

ANALYZING U.S. COMMITMENT TO SOCIOECONOMIC HUMAN RIGHTS

*Philip C. Aka**

I. INTRODUCTION

The severe storm, Katrina, which, on August 29, 2005, hit New Orleans and other communities in the gulf region of the United States, has drawn attention to the problem of dire poverty in the country. Many of the hundreds of persons from New Orleans who perished in the hurricane were individuals who could not leave town before the destructive storm hit because they were so poor they could not afford a bus ticket.¹ With more than one out of every four of its residents poor,

* Professor of Political Science, Chicago State University; Vice Chair, American Bar Association Committee on International Human Rights; Member, Illinois Bar; Winner, Lawrence Dunbar Reddick Memorial Scholarship Award for the Best Article on Africa Published in the *Journal of Third World Studies* in 2001. Ph.D., Howard University; M.A., University of North Texas; B.A., Edinboro University of Pennsylvania; J.D., Temple University School of Law; LL.M. Candidate, Indiana University School of Law, Indianapolis. This Article originated as a paper for an internship under the auspices of the program of international human rights at Indiana University, headed by Professor George Edwards. I thank Professor Edwards for his support and encouragement. I am also indebted to the management and staff of the Cook County Commission on Human Rights in Chicago, especially Jennifer Vidis and MaryNic Foster, for their kind help and for the placement experience their agency afforded for my internship.

1. Editorial, *Hurricane Exposes Plight of the Nation's Have-Nots*, CHIC. SUN-TIMES, Sept. 6, 2005, at 49. See also Jesse Jackson, *Katrina Exposed a Society in Which the Most Vulnerable are Left to Fend for Themselves*, CHIC. SUN-TIMES, Sept. 6, 2005, at 49 ("It was the end of the month, when money runs short. Many [of the victims] could not afford gas, train or bus. . . . Disproportionately, the poor, the old, the sick, the vulnerable were left behind."). Much of New Orleans lies below sea level, in some areas more than eight feet below; Katrina overwhelmed the levees which held the Mississippi River in check. The storm ravaged the gulf region of the United States comprising Alabama, Louisiana, and Mississippi. Of the three States, Louisiana took most of the hit and within the State, the city most hit and the cynosure of controversy regarding the federal response to the disaster is New Orleans. For a flavor of the avalanche of news media stories on the storm, see, e.g., Dan Barry, *Destruction on Mississippi River Delta Illustrates Danger of Life at Earth's Edge*, N. Y. TIMES, Sept. 6, 2005 at 23; Marc Santora and Damien Cave, *For Survivors: Sorrow, Relief and Questions About Rescues*, N. Y. TIMES, Sept. 4, 2005, at 33; Ceci Connolly, *Improvising to Replace Services for Many Thousands*, THE WASH. POST, Sept. 6, 2005, at A10. For

New Orleans ranks dubiously among the poorest communities in the United States.² If the survivors of Katrina look like something out of the Third World, Professor Cornel West says, it is precisely because they are. “New Orleans was Third World long before the hurricane. It’s not just Katrina, it’s *povertina*. People were quick to call them refugees because they looked as if they were from another country. They are. Exiles in America. Their humanity had been rendered invisible.”³ Focusing on the federal government’s laggard response to the disaster, Senator Barack Obama, Democrat from Illinois, spoke in a similar vein: “The people of New Orleans weren’t just abandoned during the hurricane, they were abandoned long ago – to murder and mayhem in the streets, to substandard schools, to dilapidated housing, to inadequate health care, to a pervasive sense of hopelessness.”⁴

Nationwide, the U.S. has a poverty rate of 12.7 percent, that is assessed as the highest in the developed world and “more than twice as high as in most other industrialized countries.”⁵ The already dismal statistics are further compounded by racism and the legacy of racial segregation. About 70 percent of New Orleans’s nearly half a million residents and 84 percent of those living in poverty are black.⁶ African Americans make up less than 13 percent of the U.S. population, but 25 percent of American poor; in contrast, Whites make up 72 percent of the total population, but only 8 percent of American poor.⁷ The average annual income in some of the predominantly black parishes (or counties) of New Orleans is \$8,000, compared to the national average of \$33,000.⁸ A United Nations report released in the wake of the hurricane projects that about 85,000 lives could be saved annually in the U.S. just by

an insightful analysis that ties the death and destruction of Katrina and its aftermath to race, see Obioma Nnaemeka, *On Race, Class, and Hurricanes: Black Bodies, Imperial Hubris*, in *WORDS AND WORLDS: AFRICAN WRITING, LITERATURE, AND SOCIETY* (Susan Arndt & Katrin Berndt, eds., Africa World Press) (forthcoming 2006) (page references in the article are as in the copy with author).

2. Nnaemeka, *supra* note 1, at 5.

3. Hermene D. Hartman, *Professor West on New Orleans*, N’DIGO (Chic.), Sept. 22-28, 2005 at 3. *See also* Jackson, *supra* note 1, at 49 (“Just as when storms hit Haiti or Indonesia, Katrina ripped the cover off poverty in America.”). West notes that poverty has grown under the second Bush administration such that “[a] million more Americans became poor” in 2004 “even as the super-wealthy became much richer.” Hartman, *supra*, at 3.

4. Nnaemeka, *supra* note 1, at 3.

5. *Id.* at 6 (quoting Jonathan Alter, *The Other America*, NEWSWEEK, Sept. 19, 2005, at 42). Translated into raw numbers, the rate comes to about 37 million people in poverty or “a nation of poor people the size of Canada or Morocco living inside the United States.” *Id.*

6. *See id.* at 5.

7. *See id.* at 6.

8. *Id.*

eliminating the disparity between blacks and whites.⁹

Katrina coincides with a growing agitation for “economic human rights now” by poverty advocacy groups in the United States.¹⁰ These two events afford an opportune moment for analysis of U.S. commitment to economic, social, and cultural human rights.¹¹ The occurrences also culminate, as well as give new urgency to, eloquent appeals from human rights scholars and practitioners for the U.S. to (re)commit itself to socioeconomic human rights. In a piece, part of a selection commemorating the fiftieth anniversary of the Universal Declaration of Human Rights (UDHR),¹² Professor Louis Henkin pled that “[i]f we cannot bring ourselves to declare [socioeconomic guarantees] ‘rights,’ we can well legislate them as entitlements,”¹³ elaborating: “[o]ur ideology, our values were not frozen in 1791 when the Bill of Rights was adopted, or in 1868 when the [Fourteenth] Amendment was ratified.”¹⁴ Instead, “[b]y legislation, by civil rights[,] and voting rights act, we have moved toward our aspirations for the Great Society.”¹⁵ Henkin counseled that “[i]t is time for the United States to take the Universal Declaration seriously in other respects, in all respects.”¹⁶

More recently, Professor Cass Sunstein has entreated the U.S. government—and Americans—to reclaim President Franklin D.

9. *Id.* at 18 (citing U.N. DEV. PROG., *Human Development Report (2005)* (prepared by Kevin Watkins)). The report berated the Bush administration for having “an overdeveloped military strategy and an under-developed strategy for human security.” U.N. DEV. PROG., *Human Development Report (2005)*, ¶ 12 (prepared by Kevin Watkins). It urged the government “to develop a collective security framework that goes beyond military responses to terrorism [because] poverty and social breakdown are core components of the global security threat.” *Id.* at ¶ 13.

10. *See generally*, THE FORD FOUNDATION, *CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN THE UNITED STATES (2004)* [hereinafter *CLOSE TO HOME*]. The cover of this book is emblazoned with the footage of a standing child behind whom is displayed the legend “Economic Human Rights NOW” spelled out in bold highlights. *See also id.* at 31 (showing a picture of protesters marching for economic human rights). The protesters carried placards which read “Welfare Reform Violates Our Economic Human Rights.” *Id.*

11. Hereinafter referred to, for terminological convenience, as “socioeconomic human rights” or “socioeconomic rights.”

12. *See* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 183rd plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

13. *See* Louis Henkin, *The Universal Declaration and the U.S. Constitution*, 31 PS: POL. SCI. & POLITICS 512, 515 (Sept. 1998).

14. *Id.*

15. *Id.*

16. *Id.* Henkin is convinced that international human rights standards have had an effect on the policies of some U.S. presidents besides Franklin D. Roosevelt. “Was President Lyndon Johnson impervious, was he not responding, to what the Universal Declaration represented, as he led the United States toward the Great Society?” he quizzed rhetorically. *Id.*

Roosevelt's "Second Bill of Rights," consisting of socioeconomic guarantees, designed to complement the original Bill of Rights adopted in 1791.¹⁷ "Roosevelt, himself a victim of polio, believed that each of us is vulnerable to dangers that cannot be wholly prevented. Insofar as the Second Bill would ensure food, clothing, shelter, and health care for all, it would insure against the worst of those dangers."¹⁸ Sunstein observed that "[m]ost Americans favor a right to education, a right to be free from monopoly, a right to social security; and in many polls, most Americans favor a right to a job and a right to health care."¹⁹ In the same vein, "the national government is committed, if only in principle, to most of the rights that Roosevelt cataloged," though the commitment "is ambivalent."²⁰ True, American leaders since FDR who would want to pursue the path of a Second Bill of socioeconomic rights have nothing resembling the political stature Roosevelt enjoyed, "[b]ut they do have economic and social circumstances that are making millions of ordinary Americans increasingly uneasy about laissez-faire."²¹

Nearly one whole decade ago, the human rights scholar, administrator, and activist Dorothy Q. Thomas urged the use of international human rights norms for protecting and promoting human rights in the United States.²² Thomas analyzed measures U.S. domestic rights groups could use, taking advantage of the expanded protection for political-civil and socioeconomic rights available under international human rights law, to strengthen their domestic efforts in the face of a hostile domestic political and legal environment that led, in the 1990s, to devastating defeats in the struggle to combat race and gender discrimination, retain affirmative action, end prison abuse, and ensure

17. See Cass R. Sunstein, *Economic Security: A Human Right, Reclaiming Franklin Delano Roosevelt's Second Bill of Rights*, AM. PROSPECT, SPECIAL REPT. ON U.S. HUMAN RIGHTS, Oct. 2004, at A24-A26 [hereinafter Sunstein, *Economic Security*]. For Professor Sunstein's book-length work embodying this argument, see CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: THE LAST GREAT SPEECH OF FRANKLIN DELANO ROOSEVELT AND AMERICA'S UNFINISHED PURSUIT OF FREEDOM* (forthcoming).

18. Sunstein, *Economic Security*, *supra* note 17, at A25.

19. *Id.* at A26.

20. *Id.*

21. *Id.* Sunstein pins much of the blame for the U.S. government's "ambivalent" commitment toward socioeconomic rights on "the pervasiveness of misleading conservative homilies about the evils of government intervention." *Id.* He bemoans the occurrence that "[f]or much too long, the far right has succeeded in defining the nation's principles, leading Americans and the world to see the United States through a distorted mirror," a distortion that because it "disserves our own history," needs to be corrected. *Id.*

22. See generally, Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15 (1996).

basic economic security for Americans.²³ Thomas advised U.S. advocacy groups that “we need a new strategy,”²⁴ specifically that “[o]ur struggle will have to be internationalized.”²⁵ Crowning it all was the foremost civil rights leader, Dr. Martin Luther King Jr. King stated, “I think it is necessary to realize that we moved from the era of civil rights to the era of human rights.”²⁶ Dr. King asked, “What good is it to be allowed to eat in a restaurant if you cannot afford a hamburger?”²⁷ King proposed an “Economic Bill of Rights” that would provide “all of [America’s] citizens with reasonable opportunities to make a living wage, obtain decent housing, receive adequate medical attention, and be meaningfully educated.”²⁸

This Article critiques the U.S. government’s approach to human rights.²⁹ In particular, it assesses U.S. commitment to socioeconomic human rights.³⁰ These guarantees encompass, among others, the right to work, including the securing of favorable conditions of work through participation in trade union activities, the right to social security, the right to food, the right to education, the right to adequate health care, and the right to housing, along with the general right to be free from extreme poverty.³¹ These rights were inspired by the Universal Declaration,³² and

23. *See id.* at 15-26.

24. *Id.* at 21. Thomas stated, “the struggle to guarantee Americans the full panoply of rights recognized under international law” is not something that can rest solely with the federal government and judiciary. *Id.* at 26. Instead, given the climate of hostility toward rights that exists within the U.S., American advocacy groups “must rely more on popular mobilization and advocacy” to bring sustainable social change in the U.S. and throughout the world. *Id.*

25. *Id.* at 25.

26. CLOSE TO HOME, *supra* note 10, inside front cover.

27. WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 126 (Univ. of Chicago Press, 1987).

28. Drew S. Days, III, *Civil Rights at the Crossroads*, 1 TEMP. POL. & CIV. RTS. L. REV. 29, 39 (1992) (emphasis in original). *See also* Martin Luther King, Jr., *Showdown for Nonviolence*, LOOK, Apr. 16, 1968, at 24 (“We need an Economic Bill of Rights. This would guarantee a job to all people who want to work and are able to work. It would also guarantee an income for all who are not able to work.”).

29. For definition of human rights, *see infra* notes 34-51 and accompanying text.

30. No clear demarcation is possible among the different subcategories of socioeconomic rights; the ICESCR (see below) makes no explicit distinction among these rights. But as one scholar explains, “[m]ost rights evident both economic and social concerns.” *See* Henry Steiner, *Social Rights and Economic Development: Converging Discourses?*, 4 BUFF. HUM. RTS. L. REV. 25, 27 (1998). Some, such as the right to work, and the right to form and join a trade union, have a dominant economic feature. *Id.* Others, such as the right to quality health care, the right to food, and the right to education, have a dominant social rather than economic feature. *See id.*

31. *See infra* notes 32-33. Extreme or abject poverty is “poverty that kills.” Jeffrey D. Sachs, *The End of Poverty*, TIME, Mar. 14, 2005, at 47. Because “[t]hey are chronically hungry, unable to get health care, lack safe drinking water and sanitation, cannot afford education for their children and perhaps lack rudimentary shelter . . . and basic articles of clothing, like shoes,” extremely poor

elaborated by the International Covenant on Economic, Social and Cultural Rights (ICESCR).³³

This Article argues that the conventional characterization of the U.S. approach to human rights provides an *inadequate* accounting of the country's activities in the human rights field, but that proper portrayal of those contributions still leaves the American human rights approach unacceptably incomprehensive. The study has four main parts, in addition to this introduction and a conclusion. Part II discusses the definition of human rights and dwells on the necessity for the U.S. to apply international human rights standards. Part III presents the traditional view of the U.S.'s approach to human rights and the small place afforded socioeconomic guarantees in that model. Part IV articulates the trouble with the traditional view. Part V constructs a comprehensive approach in human rights for the U.S. that is built on embracement of international human rights standards.

individuals are the very embodiment of deprivation of socioeconomic human rights. *Id.* Extreme poverty also spells negative ramifications for the enjoyment of other rights. Not only do victims of extreme poverty lack socioeconomic rights, they may also be denied political-civil rights, such as "participation in political processes," and fair legal treatment. HENRY J. STEINER & PHILIP ALSTON, *ECONOMIC AND SOCIAL RIGHTS*, IN *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS*, 247 (Oxford University Press 2nd ed., 2000).

