

Rescuing Human Rights Law From International Legalism and its Critics

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ABSTRACT

New Realist critics of international law, like many international relations realists who came before, are taking aim at human rights for its hopeless legalism. These critics rely on a regulative model that narrowly conceives of human rights laws as potentially enforceable rules without teeth. The article defines and elaborates an alternative constitutive model of human rights law, which understands the role of law as being both constituted by, and generative of, political interactions. This understanding is superior to legalist and regulative models because it better describes a number of rights-related phenomena observed in the world.

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I. INTRODUCTION

The international human rights project everywhere seems in retreat. In December 2014, the International Criminal Court (ICC) dismissed its case against sitting President Uhuru Kenyatta and suspended its investigations in the Sudan, forfeiting the cause of many pro-justice advocates in Africa.¹ In the United States these developments were overshadowed by the coincident release of the US Senate's report on the CIA's detention and interrogation program. The report inspired an openly partisan debate on the "justified uses" of torture—a set of acts that is unquestionably prohibited under international law.² Some observers called for the prosecution of those responsible, and others dug in to defend them as terror-fighting patriots; the debate went back and forth, until media attention swiftly moved on to other crises.

Meanwhile, human rights abuses continued to occur, seemingly unchecked, in all continents of the world. Forces loyal to Guatemala's President Otto Pérez Molina, who might have been an accessory to genocidal campaigns in the 1980s, threaten judges who are investigating cases against the military.³ Security forces in Russia and other Commonwealth of Independent States participate in a region-wide rendition program to torture terrorist suspects.⁴ And in other countries like Nigeria, Egypt, Syria, and Sri Lanka, government agents, often at the direct behest of those in charge, actively engage in kidnapping, torture, mass imprisonment and the death of hundreds of men, women, and children.⁵

To many, this stack of recent negative events is evidence enough to declare the outright failure of human rights law. Though activists do not realize it, the thinking goes, a rights apocalypse is immanent. Further, this collapse has been a foregone conclusion written into the discourse's formal legalism, or the "ethical attitude that holds moral conduct to be a matter of rule following."⁶ For critics of legalism, the fact is that the last forty years of diplomatic energies devoted to defining human rights laws and obligations, and criminalizing human rights crimes, have had little effect. Why? Because rules do not, and cannot, constrain self-interested political actors.

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1. Owen Bowcott, *ICC Drops Murder and rape charges Against Kenyan President*, GUARDIAN, 5 Dec. 2014, available at <http://www.theguardian.com/world/2014/dec/05/crimes-humanity-charges-kenya-president-dropped-uhuru-kenyatta>.
 2. Janelle Bouie, *Dick Cheney's America*, SLATE.COM, 16 Dec. 2014, available at http://www.slate.com/articles/news_and_politics/politics/2014/12/why_americans_support_torture_we_accept_the_abuse_and_cruel_punishment_of.html.
 3. Romina Ruiz-Goiriena, *A Year After Genocide Trial, has Justice Been Done?*, CNN, 7 May 2014, available at <http://www.cnn.com/2014/05/03/world/americas/guatemala-genocide-trial-anniversary/>.
 4. AMNESTY INT'L, CYNICAL SUBVERSION OF JUSTICE IN THE NAME OF SECURITY: RETURNS TO TORTURE IN CENTRAL ASIA (3 July 2013), available at <https://www.amnesty.org/en/latest/news/2013/07/cynical-subversion-justice-name-security-returns-torture-central-asia/>.
 5. See generally HUMAN RIGHTS WATCH, WORLD REPORT: EVENTS OF 2015 (2016), available at https://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf.
 6. JUDITH SHKLAR, LEGALISM: LAW, MORALS AND POLITICAL TRIALS 1 (1986).

In this article, we will first argue that this “rule skepticism” is not new, nor is it grounded in the unique newness of recent events.⁷ Instead, it represents a partial revival of international relations (IR) realist theory with a rich history in United States political science.⁸ The critique of international human rights as naïve legalism resurged after IR scholars started to take international legalization seriously in the 1990s.⁹ The contribution of this “New Realist” scholarship on international law is to make a double move: it at once oversimplifies the role of law by advancing a normative theory that the purpose of international law *should be* to regulate state actors, while simultaneously contending with increasingly sophisticated statistical evidence that law does *in fact* fail to regulate state actors.¹⁰ The upshot for critics applying this regulative model of international law is the human rights legal project should be scrapped—or should at the very least be forced to confront its own irreducibly political nature.

This is not the only way to think about international human rights law. We will next describe a second *constitutive model* that is coming into form. The constitutive model proffers the notion that “law working in the world constitutes relationships as much as it delimits acceptable behavior.”¹¹ The constitutive model shares with the regulative model a focus on the impact of human rights law, and a lack of sympathy for a strictly legalist approach. That is, it does not make the stylized assumption that legal rules, once defined, are necessarily obeyed by states.

The constitutive model understands that human rights law has been politically produced, and inversely, that the diffusion of human rights legal norms is politically productive. Additionally, the impact of human rights legal activism can be beneficial, but it need not be so. Positive change is not inevitable. The micro-foundations of the constitutive model are more difficult to observe and model statistically because they suppose bottom-up, non-linear effects of international human rights law, whereas the regulative model rests solely on the supposition of top-down movement, which should be well approximated by a simple linear relationship. Each model possesses

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7. Guglielmo Verdirame, “*The Divided West*”: *International Lawyers in Europe and America*, 18 EUR. J. INT’L. L. 553, 564 (2007).
 8. See, e.g., JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* 15 (2015).
 9. This came after roughly three decades of basically ignoring the question of international law and legalization altogether. See Anne-Marie Slaughter Burley, *International law and International Relations Theory: A Duel Agenda*, 87 AM. J. INT’L. L. 205 (1993); Chandra Sriram, *International Law, International Relations Theory and Post-Atrocity Justice*, 83 INT’L. AFF. 467 (2006).
 10. The term “New Realism” is borrowed from Jens Ohlin. However, Ohlin uses New Realists to describe a small handful of scholars including John Yoo, Jack Goldsmith, and Eric Posner, while we use it to characterize the work of a wider group of scholars that includes other skeptics of human rights in international relations, comparative politics, peace studies, and critical theory. The tie that binds New Realists together, we argue, is a critique of legalism. OHLIN, *supra* note 8.
 11. Martha Finnemore & Stephen J. Toope, *Alternatives to “Legalization”*: *Richer Views of Law and Politics*, 55 INT’L. ORG. 743 (2001).

clear theoretical foundational assumptions and expectations, all of which we elucidate in Sections III and IV.¹²

Third, we take up the task of pragmatically evaluating the usefulness of each model in light of evidence presented in recent research. We submit that the constitutive model is more intellectually fruitful than the regulative model, and that an increasing amount of empirical evidence exists to support it. Among other things, this model is able to conceptualize how slow-burning and hard-to-observe improvements in state behaviors appear to be associated with sustained human rights legal activism over time. Even further, the improvements in respect for human rights have remained hidden from view by the very hard fought success of human rights activists. Each success leads to updated goals. We discuss new empirical evidence demonstrating that, when taking into account increasing information over time, human rights violations decreased markedly over the last three decades, in accordance with a simultaneous increase in legal instrumentation.¹³

Fourth and finally, we ask the question, why do IR theorists and human rights critics continue to argue against legalism rather than taking seriously a socially rooted and politically grounded constitutive model? To answer this question, we maintain that new criticism of human rights betrays two pathologies. The first is a love-hate relationship with law: critics often unleash totalizing assaults on legal formalism while contradictorily advocating for alternative forms of law. In other words, they simply seek to replace laws that they do not like with laws that they prefer. The second pathology is that new critics tend to argue against unthinking human rights legalism not because the world is dominated by unthinking legalists (it is not) but because doing so is necessary to create the space for their primary lesson: that legalists do not understand politics. Constitutive thinkers and human rights activists already understand this lesson, making the main substance of the new human rights criticism obsolete.

II. INTERNATIONAL LEGALISM AND ITS CRITICS

From the moment that various state delegations clapped congratulations after adopting the Rome Statute for the ICC, to the moment that nineteen terrorists executed their game-changing acts of horror in New York, Pennsylvania, and Washington, D.C.—in roughly the three-year period between

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12. Our categories are borrowed in part from Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L. L. 345 (1998). However, our discussion departs substantially. We hope that readers will not do Kingsbury the disservice of conflating our work with his.
 13. Christopher J. Fariss, *Respect for Human Rights has Improved Over Time: Modeling the Changing Standard of Accountability*, 108 AM. POL. SCI. REV. 297 (2014).

17 July 1998 and 11 September 2001—students of international relations reported hopefully on a world under the construction of transnational agents of legal and rights-based progress. Influential book titles from this period include *Activists beyond Borders*, *The Power of Human Rights*, and *Realizing Human Rights*.¹⁴ In top journal articles, scholars of international relations pondered the origins of human rights regimes;¹⁵ resurrected long-dormant interest in international law and the concept of legalization;¹⁶ and examined the mechanisms through which international norms are localized.¹⁷ Indeed, human rights had become a *lingua franca* in the study and practice of international politics.¹⁸

Scholars still write a great deal about human rights today, even after more than a decade of the Global War on Terror, and its stripping away of illusions of perfect compliance with rights norms. But today human rights scholarship is different. Where pre-9/11, the focus was on the potential posed by a global rule of law based on rights principles, today the focus has increasingly shifted to identifying the limits of a global human rights regime. Scholarly manuscripts published in the last decade ring of greater skepticism: “Trials and Errors,” *The Limits of International Law*, *The Perils of Global Legalism*, *Hijacked Justice*, *The Last Utopia*, *The Endtimes of Human Rights*, *The Human Rights Paradox*, and *The Twilight of Human Rights Law*.¹⁹ What sets these new projects apart, as some of the titles indicate, is not just a “paradoxical sensibility,” or a wish to proclaim the outright demise of human rights law, but a clear distaste for legalism.²⁰

Judith Shklar defined legalism exhaustively as “the preference for case-by-case treatment of all social issues, the structuring of all possible human relations into the form of claims and counter-claims under established

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14. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); THOMAS RISSE & KATHRYN SIKKINK, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse, Stephen Ropp & Kathryn Sikkink eds., 1999); *REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT* (Samantha Power & Graham Allison eds., 2000).
 15. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L. ORG. 217 (2000).
 16. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L. ORG. 401 (2000).
 17. Andrew P. Cortell & James W. Davis, Jr., *Understanding the Domestic Impact of International Norms: A Research Agenda*, 2 INT'L. STUD. REV. 65 (2000).
 18. Michael Ignatieff, *Human Rights: The Midlife Crisis*, N. Y. REV. BOOKS, 20 May 1999, available at <http://www.nybooks.com/articles/1999/5/20/human-rights-the-midlife-crisis/>.
 19. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L. SECUR. 5 (2003); JACK GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* (2009); JELENA SUBOTIĆ, *HIJACKED JUSTICE: DEALING WITH THE PAST IN THE BALKANS* (2009); SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010); STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* (2013); ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014).
 20. For paradoxical sensibility see Kenneth Cmiel, *The Recent History of Human Rights*, 109 AM. HIST. REV. 117 (2004).

rules, and the belief that the rules are ‘there.’”²¹ This type of thinking is the province of lawyers, who, in their search for answers, look only inside the legal details rather than outside the system of laws. For Eric Posner, one of legalism’s primary opponents, “*global* legalism is wedded to the idea that when international law is created, states obey it.”²² In his new volume, Posner takes aim at human rights law for its “rule naiveté”—or the misconception that precisely articulated legal rules at the international level can define the public good for all states.²³

