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BRINGING THEORIES OF HUMAN RIGHTS CHANGE HOME

*Cynthia Soohoo**

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INTRODUCTION

A recent poll conducted by The Opportunity Agenda indicates that most Americans identify with human rights as a value and think that human rights violations are occurring in the United States.[1] Eighty-one percent of Americans polled agreed that "we should strive to uphold human rights in the United States because there are people being denied their human rights in our country."[2] And approximately three quarters (seventy-seven percent) of the public expressed that they would like the United States to work on making regular progress to advance and protect human rights.[3] Globalization and recent political events have played an important role in educating the American public about human rights standards and in thinking about the United States as a country in which human rights violations can occur. However, public attitudes about domestic human rights also reflect, and are being promoted by, two shifts in advocacy work. International human rights organizations are increasingly focusing on the United States, and domestic public interest lawyers and activists are integrating human rights strategies into their work.[4]

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1. *See* THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN THE U.S.: OPINION RESEARCH WITH ADVOCATES, JOURNALISTS, AND THE GENERAL PUBLIC 2 (2007), *available at* http://www.opportunityagenda.org/atf/cf/%7B2ACB2581-1559-47D6-8973-70CD23C286CB%7D/HUMAN%20RIGHTS%20REPORT.PDF.

2. *Id.* at 3.

3. *Id.*

4. *See* Cynthia Soohoo, *Human Rights and the Transformation of the "Civil Rights" and "Civil Liberties" Lawyer*, *in* 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS 71, 71–72, 84 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008) (describing the human rights work of domestic lawyers). For the work of international nongovernmental organizations (INGOs), see, for example, Lance Compa, *Trade Unions and Human Rights*, *in* 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS, *supra*, at 209, 230–31 (describing the work of Amnesty International and Human Rights Watch on labor rights in the United States); Deborah Labelle, *Ensuring Rights for All: Realizing Human Rights for Prisoners*, *in* 3 BRINGING HUMAN RIGHTS HOME:

There is a lively debate among scholars, politicians, and judges about the appropriateness of human rights advocacy in the U.S. context. This essay tackles two related questions that are perhaps more important to domestic social justice activists: whether human rights advocacy is an effective means to bring about legal and political change in the United States and, if so, how such change occurs. There is much legal scholarship on how international human rights law becomes internalized by nation-states. However, thus far, the vast majority of scholarship has been developed by scholars of international law and international relations. These "internationalists" have focused on the way in which international actors (international institutions, national governments, and international nongovernmental organizations (INGOs)) interact to cause a nation-state to internalize international human rights law.

As a result, while internationalist theories are helpful in understanding how international actors work to bring about human rights change, they fail to capture the important role that state and local governments, social movements, and local political pressure play in the internalization of human rights norms. These actors may be more important in the U.S. context because of the U.S. government's long history of exceptionalism. More recent scholarship has focused on the effect that social movements and state and local policies can have on development of new social norms, which, over time, can influence domestic law.

This essay looks at both sets of theories to examine the ways in which each can provide insight and guidance for domestic activists in advocating that the United States takes its human rights obligations seriously. Part I provides a brief history of human rights advocacy in the United States to demonstrate that human rights and transnational advocacy have been a part of American traditions since the country's birth and to explain the more recent separation between international human rights and domestic civil rights work. It then discusses the renewed interest in human rights in the United States among both international human rights activists and domestic social justice activists. Part II analyzes internationalist and local theories of human rights change to demonstrate how both theories are necessary for a comprehensive understanding of how human rights norms come to be internalized domestically. Finally, Part III applies the internationalist and local theories of change described in Part II to U.S. debates about women's equality and reproductive rights and explores ways in which advocacy that incorporates human rights standards and methods might bolster domestic advocacy in the area of sex equality and reproductive rights.

PORTRAITS OF THE MOVEMENT 121, 133–36, 142–43 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008) (describing the work of Human Rights Watch and Amnesty International on the sexual abuse of women prisoners and juvenile life-without-parole sentences in the United States).

