donations that helped defeat a majority of the pro–health insurance legislators seeking reelection in 1950.[23]

Beyond their success in countering the specific threat of the Wagner-Murray-Dingell proposals, the AMA and other healthcare industry groups capitalized on the Cold War political climate to catalyze a shift in the broader political and social discourse around health care. The concept of a rights-based, publicly funded system of health care provision was branded as "socialized medicine" that would, according to opponents, inevitably lower quality, and constrain people's freedom to make choices about their health care. The specter of socialized medicine, associated with Cold War terrors of a totalitarian state, was conjured in lobbying and communications campaigns and durably shaped the vocabulary and limits of health policy debate in the United States. Numerous efforts at healthcare reform, up to and including President Bill Clinton's initiative in the 1990s, foundered in part because of this association and its accompanying anxieties, resurrected for example by the infamous "Harry and Louise" television ads that helped turned public opinion against the Clinton proposal.

In the absence of an inclusive, government-managed national health scheme, the United States adopted the voluntary employer-based insurance system that remains the backbone of the country's healthcare financing model, despite the refusal of growing numbers of employers to participate. Weaknesses in the employer-based approach were apparent from early on, however. By definition, the model provides coverage only to people in full-time legal employment and their dependents, and does so only when employers are willing and able to offer coverage. The model discriminates against minorities

and women, who are overrepresented in low-wage and informal sector jobs that do not provide health benefits.[24] As the financial burden and administrative complexity associated with employer-based health insurance increase, growing numbers of companies, even highly profitable ones, opt not to provide coverage to their workers, limit its availability through high premiums, or choose restricted coverage that includes high co-payments and deductibles.

The failure of employer-based health insurance to address the needs of large segments of the population has fueled repeated calls to extend healthcare coverage to underserved groups. The most important expansions came in the 1960s with the introduction of the Medicare and Medicaid programs. While far less comprehensive than the universal health insurance models found in other wealthy countries, these programs dramatically altered the U.S. healthcare landscape when they were established through an amendment to the Social Security Act in 1965. The federally funded Medicare program was designed to cover most healthcare costs for people over 65. Medicaid, financed through a combination of federal and state funds, provided health coverage to low-income people, with eligibility and benefits defined, within certain limits, at the state level (and considerable variation across the states). Fiercely opposed by the AMA, the insurance sector and other business interests, the creation of Medicare and Medicaid reflected the power of the civil rights movement in the early 1960s, as well as strong engagement by organized labor and sustained lobbying by senior citizens groups.[25]

Despite the limited victories achieved with the creation of Medicare and Medicaid, efforts to secure more comprehensive national health reform failed in the following decades, from the National Health Service bill sponsored by California Congressman Ronald Dellums in 1977 to the Clinton plan in the 1990s. Following the collapse of the Clinton initiative and a broad conservative shift in national politics under President George W. Bush, many proponents of healthcare reform in the United States moved the focus of their advocacy from the federal to the state level. Local and state health systems may constitute laboratories in which innovative strategies can be tested for subsequent regional or national scale-up.[26] As this chapter is written, eyes are turning back to the national stage, due to shifts within Congress and health care's prominence in the early stages of the 2008 presidential campaign.

Structure of the U.S. Health System

In contrast to the coherent, largely publicly funded healthcare systems established in most other industrialized countries, the U.S. healthcare system today is characterized by a high degree of institutional fragmentation and extreme complexity in administrative and financing structures.

Institutions

The current U.S. healthcare "system" (analysts often place the word in quotation marks or prefer terms like "nonsystem") is in reality a disparate assemblage of actors and processes operating with considerable independence

(and not infrequently at cross purposes). That in the United States there is no one entity tasked with overseeing and coordinating the health system as a whole is, arguably, the most important defining characteristic of the U.S. healthcare model, and the trait that most sharply distinguishes the institutional structure of U.S. health care from that of other wealthy countries.[27]

The commitment to a market-based healthcare model means that the size and influence of the private health sector is substantially greater in the United States than in most other industrialized nations. Many of the most powerful institutional actors in U.S. health care are profit-making entities, including corporate hospital chains, private insurance providers, for-profit health maintenance organizations (HMOs), manufacturers of pharmaceuticals and medical technologies, consulting firms that advise hospitals and other healthcare institutions on issues such as cost containment, and the paid lobbyists retained by many of these constituencies to influence legislative processes. Key actors in the U.S. healthcare landscape also include professional associations of healthcare providers, most notably the American Medical Association.

The influence of private health sector interests on the formulation of public policy is considerable. From 1990 to 2004, the private healthcare industry (including HMOs, insurers, pharmaceutical and hospital corporations, and physicians' organizations) contributed $479 million to political campaigns, significantly more than other potent industrial lobbies like the energy industry ($315 million), commercial banks ($133 million), and big tobacco ($52 million). According to the Center for Responsive Politics, the healthcare industry is second only to the finance, insurance, and real estate sector in the amount of money spent lobbying Congress and the executive branch.[28]

Even ardent defenders of a market-based health system recognize that some socially vulnerable groups lack resources to purchase health care in the marketplace. In the absence of rights-based guarantees, the health needs of such vulnerable groups can only be met through charity, which may take the form of private beneficence (e.g., health services provided by religious organizations) or of government assistance targeted at specific disadvantaged populations (e.g., the poor, the elderly, disabled persons). These programs, especially for the poor, often provide far more limited services and a lower quality of care than available to the insured population. Meanwhile, a consensus also exists in American society that some groups (e.g., military veterans) have earned preferential treatment in health care through their service to the nation; special, publicly funded health subsystems have been created to serve some of these constituencies. Through such ad hoc mechanisms, parallel systems of for-profit, private nonprofit, and public-sector healthcare delivery have arisen. Coordination among these systems and their subcomponents has often proved problematic. The complexity reflects unresolved tensions in American society among different ways of regarding health care: as a commodity to be purchased in the marketplace; as a public responsibility (at least in some aspects); and as a form of charity to be distributed to the needy by benefactors.

Hospitals, the most conspicuous local healthcare delivery institutions, reflect this heterogeneity. A given community may be served simultaneously by investor-owned, for-profit hospitals; state and local government hospitals

(including state medical school teaching hospitals and medical facilities in state prisons); hospitals operated by nonprofit private entities (e.g., private universities, charitable organizations, religious groups); and federal government hospitals that provide services to military personnel, federal prisoners, and veterans. Each of these types of institutions has its own pricing and financing mechanisms, management structures, and distinctive connections to other components of the healthcare architecture.

Beginning in the 1970s, but with increasing rapidity in the 1980s and 1990s, private healthcare companies sought to purchase local hospitals and clinics formerly in the public or nonprofit sectors and convert them into profit-generating entities, sparking widespread concerns about compromised quality of care.[29] A nationwide flurry of hospital mergers and acquisitions in the 1990s and early 2000s, led by industry giants like Columbia/HCA and Tenet Corporation, reflected maneuvering for market share and profitability more than an overriding concern with patient welfare.[30]

Evidence belies the frequently heard claim that privatization increases hospitals' efficiency through the bracing effects of "market discipline." Instead, analyses show a "pattern of higher payments for care in private, investor-owned hospitals as compared with private not-for-profit hospitals."[31] This is not surprising, since investor-owned hospitals are "profit maximizers, not cost minimizers." Strategies that increase profitability do not necessarily improve efficiency or reduce costs, and in fact often produce the opposite results. The enormous financial stakes of for-profit health care engender incentives for fraud and abuse. "Columbia/HCA, the largest hospital firm in the United States, has paid the U.S. government US$1.7 billion in settlements for fraud, the payment of kickbacks to physicians and overbilling of Medicare."[32]

The shift from traditional fee-for-service medicine to managed care has spurred institutional transformations in the U.S. healthcare system. The managed care model was introduced as a strategy to rein in surging healthcare costs by achieving closer integration of the basic functions of healthcare delivery; controlling the utilization of health services by consumers; and stabilizing the prices paid to providers for their services.[33] The managed care transition created whole new categories of institutional actors and an alphabet soup of acronyms, from preferred provider organizations (PPOs), to point-of-service plans (POS), to name only two. The transition was accelerated by the Health Maintenance Organization Act of 1973, which provided federal funds for the establishment and expansion of HMOs. It was thought that fostering the growth of HMOs would stimulate competition among different health plans, leading to reduced costs. After sluggish growth in the 1970s and 1980s, HMO enrollment exploded in the 1990s, as employers sought alternatives to the rapidly rising expense of traditional health insurance plans. Unfortunately, managed care has had limited success in restraining healthcare spending. On the other hand, for-profit HMOs have provided substantial rewards to entrepreneurs and investors.[34]

The government has tried to increase efficiency in Medicaid and Medicare by enrolling beneficiaries in managed care plans, with dubious results. Beginning in the 1990s, Medicare began allowing seniors to replace traditional Medicare with plans purchased through private HMOs, to which the

government would pay a fee. Entrusting seniors to the private sector was supposed to save Medicare money. As Paul Krugman notes, the strategy backfired. To maximize their profits, HMOs "selectively enrolled only healthier seniors, leaving sicker, more expensive people in traditional Medicare." Once Medicare detected this strategy and started adjusting payments to HMOs to reflect beneficiaries' health status, HMOs dropped out of the program. Their "extra layer of bureaucracy" meant that private HMOs had "higher costs than traditional Medicare" and couldn't compete with the government program on an even playing field.[35] Instead of learning the lesson from this failed experiment, the Bush administration repeated the unsuccessful program on an even larger scale. President George W. Bush's 2003 Medicare Modernization Act expanded the role of Medicare-supported HMOs, now called Medicare Advantage plans, effectively a government subsidy to the private managed care industry. As of early 2007, according to the Medicare Payment Advisory Commission, an independent federal body, Medicare Advantage cost 11 percent more per beneficiary than traditional Medicare. The Commonwealth Fund estimated that the subsidy to private HMOs cost Medicare $5.4 billion in 2005.[36]

Although the private sector dominates the U.S. healthcare landscape, it is important not to underestimate the scale of existing public expenditure on health care. The federal Medicare system is the single largest purchaser of health care in the country. And by some calculations—taking into account, for example, health care–related tax subsidies and public employees' health benefits—the proportion of current U.S. health spending ultimately derived from public sources may approach 60 percent (some 15 percentage points above standard official estimates).[37] The political significance of this is that, in terms of investment levels, the United States is already closer to a publicly funded healthcare system than many observers recognize. However, because of institutional fragmentation, very high administrative costs, and poor outcomes among the tens of millions still left without coverage, among other factors, the health of the U.S. population lags far behind what could legitimately be expected for the amount of public funds poured into the system. As one research team put it, Americans are in a sense already "paying for national health insurance, but without getting it."[38]

Healthcare Lawmaking

Historically, lawmaking on health care in the United States has been shaped by the opposed imperatives of incrementally expanding healthcare coverage while also trying to rein in costs, and of maintaining reasonable public oversight over quality and fair availability of services without departing from the fundamental commitment to the market as the best allocator of health care.

Medicare and Medicaid constitute the most important examples of federal legislation aimed at expanding healthcare coverage to previously underserved groups. Progressive modifications have attempted to strengthen the capacity of these programs to cover especially vulnerable segments of the population. For example, the State Children's Health Insurance Program (S-CHIP), enacted as part of the Balanced Budget Act of 1997, aimed to reduce the number of

uninsured children in the United States by providing matching funds to states that offer health insurance to children of low-income families.

Government entitlement programs have inevitably incurred significant costs and frequently been criticized as wasteful. Much recent health-related legislation has had cost control—in Medicare, Medicaid, and/or the healthcare field more broadly—as a prime rationale. This was the case of the 1973 HMO Act. More recent attempts to rein in healthcare costs through legislation have encountered a range of pitfalls. Provisions in the 1997 Balanced Budget Act, for example, sharply reduced payments to hospitals from the Medicare program. Medicare reimbursements were cut so drastically that hospitals' expenses for treating Medicare patients exceeded the repayments received, pushing many facilities to the brink of insolvency. Congress passed a hastily drafted Balanced Budget Relief Act to avert a major breakdown of the healthcare delivery system.

The Bush administration's Medicare Prescription Drug Improvement and Modernization Act (MMA), enacted in December 2003, introduced the most sweeping changes in the Medicare and Medicaid programs since their creation, including a major outpatient drug benefit package and measures calculated to stimulate greater private sector involvement in Medicare. The impact of private sector "efficiency" on Medicare was discussed above. Whether the MMA will reduce drug expenditures sustainably for large numbers of older Americans remains to be seen. But there is evidence that the Medicare drug benefit is costing taxpayers more than it should. Paul Krugman observes that the insurance companies with which Medicare contracts "add an extra layer of bureaucracy," hence of cost; these companies also have "limited ability to bargain with drug companies for lower prices," while Medicare is prohibited from bargaining on their behalf. "One indicator of how much Medicare is overspending is the sharp rise in prices paid by millions of low-income seniors whose drug coverage has been switched from Medicaid, which doesn't rely on middlemen and does bargain over prices, to the new Medicare program."[39]

As this chapter is written, the number of pieces of proposed health reform legislation before Congress and state legislatures is on the rise. This trend reflects the renewed political importance of health care and some lawmakers' efforts to raise their profile on the issue. On the other hand, as Jonathan Oberlander has pointed out, the proliferation of mutually contradictory legislative proposals has historically been one of the strongest factors obstructing substantive government action on health care. The committee structure of the U.S. legislative branch and the relative weakness of party discipline in the U.S. political system encourage this multiplication of clashing proposals each time health reform returns to the national political spotlight. This results in fragmentation and, often, effective paralysis of the debate—a fact that opponents of reform have consistently used to their advantage.[40]

Financing

The U.S. commitment to a market-driven healthcare system (with large publicly funded safety nets for the elderly, veterans, and the needy) and the

resultant institutional and administrative fragmentation have had significant implications for healthcare financing arrangements and levels of health spending in the United States. As is well known, U.S. per capita spending on health care far exceeds that of any other country. Health data published by the OECD in 2006 show that U.S. health spending in 2004 was $6100 per capita, more than double the per capita spending levels in Germany ($3005), Australia ($2876), Sweden ($2825), and Great Britain ($2546). U.S. healthcare expenditures represented 15.3 percent of GDP, the highest in the OECD and 6 percentage points above the OECD average of 8.9 percent. By comparison, Germany and France allocated 10.9 and 10.5 percent of their GDP to health care, respectively.[41]

Healthcare spending in the United States is also significantly more heavily weighted towards the private sector than is the case in the large majority of other industrialized nations.[42] The U.S.'s exceptionally high health spending and the dominance of the private sector in health care are not unrelated. Anderson et al. have argued that disproportionately high healthcare expenses in the United States result largely from the high prices charged by healthcare service providers in this country; these high prices are themselves the result of the disproportionate power exerted by private suppliers of healthcare goods and services in a highly fragmented, market-driven healthcare environment.[43]

Factors fueling the upward spiral of overall healthcare expenditures include high profits for MCOs and pharmaceutical companies; elevated salaries for top-level executives in the health field; a heavy reliance on high-tech medicine (often at the expense of more cost-effective preventive and public health measures); chronic administrative waste;[44] and the resources channeled into political lobbying by pharmaceutical manufacturers, the for-profit healthcare industry, and provider professional organizations such as the AMA.[45] Heavy spending on end-of-life care under Medicare has also contributed substantially to rising overall healthcare expenditures. The shift from fee-for-service medicine to managed care has profoundly reshaped financing flows within the U.S. health system, but without significantly reducing costs. Indeed, the colossal administrative expenses of managed care as it has evolved constitute one of the major financial burdens on the system.[46]

How the U.S. Healthcare System Stacks Up

Analysts of U.S. health care routinely point out that while the system is the most expensive in the world, the results obtained for this huge investment are disconcertingly poor. Indeed, the United States trails behind almost all other high-income countries (and a number of developing nations) on key measures of population health and health system performance. Among numerous indicators of how our health system is working (or failing to), three stand out: (1) overall population health status; (2) health inequities among social groups; (3) affordability of care and health insurance coverage.

Population Health Status

Measures such as life expectancy, under-five mortality rate, and infant mortality rate are often used as proxies for the overall health of populations.

In all of these areas, U.S. performance is mediocre in comparison to other industrialized countries. The World Health Report 2006 calculated average U.S. life expectancy at seventy-eight years, lower than Japan (82), Australia (81), Canada (80), and the majority of wealthy Western European countries, and only fractionally ahead of Costa Rica and Kuwait (both 77).[47] The same source shows U.S. under-five mortality at 8 per 1,000 for males and 7 per 1,000 for female children, rates substantially higher than those found in Australia, Canada, and the UK (each 6 and 5 deaths per 1,000 for males and females, respectively). The differences with most other wealthy European countries are even greater, and U.S. under-five mortality is more than twice that of Japan (4 and 3 deaths per 1,000).[48] More than twenty-five countries had infant mortality figures lower than the U.S. rate of 7.0 infant deaths per 1,000 live births in 2002.[49]

Poor health indicators for Americans relative to people living in other wealthy countries persist across a whole spectrum of conditions and affect all sectors of U.S. society. A study published in the *Journal of the American Medical Association* compared the health status of the U.S. and British populations, limiting the study population to non-Hispanic whites. The researchers found that, though Britain spends only about 40 percent as much per capita on health care as the United States, "Americans are much sicker than the English."[50] For example, among people aged fifty-five to sixty-four years, diabetes prevalence in the United States is twice as high as in Britain. Health outcomes follow a clear social gradient in both countries, with wealthier, better-educated people enjoying better health than their less affluent compatriots. However, health across the whole socioeconomic spectrum in the United States is so poor relative to Britain that Americans in the top income and education strata have rates of diabetes and heart disease comparable to those found at the bottom of the income and education scale in England.[51]

Health Inequalities

Particularly characteristic of the U.S. health situation are wide inequalities in health status among social groups. Such health inequalities are linked to differences in race/ethnicity, gender, income, education, social and professional status, and geography, among other factors. Disparities among racial and ethnic groups have drawn growing attention—with good reason. African American men in the poorest areas of major U.S. cities can expect to live fifteen to twenty years less than white men in the nation's most affluent areas.[52] African American mothers are twice as likely as white mothers to give birth to a low birth weight baby, and African American children are twice as likely as white infants to die before their first birthday.[53] In 2005, the rate of AIDS diagnoses for African American women was nearly twenty-four times the rate for white women.[54]

Health status is also significantly influenced by people's socioeconomic position. Crudely stated, the better off people are in terms of wealth and social prestige, the healthier they are. The poor get sicker and die younger than the rich. This socioeconomic gradient in health is observed in all societies for which data exist, but because socioeconomic inequalities in the United

States are more egregious than in other wealthy countries, the health differentials between rich and poor are also greater in this country than elsewhere. Americans with low socioeconomic status have levels of illness in their thirties and forties that are not seen in groups at higher income levels until their sixties or seventies,[55] and two to three times the rates of heart disease of middle-income people.[56] For both minorities and the poor, social determinants such as residential segregation, education, and exposure to environmental toxins make a significant impact on health status, and should be an important component of strategies to address health disparities.

People living in rural areas also suffer inequities. Access to health care remains a significant problem in many rural U.S. counties, both in general and in particular for minorities and the poor. For instance, waiting lists for even basic HIV medications, which are provided by the federal AIDS Drug Assistance Program, persist in Arkansas, Alabama, Kentucky, and West Virginia—even while these medications are beginning to be distributed in Africa.[57]

Access to preventive and curative health care is constrained by a variety of financial, geographic, linguistic, and cultural barriers more likely to impact minorities and the poor. Lack of insurance is a major factor, with non-elderly Hispanics almost three times more likely, and African Americans 60 percent more likely to be uninsured than whites.[58] Health professionals are also inequitably distributed across communities, with studies showing that communities with high proportions of Black and Hispanic residents are four times as likely as others to have a shortage of physicians, regardless of community income.[59] These same communities are also more likely to experience hospital closures.[60] Some minority groups are dramatically underrepresented in the health professions, with Blacks and Hispanics each representing roughly 12 percent of the population, but only 5 percent of physicians.[61] Increasing their representation in the health professions is another way to address disparities.[62]

The importance of Medicaid in providing care for low-income Americans cannot be overstated; however, aspects of its administration exacerbate disparities, including through notoriously low provider payment levels, restrictive eligibility standards, provider discrimination in Medicaid managed care, and failure to review service access and utilization by patient demographics.[63] Low payment rates to providers and hospitals have created largely separate systems of hospital and neighborhood clinics in low-income areas, often with their norms of practice shaped by financial constraints.[64]

The poor and members of minority groups are also disproportionately harmed by shortages of key services, such as mental health services for children. Lack of access to such services can lead, for example, to placement in the criminal justice system. Two-thirds of boys and more than 80 percent of girls involved in the juvenile justice system meet criteria for at least one mental health disorder; however, only 4 percent of incarcerated youth receive mental health care.[65] Minorities represent the bulk of incarcerated youth.[66]

Finally, health disparities are found in the lower quality, intensity and comprehensiveness of care given to minorities and the poor based on the (often unconscious) biases of health providers. The evidence is overwhelming that African Americans, Hispanic Americans, and other minorities receive lower quality care than comparable white patients across a wide range of disease

categories, including treatment for cardiovascular disease, cancer, diabetes, HIV/AIDS, asthma, mental health, substance abuse, and pain—this holding true even when factors such as insurance coverage, socioeconomic status, and education level are taken into account.[67] For example, despite the high incidence of heart disease and higher mortality among African Americans, they are less likely to receive indicated treatment for coronary artery disease.[68] In contrast, African Americans are more likely to receive certain less desirable treatments than white peers, including amputation.[69] Meanwhile, the poor also receive worse care than the affluent regardless of the source of payment.[70]

Troublingly, trend data suggest that many health disparity gaps are widening, not closing, over time, and that recent efforts to combat inequities have had a marginal effect, at best. From 1979 to 1998, black to white mortality ratios increased for eight major causes of death, and average numbers of deaths per day among blacks relative to whites increased by 20 percent.[71]

Affordability and Insurance Coverage

For understandable reasons, the affordability of health care and medicines has tended to dominate public debates on the health system crisis. The number of people in the United States unable to afford basic health insurance coverage stands as the most glaring sign of systemic failure. According to statistics published by the U.S. Census Bureau, 46.6 million Americans (15.9 percent of the population) were without health insurance coverage for the full year in 2005, an increase of 1.3 million over the previous year. 8.3 million children (11.2 percent) were uninsured in 2005, up from 7.9 million the year before.[72] "Health insurance is so prohibitively expensive that going without is not confined to the indigent. Indeed, 78.8% of the uninsured work full- or part-time."[73] In addition to those without insurance, millions of Americans are inadequately insured and at risk of catastrophic expenditure in the event of some forms of illness. The financial effects of serious illness on individuals and families can be devastating. Between 1980 and 2001, the number of health-related bankruptcies in the United States increased twenty-three-fold. 46.2 percent of personal bankruptcies, representing about 2 million Americans, were attributed to major medical causes, while medical causes of some kind were implicated in 54.5 percent of personal bankruptcies.[74]

Perversely, when the uninsured are forced to seek health care, they must often pay much higher prices than insured people for the same services, because they cannot benefit from the group-rate price reductions accorded to people whose care is financed through health insurance plans.[75] Studies show that if and when they do get medical treatment, the uninsured receive lower quality care and have consistently worse outcomes than people with insurance.[76]

Under the current chaotic "system" of entangled provider networks, proliferating financing mechanisms and innumerable, mutually incompatible health plans, administrative procedures devour ever greater amounts of providers' time and consume a portion of total U.S. health expenditures that far exceeds norms in other developed countries. Himmelstein and colleagues estimated that streamlining administrative overhead costs in the U.S. health system to the levels of Canada's single-payer system would have saved the U.S. system

approximately $286 billion in a single year (2003), almost $7,000 for each American who was uninsured at the time—more than enough to provide each of them with full insurance coverage.[77] Patients and healthcare workers alike find themselves increasingly frustrated by a system whose combination of high costs and bewildering administrative complexity renders care inaccessible in practice for many of those in need. Meanwhile, soaring expenditures for personal medical care are accompanied by chronic underinvestment in public health functions and in disaster preparedness, with results such as those observed with Hurricane Katrina.

HEALTHCARE POLICY THROUGH A HUMAN RIGHTS LENS

The discussion above reveals a dysfunctional U.S. healthcare system. Healthcare expenditures that dwarf outlays in any other country generate population health results inferior to those of other wealthy nations, with segments of the U.S. population falling below average health levels observed in some developing countries. What might a human rights approach add to our understanding of what is wrong with the system, and our insight into the action needed to set things right?[78]

- First and most fundamentally, applying human rights to healthcare challenges us to acknowledge that health care is a fundamental social good which should be treated differently from other goods. Audrey Chapman explains that when a society uses rights language, it gives priority to certain goods and by implication accepts responsibility for ensuring their protection and fair distribution. Thus, affirming health care as a human right would change its status "from a commodity to be distributed primarily by market forces . . . to a social good to be distributed according to principles of justice."[79]
- Second, a right to healthcare mandates that what Chapman and colleagues term a "basic and adequate" level of health care be guaranteed as an entitlement to all citizens and residents of the United States. Instituting such an entitlement would require both legal reforms to anchor it and structural changes in the health system to overcome current failures.[80]
- Third, because a human right is by definition a universal entitlement, shifting health policy discussions to the frame of human rights would set as an incontrovertible ground rule that all members of society have an equal claim to decent health care. Any form of discrimination in health care is unacceptable. This in turn implies a special focus on redressing current health inequities and meeting the needs of the most disadvantaged. The implementation of a human right can most appropriately be measured "by the degree to which it benefits those who have been the most disadvantaged and vulnerable and brings them up to mainstream standards."[81]
- Fourth, a human rights approach ensures that the people who are affected by the healthcare system have a voice in it and can hold it accountable. One of the core features of a human rights approach is the right to participate in

the way health services are organized, structured, and implemented, which is essential if the nation is to end the fragmentation of the system, the inequitable features, and the perpetuation of discrimination and marginalization. In particular, as Chapman argues, healthcare reform processes should give voice to groups traditionally excluded from debates about health care, for example "the homeless, migrant workers, poor urban residents, persons with disabilities, and remote rural communities."[82] The complement to public participation is accountability on the part of authorities. Governments and providers must be accountable to the citizenry to assure that human rights obligations are met.

Community organizers in the United States and elsewhere have reported how framing community needs in terms of human rights, rather than charity, strengthens dignity, and energizes collective action. In the long run, the most potent effect of human rights on health policy may come by empowering individuals and groups to press their claims for justice in health care, while creating a corresponding obligation for government authorities to satisfy these claims. To be effective, this obligation must be anchored in a legal mechanism. While it would be preferable to avoid a situation in which individuals and groups experiencing violations of their right to health routinely seek redress through legal action against the government, the *possibility* of such action, on the basis of a clear legal articulation of the right to basic health care, would significantly strengthen Americans' ability to protect their health.[83] This is particularly the case for communities that have suffered historical patterns of discrimination and marginalization. An interesting precedent comes from South Africa, where right to health protections were written into the country's post-apartheid constitution in the mid-1990s. The HIV/AIDS activist organization Treatment Action Campaign was later able to use these rights guarantees in a successful legal suit compelling the government to provide antiretroviral medicines to HIV-positive mothers to prevent transmission of the virus to their babies.[84]

These principles provide a foundation for evaluating healthcare reform proposals by human rights standards. It should be understood, however, that improving access to health insurance is only one of the steps needed to protect, respect, and fulfill the right to health. As noted above, realizing the right to health obligates governments to take action to protect people from illness resulting from toxins in air and water, as well as the effects of tobacco, and to take affirmative steps to address factors such as inadequate housing and education that are known to have detrimental impacts on health. In other words, the right to health is fully effective only when embedded within the complete set of economic and social rights spelled out in international law

From the narrower standpoint of reform of the health services system, a human rights analysis requires that our attention go beyond devising mechanisms to provide more equitable and affordable access to health insurance coverage with a minimum package of services. Expanding such coverage is often seen as the endpoint of healthcare reform discussions. It shouldn't be. With the ranks of the uninsured approaching 50 million, expanding coverage is essential, and the proposals put forward can be judged by human rights

criteria. But expanding conventional health coverage alone still falls far short of fulfilling the right to health. The following discussion addresses the implications of a human rights approach to healthcare reform judged through the four standards of availability, accessibility, acceptability, and quality—which must be linked to commitments to end discrimination and to mechanisms for accountability, participation, and dissemination of information.

Availability

Availability begins with assurance of sufficient primary care facilities and providers to meet everyone's needs. Healthcare reform efforts often assume, incorrectly, that such health services are available, given the high per capita spending on health services. But because of the significant shortage of health providers in rural areas and in urban settings with substantial low-income and minority populations, a true reform plan must link coverage opportunities with aggressive steps to make health services available in these areas. This includes long-delayed steps to recruit and train more African American and Hispanic physicians.

Reform must also end lesser and inequitable coverage of services in programs that serve low-income populations. Such restrictions tend to make health services less available to the poor. Thus, if Medicaid survives in a reform initiative, it must cover services in the same way as private insurance plans and pay providers rates equivalent to those they receive from patients covered through private insurance. Specialized programs for HIV/AIDS and other diseases must be financed in such a way that the standards of care for the poor and the currently insured population are equivalent. Programs for the poor must offer the same kinds of choices among providers as are available to the insured population, so that low-income people are no longer marginalized in healthcare settings.

Reform must also address dire shortages of health services for neglected health problems. The most important of these shortages is in mental health services. Many healthcare reform proposals call for "parity" in benefits for mental and physical health, including eliminating artificial caps in days of service available and in co-payments and deductibles, and this step would increase the availability of mental health care. But this is not sufficient to address the shortfall in availability of mental health services, especially for children with serious emotional disturbances and for people with chronic mental illness. Intensive supportive and rehabilitative services are typically not covered by health plans at all but are essential for addressing the needs of children with severe emotional disturbances and adults disabling conditions like schizophrenia. These are left to the vicissitudes of funding by state programs year by year. The shortages of such services and lack of firm financing mechanism not only lead to suffering, but to placement of children with mental health needs in the child welfare or juvenile justice systems and, among adults, to destitution, homelessness, and a very high level of incarceration resulting. Another key service in terribly short supply, and also related to prevention of incarceration, is drug treatment.

More generally, reform must end the lack of availability of ongoing rehabilitative and support services for people with chronic illness and disabilities. This scarcity of these services results from their characterization as social services, hence outside the realm of health care. Such artificial distinctions, which restrict or limit essential services, must be eliminated, both in Medicare and in private insurance.

The imperative of making health services available also has implications for financing schemes. A human rights analysis does not dictate any particular form of financing, but it does require that financing systems eliminate financial incentives to deny or limit care by managed care providers and insurers, either directly or through bureaucratic hurdles. The right to health does not prevent review of proposed services for appropriateness, but does militate against the existence within the system of strong financial incentives to harm health. In the same vein, to the extent high administrative costs deplete the funds for increasing the availability of needed services, a human rights approach requires the option of more services.

Accessibility

As noted earlier, it is often assumed that expanding healthcare coverage for the uninsured is the only major step needed to increase access to health services. But covering people—on paper—with an affordable package of essential services does not eliminate obstacles to access in the real world, particularly for the poor. The most pervasive challenge is eliminating service delivery structures that tend to obstruct or limit access to care for the poor and members of minority groups, such as through multiple-tier systems in Medicaid and to some extent in Medicare. Such structures undermine secure patient-provider relationships and limit the time providers have to address individual patients' health needs.

More specific barriers to access must also be addressed for low-income and minority populations, the elderly and immigrants, including language barriers. High-quality interpretation services must be available. Bureaucratic procedures that impede immigrants' access to services must be eliminated. More generally, the experience of discrimination in health services must be addressed head-on through a range of strategies that include training providers to be culturally competent, engaging in quality assurance activities specifically directed to racial and ethnic disparities in care, assuring accountability for access problems through mechanisms within health institutions, and strengthening the health care–related investigation and enforcement activities of civil rights agencies.

Acceptability

Much can be done to enhance the acceptability of healthcare services by improving their availability and accessibility: assuring ease of access to interpretation services, putting in place more equitable and less fragmented structures, ending two-tiered systems of care, strengthening clinician-patient

relationships, and taking assertive steps to eliminate discrimination. As cultural competency programs are introduced, they will not only expand access but strengthen acceptability.

However, the breakdown of trust in the existing system, especially among the most marginalized people in society, requires more assertive steps. Disparities in the quality of health services by socioeconomic status, race, and ethnicity must be eliminated through action at every level—clinician, provider agency, health system, and government—including training, assessment, information sharing, documentation, and reporting based on ongoing analysis.

Acceptability in the fullest sense can only be achieved through the participation of community members in decisions about health services. Participation requires ample opportunities for dialogue, input, and accountability. This must be ongoing and built into the system. Participatory mechanisms must be accompanied by the sharing of relevant information about the health status of the community and the actions taken to address health problems (including the obstacles encountered). Health programs should engage in direct community outreach, both at the level of management and the organization of services, to ensure that programs reach all members of the community.

Quality

Despite progress in medical technology, quality has remained a central challenge in U.S. health care. Health services must be evidence-based, and financing structures must be sufficient to allow clinicians to spend the necessary time with patients to ensure quality care. Quality assurance mechanisms must be robust and should be expanded at every level, including funding agencies such as Medicare, to address socioeconomic, racial, and ethnic disparities in care. In connection with healthcare reform proposals, entities like the Agency for Healthcare Research and Quality should receive sufficient funding to perform their watchdog role effectively. Reporting on quality, including socioeconomic, racial, and ethnic disparities in care, should be expanded to the community level.

FROM THEORY TO ACTION: CAN A RIGHT TO HEALTHCARE MOVEMENT TAKE OFF IN THE UNITED STATES?

The previous section sought to make explicit what human rights can contribute to rethinking healthcare policy in the United States. In the next sections, we explore how new, rights-based thinking might be translated into action. We begin by describing the current state of play in U.S. healthcare reform, where to date human rights approaches have had little impact. Then we consider current efforts to lay foundations for a broad-based right to healthcare movement in the United States, exploring obstacles and opportunities for the emergence of such a movement.

The State of Play in Healthcare Reform

A protracted lull in efforts to promote national health reform followed the collapse of the Clinton plan in 1994. However, as this chapter is written, the United States again finds itself in a phase of intense national debate over the failures of the health system, with political momentum (or at least lots of political rhetoric) building behind calls for aggressive reform.