With this, Posner joins a cast of critics of legal formalism and criminalization in the field of human rights. Jack Snyder and Leslie Vinjamuri, for example, attack scholars and activists who attempt to solve problems of civil war or democratic breakdown by applying a rule-based “logic of appropriateness” instead of a utilitarian “logic of consequences.”²⁴ If global actors want to end armed conflicts and promote democracy, the argument goes, they should foment political deals between rival groups, some of which involve extending legal amnesties for crimes against humanity and other abuses, rather than seeking to hold them accountable for human rights violations.²⁵ For these scholars, a rule-oriented legalist mentality will produce only backlashes and failures when encountering hard political realities.²⁶

In *The Endtimes of Human Rights*, Stephen Hopgood also sets his sights on rights-based legalism, constructing an incisive cultural critique of global phenomena as diverse as the “secular humanism” faith, the deployment of the “Holocaust metanarrative,” and the stylized “architecture of [human] suffering.”²⁷ Hopgood draws a distinction between *human rights*, in the lowercase, and *Human Rights*. The former he uses to designate all of those good things that attend to justice-based resistance: networked activism, information campaigning, determined anti-government protests, and earnest UN advocacy from below. These elements are to be distinguished from the legalized *Human Rights* regime, which is a “global structure of laws, courts, norms, and organizations that raise money, write reports, run international campaigns, open local offices, lobby governments, and claim to speak with singular authority in the name of humanity as a whole.”²⁸ On the ground, activists simply do not care about this regime because it is too distant and too professionalized. In short, Human Rights is not *genuine* enough. According to the argument, the failure for international human rights law is

21. SHKLAR, *supra* note 6, at 10.

22. POSNER, *THE PERILS OF GLOBAL LEGALISM*, *supra* note 19, at 185.

23. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW*, *supra* note 19, at 144.

24. Snyder & Vinjamuri, *supra* note 19.

25. *Id.*

26. Leslie Vinjamuri & Jack Snyder, *Law and Politics in Transitional Justice*, 18 *ANNU. REV. POL. SCI.* 303 (2015).

27. HOPGOOD, *supra* note 19, at 14, 25, 47, 69.

28. *Id.* at ix.

the hubris of its Western proponents, who attempted to make international positive law out of secular natural law ideals that are actually grounded in “liberal power and money.”²⁹

In each of these accounts, many specific points call out for further inspection—for instance, Posner’s failure to develop fully the concept of rule naïveté;³⁰ Snyder and Vinjamuri’s problematic conflation of constructivist theorists of human rights with advocates of public international law;³¹ or Hopgood’s philosophically oversimplified account of positive law being constituted and authorized by a “secular god.”³² But these commentaries are instructive in that they echo themes from the IR realist canon, which emerged in the interwar period out of distaste for diplomatic attempts to outlaw war or create collective security regimes. E.H. Carr’s trenchant and influential challenge to the utopian mindset, for one, was aimed in part at the fraught legalism of the League of Nations.³³ Shortly after, Hans Morgenthau complained that positive law at the international level was doomed because it was not grounded in states’ security interests.³⁴ Realism then turned firmly against human rights law specifically in the 1950s. Stanley Hoffman stated in a 1959 speech, “[t]o press forward in the field of *universal* definitions of human rights is an invitation to hypocrisy and to heightening political tensions.”³⁵

Skepticism toward international institutions was the lodestar of IR realism for the next four decades. In 1994, John Mearsheimer wrote that states in an anarchic international system are forced to behave as egoists, and that they must therefore ignore legal issues concerning rights or obligations.³⁶

29. *Id.* at 182.

30. The volume purports to criticize rule naïveté, but the term is only mentioned twice in the text—and it is never attributed to any specific thinkers. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW*, *supra* note 19, at 7, 144.

31. Constructivists have long resisted the idea of legalization for the sake of it. For example, noted constructivists Ellen Lutz and Kathryn Sikkink write in reference to Latin America: “Legalization led to the creation of the Inter-American Court of Human Rights and to the UN Human Rights Committee’s authority to hear individual complaints. *But these legal channels were not the only, nor necessarily the most important, mechanisms through which human rights pressures were brought to bear.*” Ellen Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 *INT’L. ORG.* 633, 658 (2000) (emphasis added).

32. HOPGOOD, *supra* note 19, at 122. More nuanced histories show that the development of positive law out of natural law, especially by thinkers like Thomas Jefferson, was not grounded in a stylized notion of natural or God-given endowments, but in the idea that self-interested humans pursue reciprocity for the sake of personal security. See MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC* (1996).

33. E.H. CARR, *THE TWENTY YEARS’ CRISIS, 1919–1939*, at 80 (1964).

34. Hans Morgenthau, *Positivism, Functionalism, and International Law*, 34 *AM. J. INT’L. L.* 260, 269 (1940); HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 264–74 (6th ed. 1985).

35. Stanley Hoffman, *Implementation of International Instruments on Human Rights*, 53 *PROC. AM. SOC. INT’L. L. ANNU. MEET. 1921–1969*, at 235, 241 (1959).

36. John Mearsheimer, *The False Promise of International Institutions*, 19 *INT’L. SEC.* 5, 40 (1994).

And in 1999, neorealist Stephen Krasner impressed the scholarly community by arguing that sovereignty, vis-à-vis human rights and other issues, is “organized hypocrisy,” echoing the sentiments of Hoffman from exactly forty years before.³⁷

Within this political realist tradition, international legalism and scholarship perceived to be legalist have long been, and continue to be, out of favor. But political realists do not entirely ignore law. They recognize that the world is filled with legal systems, all of which are operating in different ways. How, then, do new critics of human rights law, who draw on IR realism, understand the purpose and function of these systems of law? In the next section, we argue that New Realist critics approach law through what may be called a *regulative model*, whose assumptions and expectations become clear in recent works taking aim at international human rights law.

III. THE REGULATIVE MODEL

New Realist critics typically conceive of international law as a set of rules meant to regulate, constrain, or directly alter the behaviors of state leaders. This approach applies a very basic definition of regulation that hinges on coercing state executives into accepting internationally agreed-upon rules that they otherwise would not follow.³⁸ The tragic upshot for New Realists applying the regulative model is that international law has no coercive power because it lacks a centralized authority.³⁹ This is especially true of human rights law, which attempts to formalize nonreciprocal promises between states, and has only toothless treaty bodies and weak criminal courts to do its bidding.⁴⁰ None of these institutions can be expected to change the repressive practices of sovereign leaders trying to maintain security and order through the strategic use of force and repression. This is the reality legalists are unprepared for, or in the words of Eric Posner, “The legalistic version is the official ideology; the security version is the actual explanation.”⁴¹

Toothlessness has become something of a conventional wisdom across all IR treatments of human rights law—not just those by New Realists. As Stern and Straus write, “[o]ne of the most consistent themes in the literature on human rights is the absence of international enforcement mechanisms.”⁴²

37. STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999).

38. EMILIE M. HAFNER-BURTON, *FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS* (2009); EMILIE M. HAFNER-BURTON, *MAKING HUMAN RIGHTS A REALITY* 63–64 (2013).

39. Jack Goldsmith & Stephen Krasner, *The Limits of Idealism*, 123 *DAEDELUS* 47 (2003); GOLDSMITH & POSNER, *supra* note 19; HAFNER-BURTON, *MAKING HUMAN RIGHTS A REALITY*, *supra* note 38.

40. George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 50 *INT'L. ORG.* 379 (1996).

41. POSNER, *THE PERILS OF GLOBAL LEGALISM*, *supra* note 19, at 205.

42. THE HUMAN RIGHTS PARADOX: UNIVERSALITY AND ITS DISCONTENTS 3 (Steve J. Stern & Scott Straus eds., 2014).

Lack of enforcement is a significant problem for most IR theorists because strict legalism has almost no adherents in the field. If the legalist position were viable, some IR theorists may argue that international rules, simply by virtue of being written, exert an effect on behavior. This pure brand of legalism may have made more sense in bygone times. When written information was limited due to the exorbitant cost of printing, religious clerics and dynastic rulers like the Habsburgs signaled authority by writing and posting laws. Written laws were powerful because political subjects were in awe of print, and its inability to be erased.⁴³ But rarely do contemporary scholars assume that subjects of international law are inclined to comply simply because laws are put on parchment.

Instead, IR scholars focused on international law conceive of two mechanisms that, absent legalist magic or coercive enforcement, could link rights legalization to changing state behavior. These are persuasion and acculturation.⁴⁴ Leaders can either be hectored to change their behavior, or they can come to internalize the ideas embodied in human rights law. While scholars who emphasize these mechanisms are not devoted to the New Realists' limited regulative model described below, they do little to challenge the central logic, which is that the object of international laws is to alter the decision-making of state leaders who wield power. They accept that the formation of legal rules alone does not inspire rule-following (legalism), and that ideally leaders would be coerced to follow rules (regulative model); however, lacking force, human rights law must rely on arguing with, outcasting, or re-educating leaders.⁴⁵ These mechanisms do not challenge the regulatory frame, but accept it and offer consolation.

A. Assumptions of the Regulative Model

The regulative model makes three important theoretical assumptions. First, it approaches the international system as anarchic, and it assumes that domestic political structures are hierarchic.⁴⁶ On the one hand, states have regularly trained police forces, headed by executives with enforcement power. The international system, on the other hand, is seriously lacking in this regard. The only forces able to coerce at the international level are those armies under control of great powers. In short, if human rights law is to be enforced at the international level, it must be at the bidding of the United States and

43. ANDREW WHEATCROFT, *THE HABSBURGS: EMBODYING EMPIRE* 45–46 (1995).

44. HAFNER-BURTON, *MAKING HUMAN RIGHTS A REALITY*, *supra* note 38, at 14; RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013).

45. Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L. J.* 252 (2011).

46. KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979); HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (3d ed., 2002).

other members of the Security Council.⁴⁷ Furthermore, international laws themselves emanate almost entirely from these great powers, who aim to mask their unjustified control, rooted in superior force, with a thin veneer of legal legitimacy.

Second, for law to best regulate, it should have enforcement power, and that power is wielded by the sovereign. With intellectual precedents in the work of legal positivist John Austin, regulatory theorists tend to argue that law is *properly* conceived of as commands issued by superiors and backed with the threat of sanction.⁴⁸ Thus, good law is grounded in political might in a way that is analogous to the operation of heavily policed municipal law in advanced countries.⁴⁹

The third and final assumption of the regulative model is that nationalist identities and interests are the eternal guiding motivations of leaders, and that they will always trump the appeal of international solidarity or “rights talk.”⁵⁰ Owing to innate impulses within human psychology or the manipulation of communicative technologies by states, people in the world will continue to identify with their own groups and nations at the expense of minorities or outside members of the global community.⁵¹ This breeds national exceptionalism among rational leaders, and privileges local constitutions over international laws. And this is why Emilie Hafner-Burton argues that coercion is necessary to “make human rights a reality.”⁵²

B. Expectations of the Regulative Model

The regulative model comes with three empirical expectations. First, global human rights practices will not change drastically with the expansion of international legal instruments. These instruments are mostly promotional because no central sovereign power is forcing state leaders to change their behavior.⁵³ Second, positive change will generally not come in “tough”

47. Stephen D. Krasner, *Sovereignty, Regimes, and Human Rights*, in *REGIME THEORY AND INTERNATIONAL RELATIONS* 139 (Volker Rittberger & Peter Mayer eds., 1993).

48. In this sense, the model is normative as well as empirical: “Laws and other commands are said to proceed from *superiors*, and to bind or oblige *inferiors*. . . . the term *superiority* signifies *might*.” John Austin, *A Positivist Conception of Law*, in *PHILOSOPHY OF LAW* 33, 38 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000).