I. WHY HUMAN RIGHTS IN THE UNITED STATES?

The historic separation between human rights activists (who focused on rights abuses abroad) and civil rights and social justice activists (who focused on rights abuses in the United States) has been well documented.[5] Recent scholarship suggests that, rather than reflecting an irreconcilable ideological divide, the split is a product of international and domestic politics at the end of World War II. However, in the postwar years, the split became accepted as a fact of advocacy work.[6] More recently, there has been a call to "bring human rights home" to the United States. The call comes both from "internationalists"—international human rights groups, scholars, and lawyers—and domestic human rights activists. This part discusses the reasons why internationalists and domestic human rights activists are converging in their claims to bring human rights back to the United States. An understanding of the internationalist and local perspectives developed in this part helps to inform the analysis of theories of human rights change in Part II. In order to place the current work of domestic human rights activists into context, this part first discusses the early origins of human rights advocacy in the United States and political and historic reasons that have prevented it from playing a major role in domestic social justice activism.

A. *A History of Domestic Human Rights Advocacy*

Although infrequently made in the recent past, domestic human rights claims are not something new. Recent scholarship has shown that the core components of modern human rights activism—claims that fundamental rights are universal and inherent in all human beings, and transnational dialogue and advocacy—have been present since the founding of the United States and precede the creation of the United Nations (U.N.) and the modern human rights movement.

From the birth of the nation, American colonists were inspired by European discourse on natural rights. The concept—developed by Enlightenment philosophers like John Locke—that human beings have inherent natural rights heavily influenced the Founders of the nation and served as one of the core principles in the Declaration of Independence.[7] In

5. *See* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955 (2003); MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000); Soohoo, *supra* note 4, at 72; Dorothy Q. Thomas, *Against American Supremacy: Rebuilding Human Rights Culture in the United States*, *in* 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS, *supra* note 4, at 1, 4–6; *see also* Vita Bite, *Human Rights Treaties: Some Issues for U.S. Ratification*, *in* HUMAN RIGHTS: BACKGROUND, TREATIES AND ISSUES 7, 9 (Arthur V. Carrington ed., 2002) ("The U.S. civil rights movement has been largely a domestic movement not linked to the international human rights movement.").

6. Thomas, *supra* note 5, at 6.

7. Paul Gordon Lauren, *A Human Rights Lens on U.S. History: Human Rights at Home and Human Rights Abroad*, *in* 1 BRINGING HUMAN RIGHTS HOME: A HISTORY OF

addition, dating back to Chief Justice John Marshall, the U.S. Supreme Court traditionally understood constitutional interpretation to include a form of transjudicial dialogue in the consideration of international sources.[8] And, it is important to recognize that historically, domestic human rights claims were not limited to philosophers, political elites, judges, and lawyers. Instead, similar to modern domestic human rights advocacy, human rights claims were made by social justice activists working at all levels of advocacy. For example, activists working to end slavery and the disfranchisement of women both made human rights claims and engaged in transnational advocacy.[9]

Scholars have described the abolitionist movement and the movement for women's suffrage as early examples of transnational human rights advocacy networks, and abolitionist societies as the first human rights nongovernmental organizations (NGOs).[10] These early activists drew upon the natural rights ideas embodied in the Declaration of Independence[11] as well as a vision of the U.S. Constitution as an antislavery constitution.[12] But they also used human rights claims to justify normative demands for rights that were not recognized by the Constitution or the law. In advocating to change a legal system that did not protect (or even recognize) the rights they sought, they asserted human rights claims—claims that transcend government and are inherent in all human beings.[13] Abolitionist and suffrage organizations, which initially constituted "a beleaguered minority at home, . . . found strength and comfort by standing shoulder to shoulder with like-minded people from outside the United States."[14]

HUMAN RIGHTS IN THE UNITED STATES 1, 3 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008).

8. Sarah H. Cleveland, *Our International Constitution*, 31 YALE L.J. 1, 12, 88 (2006); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44 (2004) [hereinafter Koh, *International Law*] ("[M]any of Marshall's early opinions expressly promoted the implicit or explicit internalization of international law into U.S. domestic law: through statutory construction, direct invocation, and even constitutional interpretation."); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1513 (2003) [hereinafter Koh, *American Exceptionalism*] (discussing proponents of transnational jurisprudence on the Supreme Court beginning with John Jay and John Marshall); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 82–84 (2004).

9. Lauren, *supra* note 7, at 5–12; Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1585–91 (2006).

10. *See* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 647 (1998); Lauren, *supra* note 7.

11. It was no accident that the Declaration of Sentiments, which set forth the equality demands of the suffragettes, modeled its language on the Declaration of Independence. Lauren, *supra* note 7, at 9.

12. *See infra* note 105 and accompanying text.