32. UDHR, *supra* note 12, at arts. 22-28. Article 22 stipulates that "[e]veryone, as a member of society, has the right to social security and is entitled to realization," consistent with the organization and resources of their country, "of the economic, social[,] and cultural rights indispensable for his dignity and the free development of his personality." *Id.* at art. 22.

33. International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200, arts. 49-52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A16316, 993 U.N.T.S. 3, 6 I.L.M. 360 (1966) (entered into force Jan. 3, 1976), *available at* http://www.unhchr.ch/html/menu3/b/a_ceschr.htm [hereinafter ICESCR]. Another key instrument, besides the UDHR and the ICESCR, that provides for socioeconomic rights is the United Nations Charter. The document makes reference to employing "international machinery for the promotion of the economic and social advancement of all peoples." U.N. CHARTER preamble. Next, it lists achievement of "international cooperation in solving international problems of an economic, social, cultural, or humanitarian character" among the purposes of the new organization. U.N. CHARTER art. 1. It then states that to create the "conditions of stability and well-being necessary for peaceful and friendly relations among nations, . . ." the U.N. shall promote a multiplicity of socioeconomic objectives that include higher standards of living, full employment, and conditions of economic and social progress and development, as well as solutions of international economic, social, health, and related problems. U.N. CHARTER art. 55. Finally, Article 62 of the document created the Economic and Social Council and charged it with responsibility for making or initiating studies and reports relating to international economic, social, cultural, educational, health, and related matters and making recommendations. U.N. CHARTER art. 62. For full text of the Charter, see, e.g., HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 561-90 (5th ed., rev.1978).

II. HUMAN RIGHTS AND THE NECESSITY FOR THE U.S. TO APPLY INTERNATIONAL HUMAN RIGHTS STANDARDS

A. *Defining Human Rights*

Human rights are rights people have by reason of the fact that they are human beings. They are international ethical standards that uphold, as a birthright, the minimum thresholds individuals and communities everywhere require to live in dignity and to realize their potentials.³⁴ Human rights are not based on status, or dependent on recognition by an external authority. Nor are they granted for good behavior that can be taken away if the beneficiary engaged in bad conduct.³⁵ These standards also confer responsibility on all governments to respect, protect and help realize people's human rights,³⁶ as well as form the basis for evaluation of these governments both domestically and internationally.³⁷

International human rights instruments recognize and "guarantee" three categories of human rights: civil and political rights,³⁸ socioeconomic rights as referred to above, and "the rights of peoples"³⁹ or collectivities. Political-civil rights include, among others, the right to life, liberty and freedom of movement, rights to freedom of thought, conscience and religion, freedom of expression and the press, peaceful assembly and association, and freedom from discrimination. They were, like socioeconomic human rights, inspired by the Universal Declaration.

34. INT'L HUMAN RIGHTS FUNDERS GROUP, *FUNDING HUMAN RIGHTS: AN INVITATION*, 4-5 [n.d.] [hereinafter *IHR FUNDERS*]. Compared, e.g., to women's or worker's or prisoner's or immigrant's rights, human rights sets forth an understanding of rights as inherently the same for all people rather than as defined by any particular status. *See* *CLOSE TO HOME*, *supra* note 10, at 9-10.

35. *IHR FUNDERS*, *supra* note 34, at 4-5 (denoting that human rights affirm as inalienable a spectrum of political-civil and socioeconomic rights "that can neither be bestowed as charity nor withheld as punishment"); *CLOSE TO HOME*, *supra* note 10, at 9. *See also* *Murder Victims' Families for Human Rights, Newsletter 1* (Sum./Fall 2005) at 11 (interview with Sister Helen Prejean on the death penalty and human rights) [hereinafter *MVFHR Newsletter*].

36. *See* the Declaration and Program of Action adopted by participants at the conclusion of the Second World Conference of Human Rights held in Vienna in 1993, cited in LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION 4* (The John Hopkins University Press 1999) (stating that governments have a "first responsibility" for protecting and promoting human rights).

37. *IHR FUNDERS*, *supra* note 34, at 4-5. Respect for human rights represents humankind's "last, best chance, to quote the ancient Greeks 'to tame the savageness of man and make the world gentle.'" *See* MARIANNE PHILBIN, *CLOSE TO HOME: BRINGING HUMAN RIGHTS TO ILLINOIS 12* (The Libra Foundation 2005) [hereinafter *Bringing Human Rights to Illinois*] (report of a human rights conference of similar name held in July 2005 in Chicago, quoting keynote speaker Riki Wilchins, quoting the ancient Greeks).

38. Hereinafter referred to as "political-civil rights."

39. SEYOM BROWN, *HUMAN RIGHTS IN WORLD POLITICS* 31 (Addison Wesley Longman, Inc. 2000).

The specific instrument that elaborated these rights is the International Covenant on Civil and Political Rights.⁴⁰ The rights-bearing entities for political-civil rights and socioeconomic rights are individuals.

Rights of peoples, instructively denominated “solidarity rights” by some writers, include the right to self-determination, the right to free disposal of natural wealth and resources, and the right to a safe environment, development, and peace.⁴¹ Entities which bear these rights include women, children, the disabled, elderly persons, and nationalities or ethnic groups. Both the ICESCR and ICCPR recognize and provide for these group or non-individual(ized) rights.⁴² Other group-based human rights instruments include the Convention on the Prevention and Punishment of the Crime of Genocide,⁴³ the Convention on the Elimination of All Forms of Discrimination Against Women,⁴⁴ and the Convention on the Rights of the Child.⁴⁵ The first was designed to protect nations, while the remaining two, respectively, as their very names imply, protect women and children.

Referring to the historical-sequential nature of these rights, rather than suggesting that any one category is superior to the other(s), some human rights scholars denominate these three categories of internationally protected rights as “three generations” of human rights—political-civil rights as first generation, socioeconomic rights as second generation, and rights of peoples as third generation.⁴⁶

40. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976), *available at* <http://www1.umn.edu/humanrts/instree/b3ccpr.htm> [hereinafter ICCPR].

41. *See infra* note 42. What makes these rights “solidarity,” the legal scholar Professor Umozurike explains, is that they require “the solidarity of all peoples,” including “the cooperation of the other members of the international community to carry into effect.” U. OJI UMOZURIKE, *THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS* 51 (Martinus Nijhoff Publishers 1997).

42. *See* ICESCR, *supra* note 33, at art. 1 and ICCPR, *supra* note 40, at art. 1.

43. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]. For a text of this instrument, see *Center For The Study of Human Rights (Columbia University) in 25+ HUMAN RIGHTS DOCUMENTS* 34-6 (J. Paul Martin ed., 2001) [hereinafter HUMAN RIGHTS DOCUMENTS].

44. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14 (entered into force on Sept. 3, 1981) [hereinafter CEDAW]. A text of the treaty can be found in HUMAN RIGHTS DOCUMENTS, *supra* note 43, at 53-57.

45. Convention on the Rights of the Child, *adopted* Nov. 20, 1989 (entered into force on Sept. 2, 1990) [hereinafter CRC]. A text of the treaty can be found in HUMAN RIGHTS DOCUMENTS, *supra* note 43, at 80-92.

46. *See, e.g.*, KAREN A. MINGST & MARGARET P. KARNS, *THE UNITED NATIONS IN THE POST-COLD WAR ERA* 164-65 (Westview Press 2d ed. 2000).

Human rights are a “rule in the interest of individuals”⁴⁷ that approaches whole(some)ness only when *all* three categories of human rights without exception are protected and promoted. To underscore the interdependency and indivisibility of the three categories of human rights, “[p]olitical-civil and socioeconomic rights are individual rights that” individuals within a group may also enjoy, “while collective rights such as the rights to peace . . . are collective rights that individuals may also enjoy. The U.N. recognizes the equality of opportunity for development as a right that belongs to both individuals and nations.”⁴⁸ Also, as we have seen, international human rights instruments, such as the ICCPR and the ICESCR “guarantee” both individual and collective rights.⁴⁹ Finally, the International Convention on the Elimination of All Forms of Racial Discrimination,⁵⁰ an instrument devoted to protecting and promoting the rights of peoples, provided for the elimination of discrimination in the enjoyment of political-civil rights as well as socioeconomic rights.⁵¹

B. Necessity for the U.S. to Apply International Human Rights Standards

The U.S. is said to possess a “distinctive rights culture” “not fundamentally inconsistent with universal human-rights value” that some analysts contend “sets it apart” from other countries.⁵² But this attribute, assuming America has it, should not except or exempt it from international (and universal) human rights standards, just like, for example, a claim years ago of “Asian values” by a group of Asian countries, did not exempt these countries from universal human rights standards.⁵³ Obedience to international human rights standards is good

47. David P. Forsythe, *Human Rights Fifty Years after the Universal Declaration*, 31 PS: POL. SCI. & POLITICS 507, 508 (Sept. 1998).

48. See Philip C. Aka, *Prospects for Igbo Human Rights in Nigeria in the New Century*, 48 HOW. L.J. 165, 172 (2004).

49. See ICESCR, *supra* note 33, at art. 1; ICCPR, *supra* note 40, at art. 1.

50. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965 (entered into force on Jan. 4, 1969) [hereinafter ICERD]. A text of this instrument can be found in HUMAN RIGHTS DOCUMENTS, *supra* note 43, at 37-44.

51. ICERD, *supra* note 50, at art. 1.

52. See Harold Hongju Koh, *On America's Double Standard*, AM. PROPSECT, SPECIAL REPT. ON U.S. HUMAN RIGHTS, Oct. 2004, at A16. See also Henkin, *supra* note 13, at 514 (Sept. 1998) (commenting on how “[t]he United States had an established rights jurisprudence and was well-set in its constitutional ways when the Declaration [of Human Rights] was promulgated”).

53. See Forsythe, *supra* note 47, at 508; Henkin, *supra* note 13, at 515. The affected Asian countries include China, Indonesia, Malaysia, and Singapore. See generally, ANTHONY L. LANGLOIS, *THE POLITICS OF JUSTICE AND HUMAN RIGHTS: SOUTHEAST ASIA AND UNIVERSALIST*

for the United States government, as well as for the United States human rights community. I will address each of these topics in turn. The discussion on the benefits of international human rights for the U.S. conducted here is broad or general; illustration of the diverse issue-areas of that application is saved for Part V of the Article.

1. Benefits to the U.S. Government

The U.S. needs to embrace international human rights standards because human rights violations occur in the U.S., as in many other countries. “When a family is homeless, when a school provides inadequate education, when people with disabilities are denied universal access to buildings, when a woman is beaten or raped, or when a hate crime is committed, these are human rights violations.”⁵⁴ These are instances of human rights violations that took and still take place within the United States.⁵⁵ Second, because it incorporates an appeal to rights based solely on a person’s humanity,⁵⁶ the human rights approach embedded in embracement of international standards is superior. Although the U.S. Constitution and international human rights instruments share a similarity embedded in the inalienability of rights the two sets of documents embody (the quality analysts (un)wittingly celebrate when they talk about the U.S.’s distinctive rights culture), international human rights documents assert the inalienability better than the U.S. Constitution.⁵⁷ The scope and meaning of inalienable rights have come under attack during periods of internal and external threats in the U.S.⁵⁸

Such risk of derogation is absent with internationally-guaranteed human rights, given that phrasing one’s work in human rights terms “takes you back to the primacy of equality and dignity[,] *no matter what the circumstance.*”⁵⁹ And, third, the human rights approach affords a baseline for “independent review,” now non-existent, “of the inadequacies of the U.S.” constitutional and judicial order,⁶⁰ as Part V

THEORY (2001).

54. National Center for Human Rights Education, (Introductory comments to) Universal Declaration on Human Rights.

55. See *supra* text to note 4 (Senator Obama recounting the deprivation endured by New Orleans residents and discussing the laggard Federal response to hurricane Katrina).

56. See *Bringing Human Rights to Illinois*, *supra* note 37, at 2 (remarks of Dorothy Q. Thomas).

57. CLOSE TO HOME, *supra* note 10, at 9.

58. See *id.*

59. See *id.* (emphasis added).

60. See *id.* at 34.

elaborates.

The Universal Declaration was designed “as a common standard of achievement” “all peoples and all nations” require to live in dignity.⁶¹ A feature critical to the nature of human rights is internationality and/or universality; human rights necessarily signify *international* human rights. President Franklin D. Roosevelt’s speech in 1941 elaborating “four freedoms” to be enjoyed “everywhere in the world” at the end of World War II,⁶² recognized these international standards to be applied to every nation without exception. So too, arguably, did his address to Congress in January 1944, urging “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,”⁶³ but particularly so did his administration’s initiatives leading to the formation of the United Nations, which organization institutionalized these international standards. Roosevelt’s own wife, Eleanor, deservedly widely acclaimed as the “mother of the international human-rights movement,” led those initiatives.⁶⁴ President Roosevelt’s commitment to a Second Bill of Rights of socioeconomic benefits is probably responsible for the fact that all U.S. States today, excepting Iowa, accord some degree of constitutional recognition to access to quality education.⁶⁵

After helping found the United Nations, the U.S. government, succumbing to pressure from southern states to maintain racism and Jim Crow segregation, withdrew its support for international human rights standards and abandoned the U.N. human rights treaty system. The occurrence severely impeded the struggle for black equality,⁶⁶ hurt the

61. See UDHR, *supra* note 12, at Preamble.

62. See 2 ERIC FONER, VOICES OF FREEDOM: A DOCUMENTARY HISTORY 158-60 (W. W. Norton & Company 2005). The four freedoms are freedom of speech and expression, freedom of every person to worship God in his own way, freedom from want, and freedom from fear. See *id.* at 159.

63. See Sunstein, *Economic Security*, *supra* note 17, at A24 (citing Franklin D. Roosevelt’s Jan. 11, 1944, message to Congress on the State of the Union).

64. Elisa Massimino, *Holding America Accountable*, AM. PROSPECT, SPECIAL REPT. ON U.S. HUMAN RIGHTS, Oct. 2004, at A14. Eleanor Roosevelt’s services for human rights took place outside her role as First Lady which ended in 1945 following the death of Franklin Roosevelt. She was a delegate to the United Nations from 1945 to 1952 and again from 1961 to 1962. In the first period the President was Harry S. Truman (1945-1953); in the second period it was John F. Kennedy (1961-1963). Mrs. Roosevelt died in 1975 at the age of ninety.

