

Bringing Human Rights Home

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On March 1 the Supreme Court ruled 5 to 4 that the Constitution forbids executing juvenile offenders. In putting to death people who were minors when they committed their crime, the majority noted, “The United States now stands alone in a world that has turned its face against the juvenile death penalty.” In a strongly worded dissent, Justice Antonin Scalia attacked the majority’s consideration of laws and practices outside the United States, saying that the consensus of “like-minded foreigners” had no bearing in understanding our own Constitution. One month later, in a speech to the American Society of International Law, Justice Ruth Bader Ginsburg responded that US courts should pay more attention, not less, to international norms. She added that “the notion that it is improper to look beyond the borders of the United States in grappling with hard questions has a certain kinship to the view that the US Constitution is a document essentially frozen in time as of the date of its ratification.”

The increasingly noisy debate on the High Court over the proper role of international standards of justice in our domestic law and policy reflects a broader development that is gaining momentum around the country: Human rights are coming home. Advocates are discovering how the fight for justice and freedom here can be waged through human rights, the international ethical and legal standards that the United States helped to create more than fifty-five years ago and that it is officially committed to respect and uphold. In so doing, this emerging human rights movement is forced to confront deliberate, longstanding and nonpartisan policies aimed at insuring that human rights are reserved for external use only.

Unlike many governments, the United States never underestimated the power of human rights. Led by Eleanor Roosevelt, this country played a critical role in the adoption, on December 10, 1948, of the Universal Declaration of Human Rights (UDHR), which for the first time bound all governments to a common standard of conduct. Ever since then the United States has invoked human rights standards, often aggressively if highly selectively, to criticize other governments.

Yet from the very beginning, leaders from both political parties sought to insure that the human rights the United States championed abroad could never be employed as instruments of change at home. One concern was the possibility that the Declaration’s recognition of economic and social rights—the right to a job, education, adequate food, shelter and healthcare—could be used to expose the large holes in the US social safety net. The driving fear, however, was the threat that human rights standards posed to the system of US racial apartheid. Even the treaty against genocide, adopted at about the same time as the Declaration, was blocked successfully by Southern politicians because of its potential use in the fight against lynching in the United States. As Professor Carol Anderson documents in her book *Eyes Off the Prize*, one of Eleanor Roosevelt’s less celebrated roles was to work against any enforcement powers for UN human rights bodies and thus assure Southern Democrats that racial segregation had nothing to fear from human rights.

Under a deal made by the Eisenhower Administration, the United States would for forty years refuse to ratify a single one of the human rights treaties it had helped to inspire. When some

treaties, such as the Covenant on Civil and Political Rights, were finally ratified in the 1990s it was with the explicit condition that, absent specific legislation, these treaties could not be enforced in domestic courts. This policy of “US exceptionalism” effectively deterred civil rights and social justice organizations from taking advantage of the language, laws, methodologies, mechanisms, possible alliances and unifying vision offered by the international human rights framework and movement. American-based human rights organizations put most of their focus on every country except the United States, thus reinforcing the view that human rights were of relevance only to other countries.

In recent years, however, social justice activists, public interest attorneys and even federal judges have begun to discover human rights—and to bring them home. One promising development is the recent creation of the US Human Rights Network, a membership group that already includes more than 150 mostly community-based organizations. The network is dedicated to promoting US accountability to universal human rights standards, connecting domestic social justice movements with international movements for human rights, and building a “human rights culture” in America (“Something Inside So Strong,” the network’s resource guide, is available at www.ushrnetwork.org).

In San Francisco, WILD for Human Rights has been pioneering in its use of a human rights framework. WILD (Women’s Institute for Leadership Development) led a highly creative campaign that convinced the City Council in 1998 to adopt the international Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as part of its municipal law and to conduct a “gender analysis” of city operations to determine their impact on women. The campaign included organizing a public hearing in which residents who had experienced discrimination and community leaders testified about the practical impact that adopting CEDAW would have. The ordinance that emerged required the city not only to refrain from discriminating itself but also to “take all appropriate measures” to prevent discrimination by others—including gender-based violence—within the city. An analysis of the Department of Public Works, for example, led to new, nontraditional employment opportunities for women and more streetlights in unsafe neighborhoods. And in El Paso, Texas, the Border Network for Human Rights, which works to curb abuses against immigrants, has had similar success with a human rights approach. Within a year of adopting such a strategy, the network had established ten local Committees for the Defense of Human Rights, with more than 250 families as members.

These activists join groups, like the Indian Law Resource Center and the Center for Constitutional Rights, that have long used human rights principles in the legal context. And they mirror a change in the way that international human rights organizations based in the United States think about their own country’s obligations. Global Rights, for example, is a twenty-five-year-old human rights group with offices around the world. Its work now includes the United States, with a focus on protecting the rights of migrant farm and domestic workers, addressing racial disparities in criminal justice and promoting the right to equal education. Human Rights Watch, too, has turned its attention to the domestic context, exposing violations of workers’ rights in meatpacking and other industries.