13. Lauren, *supra* note 7, at 5–7.

14. *Id.* at 5, 7 ("[I]t was precisely the discussion about human rights surrounding the American Revolution and the Bill of Rights in the Constitution that sparked unprecedented public debate at home and abroad about the issue of human bondage."); *id.* at 9–10

Abolitionists in the United States looked to "British abolitionists for inspiration and for evidence that their own efforts might be successful."[15] They also participated in a network of antislavery societies in Britain, the United States, France, and Brazil, all of which shared strategies and learned from each other. During the same period, a vibrant transnational network of women's rights activists developed as well.[16] Leaders in both movements explicitly linked their struggles, framing these travails as part of a broader quest for human rights.[17]

Just as the abolitionist and women's suffrage movements drew inspiration from the rights claims in the Declaration of Independence, social justice activists in the 1940s were inspired by two other historic American documents: President Franklin Delano Roosevelt's January 6, 1941 address to Congress (now known as the "Four Freedoms" speech)[18] and the Atlantic Charter of August 14, 1941.[19] The 1941 Atlantic Charter drew upon the ideas in the Four Freedoms speech to set forth Roosevelt and Winston Churchill's vision for a postwar world. The Charter included commitments to (1) "the right of all peoples to choose the form of government under which they will live"; (2) collaboration between nations "in the economic field" to secure for all "improved labor standards, economic advancement, and social security"; and (3) assurances that after the destruction of the Nazi tyranny "all the men in all the lands may live out their lives in freedom from fear and want."[20] By articulating wartime values that emphasized a commitment to ending racial tyranny and supremacy and acknowledging the obligation of nations to address social and economic needs, the Atlantic Charter not only fueled support for war efforts, but also served as an

(discussing how many activists advocated for women's equality "within the larger context of human rights" and noting that the Declaration of Sentiments is modeled after the Declaration of Independence).

15. *Id.* at 6 (noting that the abolitionist societies "developed significant organizational skills and techniques of human rights activism still used today").

16. *Id.* at 10–11.

17. *Id.* at 8–9.

18. President Franklin Delano Roosevelt, Annual Message to Congress (Jan. 6, 1941), *in* 9 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 663 (Samuel I. Rosenman ed., 1950).

19. *See* The Atlantic Charter, Official Statement on Meeting Between the President and Prime Minister Churchill (Aug. 14, 1941), *in* 10 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 314 (Samuel I. Rosenman ed., 1950) [hereinafter The Atlantic Charter]; *see also* ELIZABETH BORGWARDT, A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS 5, 6 & n.12 (2005) ("The Atlantic Charter also served as a focal point for movements promoting an expanded role for multilateral institutions. . . . [T]he text echoed Roosevelt's famous 'Four Freedoms' address of the previous January, which had highlighted freedom of speech and religion and freedom from fear and want as the distinctive characteristics of democracies. Contemporaries quickly began to cite the charter as the foundation stone for an internationalized set of 'fundamental freedoms,' using a particularly emblematic term for these universalist principles popularized during the war, 'human rights.'"). Elizabeth Borgwardt describes how the language in the Charter helped to inspire the modern human rights movement. *Id.* at 1–45.

20. The Atlantic Charter, *supra* note 19, at 315.

inspiration and invitation to domestic activists struggling with issues of racial supremacy and poverty within the United States.

According to historian Carol Anderson, by the 1940s, National Association for the Advancement of Colored People (NAACP) leadership had identified the need to address economic and social conditions as part of the NAACP's struggle for racial equality.[21] The leaders saw the Atlantic Charter as a commitment to a human rights agenda that could address the problems that had continued to plague African Americans since the end of slavery.[22] The creation of the United Nations after World War II presented an interesting opportunity for social justice activists not only to articulate their struggles as claims for human rights, but also to help develop an infrastructure for future advocacy. The NAACP (along with the American Jewish Congress and other domestic groups) emerged as a strong domestic voice, advocating that the protection of human rights be a key component of the Allied powers' postwar agenda, and for the creation of a human rights body within the U.N.[23]

Having pushed for the creation of the U.N. Human Rights Commission, the NAACP became one of the first American organizations to try to use international human rights bodies to pressure human rights compliance within the United States. In 1947, the NAACP brought a petition, aptly titled "An Appeal to the World," to the Commission, denouncing racial discrimination and segregation within the United States.[24]

Unfortunately, the hopes of the NAACP and other domestic social justice organizations that the newly formed international human rights system might provide a new forum for advocacy and new allies in domestic rights struggles were short lived. Even though the United States played a leading role in the creation of the U.N. and the drafting of the Universal Declaration of Human Rights, not all Americans supported the development of a human rights system at home. As chronicled by Anderson, Mary Dudziak, and

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21. Carol Anderson, *A "Hollow Mockery": African Americans, White Supremacy, and The Development of Human Rights in the United States*, *in* 1 BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES, *supra* note 7, at 75, 76.