65. This is how, hopefully rightly, I read Professor Sunstein’s statement, Sunstein, *Economic Security*, *supra* note 17, at A25, that “[I]t is noteworthy that of all the rights listed in FDR’s Second Bill, the right to education is by far the most frequently included in the constitutions of the States. Forty-nine of the [fifty] give it some constitutional recognition (Iowa is the only holdout).”

66. See generally, CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-52 (Cambridge Univ. Press, 2003)

struggle for socioeconomic human rights,⁶⁷ and had a negative effect on the country's leadership of the international human rights movement.⁶⁸ The end of the Cold War afforded the U.S. a fresh opportunity for (re)dedication to human rights. The U.S. government under President William J. Clinton seized that opportunity during the 1990s by participating in the humanitarian interventions in Bosnia, Kosovo, and East Timor, as well as in the U.N. human rights tribunals in The Hague, Netherlands and Arusha, Tanzania.⁶⁹

The participation in international human rights regime endured only briefly before it came to an abrupt end with the onset of President George W. Bush's war on terrorism, launched in response to the terrorist attacks of September 11, 2001. The attention to human rights by the U.S. and other Western countries during the 1990s was *not* because these countries committed themselves to a new era marked by the backing of human rights principles with political will and military power,⁷⁰ instead, "[i]n reality, it was only an interregnum, made possible because Western militaries had spare capacity and time to do human rights work."⁷¹ The war on terrorism, marked as it is by "indefinite military campaign against terrorists," means that the U.S. has little time and energy—and inclination—for international human rights work.⁷² The international human rights movement does not have its headquarters in Washington, so the U.S.'s being entirely absorbed by domestic priorities related to the

(narrating how the NAACP and African American leaders sought unsuccessfully to launch an offensive against segregation and Black inequality in the U.S., using the "prize" of human rights, which they assessed as the only lexicon laced with the language and moral power to address the power and legal inequality Blacks faced along with their educational, health care, housing, and employment needs). See also Gay McDougall, *Shame in Our Own House*, AM. PROSPECT, SPECIAL REPT. ON U.S. HUMAN RIGHTS, Oct. 2004, at A23 (pointing out that the U.S. lack of appetite for international human rights was the reason the movement for racial equality in the U.S. focused advocacy largely on issues such as due process, voting rights, and nondiscrimination).

67. See McDougall, *supra* note 66, at A23 (stating that the limitation of the strategy focused on limited category of political-civil rights in the struggle for equality is borne out in the reality that "[t]he still-unmet goals of the civil-rights struggle today are primarily about economic and social needs," such as "a living wage, decent shelter, adequate food, life-sustaining health care").

68. See McDougall, *supra* note 66, at A23 (referring to President Dwight Eisenhower's decision "to sacrifice American leadership on human rights rather than risk defeat on the Bricker amendment," named after Senator John Bricker of Ohio, a Republican, designed to minimize the treaty-making powers of the President); see also Margaret E. Galey, *The Universal Declaration of Human Rights: The Role of Congress*, 30 PS. POL. SCI. & POLITICS 524, 524 (1998); Thomas, *supra* note 22, at 19-20.

69. Michael Ignatieff, *Is the Human Rights Era Ending?*, in PERSPECTIVES ON TERRORISM: HOW 9/11 CHANGED U.S. POLITICS 103, 104 (Allan J. Cigler, ed., 2002).

70. *Id.* at 104-05.

71. *Id.* at 105.

72. *Id.*

war on terror does not and cannot spell an end to the movement.⁷³ However, “if Washington turns away, the movement loses the one government whose *power* can be decisive in stopping human rights abuses.”⁷⁴

From a foreign policy standpoint, President Bush’s war on terrorism evokes, as Professor Ignatieff thoughtfully points out, the atmosphere of the Cold War. “Then the imperative of countering Soviet and Chinese imperial advances trumped concern for the abuses of authoritarian governments in the Western camp. The new elements in determining American foreign policy is what assets, in terms of bases, intelligence[,] and diplomatic leverage” an ally brings to the table in the war against terrorism.⁷⁵ Whereas, under President Ronald Reagan, the international human rights movement “merely risked being unpopular,” “[i]n the Bush era, it risks irrelevance.”⁷⁶ If the Cold War taught any lesson, Ignatieff said, it is that “cozying up to friendly authoritarians is a poor bet in the long term.”⁷⁷ Therefore, to promote the building of secure states that do not sponsor terrorism, the U.S. “will have to do more than secure base agreements. It will have to pressure these countries to provide basic political rights and due process.”⁷⁸ Ignatieff advised the international human rights movement “to challenge directly the [U.S. government’s] claim that national security trumps human rights. The argument to make is that human rights is the best guarantee of national security.”⁷⁹ One more danger of the continuing self-insulation of the U.S. from international human rights standards, complicated now by the war on terror, is a possible risk of a reduction in the attractiveness of the U.S. model of development to foreign countries.⁸⁰

73. *Id.* at 104. The point of Professor Ignatieff’s essay is that the U.S.’s preoccupation with domestic security priorities does not mean that “in global terms, the era of the [international human rights] movement is over.” *Id.* This is because “[h]uman rights has gone global by going local, anchoring itself in struggles for justice that can survive without American inspiration or leadership.” *Id.*

74. *Id.* (emphasis added). *Accord* Koh, *supra* note 52, at A17 (narrating the anecdote from Koh’s childhood involving the overthrown Prime Minister of South Korea who was placed under house arrest and would probably have been executed if not for the global reach to Seoul of the U.S. power).

75. *See* Ignatieff, *supra* note 69, at 105. *See also* JACKSON NYAMUYA MAOGOTO, *BATTLING TERRORISM: LEGAL PERSPECTIVES ON THE USE OF FORCE AND THE WAR OF TERRORISM* (Ashgate Publishing Limited 2005) (suggesting that President Bush’s war on terror has the effect of “rattling international law with raw power.”).

76. *See* Ignatieff, *supra* note 69, at 105.

77. *Id.*

78. *Id.*

79. *Id.*

80. *See, e.g.,* Michael Ignatieff, *Who Are Americans to Think That Freedom Is Theirs to*

Human rights are a critical source of legitimacy and soft power (power not based on display of sheer military strength).⁸¹ Informed assessments affirm that “the only legitimate state in the modern world is the liberal democratic state that” along with being “properly elected,” also “protects a wide range of internationally-recognized human rights.”⁸² In the aftermath of the terrorist attacks of 2001, the U.S. needs the “moral authority” that comes with obedience to internationally-recognized human rights to preserve its hegemony.⁸³ As Professor Henkin reminds us, international human rights laws and institutions became necessary because national laws and institutions are never fully effective.⁸⁴ As he explains,

The purpose of international concern with human rights is to make national rights effective under national laws and through national institutions. The purpose of international law relating to human rights and of international human rights institutions is to make national human rights law and institutions effective instruments for securing and ensuring human rights. In an ideal world—if national laws and institutions were fully effective—there would be no need for international human rights laws and institutions.⁸⁵

Since we do not live in an ideal world where national laws and institutions are fully effective, the U.S., like any other country, must abide by international human rights standards.

Spread, N.Y. TIMES, June 26, 2005, at 42. Ignatieff instructively discloses that

[o]ne reason the American promotion of democracy conjures up so little support from other democrats is that American democracy, once a model to emulate, has become an exception to avoid. Consider America’s neighbor to the north. Canadians look south and ask themselves why access to health care remains a privilege of income in the United States and not a right of citizenship. . . . They can’t understand why the American love of limited government does not extend to a ban on the government’s ultimate power—capital punishment.

Id.

81. Forsythe, *supra* note 47, at 510.

82. *Id.* See also Kathryn Sikkink, *Transnational Politics, International Relations Theory, and Human Rights*, 30 PS: POL. SCI. & POLITICS 517, 520 (1998) (“[G]ood human rights performance is one crucial signal to others to identify a member of the community of liberal states.”).

83. See Koh, *supra* note 52, at A16-A17.

84. See Henkin, *supra* note 13, at 512. Henkin contends that human rights “are national rights, rights of the individual in his or her society, enforced and given effect by national laws. Strictly, there are no ‘international human rights’; strictly, there is no ‘international law of human rights.’” *Id.*

85. *Id.*

2. Benefits to the U.S. Human Rights Community

In addition to the U.S. government, application of international human rights also immensely benefits the U.S. human rights community. Little wonder that activists dealing with issues relating to immigrants, prisoners, the poor, and other minorities are now increasingly using human rights as a tool of advocacy.⁸⁶ Commenting on the strategic utility of the human rights approach, one activist stated, “You cannot reduce rights. You either have to hold the line or increase them.”⁸⁷ The human rights approach affords social justice activists a chance “to break out of the chokehold of domestic law,”⁸⁸ as well as an indispensable “another place to go.”⁸⁹ With more and more poverty advocacy groups taking the position that “scarcity is not the issue—greed is,”⁹⁰ a human rights approach gets “people to think about economic inequality differently, in terms of rights.”⁹¹ It “act[s] as a counter to society’s unceasing attempt to make poor people think it’s their fault that they can’t make it.”⁹² Placing economic and social needs like a living wage, decent shelter, adequate food, and life-sustaining health care “within an international human-rights framework would allow them to be seen . . . as falling squarely within the categories of rights.”⁹³

Utilizing international human rights standards can also bring important political rewards that can occur when mobilizing international pressure results in “the embarrassment of international attention” that then, as was the case during the 1950s, “provide[s] a powerful incentive to the United States to improve its domestic rights record.”⁹⁴ Finally, “placing domestic struggles in an international context” can provide access to critical resources that may “ease the racial and class tensions that can often frustrate cooperation” in the U.S., such as “the insights and solidarity of . . . international colleagues,” stronger links that could encourage greater national solidarity, and conceptualization and

86. See *Bringing Human Rights to Illinois*, *supra* note 37, at 2.

87. See CLOSE TO HOME, *supra* note 10, at 11, 31 (quoting Cathy Albisa of the Center for Economic and Social Rights, a human rights group headquartered in Brooklyn, New York).

88. *Id.* at 10, 94 (quoting Monique Harden of the Advocates for Environmental Human Rights).

89. *Id.* at 10 (quoting Anthony Romero, executive director, American Civil Liberties Union).

90. *Id.* at 50-51 (slogan of the Kensington Welfare Rights Union, an advocacy group for the poor).

91. See *id.* at 11, 31.

92. See *id.* at 54 (quoting Ethel Long-Scott of the Women’s Economic Agenda Project in Oakland, California).

93. McDougall, *supra* note 66, at A23.

94. Thomas, *supra* note 22, at 22.

implementation of domestic advocacy strategies that are informed by the experiences of activists elsewhere.⁹⁵ The human rights scholar and administrator Gay McDougall probably had some of these gains in mind when she indicated that U.S. advocacy groups “need to foster greater awareness that our rights and realities here [meaning in the U.S.] are connected to what’s happening in other countries.”⁹⁶

At a human rights gathering in Chicago in July 2005, speaker after speaker testified to the utility of the human rights framework for activist work in fields ranging from poverty to women’s health to the environment.⁹⁷ Libra Foundation President Susan Pritzker, who opened the conference, noted that “[h]uman rights as a framework has the power to transform our activism. The human rights framework has a moral and ethical power that resonates across barriers and differences. It provides an alternative to the more narrow view of ‘morality’ that is all too pervasive in the U.S. today.”⁹⁸ Participants also presented evidence to the effect that “a human rights framework changes the discussion . . . and opens the door to different outcomes. ‘A human rights framework helps us see and think about issues in a new light, helps us to determine what is ours by right. And when we talk in those terms, the discussion changes.’”⁹⁹ The human rights administrator and veteran activist Loretta Ross, commenting on the necessity for human rights education, alleged interestingly that the lack of knowledge of international human rights instruments like the Universal Declaration that prevails among the general population in the United States occurs because political leaders “don’t want us to know this stuff, for fear that we might use it. Keeping a human rights awareness *out* of public discussion can make it easier for

95. *Id.* See also *Bringing Human Rights to Illinois*, *supra* note 37, at 2 (remarks of Gay McDougall) (stating that the human rights approach holds the promise of “a common frame that might interconnect rights work within this country and globally”). Thomas recognizes that the international rights advocacy arena may itself be “fraught with status-related and sectoral conflicts” of the kind that exists in the U.S., but indicates nonetheless that “it has had considerable success in encouraging participants both to acknowledge their differences and to mount collective campaigns.” Thomas, *supra* note 22, at 22-23.

96. *Bringing Human Rights to Illinois*, *supra* note 37, at 5.

97. To be sure, as the human rights scholar and administrator Gay McDougall explains, activism in these and other issue-areas is not new, only “they lacked any appeal to rights based solely on one’s humanity, and to a common frame that might interconnect rights work within this country and globally[.]” *Id.* See comment attributed to Thomas in *Bringing Human Rights to Illinois*. *Id.* at 2. In short, as Susan Pritzker conveyed in the next statement, the main difference is that groups engaged in advocacy in these areas see a possibility of transforming their activism in the human rights framework.

98. *Id.* at 1.

99. *Id.* at 2-3.

governments to deny responsibilities and evade accountability.”¹⁰⁰

III. THE TRADITIONAL VIEW OF THE U.S.’S APPROACH TO HUMAN RIGHTS

Reference to the United States’s approach to human rights has an ironic ring given “the pervasive notion” in America “that there was something un-American and communistic about human rights.”¹⁰¹ But the U.S. still has an approach to human rights even where, as this Article argues, that approach is *incomprehensive*. The traditional view in the U.S. approach to human rights holds that America recognizes and guarantees only political-civil rights to the exclusion and relegation of socioeconomic human rights and the rights of peoples, which the U.S. does not promote. Numerous indicators attend this orientation with consequences for governmental pursuit or promotion of human rights. One was the tendency, known as “exceptionalism,” wherein the U.S. preaches support for the rule of law in international affairs that it refuses to adhere to domestically.¹⁰² Related to “exceptionalism” is the

100. *Id.* at 3. (emphasis in original). Responding to a question as to why advocacy for social services is discouraged in the U.S., Ross contended that “the powers-that-be have historically tried to disconnect serving needy people’s needs from the question of why they have those needs in the first place,” maintaining that “[a] unified movement that sees the connection” represents the only antidote to the “the political pressure that seeks to prevent people from being advocates for themselves, and for the people they serve.” *Id.* at 3-4.