49. H.L.A. HART, *THE CONCEPT OF LAW* (1961).

50. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (2008).

51. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983).

52. HAFNER-BURTON, *MAKING HUMAN RIGHTS A REALITY*, *supra* note 38, at 63.

53. Posner writes: “there is little evidence that human rights treaties, on the whole, have improved the well-being of people,” and Hopgood writes that “A disconnect is opening up between global humanism with its law, courts, fund-raising, and campaigns on the one hand, and local lived realities on the other.” POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* *supra* note 19, at 7; HOPGOOD, *supra* note 19, at 14.

cases such that human rights will fail where it is needed most.⁵⁴ Repressive authoritarian rulers, many of whom are aligned with great powers, will have little reason to alter their preference for the use of repressive violence. This problem is enhanced by the selectivity of weak international courts like the ICC. The ICC is unable to prosecute offenders in major powers like the United States or Britain, and it has a difficult time apprehending suspects in states like Sudan, which receives a good deal of support from oil-thirsty states like China and India. If it happens, human rights advances occur solely in states that are already experiencing some kind of political transition to liberal democracy. Third and finally, as a result of its ineffectiveness and the favoritism it shows toward exceptionalist Western powers and their abusive allies like Saudi Arabia, human rights talk will lose its influence on contentious politics or struggles, ceasing to resonate among local constituencies and social movements around the world.

C. Justifications of the Regulative Model

From a pragmatic perspective, there are three dimensions on which to judge the original intellectual contribution.⁵⁵ The first is originality: does it occupy a unique position in continuing to recognize the failure of human rights legalism to account for the importance of politics—or the ways in which law cannot be conceived as separable from political interests and power? The second is ontology: is the set of assumptions about the regulative nature of international law and rights truer, or more descriptively accurate, than any alternative set of assumptions about the nature of rights-based realities? The third is on empirical grounds: are its expectations more historically accurate than those of any other model, meaning that its predictions about the ultimate demise of human rights are more grounded than other predictions? In the next two sections, we argue that the New Realism has little claim for theoretical superiority on any of these three dimensions.

IV. THE CONSTITUTIVE MODEL

With regard to originality, the regulative model is not the only game in town. It is not the only alternative to New Realists' favored straw man: unthinking

54. Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RES. 407 (2007).

55. James Johnson, *Consequences of Positivism: A Pragmatist Assessment*, 39 COMP. POLIT. STUD. 224 (2006); Geoff Dancy, *Human Rights Pragmatism: Belief, Inquiry, and Action*, 22 EUR. J. INT'L. RELAT. 512 (2016).

legalism based on the belief that human rights law *qua* law is powerful. Coercion as the grounds for legal change is surely an alternative conception to unthinking legalism. But a third alternative also exists, and it posits that human rights law is forged through, and reinforcing political struggles between the weak and the powerful. This is the constitutive model.

The constitutive model derives from social-theoretic and anthropological approaches to law,⁵⁶ and it is less clearly aligned to a coherent research program in IR, though it does possess family resemblances to ideas present in constructivism and critical theory.⁵⁷ The constitutive model assumes that international laws, and the processes that support them, can become politically and socially productive, often in unpredictable ways. In this formulation, human rights law has an impact because of its *generative* qualities.⁵⁸ Where legalism assumes that law trumps politics, and the regulatory model assumes that law influences politics only through the intermediary variable of force, the constitutive model assumes that law and politics are co-productive.⁵⁹ That is, certain political contests would never exist without the creation of human rights law, and human rights law would never exist without political contests. Where legalism assumes that law is by its very nature normative, and the regulative model denies that normativity, the constitutive model holds that human rights laws' normativity is a causal variable, "no less than the more traditional casual suspects of the economy, the state, class structure, and so on."⁶⁰

Importantly, the constitutive model, like the regulative model proposed by the New Realists, is not sympathetic to strict legalism. That is, it does not assume that legal rules, once codified, are auto-enforcing; they are not obeyed

56. For a review see Margaret R. Somers & Christopher N.J. Roberts, *Toward a New Sociology of Rights: A Genealogy of "Buried Bodies" of Citizenship and Human Rights*, 4 *ANNU. REV. L. SOC. SCI.* 385 (2008). See also Kim Lane Scheppele, *Legal Theory and Social Theory*, 20 *ANNU. REV. SOCIOLOGY* 383 (1994); Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 *AM. ANTHROPOLOGY* 38 (2006).

57. See, e.g., *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 2013); *MICHAEL HARDT & ANTONIO NEGRI, MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE* (2004).

58. Seyla Benhabib, *Claiming Rights across Borders: International Human rights and Democratic Sovereignty*, 103 *AM. POLI. SCI. REV.* 691 (2009).

59. That is, the act of prohibiting and enabling certain kinds of political behaviors through legalization can have lasting effects by framing actors' interests, providing a shared vocabulary of judgment, and contributing to a global vernacular of popular resistance. Here, this constitutive model is similar to processes of "acculturation," outlined by that follow treaty ratification in states: "The initial commitment on the part of the state may be relatively shallow, but the ensuing political mobilization can introduce deeper and increasingly efficacious changes on the ground." Still, there are notable differences between the notion of acculturation and the notion of constitutive effects. In the latter, law can condition the entire process of interaction between state and society by changing discourse; in the former, the question is simply whether state leaders are socialized. GOODMAN & JINKS, *supra* note 44, at 150.

60. Somers & Roberts, *supra* note 56, at 407.

by states simply because they have been written, or because they possess natural legitimacy that encourages states to obey.⁶¹ Instead, the constitutive model holds that claims about the legality of rights, or about the pre-political existence of rights innate to human nature, *are themselves political claims*. There is no legal domain that is prior to, or outside of, political interaction; there are only a series of politically charged arguments that such a domain exists. Insofar as people come to believe in the binding or non-binding of qualities of law—or the “anti-political” nature of legal action—they do so as a result of contentious politics, conflict, and continuously re-negotiated social relations.⁶² Political struggles, when they become settled, can then form habits that frame future interactions and beliefs. In this way, human rights are little different than other social facts that were at one point deeply contested—like the value of paper money,⁶³ the non-justifiability of aggressive territorial expansion,⁶⁴ or the shamefulness of *not* binding the feet of young women.⁶⁵ To quote Kim Scheppele, “legal doctrine is like a rough draft of social theory, comprising concepts, categories, rules and procedures for managing the vast array of human conduct.”⁶⁶

A. Assumptions of the Constitutive Model

Like the regulative model, the constitutive model has three primary animating assumptions. First, no such thing as a purely hierarchical legal system exists at the domestic level, and the international system is not entirely anarchic.⁶⁷ Instead, levels of legal organization and enforcement in all jurisdictions are matters of degree. Hierarchy is mutable. For example, one could easily argue that the European human rights regime, an international system of law, is more hierarchic than the domestic legal systems of states like Guatemala, Ethiopia, the Democratic Republic of Congo, or East Timor. Rather than approaching international and domestic systems of law as entirely separate according to Kenneth Waltz’s assumption of international anarchy, one might approach the world as if it characterized by zones of hierarchy and

61. Thomas Franck calls this the pull of compliance. THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

62. BENJAMIN GREGG, *HUMAN RIGHTS AS SOCIAL CONSTRUCTION* (2012).

63. Adam Davidson, *In Greenbacks We Trust*, N.Y. TIMES MAG., 27 Feb. 2015, available at <http://www.nytimes.com/2015/03/01/magazine/in-greenbacks-we-trust.html>.

64. Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT’L. ORG. 215 (2001).

65. Gerry Mackie, *Ending Footbinding and Infibulation: A Convention Account*, 61 AM. SOCIOLOGICAL REV. 999 (1996).

66. Scheppele, *supra* note 56, at 385.

67. See, e.g., Jeffrey K. Staton & Will H. Moore, *Judicial Power in Domestic and International Politics*, 65 INT’L. ORG. 553 (2011).

anarchy that are constantly evolving.⁶⁸ Hierarchic zones, both domestic and international, are characterized by greater trust in the legitimacy of courts, belief among executive leaders that the rule of law must be obeyed, and a complex blend of both domestic and international rules.

Second, international law need not have centralized enforcement, nor a kingly sovereign, to have an influence. As Seyla Benhabib states, “many critics of cosmopolitanism view the new international legal order as if it were a smooth ‘command structure,’ and they ignore the *jurisgenerative* power of cosmopolitan norms.”⁶⁹ In this view, human rights law is influential because it is networked into campaigns that resist entrenched networks of state power, using a legal language that states themselves adopt.⁷⁰ By mobilizing law, rights claimants thus form a productive dialectic with modern state structures, rather than proposing a stateless and utopian political alternative.⁷¹ Rights law, and claims made on the basis of rights law, are not simply abstractions meant to intervene on political circumstances. They are part of political relationships.⁷²

Third, and relatedly, if human rights laws resonate and frame social movements, it is because people care about, and are empowered by, ideas that have been legalized at the international level.⁷³ In fact, some go as far as to argue that a collection of transnational social movements that began outside the purview of the West and the great powers are the “hidden authors” of human rights law and legal developments.⁷⁴ In this formulation, the immeasurable *it-ness* of human rights law is both that it embodies the ideas of resisters in the past, and that contemporary resisters “tap” its pool of ideas.⁷⁵ Furthermore, though states certainly contain their fair share of nativists who privilege their nation and laws to the exclusion of outsiders, national identity is not immutable.⁷⁶ States are also composed of segments of the population that identify as liberal citizens of the world who empathize with claims of outsiders, and these segments are growing with globalization. Human rights are political claims over which nationalists and cosmopolitans

68. For the assumption of anarchy see WALTZ, *supra* note 46. For alternative conceptions of anarchy and hierarchy see DAVID A. LAKE, *HIERARCHY IN INTERNATIONAL RELATIONS* (2009).

69. Benhabib, *supra* note 58, at 696 (emphasis added).

70. KECK & SIKKINK, *supra* note 14. For a more radical formulation of this argument see HARDT & NEGRI, *supra* note 57.

71. ANDREW VINCENT, *THE POLITICS OF HUMAN RIGHTS* 158 (2010).

72. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 25 (1990).

73. GREGG, *supra* note 62, at 2, 4.

74. Neil Stammers, *The Hidden Authors and Missing Histories of Human Rights*, *OPENDEMOCRACY.NET*, 25 Sept. 2013, available at <https://www.opendemocracy.net/openglobalrights/neil-stammers/hidden-authors-and-missing-histories-of-human-rights>.

75. Benoit Challand, *The Counter-Power of Civil Society and the Emergence of a New Political Imaginary in the Arab World*, 18 *CONSTELLATIONS* 271 (2011).

76. Aviel Roshwald, *The Global Crisis of the Nation-State*, *CURRENT HISTORY*, Jan. 2015, available at https://www.academia.edu/9953440/The_Global_Crisis_of_the_Nation-State.

will continue to struggle in perpetuity. This struggle is embodied in international law and jurisprudence.

B. Expectations of the Constitutive Model

The expectations of the constitutive model depart substantially from those of the narrower regulative model. First, a change in global human rights practices has taken place in relation to international legal developments. This change in global society is not propelled by “easy” cases, or states with a predisposition to rights mobilization. With persistence, even the more entrenched abusive states of the world face legitimacy crisis in relation to rights legal consciousness and activism. The significance of international human rights law in this process is that it serves as a codified external script, based on an “overlapping consensus,” by which abusive governments are judged.⁷⁷ Compliance with legal human rights protections is one criterion by which abusive leaders’ claims to sovereignty are judged illegitimate by members of the community; if leaders are largely seen as non-compliant, their “recognitional legitimacy” can erode from within and without.⁷⁸ With eroding legitimacy, some regimes will ultimately fail.