Today's national healthcare debates reflect political pressure building at the state level in recent years, mainly because of the growing numbers of uninsured and underinsured. As of February 2007, more than twenty states had either taken steps toward significant health policy reform, primarily aimed at reducing the ranks of the uninsured, or were seriously considering proposals to do so.[85] The most widely discussed examples are the healthcare package signed into law in Massachusetts in 2006 and California Governor Arnold Schwarzenegger's recent proposal for comprehensive state health reform aimed at universal coverage. While the ultimate success of these ambitious state plans remains uncertain, their existence has helped rekindle enthusiasm for national-level reform efforts.[86] Riding the momentum, new healthcare bills have been introduced in Congress, and several previously submitted pieces of legislation are drawing fresh attention.[87] Health care is emerging as a major theme for the 2008 presidential election.

What national health reform will look like, if and when it comes, is far from clear. A bewildering array of plans and recommendations have been advanced by a diverse range of actors, including politicians, business groups, labor unions, think tanks, nonprofit organizations, citizens' interest groups (e.g., the AARP), and independent academics. While numerous prescriptions for health reform exist, many of them are composed of varying combinations from the same basic menu. Frequently used ingredients include: (1) an individual mandate, i.e., a legal requirement that those who can afford to purchase health insurance do so; (2) an employer mandate, i.e., incentives or obligations for employers to provide insurance coverage to their employees; (3) targeted subsidies for people with low incomes to help them purchase insurance; and (4) incremental expansion of existing government insurance programs, such as Medicare. Jonathan Oberlander classifies current health reform proposals into three broad categories of options: building on the existing system of employer-based coverage supplemented by public insurance; moving to a completely individual-based insurance system through measures such as tax credits; or adopting a national health plan. Each category can include many models, and an increasing number of hybrid plans straddle categories. However, Oberlander warns, the more desirable a particular health reform proposal is on substantive public health and cost-effectiveness grounds, the less likely it is to be politically viable.[88]

What Role for Human Rights?

Human rights approaches have had minimal influence on current healthcare reform processes to date. Among the major players who set the agenda for national discussions (the major political parties, unions, industry lobbies,

pressure groups like AARP, and a few key nonprofits such as Families U.S.A.), none has explicitly framed its health system analysis and advocacy in human rights terms. Indeed, even rights language, much less human rights analysis, rarely surfaces in mainstream political debate and media analysis of healthcare issues. When such language does appear, the intention is often more rhetorical than substantive.[89] Allusions to international standards and jurisprudence on the human right to health among U.S. political actors remain extremely rare. Only a handful of national politicians, among them Michigan Congressman John Conyers and Illinois Representative Jesse Jackson Jr., have embraced a rights-based approach to health care.

In contrast to the feeble penetration of human rights discourse in mainstream politics and media coverage of healthcare reform, there is evidence of strong support for the right to health among ordinary Americans. Public opinion polls have repeatedly shown that a majority of Americans are sympathetic to the idea of health care as a universal entitlement. A February 2007 CBS News/*New York Times* poll, for example, found that 64 percent of Americans surveyed believe the government should guarantee health coverage for all.[90] This is not an isolated finding, but continues a well-established historical pattern extending back for decades, prompting Oberlander's assessment that an "overwhelming number of Americans have consistently supported the idea that healthcare should be a right."[91]

Recent experiences among community organizers in several U.S. regions confirm the strong resonance of rights-based approaches at the grassroots. One example comes from Seattle, where in November 2005, a grassroots campaign placed an advisory proposition about the right to health on the election ballot. More than two-thirds (69 percent) of Seattle voters approved Ballot Measure Number 1, which affirmed that access to quality health care should be regarded as a right and that the U.S. government should implement this right through appropriate national health policy.[92] The measure requests Seattle's mayor and city council to "take steps to secure" the right to health care, including: publishing a report on local healthcare access, supporting education and advocacy, and promoting legislative action.

The success of the Seattle ballot measure constitutes one of the most significant expressions to date of public support for a rights-based approach to health care. Plans are underway to advance similar ballot initiatives in other cities and communities in the Pacific Northwest. A growing number of cities across the United States have adopted comparable measures. In Portland, Maine, a ballot initiative in support of universal health coverage passed in 2001, despite an industry-funded publicity blitz that enabled opposing interest groups to outspend the bill's proponents—mainly small, grassroots organizations—by twenty-five to one.[93]

Toward a National Movement?

Commentators have underscored the ironic contrast between sustained public support for a right-based approach to health care and the U.S. government's century-long inability to pass legislation providing universal access to care for all Americans.[94] How might the responsiveness to the right to health

at the grassroots level be translated into a political force that could spur the incorporation of human rights principles in national healthcare legislation?

The best answer, in the long run, is the creation of a broad-based social movement for the right to health care in this country. A cohesive national right to health care movement will not crystallize in time to exert meaningful influence on healthcare reform debates before the 2008 elections or in their immediate aftermath. But building such a movement is, we argue, vital to getting U.S. healthcare reform right in the long term.

Beatrix Hoffman has made a compelling historical case for this view. Surveying the history of efforts to secure universal health care in the United States, Hoffman argues that the common causal factor in the defeat of numerous national health reform efforts has been the failure to build a grassroots movement around a rights-based approach to health care.[95] Hoffman demonstrates that the many campaigns for universal health coverage over the past century "have most often been initiated and run by elite organizations and individuals with little connection to a popular base of support." Thus, while public opinion has generally favored reform, this popular approval "has not been matched by the rise of a large-scale, activist popular movement for change." From campaigns for compulsory workers' health insurance in the first decades of the twentieth century through the Clinton health plan of the 1990s, Hoffman diagnoses a recurrent pattern in which "health reformers [choose] a strategy of research and lobbying rather than political organizing," opting for "expertise, not popular pressure" as their preferred instrument for effecting change.[96] One after another, she argues, well-intentioned reform efforts have foundered because of this failure to build a popular base.

Four basic points about a possible U.S. right to health care movement need to be strongly underlined:

- First, such a movement does not yet exist.
- Second, a small but growing number of organizations around the country are working purposefully to bring a movement into being.
- Third, the ultimate outcome of these efforts is highly uncertain.
- Fourth, in the absence of such a movement, it is unlikely that recognition of the human right to health care will be integrated into U.S. law and health policy.

The victory of ballot initiatives endorsing the right to health care in a handful of cities is not equivalent to the creation of a nationwide movement (although it could, under the right conditions, be an important early step). Furthermore, that we recognize a broad social mobilization as necessary to achieve a particular policy goal does not mean that mobilization will happen. Broad social movements might be necessary to achieve all sorts of important social justice objectives in the contemporary United States (and elsewhere), from progressive taxation to equity in education. However, in most instances such movements do not appear to be coming forward. Are there reasons to believe the situation with regard to the right to health care might be different? In the following sections, we explore obstacles and enabling factors that may influence the development of a movement for the right to health in the years ahead.

Persistent Barriers

Formidable obstacles confront efforts to build a right to health care movement in the United States. Some reflect challenges that would affect any grassroots social mobilization, and concern matters such as traditionally weak social class identification in this country; limited resources and organizing capacity in affected communities; protagonists' lack of access to influential media; and an increasingly atomized, individualistic culture that undermines collective action. Other barriers are more specific to the historical dynamics of healthcare reform per se. These include the economic and political power wielded by interest groups that profit from the market-based healthcare model; predominantly negative attitudes toward government among many Americans, creating resistance to health reform proposals that would expand government's role; and structural aspects of U.S. political institutions with influence over health policy.[97]

It goes without saying that a grassroots mobilization for rights-based healthcare reform would have to confront fierce resistance from interest groups connected with the for-profit healthcare industry. But some analysts have argued that an even more serious barrier is the fragmentation of political power intentionally built into U.S. political institutions, which creates an overwhelming "structural bias" against the types of sweeping changes required to introduce a nationwide, universal, rights-based healthcare model.[98] Interest groups opposed to substantive reform—including insurers, for-profit healthcare chains, manufacturers of pharmaceuticals and medical technologies, and many health professionals, especially physicians—have learned to play different pieces of the political system off against each other to break momentum for reform. Such groups are "well organized, well funded, and willing to take advantage of fragmented political institutions that provide multiple opportunities to block legislation deemed as hostile to their interests."[99] The increasingly vast sums of money in play, as U.S. healthcare spending tops 15 percent of GDP, strengthen these groups' motivation to fight sweeping reform tooth and nail.

Meanwhile, it must be clearly acknowledged that most organizations currently working to promote a human rights approach in U.S. healthcare policy are tiny, underresourced, and politically marginal. Some are grassroots groups and networks of predominantly low-income people, such as California's Women's Economic Agenda Project (WEAP) and other organizations connected with the national Poor People's Economic Human Rights Campaign (PPEHRC). Others are advocacy organizations focused on a particular constituency or issue within the health field (e.g., women's health or reproductive rights). Others are primarily service providers or resource networks supporting providers, for example the Nashville-based National Healthcare for the Homeless Council (NHCHC). Many are locally focused and, while eager in theory to connect to national processes, in practice have little time and few resources to do so. In virtually all cases, groups currently pushing right to health approaches are dwarfed by the major actors who set the terms for healthcare reform debates. Today, groups with a strong human rights

focus in health care are simply not at the table where national health policy options are being hammered out.

Opportunities

Despite the obstacles, there are reasons to believe that the present period offers distinctive opportunity for a right to health care movement to progress. The depth of the current health system crisis may be one of the key enabling factors. A substantial and growing portion of the U.S. population is directly affected by the various dimensions of this crisis (including availability, accessibility, acceptability, and quality of services). The scandal of 45 million uninsured, many of them working, people and the upward spiral in health care–related bankruptcies are clear indicators of the extent to which many working- and middle-class Americans now find their well-being and financial security undermined by a healthcare system that privileges corporate profit margins over patients' needs. The sense that the status quo is untenable and that some form of significant action must be taken to reform U.S. health care has reached many sectors of society. Such frustration is not new, but it is arguably now both more intense and more widely shared than at any time since the broad social mobilizations that led to the creation of Medicare and Medicaid in the 1960s. Rising anxieties about health care among the middle classes create fresh opportunities for coalition-building around rights-based approaches. Some grassroots right to health groups are already consciously harnessing these opportunities in their community-level outreach work.[100]

There are signs some major political players may be prepared to bring human rights terms and perspectives increasingly into their analysis and policy proposals on healthcare—though these moves are still tentative. A March 2007 AFL-CIO Executive Council statement on health care affirms that: "Healthcare is a fundamental human right and an important measure of social justice." The term "right" appears just once in the three-page document. The recommendations contained in the text, while arguably consistent with a human rights approach, are not explicitly grounded in a rights-based analysis; nor are the proposals as thoroughgoing as a human rights approach requires. However, the inclusion of this bold statement in a summary of the AFL-CIO's healthcare platform points to a potentially higher profile for rights language in some health policy discussions—especially since AFL-CIO leaders pledge to judge 2008 presidential candidates by how well their healthcare proposals match the Federation's position.[101]

Dissatisfaction with the current U.S. health system among some influential professional and business constituencies may also contribute to a more receptive climate for ambitious reform proposals. Many physicians and other healthcare professionals are deeply frustrated with the constraints imposed by the current system, and willing to consider new frameworks. The American Nurses Association (ANA), long favorable to health care as a human right, reasserted this position in the organization's 2005 Healthcare Agenda. Even the AMA, traditionally the fiercest political opponent of progressive health reform efforts, began to nuance its positions in the 1990s, acknowledging

that new strategies to reduce the number of uninsured and underinsured constituted both a "national moral imperative" and a "pragmatic necessity."[102] Meanwhile, growing numbers of private companies and business leaders are unhappy with the traditional U.S. employer-based health insurance model, because of the costs and administrative burdens the model imposes on firms. It is by no means obvious that this dissatisfaction in the business sector will translate into support for a health policy model based on human rights. However, human rights advocacy groups such as Seattle's Uplift International are finding some receptivity to right to health care positions among certain large corporations. Possibilities for unexpected strategic alliances between citizens' groups and business may emerge.

Some of the most successful social activism of the past decades emerged around health issues. African American civil rights groups mobilized effectively for more equitable access to medical care. Subsequently, powerful movements arose among advocates for women's health and reproductive rights, people living with HIV/AIDS, people with disabilities, and survivors of breast cancer and forms of mental illness. These groups struggled for and often obtained significant changes in health policy to improve the lives of specific constituencies. At the same time, these struggles were often fairly limited in scope. A broad-based grassroots movement for universal health care or a right to health failed to materialize, even as these particular groups made gains. Indeed, some commentators argue that the isolated victories extracted by particular interest groups have actually undercut momentum for broader systemic change. Nevertheless, as Beatrix Hoffman shows, a number of groups that began their work focusing on very specific issues (for example, abortion rights or access to HIV/AIDS treatment) have come to adopt a more comprehensive healthcare reform agenda, in some cases framed in human rights terms. Hoffman cites activist organizations and patients' advocacy groups that have come to understand that only a rights-based universal healthcare model can "ensure that [people] with different diseases and conditions not be pitted against each other" in a constant struggle over limited healthcare resources.[103]

Many grassroots organizers cite the capacity to clarify connections among different agendas and constituencies as a key strength of the human rights framework. In coming years, a human rights perspective could help different interest and advocacy groups in health connect their respective struggles into a wider, unified healthcare reform agenda. Using rights analysis in this integrative way could harness the energy, creativity and determination that have characterized particular interest groups to dynamize a wider struggle for comprehensive health reform. An encouraging sign of what is possible came in March 2007, when the renowned HIV/AIDS activist organization ACT UP New York chose to focus the rally and civil disobedience action marking the group's twentieth anniversary on the demand for universal health care. ACT UP and Health GAP members teamed with health workers from Physicians for a National Health Program (PNHP) to stage a rally and march on Wall Street, under the slogan "No More Bull: Healthcare for All."[104] More than twenty members of ACT UP, PNHP, and other organizations were arrested in a civil disobedience action. ACT UP New York has chosen universal

health care as the theme of its organizing and advocacy in the run-up toward the 2008 presidential elections and has explicitly adopted human rights language in framing objectives.[105]

Knitting small, isolated groups together into a cohesive movement remains an immense and imperfectly understood challenge. In the case of rights-based healthcare reform, this quantum leap from dispersed actors to a true movement has yet to take place—and nothing guarantees it will occur. Today, however, an increasing number of groups are consciously focused on this movement-building process, and devoting time and resources to the task. In recent years, networks, coalitions, and coordinating mechanisms have emerged, whose purpose is to expand the reach and integration of alliances on the right to health, linking smaller organizations so as to strengthen their collective voice. Such intentional organizing is a necessary, though not a sufficient, condition for the creation of a robust movement. Examples of emergent coalitions and coordinating mechanisms include: the Universal Healthcare Action Network (UHCAN, founded in 1992);[106] the health-focused Internet-organizing initiative Project EINO (launched in 2000);[107] the right to health program of the National Economic and Social Rights Initiative (NESRI, launched 2004);[108] and the Health Caucus of the U.S. Human Rights Network (founded 2005).[109] If successful, these structures could enable small groups and local and state campaigns to connect across geographical distance, gradually laying the groundwork for coordinated national action. At the same time, several major human rights organizations, including Amnesty International and Physicians for Human Rights, are becoming increasingly engaged in domestic right to health care work. This could open new alliance-building opportunities.

Strategic Concerns

As groups committed to the right to health care press their political agenda and attempt to build a sustainable movement, numerous strategic issues will have to be confronted. In closing our discussion of movement building, we highlight three problems of special importance.

The first is how initiatives at state and local levels relate to action for comprehensive national healthcare reform. In recent years, state-level reform efforts have captured media attention and increasing portions of advocates' energy. But if health reform organizations' limited resources are increasingly invested in state-level politicking and debate over the details of individual state plans, this may drain energy from building a national movement. At the same time, the possibility that progress in state healthcare reform could become an excuse for continued federal government inaction on health care must be taken seriously, given historical precedents. Previous phases of intense health policy experimentation in the states have failed to catalyze reform at the national level.[110] And it is doubtful that better state healthcare policies can substitute for a comprehensive reform of the national system. In fact, absent rights-based national standards for access and quality of care, state-level policy experiments could further undermine health equity by reinforcing geographical and social disparities.

On the other hand, mobilization for health policy change at state and local levels could become a motor for national reform. In fact, if we value grassroots participation and ownership, then reform efforts must include this "bottom-up" component. This was the spirit in which the organizers of the 2005 Seattle ballot initiative approached their work. The Seattle initiative shows grassroots mobilization explicitly intended to act through local and state mechanisms to influence national policy. The ballot initiative underscores rights-based healthcare reform as a federal government responsibility, but instructs local and state officials to pressure the federal government to fulfill its obligations in health. This example models one suggestive approach to aligning local, state, and national agendas. Nonetheless, how to link disparate local and state campaigns and reform models together to build a national movement remains a major pending issue. It is unclear where the authority (or the material resources) to take leadership of the process will come from. As state healthcare reform initiatives multiply, advocates will be challenged to see that this work energizes, rather than postpones or supplants, national action for comprehensive, rights-based reform.

A second, related issue concerns accepting incremental changes versus holding out for sweeping, systemic reform. Recent debates around the 2006 health insurance reform enacted in Massachusetts have shown the extent to which progressive health actors may be divided on this key issue.[111] Rather than claiming to have an easy answer, we would like to highlight two features which reveal the structural depths of the conflict. One is the ongoing receptiveness of a large portion of the U.S. public to ambitious proposals for reform of the health sector. A February 2007 CBS News/*New York Times* poll, for example, found that nine out of ten Americans believe the country's health system needs fundamental changes, including 36 percent who declared that the system should be "completely rebuilt."[112]

The contrary aspect, already alluded to, is the enormous difficulty placed in the way of comprehensive national-level health reform by the structure of American political institutions, in particular the fragmentation of political power in the U.S. federal system, illustrated for example by the fact that four separate congressional committees share degrees of oversight over healthcare legislation. This fragmentation means that, to gain passage, any specific healthcare reform proposal would have to achieve a virtually unimaginable consensus among different actors and factions within government, as well as the interest groups that lobby and influence them.[113] This tension between citizens' desires and institutional immobility remains a lasting challenge, on which previous rights-oriented reform efforts have come to grief, and which a successful national push for the right to health care in the United States must find fresh strategies for confronting.

A third key issue has to do with what groups actually mean when they use the term "right to health care." People and groups advocating rights-based healthcare reform in the United States do not all define this term in the same way. For some, the right to health care is basically equivalent to universal health insurance coverage. However, the scope of the right in international law reaches far beyond universal coverage to include multiple facets of availability, accessibility, acceptability, and quality of services, as well as engaging

additional dimensions such as participation. Reaching a shared and robust understanding of the requirements of a human rights approach to health care is important to building a cohesive movement that links major players on universal access to health care to grassroots organizations.

This definitional problem is linked to a further strategic issue about whether and to what extent to make explicit use of international human rights language and standards in domestic U.S. political debates. Some groups, including many of those connected with the Poor People's Economic Human Rights Campaign, invoke the "human right to healthcare," in direct reference to international human rights law and standards. Other organizations are more comfortable with a "right to healthcare" to be defined and assigned by U.S. law, without international comparisons, or indeed as a slogan without legal reference. The choice of approaches carries significant consequences. Groups organizing in minority or low-income communities often report that people who have suffered oppression and marginalization in U.S. society find empowerment in international instruments such as the Universal Declaration of Human Rights, precisely because they enable a critique of existing U.S. institutions, including the health system, from the standpoint of a more universal conception of human dignity. For these groups, the fact that international instruments enshrine a "human right to healthcare," while a "right to healthcare" is not currently recognized in U.S. law, simply confirms that international standards must be used to correct the shortcomings of the U.S. system.

Meanwhile, however, political pragmatists in the United States are often skeptical of the value of introducing human rights language and analysis into domestic U.S. political discussions. Some advocates have learned by experience that critically evaluating U.S. policy and institutions by "foreign" standards, in particular international human rights norms, is among the quickest ways to shut down dialogue with many U.S. lawmakers, derailing communication before concrete, constructive proposals can even be discussed. However, deferring to such viewpoints can assure that human rights will never drive decisions. It can also be argued that references to international human rights standards are increasingly adopted by key legal decisionmakers, even in the Supreme Court's death penalty jurisprudence.

Organizations working to broaden access to health care may have sharply divergent views on how to navigate the obstacles and find pathways for introducing human rights approaches to health care. Determining how to work with the different rights vocabularies (and their underlying politics) looms as a challenge for those seeking to create a broad-based coalition for U.S. healthcare reform.

CONCLUSION

Today, the United States stands alone among wealthy democracies in failing to guarantee its citizens a right to health care. Not coincidentally, the U.S. healthcare system is by far the most expensive in the world in per capita expenditure, while yielding results that compare poorly with those of other wealthy nations, and even with health systems in some developing countries.

Will a grassroots movement arise in response to this situation, to demand and win the right to health care for Americans? Will leaders in healthcare reform adopt a human rights approach? The answers are uncertain, and history gives grounds for doubt, if not outright cynicism. Pressures for major healthcare reform in the United States have mounted at regular intervals over the last half century. With the partial exception of the 1960s policy shift that created Medicare and Medicaid, these pressures have always failed to bring significant results. On the other hand, again with the 1960s as something of an exception, efforts to achieve healthcare reform in this country have tended to rely on technical expertise and insider politicking and to downplay popular participation. This pattern must change, for comprehensive health reform to have a chance.

In general, the current social context in the United States does not seem favorable for mass organizing. Not to mention that, in the age of political action committees, CNN, and the digital world of Internet logs and chat programs (blogging), effective political strategies will probably depart significantly from those of the civil rights struggle, anti–Vietnam War protests, and the women's movement. Activists are beginning to harness the enormous power of the Web as an organizing tool that can unify constituencies in new ways, but the ultimate scope and significance of this transformation remain uncertain. It seems likely, however, that if a contemporary grassroots mobilization around the right to health care did arise, it might look very different from the venerable archetypes.

Without significant organized popular demand in some form, however, it is improbable that the United States will embrace the right to health care. And without the incorporation of the right to health care into U.S. law, the country is unlikely ever to create an effective and equitable healthcare system. Political authorities will not bestow an equitable healthcare system on the American public out of the goodness of their hearts. The economic stakes are too high, the pressure from well-organized interest groups too relentless, and the interests of policymakers and industry elites too closely intertwined. Popular pressure galvanized and oriented by human rights would be one way to change the terms of this equation.

A grassroots movement for the right to health care will not coalesce in time to exert significant influence on national health policy debates during or immediately following the 2008 elections. And, absent organized grassroots pressure, the reform solutions adopted by whatever party and candidate win the 2008 elections are likely to be incremental in nature, and to avoid tackling structural issues. Incremental healthcare reform approaches not grounded in human rights, as Oberlander and others have shown, will always be the most appealing and politically feasible, given the fragmentation of the U.S. political system. Nonetheless, the very qualities that make such approaches political viable also mean they don't work very well. Experience with incrementalism "does not bode well for its long-term success. . . . Over the long run, incremental reforms may not be sustainable precisely for the same reason they are enacted: their acceptance of the status quo guarantees that they will fail to control costs or assure universal coverage."[114] In other words, further iterations of the United States' "endless repeating loop"[115] of healthcare reform

efforts may well lie ahead of us. This in turn means that the opportunity and the need for a grassroots movement on the right to health care will persist, whatever the short-term outcomes of today's debates.

Meanwhile, even within the limits of incremental approaches, it is certainly possible for unions and other major proponents of universal health care to adopt platforms more fully aligned with human rights. Even incremental approaches would be strengthened by using human rights as a point of reference to judge and compare proposals, resist unwarranted compromises, and promote equity. So the current environment does not call for despair, but for strengthened advocacy on human rights as the standard by which healthcare reform efforts should be evaluated.

As a final point, it is worth observing that a successful campaign for recognition of the human right to health in the United States would have transformative effects far beyond this country's borders. How the United States understands health care has implications for the rest of the world, particularly people living in developing countries vulnerable to pressures from donor governments and the international financial institutions. The conspicuous failures of the American healthcare system have not stopped aspects of the U.S. model from being exported to other countries, under the banners of privatization, consumer choice and "market freedom." The U.S. hard-line commitment to market-based health care and hostility to economic and social rights have been obstacles to equitable health progress for poor and excluded populations in many regions.[116] This country's embrace, one day, of the human right to health would be a stride toward global social justice.

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CHAPTER 8

Strategic Uses of a Human Rights Framework to Guarantee Reproductive Health and Rights in the States: Two Case Studies

Theresa McGovern

In this chapter, we will examine the status of reproductive health and rights in two states within the United States, South Carolina and Florida, to explore whether these states violate the human rights of women in the area of reproductive health. We will also examine the utility of a human rights framework in organizing advocacy strategies aimed at guaranteeing reproductive rights and access to health care.

The international community is ahead of the United States in recognizing reproductive rights as human rights. While the realities of many women's lives throughout the world do not necessarily reflect these principles, the concept that reproductive health and rights are fundamental human rights is widely accepted by most governments and international organizations. International agreements often speak directly to low-income women's reproductive health and rights. Dating as far back as the Universal Declaration, there has been a recognition that governments must act affirmatively to ensure fundamental rights and equity.

That reproductive rights are protected human rights is well established in human rights doctrine. The International Covenant on Civil and Political Rights (ICCPR) ratified by the United States in 1992, explicitly address privacy rights and has been applied to reproductive health and rights, requiring access to reproductive health education.[1] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), although not ratified by the United States, contains significant language about access to reproductive heath, empowerment, and guarantees of rights. Documents from the International Conference on Population and Development (ICPD) in Cairo, to which the United States consented, articulate significant protection

for low-income women's reproductive health. Cairo established that development must be taken from the vantage point of empowerment and that there must be universal access to a full range of safe and reliable family planning and related reproductive health services. These principles were affirmed again at the Fourth World Conference on Women in Beijing, and then at Beijing +5. The official reports for Beijing +5 outline specific timeframes for accomplishing gender equality goals, including "reinforcing efforts to ensure universal access to high quality primary health care throughout the life cycle, including sexual and reproductive health care, no later than 2015."[2] Such goals are a part of a larger set of recommended actions to be taken at the national and international levels by governments, the United Nations system, international and regional organizations, including international financial institutions, the private sector, nongovernmental organizations, and other actors of civil society.[3] In addition, CEDAW and ICCPR include the right to education[4] and an adolescent's right to accurate information is protected by the Convention of the Right of the Child (CRC).[5]

As these case studies will illustrate, states within the domestic United States are not in compliance with these universal standards.

SOUTH CAROLINA

Although South Carolina policymakers have been reluctant to increase government involvement in healthcare access issues, the state has been quite active in regulating reproductive choice. In April 2003, the United States Supreme Court upheld the South Carolina Department of Health and Environmental Control's (DHEC) right to obtain, copy, and catalogue the identity and medical records of women who seek abortion.[6] South Carolina does not allow Medicaid funding for abortion except in cases of rape, incest, or to save the life of the mother[7] and passed a post-viability abortion ban with an exemption only to preserve the life or health of the mother.[8] South Carolina also passed a "partial-birth" abortion ban,[9] and requires parental or grandparental consent for minors seventeen years old or younger to obtain abortion services.[10] Recently, South Carolina implemented a mandatory waiting period of one hour[11] and allows any individual health care provider or health facility an exemption from providing an abortion for any reason.[12]

South Carolina has some of the most restrictive sexuality education laws in the country.[13] The state Department of Education prohibits instruction in sexual practices outside of marriage or practices unrelated to reproduction except within the context of the risk of disease.[14] These restrictions limit the teacher's ability to discuss communication and negotiation skills about a variety of sexual practices, including oral and anal sex. Furthermore, methods of contraception can only be explored in the context of marriage and future family planning.[15] Teachers may not discuss them as being relevant to young people's current, and potentially sexually active, lives.[16] Of those requiring health education, only 37.6 percent of schools in South Carolina taught students how to correctly use a condom.[17] Three-fourths of the residents believe that sexuality education should emphasize abstinence and also address

contraception and should be taught in South Carolina schools.[18] However, South Carolina received $1,840,992 in federal funding for abstinence-only-until-marriage programs in FY 2004.[19]

As evidenced by several court cases, increasing efforts have been made to prosecute pregnant women using drugs in South Carolina. The state Supreme Court's decision in *South Carolina v. Whitner* (1997) set precedence for incarcerating pregnant women found to be using drugs, rather than providing them with treatment.[20] In 2004, the state was only able to offer treatment to 57,421 of the 235,884 residents identified with drug problems.[21] South Carolina's women and pregnant women remain underserved.[22] The Department of Alcohol and Drug Abuse Services (DAODAS) and its local provider network have received the largest proportional state-funding cut of any agency, amounting to a loss of 55 percent of funding since May 2001.[23] Policies initiated in the late 1980s and codified in the state Supreme Court decision *Whitner v. State* in 1997 focus on tackling drug abuse and addiction by identifying pregnant women who ingested drugs—primarily crack cocaine—during pregnancy and prosecuting these women under the state's criminal child endangerment statutes.[24] Alliances between medical and law enforcement personnel who were empowered to interpret the state's Children's Code to include coverage of "viable fetuses,"[25] led to the arrest and conviction of at least thirty women throughout the late 1980s and early 1990s. Most of these women were seeking care at public hospitals—including the Medical University of South Carolina teaching hospital in Charleston—serving low-income, predominantly African American clients.[26] According to Lynn Paltrow, the director of National Advocates for Pregnant Women, the group that has focused on defending these women, the *Whitner* decision around fetal endangerment still stands and has had a significant impact on the ability and willingness of women suffering from drug addiction to access prenatal and delivery care.[27]Advocates report that the number of drug abuse treatment facilities statewide is lacking, particularly for drug addicted pregnant and parenting women.[28]

REPRODUCTIVE HEALTH

South Carolina policymakers have been often unwilling to spend tax dollars to address some very disturbing reproductive health outcomes. Women in South Carolina face greater health risks than most women living in the United States and from heart disease to diabetes, African American women living in South Carolina experience worse rates of morbidity and mortality than do White women.[29] There is little data on the health status of Latinas or other women of color in South Carolina.[30] These vast racial disparities in access to health care and health outcomes exist in most health categories.[31]

In 2004, 15.2 percent of South Carolinian women were without health insurance with a rate ranging from 8.9 percent for white women to 19.7 percent for African American women.[32] Breast cancer is the second leading cause of death for women in the state, and the mortality rate among African American women is nearly double than that of White women residing in

South Carolina.[33] Studies suggest that inadequate rates of mammography and clinical breast cancer screening in the community may be a reason why the mortality rates are so high.[34] Similarly, a significantly higher percentage of Black women are diagnosed with late stage cervical cancer than are White women (39.5 percent versus 28.5 percent, respectively).[35]

The South Carolina Department of Health's Annual Report (2005) stated that almost half of the women (47.5 percent) in South Carolina that gave birth had become pregnant unintentionally.[36] African American women are almost twice as likely (41 percent) as White women to have an unintended pregnancy.[37] Furthermore, this is complicated by the fact that 66 percent of women in South Carolina live in a county without an abortion provider compared with 34 percent nationally.[38]

In 2004, the National Center for Health Statistics ranked South Carolina forty-sixth in the nation, with one of the highest rates of infant mortality.[39] African American children are disproportionately affected, with rates more than twice as high as among White infants (14.2 versus 5.5 deaths/1,000 live births).[40] South Carolina offers pregnant women Medicaid coverage for up to 185 percent of the federal poverty level, but there is no presumptive eligibility, which would allow pregnant women to receive prenatal services immediately rather than waiting until their application is processed, which is the norm in most other states for pregnant women.[41]

The AIDS rate among women in South Carolina is high. According to the CDC, South Carolina was the ninth most affected state nationwide in 2003, with an AIDS rate of approximately 18.7 cases per 100,000 persons, compared with a national average of 15 cases per 100,000 persons.[42] Women in South Carolina represented 25 percent of the state's cumulative AIDS cases in 2004 compared to 19 percent nationally.[43] The state's rate of persons living with HIV/AIDS per 100,000 in 2003 was twelve times higher for Black females than for White females.[44]

South Carolina's HIV rates are similarly disproportionately high. For cumulative HIV cases (not AIDS), South Carolina ranks as the eighth most affected state in the nation, with 7,635 cases reported through 2003.[45] In 2003, 539 new HIV cases were reported in South Carolina, making it the twelfth most affected state among states with confidential name-based reporting.[46] Women represent 35 percent of HIV cases diagnosed in South Carolina.[47] Although African Americans make up 30 percent of the population in South Carolina, they represent 77 percent of the newly diagnosed cases of HIV.[48] African American women have been hit hardest by the HIV epidemic, representing more than eight in every ten women diagnosed.[49]

FLORIDA

In the area of reproductive health and rights, Florida is most distinguished by its record of violent attacks on abortion providers. Incidents of violence and disruption intimidate abortion providers across the state.[50] As recently as 2005, the Presidential Women's Center of Palm Beach County was terrorized by arsonists.[51] Among all states in the nation, Florida has the highest death

toll from anti-abortion extremism. Of the seven physicians and clinic workers who were murdered in the United States and Canada from 1993 to 1998, three were shot and killed in Pensacola, Florida.[52] While these most extreme incidents of violence have been isolated, others such as bombings, arsons, butyric acid attacks, anthrax threats, stalking, and other acts of intimidation have been widespread across the state. Between 1982 and 2005 there were seventeen recorded arsons and four major bombings in Florida. Estimates of these damages amount to over $2 million.[53]

Violence around abortion provision has contributed to the closing of clinics and the loss of personnel. In 1992, there were 133 clinics; by 2005 licensing records indicated that less than half were still providing abortion services.[54] Roughly 93 percent of counties in all four bordering states have no abortion services.[55] In Florida, the $300 to $3,000 out-of-pocket costs of abortion procedures can be insurmountable roadblocks to terminating an unwanted or mistimed pregnancy.[56]