22. For instance, the right to self-determination would address the systematic denial of the vote to African Americans. Improved labor standards, economic advancement, social security for all, and freedom from want would address education, working conditions, and the need for a social safety net. The destruction of Nazi tyranny and freedom from fear would address racial supremacy in the United States, including segregation, lynching, and other forms of race-based violence. *Id.* at 80–81.

23. ANDERSON, *supra* note 5.

24. *See* Petition, *reprinted in* W.E.B. Du Bois, *Three Centuries of Discrimination*, 54 CRISIS 362, 380 (1947) (reproducing a condensed version of the introduction to "An Appeal to the World," which was edited by W.E.B. Du Bois); *see also* Hope Lewis, *"New" Human Rights: U.S. Ambivalence Toward the International Economic and Social Rights Framework*, *in* 1 BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES, *supra* note 7, at 103, 115 ("The petition, presented by Du Bois to the UN in October 1947, described in book form a panoply of human rights violations against blacks—discrimination in housing, education, health care, and employment, lynchings and other forms of violence, and the legacy of slavery itself.").

other scholars,[25] southern senators—who were keenly aware of the potential effect that international scrutiny of human rights abuses in the United States could have—and isolationists—who voiced concerns about subjecting the United States to the influence of "foreign powers"—joined forces to successfully block the emergence of domestic human rights advocacy.

During the cold war years that followed the creation of the U.N., U.N. forums became a battleground for ideological attacks between the Soviet Union and the United States. Accusations of human rights abuses between the two superpowers came to be seen as political grandstanding, rather than true reflections of human rights commitments. In such an environment, human rights advocacy aimed at the United States was criticized for undermining U.S. interests and reputation, and critics of the United States on the international stage were accused of having Communist ties.[26]

Successful efforts also were undertaken to prevent the United States from taking on any international human rights commitments. In the 1950s, Senator John Bricker of Ohio led a campaign to prevent ratification of U.N. human rights treaties that almost resulted in a constitutional amendment that would have limited presidential power to ratify treaties without congressional consent. Although the amendment campaign failed, Bricker and his allies did succeed in keeping the United States from ratifying any human rights treaties until the end of the cold war in the 1990s.[27]

As a result of political attacks and the United States' refusal to engage voluntarily in any U.N. human rights mechanisms in which the country might be critiqued, the NAACP and other social justice groups essentially gave up on international human rights advocacy by the 1950s. Instead, such organizations began focusing on civil and political rights claims in domestic courts.[28]

B. *A Return to Domestic Human Rights Advocacy*

Around the turn of this century, social justice activists (and particularly lawyers) who might have been cynical about the ability of human rights

25. *See generally* ANDERSON, *supra* note 5; DUDZIAK, *supra* note 5; THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE (2007).

26. ANDERSON, *supra* note 5; DUDZIAK, *supra* note 5.

27. *See generally* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

28. It would be incorrect to say that no domestic activists saw their struggles as a human rights struggle. Indeed, just months prior to his assassination, Martin Luther King, Jr. addressed the Southern Christian Leadership Conference, stating, "I think it's necessary to realize that we have moved from the era of civil rights to the era of human rights." Vanita Gupta, *Blazing a Path from Civil Rights to Human Rights: The Pioneering Career of Gay McDougall*, *in* 1 BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES, *supra* note 7, at 145, 145. Malcolm X advocated internationalizing the African American struggle for equality and utilizing the United Nations and international forums. However, by the 1970s, these entreaties were largely unheeded.

advocacy to change U.S. law and policy started to take a second look. This renewed interest in human rights advocacy reflects both long-term structural changes in legal practice and education and strategic responses to new advocacy challenges and opportunities.[29] For U.S. lawyers, the turn to human rights results from both the increased globalization of the law and a growing receptiveness on the part of some U.S. judges to consider international law and foreign law (at least as persuasive authority).[30] These changes are reflected in, and encouraged by, a new emphasis on international law and human rights in U.S. law schools, and a commitment on the part of certain lawyers and institutions to train and encourage domestic human rights strategies.[31]