101. McDougall, *supra* note 66, at A23 (quoting ANDERSON, *supra* note 66).

102. For an enlightening analysis of U.S. exceptionalism, see David P. Forsythe, *International Criminal Justice and the United States: Law, Culture, Power*, in FROM SOVEREIGN IMMUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 61-64 (Ramesh Thakur & Peter Malcontent, ed. 2004). See also MAHMOOD MAMDANI, GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR 202-211 (2004); JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS (2004). Professor Koh does not view exceptionalism as an orientation wholly or automatically evil, hence he subtitles his piece “the good and bad faces of exceptionalism.” Koh, *supra* note 52, at A16. He identifies four “faces” of this orientation, only one of which he said is worrisome. That “most virulent strain,” according to him, is the embracement of a double standard of the type that occurs, for example, when the U.S. holds Taliban detainees at Guatánamo Bay in Cuba without Geneva Convention hearings (in effect treating the detainees as “human beings without human rights”), but decries the failure of others to accord Geneva Convention protections to their American prisoners; or, in the name of homeland security, asserts its own right of preemptive self-defense, but hesitates to recognize any other country’s claim to engage in forced disarmament or preemptive self-defense. *Id.* at A16, A18. He said the U.S. should have declared a state of emergency in response to the terrorist attacks of September 11 rather than opt as it did, for an extralegal strategy, involving the creation of extralegal zones (as in Guatánamo Bay) or extralegal persons (detainees, including American citizens, labeled “enemy combatants.”) *Id.* at A18. He said the Bush government should not have placed itself, as it did, outside the global justice system, or engage in the “oxymoronic” act of imposing democracy on Iraq. *Id.*

propensity of the U.S. government not to ratify international human rights treaties or to reluctantly ratify them many years after they have gone into force or to ratify subject to numerous “reservations, understandings, or declarations” (RUDs). The U.S. ratified the Genocide Convention only in 1987, a dubious-record thirty-six years after the treaty’s adoption in 1951; the ICCPR only in 1992, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁰³ and the ICERD both in 1994. The U.S. has yet to ratify the CEDAW, the CRC, and the ICESCR. America shares the dubious honor with Somalia as the two countries in the world that have yet to ratify the CRC.¹⁰⁴ The U.S. government also does not permit individual complaints under the ICCPR.¹⁰⁵ Appending RUDs to the U.S. Senate’s consent to a treaty can greatly limit the impact of the ratified treaties on U.S. law. Unfortunately, that can be their only purpose, as one analyst laments in a special collection focusing on U.S. human rights.¹⁰⁶ These RUDs became so restrictive at one point that the Netherlands lodged a complaint against the U.S. government, justifiably remonstrating that the RUDs are incompatible with the basic purposes of treaties which require nations to align their domestic law with the terms of the affected treaties.¹⁰⁷ Not only did the U.S. government refuse to ratify treaties, in general it displayed a disinclination to support the very international institutions America helped found after World War II and an unwillingness to support new popular initiatives in international law.¹⁰⁸

Besides disparaging anything that was not political-civil rights, the traditional view in the U.S.’s approach to human rights also draws a sharp distinction between international law (sometimes dismissively denoted as “foreign law”) and U.S. laws. Under this framework,

103. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, Annex G.A. Res. 46 (XXXIX 1984), 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985) (entered into force on June 26, 1987) [hereinafter CAT or the Torture Convention]. For a text of the treaty, see HUMAN RIGHTS DOCUMENTS, *supra* note 43, at 71-79.

104. Koh, *supra* note 52, at A16. Professor Koh points out that the American government’s “promiscuous failure to ratify a convention with which it actually complies in most respects” results in the U.S. not getting “enough credit for the large-scale moral and financial support that it actually gives to children’s rights around the world.” *Id.*

105. See Galey, *supra* note 68, at 528.

106. See Massimino, *supra* note 64, at A15. Massimino assessed the U.S. treaty ratification process as “cynical.” *Id.*

107. See Galey, *supra* note 68, at 528.

108. See MURPHY, *supra* note 102.

reliance on international law was considered “impolitic,”¹⁰⁹ or outrightly unpatriotic.¹¹⁰ Thus, judges refrained from applying international law in the cases that came before them, viewing it as “foreign law” with little value as precedent, and counsels saw no point or incentive in staking the merits of their argument on international law. Not only that, “civil-rights attorneys, finding human-rights treaties unhelpful in gaining specific remedies for their clients, came to be generally disinterested in the global rights movement.”¹¹¹ This was how, as Gay McDougall said, “the American movement for racial equality chose to focus largely on the denial of civil and political rights, pursuing mainly voting-rights and nondiscrimination cases.”¹¹² Until recently, American judges resisted even references to international law in rendering their decisions.

Turning specifically to socioeconomic human rights, the U.S. Constitution does not guarantee them as rights. Instead, the U.S. government sees socioeconomic concerns as “at best, legislative entitlements . . . subject . . . to budgetary constraints, political whim, and the ebb and flow of compassion and compassion fatigue.”¹¹³ Socioeconomic rights form one of the important (but unfortunate) respects where, as Professor Henkin pointed out, the U.S. Constitution and its judicial interpretations departed degeneratively from the Universal Declaration—and promiscuously lagged behind international human rights standards.¹¹⁴ The closest the U.S. gets to conferring rights on socioeconomic matters is that the constitutions of many U.S. States accord access to a good education some constitutional recognition.¹¹⁵ The justification of the U.S. government for relegating socioeconomic guarantees to non-rights status is that they are aspirations, not justiciable rights.¹¹⁶ Not only that, the U.S. government also maintains an attitude

109. See Henkin, *supra* note 13, at 514.

110. See Dorothy Q. Thomas, *A Brief History of Human Rights in the United States* (handout distributed at a Human Rights Gathering Held July 8, 2005, at the University Club of Chicago, Chicago) (noting that such reliance on “foreign law” was “condemned as traitorous or worse”).

111. McDougall, *supra* note 66, at A23.

112. *Id.*

113. Henkin, *supra* note 13, at 514 (internal quotes omitted).

114. *Id.* The term “promiscuously” is borrowed from Professor Koh who used that word in describing the U.S.’s failure to ratify the Convention on the Rights of the Child. Koh, *supra* note 52, at A16.

115. Sunstein, *Economic Security*, *supra* note 17, at A25. Professor Henkin stated, parenthetically, that socioeconomic rights “are recognized by a few state constitutions,” without naming in which matters those rights exist. See Henkin, *supra* note 13, at 514.

116. See CLOSE TO HOME, *supra* note 10, at 8. Compared to political-civil rights which it considers as principles, socioeconomic concerns are seen as matters of policy, not principles. Messing with policy, the argument goes, succeeds only in damaging their credibility. Moreover, it is

of general hostility toward these rights. Broadly speaking, U.S. officialdom and the influential media portrayed attempts by African American leaders like Dr. W.E.B. DuBois, Dr. Martin Luther King Jr., and Malcolm X to use international institutions and mechanisms to combat lynching and racial segregation in the U.S. as subversion or treason.¹¹⁷ More specifically, these rights were viewed “as mere Soviet-inspired rhetoric” and “any leader who broached such matters was . . . attacked as a communist.”¹¹⁸

In sum, the brand of politics the U.S. government pursued during the cold war “sought not only to discourage U.S. activists from invoking human rights in their domestic work, but also to distort the very meaning of human rights for Americans by eliminating its economic and social dimensions.”¹¹⁹ President Lyndon Johnson’s poverty-alleviation initiatives, designed to create a “Great Society,” attempted to resuscitate President Franklin Roosevelt’s “New Deal” programs.¹²⁰ But by the 1970s, the political consensus for these programs dissipated, and many of them were discontinued.¹²¹ The occurrence reached a high watermark in the 1980s with the guillotine of massive social-spending cuts and privatization agenda President Ronald Reagan unveiled.¹²² Further reinforcing the hostility toward socioeconomic human rights was the before-described refusal of the U.S. government to ratify the ICESCR. It is hard to miss the “exceptional[] unusual[ness]” of the U.S. in “enthusiastically support[ing] the [Universal] Declaration,” an instrument “written in the shadow of FDR” while refusing to ratify the very instrument designed to enforce these guarantees.¹²³

The traditional view in the U.S.’s approach to human rights limited to political-civil rights was not something only the U.S. government

further claimed, supporting (socio)-economic guarantees undermines the ability to promote political-civil rights, which America considers indispensable. Makau Mutua, *Human Rights International NGOs: A Critical Evaluation*, in *NGOS AND HUMAN RIGHTS: PROMISE AND PERFORMANCE* 162 n.23 (Claude E. Welch, Jr., ed., University of Pennsylvania Press 2001).

117. CLOSE TO HOME, *supra* note 10, at 7-8.

118. McDougall, *supra* note 66, at A23.

119. CLOSE TO HOME, *supra* note 10, at 8.

120. See KENNETH JANDA ET AL., *THE CHALLENGE OF DEMOCRACY: GOVERNMENT IN AMERICA* 113 (Houghton Mifflin Co. 8th ed., 2005) (portraying the Johnson programs as an “extension[] of FDR’s New Deal”).

121. See generally, JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES 1945-1974* at 676-77 (Oxford Univ. Press 1996).

122. See generally, Stuart Butler, *Privatization: A Strategy to Cut the Budget*, THE CATO INSTITUTE, available at <http://www.cato.org/pubs/journal/cj5n1/cj5n1-17.pdf> (last visited March 17, 2006).

123. Sunstein, *Economic Security*, *supra* note 17, at A25.

embraced; rather, the model also resonated well in the statements and conducts of human rights non-governmental organizations, such as the American Bar Association (ABA) and Human Rights Watch (HRW). The ABA opposed the Universal Declaration because it includes economic and social rights.¹²⁴ More recently, in 1993, the HRW stood against the application of rights language to economic and social concerns. “When it comes to the question of what are called economic rights,” Aryeh Neier, former executive director of the organization, said, “I’m on the side of the spectrum which feels that the attempt to describe economic concerns as rights is misguided. I just don’t think that it’s useful to define them in terms of rights.”¹²⁵ The HRW viewed violations of socioeconomic human rights as “misfortunes” concerning which supposedly victims have no legal recourse.¹²⁶ Even after it finally embraced the principle of indivisibility of rights and abandoned its policy of hostility toward socioeconomic rights, the organization continued to assign political-civil rights primacy, as two policy statements it released in 1992 and 1996 made obvious.

The HRW’s 1992 policy related political-civil rights to survival, subsistence, and freedom from poverty and argued that subsistence and survival are dependent on political-civil rights, especially those connected to democratic accountability.¹²⁷ Stated differently, political-civil rights belong to the first rank because the realization of other rights — which HRW interestingly designates as “assertions” of good, rather than rights — depend on political-civil rights.¹²⁸ Although an improvement on the 1992 statement, the policy released in 1996¹²⁹ was also qualified or highly restrictive in its commitment to socioeconomic human rights. According to the statement, HRW will investigate, document, and promote compliance with the ICESCR, but its intervention will be limited to scenarios, where protection of a socioeconomic right is “necessary to remedy a substantial violation of an

124. Galey, *supra* note 68, at 524.

125. Aryeh Neier, *Remarks to East Asian Legal Studies & Human Rights Program Symposium, Harvard Law School, May 8, 1993*, in HUMAN RIGHTS & FOREIGN POLICY: A SYMPOSIUM 16 (Harvard Law Sch. Hum. Rts. Program, 1994) (ellipsis added), *cited in* Mutua, *supra* note 116, at 162 n.22.

126. *See* Mutua, *supra* note 116, at 155.

127. *Id.* (referring to the policy titled Indivisible Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty).

128. *Id.*

129. Human Rights Watch, *Human Rights Watch’s Proposed Interim Policy on Economic, Social, and Cultural Rights*, *Internal Document*, Sept. 30, 1996, *cited in* Mutua, *supra* note 116, at 162 n.25.

ICCPR right,” “the violation of a [socioeconomic] right is the direct and immediate product of a substantial violation of an ICCPR right,” the violation involved is a “direct product of state action,” excluding businesses and transnational corporations; or “there is a clear, reasonable and practical remedy that HRW can advocate to address the ICESCR violation,” to name just these conditions.¹³⁰

Professor Mutua assessed that the new policy continues the HRW’s longstanding “history of skepticism” toward socioeconomic rights, one that conditions socioeconomic rights on political-civil rights and perceives socioeconomic rights as an appendage of political-civil rights.¹³¹ Since the appearance of the Mutua piece in 2001, the HRW has changed its method of operation. The organization’s website points to work that the HRW has undertaken relating to the rights to health care, education, and fair conditions of labor,¹³² and it discloses: “In addition to governments, our work also addresses economic actors such [as] international financial institutions and multinational corporations.”¹³³ But it also indicates that its methodology dictates the cases it handles. In the language of the organization, “[w]e pay particular attention to situations in which our methodology of investigation and reporting is most effective, such as when arbitrary or discriminatory governmental conduct lies behind an economic, social and cultural rights violation.”¹³⁴ That methodology gives primacy to political-civil rights.

IV. THE TROUBLE WITH THE TRADITIONAL VIEW

The objections to socioeconomic rights as non-rights embodied in the traditional view has little merit and persuasiveness. Focusing on the characterization of socioeconomic goods as “positive” rights necessitating government help as opposed to political-civil rights considered “negative rights” or rights against government interference, Professor Sunstein has eloquently demonstrated that no rights can be guaranteed by laissez-faire, but rather that all rights, political-civil rights as well as socioeconomic rights, including the right to private property, require governmental assistance without which these rights do not exist.¹³⁵ Sunstein also dispelled, as baseless, objections to socioeconomic

130. See Mutua, *supra* note 116, at 155-56.

131. *Id.* at 156.

132. Human Rights Watch, *Some Frequently Asked Questions About Human Rights Watch*, <http://hrw.org/about/faq/>.

133. *Id.*

134. *Id.*

135. See Sunstein, *Economic Security*, *supra* note 17, at A26.

rights on the “pragmatic” ground that “it would give citizens an unhealthy and even destructive sense of entitlement.”¹³⁶ The distinction between domestic U.S. law and international law embodied in the traditional view is also an artificial one that has little basis in reality. As earlier indicated, international human rights instruments provide “a common standard of achievements for all peoples and all nations” that no country—neither the U.S. nor Asian countries parrying and pleading “Asian values”—can exempt itself from. But as worrisome as they are, none of these problems afflicting the traditional view is the purpose of this section. Instead, its main point is to show the extent to which the traditional view discounts the U.S. contributions to socioeconomic rights.

To restate, the traditional notion of the U.S.’s approach to human rights is that the U.S. government only protects and promotes political-civil rights, but does not accord similar protection and promotion to socioeconomic guarantees because it does not view them as real rights. The trouble with this view is that it provides short shrift accounting of U.S.’s socioeconomic endeavors—and gives the United States government insufficient credit for its socioeconomic initiatives. For a capitalist system built on individual responsibility, “the U.S. national government provides many socioeconomic public goods for Americans that include access to social security, education, housing, and a simulacrum of health care, among others.”¹³⁷ U.S. federal agencies whose work embody traces of socioeconomic public goods include the Equal Employment Opportunity Commission (EEOC), the Department of Education (DOE), and the Department of Housing and Urban Development (DHUD). As their names signify, the first generates sediments of employment-related services, the second, traces of educational services, and the third, some trickles of housing benefits. All of these public goods qualify as socioeconomic benefits within the context of the ICESCR. The traditional view glosses over these important contributions.

