

INTRODUCTION

CLOSE TO HOME: SOCIAL JUSTICE ACTIVISM AND HUMAN RIGHTS

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Professor Louis Henkin has offered the following description of U.S. human rights policies:

[I]n 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.¹

Although most human rights scholars and activists may not express their views as eloquently as Professor Henkin, the vast majority would agree with his assessment. Indeed, in commentary and scholarly articles, the words “U.S. human rights policy” invariably seem to be followed by the word “exceptionalist.” This exceptionalism is reflected in the history of American ratification of human rights treaties and the treatment of ratified treaties under domestic law. The United States has ratified only three of the eight core human rights treaties.² Only the United States and Somalia have failed to ratify the Convention on the Rights of the Child, and Somalia has not had a functioning central government since 1991. The United States has attached reservations, understandings, and

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1. Harold Koh, *A United States Human Rights Policy of the 21st Century*, 46 St. Louis U. L.J. 293, 308 (2002) (paraphrasing Professor Henkin).

2. The United States has ratified the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention Against Torture (CAT).

declarations (RUDs) to the three human rights treaties it has ratified, whittling down the substantive obligations it will accept in an attempt to make its international obligations roughly equivalent to what existing domestic law already requires. And—for good measure—the United States has declared the treaties non-self-executing as a matter of domestic law.

While the narrative of U.S. exceptionalism is both accurate and compelling, it only tells part of the story. A narrow focus on the policies of the federal government and its record on human rights treaty ratification necessarily fails to capture the role that social justice movements play in building acceptance for new normative rights arguments that over time are reflected in changes in law, either through evolving interpretation of existing law or new legislation and policies.³ Scholars including Carol Anderson, Bert Lockwood, Judith Resnik, and Mary Dudziak have encouraged re-examination of historic human rights claims made by domestic rights organizations and the role that international standards, opinion, and pressure have played in re-defining the scope of domestic rights.⁴

By looking beyond the status of treaty ratification for the sites of domestication of international human rights standards, we can get a fuller picture of human rights advocacy in the United States.⁵ Within our federal system these sites are numerous and include state legislatures, city councils, national organizations of local officials, and courts.⁶ In some instances, such as human rights

3. Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 Cal. L. Rev. 1323 (2006); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373 (2007).

4. Carol Anderson, *Eyes Off The Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955* (2003); Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (2000); Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946–1955*, 69 Iowa L. Rev. 901 (1984); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 Yale L.J. 1564 (2006).

5. Resnik, *supra* note 4; Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 Emory L.J. 31 (2007).

6. See Resnik, *supra* note 4; Martha Davis, *Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights*, in 2 *Bringing Human Rights Home* 127 (Cynthia Soohoo, Cathy Albisa & Martha Davis eds., 2008).

litigation brought pursuant to the Alien Tort Statute (ATS),⁷ legislation explicitly contemplates the incorporation of international human rights law into domestic law, and courts have tried to articulate how this should occur. In other instances, mobilized activists and citizens use human rights standards to engage in a dialogue to inform, expand, and contest domestic definitions of rights.⁸ Recognition that there are what Judith Resnik has described as “multiple ports of entry” for human rights law and that “law[s] (like people) migrate, and seepage is everywhere,”⁹ helps us to understand the project that American lawyers and activists undertake when they engage in human rights advocacy.

This special issue of the Columbia Human Rights Law Review provides a unique opportunity to look at the history of human rights advocacy in the United States. It traces the roots of United States exceptionalism, discusses the political and institutional factors that have led to a renewed interest in human rights domestically, and provides insight into the advocacy benefits that human rights strategies can offer in particular cases.

Before taking on the history of U.S. exceptionalism, Larry Cox’s essay and Risa Kaufman’s review of a recent three-volume set on human rights in the United States (which I co-edited with Cathy Albisa and Martha Davis) trace the history of human rights in the United States. Despite the popular use of the slogan “bringing human rights home” (which also happens to be the title of the three-volume set), Cox and Kaufman point out that human rights is neither new, nor a foreign export. “[H]uman rights,” asserts Cox, “have never left home.”¹⁰ Instead, he argues that the core idea of human rights, “inalienable rights that belong to every human being and are inseparable from human dignity and freedom, is at the heart of our Declaration of Independence.”¹¹ Both authors note that U.S. human rights advocacy (defined as transnational advocacy about basic and fundamental rights) for issues such as the abolition of

7. 28 U.S.C. § 1350 (2000).

8. See Post & Siegel, *supra* note 3, at 378–88 (describing the process by which citizen debate over conflicting norms occasionally leads to judicial codification into legal doctrine).