Strategic considerations also have played a role in activists' growing openness to human rights advocacy in the domestic context. Since the 1990s, federal courts have become increasingly conservative and, in many instances, less protective of fundamental rights. Access to the courts as a venue to remedy rights violations has been limited both by Congress and by adverse judicial decisions. For instance, in recent years, the Supreme Court has narrowed plaintiffs' ability to challenge or obtain remedies in cases alleging discrimination,[32] labor violations,[33] and antiunion activity,[34] and Congress has restricted prisoners' access to the courts.[35] Legal protections and commitments to affirmative action and reproductive rights have also eroded.[36] The decline in effectiveness of traditional civil rights legal strategies has made domestic lawyers increasingly aware that, in many instances, human rights law may provide more progressive standards or

29. Soohoo, *supra* note 4, at 71.

30. *See* Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 26 (1998); Margaret H. Marshall, *"Wise Parents Do Not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633 (2004); James R. Zazzali, *International Human Rights: An Overview: Annual Vanderbilt Address to the New Jersey Alumni of Harvard Law School*, 37 SETON HALL L. REV. 661 (2007).

31. Soohoo, *supra* note 4, at 81, 89–93.

32. *See* Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that plaintiffs cannot bring a suit to enforce Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race or national origin in government programs, unless they can establish intentional discrimination); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that the Eleventh Amendment bars suits against states under the Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that the Eleventh Amendment bars suits against states under the Age Discrimination in Employment Act).

33. Alden v. Maine, 527 U.S. 706 (1999) (holding that states cannot be sued in state court for back pay or damages under the Fair Labor Standards Act).

34. Hoffman Plastics Compounds, Inc. v. NLRB., 535 U.S. 137 (2002) (holding that undocumented workers who are fired for union organizing activities are not entitled to a back pay remedy).

35. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of 11, 18, and 28 U.S.C.). Specifically, Congress has narrowed the remedies available with respect to prison conditions. *See* 18 U.S.C. § 3626 (2006).

36. *See generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Gonzales v. Carhart, 550 U.S. 124 (2007).

different and helpful ways to articulate rights claims. Indeed, in cases involving the death penalty and gay rights—two of the few areas in which the Supreme Court has expanded rights in recent years—human rights and international law were cited to support the Supreme Court's decisions.[37]

The executive branch has also played an important role in building domestic support for human rights advocacy. In particular, the Bush administration's post-9/11 "antiterrorism" policies and arguments that torture and detention without access to judicial review could be justified (or at least were not illegal)[38] under U.S. law forced the public to confront the fact that the U.S. legal system might prove insufficient to protect many of the rights that we take for granted. The idea that the United States could violate the prohibition against torture, one of the fundamental principles of human rights law, has had a profound effect on the nation's perception of itself and its government. José Alvarez describes the impact of the Bush administration's "Torture Papers":

> [W]e have discovered that the torturer is no longer just the alien subject of the Alien Tort Claims Act ("ATCA"), that outsider to the civilized rule of law operating in some Third World totalitarian shore that we condemn so easily in large part because it makes us feel so superior. The torturer is now us—distinguished, accomplished, highly credentialed public servants and high government officials, current or former professors of law at famous law schools, civil servants in the White House Counsel's Office, the U.S. Department of Defense, or the Office of Legal Counsel ("OLC") within the U.S. Department of Justice, even one who has since become a federal judge.[39]

During the legal and political debates surrounding the Bush administration's antiterrorism policies, "[i]nternational human rights law became a key bulwark against the erosion of fundamental rights."[40]

In addition to providing new arguments to make in U.S. courts, human rights advocacy provides an opportunity to work for change in different forums and in different ways, thus opening up new avenues for advancing

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37. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (considering the number of countries that have ratified treaties prohibiting the juvenile death penalty, and the practices of other countries and U.K. law); Lawrence v. Texas, 539 U.S. 558, 572–73, 576–77 (2003) (considering a case from the European Court of Human Rights and the law of other countries in a decision striking down a Texas law criminalizing sexual conduct between two people of the same sex); Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002) (noting that the world community "overwhelmingly disapproved" of execution of the mentally retarded).

38. José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006) (discussing the ways the administration's "torture" memos ignored or misconstrued customary international restrictions on torture).