Second, international law inspires decentralized enforcement through creative techniques of legal mobilization rather than through reliance on brute force. All law, no matter its source, has the problem of making people with guns believe they are the law’s subjects and executors.⁷⁹ In this sense, the problem facing international human rights law is little different than the problem facing law within states; it simply *appears* different.⁸⁰ Following the constitutive model, international human rights law develops as a focal frame around which political interactions unfold. For example, research indicates that human rights legal mobilization has generated a decreased willingness among Latin American military and security forces to use violence against civilians when called on to do so in “endgame scenarios.”⁸¹ One reason for this is that creative legal strategists played a role in generating domestic legal

77. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 40 (2d ed. 2003).

78. ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 261–65 (2004).

79. Barry R Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J. L. ECON. & ORG. 1 (1995).

80. OHLIN, *supra* note 8, at 21–23.

81. David Pion-Berlin & Harold Trinkunas, *Civilian Praetorianism and Military Shirking During Constitutional Crises in Latin America*, 42 *COMP. POL.* 395 (2010). See also Tiberiu Dragu & Yonatan Lupu, *Collective Action and Constraints on Repression at the Endgame* (2015) (Working Paper), available at https://www.researchgate.net/profile/Tiberiu_Dragu/publication/295919811_Collective_Action_and_Constraints_on_Repression_at_the_Endgame/links/56d0ab6708ae85c8234875dc.pdf.

obligations for state actors where previously none were perceived to exist.⁸² This process is far more complex and empirically productive than a statement that international treaty law either constrains state leaders or it does not.

A third and final expectation is that social movements are emboldened by human rights law, and they will continue to be. But because social movement activism unfolds over long periods of time and does not follow simple linear trends, positive change attributable to legal mobilization will be especially difficult to observe empirically and compare across heterogeneous contexts. Many social scientific models, with their focus on measurable impacts, capture short-term correlations between actions and “negative unintended consequences.” The more complex the temporal pattern relating legal mobilization to state behaviors, the more difficult it is to model empirically. For example, the fact that the warrants issued by the International Criminal Tribunal for the former Yugoslavia (ICTY) for Slobodan Milošević’s arrest made the negotiation of the Dayton Accords more difficult was taken as early evidence—in 1995 and 1996—that criminal enforcement of human rights law is potentially counterproductive.⁸³ However, others have argued in retrospect that the ICTY played a part in delegitimizing the Milošević regime over time, paving the way for Otpor’s non-violent resistance campaign in Serbia and the eventual election of reformer Vojislav Koštunica in the year 2000.⁸⁴ In this case, quick negative reactions to international law may have been proven wrong by the unfolding of events over time. The implication is that if one wants to observe the effects of law, one must make an effort to look beyond the divided, short-term antagonisms.

V. WHICH MODEL BEST DESCRIBES THE WORLD?

Both of the models we have described are constructed against outright legalism, or legal romanticism. For in neither the regulative nor constitutive models do state leaders align their behaviors with international norms simply because those norms have become law through obligation, precise rule-making, and delegation.⁸⁵ But as we argued in Section 3, new critics tend to treat the regulative model as the only theoretical alternative to strict legalism. This is not the case. Within the regulative model, unconditional respect for legal procedure is naïve by assumption. Within the constitutive

82. Ezequiel González Ocantos, *Persuade Them or Oust Them: Crafting Judicial Change and Transitional Justice in Argentina*, 46 *COMP. POLIT.* 479 (2014); Geoff Dancy & Verónica Michel, *Human Rights Enforcement From Below: Private Actors and Prosecutorial Momentum in Latin America and Europe*, 60 *INT’L. STUD. Q.* 173–188 (2016).

83. Anonymous, *Human Rights in Peace Negotiations*, 18 *HUM. RTS. Q.* 249 (1996).

84. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 *AM. J. INT’L L.* 7 (2001).

85. Abbott et al., *supra* note 16.

model, unconditional respect for legal procedure is an oversimplification. But because proponents of both critically position themselves against legalism, rarely have the assumptions and empirical expectations of the regulative and constitutive models been evaluated against one another. In this section, we compare the ontological assumptions of each model in terms of their usefulness in providing explanations of the world. We then compare the empirical performance of the models.

A. Comparison of Assumptions

1. Hierarchy

A key starting point for a comparison of assumptions is the concept of hierarchy. The regulative model's assumption that international human rights law must align with the interest of the great powers—those atop the hierarchy of material strength in the world—appears fallible when subjected to deeper investigation. First, human rights doctrine itself was not wholly a product of a unified, post-war US imperialism. Archival histories have shown that the term “human rights,” mostly absent from the security-obsessed negotiations of the Dumbarton Oaks Conference in 1944, found its way into the UN Charter in large part through the efforts of a group of US academics known as the Commission to Study the Organization of Peace (CSOP), along with a “‘stampede’ of ‘little countries’ attempting to add further commitments” at the 1945 San Francisco Conference.⁸⁶ It was not a mainstay of US or Allied strategy in the post-war period.

Second, the development of the human rights regime has not moved in lock-step with the interests of world powers since the UN's inception. Instead, human rights legal development and mobilization has been embedded within decentralized waves of anti-colonialism and democratization, which unfold outside the direct control of the West.⁸⁷ The presence of new African members of the United Nations in the 1960s allowed the Convention on the Elimination of Racial Discrimination (CERD) to reach adoption, and it revived interest in the long-dormant Covenants of the International

86. The countries included Colombia, South Africa, Mexico, Brazil, Panama, and Cuba. Glenn Tatsuya Mitoma, *Civil Society and International Human Rights: The Commission to Study the Organization of Peace and the Origins of the UN Human Rights Regime*, 30 HUM. RTS. Q. 607, 628 (2008). See also Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*, 23 HUM. RTS. Q. 44 (2001); Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 HUM. RTS. Q. 281 (2003).

87. Christian Reus-Smit, *Human Rights in a Global Ecumene*, 87 INT'L. AFF. 1205 (2011).

Bill of Rights.⁸⁸ The Inter-American human rights system has developed extensive jurisprudence, and an impactful advisory role, in spite of the lack of willingness on the part of the United States to ratify any OAS regional rights treaties.⁸⁹ The Council of Europe has steadily increased the power and reach of the European rights system, though at times it has directly challenged the interest of the United Kingdom and other major powers.⁹⁰

Moreover, progressive advancements in the pursuit of human rights accountability have repeatedly challenged the national interests of the United States. In 1986, the People Power movement in the Philippines managed to overthrow Ferdinand Marcos, a staunch ally of the Reagan Administration.⁹¹ In 1988, South Korean students launched a successful pro-democracy and human rights campaign against the wishes of a military establishment supported by the United States (the campaign would also feature anti-imperial slogans against the United States).⁹² In 1992, post-civil war El Salvador pushed for a truth commission that would expose a decade of abuses involving covert US forces.⁹³ In 1998, pro-rights Nigerians resisted sadistic dictator Sani Abacha despite the United States' reluctance to sanction the regime on account of its deep oil interests.⁹⁴ Finally, in 2011, Tunisians sparked the Arab Spring by taking aim at President Ben Ali, a loyal US ally in the Global War on Terror.⁹⁵ Each of these campaigns was accompanied by simultaneous political struggles to ratify important human rights treaties and to hold local leaders accountable for their role in torture, extended imprisonment, and corruption. This list of examples goes some way toward invalidating the notion that the strings of international human rights campaigns are pulled by primarily by cultural imperialists in the West.

88. G.A. Res. 2106, U.N. GAOR, 20th Sess., U.N. Doc. A/6181 (21 Dec. 1965).

89. Among other things, the Inter-American Court has ruled against a handful of dictatorship-era amnesty laws. Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, 19 HUM. RTS Q. 510 (1997); Lisa Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 50 VA. J. INT'L L. 915 (2009); Marny Requa, *A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court*, 12 HUM. RTS. L. REV. 79 (2012).

90. See, e.g., *Case of Ireland v. the United Kingdom*, App. No. 5310/71, 25 Eur. Ct. H.R. (ser. A) (1978).

91. William J. Burns, *The Reagan Administration and the Philippines*, 38 THE WORLD TODAY 97 (1982); Kurt Schock, *People Power and Political Opportunities: Social Movement Mobilization and Outcomes in the Philippines and Burma*, 46 SOC. PROBS. 355 (1999).

92. In Sup Han, *Kwangju and Beyond: Coping with Past State Atrocities in South Korea*, 27 HUM. RTS. Q. 998 (2005).

93. Mark Enalasco, *Truth Commissions for Chile and El Salvador: A Report and Assessment*, 16 HUM. RTS. Q. 656 (1994).

94. OLAYIWOLA ABEGUNRIN, *NIGERIAN FOREIGN POLICY UNDER MILITARY RULE, 1966–1999*, at 152 (2003).

95. Vera van Hüllen, *The "Arab Spring" and the Spiral Model: Tunisia and Morocco*, in THE PERSISTENT POWER OF HUMAN RIGHTS, *supra* note 57, at 182.

2. Enforcement

What are the regulative model's assumptions about enforcement, or lack thereof? The stark contrast between domestic and international legal enforcement is built into traditional IR theory, and makes sense when we consider the "constraints that individuals confront when they contract under the shadow of the state."⁹⁶ But as Jeffrey Staton and Will Moore argue, "the distinction breaks down when we turn our attention to the enforceability of state commitments themselves."⁹⁷ There are few convincing explanations for why state leaders worldwide might follow domestic commitments to constitutional law more devotedly than they follow international commitments. The US is anomalous in this regard because its treaty ratifications are exceptional. Congressionally-approved provisions prevent human rights agreements from becoming self-executing in domestic law.⁹⁸ International commitments have indeed been less enforced, partially because US courts themselves resist legal claims invoking treaties like the International Covenant on Civil and Political Rights (ICCPR), usually without even considering merits. Thus, when claimants appeal to treaty law in US courts, there is almost zero chance that a ruling will be made in their favor. This means that the US executive will never be called on to enforce treaty-inspired court orders in situations akin to Eisenhower's intervention in the 1957 Little Rock desegregation crisis.

US insulation from compliance is an outlier and not necessarily generalizable to other cases, though generalizing from the US case is precisely what New Realists and regulatory modelers continue to do. For example, in May 2013 a Guatemalan trial court (High Impact Court "A") convicted General Efraín Ríos Montt of genocide, pursuant to Articles 376 and 378 of the Guatemalan penal code.⁹⁹ These articles were added in 1973 in order to implement Guatemala's commitment to the Genocide Convention. While the judgment is not an unblemished success, and has been challenged by the Constitutional Court, the Ríos Montt arrest and trial alone were remarkable given that the country's president, Otto Pérez Molina, is a former military leader and likely collaborator in crimes against humanity committed in the early 1980s.¹⁰⁰ Such a trial, as well as others in Guatemala that have been brought by former victims in coordination with human rights groups, would

96. Staton & Moore, *supra* note 67, at 560.

97. *Id.*

98. Louis Henkin, *US Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L. L. 341, 346 (1995); Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 CHIC. J. INT'L. LAW 327, 328 (2000).

99. Naomi Roht-Arriaza, *Genocide and War Crimes in National Court: the Conviction of Ríos Montt in Guatemala and its Aftermath*, 17 AM. SOC. INT'L. L. INSIGHTS 14 (2013), available at <https://www.asil.org/insights/volume/17/issue/14/genocide-and-war-crimes-national-courts-conviction-rios-montt-guatemala>.