In years past, the Florida State Supreme Court has interpreted the right to privacy to guarantee that women be able to elect to have an abortion.[57] However, Florida's current governor and the majorities of both houses of the legislature have led constant legislative battles to restrict women's access to abortion care. The state has introduced amendments to the constitution that would require a mandatory waiting period, the presentation of inaccurate information to patients by providers, and parental notification and consent.[58] After a woman has exceeded the twenty-fourth week of her pregnancy, she cannot qualify for an abortion unless a physician determines that her health and life are threatened by the pregnancy. Another physician, one other than the one who will perform the abortion, must approve the procedure as well.[59] The court has also prohibited physicians from performing 'partial-birth' abortions, except when a woman's health or life is at risk.[60] Anti-abortion politicians in Florida have also sought to impose strict operational regulations on abortion facilities. Targeted Regulation of Abortion Provider (TRAP) bills mandate abortion facilities to adhere to onerous structural, staffing, and licensing requirements. TRAP bills are also used to regulate which providers can perform abortions and at what types of facilities they may work.[61]

Florida law also prohibits pharmacists from dispensing Emergency Contraception (EC) without a physician's prescription. Hospital emergency room staff members are not required to provide women with information on EC.[62] Moreover, Florida healthcare providers are not legally required to give women EC even if they ask for it.[63] In cases of sexual assault, hospital-based providers inconsistently prescribe EC to patients, often leaving treatment up to the Sexual Assault Treatment Centers (SATC) that patients go to after they are discharged from the emergency room. Although these centers are more consistent in providing treatment than emergency room providers, only half of SATCs report always offering EC to sexual assault victims.[64]

As in South Carolina, there has been much less activism by policymakers around gaps in access to health care and racial disparities than around restricting reproductive rights. A recent survey shows that approximately 900,000 thirteen- to–forty-four-year-old women in Florida live in severe poverty, earning 250 percent less than the Federal Poverty Level (FPL).[65] Roughly

50 percent of these poorest women are White (4 percent of all Whites), 25 percent are Black (8.8 percent of the all Blacks), and 25 percent are Hispanic (6.8 percent of all Hispanics).[66] Women of reproductive age represent 23 percent of the uninsured in Florida yet they are only 7 percent of Medicaid recipients.[67] For many adolescent girls and women, access to reproductive health services is limited to those offered at publicly funded health care institutions.[68]

For the three million nonelderly adult women whose costs of care are offset by workplace insurance, the state government does not guarantee that employer-sponsored HMOs or preferred provider organizations (PPOs) include basic reproductive health services in their plans.[69]

More than half of nineteen- to sixty-four-year-old women in Florida receive health insurance through an employer.[70] Of the 1.7 million women in Florida who are at risk for experiencing unintended pregnancy, half depend on one of the 311 publicly funded family planning clinics to fill physician-prescribed contraceptive health needs.[71]

The primary source of federal funding supporting the operation of these clinics is Medicaid. At the height of the fiscal upswing, the state's legislature expanded Medicaid assistance for family planning services.[72] However in November 2006, funding for Florida's Family Planning Waiver Program was discontinued and pregnant women and mothers, who are poor, but not poor enough, lost access to state-financed contraception-related health care services and supplies. Although the Waiver program brought many women into family planning care that might not have received it otherwise, more than half a million of the state's poorest women had still not received contraceptive health care by 2002.[73]

HIV/AIDS

Current estimates reveal that Florida has the second highest number of known cases of HIV infection and the third highest number of AIDS cases in the nation.[74] While roughly 33,000 men, women, and children live with AIDS, an additional 97,000 residents are known to be HIV-positive. Florida women account for about one-third of HIV and AIDS cases in the state.[75] Among HIV positive women in the state, approximately 70 percent are black, 11 percent are Hispanic, and 16 percent are white.[76] The rate of HIV infection for black women is six times greater than for Hispanic women and twenty times greater than for white women.[77] Greater than 80 percent of AIDS cases in women in Florida have been attributed to heterosexual intercourse.[78] The adult AIDS mortality rate is more than two times greater than the national AIDS mortality rate.[79]

PREGNANCY AND BIRTH OUTCOMES

The last time the Department of Health conducted their Pregnancy Risk Assessment Monitoring System (PRAMS) survey, 25 percent of women who received some prenatal care were found to have not received any care during the first trimester of pregnancy.[80] Florida had the sixth highest rate of adolescent pregnancy in the nation in 2000, however, infants of eighteen- to

nineteen-year-old mothers accounted for two-thirds of the 25,000 live births to teens that year.[81] The rate of teen births to young Black and Hispanic women is greater than twice the rate to young White women.[82]

Since 1998, Florida has sponsored a statewide Abstinence Education Program and, in 2002, the Florida Department of Health launched the statewide abstinence-only-until-marriage campaign, *It's Great to Wait*.[83] The campaign includes teaching training, youth rallies, and parent workshops that incorporate biased perspectives on sexual activity and lifestyle choices, as well as discourage contraceptive use. Additionally, Florida mandates all high school students to complete a life management skills course in order to graduate, which includes information on HIV/AIDS, STDs, the consequences of teen pregnancy, the benefits of abstinence, but nothing on contraception.[84] Florida State University's School of Social Work conducted an evaluation of the Florida abstinence program and found that sexual activity actually increased among participants.[85]

Birth outcomes for pregnant women in Florida vary by race and ethnicity. State-specific data from the past five years show that 17 percent of infants born to Blacks and 11 percent of infants born to Hispanics are likely to be born before the thirty-seventh week of pregnancy.[86] White women give birth to preterm infants less than 11 percent of the time.[87] Black newborns are twice as likely to be admitted to neonatal intensive care units as are White newborns and are two and a half times more likely than White infants to die before they reach their first birthdays.[88]

After lung cancer, breast cancer is the second leading cause of cancer-related death among Black and White women in Florida.[89] Again, the rate of fatalities among Black women is greater than among White women.[90] White women in Florida are twice as likely to report that they have had a mammogram in the past five years than are either black or Hispanic women.[91] Seven of the counties with highest breast cancer annual death rates are concentrated in Florida's eastern panhandle, a poor rural area, with 13 to 22 percent of residents living below the FPL.[92] There are few mammography facilities in these areas.[93]

Last year, Florida's cervical cancer incidence and mortality rates were both higher than the national average, with new cases of the disease diagnosed one and a half times more frequently and death occurring over two times more frequently among blacks than whites.[94] Population studies confirm a negative association between socioeconomic status and prevalence of invasive cervical cancer.[95] In fact, of counties that had the five highest rates of cervical cancer mortality in 2002, an average of 13 percent of residents lived below the FPL.[96]

ARE REPRODUCTIVE HEALTH AND RIGHTS HUMAN RIGHTS? USING HUMAN RIGHTS TOOLS TO PROTECT WOMEN'S REPRODUCTIVE RIGHTS IN THE DOMESTIC UNITED STATES

Human rights concepts and standards have only recently begun to inform the advocacy strategies of reproductive health and rights activists. Many

advocates think of human rights advocacy within the United States as a matter of urging ratification of various treaties or eliminating reservations the United States has taken against cooperation with such standards.[97] However, with a hostile federal judiciary, a shrinking general safety net, and increases in state autonomy brought on in part by the 1996 Welfare reform–related devolution, we must begin to explore the use of international human rights law at the state level without regard to the U.S. stance on the internationally accepted principles.[98]

A human rights framework links the political, social, and economic rights of women throughout the world. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) does not prioritize the establishment or defense of rights over meaningful access to fulfill such rights. International human rights norms actually should provide models for state and local actors.[99] Taking the lead from human rights norms, activists for reproductive choice should be pointing out legislators' failure to address access issues when they are fending off the attacks on reproductive rights. Illuminating the state's activism around restrictions on reproductive rights compared with its refusal to address access issues adequately will help to build a broader constituency and agenda. Only by acknowledging and attempting to redress the larger disasters resulting from lack of access to health care that many women face, will activists for reproductive choice be able to gain the support of many of the women who are most affected by these issues, often low-income women of color.

A human rights approach to organizing, public education, and defining substantive rights is well suited to the task of expanding reproductive rights advocates' frame of reference.[100] The universality of these principles place the struggles for access within the domestic United States in a global context in which the affirmative obligation of the state to provide for the reproductive health care is at least textually accepted.[101] In emphasizing an internationally accepted standard that requires states to affirmatively address access to reproductive health care, activists will be able to highlight the hypocrisy of what is currently happening in these two states: policymakers are devoting themselves to restricting reproductive rights and ignoring larger reproductive health care disasters.

It may also be the case that some of the standards to which the United States has consented should be enacted at the local level. When the United States assents to a treaty or other international agreement or is bound by customary law, the federal system demands implementation on the state and local, as well as at the federal level.[102] Due to the fact that the U.S. federal system is categorical, and that states have primary regulatory responsibility for social welfare and health, human rights principles regarding these responsibilities are best addressed at the state level.[103] The federal government recognizes its limitation in implementing human rights covenants outside of its legislative and judicial jurisdiction. It also acknowledges state and local government's responsibility for taking appropriate measures for the fulfillment of covenants that are related to issues that fall within their jurisdiction; such as health and welfare. Additionally, the federal government has noted that it, "will remove any federal inhibition to the abilities of the constituent states to meet

their obligations."[104] In order to facilitate states in meeting their obligations, "a governmental working group has been entrusted with the task of developing proposals and mechanisms for improving the monitoring of actions at the state level."[105] "In sum, the federal system necessitates shared responsibility for human right implementation among federal, state, and local authorities."[106]

Returning to our state examples, women in South Carolina and Florida face greater health risks than most women living in the domestic United States. Women in these states who are racial or ethnic minorities fare even worse, with vast disparities in access to health care and health outcomes. Such disparities violate the International Convention on the Elimination of All Form of Racial Discrimination (ICERD) which mandates the elimination of racial discrimination in all its forms and guarantees the right of everyone, without distinction as to race or ethnicity to the enjoyment of economic, social, and cultural rights, in particular the right to public health, medical care, social security, and social services.[107]

Both Florida and South Carolina violate reproductive rights and the right to family planning in a multitude of ways. These rights are enshrined in such core international human right instruments as the ICESCR, CEDAW, and the CRC. Likewise, the International Conference on Population and Development and the Fourth World Conference in Beijing. In South Carolina and Florida, where there are high numbers of unintentional pregnancies, access to abortion, emergency contraception, and accurate information has been profoundly reduced. Additionally, both states have high rates of infant mortality. Yet, Florida does little or nothing to guarantee that employer-sponsored HMOs or PPOs include the most basic reproductive health services in their plans. Likewise, Florida does not require private insurance companies to cover FDA-approved contraceptive drugs at the same level of coverage as other FDA-approved prescription drugs. Moreover, Florida violates the reproductive rights of young women by failing to require coverage of the cost of adolescent women's contraceptive needs and by limiting access to modern methods of pregnancy prevention.

South Carolina's restrictive sexuality education laws and Florida's effort to limit information about pregnancy prevention violate the right to information. There are extensive provisions securing this right.[108] The United States is specifically bound to secure the "freedom to seek, receive and impart information and ideas of all kinds," which is articulated in Article 19 of the ICCPR.[109] Additionally, the Convention on the Rights of the Child requires states to ensure that "the child had access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health."[110] South Carolina's prohibition on instruction in sexual practices outside of marriage fails to provide necessary information for the spiritual, physical, and mental health of adolescents. The information that is presented to adolescents has been found to distort information about the effectiveness of contraceptives, misrepresent the risks of abortion, blur religion and science, treat stereotypes about girls and boys as scientific fact, and contain basic scientific errors.[111] Thus, such prohibitions not only fail to meet human rights standards by providing necessary information for the health of

adolescents but are dangerous, in that they negatively impact young people's willingness to use contraception or condoms once they become sexually active.[112]

In South Carolina policymakers prosecute pregnant women who use drugs rather than ensuring that treatment is available.[113] In 2004, the state was only able to offer treatment to 57,421 of the 235,884 residents identified with drug problems.[114] Given the state's failure to offer pregnant women treatment, such prosecutions are degrading forms of punishment in violation of Article 7 of the ICCPR, a U.S.-ratified treaty. This Article states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[115] The gravity of this violation is best understood in the larger context of incarceration in South Carolina. From 1980–2000, the incarceration rate in South Carolina has more than doubled.[116] In this same time period, the spending per resident from the state's general tax revenues on incarceration increased by 127 percent, while in comparison, per capita spending on higher education only increased by 2 percent.[117] In 2003, South Carolina was ranked sixth in the country for incarceration rate, and thirty-fourth for the highest per capita expenditures for correctional services.[118] It is important to note, the racial disparities in incarceration rate; even though African Americans make up only 30 percent of the general population, they constitute 69 percent of the prison population.[119] This racial disparity intersects with racial inequalities in access to health care and the lack of drug treatment, creating a dire situation for minority women. Human rights principles protecting against inhuman punishment and assuring access to care can be means to acknowledge and redress such vast inequities.

Both states violate the right to privacy defined by Article 17 of the ICCPR as the right to be protected from "arbitrary or unlawful interference with privacy, family, home or correspondence."[120] In Florida this right is violated by an amendment to the constitution that requires parental notification and consent to access abortion care. In South Carolina this right is violated through the Department of Health and Environmental Control's obtaining, copying, and cataloging the identity and medical records of women who seek abortions. In both cases women's right to privacy are interfered with in order to restrict access to abortion with larger implications on medical care.

Both Florida and South Carolina violate the right to mental and physical health in a myriad of ways. This right is articulated in the ICESCR under Article 12, which states "The right of everyone to the enjoyment of the highest attainable standard of physical and mental health"[121] and is further articulated by the Committee on Economic, Social and Cultural Rights General Comment No. 14 (regarding the right to the highest attainable standard of health: Article 12) as, "the right to maternal, child and reproductive health; the right to health facilities, goods and services; the creation of conditions which would assure to all medical service and medical attention in the event of sickness."[122] Such medial services and attention in the event of sickness includes the provision of equal and timely access to basic preventive, curative, rehabilitative health services.[123] South Carolina violates these provisions by refusing pregnant women presumptive eligibility for Medicaid and by the

state's failure to provide funding for adequate mammography and clinical breast cancer screening in rural areas. Many women in both states still are unable to access affordable reproductive health care.

ORGANIZING STRATEGIES LINKING ACCESS TO REPRODUCTIVE HEALTH AND REPRODUCTIVE RIGHTS ISSUES USING A HUMAN RIGHTS FRAMEWORK

In many states that are strongholds for social and fiscal conservatives, it would be extremely difficult to enact or ratify all human rights provisions. In many of these states, there is a reluctance to spend any state revenues on health care, making federal dollars the greatest source of healthcare funding. In these same states, divisions have evolved between legislative reproductive rights advocates and many community, particularly rural, providers and/or lobbyists for healthcare access. Lobbyists working to save the right to abortion or emergency contraception have been far too busy fighting the onslaught of restrictions to build broader coalitions and networks that work on the access to care issues as well as the racial disparities in access and outcome.

Organizations or individuals concerned with financing health care have not worked to fight the onslaught of restrictions on reproductive rights. Because of the clear gains of the extremists who want to limit women's control over their reproductive lives and the devastating effect of devolution on access to health care, there is an urgent need to attempt new strategies and build broader coalitions. Many long-term advocates for reproductive rights have argued that the divide between providers or those who prioritize access to health care and those who fight to preserve reproductive rights is caused by the "access" groups' failure to defend choice. Many of the "access" advocates argue that reproductive rights advocates ignore access issues and racial disparities in outcomes.

A human rights approach allows organizers to incorporate all of these advocacy needs. The whole of human rights doctrine addresses racial disparity and a panacea of fundamental rights defined to health care, including access to reproductive health and family planning. Integrating this framework into the advocacy message and organizing tactics in states like South Carolina and Florida will allow for a new response to the extremists. Such broader coalitions can argue that it is unacceptable to spend valuable resources restricting fundamental reproductive rights while ignoring or refusing to spend revenues to address the problems creating the needs for such rights. For example, how is it acceptable for South Carolina to spend state resources prosecuting and incarcerating drug-using women who seek prenatal care while cutting the budget for drug treatment and virtually ignoring the need for drug treatment for pregnant women? There is an urgent need for advocates to start changing their message to challenge these states' uneven approach. The extremists claim that they are fighting for "morality" or to save lives. Broader coalitions can raise

some of these same themes in challenging the state's failure to ensure basic reproductive health care for women, thereby violating basic human rights.

Beginning in 2003, the Women's Health and Human Rights Initiative (WHHRI) of the Mailman School of Public Health at Columbia University initiated research-based advocacy interventions in South Carolina and Florida. The initial phase of the initiative included conducting research on the status of women's health in the state. In each state available data were organized by race, economic status, and county and recent state policy initiatives relevant to women's health were analyzed. We prepared comprehensive reports which provided information on women's health needs throughout the state, including statistics, incidence, and prevalence comparisons among racial/ethnic groups, and related policy efforts.

SOUTH CAROLINA

We first contacted NAPW because they had litigated *South Carolina v. Whitner* and have been involved in several other cases regarding the prosecution of pregnant women accused of substance abuse. NAPW had many contacts with South Carolina advocates at the state legislative level. We contacted those advocates to gather names of activists in the counties. Most advocates at the legislative level were unaware of providers/activists at the county and local level. Similarly, these state level advocates had few connections with academics researching or writing about women's reproductive health.

WHHRI traced federal funding stream data to identify recipients of funds for rural health, community health centers, migrant health, and Title V and Title X grants. WHHRI also contacted public health schools within the state and identified researchers and academics with expertise in women's reproductive health. The South Carolina state health department also offered contact information for service providers. We began calling organizations and individuals from these lists to assess their interest in participating in a statewide advocacy strategy meeting on women's health.

FLORIDA

As we had done in South Carolina, WHHRI partnered with a group working in Florida. We contacted Byllye Avery of the Avery Institute who has a long history of women's health advocacy in Florida. Once again, however, we identified potential coalition members by tracing funding streams, as well as by contacting larger statewide organizations. We also sought out academics from the various schools of public health to measure the interest in the development of a broad initiative that addressed health care access and reproductive rights.

SOUTH CAROLINA

WHHRI, in collaboration with NAPW, held a meeting in South Carolina in May 2004. The project staff worked closely with women working in the

most affected communities to prepare presentations on the barriers and gaps in services. Statewide advocates were invited to present on the state of the legislature and possible coalition opportunities. Over fifty individuals attended the meeting, and many reported that the opportunity to meet and gain information on the status of women in South Carolina was extremely useful. WHHRI continued to work with advocates in South Carolina over the next few months, providing information about funding opportunities and research as requested, as well as facilitating contact among the growing network of potential coalition members.

WHHRI and NAPW held follow-up strategy meetings. We prepared a memorandum outlining some of South Carolina's greatest obstacles in the area of women's reproductive health and detailing how and where South Carolina differed from other states in addressing these problems. In each category, possible advocacy strategies were posed and questions about South Carolina's policies and practices were clarified. Participants learned about strategies employed by other states in addressing women's health issues.

Throughout the meetings, discussion centered on building a comprehensive advocacy strategy that prioritizes access to health issues and the racial inequities in outcomes but also emphasizes reproductive rights and access. The group agreed to continue as the newly formed Women's Health Coalition of South Carolina.

ADVOCACY EFFORTS

A total of fifty-nine health organizations, agencies, and/or university departments have participated in seven meetings. In response to the "Right to Life Act of South Carolina" the coalition conducted a letter-writing campaign, which emphasized South Carolina's poor record on women's reproductive health. Similarly, the Coalition held an informational session on Medicaid, exploring members' advocacy role in the upcoming related legislative battles. The coalition also held a strategy and information session on South Carolina's policies towards pregnant women who use drugs.

The Coalition is participating in many women's health–related events, including letter-writing campaigns to legislators regarding the need to offer drug-addicted pregnant women treatment rather than incarceration and crafting of a series of op-eds in local papers illustrating the poor status of women's health (e.g., a piece on the South Carolinian legislature's ability to pass a law making it a felony to subject roosters to abuse but no similar work on behalf of women or on the "Right to Life Act" which confers the right to due process and equal protection of laws to the embryo at fertilization). The coalition has mobilized around SC Senate Bill 1084 "Unborn Victims of Violence Act" to frame a dynamic media campaign.

The Coalition asks the population of South Carolina and its policymakers, why is it acceptable to ignore unnecessarily poor reproductive health outcomes in women while putting considerable resources into restricting reproductive choice and rights?

FLORIDA

Using the South Carolina model and with the help of the Avery Institute, WHHRI contacted and developed alliances with a diverse group of advocates, academics, and service providers throughout Florida. On 2 December 2005 the introductory meeting was held in Orlando, Florida with thirty-two women's health advocates in attendance. The meeting included informational sessions on the current status of women's health in Florida, including rural and migrant women's health issues, HIV/AIDS, access to care, current research on reproductive health, and an overview of state level reproductive health policy. The group then formed a coalition and began advocacy around Medicaid. The group continues to meet and will, we believe, evolve into an effective advocacy presence.

BUILDING MEANINGFUL PARTICIPATION

The Committee on Economic, Social, and Cultural Rights' General Comment 14 on the Right to Health addresses the importance of citizen participation in the policymaking process at the local, national, and international level for demanding and receiving the fullest attainable standard of health. But meaningful citizen participation and individuals' exercising agency over the ways they are treated or represented are central to the fulfillment of human rights doctrine overall. This participation of the directly affected or of providers for the directly affected is a necessary component of any advocacy approach to increasing access to reproductive health and protecting rights. Advocates must develop new leadership that is diverse and credible and willing to work on access issues along with rights. Many rural medical providers, for example, have the credibility to take on some of the extremist policies and win over citizens of the state. Researchers have the data showing that women are dying of treatable reproductive cancers. Contrary to many predictions providers, academics, local activists were interested in participating in large-scale advocacy efforts, they just did not know how to participate. Broad-based coalitions provided an opportunity for meaningful participation. We have witnessed the development of self-sufficient state-based coalitions working on both access issues (including racial disparities) and reproductive rights.

These coalitions are attended and run by many facets of the affected communities but the initial research was done in a university-based entity. This setting provided freedom from the usual constraints of organization-centered approaches to providing technical assistance to grassroots advocates. There were extensive opportunities for collaboration with a wide range of mainstream human rights groups, academics, and health experts. Relying upon the work of graduate students to research status of reproductive health and rights, as well as contact local activists, has also proven cost effective and efficient. But by far the most important aspect of the organizing strategy was inclusivity. Women working in rural communities where women of color are dying of treatable disease want to know that any effort will include access issues and racial disparities; women working to protect rights want assurance that the rights issues will not be dropped and NAPW want to be certain that

reproductive rights includes protecting the drug-using women who are being jailed when they show up for prenatal care. What is so exciting about this broad framework is that it allows for new and credible voices that will be able to challenge the grossly imbalanced paradigm that has evolved in these two states.

CONCLUSION

We developed this advocacy model to confront the tendency of a growing number of states to focus on restricting women's reproductive rights rather than on guaranteeing access to care. Divides between service providers and advocates have kept some of the most powerful evidence of state policy failures from reaching the public. The strength of this model lies in its dependence on a broad and diverse set of actors who have the credibility to highlight the cynicism of the current approach. In Florida and South Carolina, coalitions committed to integrating health access and women's rights issues have been established.

NOTES

1. International Convention on Civil and Political Rights, New York, NY. United Nations, 1966: Article 17.1.

2. United Nations General Assembly 23rd Special Session: Resolution on Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action: 68b, 67c, 79b, 95f. Available online at www.un.org/womenwatch/daw/followup/ress233e.pdf.

3. Ibid.

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CHAPTER 9

The Right to Social Security in the United States: Ending Welfare as We Know It

Wendy Pollack

Welfare. Poorhouse. Outdoor relief. Charity. Entitlement. Subsidy. Public assistance. Temporary assistance. Public benefits. Transitional benefits. Welfare-to-Work. Handout. Hand up. Aid. These are just a few of the most common (and relatively least offensive) terms, official and otherwise, that have been used to describe the myriad government policies and programs of dispensing cash and other kinds of income to poor people in the United States. Whatever they are called, these policies and programs have never met the definition of social security in the context of international human rights.[1]

What is the human right to social security? Why has the United States failed to make good on its promise of social security within its own borders—a promise made "to promote the general welfare" in its Constitution and as a party to the Universal Declaration of Human Rights? What does that mean for those of us who are poor and/or who work to eliminate poverty in the United States? How are anti-poverty activists using the human rights framework to bridge the gap between the reality of welfare in the United States and social security as defined by international law? These are the issues discussed in this chapter with the hope that maybe, finally, we can answer the question, "When will we truly end welfare as we know it?"

THE RIGHT TO SOCIAL SECURITY AND INTERNATIONAL HUMAN RIGHTS

Economic and social rights in the context of international human rights include the right to social security. Social security means that everyone, regardless

of age or ability to work, is guaranteed the means necessary to procure basic needs and services. Income support is a core component of social security. The right to social security is specifically mentioned in a number of international treaties (also known as conventions or covenants) including the Convention on the Elimination of All Forms of Racial Discrimination;[2] the International Covenant on Economic, Social, and Cultural Rights;[3] the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; and the newest treaty, the Convention on the Rights of Persons with Disabilities.[4]

The United States was one of the first countries to commit to protecting human rights, including economic and social rights, through the Universal Declaration of Human Rights, and, as a member of the United Nations, the United States accedes to the principle of fundamental human rights and the dignity and worth of every human person.[5] Article 25 of the Universal Declaration of Human Rights specifically states, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of livelihood in circumstances beyond his control." However, the United States has only signed but not ratified (formally incorporated into domestic law) most of the human rights treaties.[6] Through its signature, the United States has agreed not to violate the spirit of the treaties, but is not committed to upholding the standards of those treaties it has not ratified.[7] Of the international treaties listed above, the United States is bound only by the International Convention on the Elimination of All Forms of Racial Discrimination. In addition, as a member of the Organization of American States (OAS), the United States is bound under regional law to the American Declaration of the Rights and Duties of Man, which also invokes the right to social security.[8] Although obligated to do so, the United States has failed to meet its promise of implementation of human rights, including the right to social security, within its own borders.

THE AMERICAN DREAM

There are 37 million people in the United States living in poverty.[9] That is more people than the entire population of California. Among the American public there is dissatisfaction with the nation's efforts to deal with poverty and support for greater government assistance for the poor, although it is not a top priority.[10] At the same time, the American public holds fast to the notion of the American Dream, i.e., with enough initiative and hard work, anyone can grow up to be president or a successful entrepreneur. Financial and social success comes to those who earn it. It is up to the individual.[11] Not even race or gender is considered a significant factor in determining success.[12] This does not mean that people believe all work will lead to riches—they understand that many jobs will not support a family, and subsidies for childcare or healthcare *are* supported by the public.[13] Further, there is a growing anxiety about the widening disparity between the rich and the poor, and the growing

economic insecurity of the middle class.[14] However, Americans generally believe that to be poor and receive welfare in the United States means you have rejected the core values of its populace, including independence and hard work.[15]

These dissonant opinions about poverty and more pointedly, about poor people, are reflected in the disparate welfare policies and programs. A brief look at some of those policies and programs follows.

WELFARE AS WE KNOW IT

In the United States today, there are two main types of social security programs. The first are social insurance programs that are connected to an individual's work and income history and benefit people regardless of economic class. Two prime examples are Social Security for the elderly and disabled (and their dependents) and Unemployment Compensation for workers (and their dependents in some states) who lose their jobs through no fault of their own and are actively looking for work.[16] The eligibility for these programs and the amount of cash benefits available is directly linked to the amount of the individual's earnings over a particular time period. These social insurance programs carry little or no stigma, since they are available to people at all economic levels. Most of the controversy that surrounds these programs is about how they are funded, less so about who should receive benefits (e.g., noncitizen immigrants, wealthy individuals), and little controversy about whether or not these programs should exist.

The second type of social security programs is welfare programs. These programs are based on financial need and available only to low-income people. Most are targeted to specific populations who are very poor. For example, the Supplemental Security Income (SSI) program provides cash benefits to poor elderly and disabled persons.[17] While the cost and source of funding of all need-based social security programs are always a point of heated debate, the main controversy around programs targeted to the elderly and the disabled is who among that population should be eligible (e.g., noncitizen immigrants, individuals with drug-related disabilities).[18] On the other hand, welfare programs for people simply because they are poor are subject to greater public scrutiny and are repeatedly under attack. One such program is the federal cash assistance program for poor families with dependent children, which served as the flash point for "welfare reform" in the 1990s and, as a result of enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), is now known as the Temporary Assistance for Needy Families (TANF) program.[19] The monthly TANF benefit amount, which varies from state to state, is usually determined by the number of people in the household and other income available to the members of the household, such as wages or child support, if any.[20] Another program is General Assistance (GA), a state-funded program primarily for poor individuals who are not living with children dependent on them. Most adult recipients of TANF and GA benefits are generally considered able to work.[21]

Another vital income support is the Food Stamp program.[22] This program, which allows recipients to purchase food and limited personal care items, is also based on financial need, but without regard to an individual's age, disability, work history, ability to work, or number of dependents. These are factors that determine the amount of the benefit, not whether or not an individual is eligible.

Although assistance is generally available to individuals and families with incomes below 130 percent of the federal poverty level, most Food Stamp recipients (88 percent) have incomes below the federal poverty guidelines, with 40 percent of all Food Stamp households with incomes of less than or equal to half the federal poverty guidelines.[23] More than half of all Food Stamp recipients are children.[24] Only 61 percent of people who are eligible actually receive food stamps.[25] Almost 30 percent of Food Stamp households have earned income, including 45 percent of households with children.[26] But only about half of eligible low-income working families receive food stamps.[27] The PRWORA placed eligibility restrictions on the Food Stamp program, including the elimination of most noncitizen immigrants from eligibility. Some, but not all of these restrictions have been restored in subsequent legislation.[28]

Government-funded health insurance for the poor, Medicaid, has traditionally been a welfare program. However, with the growing number of uninsured among the middle class, attitudes are changing and there is now increasing public consensus on the value and need for some form of universal health insurance.[29] Thus public health insurance eligibility is evolving from a welfare program for the poor into a social insurance program without regard to income.[30]

Other social security programs provide cash or other kinds of income support for individuals and families beyond those discussed here. The 1996 federal welfare reform law, PRWORA, made significant changes to several need-based programs for which the federal government provides some or all of the funding.[31] But it is the TANF program that provides cash assistance for poor families with children that most people in the United States think of as welfare. It is TANF that drew the campaign pledge by then-governor Bill Clinton of "ending welfare as we know it." While TANF marked a major shift in welfare policy from its most immediate predecessor—both in the philosophy and in the mechanics of the law—the truth is that these changes did not end welfare as we have known it in the United States.[32] Instead, they follow a pattern of shifting philosophies and programmatic changes that began even before the United States formed as a nation. A history of welfare policy and programs in the United States with a focus on cash assistance for families with children is set out below.

THE RIGHT TO LIVE

It should be perfectly clear that there is nothing clear about social security programs in the United States. They are a hodgepodge in terms of responsibility (e.g., federal laws that are federally administered, federal laws that are state administered, state laws that are locally administered by government or

private agencies), funding source (e.g., federal, state, and/or local revenues; employee and employer contributions; premiums paid by recipients, private donations), categorical eligibility (e.g., dependent child in the home, age, disability, immigration status, work history), financial eligibility (e.g., need-based, amount of earned income, assets), other program rules (e.g., work requirements, time limit on receipt, verification, sanctions), and the amount and type of benefits provided (e.g., cash, in-kind, voucher). What is uniformly true about the welfare programs is that they do not provide an adequate standard of living for recipients in order to meet their basic needs.[33] And, eligibility for benefits does not necessarily translate into receipt.[34]

The discussion of who or what is responsible for poverty and its elimination, what should be done to eliminate poverty, even if it can or should be eliminated or just controlled—is reflected in the disparate welfare policies and programs today and throughout United States history.[35] Rarely, if ever, do we see reflected back the nation's commitment to social security or, as Ed Sparer, the guru of welfare rights litigation in the 1960s framed the issue, "the right to live."

So how did welfare policies and programs get to where they are today? Certainly any discussion of welfare and its history cannot be separated from the role racism, sexism, and xenophobia has played throughout United States history—from the decimation of native peoples to the enslavement of Africans and their descendants to the disparagement of women to the hostility towards immigrants. Just think about the persistent image of the "welfare queen"—an African American woman who is malingering, immoral, and dishonest, with multiple children fathered by multiple men nowhere to be found. Or the immigrant—living off the public largess, with language, culture, and loyalties other than "American."

Racism, sexism, and xenophobia have been and continue to be integrated into welfare policy and practice, and ultimately serve to defeat any attempts to create real social security.[36] Under current federal welfare law, sometimes it is explicit, as in the denial of benefits to certain noncitizen immigrants in the United States who are here with approval of the government. Sometimes it is tacit, as in the case of the family cap, also known as the child exclusion policy, which denies benefits to children born into recipient families. The PRWORA is silent on the family cap, neither requiring nor banning the policy, leaving the decision to the states. The family cap was allegedly intended to remove what its proponents perceived as a financial incentive for women to adopt a "welfare lifestyle" by bearing children; it most certainly is a policy grounded in the stereotype of the "welfare queen."[37] This most recent round of devolution of responsibility from the federal government to states and local governments has allowed the kind of "flexibility" that can reinforce inequalities.[38]

In addition, at least three other "themes" should be kept in mind as welfare policy in the United States changes over time. First, the relationship between welfare and its negative and positive impact on the labor market, particularly from a business perspective (e.g., undermining business's desire to keep wages low, removing "unemployables" from the labor market). Second, the role welfare plays in maintaining civil order, particularly in times of high

unemployment during an economic downturn or specifically among African Americans (e.g., liberalizing welfare policy to allow more people on the rolls, providing subsidized employment when unsubsidized work is unavailable).[39] And third, controlling the perceived immoral behavior of poor people (e.g., drinking, out-of-wedlock births). To what extent any of these "themes" influence welfare policy fluctuates with the political, economic, and social context of the times.