39. *Id.* at 176.

40. Wendy Patten, *The Impact of September 11 and the Struggle Against Terrorism on the U.S. Domestic Human Rights Movement*, *in* 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS, *supra* note 4, at 153, 154. The U.S. Supreme Court ultimately issued decisions confirming that individuals detained in Guantánamo Bay have the right to habeas corpus and are protected by the Geneva Conventions. Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

rights claims that have been foreclosed by the domestic legal system. Indeed, human rights advocacy developed precisely because of the need to address serious rights abuses in countries where the domestic legal systems fail to protect human rights. Human rights advocacy works by creating "a set of standards by which to measure state practices and seek to 'enforce' norms or hold actors accountable."[41]

Distinct international human rights strategies began to take shape in the 1970s with the rise of INGOs and the development of international and regional human rights monitoring mechanisms. During the 1970s, a new player emerged in the global fight for human rights with the creation of INGOs. Groups like Human Rights Watch and Amnesty International sought to use public and international pressure to combat human rights abuses. Initially focusing on countries in which the government and domestic legal systems failed to recognize or enforce fundamental rights, the INGOs developed a "shame and blame" strategy that was often as much moral and political as legal. INGOs produced reports that documented and exposed human rights abuses in a given country. The reports used international human rights standards "to articulate a standard of behavior against which to measure a country's treatment of its citizens and residents, relying on public opinion and political pressure for change."[42] INGOs also have been important players before international and regional human rights bodies (the development of which is discussed below), both using the forums to expose rights abuses and working within them to develop and articulate new human rights standards.

In recent years, INGOs have begun turning their attention toward the United States.[43] In many instances, INGOs are working collaboratively with activists in the United States. INGO reports have supported the advocacy efforts of domestic groups, providing opportunities for them to learn about human rights and incorporate human rights into their advocacy.[44] Learning from their international allies, domestic activists also have begun producing their own human rights reports.[45]

Over the last twenty years, the U.N. and the Organization of American States (OAS) have taken great strides in building mechanisms to protect human rights and making human rights more accessible to NGOs and activists. For instance, in the 1990s, the Office of the High Commissioner for Human Rights was created and new procedures for civil society

41. Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 513 (2003).

42. Soohoo, *supra* note 4, at 96.

43. *See* Labelle, *supra* note 4, at 128–29 (describing early INGO reports on the treatment of prisoners in the U.S. in the 1990s).

44. *Id.* at 133–36.

45. For a list of sample reports, see American Civil Liberties Union, Human Rights: Publications, http://www.aclu.org/intlhumanrights/relatedinformation_publications.html (last visited Oct. 22, 2008).

involvement were developed at the U.N. and OAS.[46] Between 1997 and 2006, the U.N. Commission on Human Rights[47] established seventeen of the existing twenty-eight U.N. special procedures for monitoring human rights violations.[48] These new mechanisms and procedures have opened up new forums for activists to address human rights violations.

In addition to the development of INGOs and the strengthening of international and regional human rights bodies, a further shift has taken place that has made international human rights law and human rights forums more relevant in the United States. In the 1990s, with the end of the cold war and the fall of many "states of exception," there has been a shift in the international human rights agenda. In response to pressure from activists, the international human rights community has moved from a near exclusive focus on issues such as torture, political assassinations, and summary executions, to "tackl[ing] 'the seriousness of everyday violations.'"[49] By increasingly addressing issues of discrimination, women's rights, and economic and social rights and considering "what human rights mean for a democratic society," the international human rights movement has become more relevant to U.S. civil rights and social justice lawyers.[50]

C. *Internationalists: Recognition of the United States as Part of the World*

As discussed in the previous section, changes in the domestic advocacy environment and the development and strengthening of international human rights have led domestic activists to incorporate human rights standards into their advocacy work. Domestic activists are also engaging in human rights advocacy strategies. They are writing human rights reports and bringing U.S. human rights violations to the U.N. and regional human rights bodies. Their entreaties that the United States engage in the international human rights system and respect human rights at home have been joined by the voices of international lawyers and human rights activists.

By the 1990s, INGOs began including the United States as a subject for human rights reports and advocacy.[51] The move to recognize that human rights abuses occurred in the United States (and other Western nations) reflected the desire of human rights professionals (many of whom lived in the United States) to address the contradiction of exposing abuses abroad while ignoring them in their home countries.[52] Indeed, to some degree, the

46. Margaret Huang, *"Going Global": Appeals to International and Regional Human Rights Bodies*, *in* 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS, *supra* note 4, at 105, 106.