Second, by focusing solely on the activities of the national government, the traditional view discounts the socioeconomic contributions of the sub-national levels of government. The national government is just one out of the complexity of the nearly 88,000

136. *See id.*

137. Philip C. Aka, *International Human Rights Internship De-Briefing Memo* (Aug. 2005), at 13.

governments in the United States federal system.¹³⁸ The fifty States and the local governments—cities, counties, special districts, school districts, and so forth—in their numerosity, make up the bulk of the U.S. political system.¹³⁹ So, though primary, the national government is only one among the U.S.’s numerous governments. These critical sub-national governments provide numerous socioeconomic public goods ranging from education to employment to housing. All states, except Iowa, grant access to a good education constitutional protection.¹⁴⁰

Many States also have “human rights” agencies that produce socioeconomic goods for citizens. In Illinois, these include the Department of Human Rights. Local governments also have similar agencies tasked with responsibility for socioeconomic public goods, and their activities in this field reinforce and complement the efforts of the national and State governments. For example, the Cook County Commission on Human Rights (in Illinois) seeks to create equal opportunity in employment, housing, credit, and access to public accommodation for all Cook County residents, by combating, through enforcement, unlawful discrimination that impedes equal opportunity in access to these socioeconomic resources.¹⁴¹ The traditional view, focused as it is on the activities of the national government, makes light of, if not completely discounts, these critical socioeconomic benefits.

Finally, the traditional account of the U.S.’s approach to human rights discounts or slights the contributions of numerous non-governmental organizations (NGOs) that comprise the human rights movement in the United States. This movement encompasses traditional human rights NGOs like Amnesty International USA, Human Rights Watch, and Human Rights First (formerly Lawyers Committee for Human Rights) and a motley of less well-known and less well-established grassroots organizations,¹⁴² among others.¹⁴³ Separated by

138. See BERNARD H. ROSS & MYRON A. LEVINE, *URBAN POLITICS: POWER IN METROPOLITAN AMERICA* 418 (7th ed. 2006); STEFFEN W. SCHMIDT ET. AL., *AMERICAN GOVERNMENT AND POLITICS TODAY 2005-2006* ED. 81 (12th ed. 2005).

139. Almost 39,000 or nearly half of the overall number of local governments are cities, counties, and townships, the general-purpose units people have in mind when they think about local government; the rest are special districts. See ROSS & LEVINE, *supra* note 138, at 418 (the figure 39,000 is based on calculation from the table on that page).

140. See Sunstein, *Economic Security*, *supra* note 17, at A25. For Illinois, that protection is embodied in Art. X, stipulating: “The State shall provide for an efficient system of high[-]quality public educational institutions and services.” ILL. CONST. art. X, § 1.

141. For more on the agency, see Aka, *supra* note 137 (a 19-page report describing my internship with the agency).

142. Some of these grassroots organizations and the issues they advocate using human rights are Advocates for Environmental Human Rights (environmental justice), Border Network for

the multiplicity of disparate issues consuming their advocacy and attention, these grassroots organizations are united by a commitment to “a revolution of values in the [country] that places the affirmation of human dignity and equality at the center of domestic and foreign

Human Rights (immigration rights), Bringing Human Rights Home Lawyers’ Network (developing new legal advocacy strategies), Center for Economic and Social Rights (economic justice), EarthRights International (environmental justice), Eve and the Snake (women’s rights), Gender Public Advocacy Coalition (transgender rights), Global Rights (legal advocacy), Indian Law Resource Center (indigenous rights), Heartland Alliance for Human Needs and Human Rights (provision of human rights services for the poor and “vulnerable” groups), and Kensington Welfare Rights Union (organizing for economic human rights for the poor). Others are Legal Services for Prisoners with Children in California (sexual abuse of women in prisons), Minnesota Advocates for Human Rights (documenting police brutality), Mississippi Workers’ Center for Human Rights (workers’ rights, including unfair wages, unsafe working conditions, and racism), Murder Victims’ Families for Human Rights (campaign for abolition of the death penalty), National Black Environmental Justice Network (environmental justice), National Center for Human Rights Education (human rights education), National Coalition to Abolish the Death Penalty (the death penalty), National Women’s Law Center (sexual abuse of women in prisons), Sistersong Women of Color Reproductive Health Collective (reproductive rights), U.S. Human Rights Network (coalition of over more than 170 grassroots organizations), Women’s Rights Network (domestic violence), Women of Color Resource Center (fostering the “solidarity and common cause of marginalized racial and ethnic groups” to combat oppression), and Women’s Institute for Leadership Development or WILD for Human Rights for short (gender and race discrimination), among numerous others. See the appendixes in CLOSE TO HOME, *supra* note 10, at 104, and HUM. RTS. NETWORK, SOMETHING INSIDE SO STRONG: A RESOURCE GUIDE ON HUMAN RIGHTS IN THE UNITED STATES at 68-74 (2003). See generally, *Bringing Human Rights to Illinois*, *supra* note 37. Key funders such as the Ford Foundation, Shaler Adams Foundation (which funds the WILD for Human Rights), and International Human Rights Funders Group, among others, should also be considered an integral part of the U.S. human rights movement. Some of these human rights organizations have won recognition for their magnificent human rights work. Such is the case with the Kensington Welfare Rights Union which was, in 1998, commended by the U.N. High Commissioner for Human Rights, Mary Robinson, for its exemplary human rights work. CLOSE TO HOME, *supra* note 10, at 55.

143. Those “others” comprise traditional civil rights groups like the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP) who, because they were in the trench in the fight for rights long before later groups emerged, Professor Mutua said, “are in reality human rights organizations.” Mutua, *supra* note 116, at 151. Some analysts would dispute characterization of American civil rights groups as human rights organizations. A major purpose of ANDERSON, *supra* note 66, was to detail how the civil rights movement became separated from the human rights movement. Also, the human rights scholar and administrator Gay McDougall laments as “a tremendous loss” the disconnect between the civil rights movement in America and the global human rights movement which disconnect, she said, served to narrow and cloud even the American understanding of justice. McDougall, *supra* note 66, at A23. She sees a spell of good news, suggestive of a possible movement toward connection, in the fact that Supreme Court associate justice Ruth Bader Ginsburg referred to the ICERD in her concurrence in the *Grutter v. Bollinger*, 539 U.S. 306 (2003), case which upheld the affirmative action program of the University of Michigan Law School. *Id.* But “[i]t would have been better,” McDougall said, “if civil-rights litigators had been able to use ICERD directly in seeking that outcome, accepting the international treaty as binding U.S. law” *Id.* The U.S. ratified the treaty in 1994.

policy. . . to promote social and economic justice on a global scale.”¹⁴⁴ Driven by the common animation of a “desire to reclaim the full legacy and meaning of international human rights,”¹⁴⁵ they are determined to “dramatically highlight the inadequacy of U.S. legal protections of the rights of poor people.”¹⁴⁶

NGO participation “is the engine that drives the human rights mechanisms at the United Nations.”¹⁴⁷ Accordingly, perceptive analysts, such as the political scientist Kathryn Sikkink, have advised that “international relations theorists hoping to understand the politics of human rights will need a different model of international politics, one that sees the international system as an international society made up not only of state, but also of non-state actors that may have transnational identities and overlapping loyalties.”¹⁴⁸ Making these human rights NGOs a necessary part of a comprehensive approach to human rights acknowledges the important role they play in promoting international human rights, and recognizes the extent to which non-governmental actors are a part of the definition of modern public administration, particularly in industrialized societies like the United States.¹⁴⁹

144. CLOSE TO HOME, *supra* note 10, at 8 (ellipsis added).

145. *Id.* At a human rights conference held in July in Chicago, designed to bring human rights close to home in the U.S. Midwest, the participants declared, “We are fighting to save the very idea of human rights,” which very idea they alleged “our own government is putting . . . at risk.” *Bringing Human Rights to Illinois*, *supra* note 37, at 13. Organized by the Libra Foundation, the Ford Foundation, and two other sponsors, the meeting “brought together nearly 200 activists, funders, nonprofit leaders[,] and human rights workers to share perspectives and strategies.” *Id.* at 1.

146. CLOSE TO HOME, *supra* note 10, at 11.

147. Gay McDougall, *Maintaining a Seat at the Table*, GLOBAL RTS. VOICES, Summer 2005, at 3. The point of McDougall’s article was to argue that it is imperative in any attempt to reform the United Nations and the human rights machinery of that world organization to “guarantee a seat at the table for the ongoing, substantive participation of” human rights NGOs. *See also* Mutua, *supra* note 116, at 151 (calling human rights NGOs “arguably the most influential component of the human rights movement”).

148. Sikkink, *supra* note 82, at 520.

149. *See* RICHARD J. STILLMAN III, PUBLIC ADMINISTRATION: CONCEPTS AND CASES 2 (8th ed. 2005) (quoting FELIX A. NIGRO & LLOYD G. NIGRO, MODERN PUBLIC ADMINISTRATION (7th ed. 1989)) (indicating to what extent modern public administration “is closely associated with numerous private groups and individuals in providing services to the community”); MICHAEL E. MILAKOVICH & GEORGE J. GORDON, PUBLIC ADMINISTRATION IN AMERICA 24 (8th ed. 2004) (“There is no consensus about the nature of ‘publicness’ in organizations. Scholars are divided over the increasing reliance on nonprofit, faith-based, or ‘third-sector’ organizations to deliver government services.”).

V. TOWARD A COMPREHENSIVE HUMAN RIGHTS APPROACH FOR THE U.S.

Although the traditional view, because of its exclusive emphasis on political-civil rights, gives the U.S. insufficient credit for its contributions toward socioeconomic human rights, there is no dispute that the U.S. does *less* for socioeconomic human rights than international standards demand and that its approach to human rights is *incomprehensive*. While it is true that, for a capitalist system, the U.S. national government provides many socioeconomic public goods for Americans that the traditional view glosses over, these benefits are not provided as rights. The lack of the language of rights is critical. Without that language, the government benefits amount to nothing more than concessions designed to cushion the material hardships arising from the operations of an otherwise laissez-faire economic system. Because these “guarantees” do not couple the language of rights, they are reduced into “privileges” or “entitlements,” which the government is under no obligation to provide, thus making it possible for the government to deny responsibility for these public goods without consequences. Rights are “instruments, or tools, designed to protect human interests. The more fundamental the interests, the more important the instruments.”¹⁵⁰ Related to the absence of right language, the quantity of these benefits provided is also so low-scale that it makes sense to denominate the benefits a “simulacrum” as the previous section does.

Sub-national governments in the United States provide socioeconomic benefits that the traditional view minimizes or completely discounts. But it is also true, as is the case with the national government’s own contribution, that these benefits are scandalously inadequate in scale. Many state and local government “human rights” agencies generate little human rights benefits beyond anti-discrimination enforcement. Even here, U.S. self-insulation from international standards hampers these agencies. In assessing allegations of discrimination, U.S. domestic laws focus only on intent (so-called disparate impact). In contrast, international human rights instruments cover not only intentional discrimination, but also laws, norms, and practices which, although seemingly neutral, in their impact result in discrimination.¹⁵¹ Application of international human rights standards

150. Sunstein, *Economic Security*, *supra* note 17, at A25 (referring to President Franklin D. Roosevelt).

151. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) defines racial discrimination as “any distinction, exclusion, restriction or preference based

will facilitate the work of state and local anti-discrimination agencies since it will enable these agencies, in assessing allegations of discrimination, to look at both intent and effect.¹⁵² At the Chicago human rights gathering in July 2005, participants commented on the necessity to restructure the Commission on Human Rights in Chicago “to reflect international standards,” elaborating that “[s]uch a focus would shift and deepen the commission’s work and enable activists to ask whether Chicago residents enjoy these protections or not.”¹⁵³

Regarding access to education, often cited as an area of socioeconomic strength for many states, the Chicago conference regretfully pointed out that the Illinois Constitution embodied no explicit right to education with the result that lawyers seeking remedy for violation of this right are hampered because they have “nothing to litigate.”¹⁵⁴ Also, the fact that U.S. states guarantee the right to education, quintessentially a socioeconomic right as part of political-civil rights, rather than as a socioeconomic guarantee, is testimony to the primacy the U.S. continues to place on political-civil rights to the exclusion of, and at the expense of, the other categories of rights, including socioeconomic rights.

The foregoing scenario leaves out the contributions of human rights NGOs and grassroots groups comprising the U.S. human rights movement as the main omission of the traditional view. Even here, problems remain. Generally, “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.”¹⁵⁵ With specific reference to socioeconomic rights, as the group Human Rights Watch exemplifies, the option of these organizations for socioeconomic human rights is still recent and their commitments to these guarantees tepid. For example, HRW calls socioeconomic benefits “assertions” of goods rather than rights and utilizes a methodology of investigation and reporting that still gives primacy to political-civil rights.

What then can the U.S. do to achieve a comprehensive human

on race, color, descent, national[,] or ethnic origin with the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights in any field of public life, including political, economic, social[,] or cultural life.” ICERD, *supra* note 50, at art. 1 (emphasis added).

152. See CLOSE TO HOME, *supra* note 10, at 15.

153. See *Bringing Human Rights to Illinois*, *supra* note 37, at 6.

154. *Id.*

155. Alan Jenkins & Larry Cox, *Bringing Human Rights Home*, THE NATION, June 27, 2005, at 28.

rights approach? America needs to embrace international human rights standards. Such orientation boils them essentially to three basic issues: (1) applying international human rights standards to correct constitutional defects relating to political-civil rights; (2) applying international human rights standards to protect and promote socioeconomic rights; and (3) applying international human rights standards to protect and promote the rights of peoples.

A. Applying International Human Rights Standards to Correct Constitutional Defects Relating to Political-Civil Rights

The U.S.'s application of international human rights standards will correct present constitutional defects relating to political-civil rights. Two illustrative issue-areas out of several that could benefit from application of international human rights standards are (i) torture and the general treatment of war prisoners, consistent with the Geneva Conventions, and (ii) the death penalty.¹⁵⁶

1. Torture and the General Treatment of War Prisoners

In response to the terrorist attacks of September 11, 2001, the U.S. government under George W. Bush unveiled a doctrine. The Bush doctrine instituted "sweeping strategies of law enforcement, immigration control, security detention, and governmental secrecy at home while abroad asserting a novel right under international law to force the disarmament of any country that poses a gathering threat, a right to preemptive self-defense if necessary."¹⁵⁷ The government has the option, for example, of declaring a state of emergency, in response to the terrorist attacks.¹⁵⁸ Instead, it chose an extra-legal strategy with several

156. Two other issue-areas, in addition to the two analyzed here, are the sexual abuse of women prisoners, and the right to privacy in electronic communications, on which latter issue the U.S. lags behind Canada and Western European countries. For the first, consult CLOSE TO HOME, *supra* note 10, at 98-103 (thematic case study of sexual abuse of women in prisons). Regarding the latter, two notable recent works that highlighted the problem and advanced some helpful solutions are Michael L. Rustad & Sandra R. Paulsson, *Monitoring Employee E-mail and Internet Usage: Avoiding the Omniscient Electronic Sweatshop: Insights from Europe*, 7 U. PA. J. LAB. & EMP. L. 829 (2005) and Gail Lasprogata et al., *Regulation of Electronic Employee Monitoring: Identifying Fundamental Principles of Employee Privacy Through a Comparative Study of Data Privacy Legislation in the European Union, United States and Canada*, 2004 STAN. TECH. L. REV. 4 (2004).