100. Frank Smyth, *Will Justice be Possible in Guatemala?*, THE NATION, 23 May 2013, available at <https://www.thenation.com/article/will-justice-be-possible-guatemala/>.

likely never be possible in the United States, which is still haunted by the “ghost” of human rights obstructionism from the 1950s.¹⁰¹ But we should be careful not to suggest on the basis of the US case that *all* states’ leaders take exception to international law. States from all regions of the world, like Argentina, Germany, India, and South Africa make serious efforts to incorporate human rights law into their domestic operations.¹⁰² The need to question the domestic-international distinction is underlined by the fact that no systematic data is available that allows for comparisons of the “frequency of compliance across domestic and international levels.”¹⁰³ In short, we have little to no basis for assuming that international law constrains state executives less than domestic law.

3. Resonance

A final foundational pillar of the regulative model is that human rights do not resonate with everyone, especially when fundamental national security issues are at stake. Another way of stating this is that people care more about their own identity groups than they do about humans as a whole. Writ large, this may be true, but with regard to human rights, what little evidence is available seems to suggest otherwise. In the United States, the idea that a majority of US citizens supported the use of torture against terror suspects—at least during the tenure of the Bush Administration—is probably the stuff of a “false consensus”: “Not once during the eight years of the Bush administration,” writes a group of scholars based on exhaustive polling data, “was there an American majority in favor of the use of torture.”¹⁰⁴ Furthermore, the topic of human rights is at least as consuming to the public as is national security. One rough indication of this is how often human rights is appealed to in widely read media outlets. Below is a chart showing the proportion of stories the *New York Times* mentioned the term “human rights” in its written content since 1945, compared to the proportion of times it mentioned “national security,” in addition to the difference in yearly proportions for these two trends. The chart depicts a periodic pendulum swing between national security and human rights interest. Never, though, does one kind of concern supplant the other.

101. Henkin, *supra* note 98, at 346.

102. KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011); F. Hoffmeister, *Germany: Status of European Convention on Human Rights in Domestic Law*, 4 INT’L. J. CONST. L. 722–731 (2006); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); CHARLES EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

103. Staton & Moore, *supra* note 67, at 571.

104. Paul Gronke et al., *US Public Opinion on Torture, 2001–2009*, 43 PS: POL. SCI. & POL. 437, 441 (2010).

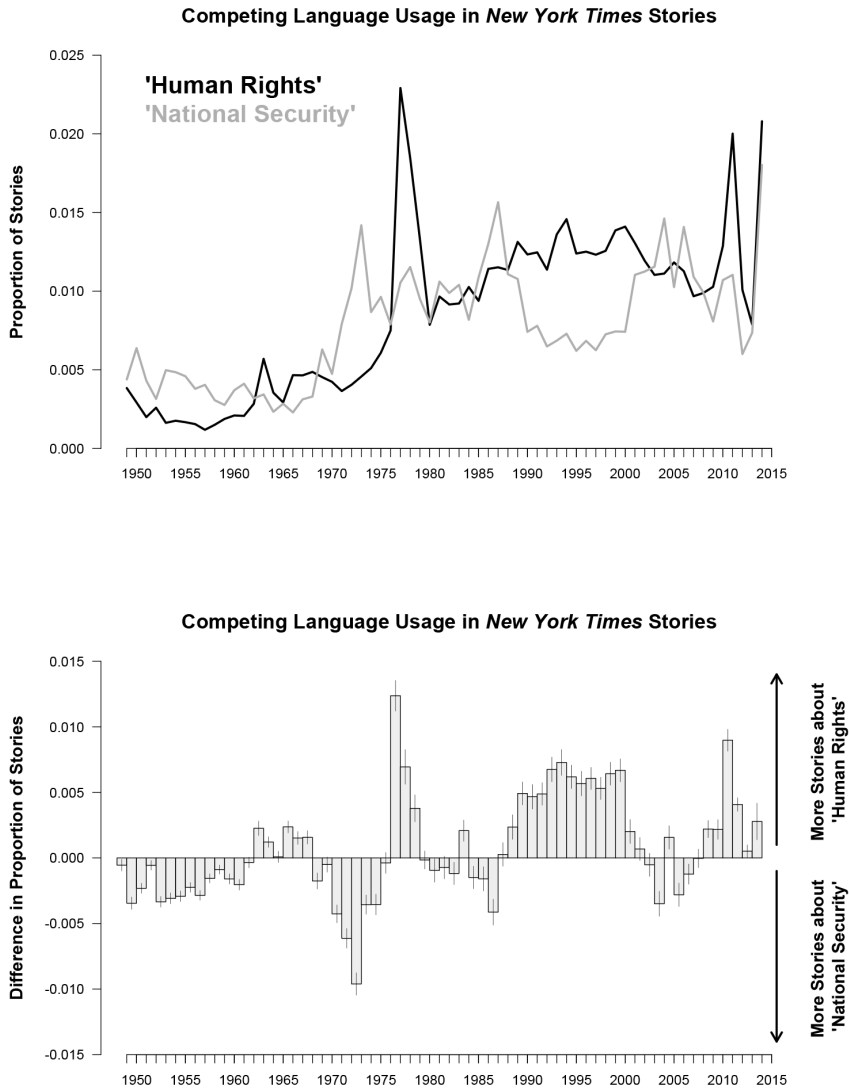


Figure 1. The top panel displays yearly proportions of *New York Times* stories which contain the two-word term “human rights” (black line) or “national security” (grey line). The lower panel displays the difference between each of these two yearly proportions. Bars above the 0 line represent years in which the *New York Times* contains more stores with two-word term “human rights” compared to stories with the two-word term “national security.” There is a clear shift in the discourse towards more stories that contain “human rights,” which begins in the mid-1970s and is punctuated briefly in the early 1980s and early 2000s. Data are obtained from the *NY Times Chronicle*: <http://chronicle.nytlabs.com>.

The resonance of human rights claim-making extends beyond the United States. A recent global poll of respondents in twenty-four countries from all of the regions of the world shows a solid consensus for the ideas embodied in the Universal Declaration of Human Rights (UDHR), which is now the most translated document in the world (380 languages). The study shows that at least a majority of people in all countries polled agreed with a right to free elections, expression, media freedom, equal treatment irrespective of race or religion, and basic healthcare and education. And 70% of the people in these twenty-four countries also supported more active role on the part of the UN to effect human rights change.¹⁰⁵ This all says nothing of human rights law. What role does law play in the formation of people's ideas about the desirability of human rights protections? In the only study on this subject, Geoffrey P.R. Wallace argues with a well-designed survey experiment that recognition of international legal prohibitions significantly decreases people's support for the use of torture, *even in situations where national security is at stake*.¹⁰⁶ Knowing that certain behaviors are prohibited by human rights law changes people's minds. Importantly, though, the resonance of human rights law, and its ability to change minds, is not likely related to its legality, but to its social mystique in contexts where rights struggles have provided that law political meaning.

4. Summary

The combination of this evidence suggests that plausibility of the theoretical assumptions of the regulative model do not outperform those of the constitutive model. In fact, the regulative model, were it to become conventional thinking, would leave a host of human rights phenomena—including the survival and repeated return to the idiom of human rights itself (Figure 1)—unexplained. Human rights law has attended political change in the absence of great power support; it sometimes is enforced, and little evidence suggests that state leaders ignore it any more or less than domestic rights commitments; and it has the support of a global constituency in many contexts. Still, proponents of a regulative model might be little concerned with the status of the model's assumptions so long as its expectations hold.¹⁰⁷

105. COUNCIL ON FOREIGN RELATIONS, PUBLIC OPINION ON GLOBAL ISSUES, CH. 8: WORLD OPINION ON HUMAN RIGHTS 1 (2011), available at: http://i.cfr.org/content/publications/attachments/2011_POP-CH8HumanRights.pdf; Stewart Patrick, *Surprising International Human Rights Consensus*, THE INTERNATIONALIST, 8 Dec. 2011 (2011), available at <http://blogs.cfr.org/patrick/2011/12/08/surprising-international-human-rights-consensus/>.

106. Geoffrey P. R. Wallace, *International Law and Public Attitudes Toward Torture: An Experimental Study*, 67 INT'L. ORG. 105, 121 (2013).

107. Approaching models as generators of empirically useful and valid expectations, rather than concrete descriptions of reality, is a necessary condition for a "science of human rights." See Keith E. Schnakenberg & Christopher J. Fariss, *Dynamic Patterns of Human Rights Practices*, 2 POL. SCI. RES. METHODS 1, 3 (2014).

In short, if we consistently observe war and terror, the brazen disregard for human rights legal norms, and backlash against attempts at change, then approaching human rights law from the perspective of regulatory failure is still the superior intellectual strategy.

B. Evidence on Expectations

The central axis of contention between New Realist skeptics and constitutive thinkers of international human rights law is whether progress is taking place. Regulative theorists tend to answer “no,” focusing on the “radical decoupling” between global commitments to human rights treaties and trends in compliance.¹⁰⁸ They also point to innumerable examples of human rights backlash. Social scientists have done valuable work demonstrating that pro-violations constituencies exist, and that they will react negatively against efforts to protect the human rights of certain individuals.¹⁰⁹ As we write this, conservative groups in Mexico rally behind chants that “human rights are for criminals,” and heavily armed anti-immigrant militias are patrolling the US border, ostensibly to target an influx of children refugees fleeing from Central American gang violence.¹¹⁰ Leaders like Zimbabwe’s Robert Mugabe and Kenya’s Uhuru Kenyatta cling to power through onslaughts of repressive violence mixed with denunciations of human rights intervention from the outside.¹¹¹ And a militia group called the Islamic State ruthlessly beheads its opponents in Syria and Iraq.¹¹² All the while, the United States continues to kill and capture terrorists with little oversight, and Saudi Arabia, a notoriously oppressive regime, dutifully attends meetings as a member to the UN Human Rights Council.¹¹³ Where is progress?

This evidence of backlash and decline is noteworthy, and it raises issues with which all human rights activists need to reckon. However, this

108. Hafner-Burton & Tsutsui, *supra* note 54.

109. SONIA CARDENAS, *CONFLICT AND COMPLIANCE: STATE RESPONSES TO INTERNATIONAL HUMAN RIGHTS PRESSURE* (2007); CLIFFORD BOB, *THE GLOBAL RIGHT WING AND THE CLASH OF WORLD POLITICS* (2012).

110. Maxwell Barna, “*It’s an American Problem*”: Meet the Militias Patrolling the US Border, VICE NEWS, 31 July 2014, available at <https://news.vice.com/article/its-an-american-problem-meet-the-militias-patrolling-the-us-border>.

111. Nick Sanchez, *Robert Mugabe, Zimbabwe Dictator, Renounces Gay Rights in UN Speech* NEWSMAX, 30 Sept. 2015, available at <http://www.newsmax.com/TheWire/robert-mugabe-zimbabwe-gay-righs-un/2015/09/30/id/694080/>; Eric Latiff, *Africa: ICC a Toy of Declining Imperial Powers—Uhuru Kenyatta*, CAPITAL FM (NAIROBI), 12 Oct. 2013, available at <http://allafrica.com/stories/201310130080.html>.

112. Masoud Popalzai & Greg Botelho, *Kabul: Protesters storm Afghan Palace After ISIS Beheadings*, CNN, 11 Nov. 2015, available at <http://www.cnn.com/2015/11/11/asia/afghanistan-unrest/index.html>.