9. Resnik, *supra* note 4, at 1576.

10. Larry Cox, *A Movement for Human Rights in the United States: Reasons for Hope*, 40 Colum. Hum. Rts. L. Rev. 135, 138 (2008).

11. *Id.*

slavery and women's suffrage preceded the modern international human rights movement. Cox reminds us that it was "not some wild eyed extremist but the longest serving President of the United States, Franklin Roosevelt, who in a State of the Union address argued that economic and social human rights had become self-evident,"¹² and that his wife Eleanor, then-chair of the U.N. Human Rights Commission, played a leading role in drafting the Universal Declaration of Human Rights.¹³ And domestic rights organizations, led by the National Association for the Advancement of Colored People (NAACP) and the American Jewish Congress, pressured their government and the international community to ensure that the promotion of human rights was made part of the post-World War II agenda.¹⁴

Understanding the role that domestic activists played in pushing for international recognition of human rights also helps to explain the development of U.S. exceptionalism. Concerned about the use of international forums to expose continuing racial discrimination and segregation, as well as the potential use of human rights treaties to push for domestic reform, Southern senators led efforts to block ratification of human rights treaties, beginning with the Genocide Convention¹⁵ (which they feared might create a back door for enacting federal anti-lynching legislation). Their efforts to shield human rights abuses within the United States from international scrutiny gained greater legitimacy within a Cold War environment where international criticism of the United States (even if accurate) opened up activists to charges of communist leanings. As a result, both the federal government and mainstream social justice activists opted out of participating in the international human rights system. The United States did not ratify the Genocide Convention until 1988 and failed to ratify any of the other core human rights treaties until the 1990s.

Despite the continued use of human rights language by

12. *Id.*

13. *Id.*

14. Carol Anderson, *A "Hollow Mockery": African Americans, White Supremacy, and the Development of Human Rights in America*, in 2 *Bringing Human Rights Home*, *supra* note 6, at 85.

15. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

activists such as Martin Luther King, Jr. and Malcolm X, by the 1960s there was little human rights consciousness in the United States. The 1970s brought the rise of international non-governmental organizations (INGOs) that helped create the modern field of international human rights advocacy. Unlike domestic activists whose human rights agenda was largely stifled by the Cold War, INGOs have been described as a Cold War phenomenon, whose goal was to affect behavior in hard to reach places that lacked domestic institutions capable of protecting basic rights. Their main tactic was “naming and shaming,” and their preferred methodology was researching, reporting, and campaigning. Notably, INGO advocacy was focused outside of the United States. Despite the fact that many of them were based or had significant membership in the United States, they continued the same exceptionalist tendencies of the U.S. government in that they failed to devote significant resources to human rights issues in the United States. However, they played a crucial role in creating a new type of human rights advocacy and in introducing human rights standards to the mainstream American public, even as they reinforced the perception that the promotion of human rights was about challenging rights violations abroad, but not at home.

Domestic lawyers also started doing human rights work by tackling abuses abroad. Refugee and asylum law is one area in which American lawyers historically have engaged with international human rights law and standards. In these cases, which typically call for courts to interpret and apply international human rights law, American lawyers have exposed human rights violations abroad.¹⁶ In 1980, the Alien Tort Statute (ATS) emerged as a new avenue for courts to engage with international human rights law. The Second Circuit, in *Filartiga v. Pena-Irala*,¹⁷ established that non-United States citizens can sue for violations of international human rights law in U.S. federal courts under the ATS. Because ATS claims require that the plaintiff be an “alien,” early cases brought under the statute focused on human rights abuses in other countries. Despite the fact that these cases typically involved rights abuses outside of the United States, asylum and ATS cases required American lawyers

16. See, e.g., *Saint Fort v. Ashcroft*, 329 F.3d 191 (1st Cir. 2003) (considering whether alleged torture of detainees in Haiti violated the Convention Against Torture).

17. 630 F.2d 876 (2d Cir. 1980).

to use international human rights standards within United States courts, which, in turn, required that lawyers familiarize themselves with human rights law and judges develop human rights jurisprudence.