Despite these complex variables, the federal, state, or local government responsibility to provide welfare has generally been accepted. The concept of welfare as state-sponsored charity, however, rather than a right has deep roots. From colonial days forward, welfare has been a public responsibility, but often with a mix of public and private agencies acting as program administrators and service providers. At first, welfare was uniquely a local responsibility. Welfare practices included auctioning off the poor (including poor children) or contracting for their labor in exchange for their maintenance; placing them in asylums or poorhouses; and providing "outdoor relief"—so named since recipients did not live in poorhouses but out in the community—usually distributed in the form of food and coal. Local responsibility translated into localized policies and programs—with variations ranging from the purpose of welfare, who received it, the type and amount of the benefits, to work and other requirements—which meant that neighboring towns could have very different programs in place, with no one having the right to social security.[40]

By the end of the eighteenth century, the responsibility for welfare moved from towns and cities to townships and counties, generally with state oversight. Poorhouses became the welfare program of choice, which offered an opportunity to not only relieve misery, but to rehabilitate and educate the poor regarding intemperance and work habits, as poverty indicated a moral failing. Over time it became cheaper to provide outdoor relief so that people could remain in their own homes, rather than to house them. The result was that most localities served more people through outdoor relief than in poorhouses. Yet outdoor relief remained controversial, with critics decrying its promotion of sloth. By the late nineteenth century poorhouses fell out of favor, particularly as the population served changed from families with children to able-bodied men looking for work. Under steady attack outdoor relief also suffered, as program costs were cut and with some localities ending it entirely. The need remained as the debate raged about the goals of welfare and who among the poor was deserving of welfare and who was not. Surely widows and children, the infirm, and elderly were deserving of public assistance. But what about the family man who lost his job through no fault of his own—isn't it better (and cheaper) to keep the family together in their own home?[41]

Private charities always played a significant independent role in providing relief to the poor. The early nineteenth century saw an increase in associations of volunteers, often affiliated with churches, organized to take on "the eradication of vice, crime, ignorance and poverty."[42] For the most part they concentrated on immediate relief, not the causes of poverty or long-term needs of those they served. Over time the volunteer aspect of these organizations gave way to a more secular, professionalized bureaucracy, as did governmental

involvement. Government and private agencies continued to both collaborate and work independently. Data collection and studies of recipients flourished, theories of poverty and welfare were articulated, and state laws were enacted to reinforce attitudes and uphold policies.[43] Yet as knowledge of the need for social security grew there was no corresponding growth in the right to social security.

By the end of the nineteenth century, "child-saving" and family preservation became the focus of welfare policy and programs. Charitable work demonstrated that regular assistance helped keep families together and eased their transition to economic independence. This led to the first mothers' pension legislation passed in 1911.[44] By the 1930s, almost every state had mothers' pension laws. Most recipients were widows, only a fraction of those in need received any assistance, the laws had very restrictive clauses (i.e., no divorced women), and the cash provided was minimal. State requirements included strict behavioral standards, long residence, citizenship, and proof of extreme poverty.[45] However, "mothers' pensions were a small, halting, step away from charity and toward entitlement."[46] Mothers' pension laws helped set the stage for the first federal government welfare program for families with dependent children.

At the turn of the century, changing attitudes about welfare were reflected in the changing social, political, and economic dynamics of the country. The United States was fast becoming urbanized, work mechanized, labor unionized, and diversified with the influx of immigrants from abroad and the migration of African Americans from the South, where they had been propping up the economy of that region through slavery and subsistence wages, to the northern and western regions of the country. An economic depression began in 1893. With so many people out of work, including able-bodied men, it became more difficult to distinguish between the undeserving and deserving poor, the truly slothful and the merely unemployed. It also exposed the inability of private efforts and local governments to respond effectively. With the growth in population, including the increase in poor people, cities and charitable organizations transformed themselves and responded with an expansion of welfare, welfare departments, and greater cooperation between the government and the private philanthropic sector, including business. In addition, professionalism of the social welfare arena continued, with social workers in private organizations taking on casework, leaving the distribution of benefits to governments. Although influenced by Christianity, social workers and social work were increasingly nonsectarian. Social work schools and professional associations were created. The settlement movement was spawned—the most famous was Hull House, Jane Addams's settlement in Chicago which began in 1889—with social workers and others living in poor urban areas focusing on the environmental and political conditions that breed poverty, not personal redemption. While small, the settlement movement's influence was powerful, and Jane Addams ranked as one of the most admired people in the United States in public opinion polls in the early twentieth century prior to World War I. In the meantime, social workers in private organizations and government officials were soon overwhelmed with large caseloads, leaving little time to practice "social work." This gave rise to

professional reformers committed to social reform, addressing issues related to poverty, such as child labor and public health, on a national level.[47]

With industrialization and the rise of unions, business often responded with repressive tactics, such as using private armies, local police, and state and federal militia to crush workers' strikes. Progressive businesses responded by joining the growing support for social insurance legislation, including workmen's compensation and unemployment insurance. Workmen's compensation, which required employers to pay their employees for injuries sustained at work, became the first widespread form of social insurance.[48] The acceptance of unemployment insurance was more problematic, raising old fears about creating an entitlement to benefits. But as the United States economy spiraled down into the Great Depression, voluntary efforts to address rising unemployment by unions and business were not enough. The Social Security Act of 1935 made unemployment compensation compulsory.[49]

By the time Franklin Roosevelt became president in 1933, there were 13 million unemployed, about one-third of the available labor force, joining the ranks of the already destitute.[50] Even though they were able to meet only a fraction of the need, private agencies had exhausted their resources, and cities and states were on the edge of bankruptcy. However, the stigma of welfare remained so great that many of the unemployed workers sought out other sources of relief, and turned to welfare only as a last resort. Ultimately, most had no choice.[51] Clearly, federal action was required and, in contrast to his predecessor, Roosevelt acted quickly to establish the first federal relief system and a massive civil works program.

First came the Federal Emergency Relief Administration (FERA), initially authorized to distribute $500 million, mostly in the form of cash paid as wages for work relief and in cash grants. FERA ultimately spent $3 billion.[52] The size of the federal government grew with its new responsibilities, but it was necessary to channel the funds through state bureaucracies for distribution to recipients. States maintained flexibility—benefit amounts, eligibility requirements, and local administration competency varied greatly—but federal administrative regulations guided state implementation. FERA established the effectiveness of the grant-in-aid system with states contributing state funds to match the federal funds (with no maximum dollar amount, allowing for increases in the number of recipients) and forcing states to provide more adequate assistance, raise administrative standards, and hire more professional staff.[53] FERA set "uniform minimum wages" and prohibited discrimination based on race and religion.[54] The Civil Works Administration (CWA), providing mostly construction jobs to unemployed men, and the Civil Conservation Corps (CCC), providing jobs for young men to help preserve the nation's parks and other natural resources, followed to provide more work relief. In 1934, these three programs combined assisted about 28 million people, or 22.2 percent of the population.[55]

President Roosevelt held the same concerns about welfare that have plagued it from the beginning, opining that both cash assistance and work relief act as disincentives to unsubsidized employment and individual initiative and may negatively impact the labor market. But the need for relief was real, as was the civil unrest.[56] Roosevelt considered the welfare programs

temporary measures in response to a crisis. As soon as the immediate crisis had passed, Roosevelt ended FERA and CWA, turned welfare for the "unemployables" back to the states, and created the Works Progress Administration (WPA) for the "employables." The WPA was more decentralized than the CWA with most of the funds going to state and local governments, had stricter eligibility requirements, paid inadequate wages, and was underfunded throughout its life, failing to meet the existing need.[57]

In addition to the concern over all welfare programs, the tension between cash grants and work relief was ever present. Part of the discussion was, and still is, the purpose of welfare and work requirements. Is it to provide relief to as many people as possible? Is being "on the dole" so psychologically damaging to individuals and harmful to society that some form of work must be required? Is the point of work relief to train workers so that they develop skills that are or will be in demand in the private sector? Or, is it to complete public works projects so that only the most highly skilled be hired so as not to compromise the project? Would work requirements even be necessary if there were enough jobs at decent wages? And when gender is added to the discussion, competing policies favoring women as caretakers or women as wage earners adds to the tension.[58]

In the same year President Roosevelt started the WPA, the Social Security Act of 1935 was enacted into law.[59] The Act created both social insurance programs and welfare programs, reinforcing in federal policy the distinction between programs for "everyone" and programs for the poor. The social insurance programs, Social Security for the elderly and Unemployment Compensation for laid-off workers, were designed to be self-funding with contributions from employees and/or employers and with no means test. The welfare programs, Aid to Dependent Children (the federal successor to state mothers' pension laws), and grants to states for the needy elderly and blind were financed through a system of federal matching grants to the states and were means tested. General Assistance was not included; that population was no longer a federal responsibility. While other Western countries developed a blend of social policies and benefits for people across economic classes that blurred the distinction between social insurance and welfare, the United States clung to a system of social insurance programs that maintained a relationship to an individual's earned income and thus "owed" to its beneficiaries, and separate welfare programs reliant on government funds and based on need, and not "earned."[60] Though modified, left in place was a scheme based on the old system of local control, with distinctions between the deserving and undeserving poor, the able-bodied and unemployables intact and, once again, one that provided neither an adequate standard of living for recipients nor relief to all of those in need.[61]

New Deal legislation was historic in that it expanded the commitment of both the federal government and the states to economic security, making welfare a right, not just charity, at least for some. There was a dramatic increase in the amount of money spent on welfare at all levels of government and the quality of state administration of programs improved.[62] And, with the acceptance of federal funds, states were obligated to follow federal law. In 1935 this included the submission of a state plan describing how a state

would comply with the law, the administration of the program in every part of a state, compliance with reporting requirements, and for any individual denied benefits, the opportunity to a fair hearing before the state agency.[63] The Social Security Act of 1935 preceded the Universal Declaration of Human Rights by thirteen years, a world war, and a very different economic picture in the United States.

The grant-in-aid programs, including the Aid to Dependent Children (ADC), were inserted into the Social Security Act of 1935 without much controversy. Based on the experience of states with mothers' pension laws, they were not thought to be expensive programs. But those programs were more restrictive. Over the next decades the ADC program grew in both the number of families receiving assistance and the costs. Who received ADC benefits also changed—from a program for families headed by widows to a program largely made up of separated, divorced, and unmarried women and their children, with a disproportionate number of African American women as heads of recipient households.[64] States tried to limit their caseloads with restrictions to keep the labor pool sufficiently supplied with workers forced to take very low-wage work and to differentiate between the deserving and undeserving poor. These included policies specifically intended to keep African Americans off welfare, particularly ADC. For example, in 1943 Louisiana denied assistance to families with children over six years old as long as the mother was presumed to be able to work in the fields—jobs traditionally filled by African Americans. This first "employable mother" rule was designed to keep African Americans in the labor pool, working for very low wages.[65] And "suitable home" laws denied welfare to families seen as deviating from social norms—usually African Americans bearing children out of wedlock.[66] Another pernicious policy known as the "man in the house" rule denied ADC benefits to families where the mother was in any way associated with a man, even if they were married to each other. For unemployed and low-wage workers whose income was not enough to support their families, this policy forced fathers to live apart from their children so that the children and their mother could receive welfare.[67]

Historical changes were underfoot that would impact welfare. In 1900, 90 percent of African Americans lived in the South. In the early part of the twentieth century, African Americans began to migrate in large numbers. Between 1940 and 1970, this "Great Migration" transformed the African American population from a predominately Southern, rural group to a Northern, urban one. African Americans moved to escape sharecropping, worsening economic conditions, and the lynch mob. Though many thrived with new economic opportunities, unemployment among African Americans was high. African Americans certainly faced racism in Northern states and cities, but their concentrated numbers allowed them to develop their own economic and political base.[68] And, in turn, they gained a growing influence on the Democratic Party in need of black votes.[69] So, although the Northern states and cities also had restrictive welfare policies, they were generally more liberal in allowing African Americans onto their welfare rolls.[70]

Against this backdrop emerged the modern day history of black protest: against unemployment, evictions, and welfare policies during the Great

Depression; against wartime defense employment and segregation in the military during World War II; and the civil rights movement of the 1950s and 1960s that began in the South and "transformed the historic links between race, poverty, and opportunity into a national disgrace."[71] While still demanding the end to racial discrimination in all aspects of law and society, civil rights activists increasingly emphasized the poor economic conditions that most African Americans endured. Dr. Martin Luther King led over 250,000 people in the March on Washington for Jobs and Freedom in August 1963, demanding not only voting rights and an end to racial discrimination, but also jobs for blacks.[72]

Politicians increasingly felt pressure to act.[73] During the 1960 election, in response to the recession of the late 1950s which hit African Americans particularly hard, presidential candidate John F. Kennedy called for an "economic drive against poverty."[74] Within days of taking office, President Kennedy proposed legislation including a temporary supplement to unemployment benefits and extending aid to the children of unemployed workers, redevelopment of distressed areas, an increase in Social Security payments, and a raise in the minimum wage and expanded coverage to more workers. In 1961 ADC was extended to cover, at state option, a second parent (the principal wage earner) when unemployed, and ADC became Aid to Families with Dependent Children, or AFDC.[75] Kennedy also urged Congress to pass the Public Welfare Amendments of 1962. This legislation augmented funding for the training of welfare workers, emphasized job training, extended child care to working mothers, and authorized federal payment of 75 percent of the costs to states for rehabilitative and preventive services, greatly expanding the provision of these services to the needy.[76] By 1963, the Kennedy administration was making plans to attack the issue with the creation of a comprehensive anti-poverty program, making it a key legislative objective in 1964.[77] President Kennedy's assassination on November 22, 1963 left it to President Lyndon Johnson to wage the "war on poverty." His message was one of providing opportunity, not eliminating inequality.[78]

In spite of, or perhaps because of this progress, attacks on rising welfare rolls continued, so that even where welfare laws were comparatively liberal, administrative practices interfered with those in need from initially applying for benefits and, for those able to obtain benefits, from maintaining those benefits. These practices included intimidation, arbitrary terminations, not informing people of their rights and options, and even active disinformation about those rights and options. A bureaucratic morass of incoherent rules, elaborate forms, unattainable documentation requirements, cumbersome procedures, intrusive investigations, and limited access made it difficult to apply for and receive benefits and served to harass or shame applicants and recipients in the process. Even with the growth in the rolls, the number of welfare recipients and the amount they received continued to have little relationship to the actual need for assistance.[79]

The anti-poverty programs that were expanded or newly created as part of the War on Poverty did not secure the right to social security, but they did have a positive impact on alleviating poverty and, as with the New Deal legislation, the federal government's role and responsibilities grew. The

programs increased access to social services, job training and employment, housing, and education.[80] Community organizations, like Mobilization for Youth (MFY) in New York City, offered activities such as work preparation, skill training, remedial education, and neighborhood service centers. Many of these organizations did more than offer programs. With federal money supporting their efforts, community action agencies across the country helped to create new leadership in poor neighborhoods and activate African Americans to press for their own interests.[81] With the obligation to respond to its constituents, welfare became a focal point. The social workers and community aides hired by these agencies became expert on welfare law and regulations. Anti-poverty lawyers also became active in this effort.[82] Organizations all over the country produced welfare manuals to educate people about their rights under the law, assisted recipients to resolve individual grievances, staged group actions at welfare offices, and actively pursued welfare litigation. Along with organizations that had formed in the early 1960s to improve the welfare system, they played a significant role in increasing the number of poor people who were able to obtain welfare.[83] Emboldened by the mass rioting and civil disorders in African American communities throughout the country, they became more aggressive in their demands.[84] In 1967 the early welfare rights organizations joined together with the community action agencies and the National Welfare Rights Organization (NWRO) was officially formed under the leadership of George A. Wiley. The goals that were adopted by the NWRO echo the economic and social rights asserted under human rights law:

> 1. Adequate income: A system that guarantees enough money for all Americans to live dignified lives above the poverty level. 2. Dignity: A system that guarantees recipients the full freedoms, rights, and respect as all American citizens. 3. Justice: A fair and open system that guarantees recipients the full protection of the Constitution. 4. Democracy: A system that guarantees recipients direct participation in the decisions under which they must live."[85]

With the growing number of welfare recipients, a welfare rights movement emerged.[86] Anti-poverty lawyers worked with community groups and the NWRO to build this movement by developing a welfare litigation agenda. In 1963 the Mobilization for Youth (MFY) added a legal unit and hired Ed Sparer as its director. Sparer envisioned using litigation to create social change while maintaining a "direct relationship with the community" and empowering poor people to be their own legal advocates. But MFY attorneys were busy with routine legal issues presented by individuals in the community—housing, workers' compensation, criminal cases, etc. It was difficult to combine strategic litigation and with case-by-case representation. Sparer re-envisioned the delivery of legal services, developing a two-tiered model with day-to-day services left to neighborhood offices working in partnership with specialists concentrating on strategic reform litigation. In 1965 Sparer left MFY to head a new law office, the Center on Social Welfare Policy and Law (Welfare Law Center), to concentrate on strategic nationwide welfare litigation. To obligate states to administer welfare programs consistent with the federal Constitution and federal law, Sparer drew up a list

of issues for litigation: laws and rules that exclude people from benefits unrelated to need such as the "man-in-the-house" rules; those that deny recipients their constitutional rights such as the absence of due process protections; the lack of uniformity among states such as residency laws; and the inadequacy of the money grant.[87] But his overarching goal was to fundamentally change the nature of the welfare system, not just to make what existed fairer, by ending the categorical nature of the welfare system. Essentially, Sparer laid out a plan to achieve the right to social security through litigation. Reinforcing the goals of the welfare rights movement, Sparer wrote the struggle was "to establish a legal right to an adequate welfare grant, without onerous conditions and with fair administration, for all persons in need of financial assistance . . . something akin to a 'right to live' would gradually emerge, and a better society would result."[88] While others did not find the "right to live" a valid legal concept, and Welfare Law Center lawyers thought it too risky to claim that welfare was a constitutional right, Sparer's welfare litigation strategy to expand eligibility forged ahead, and at least initially, with stunning success.[89]

The first welfare case heard by the U.S. Supreme Court, *King v. Smith*, struck down the man-in-the-house rule. The ruling affected 20,000 children in Alabama and about 500,000 children in the eighteen other states with similar rules.[90] Durational residency laws were struck down in *Shapiro v. Thompson* as a violation of the constitutional right of interstate travel.[91] And in *Goldberg v. Kelly*, the Court established that welfare recipients have due process rights entitling them to advance notice detailing the reasons for termination and the opportunity to defend themselves and present their own arguments at a hearing in front of an independent adjudicator prior to termination of benefits.[92] With the Welfare Law Center reluctant to directly attack the adequacy of the welfare grant, a rift developed between the Welfare Law Center and the NWRO. NWRO and community groups and anti-poverty lawyers continued to press forward, sometimes cooperating, sometimes working independently, but always in pursuit of the "right to live."

Welfare caseloads rose in every part of the country, but the disparity in welfare payment levels and policies continued.[93] In August 1967, the same month of NWRO's founding convention, the Democrat-led House passed a social security bill that amended the AFDC program to include mandatory work training programs for recipients and a freeze on the number of children covered by federal dollars to limit expansion. The NWRO lobbied hard against these provisions. But on January 2, 1968, President Johnson signed the Social Security Amendments of 1967 into law.[94] One positive provision was the requirement that each state update its "standard of need"—the minimum income necessary to live in the state—to reflect cost-of-living increases since the standard had been originally adopted. Although states were allowed to set maximum benefit levels (without regard to the actual number of people in a household), they were required to adjust them upward in proportion to the increase in the standard of need.

With new statutory claims in hand, in collaboration and independently, the NWRO, community groups, the Welfare Law Center, and other welfare rights lawyers filed law suits around the country challenging the AFDC grant level. Some cases challenged maximum benefit levels that hurt large families,

others challenged the failure to raise the benefit level to the newly adjusted standard of need, and still others challenged a reduction in benefits. While there were some wins, the net results were decidedly negative. In *Rosado v. Wyman*, the U.S. Supreme Court held that the New York legislature acted illegally when it arbitrarily eliminated the state's "special grants" which supplemented the AFDC grant, however, the Court stated that under the 1967 amendments states were not required to pay benefits consistent with the standard of need and could reduce payment levels in light of "budgetary realities."[95] And in *Dandridge v. Williams*, the Court upheld the setting of maximum benefit levels. In doing so, Justice Stewart wrote in the majority decision that a family maximum did not constitute a denial of assistance to the youngest or most recently arrived child in a family, but rather, the maximum benefit diminished the entire family's circumstances. As long as every eligible family member received some assistance, however inadequate, there was no violation of the law.[96] Moreover, Stewart wrote, it is up to the states to decide how to allocate their scarce resources. He concluded, "The intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of the Court." Any hope that the Court would create a legal right to an adequate welfare grant for all persons in need evaporated. Sparer wrote, had the *Dandridge* decision gone the other way, "The equal protection clause would have become the main vehicle for establishing a constitutional guarantee of human life."[97] As it was, the U.S. Supreme Court would not uphold the "right to live."

On the political front, momentum for income maintenance reform grew and became part of the 1968 presidential election. Despite the legal setbacks, this was a time when the right to social security seemed the most achievable. During the primaries, presidential candidate Eugene McCarthy advocated for a national minimum income for all Americans. The idea of national standards gained traction when presidential candidate Richard Nixon advocated adoption just days before his election.[98] That same year the NWRO broadened support for welfare reform by joining the Southern Christian Leadership Conference (Dr. King had been the SCLC president from its founding in 1957 to his death in 1968) in the Poor People's Campaign and connecting the antiwar movement to poverty at home. At a White House Conference on Hunger and Malnutrition in the fall of 1968, NWRO was able to convince participants to pass a resolution calling for a guaranteed annual minimum income of $5,500 for a family of four.[99]

In 1969, largely in response to states, cities, and local governments urging fiscal relief from the rising welfare rolls, President Nixon proposed the elimination of the AFDC program and in its stead the creation of a program that guaranteed a minimum annual income for families with children of $500 per adult and $300 per child per year, or $1,600 for a family of four, and a wage supplement for families with earned income up to $3,920. Although states would realize a savings under this plan, most states provided welfare payments above the $1,600 level and would still have to supplement the federal payment. And the guaranteed income came with regressive policies, such as eliminating the right to a hearing if terminated and requiring recipients to take jobs, even if the pay was less than the minimum wage.[100]

At first, NWRO worked to reform Nixon's welfare plan, but finally rejected it and called for a guaranteed income of $6,500 a year for a family of four. With opposition from all quarters—welfare rights activists and liberal politicians arguing that the proposed minimum income was insufficient, unions concerned about the threat to the minimum wage, and conservatives' concern over the costs and the belief that a guaranteed income, regardless of the amount, creates welfare dependency—President Nixon eventually gave up on his proposal.[101] The time of mass protest was ending and the theories that welfare receipt generated "pathologies" among the poor such as criminal behavior were gaining ground. In spite of legal and political setbacks, NWRO and antipoverty lawyers continued to press for enforcement of existing welfare laws with success.[102] But by 1973, the welfare rights movement was effectively over. It would be almost another decade before there was serious consideration of welfare reform. However, there was success beyond the AFDC program.

A series of legislative enactments in the 1960s and early 1970s continued to increase benefits and social service programs. Eligibility expanded beyond welfare recipients with programs available for free or at a graduated cost to a more economically diverse population. For example, the Food Stamp program, first revived as a pilot and then made permanent in 1964, blurred the distinctions between welfare recipients and the working poor with eligibility for people with incomes over the federal poverty line.[103] Service delivery altered, with a large percentage of government funds used to contract with private agencies for the provision of social services. With this expansion of social services and funding, a smaller share of benefits the poor received was in the form of cash.[104] The elderly benefited most with increases in monthly Social Security payments that were indexed for inflation in 1972, and other program improvements. The grant-in-aid programs for the elderly, blind, and disabled, originally created in the Social Security Act of 1935, had become increasingly complex and inconsistent from state to state. In 1974, the federally funded and administered Supplemental Security Income (SSI) program replaced these programs with a nationally uniform system of benefits for the poor elderly, blind, and disabled. For the first time a national minimum benefit level was set.[105]

The 1970s saw a deterioration of the United States economy. Whole industries were moving either to the southwest region of the country or out of the United States altogether and to impoverished countries. Over 38 million jobs were lost. Industrial work was replaced with a service and high-tech economy. Business and government blamed greedy trade unions and too-generous welfare policies that undermine the incentive to work for the worsening economy. The "new American poverty" saw formerly well-paid industrial workers jobless or working low-paid jobs, soaring unemployment among people of color, and rising poverty, especially among women. Welfare rolls rose while the actual value of cash grants and related programs fell. Economic recovery no longer meant reduced unemployment or poverty.[106]

The postwar period saw increasing numbers of women in the workforce, either by choice or necessity. This reality overcame any remaining reluctance to require AFDC recipients to work, and in fact has been used to fuel resentment against recipients, and women generally, who prefer to work full-time at raising

their children. But even when women were expected to stay home to raise their children, their caregiving role was largely undervalued, and did not reflect the fact that poor women had always worked for wages. The movement of women into the labor market accelerated just as social programs were being cut.

By the time Ronald Reagan became president in 1981, the war on welfare was underway with the right to social security becoming more and more out of reach. As governor of California, Reagan used innovative administrative tactics to keep people off the welfare rolls and fought antipoverty lawyers trying to stop him. President Nixon followed Reagan's lead, repealing federal AFDC regulations that guarded against states imposing excessive verification requirements and instructed states to help applicants and recipients obtain documents. New regulations lengthened the time states had to determine eligibility from thirty to forty-five days, and imposed a new "quality control" system, threatening states with financial penalties for overpayments to "ineligible" families. The result was as intended—a rise in rejections of eligible families. While the number of AFDC recipients remained relatively constant between the mid-1970s and 1989, the proportion of people who received AFDC compared with those poor enough to be eligible to receive AFDC fell sharply.[107]

Once in office, President Reagan launched a major assault on income programs, including Social Security, Unemployment Compensation, the Food Stamp Program, and AFDC, resulting in a drop in the number of people receiving these benefits. The Comprehensive Education and Training Act (CETA), the major federal job training program that provided public service jobs to almost 400,000 people, was repealed at a time of high unemployment. Reagan even cut back on welfare policies that encouraged work, such as limiting the amount of income a recipient may earn and remain eligible to receive a grant, and limiting child care deductions.[108] Reagan's cuts to programs that benefited the poor and his tax policies that benefited the wealthy led to an escalation in income inequality during his administration.[109]

By ignoring the reality of a labor market that had too few jobs for unskilled workers that paid decent wages, the welfare-to-work policies and programs implemented since the 1960s had done little to add to recipients' income and help them transition off assistance. More was needed to improve the employment prospects of poor people. The Job Training Partnership Act of 1982 (JTPA) was enacted in response. JTPA addressed the literacy and occupational skill deficits of economically disadvantaged youth and adults, including welfare recipients, through counseling, education, training, and job search assistance. JTPA created a federally funded locally based service delivery system to provide remedial education, training programs, and employment assistance. A key feature of JTPA was making equal partners of state and local governments and business in deciding how funds are administered and programs managed.[110] States were allowed to experiment with "intensive services" for long-term AFDC users and these state programs became the model for the work provisions of the next round of AFDC changes, the Family Support Act of 1988. The Family Support Act mandated that states adopt AFDC-UP (previously a state option) and require one parent in a two-parent household

work at least sixteen hours a week. Young parents who had not completed high school were required to do so, and other parents would be offered opportunities to participate in employment, basic education, and training activities intended to lead to unsubsidized employment through the Jobs Opportunity and Basic Skills (JOBS) program. With states subjected to steadily escalating federal participation rates, a growing number of adult recipients would be required to work or participate in JOBS activities. But states maintained control in determining the content and emphasis of their programs. In addition, states had to guarantee child care services and transportation allowances for recipients engaged in those activities. For recipients leaving AFDC due to earned income, states were required to continue to provide child care and Medicaid for a limited "transitional" period. The Act also made extensive revisions to child support enforcement.

The Family Support Act had mixed results. It did give recipients an opportunity to improve their economic status through education and training, but only a small percentage enrolled in new programs. It did improve the collection of child support payments of the money collected each month when determining eligibility for AFDC and the grant amount. However, it did nothing to ensure that more of the money collected each month went to the family of the child on whose behalf the support was collected. States were allowed to continue the practice of reimbursing themselves for the family's AFDC grant, and required to pay a portion of the support to the federal government. Never sufficiently funded, most states did not implement the Family Support Act with enthusiasm. And AFDC rolls continued to rise.[111] Feeling constrained by federal law and asserting that they could design a better program, states increasingly turned to Section 1115, a provision of the Social Security Act that allowed states to obtain waivers of federal AFDC and Medicaid laws and regulations so that they could test new ideas.

Section 1115 waivers were for experimental, pilot, and demonstration projects that would promote program objectives. To be approved by the U.S. Department of Health and Human Services (HHS), the projects had to be cost-neutral and include a rigorous evaluation component. In January 1992, the Bush administration implemented policy changes that allowed the federal government to more readily grant waivers for state welfare reform proposals. The Clinton administration modified the policy further, and approved waivers at an even faster rate. By 1996, almost every state had applied for one or more federal waivers. Most AFDC waivers focused on eligibility, work, time limits, and payment policies. None of them focused on the right to social security. Some states requested very comprehensive changes, others just one or two policy changes. Some waiver requests were very punitive, and more focused on changing behavior than helping recipients survive or make a successful transition into employment. For example the family cap, intended to affect the very private decision whether or not to bear a child, either reduced or eliminated any increase in the cash grant when a child was born into a family receiving AFDC. New Jersey was the first state to implement the family cap statewide, denying an increase in benefits for the new child.[112] Wisconsin's "Learnfare" program tied a family's AFDC eligibility to the school attendance of teens in the household.[113] On a more positive note, there were requests

for waivers that did not just require work but encouraged it in ways that eased the transition off welfare. For example, under AFDC, when a family member entered employment, after the first four months the family faced a dollar-for-dollar loss of assistance based on the earned income. States requested waivers to increase the amount of earned income disregarded in the calculation to determine the size of the AFDC grant. In this way recipients with earned income could remain on cash assistance and Medicaid longer.[114]

Antipoverty activists did not sit idly by during this process. They responded to state waiver requests by submitting written arguments to HHS for or against particular policy changes, and were successful in stopping or least changing some of the punitive requests. The Clinton administration actively negotiated with states around particular provisions of a demonstration project, giving activists more opportunity to influence the outcome. In Illinois activists orchestrated a campaign to oppose the worst of the state's waiver requests. Campaign participants included welfare rights organizations and other grassroots groups, advocacy organizations and social service providers, women's rights organizations, religious entities, unions, and legal services attorneys. Campaign participants submitted written comments to HHS opposing the waiver requests, met with representatives of the state welfare agency, testified before state legislative committees (opposing bills that authorized Illinois's waiver requests) and at welfare agency hearings on welfare reform. This effort did result in the denial of some waiver requests and amendments to others. Activists also organized nationally to submit comments to HHS opposing waiver requests from states other than their own, particularly the Wisconsin "Wisconsin Works" or "W-2" program. W-2 included a set of policies that had never been approved by HHS or implemented in any other state, including: ending the assurance of Medicaid for qualifying families, eliminating the state's duty to guarantee child care for persons assigned to work programs, eliminating the right to a fair hearing for families denied aid, and providing less aid to families with ill or incapacitated members.[115]

Litigation was also pursued. For example, California activists challenged the portion of the state's AFDC demonstration project that imposed a statewide "work-incentive" benefit cut, without regard to family composition or disabilities. In *Beno v. Shalala*, emphasizing the experimental nature of the project, the Ninth Circuit Court of Appeals stated that while HHS may defer to the state's judgment on what risks are necessary, HHS "must make some determination that a project does not pose unnecessary risks to human subjects." The court vacated HHS's waiver.[116]

Opening up the waiver process began the shift of responsibility away from the federal government and to the states, and away from social security to economic insecurity. While the day-to-day administration of AFDC has always been a state responsibility, the federal government has supplied the majority of the funding and enacted the laws and promulgated the rules states must follow, some allowing broad state discretion, others highly prescriptive. Welfare reform was on a fast track, barreling toward the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).

The battle over welfare reform raged. This was, once again, a time of economic downturn, with welfare rolls reaching historic levels and city and state governments looking for ways to cut their expenses.[117] Conservatives attacked welfare, and the single mothers that made up the majority of adult recipients, as the source of all evil—responsible for crime, violence, drugs, dependency, teen pregnancy, high taxes, and undermining the work ethic and "family values." During the 1992 presidential campaign, Democrat candidate Bill Clinton promised to "end welfare as we know it." Clinton intended to do this through a time-limited program that offered education, training, and child care. But Clinton did not introduce welfare reform legislation before the Republicans gained control of Congress in the 1994 elections. The political landscape shifted further to the right.[118]

A plethora of welfare reform bills were introduced in Congress. Antipoverty activists, welfare rights organizations and other grassroots groups, advocacy organizations and social service providers, women's rights organizations, religious entities, unions, legal services attorneys, researchers and academics, and outraged citizens—swung into action, working both independently and collaboratively in a nationwide effort to stop punitive welfare reform. They testified before congressional committees; lobbied members of Congress, their governors, and state legislators; drafted alternate comprehensive welfare reform legislation and amendments that would moderate some of the harsher provisions of existing bills; conducted research; produced white papers; held demonstrations; offered their expertise as poor people and advocates for the poor; and, as a last resort, set up phone banks to urge the president to exercise his veto power.[119]

In March 1995, the House Republicans passed a welfare reform bill that would leave the country's already fragile safety net in tatters. The bill was so extreme that even many Republicans opposed it. Speaker of the House Newt Gingrich caused a national uproar when he proposed orphanages as a solution to taking care of the children whose mothers would be cut off benefits, a return to the poorhouse. A compromise between the Senate and the House was reached that moderated the House version, but President Clinton vetoed the bill in January 1996. Despite a long list of objections, Clinton agreed to sign a bill when a compromise was reached to retain the entitlement to food stamps, not block grant food stamps, and continue Medicaid eligibility for children and parents who qualified for Medicaid based on their eligibility for AFDC benefits prior to enactment of PRWORA, regardless of the changes states make in their welfare programs.