113. Salil Tripathi, *Why Is Saudi Arabia Heading a UN Human Rights Council Panel?*, THE DAILY BEAST, 22 Sept. 2015, available at <http://www.thedailybeast.com/articles/2015/09/22/why-is-saudi-arabia-heading-the-u-n-human-rights-council.html>.

evidence, like many of the examples presented throughout this exposition, consists of short and vivid stories—what might be called *anecdota*.¹¹⁴ Anecdota are constructed from recent happenings reported in media outlets, and in that way, they are tied to day-by-day, events-level understandings of history.¹¹⁵ As such, anecdota tell us less about long-term trends in human rights protections and more about the way individual observers read current events.¹¹⁶ This upshot is that the short-termism that is built into human rights practice and assessment is deceptive: it hides the fact that human rights violations are in fact decreasing.

1. Recent Improvements

New Realists often find vindication for their world view in the flat-lined global average of repression scores over time (See Figure 2). Worse, some scholars use the regulative model to argue that respect for human rights is not just stagnant, but that it has degraded since the war on terror began. Until just recently, two empirical regularities appeared to be highly consistent with the regulative model. First, human rights data—derived from primary source documents such as *The Country Reports on Human Rights Practices* published annually by the US State Department and *The State of the World's Human Rights* report published annually by Amnesty International—seemed to suggest that, on average, violations of physical integrity has remained underwhelmingly consistent.¹¹⁷ Second, these data are negatively correlated with the ratification of many UN human rights treaties. Thus, the pessimistic worldview held by proponents of the regulative model, is backed up by an impressive collection of expert-coded primary source documents. The proponents of the regulative model have, for over a decade now, worked to explain this stagnant trend and negative correlations with the human rights data and these treaties. This is a significant test for the constitutive model. “It is reasonable to question,” right constitutive thinkers Margaret Somers and Christopher Roberts state, whether human rights “doctrinal and moral improvements have actually be demonstrated by a post-UDHR reduction in human rights abuses.”¹¹⁸

114. We borrow this term from Kingsbury, *supra* note 12, at 346.

115. This is what François Simiand calls *l'histoire événementielle*, as opposed to histories that are concerned with decades-long conjunctures and centuries-long durations. See FERNAND BRAUDEL, *ON HISTORY* 27 (1980).

116. See STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011). Pinker exhaustively demonstrates that when viewed over the broad sweep of history, the current period is the least violent; however, cognitive shortcuts like the availability heuristic, where recent evidence is taken as evidence of trends over time, prevent people from appreciating improvements.

117. See generally *Country Reports on Human Rights Practices for 2015*, Secretary's Preface, U.S. DEPT. OF STATE (2015), available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>; *Report 2015/16: The State of the World's Human Rights*, AMNESTY INTERNATIONAL (23 Feb. 2016), available at: <https://www.amnesty.org/en/documents/pol10/2552/2016/en/>.

118. Somers & Roberts, *supra* note 56, at 412.

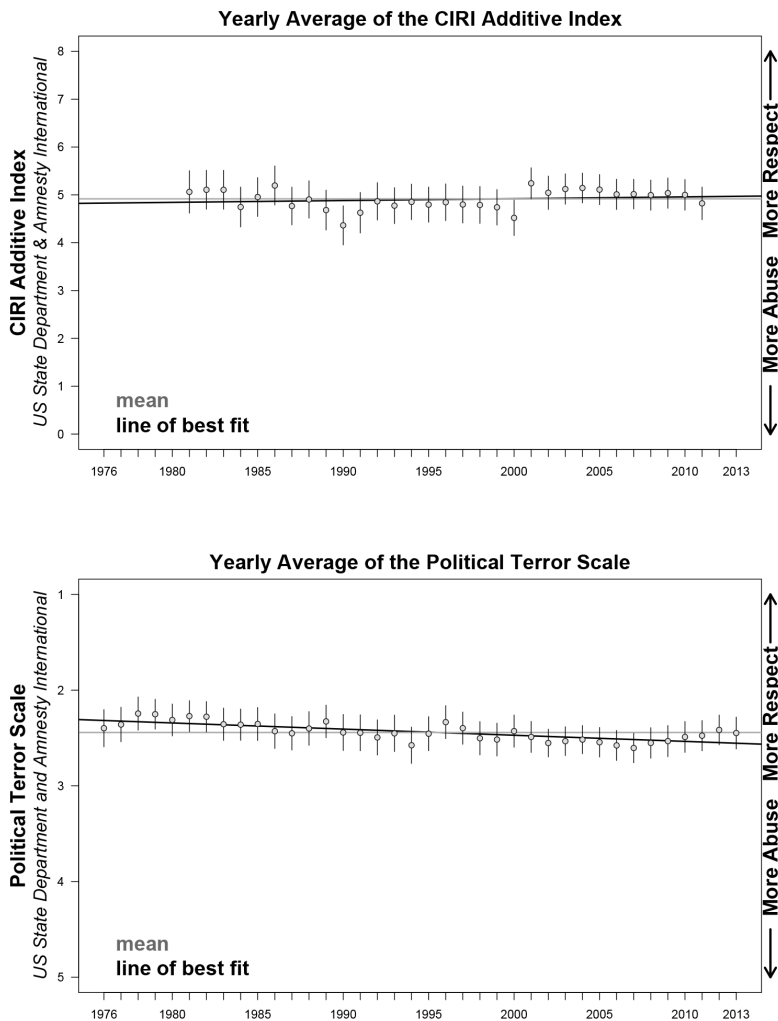


Figure 2. Yearly mean and 95% confidence intervals for the estimated level of repression using the CIRI Additive index (upper panel, 1981–2011), and the Political Terror Scale index (lower panel, 1976–2013). Each series is based on the human rights reports from the US State Department and Amnesty International. Note that the averages for the Political Terror Scale estimates are based on two scales coded independently, one from the US State Department reports and one from the Amnesty International reports. CIRI data are taken from David L. Cingranelli, David L. Richards, & K. Chad Clay. 2014. “The CIRI Human Rights Dataset.” <http://www.humanrightsdata.com>. Version 2014.04.14. PTS data are taken from Mark Gibney, Linda Cornett, Reed M. Wood & Peter Haschike, P. 2015. Political Terror Scale 1976–2013. Date Retrieved, from the Political Terror Scale Web site: <http://www.politicalterrorscale.org/>.

But what if another process is unfolding in tandem with international legal trends and human rights reporting? What if this other social processes confound the relationship between these trends? This is precisely the case. Based on sophisticated methods of computation, Chris Fariss shows that “the pattern of constant abuse found in data derived from human rights reports is not an indication of stagnating human rights practices. Instead, it reflects a systematic change in the way monitoring agencies, like Amnesty International and the US State Department, encounter and interpret information about human rights abuses.”¹¹⁹ That is, human rights data are socially constructed in a specific historical context and reflect the standards used by the monitoring agencies in that specific time period.

The set of expectations that monitoring agencies use to assess and document state behaviors changes over time as these monitors look harder for abuse, look in more places for abuse, and use international legal rules to classify more acts as abuse. For example, Amnesty International, with its original focus on prisoners of conscience, did not begin to document disappearances until 1976. Meanwhile, government agents in the Philippines and Guatemala, who developed this “innovative” new strategy in the 1960s, were actively disappearing political opponents in order to avoid public scrutiny of other human rights violations, especially political imprisonment.¹²⁰ Not only did the documentation patterns of Amnesty International begin to change so as to provide an accurate account of this new type of abuse, but it also helped initiate a campaign to develop an international treaty banning the use of disappearances. In 2006 the International Convention for the Protection of All Persons from Enforced Disappearance (ICAPED) was opened for ratification and went into force as of 2010.¹²¹

New models and new data—combining information from thirteen data sources, each of which capture some form of state sanctioned uses of torture, extrajudicial killing, disappearances, and political imprisonment—demonstrate three novel findings. First, contrary to the flattened trend in the existing uncorrected data (shown in Figure 2), human rights have improved since hitting a low point in the mid 1970s (shown in Figure 3). Second, all the existing negative correlations that exists between uncorrected measures of human rights and ratification of UN human rights treaties such as the Convention Against Torture are actually positive. And third, human rights progress is not uniformly linear over time. Based on all available data, it appears that abuses increased between the early 1950s and the mid 1970s, only then to begin a steady descent.

119. Fariss, *supra* note 13, at 297.

120. For more details on the latent variable model see Maureen R. Berman & Roger S. Clark, *State Terrorism: Disappearances*, 13 *RUTGERS L. J.* 531, 531–2 (1982); ANN MARIE CLARK, *DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS* 89 (2001).

121. International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 Dec. 2006, G.A. Res. 61/177, U.N. GAOR, 61st Sess., U.N. Doc. A/61/448 (2007) 2716 U.N.T.S. 3 (entered into force 23 Dec. 2010).

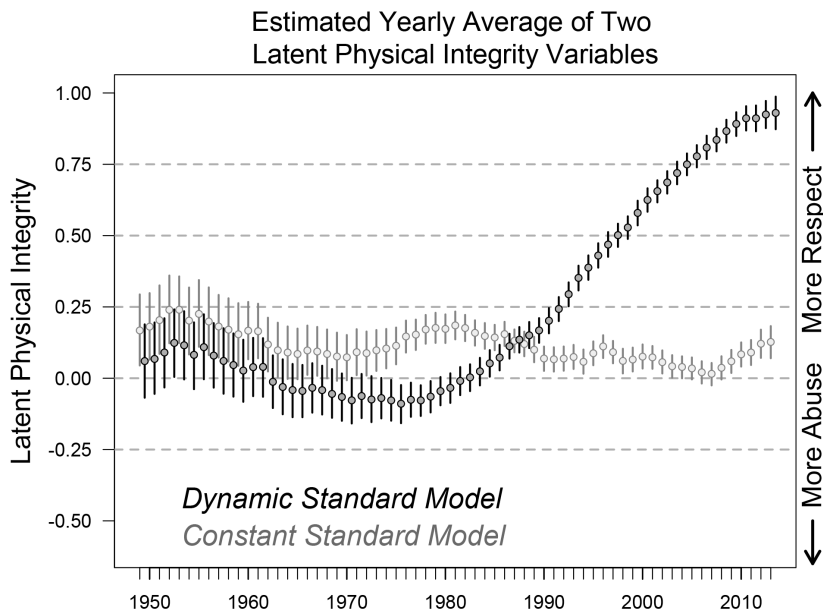


Figure 3. Yearly mean and credible intervals for latent physical integrity estimates from two latent variable models update with newly updated and available estimates that now include the years 1949 through 2013. The dynamic standard model allows the the base-line probability of being coded at a certain level on the original standards-based repression variables, to vary over time. The standards- based variables are those which use human rights reports from the United States State Department or Amnesty International as their primary information source. The difference in the two sets of estimates suggests that an increasing standard of accountability explains why the average level of repression has remained unchanged over time when the changing standard is not taken into account. For more information about the models used to generate these estimates see Fariss (2014) and Schnakenberg and Fariss (2014). The original data from Fariss (2014) are available here: <http://humanrightsscores.org/> and have been extended in this figure to include additional estimates for the years 2011 to 2013.