157. Koh, *supra* note 52, at A18. For a book-length study on the Bush doctrine, see generally, MEL GURTOV, *SUPERPOWER ON CRUSADE: THE BUSH DOCTRINE IN US FOREIGN POLICY* (Lynne Rienner Publishers 2006).

158. Coming into office, the administration has an array of options ranging from a strategy of support for the global justice system, selective engagement to encourage it in certain directions, or

decisive measures that Professor Koh pointed out placed the administration “outside the global justice system.”¹⁵⁹ The extra-legal strategy involves the creation of zones, such as the U.S. military base at Guantánamo Bay in Cuba and the Abu Ghraib prisons in Iraq, considered as ‘rights-free zones.’¹⁶⁰ The strategy also embraces creation of extralegal persons who have been effectively treated under U.S. jurisprudence “as human beings without human rights.”¹⁶¹ These extralegal persons, some of whom are American citizens detained on American soil, are detainees the administration assessed as “enemy combatants,” meaning they are not entitled to substantive or procedural rights.¹⁶² Last, but by no means least, this extra-legal strategy involves a technique whereby the U.S. “[r]ecruits a [r]ough [a]lly” to perform a job of torture the U.S. for some reason chooses not to execute by itself.¹⁶³ Specifically, the U.S. government “renders” or transfers prisoners to countries where they can be tortured, free from the cynosure or scrutiny of U.S. courts and news media.¹⁶⁴ This practice predated the second Bush administration but has expanded enormously since the inception of the war on terror.

With the expansion of the war on terror and the allegations of torture against the U.S. swirling around the U.S. prosecution of that war, the U.S. approach to torture has become an issue of ongoing debate among politicians.¹⁶⁵ The Senate has passed an amendment, endorsed by

benign neglect. *See* Koh, *supra* note 52, at A18; *see also* Massimino, *supra* note 64, at A15 (comparing the U.S.’s response to the British response).

159. *See* Koh, *supra* note 52, at A18-A19.

160. *Id.* at A18. *See also* Noah Feldman, *Ugly Americans*, THE NEW REPUBLIC, May 30, 2005, at 23-29 (review of two important works on the Abu Ghraib torture of Iraqi prisoners by U.S. military personnel).

161. *See* Koh, *supra* note 52, at A18.

162. *Id.*

163. Dan Van Natt Jr., *U.S. Recruits a Rough Ally to Be a Jailer*, N.Y. TIMES, May 1, 2005, at 1.

164. An ally to whom the U.S. outsources this proxy job is Egypt, but the countries also include Afghanistan, Guantánamo Bay in Cuba, Iraq, Jordan, Morocco, Syria, Uzbekistan, and Thailand. *See* Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, THE NEW YORKER, Feb. 14, 2005, at 106; Van Natt Jr., *supra* note 163; *Extraordinary Rendition*, WIKIPEDIA, http://en.wikipedia.org/wiki/extraordinary_rendition (last visited Dec. 19, 2005); David Scott, Vic Walter, and Hoda Osman, *CIA Jets Fly the War on Terror: Rendition Program Ships Suspects Abroad*, ABC NEWS, March 7, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=559496&page=1&CMP=OTC-RSSFeeds0312> (last visited March 6, 2006); Paul Reynolds, *Defining Torture in a New World War*, BBC NEWS, Dec. 8, 2005; *Sixty Minutes* (CBS News Broadcast Dec. 18, 2005) (broadcast interview on the CIA’s “rendition program”).

165. To the scandalization and protestation of the White House and some Senate Republicans, Senator Dick Durbin, Democrat from Illinois, analogized American interrogators at Guantánamo

the House, that would be attached to the 2006 defense appropriations bill,¹⁶⁶ that the White House, after initial opposition,¹⁶⁷ appears to have accepted.¹⁶⁸ Sponsored by Senator John McCain, who, as a prisoner of war during the Vietnam war, experienced torture, the measure would (a) prohibit “cruel, inhuman or degrading treatment or punishment” of anyone in U.S. custody, regardless of where they are held; and (b) require that service members follow procedures in the Army Field Manual during interrogations of prisoners in Defense Department facilities.¹⁶⁹ One legislator who spoke in favor of the bill indicated, “[w]e cannot torture and still retain the moral high ground. No torture

Bay to Nazis, Soviet gulags, and Khmer Rouge leader, Pol Pot. See Nedra Pickler, *White House Rips Durbin's Remarks*, CHIC. SUN-TIMES, June 17, 2005, at 3.

166. See Joseph L. Galloway & James Kuhnenn, *Senate Adds Ban on Torture to Bill*, THE SEATTLE TIMES, Oct. 6, 2005, at A4; Eric Schmitt, *Senate Moves to Protect Military Prisoners Despite Veto Threat*, N.Y. TIMES, Oct. 6, 2005 (the U.S. Senate); Josh White & Charles Babington, *House Supports Ban on Torture*, THE WASH. POST, Dec. 15, 2005, at A1 (the U.S. House of Representatives).

167. See Deb Riechmann, *Bush Declares: "We Do Not Torture,"* ASSOCIATED PRESS, Nov. 7, 2005.

168. See Liz Sidoti, *White House to Accept Torture Ban*, ASSOCIATED PRESS, Dec. 15, 2005.

169. See *id.* The McCain Amendment is expected to outlaw certain CIA “enhanced interrogation techniques” that some politicians and analysts consider overly severe within the context of CAT. These techniques include “grab,” wherein an interrogator grabs a suspect’s shirt front and shakes him; “slap,” involving an open-handed slap to produce fear and some pain; “belly slap,” consisting of a hard slap to the stomach, but not a punch, designed to be painful but not to cause injury; “standing,” wherein the prisoner is left standing for 40 hours and more, while shackled to the floor, in an attempt to achieve sensory deprivation, among other objectives; “cold cell,” wherein a prisoner is made to stand naked in a cold, but not freezing, cell and doused with water; and “water boarding,” wherein the prisoner is bound to a board with feet raised, and cellophane wrapped round his head with water poured onto his face such as to produce a fear of drowning, leading to a rapid demand for the suffering to end. Reynolds, *supra* note 164. CAT defines torture to “mean[] 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” CAT, *supra* note 103, at 71. A memorandum in 2002 from the office of Assistant Attorney General of the U.S. Jay S. Bybee interpreted “severe” under the Convention as “convey[ing] that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure,” even suggesting that “severe pain” must be severe enough to result in organ failure or death. Memoranda from Jay S. Bybee, Ass’t Att’y Gen., U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, U.S., Standards of Conduct for Interrogation under 18 U.S.C. §2340-2340A (Aug. 1, 2002) (on file at <http://www.findlaw.com>). The Bush Administration repudiated this interpretation. Still, the CIA developed the “enhanced interrogation techniques” enumerated above. The amendment proposed by Senator McCain is expected to outlaw some of these techniques like water boarding regarding which Senator McCain said, “I believe that it is torture, very exquisite torture.” Reynolds, *supra* note 164 (quoting Senator McCain).

and no exceptions.”¹⁷⁰

One obvious effect then of President Bush’s war on terrorism is the weakness it has uncovered in the U.S.’s approach to torture. International human rights instruments

recognize[] rights beyond those the Supreme Court has found in the U.S. Constitution—a right to freedom from torture, not only a prohibition on the use of evidence obtained by torture (or other coercion), a right to be free from any inhuman or degrading treatment, and not only from cruel and unusual punishment for crime, but from inhuman or degrading treatment for any purpose.¹⁷¹

Professor Henkin’s suggestion for removing the discrepancy, focusing on the Universal Declaration, is for the U.S. to build on the provision in Article 8 of the American Constitution, prohibiting cruel and unusual punishment by reinterpreting the Due Process clause to “ban[] torture and all other inhuman and degrading treatment in any context.”¹⁷² Professor Koh’s own idea for a solution is tied to his concept of “exceptionalism” and with his criticism of the Bush doctrine supposedly for the “bad face” of exceptionalism that it embodies. His argument appears to go like this: the U.S. should “respond to crisis not just with power alone but with power coupled with principle.”¹⁷³ But the Bush doctrine works against that approach. If the Bush doctrine is allowed to take hold, “the United States may well emerge from the post-9/11 era still powerful but deeply committed to double standards as a means of preserving U.S. hegemony[,]”¹⁷⁴ something contrary to U.S. claim, “since the end of World War II, to apply universal legal and human-rights standards.”¹⁷⁵ There is, in short, need “to press our government to put forward the best face of American exceptionalism, the activist face that promotes human rights and the rule of law.”¹⁷⁶ The U.S.

170. White & Babington, *supra* note 166 (quoting Rep. John P. Murtha, Democrat-PA).

171. Henkin, *supra* note 13, at 514 (comparing the Universal Declaration with the U.S. Constitution). Within the U.S., existing criminal laws against assault and battery, murder and manslaughter, kidnapping and abduction, false arrest and imprisonment, sexual abuse, and civil rights violation were considered sufficient to cover any act constituting torture. Massimino, *supra* note 64, at A14. This was the reason why, for example, the police defendants who in 1997 tortured the Haitian immigrant Abner Louima in New York, were charged not with torture but with violating his civil rights. *Id.*

172. Henkin, *supra* note 13, at 515.

173. Koh, *supra* note 52, at A19.

174. *Id.* at A18.

175. *Id.*

176. *Id.*

“follow[s] the better angels of its national nature”¹⁷⁷ when it displays the good face of exceptionalism.

Henkin’s and Koh’s commentaries, focusing on the need for the U.S. to meet international standards on a critical human rights issue, are on point. Unfortunately, their solutions do not go far enough, based as they are on U.S. exceptionalism, even though Professor Henkin himself does not use the word exceptionalism. The simple way out of the allegations of torture against the U.S. arising from its prosecution of the war on terrorism is to retire exceptionalism and embrace international standards. International human rights instruments

recognize[] rights beyond those . . . in the U.S. Constitution—a right to freedom from torture, not only a prohibition on the use of evidence obtained by torture (or other coercion), a right to be free from any inhuman or degrading treatment, and not only from cruel and unusual punishment for crime, but from inhuman or degrading treatment for any purpose.¹⁷⁸

As one U.S. legislator succinctly put it, “[n]o torture and no exceptions.”¹⁷⁹ Part of the changes in the measure proposed by Senator McCain is that service members follow procedures in the Army Field Manual during interrogations of prisoners in Defense Department facilities;¹⁸⁰ therefore, although a major improvement upon present practice, the measure under proposal, if passed, would still lag below international standards, if the procedures fail to meet universal standards.

Replacing exceptionalism with application of international standards will, as indicated before, remove the possibility ever present under the current system of the scope or meaning of inalienable rights coming under attack during periods of internal and external threats in the U.S.¹⁸¹ Professor Koh regretfully observed that the Bush administration chose “to place itself outside the global justice system and to pursue a hostile course” when it had more viable options to pick from.¹⁸² But the U.S. hostility to international law and the U.N. system is an orientation predating the second President Bush that only got worse since his administration took office. One of the viable options Koh said the U.S.

177. *Id.* at A19.

178. *See supra* note 171.

179. White & Babington, *supra* note 166 (quoting Rep. Murtha, Democrat-PA).

180. Sidoti, *supra* note 168.

181. *See supra* notes 58-59 and accompanying text.

182. *See Koh, supra* note 52, at A18-A19.

could have chosen is to “announc[e] broadscale changes in the rules by which the United States had previously accepted international human rights standards.”¹⁸³ But the statement is more figuratively than substantively true. As this Article shows, because the U.S. insulates itself from international human rights standards, there are few standards to form the basis for any “broad-scale changes.” Although U.S. power “can be decisive in stopping human rights abuses,” the U.S. affords little leadership to the international human rights movement.¹⁸⁴ The only change is that the habit of exemption from international standards has grown with little prospect of diminishment under President George W. Bush.¹⁸⁵

2. The Death Penalty

Another political-civil issue on which the U.S. lags behind and could benefit from international human rights standards is capital punishment. The U.S. still retains the death penalty. This is in contrast to more than half the countries in the world, including member-States of the European Union, which have either abolished or imposed some kind of moratorium on the death penalty.¹⁸⁶ In 1996, the International Commission of Jurists, a judicial and human rights non-governmental watchdog, criticized the practice of the death penalty in the U.S. as “arbitrarily and racially discriminatory.”¹⁸⁷ European countries consider

183. *Id.* at A18.

184. *See* Ignatieff, *supra* note 68, at 104 (pointing out that “[t]he [international human rights] movement does not have its headquarters in Washington”).

185. To ensure nobody, not even Congress, tied his hands, in his single-minded war against terror, President Bush has found a deviously creative way around Congressional commands: presidential signing statements. Following the passage by the Senate and House of the McCain amendment banning all “cruel, inhuman and degrading” treatment of anyone in U.S. custody, regardless of where they are held, the White House issued a presidential signing statement that read, “The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power.” Quoted in Andrew Sullivan, *We Don’t Need a New King George*, TIME (Jan. 23, 2006) at 74. In other words, if the president believes torture is warranted to protect the country, he will violate the law and authorize torture. And if the courts try to stop him, he will ignore them too. *Id.* George W. Bush has used more presidential signing statements than all recent presidents put together. As one analyst ruefully points out, “[i]n five years, President Bush has already challenged up to 500 provisions . . . far, far more than any predecessor. But more important than the number under Bush has been the systematic use of the statements and the scope of their content, asserting a very broad legal loophole for the Executive.” *Id.*

186. *See* Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries* (1 Feb. 2004), Mar. 2004, <http://web.amnesty.org/library/print/engact500052004>.