On August 22, 1996 Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, ending the sixty-one-year federal guarantee of public assistance to needy families with children, replacing the AFDC federal-state matching funding scheme with a fixed dollar amount that would not increase regardless of the number of families in need, placing a sixty-month life time limit on receipt of assistance paid using federal funds, annual increases in the work requirements (both the percentage of recipients in the caseload and the hours per week), and giving the states control over most aspects of the program. While there has always been variation in AFDC from state to state, especially benefit levels, with the passage of the PRWORA

and the implementation of TANF, the United States returned to a morass of fifty-plus separate programs with little to no standardization across the country.[120] PRWORA was a complete retreat from whatever tenuous right to social security had previously existed for families with children, taking us back to the era of state-sponsored charity, and increasing reliance on private charity as the lone option for those in need.[121]

The United States economy grew in the 1990s with a rapid rise in corporate earnings combined with low inflation and unemployment. After peaking in 1993, AFDC caseloads began to decline. AFDC recipients were reflecting what has been true historically, that if employment is available a significant number will leave welfare for work. Women on welfare are a diverse group, but many have lower education levels and skill deficits, and suffer higher rates of other barriers to employment such as domestic violence, than women who never received welfare.[122] In addition, the lack of health insurance (with Medicaid eligibility linked to receipt of cash assistance) and reliable, affordable child care served as significant barriers to obtaining and maintaining employment. But the low unemployment levels gave many recipients employment opportunities never before available to them. In fact, employment rates for single mothers increased significantly during the mid- and late-1990s, although they have fallen since the recession of the early 2000s and the prolonged labor market weakness that followed. In addition, the PRWORA changes that unlinked Medicaid eligibility from the receipt of TANF cash assistance, and the infusion of funding for child care went a long way to foster employment. In 1996, there were over 12 million AFDC recipients. Ten years later there were 4.4 million recipients, a drop of more than 60 percent. Most of the decline occurred before the 2001 recession. Although the decline has slowed since then, the poverty rate continued to rise or remained stagnant at a high level.[123]

After a lengthy and contentious reauthorization process that included a series of continuing resolutions to keep the program funded beyond September 30, 2002, Congress reauthorized the TANF program through September 30, 2010 as part of the Deficit Reduction Act of 2005 (DRA). The DRA does not increase funding for TANF, keeping it at the same level it was in1997, the first year states received the block grant. Flat-funding translates into a 30 percent decrease in federal TANF funds by 2011. Moreover, the DRA and subsequent implementing regulations published by HHS further restrict access to assistance by making it harder for both individuals and states to meet the work requirements and effectively eliminating one of the hallmaks of the PRWORA, state flexibility. Changes include a new formula for counting a state's work participation rate, adding to that formula recipients who had previously been excluded from the work participation rate (and are unlikely to help the state succeed in meeting the rate), and increased oversight by HHS of work participation, including onerous documentation requirements to verify the work activities of recipients.[124] Given that caseloads are already at historic lows, it is unlikely that states will be able to meet these new requirements without hurting families, further trampling on the right to social security. TANF now assists fewer than half the families with children that qualify.

More than ten years after enactment, TANF is both touted as wildly successful and decried as an abysmal failure. On the one hand, caseloads declined

dramatically, and many recipients successfully transitioned from welfare to work and remain off welfare; on the other hand, the poverty rate remains unacceptably high, there is a growing population of families without work or welfare just scraping by, and far too many recipients, former recipients, and nonrecipients are stuck in low-wage work.[125]

But this debate misses the point, or rather, makes the point that we have not ended welfare as we know it. As long as the debate is about caseload numbers, work participation rates, verification, recipient behavior, federal versus state responsibility, the deserving and undeserving poor, and costs instead of the actual need and what it takes to meet that need, welfare as we know it has not ended and will not end. What has been true about welfare programs from the beginning is still true today—they do not provide an adequate standard of living for recipients in order to meet their basic needs, and eligibility does not necessarily translate into receipt. Shifting the focus to ensure that everyone in the United States has an adequate standard of living—the right to live—will end welfare as we know it. Using the human rights framework to meet this end is more than a strategy or a clever sound bite; it is a burgeoning movement with a growing number of antipoverty activists across the United States demanding the right to social security.

ENDING WELFARE AS WE KNOW IT: THE RIGHT TO SOCIAL SECURITY

In the time leading up to and following the passage of the PRWORA in 1996, there has been growing interest in and application of the human rights framework in the domestic welfare arena. The seeds are being sown to use international human rights law to assert legal claims in litigation, to document human rights violations by the federal, state, and local governments, and to organize poor people and others to build an economic and social human rights movement that includes the right to social security. The following are exemplary case studies of what is being done and should be emulated.

Litigation: The Family Cap as a Human Rights Violation[126]

After receiving a Section 115 waiver of federal AFDC law from HHS in 1992, the state of New Jersey enacted a family cap law that denied an incremental increase in benefits for children born into families more than ten months after applying for and receiving AFDC benefits. This policy is also known as the "child exclusion law." The family is eligible to receive additional Medicaid and food stamps for the "capped" child. With the passage of the PRWORA in 1996 and the repeal of the federal AFDC program and its replacement with the TANF program, states were free to implement the family cap without a waiver from the federal government.[127] In 1997, in response to PRWORA, New Jersey enacted a new welfare law that included a child exclusion provision that operates as it did under the 1992 state law.

After unsuccessful challenges of the New Jersey family cap in both federal court and a federal administrative proceeding, plaintiffs decided to pursue

their state constitution claims in state court.[128] In *Sojourner A. v. New Jersey Department of Human Services*, plaintiffs claimed that the family cap violated the right to privacy and the equal protection guarantees of the state constitution.[129] Martha Davis, legal director at NOW Legal Defense and Education Fund (NOW Legal Defense) at the time, and Catherine Albisa, then at the Center for Economic and Social Rights, discussed the human rights implications of the family cap. Since Davis had presented to the New Jersey appellate court judges a talk on human rights, she thought they might have some interest in a brief laying out the human rights claims for the appeal.

In the brief, the attorneys for amici curiae argued that the court should construe and apply the New Jersey constitution in a manner consistent with international human rights law and invalidate the family cap as a violation of the New Jersey constitution.[130] The brief includes discussion of the relevance of international law and the authority and responsibility of states for enforcement of economic and social human rights, including the right to social security. The brief also includes claims that the family cap violates specific provisions of the international law, including discrimination based on birth status, the right to privacy and protection of family, and the right to make religious choices under the International Covenant on Civil and Political Rights (ICCPR), and race discrimination under ICCPR and the International Convention of All Forms of Racial Discrimination.

The Supreme Court of New Jersey held that the family cap did not violate the privacy and equal protection guarantees of the state constitution. The court also summarily rejected arguments by amici curiae that the New Jersey statute that established the family cap violated international norms related to birth-status discrimination.[131]

While the arguments were not successful in this case, the thorough discussion of human rights law and its relevance and application to a specific provision of state welfare law is significant in promoting the right to social security in the United States and introducing the concept into United States jurisprudence.

Documentation: Food Stamp Denials as a Human Rights Violation[132]

Since 1984, the Urban Justice Center (Center) has worked on behalf of New York City's most vulnerable residents. In the 1990s the Center was deeply involved in mobilizing people and fighting against the negative aspects of welfare reform. Once the PRWORA passed, Center staff worked to combat some of the most egregious policies and practices implemented by the administration of Mayor Rudy Giuliani. The Center collaborated with other antipoverty organizations and U.S. human rights activists to use the human rights model of documenting abuses—to name and shame—around welfare policy.

There was a concern about the number of welfare applications being denied in New York City. The decision was to focus on food stamps, since the right to food was such a compelling issue. An interview instrument was devised, people were trained to ask the questions, and over 200 people were interviewed in soup kitchens and other locations around the city. The report, *Hunger is No*

Accident: New York and Federal Policies Violate the Human Right to Food, was released in 2000. For each of the key findings, such as the denial of meaningful access to the Food Stamp program, or discrimination against immigrants, women, and others, there is a corresponding explanation of how that finding is a violation of human rights, citing international law, and recommendations on how to remedy the situation. The release of the report was timely, in that there was a lot of attention and concern in the nationwide trend of declining Food Stamp participation. The report was valuable in raising the human rights framework, incorporating international norms and standards in welfare policy advocacy, and showing that the mere existence of the Food Stamp program is not enough to ensure the human right to food.

Organizing, Educating, Mobilizing, Legislating: The Poor People's Economic Human Rights Campaign[133]

The Poor People's Economic Human Rights Campaign (PPEHRC) is made up of individuals and organizations committed to uniting the poor across color lines in a broad movement to abolish poverty. In 1996 the Kensington Welfare Rights Union (KWRU) made the decision to use the human rights framework to address welfare reform and poverty. There was a recognition that a more proactive, positive framework not limited by federal or state law was needed. Blaming the poor for all societal woes was particularly popular at the time and using an ethical standard on what it means to be human gave KWRU members a sense of empowerment and connection to poor people around the country and throughout the world. The PPEHRC was formally launched in 1998 with a membership of organizations and individuals from across the country. The PPEHRC supports the efforts of its member organizations and identifies cross-cutting issues to develop national initiatives. Issues include homelessness, housing and gentrification, child welfare, health care, low-wage work and farmwork, deaf issues, women's issues, and welfare. The PPEHRC engages in a wide variety of strategies and activities including marches, filing briefings with and testifying before the United Nations and the Organization of American States, and educating and developing leaders of the Campaign through its University of the Poor.[134]

One approach that the PPEHRC has pursued is legislative—to gain legislative support to hold state-sponsored hearings on poverty. In Pennsylvania, PPEHRC members, including KWRU and the state chapter of the National Association of Social Workers (NASW), gained the cooperation of a state legislator, Representative Larry Curry, to introduce a resolution that called for the establishment of a special legislative committee to study the feasibility of integrating economic human rights principles into the law and policies of Pennsylvania. The committee was to hold hearings around the state and report its findings to the Pennsylvania House of Representatives by the end of the year.[135] Curry met with some resistance to the resolution, including red-baiting and some African American legislators wanting the focus to be on civil and political rights, not human rights. But Curry prevailed.

Prior to the hearings, the PPEHRC conducted training sessions on economic human rights and the movement, documenting rights violations and

organizing hearings. The hearings brought together social workers, other professionals and activists, and of course poor people to testify about economic human rights violations. Testimony included demonstrating how the economic human rights framework was real and has legitimacy and currency in international law and is a useful framework to measuring policies and programs. The hearings captured media attention by tying the violations suffered by local people with the larger political and economic landscape. The legislators found that some of the causes of the violations could be addressed legislatively (e.g., allocation for transportation to get to work for people living in rural areas) and voted for a new resolution, H.R. 144, to continue the study for another two years. More public hearings were held and the legislative committee issued a report in November 2004. In the report, the legislators stated, "The adoption of both HR 473 and HR 144 validated that economic human rights are recognized as an essential component of Pennsylvania policymaking."[136] The committee's recommendations included the establishment of a task force to evaluate the multiple systems that provide services and supports so that individuals can access their economic human rights.

The results of this legislative strategy are laudable. But as Mary Bricker-Jenkins points out, the purpose of the legislative action was not to end poverty through the hearings, but rather to use the hearings to build a movement to end poverty. In this, the PPEHRC also succeeded—introducing the human rights framework to new people and organizations, building relationships, leadership and unity across color lines, and in reframing poverty as a violation of economic human rights—so that problem solving takes place in a changed environment, one that is respectful of all human beings and the right to social security.

CONCLUSION

Welfare policy in the United States is stuck. It has not so much changed or evolved over time, as it has recycled itself depending on the political, economic, and social context of the times. The context for deciding welfare policy must be changed for real change to occur. International human rights law offers that change. Guided by the lessons learned from the history of welfare in the United States and the efforts of antipoverty activists using the international human rights framework to advance economic and social rights, we can move forward to secure the right to social security. We must use all the strategies at our disposal—litigation, documentation, legislation, movement building, and more—to bridge the gap in understanding that while there are differences among us, we are all human beings deserving of dignity and valued as worthy, and entitled to social security.

NOTES

1. "Welfare" will be used as a generic term to describe federal, state, and local policies and programs throughout this chapter.

2. Art. 5. Adopted and opened for signature, ratification and accession by the United Nations General Assembly on December 21, 1965; signed by the United States on September 21, 1965 and ratified on November 20, 1994.

3. Art. 9, see also art. 11, para. 1 (Similar language is used in some of the other treaties: "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions."). Adopted and opened for signature, ratification, and accession by the United Nations General Assembly on December 16, 1966; signed by the United States on October 5, 1977, but never ratified.

4. Art. 28 is similar to the right to an adequate standard of living language found in the International Covenant on Economic, Social, and Cultural Rights, see supra note 3. This treaty has not been formally adopted by the United Nations General Assembly and is not yet in force.

5. Universal Declaration of Human Rights, available online at www.unhchr.ch/udhr/lang/eng.htm. The United States participated in creating the Universal Declaration of Human Rights. All members of the United Nations must agree to the principle of fundamental human rights and the dignity and worth of every human person. U.N. Charter, Preamble, available online at www.un.org/aboutun/charter/.

6. The United States Constitution gives the Senate the power to approve, by a two-thirds vote, treaties made by the executive branch. U.S. Const. art. II, § 2. The Senate acts only on those treaties submitted to it by the president.

7. *Human Rights in the United States* at 3, National Economic and Social Rights Initiative (hereinafter *NESRI*), available online at www.nesri.org.

8. Art. XVI. The American Declaration of the Rights and Duties of Man was approved by the Ninth International Conference of American States in 1948; available online at www.nesri.org/docs/American%20Declaration.htm. Although the United States claims it is not bound to uphold the American Declaration of the Rights and Duties of Man, the Inter-American Court of Human Rights has ruled and the Inter-American Commission on Human Rights has found that the Declaration is binding on all OAS member states. *NESRI* at 3.

9. "Income, Poverty, and Health Insurance Coverage in the United States: 2005", U.S. Census Bureau (August 2006) at 13. The federal guidelines are themselves a point of controversy, with most critics arguing that they do not accurately reflect the material well-being of low-income people. See, e.g., "Measuring Poverty: A New Approach," Executive Summary, National Resource Council (1996), critiquing the current measure and recommending an alternative, available online at books.nap.edu/readingroom/books/poverty/summary.html.

10. Meg Bostrom, *Achieving the American Dream: A Meta-Analysis of Public Opinion Concerning Poverty, Upward Mobility, and Related Issue*s (New Rochelle, New York: Douglas Gould & Co., 2002), at 10 (hereinafter *American Dream*), available online at www.economythatworks.org/PDFs/Achieving%20the%20American%20Dream.pdf; cf. *Trends in Political Values and Core Attitudes: 1987–2007: Political Landscape More Favorable to Democrats*, The Pew Research Center for the People and the Press (March 22, 2007), at 1–2 (There is increasing support for a government safety net that takes care of more needy people, even if it means the government going deeper into debt), (hereinafter *Trends*), available online at people-press.org/reports/pdf/312.pdf; *Economy Now Seen Through Partisan Prism*, *Emerging Priorities for '06 Energy, Crime and Environment*, The Pew Research Center for the People and the Press (January 24, 2006) (More than half of Americans say dealing with the problems of poor and needy people should be a top domestic priority for the President and Congress in 2006, but many other issues ranked higher), at 6, available online at people-press.org/reports/display.php3?ReportID=268.

11. *American Dream*, at 7, 12–15. But cf., there are great disparities between blacks and whites in how poverty and the poor are perceived. Ibid., at 16. See also, *Trends*, at 15-16 (A strong sense of personal empowerment and the value of hard work is widely shared. However, racial differences in views of personal empowerment have grown; 48 percent of blacks and 31 percent of whites agree that success in life is mostly determined by forces outside of ones own control).

12. *American Dream*, note 10, at 17–18.

13. Ibid., at 7, 12–15. Cf. *Trends*, note 10, at 16 (Two-thirds of the public favor government-funded health insurance for all citizens); Robin Toner and Janet Elder, "Most Support U.S. Guarantee of Health Plans, Would Pay More Taxes in Return, Poll Finds," *N.Y. Times* (March 2, 2007), pp. A1, A15

14. "[A]nxiety about the growing rich-poor divide unites Americans, crossing income and political divisions." Matthew Benjamin, *Americans See Widening Rich-Poor Income Gap as Cause for Alarm*, Bloomberg.com, December 12, 2006, available online at www.bloomberg.com/apps/news?pid=20601071&refer=politics&sid=atGy4g3gcN41#; Christian E. Weller and Eli Staub, *Middle Class in Turmoil, Economic Risks Up Sharply for Most Families Since 2001*, Center for American Progress and Service Employees International Union (2006), available online at www.americanprogress.org/issues/2006/09/MidClassReport.pdf; *Trends* at 14 (73 percent of the public agree that the rich are getting richer while the poor are getting poorer).

15. *American Dream*, note 10, at 7, 12–15 (Only 7 percent of those surveyed felt they share most of the same values as people on welfare).

16. Social Security for retirement and disability benefits is codified at 42 U.S.C. §§ 401 et seq (2005). Unemployment Compensation, commonly called Unemployment Insurance or UI, is codified at 42 U.S.C. §§ 1101 et seq. (2005). Social Security is a federal program with cash benefits funded through federal payroll taxes paid into a trust fund. 42 U.S.C. § 401 (2005); see, Jenny Kaufmann, *An Introduction to Old-Age, Survivors, and Disability Insurance and Supplemental Security Income*, *Poverty Law Manual for the New Lawyer, National Center on Poverty Law* 92 (2002): 95–97 (hereinafter *Supplemental Security Income*), available online at www.povertylaw.org//poverty-law-library/research-guides/poverty-law-manual/kaufmann.pdf. Medicare, the federal health insurance program for the elderly and disabled, is tied to eligibility for Social Security benefits. 42 U.S.C. §§ 1395 et seq. (2005); see, Kim Glann, *Medicare*, *Poverty Law Manual for the New Lawyer, National Center on Poverty Law* 84 (2002), available online at www.povertylaw.org//poverty-law-library/research-guides/poverty-law-manual/glaun.pdf. Unemployment Compensation is a federal-state partnership with cash benefits and the administration of the program funded by federal and state payroll taxes paid into a trust fund maintained by the federal government. 42 U.S.C. §§ 1100-1105 (2005); see, Sharon Dietrich, Catherine Ruckelshaus, Jim Williams, Rick McHugh, Rachel Paster, and Michele Palter, "Employment Law," *Poverty Law Manual for the New Lawyer,National Center on Poverty Law* 166 (2002): 179–180, available online at www.povertylaw.org//poverty-law-library/research-guides/poverty-law-manual/dietrich.pdf.

17. Supplemental Security Income (SSI), a program funded and administered by the federal government, is codified at 42 U.S.C. §§ 1381 et seq. (2005); see, note 16, *Supplemental Security Income*, at 97–102. Most SSI recipients receive health coverage through Medicaid, a health insurance program for low-income people. Medicaid is jointly funded by the federal government and states and is administered by the states within broad federal guidelines. *Medicaid At-a-Glance, 2005, A Medicaid Information Source*, U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, Center for Medicaid and State Operations, at 2–3 (hereinafter *Medicaid At-a-Glance*), available online at www.cms.hhs.gov/MedicaidEligibility/

downloads/MedGlance05.pdf. While only about one-quarter of Medicaid recipients is elderly or disabled, they account for over 70 percent of the spending on medical services due to the greater use of long-term and acute care used by these populations, the costs of which are generally not covered by Medicare. Kaiser Family Foundation, *Medicaid: A Primer, Key Background Information on the Nation's Health Insurance Program for Low-Income Americans*, Kaiser Commission on Medicaid and the Uninsured (July 2005), at 9, available online at www.kff.org/medicaid/7334.cfm. Effective January 2007, the maximum federal cash grant for an eligible individual is $623 per month and $934 per month for a couple. *Automatic Increases,SSI Federal Payment Amounts*, Social Security Online (updated October 18, 2006), available online at www.ssa.gov/OACT/COLA/SSI.html. Some states provide supplemental cash assistance to SSI recipients.

18. This does not mean these programs are immune from criticism or funding cuts. Under President Bush's proposed 2008 budget, grants to state and local governments for all programs other than Medicaid would be cut by $12.7 billion, or 5.1 percent from fiscal year 2006 to 2008 when adjusted for inflation. Iris J. Lav, "Federal Grants to States and Localities Cut Deeply in Fiscal Year 2008 Budget," (Center on Budget and Policy Priorities, February 6, 2007), available online at www.cbpp.org/2-6-07sfp.pdf.

19. Title I of the PRWORA replaced the Aid to Families with Dependent Children (AFDC) program with the Temporary Assistance for Needy Families (TANF) block grant program. *PRWORA* at 110 Stat. 2110-2185, 42 U.S.C. §§ 601 et seq. (2005) (TANF is a joint federal and state program, funded by both and administered by states within federal guidelines). See also General Temporary Assistance for Needy Families Provisions, 45 C.F.R. §§ 260-286 (2006) (implementing regulations); Wendy Pollack, "An Introduction to the Temporary Assistance for Needy Families Program," *Poverty Law Manual for the New Lawyer, National Center on Poverty Law* (2002), reprinted in *Clearinghouse Review* 36 (January–February 2003): 449, available online at www.povertylaw.org//poverty-law-library/research-guides/poverty-law-manual/pollack.pdf.

20. Each state sets its own benefit levels and formulas for determining the benefit amount. The maximum monthly TANF benefit for a family of three with no other countable income ranges from $164 in Alabama to $932 in Alaska. Illinois's maximum benefit amount of $396 for a family of three with no other countable income is about average for the country. Gretchen Rowe with Jeffrey Versteeg, "Table II.A.4. Maximum Monthly Benefit for a Family of Three with No Income, July 2003," *Welfare Rules Databook: State TANF Policies as of July 2003* (Washington, D.C.: Urban Institute, 2005), pp. 80–81 (hereinafter *Databook*), available online at www.urban.org/publications/411183.html.

21. Work requirements are an integral part of TANF. GA recipients may also be required to work or participate in education or training activities. However, many current and former recipients of TANF and GA are in fact unable to work or at least not able to work full-time, but do not meet the definition of disabled for the disability programs. The Social Security Administration, which administers both the Social Security Disability Insurance (SSDI) and the SSI programs, defines disability as the inability to work at all and the disability is expected to last at least one year or result in death. "Disability Planner, What We Mean By Disability," *Social Security Online*, available online at www.ssa.gov/dibplan/dqualify4.htm.

22. 7 U.S.C. §§ 2011 et seq. (2005); 7 C.F.R. §§ 271 et seq. (January 1, 2006); Anne Pearson and Sonya Schwartz, "Introduction to Food Stamps," *Poverty Law Manual for the New Lawyer, National Center on Poverty Law* 42 (2002), available online at www.povertylaw.org//poverty-law-library/research-guides/poverty-law-manual/

pearson.pdf. The federal government funds the Food Stamp benefits and 50 percent of the administrative costs of the program. Although there are some state variations, Food Stamp eligibility criteria and benefit levels are standardized throughout the country.

23. *FY 2007 Income Eligibility Standards*, Food and Nutrition Service, U.S. Department of Agriculture (last modified October 11, 2006), available online at www.fns.usda.gov/fsp/government/FY07_Income_Standards.htm; Allison Barrett, *Characteristics of Food Stamp Households: Fiscal Year 2005, Final Report*, Mathematica Policy Research, Inc. (September 2006) at xv (hereinafter *Characteristics of Food Stamp Households*), available online at www.mathematica-mpr.com/publications/publications.aspx. The maximum monthly food stamp allotment for a family of three is $408 (in the lower forty-eight states and the District of Columbia), *FY 2007 Allotments and Deduction Information*, Food and Nutrition Service, U. S. Department of Agriculture (last modified October 11, 2006), available online at www.fns.usda.gov/fsp/government/FY07_Allot_Deduct.htm.

24. *Frequently Asked Questions*, *Food Stamp Program*, Food and Nutrition Service, U.S. Department of Agriculture, question 22 (last modified October 11, 2006), available online at www.fns.usda.gov/fsp/faqs.htm#22. In 2006 the average Food Stamp participation rate was almost 27 million people. "Food Stamp Program Participation and Costs," *Food Stamp Program Annual Summary*, Food and Nutrition Service, U.S. Department of Agriculture (January 2007), available online at www.fns.usda.gov/pd/fssummar.htm.

25. Dorothy Rosenbaum, *The Food Stamp Program Is Growing To Meet Need*, Center on Budget and Policy Priorities (revised July 12, 2006), at 3, available online at www.cbpp.org/6-6-06fa.htm.

26. *Characteristics of Food Stamp Households* at xvi, 38 (Table A-6. Distribution of Participating Households with Children, Elderly Persons, and Disabled Nonelderly Individuals by Type of Countable Income).

27. *Why Food Stamps Matter—Fact Sheet, Food Stamp Program,Learn About Hunger*, America's Second Harvest, available online at www.secondharvest.org/learn_about_hunger/public_policy/food_stamp.html.

28. See *A Short History of the Food Stamp Program*, *Food Stamp Program*, Food and Nutrition Service, U.S. Department of Agriculture (last modified April 4, 2007), available online at www.fns.usda.gov/fsp/about_fsp.htm.

29. See supra note 13; cf. *Trends*, note 10, at 17 (More than a quarter of Americans said there had been a time they could not afford necessary health care for themselves or a family member during the previous twelve months, including 57 percent of those who describe their household as "struggling"; 41 percent of African American respondents and 23 percent of whites said there had been a time they could not afford necessary health care for themselves or a family member during the previous twelve months.)

30. See State Children's Health Insurance Program, 42 U.S.C. §§ 1397aa et seq.; Manjusha P. Kulkarni, "State Children's Health Insurance Program," *Poverty Law Manual for the New Lawyer, National Center on Poverty Law* 77 (2002), available online at www.povertylaw.org//poverty-law-library/research-guides/poverty-law-manual/kulkarni.pdf. See cf. John Bouman, "The Path to Universal Health Coverage for Children in Illinois," *Clearinghouse Review* 39 (March–April 2006): 676 (With the passage of All Kids in November 2005, Illinois became the first state in the country to offer health insurance to literally every child, regardless of income or immigration status; families pay premiums based on income).

31. The PRWORA amended the SSI program, Food Stamps, child support, and child care, among other programs, and replaced the AFDC grant program with the

TANF block grant program. While some of these changes were positive, the PRWORA mainly serves as a hallmark of restricting access to public benefits for those in need, particularly for noncitizen immigrants. The Balanced Budget Act of 1997 amended parts of PRWORA, including an easing of restrictions for some immigrants.

32. Changes included the end of a federal entitlement to aid, time limits on receipt of aid, block grant funding (i.e., finite resources from the federal government), work requirements, restrictions for noncitizen immigrants, and the devolution of decision making and responsibility to the states and federally recognized tribes.

33. See, e.g., Dorothy Rosenbaum, *Families' Food Stamp Benefits Purchase Less Food Each Year*, Center on Budget and Policy Priorities (revised March 9, 2007), available online at www.cbpp.org/3-6-07fa.htm; *Report on Recommendation for TANF Grant Increases of 15 Percent in Fiscal Years 2008, 2009, and 2010*, Social Services Advisory Committee, Illinois Department of Human Services (March 9, 2007) (Illinois's TANF grants are so low that they put TANF families at risk) (on file with the author).

34. Ibid.; Pamela Loprest and Sheila Zedlewski, *Welfare Reform Must Fix Safety Net*, Urban Institute (posted August 25, 2006) (In 2002, more than 900,000 low-income families with children had no earned income or cash assistance from the government), available online at www.urban.org/publications/900991.html.

35. This discussion of the history of welfare relies extensively on four books: Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America*, rev. ed. (New York: Basic Books, 1996) (hereinafter *Poorhouse*); Frances Fox Piven and Richard A. Cloward, *Regulating the Poor: The Functions of Public Welfare*, updated ed. (New York: Vintage Books, 1993) (hereinafter *Regulating the Poor*); Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973*, (New Haven: Yale University Press, 1993) (hereinafter *Brutal Need*); and Frances Fox Piven and Richard A. Cloward, *Poor People's Movements, Why They Succeed, How They Fail* (New York: Vintage Books 1979) (hereinafter *Poor People's Movements*).

36. See, e.g., Linda Burnham, "*Racism in U.S. Welfare Policy: A Human Rights Issue*," in Gary Delgado (ed.), From Poverty to Punishment, How Welfare Reform Punishes the Poor (Oakland, California: Applied Research Center, 2002), p. 121; Henry A. Freedman, "The Welfare Advocate's Challenge: Fighting Historic Racism in the New Welfare System," *Clearinghouse Review* 36 (May–June 2002): 31; Kenneth J. Neubeck and Noel A. Cazenave, *Welfare Reform: Playing the Race Card Against America's Poor* (New York: Routledge, 2001).

37. Cf. Jodie Levin-Epstein, "Lifting the Lid off the Family Cap: States Revisit Problematic Policy for Welfare Mothers," *Policy Brief, Center for Law and Social Policy* (December 2003): 2 (research identifies a possible link between a state's decision to adopt the family cap policy and high percentages of African Americans or Latinos in their TANF caseload), available online at clasp.org/publications/family_cap_brf.pdf. Twenty-four states have implemented some type of family cap policy, although the Illinois family cap will end July 1, 2007. Ibid., at 1, 4.

38. See, Joe Soss, Richard Fording, and Sanford F. Schram, *The Color of Devolution: Race, Federalism, and the Politics of Social Control*, 14–16, 19 (undated) (Black and white TANF recipients are distributed unequally across states and their presence influences policy choices, with blacks more likely to experience stricter welfare policies, such as the family cap, shorter time limits than the sixty months allowed by federal law, and full-family sanctions.), available online at www.polisci.wisc.edu/~soss/Courses/PS904/Readings/week9/SossFordingSchram_AJPS_ms.pdf; Rebecca Gordon, *Cruel and Unusual: How Welfare "Reform" Punishes People*, Applied Research Center (2001), at 4–5, 29–38 (a survey of welfare applicants and recipients in thirteen different states found that women and people of color routinely faced discrimination

in the administration of welfare programs. The experience of Native Americans was generally worse than that of other people of color), available online at www.arc.org/pdf/285cpdf.pdf.

39. *Regulating the Poor*, note 35, at xv–xix (The authors explain the two main functions of welfare to be maintaining civil order and enforcing work).

40. *Poorhouse*, note 35, at 14–15.

41. *Poorhouse* at 15–16, 38–39, 54–56, 96, 102–113.

42. *Poorhouse* at 60–61.

43. *Poorhouse* at 60–113.

44. *Poorhouse* at 117–150.

45. *Poorhouse* at 133. While mothers' pension laws recognized the role women played in raising children, they did not recognize women as workers, even though most poor women were wage workers. See, e.g., Joanne L. Goodwin, "'Employable Mothers' and 'Suitable Work': A Re-evaluation of Welfare and Wage-earning for Women in the Twentieth Century United States," *Journal of Social History* 29(2) (Winter 1995), available online at www.encyclopedia.com/doc/1G1-17841763.html, (hereinafter "Employable Mothers").

46. *Poorhouse* at 133.

47. *Poorhouse* at 151–175.

48. Between 1909 and 1920, forty-three states passed workmen's compensation laws. *Poorhouse* at 197.

49. *Poorhouse* at 202–206; The Social Security Act of 1935, available online at www.ssa.gov/history/35actinx.html. Title III created unemployment compensation. The Act and subsequent amendments are codified at 42 U.S.C. §§ 301 et seq.

50. The White House, History and Tours, Past Presidents, available online at www.whitehouse.gov/history/presidents/fr32.html.

51. *Poorhouse* at 217–218, 220–224.

52. *Poorhouse* at 226–227.

53. *Poorhouse* at 227–229.

54. *Poorhouse* at 229. While most New Deal welfare programs officially prohibited discrimination, African Americans did not receive their fair share of assistance or work relief. But because New Deal relief did not exclude African Americans, it "was a sufficient departure from past practice to make Roosevelt look like a benefactor of the race." Ibid. at 252–254. However, the Social Security Act of 1935 did not prohibit racial discrimination, and the Federal Old-Age Benefits (now called Social Security) and Unemployment Compensation specifically excluded agricultural workers and domestic workers, leaving two-thirds of employed African Americans without protection for old age or unemployment. Ibid. at 252.

55. *Poorhouse* at 234.

56. *Poorhouse* at 223–224, 243 (By 1932, organized looting of food stores, rent strikes, sit-down strikes at welfare offices, and mass demonstrations raised the specter of a revolution. In 1934 almost 1.5 million workers took part in some 1,800 strikes).

57. *Poorhouse* at 234–237.

58. See, e.g., "Employable Mothers," note 45 (The Woodrum Act of 1939 changed the eligibility for the WPA explicitly excluding anyone eligible for ADC, effectively excluding women with children from benefiting from work relief).

59. The language of the original Social Security Act of 1935 is available online at www.ssa.gov/history/35actinx.html.

60. *Poorhouse* at 242–247.

61. At the time of its creation the welfare system was criticized for not meeting these criteria: universal coverage, comprehensiveness, and coordination. *Poorhouse* at 249.

62. *Poorhouse* at 254–255 (In fiscal year 1913, all levels of government spent about $21 million on welfare. The amount increased to $208 million in 1932 and $4.9 billion in 1939).

63. See, e.g., Social Security Act of 1935, note 49, Title IV, Grants to States for Aid To Dependent Children.

64. The original federal Aid To Dependent Children (ADC) program granted assistance to mothers on behalf of their children. Ibid. It was extended to mothers in 1950. In 1962 states were allowed to extend benefits to a second parent in a family with an incapacitated or unemployed parent in the household and the name of the program was changed to Aid to Families with Dependent Children, commonly called AFDC. In 1936 147,000 families received ADC. Except for the years of World War II, the number of families receiving ADC grew steadily to 787,000 families, or over three million people, in 1960. *Average Monthly Families and Recipients for Calendar Years 1936–2001.*

65. *Regulating the Poor* at 134.

66. *Regulating the Poor* at 140–141; see also, *Poorhouse* at 261.

67. *Regulating the Poor* at 127.

68. *Poor People's Movements* at 184–194, 203–206 (African Americans working in agriculture in the South had unemployment rates lower than that of whites. With migration, this relationship reversed.); see also *Regulating the Poor* at 191 (Not all rural African Americans in the South migrated north, many migrated to Southern cities).

69. *Poor People's Movements* at 203–221.

70. *Regulating the Poor* at 194. Due to pressure by the federal government on Southern states to relax discriminatory practices, after 1948 the number of blacks in the South who received welfare also increased. Ibid. at 193–194.

71. *Poorhouse* at 260; *Poor Peoples Movement* at 204–211.

72. Dr. King understood the interconnectedness of the civil rights movement in the United States and all human rights struggles. See, e.g., *Martin Luther King's Letter from Birmingham Jail* (April 16, 1963) ("Injustice anywhere is a threat to justice everywhere."), available online at www.nobelprizes.com/nobel/peace/MLK-jail.html.

73. See, e.g., *Poor People's Movement* at 243–246. One way in which President Kennedy responded was to support further civil rights legislation, the Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 (1964), codified as amended at 42 U.S.C. §§ 1971 et seq.

74. President Kennedy was also greatly influenced by the destitution he saw while campaigning in rural West Virginia. Scott Stossel, *Sarge: The Life and Times of Sargent Shriver* (Washington, DC: Smithsonian Books, 2004), pp. 334–335 (hereinafter *Sarge*).