Also spurring the nation’s tentative steps toward embracing human rights is the work of scholars in the legal academy. At the University of Chicago Law School, Cass Sunstein is forcefully making the case that the notion of economic human rights is a part of our nation’s political, legal and cultural legacy. His recent book *The Second Bill of Rights* details how much of the

international human rights system flowed from the US experience of the Great Depression, as well as from core American values of freedom and human dignity. Just as legal scholars like Charles Hamilton Houston laid the theoretical groundwork for the rebirth of the equal protection clause in *Brown v. Board of Education* a half-century ago, so Sunstein and others are developing and testing the bases for human rights to assume their proper role in US law.

This legal movement is beginning to bear fruit—notably through some recent Supreme Court decisions. Over the past two decades the Rehnquist Court has rolled back a range of constitutional and civil rights protections. Yet in several landmark cases during its last two terms, the Court has vindicated fundamental freedoms, based partly on international human rights principles.

In *Lawrence v. Texas*, in which it protected consensual gay sexuality as within Americans' right to privacy, the Court cited a European Court of Human Rights decision as persuasive authority. In its decision upholding affirmative action as a tool for advancing diversity and addressing discrimination, Justice Ginsburg cited the convention against racial discrimination in her concurring opinion. In holding that executing people with mental retardation constitutes cruel and unusual punishment, the Court looked, in part, to international practices and standards of decency. And in its recent decision overturning the juvenile death penalty, the Court found relevant that every country save the United States and Somalia had ratified the international Convention on the Rights of the Child, which outlaws the practice.

These legal references have not gone unnoticed by critics of US human rights. House Republicans have introduced a resolution declaring that the “meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws or pronouncements inform an understanding of the original meaning of the Constitution of the United States.” A similar resolution has been introduced in the Senate.

What difference would it make if we in the United States began to take human rights seriously? Certainly, constitutional rights are central to our democracy. But reinvigorating a human rights culture alongside our constitutional one would advance American values of opportunity, fairness and dignity that have languished in recent years.

Think of what it would mean to the 45 million Americans without health insurance if the United States respected the right to “the highest attainable standard of physical and mental health” contained in the International Covenant on Economic, Social and Cultural Rights. In South Africa, since a landmark Constitutional Court ruling, the right to health has meant that low-income, HIV-positive women who are pregnant have had access to antiretroviral drugs to prevent transmission of the virus to their newborn babies. We can only imagine what the trajectory of the HIV/AIDS epidemic might have been in the United States if we had made human rights principles central to our early response.

And consider our nation's criminal justice policies. In 2002, for the first time in our history, the nation's prison and jail population exceeded 2 million people—almost two-thirds of whom are people of color. Yet when the Supreme Court heard a 1987 case asserting that race played a determinative role in who receives the death penalty in Georgia, it assumed the accuracy of that claim, then went on to rule that this form of unequal protection did not violate the Constitution.

In contrast, the Convention on the Elimination of All Forms of Racial Discrimination—which President Johnson signed in 1966 and the Senate ratified in 1994--requires governments to eliminate and redress “any distinction, exclusion, restriction or preference based on race, color, 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.” There is no question that Georgia’s racially biased use of the death penalty violated that standard, which focuses on government’s obligation to remedy injustice rather than a defendant’s obligation to prove individual discriminatory intent.

Just as social justice at home suffers in the absence of respect for human rights, the cost of US exceptionalism to our credibility abroad is immeasurable. It is especially great at a time when our government is pursuing the hearts and minds of the world’s nations to combat global terrorism. Moreover, legitimate US criticism of countries like China and North Korea for human rights violations is unlikely to get a fair hearing when the United States has renounced its own treaty obligations to respect the rights of Guantánamo Bay prisoners under the Third Geneva Convention. Until it was recently rebuked by the Supreme Court, the Bush Administration asserted the right to imprison US citizens indefinitely as “enemy combatants” without charging them with a crime and without affording them access to impartial review or an attorney; it still claims the authority to subject foreign nationals to such treatment. The United States has properly called for international action to address the human rights catastrophe in the Darfur region of Sudan. Yet it tried to “unsign” the International Criminal Court treaty, which was designed to address precisely that kind of gross human rights violation.

To be sure, human rights are no magic bullet. Many countries have signed and ratified all the major human rights instruments, then routinely ignored them. Bringing human rights home to the United States would spur debate, disagreement and dissent. But whatever the leanings of the leaders in power at any given time, Americans have a tradition of respect for the rule of law. Government officials would oppose rights enforcement when inconvenient or embarrassing, and judges would disagree about the fundamental meaning of various human rights—just as they do with constitutional rights. But ultimately, they would be our law and could be enforced in ways that would change lives at home and be an inspiration abroad.

There is no question that international human rights remain a foreign concept today in many—perhaps most—communities around the United States. Yet they are no more foreign than the right to vote was in Mississippi before courageous civil rights activists and ordinary people began standing up to hatred and violence in an organized way. They are no more foreign than the right to a safe and legal abortion was in Texas when reproductive rights activists began laying the groundwork for *Roe v. Wade*. They are no more foreign than the right to organize for decent working conditions was in the auto plants of Detroit or the mines of West Virginia before workers took up that cause in mass numbers. That the right to vote, the right to organize and the right to reproductive freedom are under attack right now emphasizes the challenge facing all those who care about social justice, as well as the new energy and direction that human rights can bring to those struggles.