47. The Human Rights Commission was replaced by the U.N. Human Rights Council in 2006. G.A. Res. 60/251, ¶ 5, U.N. Doc. A/Res/60/251 (Apr. 3, 2006).

48. *Id.*

49. Soohoo, *supra* note 4, at 96–97 (quoting Rhonda Copelon).

50. *Id.* at 97.

51. *See* Thomas, *supra* note 5, at 9–10.

52. Labelle, *supra* note 4, at 128; Thomas, *supra* note 5, at 6.

legitimacy of INGOs required that they take on the United States and other Western nations where they were based.

Lawyers doing international human rights work were also aware that allowing the United States to continue its "exceptionalist" human rights policy had the potential to undermine both international human rights law globally and the ability of the United States to achieve its human rights related foreign policy goals in other countries. In describing the problem of U.S. exceptionalism, Harold Koh, Dean of Yale Law School and former U.S. Assistant Secretary of State for Democracy, Human Rights and Labor, discussed the negative effect that exceptionalism has on the ability of the United States to pursue human rights as a foreign policy agenda and its tendency to undermine international law.[53]

II. DEVELOPING A THEORY OF HUMAN RIGHTS CHANGE

> [A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all the time.[54]

A. *Internationalist Theories of Change*

Scholars of international law and international relations have developed theories about how international law is internalized, and how, in particular, human rights law brings about domestic change.[55] These theories generally fall into two broad categories: the realists (also known as the rationalists) and the constructivists. Others have explained the split between "realist" and "constructivist" schools of thought.[56] Briefly, realists posit that nations only obey international law when it is in their interest to do so, whereas constructivists claim that ideas and norms embodied in international law and standards can cause political change. Recently, Ryan Goodman and Derek Jinks have suggested that there are three ways in which international law can change state behavior: coercion, persuasion, and acculturation.[57]

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53. Koh, *American Exceptionalism*, *supra* note 8, at 1486–87 (citing four problems with U.S. exceptionalism and double standards: (1) the United States often ends up on the "lower rung with horrid bedfellows"; (2) "hypocrisy undercuts America's ability to pursue an affirmative human rights agenda" and may force it to condone or defend other countries' human rights abuse; (3) the United States' moral authority and claim to be a global leader is weakened; (4) the United States ends up "undermining the legitimacy of [international] rules themselves").

54. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979).

55. *See, e.g.*, THE POWER OF HUMAN RIGHTS (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

56. *See, e.g.*, Harold Hongju Koh, *Internalization Through Socialization*, 54 DUKE L.J. 975, 976 (2005); Kathryn Sikkink, *Bush Administration Noncompliance with the Prohibition on Torture and Cruel and Degrading Treatment*, *in* 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS, *supra* note 4, at 187, 189–91.

57. *See* Goodman & Jinks, *supra* note 55, at 630.

They suggest that coercion and persuasion predominate international legal studies, but argue that acculturation is a distinct social process through which state behavior is influenced.[58] While these theories can be instructive on a macrolevel to understand interstate behavior, they are unsatisfying for human rights and social justice activists eager to move beyond a discussion about why nations comply with international human rights law to a discussion about the process by which they can be made to do so.[59]

Liberal theory provides a partial answer by recognizing that nations are not unitary and by acknowledging the role domestic interest groups can play in government compliance with international law. Liberal theory suggests that change comes about because human rights law "creates an international legal obligation that domestic interest groups can use to mobilize pressure on domestic political institutions to take action in conformance with that obligation."[60] According to liberal theory, this process should be particularly strong in liberal states where there is an active and engaged civil society and a tradition of respect for legal obligations.[61]

Dean Koh's theory of transnational legal process provides more specificity about how human rights change occurs. He describes a transnational legal process through which nations come to obey international law. According to Koh, this process is composed of three elements: interaction, interpretation, and internalization. Koh posits that "[t]hose seeking to create and embed certain human rights principles into international and domestic law should trigger transnational interactions that generate legal interpretations, that can in turn be internalized into the domestic law of even resistant nation states."[62]

Koh correctly points out that the most overlooked determinant of compliance is "vertical process," which he describes as "the process by which public and private actors—namely, nation states, corporations, international organizations, and nongovernmental organizations—interact in a variety of fora to make, interpret, enforce, and ultimately internalize rules of international law."[63] Koh builds on constructivist theories, arguing

58. *See id.* at 632. Ryan Goodman and Derek Jinks note that constructivists and rationalists rely on both coercion and persuasion, although "[i]t is fair to say that rationalists emphasize the coercion mechanism and that constructivists emphasize the persuasion mechanism." *Id.* (footnotes omitted).