Recognizing the role that litigation around human rights abroad has played in building domestic law and consciousness about human rights, the two Notes in this issue analyze how human rights law should be integrated into domestic law. Teddy Nemeroff looks at current efforts to hold corporations responsible, under the ATS, for participating in human rights violations around the world. In *Sosa v. Alvarez-Machain*,¹⁸ the Supreme Court affirmed the ATS line of cases by holding that it is appropriate to allow tort recovery in federal courts for certain violations of international human rights law. However, *Sosa* left open a number of complicated questions, such as when such claims are appropriate, and what the relationship between international and domestic law ought to be. Nemeroff addresses a recent Second Circuit case, *Khulumani v. Barclay Nat'l Bank*,¹⁹ in which all three judges reasoned differently about whether courts should look to international law or federal common law to determine if non-state actors may be held liable under the ATS for aiding and abetting human rights violations. Nemeroff resolves the dispute by suggesting that both international law and federal common law have a role to play: courts should rely on international law but use federal common law to fill in the gaps created when a norm from international law is removed from its context and converted into a tort cause of action.²⁰

Carrie Acus Love's Note criticizes the divergent treatment of victims of female genital mutilation (FGM) and forced sterilization under U.S. asylum law.²¹ Current law has created a statutory right for victims of forced sterilization to obtain asylum. However, there is no similar statutory grant of refugee status to FGM victims, and the treatment of claims under U.S. asylum law has varied. Love argues

18. 542 U.S. 692 (2004).

19. 504 F.3d 254 (2d Cir. 2007).

20. Teddy Nemeroff, *Untangling the Khulumani Knot: Corporate Aiding and Abetting Liability Under the Alien Tort Claims Act After Sosa*, 40 Colum. Hum. Rts. L. Rev. 231, 284–85 (2008).

21. Carrie Acus Love, *Unrepeatable Harms: Female Genital Mutilation and Involuntary Sterilization in U.S. Asylum Law*, 40 Colum. Hum. Rts. L. Rev. 173 (2008).

for integration of the existing theories for granting asylum to FGM victims by creating a right to asylum for victims of recognized human rights abuses. Such a theory would allow for more uniform treatment of victims of unrepeatable harms such as FGM and forced sterilization.

The two articles written by Deborah Labelle and Caroline Bettinger-Lopez forcefully articulate why domestic lawyers are so interested in human rights strategies and how they are putting them to use. Although a wide range of strategies are discussed, including human rights documentation, organizing, and advocacy before the United Nations and the Inter-American Human Rights system, both articles illustrate how the existing domestic rights paradigms fail to address the needs of victims of human rights violations. The articles also discuss how a human rights framework can change the very discourse within which decision-makers operate.

It is worth noting the articles' broader historical context. The advocacy work discussed could not have occurred absent two significant structural changes. First, the growth and development of international human rights advocacy (reflected by the work of INGOs beginning in the 1970s and the development of human rights mechanisms by the U.N. and regional human rights bodies though the 1990s) created new human rights strategies, new human rights activists, and new forums where victims could bring their claims. Second, the success of the international human rights movement and increasing globalization of discussions about fundamental rights built familiarity with, and receptiveness to, international human rights claims among U.S. judges, lawyers, activists, and the public.

Labelle and Bettinger-Lopez discuss how they have used human rights strategies in particular cases. Labelle, a lawyer who litigates prisoners' rights cases, discusses how human rights strategies influenced domestic litigation on behalf of women in prison who were victims of sexual violence.²² She describes how simultaneous human rights documentation and advocacy prior to and during her representation of a class of women who were victims of sexual abuse in prison changed the perception of the case. Human rights documentation reports by respected human rights INGOs and a report by a U.N. human rights expert both provided well-respected

22. Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 Colum. Hum. Rts. L. Rev. 79 (2008).

corroboration of the women's claims and focused international attention on the proceedings. Although no direct claim for human rights violations was raised before the court, Labelle's work illustrates how the tools of human rights advocacy can be applied to effect domestic litigation.

Bettinger-Lopez discusses her representation of Jessica Gonzales, a domestic violence victim whose three children were killed after police refused to enforce a restraining order against her estranged husband.²³ Unlike Labelle's account, in which human rights advocacy helped to shape the outcome of litigation before a domestic court, Gonzales did not turn to a human rights strategy until after she lost at the Supreme Court. In *Town of Castle Rock, Colo. v. Gonzales*,²⁴ the Supreme Court held that despite the fact that Colorado law requires mandatory arrest for violation of a restraining order, Gonzales had no personal entitlement under the due process clause to police enforcement of the order.²⁵

Bettinger-Lopez describes how Gonzales, rather than giving up, decided to file a petition against the United States before the Inter-American Commission for Human Rights. The petition provided an opportunity to continue her quest for governmental accountability after domestic legal avenues were foreclosed. It allowed Gonzales to continue public discussion about the government's failure to enforce the restraining order²⁶ and to contrast existing U.S. law and policy with international human rights standards that hold government actors to a higher standard. Based on jurisprudence in the Inter-American human rights system, Gonzales argued that the United States had an affirmative obligation to act with due diligence to protect individuals such as herself and her children who were known to be at risk of violence. Rather than using human rights strategies to advance claims within the domestic legal system, Gonzales' case before the Inter-American Commission must be understood as creating a venue to criticize current U.S. law and mobilize reform.