187. *See* Salim Muwakkil, *The Capital of Capital Punishment*, CHI. TRIB., July 12, 1999, at 11.

the practice as “barbaric” and have engaged in a concerted and unabated campaign designed to compel the U.S. government to abolish capital punishment.¹⁸⁸

Professor Henkin stated, commenting on this discrepancy, that “[t]he right to life is the primary Right proclaimed by the Universal Declaration; it ought to inform our jurisprudence on capital punishment.”¹⁸⁹ His recommendation for correcting the problem is “federal and state legislation in the spirit of the Declaration,” if constitutional interpretation is unable to resolve the problem.¹⁹⁰ The provision of the Universal Declaration that Professor Henkin refers to in the prior statement is Article 3, which simply stipulated without qualification that “[e]veryone has the right to life, liberty and security of the person.”¹⁹¹ Advocates against the death penalty read this lack of qualification to mean that the Universal Declaration intended to abolish capital punishment.¹⁹² Professor Koh assesses America’s position on the death penalty as the embracement of a double standard which puts the U.S. “on the lower rung with horrid bedfellows like Iran, Nigeria, and Saudi Arabia, the only other nations that have not in practice either abolished or declared a moratorium on the imposition of the death penalty on juvenile offenders.”¹⁹³ Commentators like the human rights scholar Michael Ignatieff wonder “why the American love of limited government does not extend to a ban on the government’s ultimate power - capital punishment.”¹⁹⁴ Although public support for capital

188. Tom Hundley, *Europe Seeks to Convert U.S. on Death Penalty*, CHI. TRIB., June 2000, at 1. See also William J. Kole, *Schwarzenegger Name Removed from Stadium*, ASSOCIATED PRESS, Dec. 26, 2005 (news story on CA governor, Arnold Schwarzenegger, whose name on a soccer stadium officials in his birthplace in Austria removed because of his pro-death penalty stance).

189. Henkin, *supra* note 13, at 515.

190. *Id.*

191. UDHR, *supra* note 12, at art. 3.

192. This is the position of Sister Helen Prejean in a new book on the topic, revealingly titled *The Death of Innocents*, which sets forth the following unofficial legislative history:

It was to be expected when Article 3 of the Universal Declaration of Human Rights was debated back in the 1940s that such a declaration, which granted everyone the right to life without qualification, would provoke debate, and one of the first proposed amendments was that an exception ought to be made in the case of criminals lawfully sentenced to death. Eleanor Roosevelt urged the committee to resist this amendment, arguing that their task was to draw up a truly universal charter of human rights toward which societies could strive. She foresaw a day when no government could kill its citizens for any reason.

MVFHR Newsletter, *supra* note 35, at 11 (quoting interview with Sister Prejean). Prejean is also an MVFHR board member.

193. Koh, *supra* note 52, at A16-A17.

194. Ignatieff, *supra* note 80.

punishment remains high in America,¹⁹⁵ U.S. approach toward the death penalty appears lately to be taking a turn in the positive direction.¹⁹⁶ To achieve complete resolution of the problem and guard against the risk of possible backsliding, the U.S. should embrace international human rights standards.

A first step of immense symbolic and substantive importance in any move toward embracement of international human rights will be for the U.S. government to reassess its opposition to the International Criminal Court (ICC).¹⁹⁷ The permanent tribunal came into force on July 1, 2002, following ratification by sixty-six countries, six more than the number needed for it to take off.¹⁹⁸ Although the U.S. participated actively in negotiations leading to the treaty creating the tribunal,¹⁹⁹ the government under President William J. Clinton, signed the treaty in 2000, but did not ratify it. Since coming into office, the Bush administration has not only attempted to retract that signature,²⁰⁰ but has also entered into bilateral agreements designed to undermine the work of the fledgling Court.²⁰¹ It also continues to support *ad hoc* war crimes tribunals, such as those of Bosnia, Cambodia, and Rwanda, of the kind this permanent Court was specifically designed to replace.²⁰² But the U.S.'s self-exclusion from the ICC and its failure to support the Court are self-defeatist rather than

195. See Jeffrey M. Jones, *Support for the Death Penalty Remains High at 74%*, GALLUP NEWS SERVICE, May 19, 2003, <http://www.gallup.com/poll/releases/pr030519.asp> (Showing that 74 percent of all respondents favored the death penalty for murder; only 24 percent opposed it).

196. Since the publication of Professor Koh's piece, the U.S. Supreme Court has handed down a ruling that makes unconstitutional the imposition of the death penalty against anyone below 18. See *Brown v. Payton*, 544 U.S. 133 (2005). This, along with a similar prior ruling of the death penalty as unconstitutional for retarded offenders, is only as far as the U.S. has come in abolishing the death penalty.

197. See MAMDANI, *supra* note 102, at 208-9.

198. See, e.g., Human Rights First, *The International Criminal Court*, http://www.humanrightsfirst.org/international_justice/icc/icc.htm (last visited 4/2/06); Human Rights Watch, *International Criminal Court*, <http://hrw.org/campaigns/icc/> (last visited 4/2/06). See also Human Rights Watch, *Questions and Answers about the ICC*, <http://hrw.org/campaigns/icc/qna.htm> (last visited 4/2/06).

199. See generally David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L J. 12 (1999). As then U.S. Ambassador-at-Large for War Crimes Issues, Scheffer led the U.S. delegation to the Rome Conference where the treaty establishing the ICC was negotiated. *Id.*

200. See Koh, *supra* note 52, at A16.

201. Under these bilateral agreements, appropriately referred to contemptuously by Amnesty International as "impunity deals," the U.S. and the affected country pledge not to hand over to the ICC, nationals of the signatories accused of crimes against humanity. Beginning with Sierra Leone on May 6, 2003, by mid-June 2003, the U.S. concluded these agreements with 37 countries. Except for Egypt, India, Israel, and the Philippines, these countries are small, poor nations, most heavily dependent on U.S. aid. See MAMDANI, *supra* note 102, at 209.

202. See *id.*

serve U.S. national interest.²⁰³ As part of the global war against terrorism, the Bush administration has abridged civil liberties for U.S. residents, aliens as well as citizens,²⁰⁴ and claimed the power to try suspected terrorists in military tribunals.²⁰⁵ The ICC is set up to investigate and prosecute serious crimes, such as genocide and crimes against humanity, long recognized by the international community but until now left unpunished because of the unwillingness or inability of individual countries to prosecute them.²⁰⁶ Because it would have jurisdiction over matters involving terrorism, the ICC would have afforded the most appropriate forum for trials of suspected terrorists,²⁰⁷ hence dispensing with any need to expose these suspects to trials in secret military courts, and the controversy the decision has generated at home and abroad.

B. Applying International Human Rights Standards to Protect and Promote Socioeconomic Rights

Another area in which application of international standards will greatly benefit the American human rights approach is the protection and promotion of socioeconomic rights. America needs to extend to socioeconomic human rights and collective rights the same primacy it affords to and accords political-civil rights. The introduction summarized the eloquent arguments, going back to the days of Dr. Martin Luther King, Jr., including the positions of Professors Henkin and Sunstein, for the U.S. to protect and promote socioeconomic human rights and as well contended that the hurricane Katrina, which, in its wake, left a trail of death and destruction in New Orleans and other

203. See generally Anne-Marie Slaughter, *The Partial Rule of Law, America's Opposition to the ICC is Self-Defeating and Hypocritical*, AM. PROSPECT, SPECIAL REPT. ON U.S. HUMAN RIGHTS, Oct. 2004, at A20.

204. See, e.g., Deborah Pearlstein, *Rights in an Insecure World: Why National Security and Civil Liberty are Complements*, AM. PROSPECT, SPECIAL REPT. ON U.S. HUMAN RIGHTS, Oct. 2004, at A7-A10; David Cole, *Terrorizing Immigrants in the Name of Fighting Terrorism*, 29 HUM. RTS. 11-13, 22 (Winter 2002).

205. See Elisa Massimino, *Alien Justice: What's Wrong with Military Trials of Terrorist Suspects?*, 29 HUM. RTS. 14-15, 22 (Winter 2002). See also David G. Savage, *Executive Decisions: Not Since Nixon Has the High Court Offered so Many Rulings on Presidential Power*, A.B.A. J. 18, 20 (discussing the various cases involved); U.S. ECONOMIC & SOCIAL COUNCIL, *SITUATION OF DETAINEES AT GUANTÁNAMO BAY*, E/CN. 4/2006/120 (Feb. 15, 2006) (U.N. Commission on Human Rights report calling for closure of the U.S. naval base in Cuba because, in the Commission's assessment, the facility is effectively a torture camp).

206. Human Rights Watch, *Questions and Answers about the ICC*, *supra* note 198.

207. Maryam Elahi, *Military Tribunals: A Tragedy of Justice*, 29 HUM. RTS. 15 (Winter 2002); see also Massimino, *Alien Justice*, *supra* note 205, at 22.

communities in the gulf region, reinforces the necessity that should have been long obvious to all for socioeconomic human rights. There are, however, some points in these legal scholars' commentaries, which, in the light of the argument made in this Article, are unavailing.

One such point is Professor Henkin's statement relating to legislation of socioeconomic rights as entitlements. The position is inconsistent with the merits of the human rights framework set forth in Part II and elaborated further here. Legislating socioeconomic rights as entitlements would serve to immunize the U.S. from international human rights standards, a factor contributing to the relegation that has taken place with respect to socioeconomic rights in the U.S. human rights approach. Henkin stressed the imperativeness of U.S. support for the Universal Declaration (and the idea of universal human rights the document embodies) at a time the document has come under attack by advocates of "cultural relativism" and state "sovereignty."²⁰⁸ America "should, on every occasion and by every means, reaffirm its identification with the Declaration and its ideology, with its contents, its universality, its fundamental commitment to human dignity."²⁰⁹ The most effective way to provide that support is to embrace international standards. Legislating rights as entitlements, as Henkin suggests, falls below and lags behind international standards.

Political-civil rights and socioeconomic rights are interlinked and inseparable. The Universal Declaration "at the very start of the human rights movement, included both categories without" separating or prioritizing them.²¹⁰ Also, the Preamble to the ICESCR, in terms mirroring those used in the ICCPR, states, "in accordance with the Universal Declaration, 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."²¹¹ Notice the reference to freedom from fear and want; the expression calls to mind President

208. See Henkin, *supra* note 13, at 515.

209. *Id.*

210. STEINER & ALSTON, *supra* note 31, at 247.

211. Further reinforcing this close linkage and indivisibleness are the interesting examples Steiner and Alston cite. These examples include (1) the right to form trade unions contained in the ICESCR versus the right to freedom of association recognized in the ICCPR; (2) the ICESCR recognizing various "liberties" and "freedoms" relating to scientific research and creative activity; and (3) the ICESCR in Art. 13 recognizing the right to education and the parental liberty to choose a child's school versus the ICCPR recognizing in Art. 18 the liberty of parents to choose their child's religious and moral education. STEINER & ALSTON, *supra* note 31, at 247.

Roosevelt's "four freedoms" speech in 1941.²¹²

Another important pronouncement, additional to the language of the Universal Declaration, the ICESCR, and the ICCPR, speaking to the interdependency and inseparability of political-civil and socioeconomic human rights, is the statement, to the effect that "[t]he international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis[.]"²¹³ released following the conclusion of the Second World Conference on Human Rights in Vienna. The Vienna conference is momentous because there the international community successfully rebuffed the argument of cultural relativism in favor of the concept of universal human rights—and international standards—that all nations, big and small, must abide by.²¹⁴ Adopting a human rights approach focused solely on political-civil rights to the exclusion of socioeconomic rights ignores this repeated U.N. counsel regarding the inter-linkage and inseparability of the two categories of rights.

To be sure, the U.S. is not the only country in the world that disrespects socioeconomic human rights. Many other countries also unfortunately do. At the Second World Conference on Human Rights held in Vienna, Austria, in 1993, the Committee on Economic, Social, and Cultural Rights (CESCR), an independent expert body tasked with responsibility for monitoring the implementation of the ICESCR,²¹⁵ assessed the observance of these rights as "shocking" and lamented the

212. See *supra* note 62 and accompanying text.

213. Vienna Declaration and Programme of Action, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993).

214. A declaration adopted at the end of this conference reaffirmed "the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question." *Id.* ¶ 1. It also pronounced political-civil rights and socioeconomic rights "universal, indivisible[,] and interdependent and interrelated," adding "The international community must treat human rights globally in a fair and equal and equal manner, on the same footing, and with the same emphasis." *Id.* ¶ 5. The wording of the declaration was also designed to respond to a challenge to the concept of universal human rights by some Asian States who, in a "Universal Declaration of Duties" they issued (obviously mimicking the Universal Declaration of Human Rights), at a preparatory meeting in Bangkok, Thailand, contended that universal human rights take into consideration "national and regional peculiarities and various historical, cultural, and religious backgrounds." UN Doc. A/CONF.157/PC/59, *quoted in* Phillip Alston, *The UN's Human Rights Record: From San Francisco to Vienna and Beyond*, 16 HUMAN RIGHTS Q. 375, 382 (1994). The global human rights conference preceding Vienna, the First World Conference on Human Rights took place in Teheran, Iran, in 1948.

215. See Human Rights Education Associates, *The United Nations Human Rights System*, <http://www.hrea.org/learn/guides/UN.html>.

occurrence in the following strong language:

States and the international community as a whole continue to tolerate all too often breaches of economic, social[,] and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. . . . [V]iolations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social[,] and cultural rights. . . . Social indicators of the extent of deprivation, or breaches, of economic, social[,] and cultural rights have been cited so often that they have tended to lose their impact.²¹⁶

But promotion of socioeconomic human rights is an issue where the U.S. can show leadership.

America “is genuinely exceptional in international affairs,” as Professor Koh states, when it exercises “exceptional global leadership and activism.”²¹⁷ Its ability to deflect attacks by countries opposed to the notion of universal human rights is also optimized when the U.S. embraces international standards. The ICESCR urges a “progressive” enforcement²¹⁸ that a country like the U.S., because of its immensely superior economic and related material accomplishments, is in a better position to muster than many countries. The U.S. should correct its historic inattention to socioeconomic rights and begin the process of protecting and promoting these rights by ratifying the ICESCR.