2. The Role of Law

Demonstrating that protection of physical integrity rights is trending upward over time does little to prove that international human rights law is helping to produce that trend, or that law can assist people in the greatest need. Repressive violence (mass killing, torture, disappearance, and political

imprisonment) is mainly committed by state security forces, militaries, and ambitious armed insurgents. These are well-resourced individuals who use repression to secure state power. As both Steve Poe and Ben Valentino have argued separately, leaders use rational calculations to determine whether to use repression to secure their goals. Individuals already responsible for orchestrating repressive campaigns are unlikely to be subject of legal-normative socialization.¹²² However, leaders may be deterred from further human rights violations as costs become clearer and more likely to be incurred. One source of costs that have drastically increased over the last thirty-five years is human rights-base criminal prosecutions (See Figure 4). These prosecutions start in international tribunals, in foreign courts applying universal jurisdiction, and in domestic courts seeking to enforce both domestic and international law.¹²³

A good deal of criticism has been directed toward ad hoc tribunals for the former Yugoslavia and Rwanda,¹²⁴ and now against the ICC.¹²⁵ Regulative theorists argue that the role of international courts should be to compel state leaders into compliance with international norms of peace and security and then go on to find, unsurprisingly, that courts like the ICC lack the power to coerce state leaders to cease fighting civil wars in the immediate term.¹²⁶ Constitutive theorists, on the other hand, have discovered that the wide-ranging efforts of international courts alter social practices in target countries. The proceedings of ICTY, however contentious, have led to the expansion of non-violent political expression over time in Bosnia, and have limited the range of permissible lies for Serbian nationalists.¹²⁷ European Court rulings on LGBT rights have led to significant changes in national policy among Council of Europe member states.¹²⁸ Also, evidence is emerging that ICC

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122. Steven C. Poe, *The Decision to Repress: An Integrative Theoretical Approach to the Research on Human Rights and Repression*, in UNDERSTANDING HUMAN RIGHTS VIOLATIONS: NEW SYSTEMATIC STUDIES 16 (Sabine C. Carey & Steven C. Poe eds., 2004); BENJAMIN VALENTINO, FINAL SOLUTIONS: MASS KILLING AND GENOCIDE IN THE 20TH CENTURY (2004).
123. KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011).
124. MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY (Eric Stover & Harvey M. Weinstein eds., 2004).
125. Phil Clark, *Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of Congo and Uganda*, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE (Carsten Stahn ed., 2010).
126. Kenneth Rodman, *Darfur and the Limits of Legal Deterrence*, 30 HUM. RTS. Q. 529, 529 (2008); Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, 7 INT'L. J. TRANS'L JUST. 434 (2013).
127. LARA J. NETTELFELD, COURTING DEMOCRACY IN BOSNIA AND HERZEGOVINA: THE HAGUE TRIBUNAL'S IMPACT IN A POSTWAR STATE 54, 184 (2010); DIANE F. ORENTLICHER, SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA 5–6 (Open Society Justice Initiative, 2008), available at https://www.opensocietyfoundations.org/sites/default/files/serbia_20080501.pdf.
128. Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L. ORG. 77 (2014).

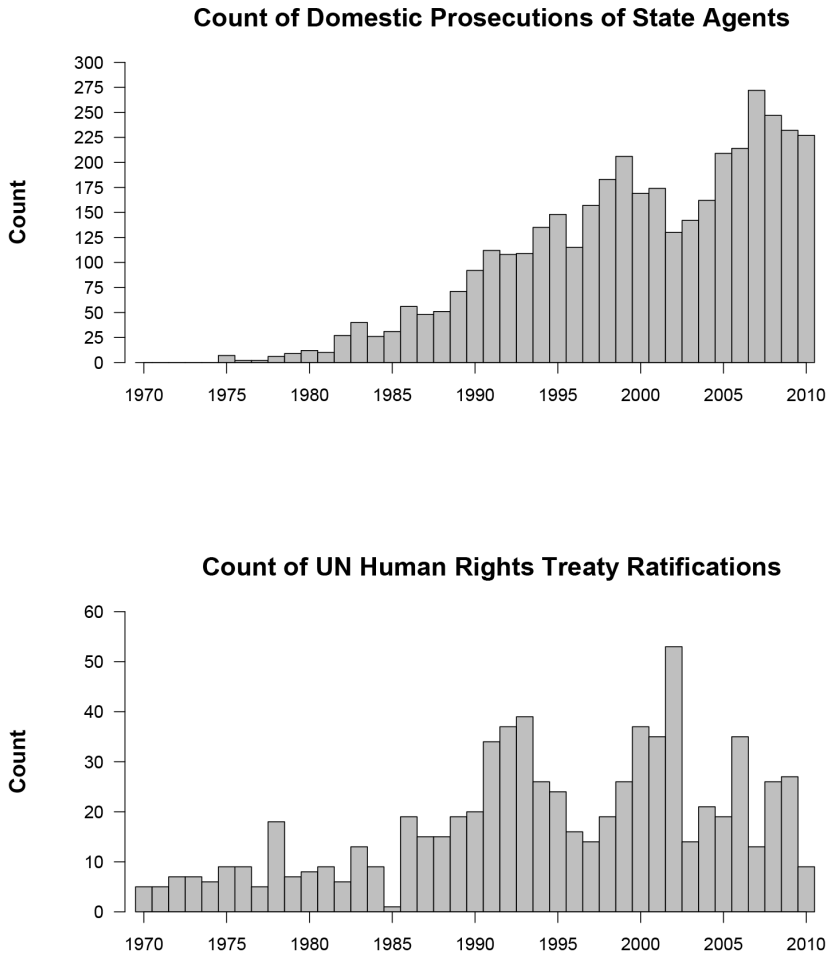


Figure 4. The top panel displays yearly count of the number of domestic criminal prosecutions for human rights abuses (1970–2010). The lower panel displays the yearly number of country ratifications of United Nations Human Rights Treaties (1970–2010). These positive trends coincide with the new view of increasing respect for human rights found with the new data from Fariss (2014) displayed in Figure 3 above. Data are taken from Dancy, Geoff, Francesca Lessa, Bridget Marchesi, Leigh A. Payne, Gabriel Pereira, and Kathryn Sikkink. 2014. “The Transitional Justice Research Collaborative: Bridging the Qualitative-Quantitative Divide With New Data.” Available at www.transitionaljusticedata.com.

intervention, even as it has so far appeared to have little effect in terms of jurisprudence, decreases civilian deaths in ongoing civil wars, an outcome attributable to concern that fighters have for the way that they are perceived internationally.¹²⁹

There is also a dense network of linkages between international legal obligations and domestic criminal enforcement. Countries with more commitments to human rights treaties with precise obligations for individual accountability—like the Convention Against Torture—are more likely to prosecute state agents for human rights violations.¹³⁰ Moreover, new evidence suggests that ICC investigations create opportunities, through international attention, for judicial activists to initiate local reforms and hold state agents accountable for rights violations in court.¹³¹ But domestic activists and reformers are not just passive recipients of legal interventions from the outside. They also mobilize through international bodies. For example, the Inter-American Court's ruling in *Almonacid v. Chile*, which argued that a 1978 self-amnesty for human rights crimes violated the American Convention, came about because the family of a disappeared victim had been blocked from justice in Chilean courts.¹³² The family brought its case to the Inter-American Court of Human Rights, which decided in its favor. After, the Chilean Supreme Court issued a series of rulings undermining (though not overturning) the amnesty protecting dictatorship-era rights violators.¹³³

One lesson is that the widespread pursuit of human rights enforcement is not taking place because willing executives are becoming convinced that international laws are good, or morally proper. Leaders are not being regulated or indoctrinated. Instead, in most cases, state executives are simply giving way, realizing that they are unable to prevent the pressure that comes from private actors working with educated, transnational elites who make creative use of human rights law.¹³⁴ Activists push, state leaders push back, and activists change their tactics. Evidence that legal advancements come from below is plentiful. For example, countries which give private actors standing to bring criminal trials—which is common in European, African, and Latin American countries—are far more likely to pursue extensive prosecution of state agents.¹³⁵

129. Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, INT'L. ORGAN. (forthcoming 2016) (manuscript at 31), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552820.

130. Geoff Dancy & Kathryn Sikkink, *Ratification and Human Rights Prosecutions: Toward a Transnational Theory*, 44 NYU J. L. INT'L. POL. 751, 755 (2012).

131. Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions* (Working Paper, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736519.

132. See generally *Almonacid-Arellano et al v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 154 (26 Sept. 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf.

133. Requa, *supra* note 89, at 80.

134. Ocantos, *supra* note 82, at 482.

135. Dancy & Michel, *supra* note 82, at 1.

A second lesson is that the global trends toward greater respect for physical integrity and toward human rights legal formalization are correlated, not simply co-incident. In short, they are related, but because of the diffuse and gradual nature of these changes, it is hard to see direct causal linkages. Still, sophisticated new studies are filling in the gaps. We know now, for example, that the ratification of international treaties is associated with improvement in women's protections and select civil and political rights.¹³⁶ We also know that international and domestic prosecutions deter future acts of repressive violence over time.¹³⁷ Recent evidence suggests too that ratification of the Convention Against Torture actually reduces torture in cases in which many legislative veto players are present and constrain political leaders based on rules written into law.¹³⁸

A third lesson is that improvements are not only happening in cases already prone to change. Human rights campaigning and legal mobilization has been catalytic and transformative. Few people today think back on the cloud of pessimism surrounding repressive dictatorships of Greece, Portugal, Argentina, Chile, and Spain. In 1991, journalist Tina Rosenberg wrote, "Most of Latin America was conquered and colonized through violence, setting up political and economic relationships based on power, not law."¹³⁹ In 2010, this situation had completely changed. According to Cath Collins, "the trend toward calling former torturers to account "now seems unstoppable, and yet it represents a major turnaround for a continent that for most of the 1980s and 1990s had been a byword for impunity."¹⁴⁰ One reason for this turnaround is the role that legal activism played in *propelling* political transition away from authoritarianism toward democracy.¹⁴¹

Similarly, today we may be witnessing the stirrings of conjunctural change in areas of the world understood to be failed and immune to progress. The Democratic Republic of Congo, for example, underwent extensive judicial reform in the last few years. Between 2008 and 2012, 55 mobile court hearings involving 813 cases in which 459 convictions were secured for crimes of sexual violence.¹⁴² Also, newly reformed courts in the Ituri province have heard

136. BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 204–5 (2009); Yonatan Lupu, *The Informative Power of Treaty Commitment: Using the Spatial Model to Address Selection Effects*, 57 AM. J. POL. SCI. 912, 912 (2013).

137. Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions*, 54 INT'L. STUD. Q. 939, 939 (2010).

138. Yonatan Lupu, *Legislative Veto Players and the Effects of International Human Rights Agreements*, 59 AM. J. POL. SCI. 578, 591 (2015).

139. TINA ROSENBERG, CHILDREN OF CAIN: VIOLENCE AND THE VIOLENT IN LATIN AMERICA 8–9 (1992).

140. CATH COLLINS, POST-TRANSITIONAL JUSTICE : HUMAN RIGHTS TRIALS IN CHILE AND EL SALVADOR 1 (2010).

141. See generally Larry Diamond, *Why Democracies Survive*, 22 J. DEMOC. 17 (2011).

142. Michael Maya, *Mobile Courts in the Democratic Republic of Congo: Complementarity in Action?*, ABA RULE OF LAW INITIATIVE 34 (2012), available at http://worldjusticeproject.org/sites/default/files/mobile_courts_in_the_democratic_republic_of_congo_maya.pdf; see also Milli Lake, *Organizing Hypocrisy: Providing Legal Accountability for Human Rights Violations in Areas of Limited Statehood*, 58 INT. STUD. Q. 515–526 (2014).

a number of cases of atrocity crimes committed by both rebel and government actors. What we are left with is a situation where “the courts have produced remarkable (and rapid) results.”¹⁴³ The impact of these changes, as is often the case, will remain difficult to observe for quite some time, especially if we are relying on aggregated information from documentary evidence for the observations used to make comparisons across different spatial and temporal contexts.