23. Caroline Bettinger-Lopez, *Human Rights at Home: Domestic Violence as a Human Rights Violations*, 40 Colum. Hum. Rts. L. Rev. 19 (2008).

24. 545 U.S. 748 (2005).

25. *Id.* at 766.

26. Because Gonzales's federal claims were dismissed prior to discovery, the proceedings before the Inter-American Commission marked the first time Gonzales told her story before a legal body considering her claims.

Faced with the exceptionalist policies of the United States, which have prevented the ratification of all but three major human rights treaties and made the treaties it has ratified essentially unenforceable as a matter of domestic law, U.S. lawyers and activists have developed other methods for the domestication of international human rights law. As illustrated by the above case studies, these strategies use human rights to influence normative understandings of fundamental rights and, ultimately, change the law. This can come about in one of two ways: either through the use of international human rights standards and foreign law as persuasive authority to influence the interpretation of domestic law or in a more long-term struggle to encourage law and policy reform. For such advocacy, the non-self-executing status of treaties (or even their non-ratification) does not preclude their usefulness; treaties, whether ratified by the United States or not, can nonetheless serve as an indication of international consensus about fundamental rights that can be persuasive to the courts and to the broader public.

In addition to the work of U.S. human rights activists, Risa Kaufman proposes an additional means of human rights domestication: the creation of institutions to oversee U.S. implementation of its treaty obligations.²⁷ These might include, for example, a national human rights commission working in coordination with human rights commissions on the state and local level. In addition to educating government officials about treaty obligations, a formal implementation structure might include systemic monitoring of the United States' compliance, providing oversight of and support to federal, state, and local authorities, as well as a process for reviewing current and new legislative policies. Such structures would create an opportunity to actively engage government officials in implementation of U.S. human rights obligations. They would also create another site for dialogue with human rights lawyers and activists.

In her article in *Bringing Human Rights Home*—as well as in her book, *Eyes Off the Prize*²⁸—historian Carol Anderson offers a stinging critique of Eleanor Roosevelt, a U.S. hero in the

27. Risa E. Kaufman, *Human Rights in the United States: Reclaiming the History and Ensuring the Future*, 40 Colum. Hum. Rts. L. Rev. 149, 158–69 (2008).

28. Anderson, *supra* note 4.

international human rights movement.²⁹ Anderson describes how, in 1947, the NAACP asked Roosevelt to introduce a petition requesting that the U.N. Human Rights Commission investigate discrimination against African-Americans in the United States. Roosevelt, then both the chair of the Commission and an NAACP board member, refused.³⁰

Roosevelt's reticence can be explained if not excused by the Cold War context in which the United States and the U.S.S.R. each used U.N. forums to attack each other's records on human rights. Roosevelt's correspondence with Walter White confirms that she was more concerned about ensuring that the Soviets did not have additional ammunition against the United States than with the substance of the NAACP's petition.³¹ Strongly influenced by Roosevelt's counsel, the NAACP dropped its petition before the United Nations.

In 1958, over ten years after she helped to quash the NAACP's petition, Roosevelt offered an alternative site for human rights advocacy in remarks delivered to the U.N. Commission on Human Rights:

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 map of the world. Yet they are the world of the individual person: the neighborhood he lives in; the school or college he attends; the factor, farm or office where he works . . . Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.³²

Today, although it is certainly true that advocacy in international forums plays a key role in the U.S. human rights movement, it is also true that the success of human rights strategies cannot be measured exclusively by looking at the domestic human

29. Anderson, *supra* note 14, at 90.

30. Mary Ann Glendon, *A World Made New* 82 (2001); Anderson, *supra* note 14, at 90.

31. See Anderson, *supra* note 4, at 111–12.

32. Eleanor Roosevelt, Address before the United Nations, *In Your Hands: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights* (Mar. 27, 1958), available at <http://www.udhr.org/history/inyour.htm>.

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rights obligations that the United States undertakes on the international stage. Instead, current human rights advocacy must be measured by the extent to which it succeeds in getting human rights standards accepted and internalized close to home.

As eloquently set out in the articles in this issue, there is a long and rich human rights history in the United States. By bringing together the diverse perspectives of a range of academics and practitioners, this issue of the Columbia Human Rights Law Review advances our understanding of the full range of human rights advocacy in the United States and makes a unique and timely contribution to the field of human rights scholarship.