75. The AFDC-Unemployed Parent (AFDC-UP) program became mandatory for states with the Family Support Act of 1988.

76. Public Welfare Amendments of 1962, P.L. 87-543, 76 Stat. 172. The legislation also increased funding for the grants-in-aid programs for the needy aged, blind, and disabled.

77. *Poor People's Movement* at 267–270; *Poorhouse* at 265; *Sarge* at 334–340.

78. *President Lyndon B. Johnson's Annual Message to the Congress on the State of the Union, January 8, 1964*, available online at www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/640108.asp.

79. *Regulating the Poor* at 150–175, 205–206 (A 1965 survey of unwed mothers in New York found even those in dire financial straits did not apply for assistance because they believed they would be found ineligible, the amount given would be so

little that it would not be worth the harassments of applying, or because they had a previous humiliating experience with the welfare department).

80. The Economic Opportunity Act of 1964 launched or expanded many, but not all the antipoverty policies and programs of the 1960s, including Job Corps, work study, VISTA (Volunteers in Service to America), adult basic education and jobs programs, and the Community Action Program (CAP). A new umbrella organization, the Office of Economic Opportunity (OEO), oversaw VISTA, Job Corps, and the CAP. The OEO bypassed state and local governments and distributed funds directly to community organizations to maintain federal control. *Poor People's Movements* at 270–271; *Regulating the Poor* at 257–263. Other antipoverty programs created during this period include work relief and job skills training programs such as the Comprehensive Employment and Training Act (CETA) and the Manpower and Development Training Program, Head Start, Legal Services for the Poor, urban renewal initiatives, Neighborhood Health Services, Medicare, Medicaid, and the Food Stamp program. *Poorhouse* at 266, 274.

81. *Poorhouse* at 262–269.

82. MFY added a legal unit in 1963. *Brutal Need* at 29. In January 1966, the OEO opened neighborhood law offices in 250 cities and towns across the country. In 1967, 300 more offices were opened and the Legal Services program budget was $40 million. In order to have "maximum impact," Legal Services program's top priority was legal reform. *Sarge*, pp. 440–441. For a history of civil legal services programs in the United States, see Alan W. Houseman and Linda E. Perle, *Securing Equal Justice For All: A Brief History of Civil Legal Assistance in the United States*, rev. ed. (Washington, D.C: Center for Law and Social Policy, 2007) (hereinafter *Securing Equal Justice*), available online at clasp.org/publications/legal_aid_history_2007.pdf.

83. *Poor People's Movements* at 271–272; R*egulating the Poor* at 300–302. Between 1960 and 1969, the number of families receiving ADC/AFDC more than doubled, rising from 787,000 to 1,698,000. *Average Monthly Families and Recipients for Calendar years 1936–2001.*

84. *Poor People's Movements* at 272–275.

85. *Brutal Need* at 45.

86. For a history of the welfare rights movement, particularly the role of the National Welfare Rights Organization (NWRO), see *Poor People's Movements* at 264–359.

87. *Brutal Need* at 36, 31, 34–36; Edward V. Sparer, "The Right To Welfare," in Norman Dorsen (ed.), *The Rights of Americans: What They Are—What They Should Be* (New York: Pantheon, 1971), pp. 65, 66 (hereinafter "The Right To Welfare").

88. "The Right to Welfare," pp. 65–67.

89. *Brutal Need* at 36–39, 81–82; see also, *Regulating the Poor* at 306–320.

90. *King v. Smith*, 392 U.S. 309 (1968).

91. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

92. *Goldberg v. Kelly*, 397 U.S. 294 (1970).

93. *Regulating the Poor* at 183–189.

94. *Brutal Need* at 119–120.

95. *Rosado v. Wyman*, 397 U.S. 397, 413 (1970).

96. *Dandridge v. Williams*, 397 U.S. 471, 480-481 (1970). In subsequent decisions, the U.S. Supreme Court reaffirmed its position that welfare is not a right. See, e.g., *Wyman v. James*, 400 U.S. 309 (1971); *Jefferson v. Hackney*, 406 U.S. 535 (1972).

97. "The Right To Welfare," note 87, p. 82.

98. *Poor People's Movement* at 319–320. The idea for a national guaranteed minimum income had been circulating for years. In 1962, Milton Friedman proposed a negative income tax which would guarantee an income to everyone. Milton Friedman

and Rose D. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 2002). In November 1967 the OEO initiated a small program to test the negative income tax concept. *Brutal Need* at 71.

99. *Poor People's Movements* at 325–326.

100. *Poor People's Movement* at 335–336, 339–340 (the Nixon proposal for welfare reform is known as the Family Assistance Program [FAP]).

101. *Poor People's Movements* at 337–338, 341–347.

102. *Brutal Need* at 136–137.

103. *Poorhouse* at 274–275.

104. *Poorhouse* at 270–271.

105. *Poorhouse* at 276, 280. Although created in 1972, the SSI program did not start until 1 January 1974. SSI payments were also indexed for inflation resulting in annual cost-of-living increases.

106. *Poorhouse* at 283–286, 290–292.

107. *Regulating the Poor* at 374–381. Reagan was an avowed opponent of legal services programs, and he repeatedly tried to eliminate federal funding for legal services programs and curtail their activities. See *Securing Equal Justice*, note 82, at 14–16, 29–33.

108. *Regulating the Poor* at 359–362. In 1984, another round of welfare amendments improved the earnings disregard slightly.

109. *Poorhouse* at 298. The federal school lunch program, intended to ensure that poor children eat a nutritious meal, was also on the chopping block. See generally, *FRAC Milestones 1970–2005*, available online at www.frac.org/html/all_about_frac/milestones.html.

110. Job Training Partnership Act of 1982, Pub. L. No. 97-300. JTPA was subsequently repealed and replaced with the Workforce Investment Act of 1998 (WIA), Pub. L. No. 105-220, 112 Stat. 936 (August 7, 1998). WIA is the largest single source of federal funding for workforce development activities.

111. *Poorhouse* at 300–301.

112. Sheila R. Zedlewski, Pamela A. Holcomb, and Amy-Ellen Duke, C*ash Assistance in Transition: The Story of 13 States*, Urban Institute (December 1, 1998) (hereinafter *Cash Assistance in Transition*), available online at www.urban.org/publications/310303.html#pre.

113. Emma Caspar, Karen McKim, Sandra McKinley, John Neumann, and David Varana, *An Evaluation of the Effects of the Learnfare Program, 1993–1996*, Data and Information Services Center, University of Wisconsin-Madison (last updated October 14, 2002), available online at www.disc.wisc.edu/Learnfare/index.html.

114. *See Cash Assistance in Transition,* note 112.

115. *Illinois Welfare News*, Welfare Reform Information Center and Poverty Law Project, National Clearinghouse for Legal Service (vol. 1, issue 11, July 1996) 1 (on file with the author).

116. *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994).

117. In 1990, there were 11,694,712 AFDC recipients. The number of recipients reached its highest level in the years 1993 and 1994 when over 14 million recipients in over 5 million families received AFDC. *See Average Monthly Families and Recipients for Calendar Years 1936–2001.*

118. The House Republicans produced the "Contract with America", which outlined the legislation that they intended to introduce within the first 100 days of the 104th Congress. This included their version of welfare reform, The Personal Responsibility Act, available online at www.house.gov/house/Contract/CONTRACT.html.

119. An example of a provision written by advocates and amended to the final bill is the Wellstone-Murray Amendment, known as the Family Violence Option (FVO).

The FVO allows states to waive any program requirement (e.g., time limits, work requirements) that may make it more difficult for TANF recipients to escape domestic violence, unfairly penalize recipients who are or have been victims, or put them at risk of further harm. See, *PRWORA* at Title I, Section 402(a)(7), codified at 42 U.S.C. 602(a)(7); see also, Wendy Pollack and Martha F. Davis, "The Family Violence Option of the Personal Responsibility and Work Opportunity Act of 1996: Interpretation and Implementation," *Clearinghouse Review* 30 (March–April 1997): 1079.

120. See Gretchen Rowe and Linda Giannarelli, *Getting On, Staying On, and Getting Off Welfare: the Complexity of State-by-State Policy Choices*, New Federalism (Series A, No. A-70) Urban Institute (July 2006), available online at www.urban.org/UploadedPDF/311349_A70.pdf. Several states devolved responsibility further to county or city governments; Indian tribes also have the option to administer their own programs.

121. See, e.g., America's Second Harvest, *Hunger in America 2006*, *General Assistance, Welfare, and TANF in the Previous Two Years, Table 7.5* (current and former welfare recipients and nonrecipients rely on food assistance through a nongovernmental charitable organization), available online at www.hungerinamerica.org/who_we_serve/Food_Insecurity/food_assistance/general_assistance.html.

122. See LaDonna Pavetti, *Time on Welfare and Welfare Dependency: Testimony before the House Ways and Means Committee, Subcommittee on Human Resources*, Urban Institute (May 23, 1996), available online at www.urban.org/publications/900288.html; Jody Raphael and Richard M. Tolman, *Trapped by Poverty, Trapped by Abuse: New Evidence Documenting the Relationship Between Domestic Violence and Welfare*, Project for Research on Welfare, Work and Domestic Violence (April 1997), at 5, available online at www.ssw.umich.edu/trapped/pubs_trapped.pdf.

123. Robert Pear, "New Rules Force States to Curb Welfare Rolls," *N.Y. Times* (June 28, 2006), available online at nytimes.com/2006/06/28/washington/28welfare.html; *Poverty Remains Higher, And Median Income For Non-Elderly Is Lower, Than When Recession Hit Bottom: Poor Performance Unprecedented for Four-Year Recovery Period*, Center on Budget and Policy Priorities (revised September 1, 2006), available online at www.cbpp.org/8-29-06pov.htm.

124. TANF was reauthorized and amended by Title VII of the Deficit Reduction Act of 2005 (DRA), Pub. L. 109-171, 120 Stat. 4, 135-137. See also Reauthorization of the Temporary Assistance for Needy Families Program; Interim Final Rules, 71 Fed. Reg. 37,454-37,483 (2006) (to be codified at 45 C.F.R. §§ 260 et seq.). The DRA and the implementing regulations further restrict access to assistance by making it harder for both individuals and states to meet the work requirements and adding excessive verification requirements, effectively eliminating one of the hallmarks of the 1996 law, state flexibility.

125. Pamela Loprest and Sheila Zedlewski, "Welfare Reform Must Fix Safety Net," *The Providence Journal* (August 25, 1996), available online at www.urban.org/publications/900991.html; *Welfare Reform: Ten Years Later*, Urban Institute (results are mixed for welfare reform policies and poverty), available online at www.urban.org/toolkit/issues/welfarereform.cfm.

126. Author interview with Martha F. Davis, January 9, 2007. Davis was the legal director at NOW Legal Defense and Education Fund at the time the family cap was litigated. She is currently a professor of law at Northeastern University School of Law in Boston, Massachusetts.

127. Jodie Levin-Epstein, "Lifting the Lid off the Family Cap: States Revisit Problematic Policy for Welfare Mothers," *Policy Brief, Center for Law and Social Policy* (December 2003): 1, available online at clasp.org/publications/family_cap_brf.pdf.

128. *C.K. v. New Jersey Dept. of Health and Human Services*, 92 F.3d 171 (3rd Cir. 1996).

129. Complaint at 19, available online at www.aclu-nj.org/legal/closedcasearchive/sojourneravnewjerseydepart.htm. Attorneys for the plaintiffs were NOW Legal Defense and Education Fund, American Civil Liberties Union of New Jersey Foundation, and the law firm of Gibbons, Del Deo, Dolan Griffinger & Vecchione.

130. *Amici Curiae Brief for the Center for Economic and Social Rights, the International Women's Human Rights Law Clinic, and the Center for Constitutional Rights in Support of Plaintiffs-Appellants*, *Sojourner A. v. New Jersey Dept. of Human Services* 177 N.J. 318 (2003), available online at cesr.org/node/459. Amici Curiae attorneys were the Center for Economic and Social Rights, International Women's Human Rights Law Clinic, and Cindy Soohoo, *Of Counsel*.

131. 177 N.J. 318, 336 & n.9 (N.J. 2003), available online at www.aclu-nj.org/legal/closedcasearchive/sojourneravnewjerseydepart.htm.

132. Author interview with Heidi Dorow, September 22, 2006. Dorow was the director of the Human Rights Project at the Urban Justice Center at the time the report was released.

133. Author interview with Dr. Mary Bricker-Jenkins, September 28, 2006, and Liz Theoharis, October 2, 2006. Bricker-Jenkins is Professor Emeritus of Social Work at Temple University, School of Social Administration, in Philadelphia, PA. She is a member of the PPEHRC national coordinating council, and serves as one of the co-coordinators of the School of Social Work and Social Transformation for the University of the Poor, and a member of NASW-PA. With Willie Baptist, Liz Theoharis co-founded and is the co-coordinator of the PPEHRC's University of the Poor. Theoharis serves on the PPEHRC coordinating council. She is a Ph.D. candidate at the Union Theological Seminary and is a certified for ordination in the Presbyterian Church (USA).

134. See PPEHRC Web site available online at www.economichumanrights.org/index.shtml.

135. The resolution, H.R. 473, was introduced in March 2002 (on file with the author).

136. *Report of the Select Committee on House Resolution 144 Investigating the Integration of Human Rights Standards in Pennsylvania Law and Policies* (2004) (on file with the author).

CHAPTER 10

Acting on Principle: Opportunities and Strategies for Achieving Environmental Justice through Human Rights Laws and Standards

Monique Harden, Nathalie Walker, and Vernice Miller-Travis

THE ENVIRONMENTAL JUSTICE DEMAND FOR HUMAN RIGHTS

In the United States, it is well documented that polluting industrial facilities and toxic waste sites are disproportionately located in communities of color, where they threaten the health of nearby residents.[1] Notwithstanding the fact that in the United States there are volumes of environmental laws, communities of color are living proof of not only the ineffectiveness of these laws to protect human health and the environment, but also the inherent injustice of these laws. The current system of "environmental protection" actually perpetuates and facilitates a polluted and unhealthy environment for people of color who live, work, and play in places that are used as toxic dumping grounds, and are deprived of many life pursuits that are contingent on a healthy and sustainable environment.

According to Margie Richard, a community activist living in Louisiana's Cancer Alley,[2] "You know when your daughter struggles to breathe at night because of all the pollution that her human rights are being violated." This profound understanding of environmental injustice is shared by many people, as evidenced by the First National People of Color Leadership Summit in Washington, D.C., in 1991, where the environmental justice movement was born. At this summit there was consensus among the grassroots community and indigenous peoples organizations, civil rights groups, religious and spiritual organizations, youth advocates, labor coalitions, lawyers, health professionals, and academics that environmental racism is a human rights violation.

First National People of Color Environmental Leadership Summit (1991)

Bringing a human rights focus to the First National People of Color Environmental Leadership Summit began through intensive preparations by organizers who witnessed the global dimensions of environmental racism and injustice. Their contributions to the summit included a key plenary address delivered by the late Dana Alston, senior program officer of the Panos Institute, titled *Moving Beyond the Barrier*s:

> For us, the issues of the environment do not stand alone by themselves. They are not narrowly defined. Our vision of the environment is woven into an overall framework of social, racial, and economic justice. It is deeply rooted in our cultures and our spirituality. It is based in a long tradition of understanding and respecting the natural world. The environment, for us, is where we live, where we work, and where we play. . . . The environment affords us the platform to address the critical issues of our time: questions of militarism and defense policy, religious freedom, cultural survival, energy and sustainable development, the future of our cities, transportation, housing, land and sovereignty rights, self-determination, and employment.

Summit organizers convened sessions in which participants addressed the need for human rights protections in the context of the international hazardous waste trade and the global impacts of multinational polluting corporations. Participants developed strategies for building global environmental justice alliances and seeking environmental justice remedies in international human rights fora. Participants also discussed the issue of some national environmental organizations who took positions that were in conflict with environmental justice goals and unwittingly supported the unethical practice of developing countries being compelled to trade their national debt for their natural resources—e.g., giving away lands lived on and stewarded by indigenous peoples for centuries without their knowledge or consent.

Moving the summit participants into international human rights advocacy was spearheaded by Jean Sindab, deputy secretary of the Racism Unit of the World Council of Churches based in Geneva, Switzerland, who believed that the environmental justice movement in the United States was an important part of the global struggle for human rights. She convened a workshop that prepared participants for the United Nations's Conference on the Environment and Development, popularly known as the Earth Summit, which took place eight months later, in June 1992.

Among its many achievements, the First National People of Color Environmental Leadership Summit was a catalyst for a shared understanding that the environmental justice movement is built upon a foundation of protecting fundamental human rights around the globe. The impact of the speeches, workshops, and strategy sessions connecting environmental justice to human rights is reflected in the *Principles of Environmental Justice* that were developed by summit participants: "Environmental justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration on Human Rights, and the United Nations Convention on Genocide." (Principle 10, *Principles of Environmental Justice.*)[3]

This principle has made a profound impact on environmental justice advocacy in the United States. Recognition of the human rights of individuals and communities to a healthy environment as integral to the human rights to life and health and the global dimension of environmental issues would become cornerstones of the environmental justice movement. By incorporating a human rights framework, the movement shifted the focus from the issue of polluters meeting bureaucratic pollution standards to the harm caused by governmental environmental decisions on the lives of people. In the years following the summit, U.S. activists have worked on the international level to help articulate standards for environmental justice and to build coalitions with communities struggling with the same issues across the globe. They have also worked within their communities to change the way the public looks at these issues and have integrated human rights into their legal, policy, and legislative work.

United Nations's Earth Summit (1992)

Finding the resources to bring a delegation of U.S. environmental justice advocates to the United Nations's Earth Summit in Rio de Janiero, Brazil, proved to be a challenge that ultimately limited the number of people who were able to attend. As a result of the criticism of some national environmental organizations that had taken place at the First National People of Color Environmental Leadership Summit, the funders of those organizations decided not to support the participation of an environmental justice delegation at the Earth Summit. Notwithstanding this difficulty, environmental justice organizations scraped together enough resources to send a small delegation to the Earth Summit, which included Dr. Robert Bullard of Clark Atlanta University, Reverend Benjamin Chavis of the United Church of Christ, Hazel Johnson of People for Community Recovery, Sylvia Ledesma and Sophia Martinez of the Southwest Network for Environmental and Economic Justice, Vernice Miller of West Harlem Environmental Action, Carletta Tulusi of the Havasupi Nation and the Indigenous Environmental Network, Dana Alston of the Panos Institute, and Jean Sindab of the World Council of Churches.

The U.S. environmental justice delegation connected immediately with peoples movements from around the world for environmental and social justice that numbered in the thousands at the Earth Summit. The delegation worked tirelessly to get their message out to the media stationed at the Earth Summit as well as back home in their communities. They also spent countless hours in discussions with country delegates from around the world who were negotiating treaties of cooperation to promote environmental sustainability. The environmental justice delegation brought a voice and perspective from the United States that was unique and welcomed by the country delegates and nongovernmental organizations, who wanted to better understand the history and workings of the environmental regulatory system within the United States and share their experiences of the effect of U.S. foreign policies on the environments of their countries.

The greatest impact of the Earth Summit was made by nongovernmental organizations, including the U.S. environmental justice delegation, who

demanded that national governments end environmentally destructive practices and ensure meaningful public participation in governmental decisions affecting the environment. The passionate and effective expression of this demand by thousands of diverse people took center stage, pushing to the side news of then–U.S. President George H. W. Bush's snubbing of the Earth Summit in order to stall negotiations on key treaties, including the precursor to the Kyoto Protocol, which sought to reduce the contribution of greenhouse gas emissions to global climate change, and a treaty to eradicate environmental injustice as a global scourge. Bush's absence did not impede in any way the successful efforts by nongovernmental organizations to persuade the country delegates to enter into bilateral and multinational agreements to sustain the environment; instead, it fanned the flames for nongovernmental organizations to become more engaged in scrutinizing international agreements and advocating for human rights standards that protect the environment.

World Conference Against Racism (2001)

The United Nations's World Conference Against Racism, Xenophobia, and Other Related Intolerances took place in Durban, South Africa, in 2001, ten years after the First National People of Color Environmental Leadership Summit had inspired a new generation of community, cultural, legal advocacy, and research groups dedicated to environmental justice. Their activism compelled President Bill Clinton to sign a 1994 executive order requiring all federal agencies to address the issue of people of color and the poor bearing disproportionate pollution burdens,[4] which resulted in federal agencies, as well as state and local governments, instituting environmental justice programs and policies.[5] Through extensive media coverage, public awareness and support of environmental justice activism grew significantly, which induced some national environmental organizations to diversify their staffs and transform their programs to work cooperatively on environmental justice issues. In addition, U.S.-based environmental justice groups and South African environmental justice groups organized exchanges that led to partnerships and collaborative work. With these achievements, environmental justice organizations were able to effectively plan and acquire the resources for a large delegation of more than fifty environmental justice advocates from the United States and Caribbean nations to participate in the World Conference Against Racism.

During the World Conference Against Racism, U.S., Caribbean, and South African environmental justice organizations coordinated a tour of South African communities devastated by environmental racism. This was a profound experience for U.S. environmental justice advocates to witness the painful similarities between their communities and those in and around Durban.

At the World Conference Against Racism, environmental justice organizations convened a session on environmental justice and introduced a resolution for a plan of action that was adopted by hundreds of conference attendees, who identified the commonalities of environmental racism taking place

around the world. At this session, people from numerous countries shared their specific experiences with environmental injustice: the loss of habitable land; declining health, especially among women and children; the loss of opportunities to prosper and be secure; and governmental corruption that trampled on their human rights for the purpose of ushering in unsustainable developments. This process engendered and strengthened global alliances among environmental justice advocates. Working together, these environmental justice advocates successfully persuaded governmental delegates from other countries and United Nations officials to adopt the environmental justice plan of action in the official policy produced by the World Conference Against Racism, which calls on nations to:

> consider non-discriminatory measures to provide a safe and healthy environment for individuals and groups of individuals who are victims of or subject to racism, racial discrimination, xenophobia, and related intolerance, and in particular:
>
> a. To improve access to public information on health and environmental issues;
> b. To ensure that relevant concerns are taken into account in the public process of decision-making on the environment;
> c. To share technology and successful practices to improve human health and the environment in all areas;
> d. To take appropriate remedial measures, as possible, to clean, re-use, and redevelop contaminated sites and, where appropriate, relocate those affected on a voluntary basis after consultations.[6]

UN World Summit on Sustainable Development (2002)

At the United Nations's World Summit on Sustainable Development in Johannesburg, South Africa, in 2002, a follow-up to the 1992 Earth Summit, the primary focus was governmental partnerships with private corporations that profit from environmentally destructive practices, such as oil refining, and those that profit from privatizing water and other natural resources. Thousands of people of different races, nationalities, languages, and cultures advocated for human rights protections from the manifold injustices of environmentally destructive practices employed by these corporations and governmental authorities. Over 30,000 South African people and summit participants marched in solidarity through the streets of Johannesburg calling for human rights reforms, such as environmental justice and sustainable development, debt relief in South Africa and other developing countries, and protection of natural resources from private ownership.

In preparation for the World Summit, U.S. environmental justice groups produced reports and organized sessions for consciousness-raising and strategy development. One report produced by the National Black Environmental Justice Network, *Combating Environmental Racism with Sustainable Development—The Time Is Now!* has been cited by human rights jurists in India, among others.[7] In addition, the National Black Environmental Justice Network and the South African Environmental Justice Networking Forum convened three sessions that focused on: (1) environmental justice activism taking place globally; (2) environmental justice and global climate change;

and (3) environmental justice and the human right to health. Each of these sessions was skillfully chaired by Dr. Beverly Wright, director of the Deep South Center for Environmental Justice in New Orleans, Louisiana. The strong interest by summit participants in environmental justice was evidenced by the sizeable attendance, moving testimonies, and in-depth discussions that occurred at these sessions. The participants acknowledged that in their respective countries there is either a dearth of environmental laws, or else a substantial body of environmental laws that nevertheless fail to protect human rights. There was a consensus among the participants that more effort should be made in cultivating the expertise of environmental justice advocates on human rights laws and policies and their application to environmental injustices taking place in their respective communities and countries.

ENVIRONMENTAL JUSTICE VERSUS THE U.S. ENVIRONMENTAL REGULATORY SYSTEM

Rather than adopting human rights as the guiding principle for environmental protection, the United States has, for the last thirty years, developed an environmental regulatory system that is myopically technical, bureaucratically fragmented, racially discriminatory, and ultimately deferential to industrial interests. Reforming that system is critical for communities who are being destroyed by toxic industrial pollution in violation of fundamental human rights.

The United States has enacted an enormous body of environmental laws and regulations and has made significant contributions to the development of international human rights laws and mechanisms. However, this country has failed to incorporate human rights into its system of environmental protection. As a result, there is a dichotomy between human rights and environmental protection to such an extent that environmental laws authorize projects which have devastating effects on natural resources, threaten human health and lives, deprive people of their cultural and religious rights, and denigrate social and economic values. Further, the fact that the U.S. government allows a majority of these projects to operate in and near communities of color reflects a systemic form of discrimination known as environmental racism.

Because the environmental protection system in the United States focuses primarily on technological controls for a limited number of pollutants,[8] rather than on the holistic protection of the human right of all people to a healthy and safe environment, that system is blind to the devastating impacts suffered by communities, in particular communities of color, where regulated industries dump massive quantities of toxic pollution. The failure of the United States government to recognize environmental protection as a human right has led to a fundamentally flawed environmental regulatory system.

Flaws in the U.S. Environmental Regulatory System That Give Rise to Human Rights Violations: A Case in Point

People of color and poor communities across the nation suffer egregiously disproportionate pollution burdens as a consequence of the deeply flawed

U.S. environmental regulatory system. The African American community of Mossville, Louisiana, is a case in point.

Mossville is an historic unincorporated community, located between the two municipalities of Sulphur and Westlake in Calcasieu Parish, Louisiana, in the Southern United States.[9] With a land area of approximately five square miles, the Mossville community is currently composed of 375 households. People living in Mossville suffer from severe health problems, elevated levels of cancer-causing and hormone-disrupting chemicals, a devastated environment, and a deteriorated quality of life, all of which are associated with the massive amounts of toxic pollution released by nearby industrial facilities.

The United States government and its political subdivisions have authorized fourteen industrial facilities to manufacture, process, store, and discharge toxic and hazardous substances in close geographic proximity to Mossville residents.[10] Three of these facilities—an oil refinery, a vinyl manufacturer, and a petrochemical facility—are located within the recognized historic boundaries of Mossville, and eleven other facilities—three vinyl manufacturers, one coal-fired power plant, and eight petrochemical facilities—are located within one-half mile of the community. Each of the facilities in the Mossville area has received from governmental agencies the requisite permits to pollute the air, water, and land.[11] In recent years, industries have acknowledged that their facilities surrounding Mossville have *annually* polluted the air, water, and land with a combined total of more than 1 million kilograms (2 million pounds) of toxic chemicals that are scientifically known to cause cancer and damage the immune, respiratory, cardiovascular, nervous, and reproductive systems.[12] The actual amount of total toxic pollution is unknown, as all industrial facilities are not required to report all releases of pollution.

Although the environmental and health agencies of the United States have documented the massive industrial pollution burdens on the Mossville community, as well as residents' exposure to health-damaging levels of toxic chemicals, these agencies have failed to adequately address this environmental health crisis which denies Mossville residents their fundamental human rights to life, health, and privacy. Further, although the United States government has acknowledged the pervasive pattern of discrimination that subjects Mossville, as well as other racial minority communities throughout the nation, to racially disproportionate toxic pollution burdens, the United States government has failed to protect the human right to nondiscrimination.

The severe environmental degradation and resulting human rights violations suffered by Mossville residents are a consequence of the lack of appropriate legal mandates in the environmental regulatory system. The absence of such mandates gives rise to significant flaws in the U.S. system of environmental protection.[13] Five of the more obvious flaws in the U.S. environmental regulatory system are that it: (1) requires emission limits and technological controls on only a fraction of pollutants; (2) fails to remedy past practices and prevent future actions that intentionally or inadvertently impose racially disproportionate pollution burdens; (3) does not prevent the siting of individual toxic and hazardous facilities or the clustering of such facilities in close proximity to residential areas; (4) entirely fails to protect against the multiple, cumulative, and synergistic impacts of pollutants; and (5) relies on air quality

standards that are set on an overbroad geographic scale, which completely ignores excessive air pollution occurring in smaller areas. Each of these five flaws demonstrates that the U.S. government provides woefully inadequate environmental protection, which has contributed to the severe environmental health crisis in Mossville.

First, U.S. environmental laws do not establish reporting requirements or emission limits for all of the toxic chemicals released by all facilities. As a consequence, only a fraction of the universe of chemicals released by industries—189 out of several thousand—is required to have emission limits.[14] Furthermore, even for this limited number of regulated chemicals, pollution control standards have only been established for ninety hazardous air pollutants.[15] Compounding this problem, by legislative mandate these standards "are based on the performance of technology, and *not* on the health and environmental effects of hazardous air pollutants."[16] Thus, Mossville residents have no legal basis to demand that in order to address the health effects they suffer as a consequence of massive pollution emissions, the oversight agencies establish emissions limits that ensure health protection for all of the toxic chemicals emitted by all of the industrial facilities surrounding Mossville.

Second, there is no enforceable mandate in U.S. environmental law to remedy practices that impose racially disproportionate pollution burdens. Although a U.S. presidential executive order directs the U.S. Environmental Protection Agency (EPA) "to address" pollution burdens that fall disproportionately on people of color and poor populations,[17] the order is neither legally enforceable nor corrective of the pollution burdens that continue to afflict people of color and the poor in the United States.[18] Notwithstanding the injustice of communities of color, such as Mossville, being undisputedly subjected to racially disproportionate pollution burdens, nothing in the law requires EPA to prevent or even ameliorate such burdens. In fact, a report commissioned by EPA's Office of Environmental Justice—an office which is supposed to help communities of color suffering from disproportionate pollution burdens—acknowledges that "the law may not be the best way to address a problem."[19] Further, EPA and government officials admit that denying a permit to an industrial facility on the grounds that it creates or contributes to racially disproportionate pollution burdens is beyond the scope of their legal authority.[20]

Third, existing U.S. environmental laws and regulations do not prohibit the siting of individual or even clusters of polluting industrial facilities in close geographic proximity to residential areas. Furthermore, in Mossville, where fourteen polluting facilities have clustered, laws governing air pollution do not require environmental agencies even to consider the aggregate pollution burden of existing and proposed emissions of toxic pollution when deciding whether to issue permits for yet more pollution. Nor do these laws require agencies to consider the cumulative and synergistic health effects of existing pollution burdens in their permitting decisions.[21]

Fourth, there is no enforceable mandate in U.S. environmental law to protect against the multiple, cumulative, and synergistic impacts of toxic pollution from existing and proposed industrial facilities. Scientific studies have found that long-term exposure to multiple chemicals can have effects that are

much more powerful than single chemicals alone.[22] However, instead of establishing safeguards against complex mixtures of chemicals, U.S. environmental laws and regulations continue to focus on single chemicals. U.S. environmental laws authorize governmental agencies to continue issuing permits to industrial facilities for increased pollution levels in Mossville, notwithstanding the fact that residents are currently suffering serious health problems associated with industrial pollution. Being exposed to significant levels of toxic chemicals is not recognized by United States environmental laws as a ground for requiring pollution reductions from the offending facilities or imposing a moratorium on new permits that would further increase pollution levels.[23]

Thus, for example, in 2000 the U.S. government issued an environmental permit to a facility located near Mossville that allows the facility to pollute the air with over 53,524 kilograms (118,000 pounds) of chemicals that are scientifically known to cause cancer in humans. When issuing this permit, the government was under no legal mandate to consider the fact that eight other facilities were also permitted to release 38,102 kilograms (84,000 pounds) of other cancer-causing chemicals, amounting to a cumulative total in excess of 90,718 kilograms (200,000 pounds) of cancer-causing chemicals in the Mossville community.[24] This massive amount of cancer-causing chemicals is only part of the toxic soup in which Mossville residents live; they are also routinely exposed to other toxic chemicals that are scientifically known to damage the reproductive, respiratory, immune, cardiovascular, hormone, neurological, gastrointestinal, and musculoskeletal systems, as well as the skin and sense organs.[25] Such significant pollution burdens are in accordance with the law.

Fifth, U.S. environmental laws and regulations have established health-based standards for ambient air quality that apply only on a broad regional basis and therefore do nothing to protect Mossville and other communities in which air quality is significantly worse than generally accepted on a regional basis. These standards are supposed to achieve a healthy ambient outdoor air quality by setting limits on the concentration of six air pollutants (known as "criteria pollutants") in order to protect public health and welfare.[26] This approach mistakenly presumes that criteria pollutants are uniformly distributed throughout each designated regional area and that health problems only result when criteria pollutants exceed the health-based standards for the entire regional area. Entirely ignored is the fact that small areas within each region can have dangerous levels of a criteria pollutant even when that region as a whole is in compliance with the health-based standard.[27]

For example, in 1999 over 90,000 tons of sulfur dioxide were released by facilities within approximately one-half mile of the Mossville community.[28] These releases accounted for over 75 percent of all sulfur dioxide releases in Calcasieu Parish as a whole. Sulfur dioxide is one of the criteria pollutants, and can trigger asthma attacks and severe respiratory ailments.[29] Notwithstanding this dire situation in Mossville, the health-based standards for sulfur dioxide were not exceeded for the broader regional area of Calcasieu Parish, and thus, under existing law, Mossville residents had no legal remedy. Sulfur dioxide levels continue to increase significantly in the Mossville area without

triggering the requirements for sulfur dioxide reductions because the health-based standards for the broader regional area still are not being exceeded.[30] Mossville is simply left to suffer until and unless the entire regional area experiences this dangerous level of sulfur dioxide pollution—a contingency that will never come to pass because the combined effect of the relatively small geographic areas with high industrial emissions of sulfur dioxide does not and cannot outweigh those vast areas within the same region that do not have significant sources of sulfur dioxide. In effect, the massive quantity of sulfur dioxide emissions in Mossville is diluted by the vast areas in the region that do not have sulfur dioxide emissions.