3. Diffusion

This exposition on the role of human rights law in improving human rights conditions has only skimmed the surface, focusing narrowly on physical integrity rights and efforts to prosecute human rights violators. Part of the reason for this is that the issues covered are central to the debate between regulative and constitutive theorists, and between legal pessimists and rights proponents. But the reach of human rights law may be even wider and deeper than proposed. Anthropologists are showing that international law can be translated, or “vernacularized” in unexpected ways.¹⁴⁴ For example, the Gulabi Gang (Pink Ladies) of India take their knowledge of human rights principles to inform their “army” of women that carry sticks and lobby local police departments to act on allegations of rape.¹⁴⁵ Civil society networks in Africa have pushed for a regional court that can address endemic problems of rights abuse and bad governance.¹⁴⁶ And activists in South Africa and Argentina have used past successes in the advancement of civil and political rights to argue against the abuses of neoliberalism, and to stand up for economic and environmental rights.¹⁴⁷ We are witnessing the rise of a more multi-vocal, plural human rights movement, which uses law to demand a wide array of entitlements. These changes are often dismissed by observers who are comfortable pointing to single incidents where “the” human rights movement and its laws fail to regulate self-interested state leaders.

143. Phil Clark, *The ICC is Only a Small Piece in the Justice Puzzle of Africa's Conflicts*, THE EAST AFRICAN, 11 Apr. 2011, available at <http://www.theeastafrican.co.ke/news/-/2558/1141438/-/o3vyj7z/-/index.html>.

144. Merry, *supra* note 56, at 39.

145. *Gulabi Gang: India's Women Warriors: An All-Women Vigilante Group Captures Popular Imagination by Wielding Sticks and Taking on Villains*, ALJAZEERA, 4 Mar. 2014, available at <http://www.aljazeera.com/indepth/features/2014/02/gulabi-gang-indias-women-warriors-201422610320612382.html>.

146. Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT'L. L. 737, 738 (2013).

147. ELKE ZUERN, THE POLITICS OF NECESSITY: COMMUNITY ORGANIZING AND DEMOCRACY IN SOUTH AFRICA (2011); KAREN ANN FAULK, IN THE WAKE OF NEOLIBERALISM: CITIZENSHIP AND HUMAN RIGHTS IN ARGENTINA 165 (2012); Geoff Dancy & Eric Wiebelhaus-Brahm, *Bridge to Human Development or Vehicle of Inequality? Transitional Justice and Economic Structures*, 9 INT'L. J. TRANS'L JUST. 51, 51 (2015).

C. Implications

The purpose of this exposition is to evaluate pragmatically the contribution of New Realist human rights criticism. Like the regulative model favored by New Realists, the constitutive model is an ontological alternative to legalist approaches to human rights law. However, the descriptive accuracy of its assumptions is likely greater, and its empirical expectations have more supportive evidence. Thus, at a minimum, the emergence of a constitutive model challenges the three intellectual justifications of new human rights criticism. But a pragmatic analysis must also analyze the consequences of intellectual endeavors.¹⁴⁸ In this regard, the constitutive thinking has an undeniable advantage; specifically, it can theorize about the politics of human rights law without *destroying the entire concept of law*.

If the point for new critics applying the regulative model is that law matters most when it is coercively enforced, then only two possible implications may be drawn. The first is to reject altogether the idea that law possesses qualities that provides meaning for political authorities and political resisters alike. This would amount to rejecting what Shklar refers to as the “thereness” of rules, which are laced into the social fabric, in favor of theory that treats law as entirely epiphenomenal to power.¹⁴⁹ This theoretical move echoes Carl Schmitt, who anchored the law to the power of the sovereign, defined as “he who decides the exception.”¹⁵⁰ If law is wholly an extension of the whims of those in power, however, it is an ineluctable instrument of tyranny. In practice, then, theories of international human rights law that rely exclusively on coercion as a mechanism assume the “permanent structure of antiliberal thought,” and run the risk of “rehabilitating fascist rhetoric without fascist connotations.”¹⁵¹

This implication is only a logical extrapolation of the regulative model, and we do not think the intent of new critics is to promote neo-fascism. If anything, they are like IR realists of yesteryear, “despairing liberals all” who “long for a central, essential concept of politics, but not at the full price.”¹⁵² Evidence of this lies in the fact that New Realists often resort to legal or rationalist solutions amidst their charged attacks on legal rationalism. By doing so, these critics often move seamlessly from a total rejection of rule-guided action to subtle support for their own preferred rule-guided alternatives. For instance, Eric Posner proposes that those concerned about human rights “do without algorithms” that reflect a “civilizing ideology combined with the same top-down mode of implementation, pursued in the same crude

148. Johnson, *supra* note 55, at 224.

149. Shklar, *supra* note 6, at 9–20.

150. Carl Schmitt, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 1 (1985).

151. Stephen Holmes, *The Permanent Structure of Antiliberal Thought*, in *LIBERALISM AND THE MORAL LIFE* 227, 228 (Nancy L. Rosenblum ed., 1989).

152. Shklar, *supra* note 6, at 125.

manner."¹⁵³ At the same time, he counsels that we engage in the "furious" experimentation of development economics, complete with rigorous statistics and randomized controlled trials.¹⁵⁴ In essence, his prescription simply trades one type of rationalism for another: rather than appealing to positive human rights laws, outside actors should appeal to laws of positivist social science. In the former, interveners make law-based demands on state actors to cease engaging in torture; in the latter, they would demand that they be allowed to experiment on subjects in the country to learn (somehow) how to generate rule-based guidelines for preventing torture.

In another stark example, Snyder and Vinjamuri counsel activists operating in contexts of weak or corrupt institutions to stop lobbying for "adoption of just rules" and criminal prosecution of massive rights violators in favor of amnesties that might make bargaining easier.¹⁵⁵ But because amnesties are also laws, this prescription simply replaces one legal demand based on rights enforcement for a legal demand based on the need for indemnity or political exception. Confusingly, the authors admit that "amnesties, like tribunals, require effective political backing and strong institutions to enforce their terms. . . . Amnesties are likely to succeed only if they are accompanied by political reforms that curtail the power of rights abusers."¹⁵⁶ With this, Snyder and Vinjamuri make clear that in terms of legal form and enforceability, nothing really separates criminal punishment from amnesties. They both assume the form of rational laws that must be supported by institutions.

The difference for Snyder and Vinjamuri is therefore in the *content* of the laws, and here is where the authors show their hand. They do not resist laws or legalism; they would simply prefer to advocate for laws that form *sui generis* out of temporarily balanced political interests rather than laws that appeal to human rights norms. Judith Shklar observed a similar tendency among IR realists long ago. Writing on the US political realists of the 1960s, she states, "[w]hatever the national interest may be, it is agreed that there are specific, rationally calculable techniques for promoting it."¹⁵⁷ In essence, IR critics of law do not want to erase rational legalism; they simply want to remind us that the laws of human rights are less rational than the "laws" of politics.¹⁵⁸

153. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW*, *supra* note 19, at 142, 147.

154. *Id.* at 143.

155. Snyder & Vinjamuri, *supra* note 19, at 6.

156. *Id.* at 33–34.

157. SHKLAR, *supra* note 6, at 124.

158. In fairness, Stephen Hopgood is not guilty of arguing for a rational alternative to human rights legalism. In fact, he is content to finish his book, not with prescriptions for how to improve practice, but with a dark premonition: the "classic humanist" human rights project "has foundations that will crumble regardless of how deep they pour the concrete for humanity's new palace in the sand dunes of the Hague." HOPGOOD, *supra* note 19, at 182.

The more modest implication of New Realism thus boils down to a desire to remind readers that human rights law is a site of political contestation and that legal interventions have political consequences that are sometimes positive and sometimes negative. For example, Stephen Hopgood proclaims in a foreboding tone that “Trust [in human rights] . . . must be *constructed*. As a result, it remains always and permanently contested.”¹⁵⁹ The problem for New Realist critics of human rights law is that such attacks have little to offer theoretically if activists *already recognize* that law does not necessarily produce “social magic” or automatically “trump” politics.¹⁶⁰ Of course, many advocates do in fact recognize—maybe better than anyone, especially those of us in the academy—that appealing to human rights law often fails when confronting political realities. Human Rights Watch’s Jo Becker, in her recent volume on tactics of advocacy, writes “despite their best efforts, advocates may work on an issue for years without discernible progress. Often external factors, such as powerful governmental interests, are simply insurmountable.”¹⁶¹ At the moment of recognition by activists that law and politics are related, the New Realism has nowhere else to go: its sole purpose is to get people to think about the political consequences of human rights legal action. Once they do, the critique loses its reason to be.

A paradox is thus reached. For New Realist criticisms of human rights law to be meaningful, they *need* unthinking legalism to be present among activists and scholars. Once that unthinking legalism is shed in favor of a political approach—which has happened, by and large—then the critics have few directions to travel. Perhaps, in order to deal with this problem, critical scholars have simply chosen to ironically redeploy a regulative ideal of law for the sole purpose of showing that human rights law is weak or lame. However, the regulative model, complete with assumptions and expectations, is a non-ideal understanding of law that if taken seriously would justify the most unsavory forms of government. The problem is that hardly anyone, possibly not even some of the New Realist critics, believes in the model of law they are proposing.

159. *Id.* at 7.

160. For social magic, see PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* (John B. Thompson tran. 1991); Todd Landman, *Social Magic and the Temple of Human Rights: Critical Reflections on Stephen Hopgood’s Endtimes of Human Rights*, in *DEBATING THE ENDTIMES OF HUMAN RIGHTS: ACTIVISM AND INSTITUTIONS IN A NEO-WESTPHALIAN WORLD* 25–32 (Doutje Lettinga & Lars van Troost eds., 2014). For rights as trumps, see Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 154–160 (Jeremy Waldron ed., 1984).

161. JO BECKER, *CAMPAIGNING FOR JUSTICE: HUMAN RIGHTS ADVOCACY IN PRACTICE* 8 (2013).

VI. CONCLUSION

International human rights law has not failed or succeeded, and we should stop thinking in such dichotomies. Based on a variety of studies using a good deal of newly uncovered evidence, we are comfortable arguing that human rights protections have improved over the last three decades, and that the development of international human rights law is associated in multiple ways with that change. Importantly, these patterns are consistent with the constitutive model, which finds much more support in the emerging empirical record. This model also offers critics of legalism an alternative to the regulative model, which is not only consistent with the new and existing empirical evidence but also with realists' assertion that power politics matters for both understanding and ultimately improving human rights for the better. What we all need to recognize is that predictable failures of rights law to regulate or persuade leaders—in Russia under Vladimir Putin, in Syria under Bashar al-Assad, or in China under Xi Jinping—are easier to observe in the immediacy of the news cycle than the long-term, gradual improvements that would not exist in the absence of legal activism and mobilization.

Today, our expectations are quite high for what constitutes legitimate government actions in part because of the successful reforms from earlier decades. The reason is that the “zone of application” for rights has expanded.¹⁶² It is therefore not surprising how abhorrent the extreme cases seem to us today. Our disappointment is a positive development because it acts to help reinforce the norms of good governance being advocated for by civil society, but it makes the counting and categorizing of repressive events, as well as the comparison of contemporary events with those from the past, all the more tenuous. We forget that we keep raising the bar and that many success stories do indeed exist.

Though respect for human rights is improving, it is important to recognize that these improvements are uneven and contingent. Rights struggles in some countries stall, while in others, conditions decline. One should not assume that just because activists are on the job that things are going to get better right away. That the Burmese human rights struggle against military rule has produced modest democratic elections after thirty years of extreme repression is a case in point. International human rights law should also not be treated as beyond reform, but reform would best be approached as a profoundly political process. However, if normatively interested in limiting government abuse, one should also recognize that relentless reportage exclusively focused on the short-term negative unintended consequences of legal activism, or premature declarations of the end of human rights, are not as productive as measured and careful analyses grounded in increasingly accurate data.

162. Reus-Smit, *supra* note 87, at 1210.