C. Applying International Human Rights Standards to Protect and Promote the Rights of Peoples

No human rights approach is complete if it does not integrate the rights of peoples, which is not a superfluous human rights category. Instead, as the human rights scholar Seyom Brown explains, the criticalness of these rights is underscored by the fact that “collective or peoples’ rights frequently emerge out of situations in which individuals are denied their basic rights, not simply as individuals, but because they belong to a group that the government or the dominant cultural group

216. STEINER & ALSTON, *supra* note 31, at 239 (quoting UN Doc. E/1993/22, Annex III, ¶ 5 and ¶ 7).

217. Koh, *supra* note 52, at A17.

218. See ICESCR, *supra* note 33, art. 2, (“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, 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. . . .”).

wants to suppress or weaken.”²¹⁹ An individual member of an aggrieved group may not feel personally deprived of his or her individual rights, such as equal protection of the laws, freedom of expression and association, and so forth, but may belong to a group whose minority status in a given society does not allow the group to exercise sufficient weight in shaping the rules and policies of that society.²²⁰ It is probably in cognizance of this reality that both the ICCPR and the ICESCR guarantee this right. Even before setting forth the rights of individuals, Article 1 of both documents stipulates that “[a]ll 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.”²²¹ As previously indicated, women and children, along with persons with disabilities, are entities upon whom international human rights instruments confer the rights of peoples. An important first step in the U.S. commitment to protecting and promoting the rights of peoples would be for the U.S. Senate to ratify without delay the Convention on the Rights of Children (CRC), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This should not be too hard to accomplish regarding a treaty like the CRC given that, as Professor Koh points out, the U.S. government “actually complies in most respects” with the Convention.²²²

Next, the United States should move to apply international standards to its domestic policies relating to indigenous groups within the country. Indigenous rights evolved within the international community as an outgrowth of the new world standards that emerged after the Second World War in the wake of the dissolution of colonial empires.²²³ Two international instruments relating to the rights of indigenous peoples are Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, adopted by the International Labor Organization (ILO), a specialized agency of the UN, in 1989;²²⁴ and the Draft Declaration on the Rights of Indigenous Peoples (DDRIP).²²⁵ Convention No. 169 generally protects indigenous lands and sets out measures to improve the health, education, and employment

219. BROWN, *supra* note 39, at 31.

220. *Id.*

221. See ICESCR, *supra* note 33, at art. 1; ICCPR, *supra* note 37, at art. 1.

222. Koh, *supra* note 52, at A16.

223. CLOSE TO HOME, *supra* note 10, at 34.

224. For a text of this document, see HUMAN RIGHTS DOCUMENTS, *supra* note 43, at 100-108.

225. For the text of the document, see Indian Law Resource Center, *available at* http://www.indian-law.org/un_draft_decl.

of indigenous peoples. The U.S. has not ratified the Convention. The DDRIP guarantees the rights of indigenous peoples to determine for themselves in many issue-areas, including culture and language, education, health, housing, employment, land and resources, environment and development, intellectual and cultural property, and the capacity of indigenous peoples to conduct treaties and agreements with governments.²²⁶

Going back in U.S. history, African Americans have viewed themselves as a distinct political (sub)culture.²²⁷ Malcolm X conceived and advocated the concept of a Black nation within the United States.²²⁸ Before Malcolm X, in 1951, the Civil Rights Congress filed a petition before the United Nations, significantly titled *We Charge Genocide*, accusing the United States government of genocide because of its mistreatment of African Americans.²²⁹ A most recent (re)formulation of this concept of black nationality is by the political scientist Robert T. Stark who, in the context of a criticism of deracialization strategies, commented that, "black politics is a group struggle for race-specific empowerment in order to exercise some degree of independence and self-determination. If campaign behavior is a predictor of governance style and behavior, then deracialization is an anathema to the essence of black politics."²³⁰ A nationality group, even more so than African Americans, considered an indigenous population within the U.S. and the focus of the rest of the analysis on this topic, are Native Americans.

The most fundamental right Native Americans seek is the right to

226. Both the U.N. and the Organization of American States (OAS) are nearing the completion of declarations on the rights of indigenous peoples which, once adopted, will form the standards with which all affected national governments are expected to conform in their treatment of the indigenous peoples within their borders.

227. See the analysis of Black "political behavioralism" in HANES WALTON, JR. & ROBERT C. SMITH (3rd. ed. 2006) [*hereinafter* WALTON & SMITH], made up of African American political culture (chap. 3), political socialization (chap. 4), public opinion (chap. 5), and media (chap. 6). See also the text of a position paper, Student Nonviolent Coordinating Committee, *The Basis of Black Power*, in FRANKLIN D. GILLIAM, JR., *FARTHER TO GO: READINGS AND CASES IN AFRICAN-AMERICAN POLITICS* 129-135 (2002) [*hereinafter* SNCC Position Paper].

228. See WALTON & SMITH, *supra* note 227, at 99-100 (discussing the Black Power Movement); see also SNCC Position Paper, *supra* note 227. SNCC nationalist thoughts were inspired partly by Malcolm X.

229. See *WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS* (William L. Patterson, ed. 1971).

230. Robert T. Starks, *A Commentary and Response to 'Exploring the Meaning and Implications of Deracialization in African-American Urban Politics,'* 27 *URB. AFF. Q.* 216, 212 (1991). Deracialization strategies are an approach to campaign for office and leadership style that de-emphasize race-consciousness.

remain indigenous,²³¹ specifically “rights to their culture, language and forms of worship[,] and to maintain control over their territories and governance of their own affairs.”²³² Yet, going back to the very formation of this country, the U.S. government has impeded and continues to impede through removal, killing, and or forced assimilation, the right of Native Americans to determine for themselves.²³³ Violations of Indian human rights in the U.S. include taking Indian lands by the federal government without due process or compensation in an attempt to accelerate the assimilation of tribes through the elimination of their land base, federally-approved destruction of Indian sacred sites critical to Indian cultural life, federally-approved destruction and contamination of natural resources that Indians depend upon for food and water, continuing judicial attacks on the right of Indian governments to manage their own territories and peoples,²³⁴ and systematic erasure of Indian cultural identity.²³⁵ A judicial decision laying the foundation for contemporary violation of Indian human rights is *Tee-Hit-Ton Indians v. the United States*,²³⁶ in which the Supreme Court ruled that the U.S. government has the authority to seize Indian lands without compensation. It was this decision—and the failure to overturn it during the ensuing decades—that led Native Americans to seek recourse in international human rights laws and mechanisms for resolution of their land and natural resource claims against the U.S. government.²³⁷ Analysts have described the relationship between the U.S. government and Native Americans, embodied in U.S. law, as “an involuntary permanent trusteeship with no accountability. The only other parallels are childhood or mental incapacity. But the difference is that those relations end with age or compliance. Indians can’t end their relationship.”²³⁸

One recent occurrence that highlights the nature of the U.S. government’s trusteeship relationship with Native Americans is a thirty-

231. HUM. RTS. NETWORK, *supra* note 142, at 15.

232. CLOSE TO HOME, *supra* note 10, at 34.

233. HUM. RTS. NETWORK, *supra* note 142, at 15.

234. *Id.*

235. See Tara McKelvey, *Domestic Abuse*, AM. PROSPECT, SPECIAL REPT. ON U.S. HUMAN RIGHTS, Oct. 2004, at A29 (discussing the mistreatment of an estimated 100,000 Native American children, many of whom “were not only physically abused,” but “were also stripped of their cultural identity . . . children were forced to give up Indian names, stop speaking their own language, and cut off their long braids”).

236. 348 U.S. 272 (1955).

237. CLOSE TO HOME, *supra* note 10, at 32.

238. *Id.* at 33 (quoting Tim Coulter, executive director of the Indian Law Resource Center).

year struggle over land rights involving Mary and Carrie Dann, of northern Nevada in the Western Shoshone nation, and the U.S. Bureau of Land Management (BLM), the agency charged with responsibility for managing federal land. In 1974, the BLM sued the Dann sisters for trespass for grazing their cattle on public lands. The sisters defended that the lands they used to graze their livestock are not publicly owned, but rather ancestral territory of the Western Shoshone nation. From 1974 to 1991, the case worked its way through the U.S. federal court system, to the Supreme Court, with all the courts ruling for the government, supposedly on the ground that the claims to their land by the Western Shoshone have been nullified by “white encroachment” and/or “extinguished.”²³⁹

Subsequently, in 1992, the BLM raided the northern Nevada ranch of the Dann sisters, confiscating 430 horses.²⁴⁰ With the help of the Indian Law Resource Center, the two sisters, in 1993, lodged a complaint before the Inter-American Commission on Human Rights (IACHR), accusing the U.S. government of interfering with their use and occupation of ancestral lands, appropriating the land, and removing their livestock through unfair legal procedures.²⁴¹ In January 2003, almost ten years later, the Commission ruled for the sisters and against the U.S. government, reasoning that the United States had

failed to ensure the Dann’s right to property under conditions of equality, contrary to Articles II, XVIII[,] and XXIII of the American Declaration on the Rights and Duties of Man, which sets forth the human rights standards of the OAS, in connection with their claims to property rights in the Western Shoshone ancestral lands.²⁴²

The response of the United States was that it “rejects the commission’s report in its entirety and does not intend to comply with the commission’s recommendations.”²⁴³ It based this rejection on the ground that the *Dann* case did not involve human rights violations but land-title and land-use questions it said were already decided by the Indian Claims Commission (ICC).²⁴⁴ In its final report on the case, the IACHR replied that the U.S. rejection of its recommendation

fail[s] to consider . . . the well-established jurisprudence and practice of the inter-American system according to which the American

239. *See id.* at 32, 35.

240. *See id.* at 32.

241. *Id.* at 36.

242. *See id.*

243. *See id.* at 37. The acronym OAS stands for Organization of American States.

244. *See id.*

Declaration is recognized as constituting a source of legal obligations for OAS member states . . . These obligations are considered to flow from the human rights obligations of member states under the OAS charter, which member states have agreed are contained in and defined by the American Declaration.²⁴⁵

Reinforcing the position of the IACHR are the comments of the United Nations' Committee for the International Convention on the Elimination of All Forms of Racial Discrimination (CICERD)²⁴⁶ relating to the U.S. government's report for 2001 on its compliance with the ICERD. Recall, as indicated before in this article, that the U.S. ratified this multilateral treaty in 1994. Part of the obligations for state-parties to the treaty is an undertaking to report periodically on their compliance with the terms of the treaty.²⁴⁷ The CICERD in turn periodically reviews such report relating to compliance and makes recommendations accordingly. The CICERD faulted the U.S.'s 2001 compliance with the ICERD, noting "with concern, the federal government's ability to unilaterally abrogate treaties with Indian tribes."²⁴⁸ It also expressed concern regarding the "expansion of mining and nuclear waste storage on Western Shoshone ancestral land, for placing their land on auction for private sale and other actions affecting the rights of indigenous peoples."²⁴⁹ It recommended that the federal government "ensure effective participation by indigenous communities in decisions affecting them . . ."²⁵⁰

The relationship between the U.S. government and American Indians can benefit from application of international human rights principles; international mechanisms will provide much needed "independent review of the inadequacies of the U.S. judicial system and federal Indian law."²⁵¹ International human rights instruments embody principles relating to "sovereignty and self-determination for indigenous peoples" that is in contrast to U.S. legal limitations.²⁵² International

245. *See id.*

246. The CICERD is the treaty body responsible for monitoring compliance with the ICERD. *See ICERD, supra* note 50, at art. 8; *see also The United Nations Human Rights System, supra* note 215, at 11.

247. *See ICERD, supra* note 50, at art. 9.

248. *See CLOSE TO HOME, supra* note 10, at 36.

249. *See id.*

250. *See id.* The U.S. government submitted its first compliance report to the committee only in Sept. 2000, five years later. The U.S. government has yet to respond to the ICERD findings; the government has three years within which to respond. *See id.*

251. *See id.* at 34.

252. *See id.*

human rights standards are “far more expansive in terms of property and collective rights for indigenous people[s] than U.S. law.”²⁵³ Native Americans need to address violation of their rights “on a nation-to-nation basis, rather than within the context of trusteeship” imposed by U.S. law.²⁵⁴ Violation of Native Indian fundamental human rights represents “a perfect example of the disconnect” arising from the U.S. failure to follow international standards in human rights.²⁵⁵ To demonstrate its gesture of good-faith toward commitment to indigenous rights, the U.S. should ratify the ILO’s Convention No. 69 and participate positively in the design of international law principles to protect indigenous peoples.

VI. CONCLUSION

The U.S. follows an *incomprehensive* approach to human rights that focuses exclusively on political-civil rights to the neglect and relegation of socioeconomic and collective human rights. However, the recent natural disaster in the U.S.’s gulf region and the lack of a progress in the U.S. national government policies toward Native Americans reveal the inadequacy of a human rights approach anchored solely on political-civil rights. The hurricane disaster that ravaged New Orleans exemplified the consequences that can attend a low-grade commitment to socioeconomic human rights. The unfavorable socioeconomic conditions of nationality groups, such as blacks, and the lack of positive result in the U.S. government’s responses to American Indians’ campaign for internal self-determination, both testify to the problem that can come from lack of attention to group rights.

To increase its commitment to socioeconomic human rights as well as to the rights of peoples while correcting constitutional weaknesses in political-civil rights, made worse now by the war on terrorism, the U.S. needs to embrace international human rights standards. The debate recently among Supreme Court justices regarding the place of international law in Supreme Court jurisprudence “reflects a broader development that is gaining momentum around the country: Human rights are coming home.”²⁵⁶ Embracement of international human rights standards also has positive long-term consequences for both U.S. power

253. *Id.*

254. *Id.*

255. *See* McKelvey, *supra* note 235, at A29 (quoting Hadar Harris, executive director, American University’s Center for Human Rights and Humanitarian Law).

256. Jenkins & Cox, *supra* note 155, at 27.

and sovereignty that continuing self-insulation from those standards stands every chance of damaging.²⁵⁷ U.S. pursuit of freedom will remain “unfinished” so long as America protects and promotes only political-civil rights to the exclusion of the remaining two other categories of human rights.²⁵⁸

257. See Koh, *supra* note 52, at A19 (warning that “[l]eft unrestrained, it seems clear, a continuing impulse to adopt double standards will continue to weaken American soft power and damage the rule-of-law structures that America has helped put in place. Double standards diminish American sovereignty”). With the Cold War over and in the aftermath of September 11, the U.S. government should, as Professor Koh advises, pursue a norm-based internationalism in which American power derives from hard power as well as from perceived fidelity to universal values of democracy, human rights, and the rule of law, rather than on an internationalism based on display of raw power. *Id.* In an interesting analysis on the background to U.S. world hegemony at the start of the new century, Professor Bacevich, an accomplished ex-soldier, argues that post-Cold War U.S. administrations have inexorably found themselves resorting to military force in an attempt to create openness motivated by the imperative of economic expansionism. See ANDREW J. BACEVICH, *AMERICAN EMPIRE: THE REALITIES AND CONSEQUENCES OF U.S. DIPLOMACY* (Harvard University Press 2004). Assuming this interpretation is correct, large questions remain regarding the impact of such a strategy on U.S. leadership on global issues, human rights included.

258. See generally, Sunstein, *Economic Security*, *supra* note 17. Note that the book’s subtitle makes reference to “America’s Unfinished Pursuit of Freedom.” Appropriately, the historian Eric Foner includes FDR’s four-freedoms speech, initiating the president’s advocacy for socioeconomic rights later fleshed out in his State of the Union address in 1944, among the selections that form his documentary history of the United States titled “Voices of Freedom.” FONER, *supra* note 62, at 158-60. See also Mary Robinson, *What We Expect from America*, AM. PROSPECT, SPECIAL REPT. ON U.S. HUMAN RIGHTS (Oct. 2004) at A32 (advising the U.S. government that “a world of true human security is only possible when the full range of human rights . . . are guaranteed for all people”). Robinson, former president of Ireland, is also a former UN High Commissioner for Human Rights the Bush government helped force out of office for insisting that the U.S. abide by international human rights standards. See MAMDANI, *supra* note 102, at 202-06.