These limitations of U.S. environmental laws have been exposed by the growing social movement of people in the United States who denounce the phenomenon of polluting industries operating in or near communities that are populated predominantly by racial minorities and poor people. The demands of this social movement for environmental justice led to the issuance of the presidential executive order that directed all federal agencies, including EPA, to address the problem of disproportionate pollution burdens on racial minorities and the poor.[31] Pursuant to the executive order, EPA created the Office of Environmental Justice and convened the National Environmental Justice Advisory Committee to engage in, among other things, policy recommendations to the agency regarding its legal authority to address environmental justice issues.[32] Unfortunately, these efforts to date have merely identified a few environmental laws in the United States that simply require opportunities for public participation in matters involving: (1) the issuance of permits to polluting facilities; (2) the monitoring of facilities; (3) the promulgation of pollution standards; and (4) the environmental compliance of facilities.

Although public participation is important, these laws do not prohibit, or otherwise establish a remedy for, the underlying problem: routine decisions by EPA and state agencies that permit numerous polluting facilities to release tons of toxic chemicals in close proximity to residential communities. Notwithstanding the fact that communities such as Mossville habitually present comments regarding the injustice of the pollution burdens they suffer, EPA has no legal obligation to deny permits in order to prevent, or even ameliorate, disproportionate pollution burdens. Indeed, as discussed earlier in this chapter, the EPA itself admits that denial of a permit because it creates or contributes to racially disproportionate pollution burdens is beyond the scope of its legal authority and that existing law may not be the best way to address a problem.[33]

For this reason, policy recommendations for ensuring environmental justice have repeatedly urged EPA to exercise its *discretionary* authority under environmental laws to fashion remedies for alleviating the impacts of disproportionate pollution burdens.[34] EPA has consistently failed to do so. And although the potential of EPA's discretionary authority to provide new and creative approaches to remedying environmental injustices should not be ignored, it must be noted that as a matter of law in the United States, there is no legally enforceable right to compel the EPA to exercise such discretionary authority.

The Limitations of Traditional Litigation in Achieving Environmental Justice

The serious flaws in the environmental regulatory system greatly restrict the remedies that can be achieved through traditional litigation. Such litigation falls within three basic categories: enforcement of existing environmental laws and/or challenging proposed environmental regulations, tort lawsuits, and enforcement of civil rights laws.

First, although some community organizations have been successful in litigation to enforce environmental laws,[35] such litigation is inadequate to fully achieve a healthy and safe environment as demanded by communities. Such litigation can block the construction and operation of a proposed toxic facility based on a demonstration that the issuance of an environmental permit fails to comply with environmental laws, but it cannot stop such permits when they are in compliance with these laws, notwithstanding the fact that the proposed facility would cause serious environmental harm. For example, an oil refinery may be in full compliance with the law, but because the law is woefully inadequate, the refinery is entitled under the law to release millions of pounds of toxic pollution on an annual basis, regardless of the fact that the refinery would operate in close proximity to a residential area, regardless of the fact that other facilities in the area are already emitting massive amounts of pollution, and regardless of the fact that the refinery would emit pollutants, as other facilities in the area already do, that are not regulated at all.

Further, environmental litigation that challenges proposed environmental regulations provides an inadequate, piecemeal remedy, as proposed regulations apply only to an individual toxic pollutant or an individual industrial sector. Thus, while successful litigation in this area can result in reducing the level of an individual toxic emission or requiring a specific industrial sector to reduce a toxic emission, such reductions do nothing to protect a community from the long-term, cumulative, and synergistic impacts of the full range of toxic pollution released by all nearby industrial facilities.

Second, lawsuits based on tort claims alleging harm from a facility have also proven to be ineffectual. Courts have held that the elaborate system of federal and state pollution control regulations generally preempt tort claims against facilities that are operating in compliance with such regulations.[36]

Third, it is no longer possible to prevail in civil rights litigation based on either Title VI of the Civil Rights Act or the Equal Protection Clause of the United States Constitution by claiming discriminatory impact; a showing of intentional discrimination is required.[37] Thus, the fact that a governmental action such as the issuance of a pollution permit has a discriminatory impact on a community of color in the form of a disproportionate pollution burden is of no moment; the community must prove that the government intentionally discriminated against them. However, because the location and proximity of a toxic facility to a community is not within the ambit of environmental permit decision-making, and because the regulatory criteria for issuing permits are race neutral, the governmental entity issuing the permit can readily defeat any allegation of intentional discrimination.[38]

Further, attempts by lawyers to claim constitutional protection for a healthy environment have also been fruitless. Federal courts in the United States have ruled that no such right to health and a healthy environment exists under the U.S. Constitution.[39]

For these reasons, environmental activists began to adopt human rights as a guiding principle to shift the focus to the impact of pollution on individuals and communities whose human right to a healthy and safe environment is being violated. Human rights laws that establish the rights to life, health, racial equality, and economic, cultural, and social development provide an opportunity for creating legal standards and a political awakening that achieve environmental justice. By recognizing a right to a healthy environment, human rights law provides a vehicle for challenging the U.S. environmental regulatory system for subjecting communities, in particular communities of color, to severe environmental degradation that jeopardizes human life and health. Given the limitations of environmental litigation in the United States, activists began to use human rights mechanisms and engage the international community to provide a forum to consider and expose the human rights implications of environmental policy. Such efforts have involved advocating for human rights standards and policies at the Earth Summit, World Conference Against Racism, and World Summit on Sustainable Development, as discussed above; legally challenging the U.S. environmental regulatory system for human rights violations through a human rights petition filed with the Inter-American Commission on Human Rights of the Organization of American States; as well as critical thinking and consciousness-raising in the form of books and essays.

U.S. LAW VERSUS HUMAN RIGHTS LAW: THE RIGHT TO A HEALTHY AND ECOLOGICALLY SECURE ENVIRONMENT

U.S. laws, as evidenced by the so-called U.S. environmental protection laws, do not recognize the right to health and an ecologically secure environment. Furthermore, federal courts in the United States have affirmatively ruled that no such right exists under the U.S. Constitution.[40] However, this right is recognized by international law.

According to a survey of human rights laws, there are over 350 multilateral treaties, 1,000 bilateral treaties, and a multitude of instruments of intergovernmental organizations which recognize that "[a]ll persons have the right to a secure, healthy and ecologically sound environment." Resolutions adopted by the United Nations's General Assembly have consistently affirmed that "all individuals are entitled to live in an environment adequate for their health and well-being";[41] and "democratic and equitable international order requires, inter alia, the realization of . . . the entitlement of every person and all peoples to a healthy environment."[42]

Of the approximately 191 nations in the world,[43] there are now 109 national constitutions that address protection of the environment or natural resources.[44] One hundred of these constitutions specifically recognize the

right to a clean and healthy environment and/or the state's obligation to prevent environmental harm.[45] Fifty-three of these constitutions explicitly recognize the right to a clean and healthy environment,[46] and ninety-two constitutions mandate that the national government prevent harm to the environment.[47] Fifty-four constitutions recognize a responsibility of citizens or residents to protect the environment,[48] while fourteen prohibit the use of property in a manner that harms the environment and/or encourage land use planning to prevent such harm.[49] Nineteen constitutions explicitly make those who harm the environment liable for compensation and/or remediation of the harm, or establish a right to compensation for those suffering environmental injury.[50] Sixteen constitutions provide an explicit right to information concerning the health of the environment or activities that may affect the environment.[51]

In addition, the international legal obligation of nations to safeguard the environment for their residents has been recognized repeatedly by judicial and quasi-judicial bodies. The Inter-American Commission on Human Rights of the Organization of American States has ruled that individuals have a right to a secure, healthy, and ecologically secure environment.[52] In addition, the International Court of Justice has enforced the obligation to prevent serious environmental harm, recognizing that such an obligation safeguards human rights.[53] Further, domestic courts in other countries have reached similar conclusions.[54]

The United States is one of thirty-four countries, referred to as "states" and "nation-states," in the Western Hemisphere that are members of the Organization of American States, whose mission is to promote and defend human rights. By virtue of its membership in the Organization of American States, the United States has committed itself to not violate the provisions of the American Declaration of the Rights and Duties of Man (the "American Declaration").[55] As the Inter-American Court on Human Rights of the Organization of American States has established, "[f]or the member States of the Organization, the Declaration is the text that defines the human rights . . . . [T]o this extent the American Declaration is for these States a source of international obligations."[56] Among other things, the American Declaration requires the United States to uphold the human rights to life and health, as well as equal protection and freedom from discrimination[57]—each of these rights is critical to achieving environmental justice.

In addition, as a signatory to the American Convention on Human Rights (the "American Convention") which "represent[s] an authoritative expression of the fundamental principles set forth in the American Declaration,"[58] the United States has an obligation to not defeat the object and purpose of the American Convention.[59] The International Law Commission has found that a nation-state's decision to sign the American Convention obligates the nation-state "to abstain, prior to ratification, from a course of action inconsistent with the purpose of the treaty."[60] Thus, the United States is obligated to prevent environmental racism as established by the American Declaration and Convention,[61] in order to protect the human rights to life,[62] health,[63] and equal protection and freedom from discrimination.[64] In fact, the Inter-American Commission on Human Rights has ruled that a national

government's failure to adequately protect the environment can constitute a human rights violation.[65]

Accordingly, in March 2005, on behalf of Mossville residents organized as Mossville Environmental Action Now, Advocates for Environmental Human Rights filed the first ever environmental human rights petition with the Inter-American Commission on Human Rights of the Organization of American States. The petition seeks remedies for the environmental degradation sanctioned by the U.S. government. For the last sixty years, since the introduction of hazardous industrial development in Mossville, residents have been suffering from the damaging effects of industrial pollution that interfere with their fundamental human rights. These fundamental human rights have been and continue to be violated by the actions and inactions of the United States government and its political subdivisions.

The Mossville petition seeks remedies for these human rights violations, and requests that the Inter-American Commission on Human Rights recommend that the United States:

1. provide medical services to Mossville residents suffering from diseases and health problems associated with environmental toxic exposures, including health monitoring services;
2. offer appropriate relocation to consenting Mossville residents that allows them to live in healthier environs, away from toxic industrial facilities and contaminated sites;
3. refrain from issuing environmental permits and other approvals that would allow any increase in pollution by existing industrial facilities located in close proximity to the Mossville community, and to refrain from issuing any environmental permits and other approvals that would allow the introduction of any new industrial facility in the Mossville area; and
4. reform its existing environmental regulatory system to:
   a. require a safe distance between a residential population and a hazardous industrial facility so that the population is not located within the area where deaths or serious injury would result in the event that a toxic or flammable substance stored, processed, or generated by the facility would be released to the environment through explosion, fire, or spill;
   b. establish in all regulatory programs pollution limits that prevent harm to human health and the environment from aggregate, cumulative, and synergistic pollution exposures; and
   c. remedy past practices and prevent future actions that intentionally or inadvertently impose racially disproportionate pollution burdens.

Advocates for Environmental Human Rights will request that the Inter-American Commission on Human Rights conduct an investigative, fact-finding mission in Mossville, Louisiana and convene an adjudicative hearing on this human rights petition. The remedies sought in the Mossville petition reflect the demands that have been articulated by the environmental justice movement through years of international and domestic advocacy. As such, the remedies not only seek to protect the human rights in Mossville, Louisiana, but also call for systemwide reform of environmental laws, policies, and practices

that threaten the survival of Mossville as well as all other similarly situated communities throughout the country. In this regard, the human rights remedies serve to guide and strengthen ongoing environmental justice advocacy by pinpointing the transformative changes that are necessary for our government to protect both fundamental human rights and the human right to a healthy environment.

CONCLUSION

Laying a comprehensive legal and public advocacy framework based on the fundamental human rights to life, health, racial equality and nondiscrimination, and a healthy, ecologically secure environment is urgently needed in the United States and communities around the world. There is escalating global concern for the devastating impacts of toxic pollution, global warming, and other forms of unsustainable development that are particularly devastating to people of color. There is also growing consensus among people of different nationalities and diverse backgrounds that a healthy environment is a human right. Building effective human rights advocacy to achieve environmental justice must include the following strategies:

1. Community-organizing support that enhances the capacity of groups to incorporate human rights advocacy into existing campaigns;
2. Human rights litigation that challenges cases of environmental injustice;
3. Public education campaigns that demystify the role and responsibility of the United States to uphold human rights; and
4. Coordination of multinational coalitions that collaborate on transboundary issues related to environmental injustice as a human rights violation.

Since the 1991 First People of Color Environmental Leadership Summit defined environmental injustice as a human rights violation, the environmental justice movement has made remarkable strides in organizing communities to advocate for human rights. Prominent networks within the environmental justice movement continue to actively pursue human rights policies to combat environmental racism. The Indigenous Environmental Network[66] has linked environmental justice to domestic and international human rights advocacy for the sovereignty rights of indigenous nations. The National Black Environmental Justice Network,[67] Southwest Network for Economic and Environmental Justice,[68] and the Asian Pacific Environmental Network[69] have also been active in advocating for human rights protections from environmental racism before the United Nations Commission on Human Rights[70] and at UN policymaking conferences, as discussed above. Such advocacy lays important groundwork for bringing human rights advocacy home to reform the current U.S. environmental regulatory system.

Advancing this human rights reform requires an identification of the fundamental flaws in the environmental regulatory system that have subjected communities to polluted environments and a working knowledge of the human rights laws and standards that are critical to achieving environmental

justice. In addition, such reform efforts must be cognizant of the need for developing public advocacy campaigns that make transparent the legal obligations of the United States to uphold human rights in general, clarify the importance of these rights to average Americans, and counter the politics of promoting U.S. exceptionalism as a shield for remedying human rights abuses.

It is imperative that capacity-building continue in communities so that grassroots groups can avail themselves of international human rights mechanisms and forums, where they can seek redress for complaints of environmental injustice. Efforts must also be made to support human rights litigation within U.S. courts by educating jurists and legislators about the efficacy of human rights standards in achieving justice in general, and environmental justice in particular.

The power of the environmental justice movement rests in its clear focus on creating a world where the denial of human rights and the destruction of the environment are no longer tolerated as the mere costs of doing business. This movement, which is guided by a set of principles that define environmental injustice as a human rights violation, continues to inspire, motivate, and challenge advocates in the global struggle for human rights.

NOTES

1. The pattern of racially disproportionate pollution burdens has been documented in governmental and academic studies. See, e.g., U.S. General Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation With Racial and Economic Status of Surrounding Communities*, GAO/RCED-83-168, B-211461 (Washington, DC: General Accounting Office, 1983); Commission for Racial Justice, United Church of Christ, *Toxic Waste and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites* (New York: Public Access Data, 1987); Robert D. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Boulder, CO: Westview Press, 1990); Robert D. Bullard and others, *Toxic Waste and Race at Twenty, 1987-2007* (2007).

2. Cancer Alley is a section of the Mississippi River corridor between the Louisiana cities of Baton Rouge and New Orleans, where more than 130 petrochemical facilities are located in close proximity to predominantly African American communities.

3. First National People of Color Environmental Leadership Summit, "Principles of Environmental Justice," First National People of Color Environmental Leadership Summit, October 27, 1991. Available online at www.ejrc.cau.edu/princj.html.

4. Executive Order no. 12,898, Federal Register 59, no. 32 (February 16, 1994): 7629.

5. Steven Bonorris, Jodene Isaacs, and Kara Brown (eds.), *Environmental Justice for All: A Fifty-State Survey of Legislation, Policies, and Initiatives* (Chicago, IL: American Bar Association and Hastings College of Law, 2004). Available online at www.aba.org/irr/committees/environmental.

6. *Durban Declaration and Programme of Action*, adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, UN Doc. A/CONF.189/12, September 2001.

7. Center for International Environmental Law, *Building Bridges: North America/South Asia Conversation on Environmental Justice* (Washington, DC: Center for

International Environmental Law, 2003). See, e.g., Antonio La Vina, "Making Participation Work: Lessons from Civil Society Engagement in the WSSD" (World Resources Institute, October 24, 2003), available online at pdf.wri.org/wssd_final_paper_wri.pdf.

8. See, e.g., the *Clean Water Act*, *U.S. Code* 33 (1977), §1311 (requiring best practice control technology to meet effluent limitations); and the *Clean Air Act*, *U.S. Code* 42 (1990) §7412 (requiring pollution control technologies to meet hazardous air pollutant emission standards).

9. "Parishes" in Louisiana are the equivalent of "counties" elsewhere in the United States.

10. The United States government has authorized the following fourteen industrial facilities to release massive quantities of toxic chemicals within one-half mile of the homes, churches, and community center of Mossville residents: Air Liquide; Arch Chemical; BioLab; Certainteed; Conoco Philips (formerly Conoco Lake Charles Refinery); Entergy Roy S. Nelson Power Plant; Excel Paralubes; Georgia Gulf (formerly Condea Vista); Lyondell/Arco Chemical; PHH Monomer; PPG Industries; Sasol (formerly Condea Vista); Tessenderlo Kerley Chemicals (formerly Jupiter Chemicals); and Tetra Chemicals.

11. See U.S. Environmental Protection Agency Enforcement and Compliance History Online. Available online at www.epa.gov/echo.

Mossville area facilities that have been issued environmental permits by the U.S. government to release air pollution include: Air Liquide; Arch Chemical; BioLab; Certainteed; Conoco Lake Charles Refinery; Entergy Roy S. Nelson Power Plant; Georgia Gulf; Jupiter Chemicals (now Tessenderlo Kerley Chemicals); Lyondell Chemical; Olin; PPG Industries; Sasol; and Tetra Chemicals.

Mossville area facilities that have been issued environmental permits by the U.S. government to discharge water pollution include: Certainteed; Conoco Lake Charles Refinery; Entergy Roy S. Nelson Power Plant; Jupiter Chemicals (now Tessenderlo Kerley Chemicals); Lyondell Chemical; PPG Industries; Sasol; and Tetra Chemicals.

Mossville area facilities that have been issued environmental permits by the U.S. government to generate, store, and dispose of hazardous waste include: Arch Chemical; BioLab; Certainteed; Conoco Lake Charles Refinery; Entergy Roy S. Nelson Power Plant; Georgia Gulf; Jupiter Chemicals (now Tessenderlo Kerley Chemicals); Lyondell Chemica;, Olin; PPG Industries; Sasol; and Tetra Chemicals.

12. Toxic Release Inventory (TRI), available online at www.epa.gov/tri/tridata/ (for the year 2002, App. 2). The TRI is a database of industrial pollution emissions compiled from reports that industrial companies are required to submit to the U.S. Environmental Protection Agency pursuant to the *Emergency Planning and Community Right-to-Know Act ("EPCRA"), U.S. Code* 42 (1986), § 11023.

13. See e.g., U.S. EPA Office of Environmental Justice, *Environmental Justice in the Permitting Process: A Report from the National Environmental Justice Advisory Council's Public Meeting on Environmental Permitting*, EPA/300-R-00-0004, (Washington, DC: Government Printing Office, July 2000), 23-25 (recommending that EPA consider the following factors for denying permits applied for by toxic industries: (1) negative health risks; (2) racially disproportionate burdens; (3) cumulative and synergistic adverse impacts on human health and the environment; (4) high aggregation of risk from multiple sources; (5) community vulnerability based on the number of children, elderly, or asthmatics; (6) cultural practices including Tribal and Indigenous cultures and cultural reliance on land and water that may become pathways of toxic exposure; and (7) proximity to residential areas and adequacy of buffer zones. EPA has failed to consider these factors).

14. The Clean Air Act lists only 189 hazardous air pollutants and requires EPA to establish pollution control standards, also known as emission limits, for each of these pollutants. *Clean Air Act*, § 7412 (b) and (d).

15. *U.S. Code* 40, Part 63. See also *Sierra Club v. EPA*, 353 F.3d 976, 979 (D.C. Cir. 2004) (explaining the legislative history of the Clean Air Act which defines "hazardous air pollutants" as those that "may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.")

16. Ibid., 353 F.3d at 980 (quoting legislative history) (emphasis added).

17. Executive Order no. 12898, (see n. 4).

18. As is the case for all presidential executive orders, Executive Order 12898 provides as follows: "This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order." Executive Order no. 12898, section 6-609 (see n. 4). See U.S. EPA Office of the Inspector General, *Evaluation Report: EPA Needs to Consistently Implement the Intent of the Executive Order on Environmental Justice*, Report No. 2004-P-00007 (March 1, 2004), available online at www.epa.gov/oig/reports/2004/20040301-2004-P-00007.pdf ("EPA has not fully implemented Executive Order 12898 nor consistently integrated environmental justice into its day-to-day operations.").

19. See Environmental Law Institute, *A Citizen's Guide to Using Federal Environmental Laws to Secure Environmental Justice* (Washington, DC: Environmental Law Institute, 2002), p. 7 (explaining that environmental agencies "do not have the specific authority to disapprove the siting of a [proposed] facility," and acknowledging that environmental laws do not support denial of a permit based on close geographic proximity of a proposed toxic facility to a residential community, but instead can only be invoked to require compliance with existing environmental laws and regulations).

20. See U.S. EPA, *Environmental Justice in the Permitting Process* (see n. 13) (reporting that government stakeholders frequently cite their lack of any legal mandate to reject projects on grounds of racially disproportionate pollution burdens, and quoting an EPA official: "If the objective of the community is to stop the permit altogether . . . it is hard for EPA to share that goal. Our goal is to make sure these sources have permits").

21. See Environmental Law Institute, *A Citizen's Guide*, (see n. 19) p. 7 (explaining that environmental agencies "do not have the specific authority to disapprove the siting of a [proposed] facility," and acknowledging that environmental laws do not support denial of a permit based on close proximity of a proposed facility to a residential community, but instead can only be invoked to require a technologically better permit).

22. Massachusetts Precautionary Principle Project, *Facing Our Toxic Ignorance* (Fall 1999), available online at sustainableproduction.org/precaution/back.brie.faci.html.

23. Although the Clean Air Act requires EPA, no later than November 16, 1996, to provide a one-time report regarding residual public health risks from regulated facilities, EPA failed to do so. *Clean Air Act U.S. Code* 42 (1990), § 7412(f)(1).

24. TRI (see n. 12).

25. Ibid.

26. *Clean Air Act U.S. Code* 42 (1990), § 7408; Code of Federal Regulations, Title 40, Part 50.

27. In a country as vast in land area as the United States, there are only 264 regional areas, known as "air quality control regions."

28. U.S. Environmental Protection Agency, National Emission Trends, www.scorecard.org (database for 1999 criteria pollutant emissions). This figure represents the total sulfur dioxide emissions reported by the Entergy Roy S. Nelson Power Plant, Conoco Refinery, Condea Vista, and PPG Industries—facilities which surround the Mossville community.

29. See U.S. Environmental Protection Agency, *Greenbook: Criteria Pollutants.* Available online at www.epa.gov/oar/oaqps/greenbk/o3co.html. ("High concentrations of sulfur dioxide [SO_2] affect breathing and may aggravate existing respiratory and cardiovascular disease. Sensitive populations include asthmatics, individuals with bronchitis or emphysema, children and the elderly. Ambient SO_2 results largely from stationary sources such as coal and oil combustion, steel mills, refineries, pulp and paper mills and from nonferrous smelters").

30. U.S. Environmental Protection Agency, National Emission Trends, available online at www.scorecard.org (databases for 1996 and 1999 criteria pollutant emissions). These databases show that sulfur dioxide emissions in Calcasieu Parish increased from approximately 18,000 tons in 1996 to over 90,000 tons in 1999.

31. Executive Order no. 12,898(see n. 4).

32. See e.g., U.S. EPA, *Environmental Justice in the Permitting Process* (see n. 13).

33. See notes 19 and 20.

34. Office of the General Counsel, *Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting*, (Memorandum, December 1, 2000), www.epa.gov/compliance/resources/policies/ej/ej_permitting_authorities_memo_1120100.pdf.

35. See, e.g., *In the Matter of Shintech, Inc and its Affiliates' Polyvinyl Chloride Production Facility*, Permit Nos. 2466-VO, 2467-VO, 2468-VO, Order Partially Granting and Partially Denying Petitions for Objections to Permits (September 10, 1997); *In the Matter of Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, Docket No. 70-3070-ML, Final Initial Decision (May 1, 1997).

36. See, e.g., *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (holding that the federal common law of nuisance in the area of water pollution had been displaced by the Federal Water Pollution Control Act Amendments of 1972); *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 11 (1981) (holding that the Marine Protection, Research, and Sanctuaries Act of 1972 "fully" preempts the federal common law of nuisance "in the area of ocean pollution"); *Papas v. Upjohn Company*, 926 F.2d 1019 (11th Cir. 1991) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act preempts state common law tort claims regarding improper labeling or failure to warn of the harmful elements of the pesticide); *United States v. Kin-Buc, Inc.*, 532 F.Supp. 699 (D.N.J. 1982) (holding that the Clean Air Act displaces the federal common law of nuisance with respect to air pollution); *United States v. Price*, 523 F.Supp. 1055, 1069 (D.N.J. 1981) (holding that the intrastate hazard created by the defendant's chemical dumping was not an appropriate area for federal common law, and if it were, federal common law in the area of hazardous waste has been pre-empted by the enactment of the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation, and Liability Act); *Mattoon v. City of Pittsfield*, 980 F.2d 1, 4 (1st Cir. 1992) (concluding that "Congress occupied the field of public drinking water regulation with its enactment of the SWDA [Safe Drinking Water Act]").

37. See *Alexander v. Sandoval*, 121 S.Ct. 1511 (2001) ("Neither as originally enacted nor as later amended does Title VI [of the Civil Right Act] display an intent to create a freestanding private right of action to enforce regulations [that prohibit

discriminatory effects]. We therefore hold that no such right of action exists."); *McClesky v. Kemp*, 481 U.S. 279, 292 (1987) ("[A] party who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination."); *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.").

38. See, e.g., *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3rd Cir. 2001).

39. See *Long Beach v. New York*, 445 F. Supp. 1203, 1212 (D.N.J. 1978) (quoting *Ely v. Velde*, 451 F.2d 1130, 1139 [4th Cir. 1971]) ("[G]enerally it has been held that there is no constitutional right to [environmental] protection."); *Tanner v. Armco Steel*, 340 F. Supp 532, 537 (S.D. Tex. 1972) ("[N]o legally enforceable right to a healthful environment . . . is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution."); *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F.Supp. 716, 720-22 (E.D. La. 1976), cert. denied, 438 U.S. 1073; *Upper W. Fork River Watershed Ass'n v. Corps of Engineers*, 414 F.Supp. 908. 931-32 (N.D.W.Va. 1976), *aff'd mem.*, 556 F.2d 576 (4th Cir. 1977), *cert. denied*, 434 U.S. 1073; *Pinkey v. Ohio Environmental Protection Agency*, 375 F.Supp. 305, 309-10 (N.D.Ohio 1974); *Hagedorn v. Union Carbide Corp.*, 363 F.Supp. 1061, 1064-65 (N.D.W.Va. 1973); *Virginians for Dulles v. Volpe*, 344 F.Supp. 573, 579 (E.D.Va. 1972); *aff'd in part and rev'd in part*, 541 F.2d 442 (4th Cir. 1976); *Environmental Defense Fund v. Corps of Engineers*, 325 F.Supp 728, 739 (E.D.Ark. 1971).

40. See *Long Beach v. New York*, 445 F. Supp. 1203, 1212 (D.N.J. 1978) (quoting *Ely v. Velde*, 451 F.2d 1130, 1139 [4th Cir. 1971]) ("[G]enerally it has been held that there is no constitutional right to [environmental] protection."); *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F.Supp. 716, 720-22 (E.D. La. 1976); *Upper W. Fork River Watershed Ass'n v. Corps of Engineers*, 414 F.Supp. 908. 931-32 (N.D.W.Va. 1976), *aff'd mem.*, 556 F.2d 576 (4th Cir. 1977); *Pinkey v. Ohio Environmental Protection Agency*, 375 F.Supp. 305, 309-10 (N.D.Ohio 1974); *Hagedorn v. Union Carbide Corp.*, 363 F.Supp. 1061, 1064-65 (N.D.W.Va. 1973); *Virginians for Dulles v. Volpe*, 344 F.Supp. 573, 579 (E.D.Va. 1972); *aff'd in part and rev'd in part*, 541 F.2d 442 (4th Cir. 1976); *Tanner v. Armco Steel Corp.*, 340 F.Supp. 532, 536-37 (S.D.Tex. 1972); *Environmental Defense Fund v. Corps of Engineers*, 325 F.Supp 728, 739 (E.D.Ark. 1971); *Tanner v. Armco Steel*, 340 F. Supp 532, 537 (S.D. Tex. 1972) (quoting *Lindsey v. Normet*, 405 U.S. 56 [1972]) ("[N]o legally enforceable right to a healthful environment . . . is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution.").

41. UN General Assembly, Resolution 45/94, UN GAOR, UN Doc. A/45/749, p. 8.

42. UN General Assembly, Resolution 55/107, UN GAOR, 55th Sess., UN Doc. A/Res/55/107, 3(k).

43. There are more than 191 members of the United Nations. See *U.N., List of Member States.* Available online at www.un.org/Overview/unmember.html.

44. Earthjustice, *Issue Paper: Human Rights and the Environment* (prepared for the sixtieth Session of the UN Commission on Human Rights, March 15–April 23, 2004), Appendix, pp. 61–84, available online at www.earthjustice.org/library/references/2004UNreport.pdf.

45. Andorra, Angola, Argentina, Armenia, Azerbaijan, Bahrain, Belarus, Belgium, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Cambodia, Cameroon, Cape Verde, Chad, Chechnya, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Czech Republic, Ecuador, El Salvador, Equatorial Guinea, Eritrea (draft), Ethiopia, Finland,

Georgia, Germany, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, India, Iran, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Latvia, Lithuania, Macedonia, Madagascar, Malawi, Mali, Malta, Mexico, Micronesia, Moldova, Mongolia, Mozambique, Namibia, Nepal, Netherlands, Nicaragua, Niger, Norway, Palau, Panama, Papa New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Sao Tome and Principe, Saudi Arabia, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Sri Lanka, Suriname, Switzerland, Taiwan, Tajikistan, Tanzania, Thailand, Togo, Turkey, Turkmenistan, Uganda, Ukraine, Uzbekistan, Venezuela, Vietnam, Yugoslavia, Zambia.

46. Angola, Argentina, Azerbaijan, Belarus, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Cameroon, Cape Verde, Chad, Chechnya, Chile, Colombia, Congo, Costa Rica, Croatia, Cuba, Czech Republic, Ecuador, El Salvador, Ethiopia, Finland, Georgia, Honduras, Hungary, Kyrgyzstan, Latvia, Macedonia, Mali, Moldova, Mongolia, Mozambique, Nicaragua, Niger, Norway, Paraguay, Philippines, Portugal, Russia, Sao Tome and Principe, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Tajikistan, Togo, Turkey, Ukraine, Yugoslavia. In addition to these, the constitutions of Comoros and Guatemala recognize a right to health that is not explicitly tied to the state of the environment.

47. Andorra, Angola, Argentina, Armenia, Bahrain, Belarus, Benin, Bolivia, Brazil, Bulgaria, Cambodia, Cameroon, Cape Verde, Chad, Chechnya, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Ecuador, El Salvador, Equatorial Guinea, Eritrea (draft), Finland, Georgia, Germany, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, India, Iran, Kazakhstan, Kuwait, Laos, Latvia, Lithuania, Macedonia, Madagascar, Malawi, Mali, Malta, Mexico, Micronesia, Mongolia, Mozambique, Namibia, Nepal, Netherlands, Nicaragua, Niger, Palau, Panama, Papa New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Sao Tome and Principe, Saudi Arabia, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Sri Lanka, Suriname, Switzerland, Taiwan, Tajikistan, Tanzania, Thailand, Togo, Turkey, Turkmenistan, Uganda, Ukraine, Uzbekistan, Venezuela, Vietnam, Yugoslavia, Zambia.

48. Algeria, Argentina, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Cameroon, Cape Verde, Chad, China, Colombia, Congo, Cuba, Czech Republic, Finland, Ghana, Guatemala, Guyana, Haiti, India, Kazakhstan, Kyrgyzstan, Laos, Lithuania, Macedonia, Madagascar, Mali, Moldova, Mongolia, Mozambique, Panama, Papa New Guinea, Poland, Russia, Sao Tome and Principe, Seychelles, Slovakia, Slovenia, South Korea, Spain, Sri Lanka, Sudan, Tajikistan, Tanzania, Thailand, Turkey, Ukraine, Uruguay, Uzbekistan, Vanuatu, Vietnam, Yugoslavia.

49. Albania, Armenia, Belarus, Burundi, Chile, Czech Republic, Moldova, Mongolia, Romania, Russia, Slovakia, Switzerland, Ukraine, Uzbekistan.

50. Angola, Argentina, Azerbaijan, Belarus, Brazil, Chechnya, Chile, Congo, Costa Rica, Ecuador, Haiti, Kyrgyzstan, Moldova, Mongolia, Paraguay, Poland, Russia, Spain, Ukraine.

51. Albania, Azerbaijan, Belarus, Colombia, Czech Republic, Ecuador, Eritrea (draft), Georgia, Kazakhstan, Latvia, Moldova, Norway, Russia, Slovakia, Ukraine, Yugoslavia.

52. See IACHR, *Report on the Situation of Human Rights in Ecuador,* Chapter VIII, 1997, OAS Doc. OEA/Ser.L/V/LL.96 Doc. 10 rev. 1, addressing the effects of environmental degradation and pollution from government-sanctioned private oil drilling on the ancient tribal lands of the Huaorani people, an indigenous population in Ecuador. The Inter-American Commission on Human Rights recognized "the right . . . to live in a healthy environment," Ibid., at 92, and found that "[s]evere environmental pollution may pose a threat to human life and health, and in the

appropriate case give rise to an obligation on the part of the state to take reasonable measures to prevent such risk, or the necessary measure to respond when persons have suffered injury." Ibid., at 88. The Commission concluded that "[t]he *American Convention on Human Rights* is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being." Ibid., at 92.

Similarly, the Commission protected the right to a clean and healthy environment of the indigenous Wichi, Chorote, Chulupi, Toba, and Tapiete peoples by halting construction of a road linking Brazil to Chile through Argentina. See Center for International Environmental Law Press Release: *Human Rights Commission Halts Argentine Plan That Would Lead to Genocide of Indigenous Communities*, October 12, 2000, available online at www.ciel.org/Announce/wichipress release2.html. That project would have destroyed these peoples' environment, increased their exposure to disease, and threatened their culture and lifestyle.

53. In the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. 7 (September 25, 1997), the majority opinion recognized the irreversible nature of environmental damage from a hydroelectric dam project undertaken pursuant to a bilateral treaty as well as the presence of new environmental norms and standards to address such damage:

> The court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was done without consideration of the effects on the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.

In a separate opinion, Justice Weeramantry, vice-president of the ICJ, wrote that "The protection of the environment is likewise a vital party of contemporary human rights doctrine for it is sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments." Ibid. (Sep. Op. Judge Weermantry) at 4.

The International Court of Justice has also recognized the obligation of nation states to protect the environment for current and future generations. In *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, 996 I.C.J. 226, the Court found that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of

areas beyond national control is now part of the corpus of international law relating to the environment." Ibid., at para. 29.

54. See, e.g., *Claudia Sanpedro y Héctor A. Suárez v. Ministerio del Medio Ambiente y otros (Acción Popular)*, Administrativo de Cundinamarca, Sección Segunda, Subsección "B", Bogotá D.C., June 13, 2003, Magistrada Ponente: Dra. Ayda Vides Paba. Referencia (Caso No.): 01-0022, p. 113 (a Colombian tribunal finding that "every person [enjoys] the protection of the right to a healthy environment, as stated in the Constitution and the Law, as well as all the other interests related to the protection and restoration of the environment"); *Minors Oposas v. Secretary of the Dep't of Env't and Nat. Resources*, 33 I.L.M. 173 (S. Ct. Philippines 1994) (timber licenses implicate right to healthy environment, which "belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation"); Constitutional Chamber of the Supreme Court (Costa Rica), Vote No. 3705, July 30, 1993 (placing dump in the plaintiffs' neighborhood violated right to healthy environment); *Review of the China Western Poverty Reduction*; *Narmada Bachao Andolan v. Union of India & Others*, Writ Petition (C) No. 319 of 1994 (Sup. Ct. India 2000) (determining that environmental degradation harms human rights, and including a minority opinion by Justice Bharuch noting that "environmental harms to human rights outweighed the need for the dam construction"); *Ruth Solano Vazquez, et al v. Ministry of the Environment and Energy* (Res. No. 2000-08019), Constitutional Chamber of the Supreme Court of Costa Rica (citizens have right to a healthy and ecologically balanced environment and so the government must carry out a prior consultation process with local communities concerning potentially environmentally harmful activities, such as oil and gas exploration). See also *Montana Environmental Information Center v. Department of Environmental Quality*, 1999 MT 248 (1999) (State Supreme Court "conclude[d] that the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of the Montana State Constitution." That section states that "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment").

55. *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, 1989, Inter-Am. Ct. H.R. (Ser. A) No. 10 at para. 45, available online at www.corteidh.or.cr/seriea_ing/seriea _10_ing.doc.

56. Ibid.

57. *American Declaration of the Rights and Duties of Man,* Article I, II, and XI, 1948, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS Doc. OEA/Ser.L.V/I.4 rev. 10 at 17 (May 2004).

58. *American Convention on Human Rights*, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS Doc. OEA/Ser.L/V/I.4 rev. 10 at 27 (May 2004). *See Garza v. United States*, Case 12.243, Report No. 52/01, Inter-Am. C.H.R., O.A.S. Doc. OEA/Ser.L/V/II.111 Doc. 20 rev. at para. 89 at and n. 41 (2000), available online at www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/ USA12.243.htm.

59. The *Vienna Convention on the Law of Treaties* establishes that a state "is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty. . . . " *Vienna Convention on the Law of Treaties*, Article 18, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679.

According to the International Law Commission, which drafted the *Vienna Convention*, "the obligation laid down in Article [18] had its origin in the principle of good faith, but has since become a legal obligation." Minutes of the 812th Meeting on Drafting Articles Proposed by the Drafting Committee, Y.B. Int'l. L. Comm'n.

262-263, ¶ 104 (1965). *See* Mark E. Villiger, *Customary International Law and Treaties*, 321 (1985).

See also Restatement (Third) of the Foreign Relations Law of the United States (Restatement), Pt. III, Introductory Note, at 145 and n.2 (1987); Joni S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Engima*, 25 GWJILE 71, 107 ("[S]tates do indeed regard Article 18 and the interim obligation to refrain from defeating the object and purpose of a signed treaty as just and sound.")

The United States has "generally recognized [the *Vienna Convention*] as the authoritative guide to current treaty law and practice," and has "widely recognized [Article 18] as customary international law." S. Exec. Doc.L., 92 Cong., 1st Sess. 1971 at 1 (text of the 1971 Letter of Submittal from the U.S. Department of State to the U.S. President to accompany transmission of the *Vienna Convention* to the U.S. Senate for consent to ratification), available at 6 *International Lawyer* 431 (1972).

60. Report by Mr. H. Lauterpacht, Special Rapporteur to the General Assembly, *Report of the International Law Commission to the General Assembly*, reprinted in H. Lauterpacht, Special Rapporteur, "Law of Treaties," 2 *Y.B. Int'l L. Comm'n* 90 at 110 (1953).

61. The Inter-American Court of Human Rights has found that the obligation "to ensure" in Article 1(1) of the *American Convention on Human Rights* implies a duty to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. "As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation." *Velasquez-Rodriguez v. Honduras*, 4 Inter-Am. Ct. H.R. (ser. C) at para. 166 (Judgment of July 29, 1988); *Godinez-Cruz Case*, 5 Inter-Am. Ct. H.R. (ser. C) at para. 175 (Judgment of January 20, 1989). Furthermore, the obligation "to prevent, investigate, and punish" violations requires a State: to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." *Velasquez-Rodriguez v. Honduras* at para. 174 *Godinez-Cruz v. Honduras* at para. 184. See also Dinah Shelton, *Human Rights, Environmental Rights, and the Right to the Environment*, *Stan. J. Int'l. L.*28(78) (1991): 123.

62. *American Convention on Human Rights*, (see n. 58), Article 4(1), *American Declaration of the Rights and Duties of Man,* (see n. 57), Art. I .

63. *American Declaration of the Rights and Duties of Man,* (see n. 57), Art. XI; *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"*, Article 10, 1999, OAS Doc. OEA/Ser.L.V/II.82 doc.6 rev.1 at 67, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS Doc. OEA/Ser.L.V/1.4 rev. 10 (May 2004). Available online at www1.umn.edu/humanrts/oasinstr/zoas10pe.htm

64. *American Declaration of the Rights and Duties of Man*, (see n. 57), Art. II ; *American Convention on Human Rights*, (see n. 58), Arts. 1(1) and 24.

65. IACHR, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96 (1997); IACHR, *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97 (1997).

66. Information about the Indigenous Environmental Network is available online at www.ien.org.

67. Information about the National Black Environmental Justice Network is available online at www.nbejn.org.

68. Information about the Southwest Network for Economic and Environmental Justice is available online at www.sneej.org.

69. Information about the Asian Pacific Environmental Network is available online at www.apen4ej.org.

70. See, e.g., John McQuaid, "Delegates to Testify about Environmental Discrimination: UN Panel to Hear Them in Geneva," *Times Picayune* (April 3, 1999), A-14.

CHAPTER 11

A Call for the Right to Return in the Gulf Coast

William Quigley and Sharda Sekaran

This chapter is composed of two separate accounts of human rights work in the Gulf Coast following Hurricanes Katrina and Rita in 2005. William Quigley writes about his personal experience as a New Orleans resident and social justice activist. Sharda Sekaran writes from her perspective as a human rights activist from a national organization working to support Gulf Coast communities on economic and social rights issues.

WILLIAM QUIGLEY

Even though I have been a civil rights lawyer for over twenty-five years, I really did not know much about international human rights until a few years ago. For two decades my concentration was mostly on domestic social justice issues like poverty, the death penalty, voting rights, housing, living wage campaigns, and the like. Before Katrina, my understanding of human rights was mostly shaped by my experiences in Port au Prince, Haiti, my work with the National Lawyers Guild, Human Rights Watch, and Amnesty International, and the time I spent in Iraq with peacemakers from Voices in the Wilderness. While all these experiences taught me about human rights, it was my many visits to Haiti that taught me the most.

In Haiti, I became good friends with an outspoken advocate for human rights in Haiti, Père Gerard Jean-Juste. Fr. Jean-Juste was repeatedly threatened because he kept speaking out for the rights of the people of Haiti, especially the poor. I went to Haiti each time he was arrested on bogus charges and worked with others to get him released from prison after he spent several

months in many different prisons. In my travels to Haiti I met many human rights advocates, Haitians who were organizing to create opportunities for people and international advocates who were helping them. Since the laws of Haiti are rarely followed, international human rights are often invoked as authority in calls and campaigns for justice. Human rights are the key to all advocacy work in Haiti and forms the basis for work for economic, political, and social justice.

When Katrina hit and the levees failed, New Orleans was essentially destroyed for several weeks because the waters of Lake Ponchartrain drained into the city and put 80 percent of our community under water. As the waters were pumped out, the devastation that remained was unimaginable to most in our city. As the water receded, we were left with an almost militarized city with no working electricity, no working traffic lights, no health care, no grocery stores, no pharmacies, no schools, and miles and miles of wrecked homes and neighborhoods.

One of the very biggest challenges for all of us who lived in New Orleans was to try to come up with a way to think about what had happened and ways to think about what we were supposed to do next. In addition to being emotionally devastated by the death and loss, we did not have the intellectual ideas or vocabulary to verbalize what was going on. It was inadequate to describe this as just the aftermath of a storm. Our city looked more like the aftermath of a war, but we had not been attacked. We struggled to even know how to describe our situation. Were we flood victims? Were we refugees in our own country? Were we the new migrants, like those fleeing the disaster of the dust bowl?

Defining justice in the days and weeks after Katrina was an even harder task. If we had been attacked by terrorists, we could at least name those whose fault caused our losses. We did not know how to describe the combination of a powerful storm, years of poor planning, bungled rescue, and our inability to even return to see our homes for weeks and months afterwards.

Slowly, it dawned on me that New Orleans had become somewhat like Port au Prince. The rich and powerful hired private security mercenaries to guard their property and way of life. Automatic weapons were openly brandished. Businesses pushed their way back in and cut deals to be able to survive. Some parts of the city were off limits for months. The public was kept out by national guardsmen in uniforms who rode in Humvees. The rich and the connected started to reestablish their lives, their schools, their homes, often in schools and homes that had been occupied by the poor before Katrina. The poor were not welcomed home. They remained displaced.

It was several weeks after Katrina hit, while I was still myself displaced and working with the displaced in Texas, when I first started reading e-mailed articles about using human rights as an advocacy tool. A number of human rights organizations were working to get the word out that Katrina was, in addition to its many other failings, a human rights disaster. These early e-mails sparked interest in reframing the national response to Katrina in human rights terms.

It was also at this point that Cathy Albisa of the National Economic and Social Rights Initiative found me in Houston and asked me to help with an

upcoming tour of Dr. Arjun Sengupta, the United Nations Special Rapporteur on Human Rights and Extreme Poverty. Dr. Sengupta had a previously scheduled tour of the United States set for late October 2005. Now he wanted to visit New Orleans and the Gulf Coast as part of his tour. I worked with Cathy and others to set this up.

Dr. Sengupta's visit to the Gulf Coast in October 2005 was an opportunity for some of the displaced, some still in shelters, to come together to meet him and voice their concerns about the injustices that occurred during and after Katrina. He visited with people in New Orleans, Baton Rouge, and Mississippi. After hiring local law enforcement to accompany us, we were permitted to give Dr. Sengupta a tour of many of the most devastated areas—areas not open to the public still blocked by armed soldiers.

One of my friends on the Loyola faculty, Jeanne Woods, along with another professor and friend, Hope Lewis, submitted a nine-page document which I gave to Dr. Sengupta outlining the many violations of human rights that Katrina and its aftermath exposed. Their document further opened my eyes and my mind to the uses of human rights in advocacy.

Dr. Sengupta was visibly moved by what he heard and by the widespread severe devastation of New Orleans still quite visible two months after Katrina. When a reporter asked for his reaction, Dr. Sengupta described current conditions as "shocking" and "a gross violation of human rights." The devastation itself is shocking, he explained, but even more shocking is that two months have passed and there is little to nothing being done to reconstruct vast areas of New Orleans. "The U.S. is the richest nation in the history of the world. Why cannot it restore electricity and water and help people rebuild their homes and neighborhoods? If the U.S. can rebuild Afghanistan and Iraq, why not New Orleans?"

Dr. Sengupta's visit helped local advocates start to place our problems in a global context. His conclusions reinforced our feelings that something was desperately wrong. His view of our situation from a human rights perspective opened our eyes to new possibilities about thinking of ourselves and about new ways to cry out and act for justice.

Human rights was now squarely settling in as a part of the agenda of local activists. Over the next several months, Gulf Coast trainings by a coalition of human rights groups educated numerous local justice activists on the issues, analysis, and opportunities of human rights advocacy. Local social justice attorney Monique Harden kept raising these issues and helping educate us to the possibilities. Reports were filed with international agencies; people went to Geneva to highlight the injustices. A powerful new set of advocacy tools were now in use in justice work on the Gulf Coast. As part of our social justice critical thinking, organizing, and advocacy, human rights are here to stay.

The single most effective tool that human rights added for us was the powerful idea of the right to return contained in the United Nations Guiding Principles on Internal Displacement. Because U.S. law does not have a corresponding principle similar to the right to return, this international principle of human rights flashed like a bolt of lightning through the social justice community.

As I write this reflection, hundreds of thousands of people who lived on the Gulf Coast before Katrina remain displaced. In New Orleans alone, nearly 300,000 out of the 480,000 who lived in the city before Katrina are still not home. The right to return has been used in meetings of the displaced to help articulate the longing for home and the obligation of the government to help make that possible. It has been used in op-ed pieces and letters to the editor.

Human rights principles have not proven successful in legal proceedings so far. A federal class action suit filed on behalf of 5,000 families who lived in public housing in New Orleans explicitly included a human rights claim under the UN Guiding Principles on Internal Displacement. Though the federal judge hearing the case announced he was dismissing that part of the suit, it was fully argued in front of more than a hundred of the displaced in federal court. The judge agreed that the principle was a good one, but felt bound by higher courts to dismiss it as part of the case. The opportunity to argue it, however, was greatly beneficial as it offered another lens in which to view the injustices being suffered by the displaced families.

There is no doubt human rights advocacy has proven to be a powerful new tool for us in the Gulf Coast. While its use has not yet resulted in any concrete accomplishments, it has helped local communities find the words and the principles to describe some otherwise indescribable injustices and to place the local struggle for justice squarely within the international context where it belongs.

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SHARDA SEKARAN

In late August 2005, hurricanes Katrina and Rita devastated the Gulf Coast of the United States, left thousands dead or missing, and displaced residents in the hundreds of thousands. The impact continues to be tremendous for the survivors scattered across the country and for those struggling to return to the region to rebuild their lives and communities.

The world was shocked by this disaster, not only because of its magnitude, but because of what it revealed about social inequity and the devaluation of the poor, working class, and African Americans in this country. Many people in the international community had never been confronted with the stark disparity in resources and wealth in the United States. The hurricanes washed away the veneer of American prosperity and freedom and revealed a human rights crisis.

For human rights advocates, particularly those focusing on economic and social rights, the crisis in the wake of hurricanes Katrina and Rita begged for the application of international standards. Clearly, the United States was not living up to its human rights obligations. The images emerging from the Gulf Coast looked like they were coming from a Third World country and shattered any preconception that gross violations of human dignity, freedom, and life were not legitimate concerns in one of the world's wealthiest countries. Likewise, for grassroots activists and organizers in the Gulf Coast, references

to international human rights law offered the potential to shed new light on their struggle and apparent abandonment by the government. It gave legitimacy to their demands for basic protections and resources to ensure the well-being of survivors.

From every stage prior to, during, and following the disaster, human rights violations were rampant. Poverty was an epidemic in the Gulf region well before the hurricanes, particularly in the African American community.[1] This poverty, coupled with racism, segregation, corruption, and recklessly poor disaster preparedness, contributed to unequal vulnerability and shockingly inadequate evacuation. These injustices were then exacerbated in the relief and recovery stage, where resources were squandered or used corruptly, and the poor were systemically excluded from planning and rebuilding and denied adequate support to salvage their homes and communities.

Given the long-standing dire warnings about the potential for such a disaster and the special risks for New Orleans, the gross neglect of the protective infrastructure was reprehensible.[2] The evacuation planning ignored human rights and the needs of the poor, elderly, incarcerated, and less able. What in some ways might be even more appalling, given that the failures in preparation and evacuation were so apparent that even the government was forced to acknowledge them,[3] was the extreme lack of effort in helping survivors return and rebuild.

Many low income people displaced by the hurricanes have either been barred from returning to their homes (as in the case of many New Orleans public housing residents) or have been less formally excluded because there have been woefully few resources committed to developing infrastructure, basic services, and human rights protections for the poor. Whether deliberate or not, this neglect in state responsibility has had the impact of removing from the region the poor and much of the African American community, who have been systematically marginalized and abandoned through every stage of the disaster.

PUTTING KATRINA AND RITA IN A HUMAN RIGHTS CONTEXT

Human rights are certainly not a magic bullet for the many problems being faced in the post-hurricane U.S. Gulf Coast. It was very important for advocates and allies working in the region to make it clear that naming the plight of Katrina and Rita as a human rights issue would not necessarily lead to immediate and effective remedy. Very soon after the disaster, some grassroots advocates were calling for international observers to visit the region to document violations. While this might prove to be difficult, if not impossible, for political reasons, it was important to make sure that these activists received support for their calls for monitoring and accountability and were not discouraged from claiming their rights as human beings.

There are no international bodies in a position powerful enough to effectively pressure the United States into ensuring human rights protections. However, as a grassroots approach, human rights could provide a compelling

framework for developing an analysis to describe what was so inherently reprehensible about the management of the disaster and the treatment of communities in the aftermath. Human rights offered a vision, along with concrete principles, for how state and local agencies should have responded to the crisis.

Though virtually unknown by local organizations before Katrina and Rita, the United Nations Guiding Principles on Internal Displacement played a central role in grassroots human rights organizing and advocacy in the region, particularly those principles associated with the right to return, which have been widely used in community advocacy. The application of the Guiding Principles emerged from rhetorical confusion by commentators, policymakers, and pundits in the early days after the hurricane, who struggled with what to call this newly uprooted population of people. Under international standards, people who are displaced from their homes due to natural or unnatural disasters but remain within the confines of their country of origin are called Internally Displaced Persons or IDPs.

The term "refugees" was often used to describe the tens of thousands left behind in New Orleans and elsewhere on the Gulf Coast and the hundreds of thousands who could not go home. Comparing those waiting in front of the New Orleans Convention Center with people in the Sudan or Haiti was commonplace. However, critics challenged the description of U.S. citizens as "refugees," finding it offensive to imply that this population of people, by and large African American, was not from the United States. Others preferred to call Katrina and Rita victims "evacuees." However, this did not seem an adequate term to describe people who not only lost everything but were also scattered widely across the country and might not be unable to return to their homes and communities ever again. Even those who could go back to the region did not know what term best described their plight.

Human rights advocates insisted that neither "refugees" nor "evacuees" was appropriate—the people run out of their homes by Katrina and Rita were IDPs. Furthermore, they maintained that defining the status of hurricane survivors was not merely a question of semantics but had major implications for the protections afforded to this population and obligation of the state. Activists were emboldened by the fact that both the U.S. government's Department of State and Agency for International Development (U.S. AID) have acknowledged the Guiding Principles as the recommended framework for countries around the world facing crises similar to the Gulf Coast hurricanes.[4] In July 2001, Betty King, U.S. ambassador to the UN, stated that "all states should apply internationally recognized norms with regard to internally displaced persons." U.S. AID policy sets forth important principles about the treatment of IDPs, including that their home country has "primary responsibility for their welfare."[5]

Most on the Gulf Coast had never heard of the term "internally displaced persons" or the UN Guiding Principles on Internal Displacement. But the description gained momentum as people became educated about its meaning. Within a few months, thanks to much outreach by human rights advocates, the concepts of internal displacement and human rights were being

regularly discussed in meetings and strategy development plans by hurricane survivors.

THE UN GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

The Guiding Principles compile and restate principles of international and humanitarian law to set forth the rights of IDPs and the responsibilities of governments in situations of displacement, including natural disasters. These rights include: "(1) protection from arbitrary displacement in the first instance; (2) protection and assistance after displacement has taken place; and (3) assistance with safe and voluntary return or resettlement and rehabilitation."[6] The Guiding Principles also reiterate basic human rights concepts of equality and human dignity. IDPs have the right to dignity and physical, mental, and moral integrity and should enjoy rights and freedoms on an equal basis with other persons in the country.

The Guiding Principles recognize government obligations in responding to natural disasters. IDPs have the right to request and receive protection and humanitarian assistance, and individuals with special needs, including children, persons with disabilities, and the elderly, are entitled to special assistance. IDPs have the right to an adequate standard of living, which includes essential food and water, basic shelter and housing, appropriate clothing, medical care, and sanitation. The principles recognize IDPs' right to family life and require that family members' wish to remain together be respected and that separated families should be united as soon as possible. The Guiding Principles also include rights to information about missing relatives and standards concerning access to the remains and grave sites of the deceased.

The Guiding Principles clearly set out the government's obligations in light of IDPs' right to return. Special efforts should be made to ensure participation of IDPs in the planning and management of their return and resettlement. The Principles also state:

> Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall make efforts to facilitate the reintegration of returned or resettled internally displaced persons.[7]

Nathalie Walker of Advocates for Environmental Human Rights (AEHR) in New Orleans, Louisiana, describes the value and impact of the IDP Guiding Principles on organizing and activism in the Gulf Coast:

> It is such a holistic approach. There's virtually no area of need that's not covered by the U.N. Guiding Principles and by our own government's State Department policy. That's what we realized we needed . . . When we brought it to citizens and community groups . . . their reaction was uniformly and overwhelmingly positive.

They were thrilled to see all the things they know they need being talked about in these policies and guidelines.[8]

THE RIGHT TO RETURN

Because hundreds of thousands of people were not only displaced but scattered across the country, the Guiding Principles that reference a right to return had particular significance for survivor activists. The right to return was not a principle that people on the Gulf Coast really ever considered before Katrina and Rita. After the hurricanes, however, hundreds of thousands of displaced people searched for a way to express their deep longing for a way back and a way to re-create their severely damaged homes and communities. No traditional expression in U.S. law or understanding of basic rights was adequate to convey the sense that people were wrongfully separated from their communities.

The right to return has been frequently invoked by local advocates in speeches, organizing materials, demonstrations, op-ed pieces, and even in litigation. Groups and individuals raised the right to return before local, national, and international forums, as a way to crystallize one of the core human rights violations being inflicted on the displaced. Public housing residents and allies continually invoked the right to return in the community and political organizing work to reopen the 5,000 apartments occupied by families, in some cases for generations, before Katrina and Rita.

OUTREACH AND ADVOCACY

Very soon after the hurricanes, human rights advocates like the U.S. Human Rights Network and the National Economic and Social Rights Initiative (NESRI), Environmental Advocates for Human Rights, and the Brookings Institute produced statements describing the human rights implications of Katrina and Rita and outlining the UN Guiding Principles on Internal Displacement. They also conducted trainings and workshops to support local activists in referencing relevant human rights standards and developed standards for conducting participatory documentation. The Guiding Principles were discussed at many grassroots activist meetings and became part of ongoing public education and outreach. They have been discussed before planning meetings, city council meetings, and before elected and appointed officials of all jurisdictions. The U.S. Human Rights Network launched a major public education campaign demanding recognition of and adherence to human rights standards by the U.S. government in its Katrina-related policies. The campaign included a widely circulated sign-on letter endorsing the use of the Guiding Principles.

The Guiding Principles were included as a separate and distinct legal claim in a federal class action lawsuit brought on behalf of the thousands of displaced residents. Though it appeared that the court would not allow the principles to be used to create an independent legal claim, they were useful in reminding

the court and the parties of the international human rights context in which to evaluate actions and inactions by the government in the provision of housing for the displaced. To a much lesser extent, the principle that the displaced have a right to participate in decisions about their future has been a part of discussions and presentations in local organizing. However, in the year after Katrina and Rita, the other rights protected by the principles did not seem to have been utilized in advocacy as much as the right to return.

Post-Katrina campaigns that focused on civil and political rights, such as the right to vote (which was severely compromised by restrictions on absentee voting by IDPs) and the fair treatment of prisoners (who were abandoned or treated with gross negligence during the storm), used a human rights message but did not often reference IDPs or the Guiding Principles. Similarly, the ongoing efforts to stop discrimination in the provision of rental housing and other services have also neglected to regularly reference IDPs and the Principles.

Particularly in the cases of voting and discrimination, human rights standards may not have been used because many relevant principles are embodied in current U.S. laws and popular expectations. The United States has the legal words and phrases to discuss the right to vote and the right to be free of discrimination. On the other hand, a right to return for IDPs, a human right to housing and health, and the right to participate in post-disaster public policy and decision-making were unfamiliar ideas, for which the domestic standards were inadequate on their own.

There was a range of goals and expectations for the activists and organizers who chose to employ a human rights approach for their advocacy work. Some were primarily focused on documentation and accountability, others wanted to increase international pressure on the U.S. government, and others hoped to build solidarity and cooperation among different groups through human rights. Soon after the hurricanes some human rights organizations began attempts to document violations in the Gulf Coast. Human Rights Watch issued a statement on human rights abuses committed against prisoners. The University of California–Berkeley's International Human Rights Law Clinic, in partnership with Tulane University, issued a report on the human rights of undocumented workers.

NESRI, which was less than a year old at the time of the Gulf Coast hurricanes, attempted to use its economic and social rights mandate to address the broader range of human rights violations, including the rights to housing, health care, and education. Because NESRI had limited capacity, it primarily took on a supportive role. It had neither the staff nor the funding to do full-scale documentation, especially given the scope of the disaster and displacement. Instead, it provided background on the standards, relevant human rights analysis, educational materials, and training for activists in human rights standards and protocol for participatory documentation.

NESRI also joined the U.S. Human Rights Network, Amnesty International (U.S.), Environmental Advocates for Human Rights, Saving Our Selves, and others to organize workshops in New Orleans, LA, and Biloxi, MS, to train local activists on applying international human rights law to the

Gulf Coast. Many of the groups that spearheaded these trainings also participated in efforts to engage with international monitors and institutions such as the United Nations Human Rights Committee and the Inter-American Commission on Human Rights hearing organized by the UC–Berkeley's International Human Rights Law Clinic. A team of local advocates traveled from the Gulf Coast to Geneva, Switzerland, in order to testify before the UN Human Rights Committee. Among the issues raised was the violation of housing rights, discrimination, and application of the Guiding Principles. In direct response to the testimonies of Katrina survivor activists, Human Rights Committee member Michael O'Flaherty specifically asked the United States if it had applied the Guiding Principles in Katrina. Despite the United States's failure to actually implement the principles, the United States felt pressure to recognize their importance on the international stage. It issued the following reply:

> The U.S. strongly supports these voluntary principles and recognizes that they provide a useful framework in addressing the numerous challenges posed by internal displacement. Indeed they articulate multiple important protections that also find expression in the Covenant, which is of course a legally binding treaty. . . . [T]the US's response to the displacement resulting from Hurricane Katrina has been informed by its obligations under the Covenant and under U.S. laws, including providing relief assistance to all disaster victims as soon as possible without discrimination. At the same time, the U.S. continues to examine its response to Hurricane Katrina and is aggressively moving forward with implementing lessons learned from Hurricane Katrina.[9]

In fact, community groups found that their presence in Geneva and demand for compliance with the principles did influence the government. After local advocates returned from Geneva, they decided to hold a press conference to announce that the UN Human Rights Committee had concluded its review and expressed concern "about information that poor people, and in particular African Americans, were disadvantaged by the rescue and evacuation plans implemented when Hurricane Katrina hit the United States of America, and continue to be disadvantaged under the reconstruction plans."

The press conference was scheduled in Gert Town in front of a house that had crashed down and had been left for ten months without any removal. Nathalie Walker describes the press conference:

> [W]hen we got to the press conference to start it, the corps of engineers had ordered some of the crews that had been doing rebuilding work in the ninth ward to come over to our press conference and get that house out of there because they didn't want that to be the backdrop for the press conference . . . one of the final questions that one of the reporters asked was "Do you really think that this human rights stuff is going to get you anywhere?" And Rev. Dejean (from the Gert Town Revival Initiative) shot back without skipping a beat, "It already has. This house has been here for about the last year and it's getting removed right now as we speak." So it was a great way to close it out and it was a perfect example of why people who have these defeatist attitudes about, "Well, it's not mandatory. Isn't it all just theory," are wrong. You can make it work on the ground.[10]

INTERNATIONAL SOLIDARITY

The human rights disaster of hurricanes Katrina and Rita also received attention from international grassroots activists who faced similar catastrophes. A New Orleans housing rights advocacy group, the National Policy and Advocacy Council on Homelessness, developed a correspondence with a housing rights group in Thailand, the Asian Coalition for Housing Rights (ACHR). Both groups had been working on post-disaster housing access for poor survivors who were being discouraged from returning to their homes.

ACHR worked with survivors of the 2004 tsunami in South Asia that killed hundreds of thousands and left many more homeless. ACHR was part of a multi-country Tsunami Survivors Network that bridged organizing efforts on the village level with regional, national and international networks. The parallels between what tsunami and Katrina and Rita survivors were experiencing was remarkable. As in the Gulf Coast, poor tsunami survivors were discouraged from returning to their home villages, and sometimes were officially forbidden to do so by the state or private interests. The beachfront areas they had lived on for generations were now prime real estate and most of the poor never had legal rights to the land.

One of the major differences between the two situations was that survivors in Asia were not as widely displaced as in the Gulf Coast and were quickly able to return to nearby areas. For this reason, the task of organizing these communities and initiating community-led rebuilding was more feasible. Organizers formed community meetings and started building networks within days of the disaster. The Tsunami Survivors Network approach was guided by a commitment to human rights and full participation of the affected communities in planning and rebuilding. The strategy proved to be very effective. Villagers mobilized to reoccupy their homelands without any official permission, and began reconstructing their homes and the process of claiming recognition of their rights as residents.

Through ongoing communication with ACHR, NPACH, AEHR, and NESRI, a transnational exchange was formed between the United States and Asia. The goal was for people from the two survivor communities to learn from one another about operationalizing human rights into a platform for self-determination and access to housing. The first step was a visit from representatives of ACHR to New Orleans in June 2006. The visitors from Asia were shocked at the lack of recovery they witnessed. Somsook Boonyabancha, director of Community Organisations Development Institute (CODI) in Thailand, told Reuters she was shocked at the lack of progress in New Orleans. "I'm surprised to see why the reconstruction work is so slow, because this is supposed to be one of the most rich and efficient countries in the world. It is starting at such a slow speed, incredibly slow speed."[11]

ACHR was so moved by what they saw in New Orleans that they raised money to help sponsor a delegation from the Gulf Coast to travel to Thailand and Indonesia to meet with community activists and observe their projects. Subsequently, two groups from Louisiana and Mississippi went to Asia from September through November 2006. They returned with a new appreciation

for human rights, not only as a platform for demanding government responsibility but also as a practical tool for community survival and self-help.

> I know we talked about things that happened with the tsunami. I don't even have a word to describe the way I felt when I heard about what these people are doing. I thought, boy if we could do that in the United States, wouldn't it be so great. And they lost 200 times more people than we did. The devastation was much greater. And yet you talking about "Don't come back to New Orleans. We had a flood." They had a tsunami. It wiped out everything. They're back! I mean that was mind boggling to me. So they have given me a new shot in the arm to go back and say we can do this but we have to change our mindset. I mean those people have a different mindset. I think one thing wrong with the United States is that everybody wants to be right. Every one of those guys who talked about it (tsunami survivor advocates), said call in the community people. They know what they need. They know where the people are. They realized that the people know. But do we call people from the community to the table? You call one people in the community to go testify in Washington but you still not bringing them to the table in your rehabilitating their areas.
>
> —Rev. Lois DeJean, Gert Town Revival Initiative

Other members of the international human rights community who were invited to visit the Gulf Coast were equally shocked by the lack of progress and government neglect of basic human rights. Dr. Arjun Sengupta, the United Nations Special Rapporteur on Human Rights and Extreme Poverty, visited Mississippi, New Orleans, and Baton Rouge in late October 2005. He toured the devastated areas and listened to the evacuees still in shelters and those living out of town with family. His visit helped to publicize the government's failure to adequately prepare and respond to the disaster and the devastating effect it had on the most vulnerable populations. His final report described how the poor, African American, elderly, and disabled where left behind during the disaster and how the poor were being excluded from plans to rebuild New Orleans.

The Gulf Coast has gained new respect for international human rights because they provide a more appropriate way to look at what should be happening. The fact that there is an international human right of internally displaced people to return to their homes and a responsibility on government to help is heartening even though yet unfulfilled. People in the Gulf Coast still have a long road to reclaiming their communities. In order to fulfill their basic rights as human beings, they should be given adequate support to live with dignity, and under better conditions than existed before the storms. The grossly unequal living standards and rampant poverty that have been longstanding problems in the region create a breeding ground for human rights violations and should not be replicated.

Katrina and Rita exposed a U.S. human rights crisis propelled by greed, indifference to the value of human life, and racism. It has demonstrated the urgency of claiming human rights as a mechanism for empowerment, vision for a healthier society, and platform for action. It has also positioned human rights violations experienced here at home into the international context for the world to witness. Activists adopting this approach have a great deal of

hope but also face the very real challenges of advancing the human rights framework in a country where it has been either unknown or aggressively resisted. It is still too soon to cite any major successes achieved through a human rights strategy other than the psychological and philosophical shift that it has offered activist disaster survivors in articulating their struggle, goals and demands.

NOTES

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7. UN Commission on Human Rights, 54th Session, "Guiding Principles on International Displacement," E/CN.4/1998/53/Add.2, annex (February 11, 1998).

8. Nathalie Walker, in discussion with author, November 2006.

9. Mr. Igor Timofeyev in his response to questions about Hurricane Katrina and migration. Press release available online at geneva.usmission.gov/Press2006/0718iccprResponse.html.

10. Nathalie Walker, in discussion with author, November 2006.

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About the Editors and Contributors

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