59. *Id.* at 624 ("What is needed is a 'second generation' of empirical international legal studies aimed at clarifying the mechanics of law's influence.").

60. Hathaway, *supra* note 55, at 1954.

61. Liberal democracy has been defined as combining "representative government with a commitment to the rule of law, itself defined to include both an independent judiciary and protection of basic civil and political rights." Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 331–32 (1997).

62. Koh, *American Exceptionalism*, *supra* note 8, at 1502 (emphasis omitted); *see* Koh, *supra* note 10, at 644.

63. Koh, *American Exceptionalism*, *supra* note 8, at 1502.

that nations comply not because they are coerced but, instead, that they voluntarily comply, because the transnational legal process leads to internalization of the human rights norms.

Koh has identified three forms of norm internalization—social, political, and legal:

- *Social internalization* occurs when a norm acquires so much public legitimacy that there is widespread general adherence to it.
- *Political internalization* occurs when the political elites accept an international norm and advocate its adoption as a matter of government policy.
- *Legal internalization* occurs when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, legislative action, judicial interpretation, or some combination of the three.[64]

Political internalization can occur where governmental actors do not necessarily accept a legal obligation to comply, but nonetheless conform their policies to international legal or human rights standards.[65] For instance, beginning in 1998, activists opposed to the execution of foreign nationals convicted of capital crimes in the United States began to bring challenges in international forums. Instead of basing the challenges on international prohibitions on the death penalty, activists based their claims on U.S. violations of the right to consular notification under a non–human rights treaty, the Vienna Convention on Consular Relations (VCCR). The VCCR provides that when foreign nationals are detained or arrested in the United States, they have the right to notify and communicate with their consulate.[66] However, that right frequently was ignored by state law enforcement. Cases were brought before the International Court of Justice (ICJ) against the United States by Paraguay, Germany, and Mexico asserting violation of the consular rights of their nationals on death row,[67] and Mexico also sought an advisory opinion from the Inter-American Court

64. Koh, *supra* note 10, at 642.

65. For example, Harold Koh cites human rights activism with regard to the treatment of Haitian refugees by the U.S. government in the 1990s, which did not lead to judicial recognition of rights, but did achieve political internalization through a change in the Clinton administration's policy. Koh, *supra* note 55, at 2657.

66. *See* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf. Petitioners argued that violation of these procedural rights prejudiced the outcome of their cases because consular officers would have provided the defendants with material assistance in defending their cases, which may have changed the outcome, including helping to gather evidence and serving as a cultural bridge between the defendant and his attorney. Sandra Babcock, *Human Rights Advocacy in United States Capital Cases*, *in* 3 BRINGING HUMAN RIGHTS HOME: PORTRAITS OF THE MOVEMENT, *supra* note 4, at 91, 106.

67. LaGrande Case (Ger. v. U.S.), 2001 I.C.J. 466 (June 21); Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9).

for Human Rights.[68] In 2004, the ICJ held that the United States had violated its obligations under the VCCR and that fifty-one Mexicans on death row were entitled to "judicial review and reconsideration" of their convictions.[69] However, in 2006, the U.S. Supreme Court held that it was not bound to enforce the ICJ's decision.[70] Despite the Court's explicit refusal to legally internalize the ruling, there was evidence that the interactions at the ICJ and the Inter-American Court provoked political internalization. For instance, after the initial cases were brought, the U.S. State Department launched a "broad educational program to inform local and state police, prosecutors, and courts about the notification requirement," and after the 2004 ICJ case, the governor of Oklahoma granted clemency to one of the petitioners, commuting his death sentence to life without parole.[71]

Legal internalization can occur through domestic lobbying that leads to legislation that embeds or internalizes human rights norms, or through judicial internalization. Much has been written about how transjudicial dialogue and transnational jurisprudence can influence domestic law and lead to judicial internalization of human rights norms.[72] Personal contact between judges from different countries is becoming more commonplace, which has led to increased discussions about issues of mutual concern.[73] The growth of judicial networks has also made it easier for judges to learn about and pay attention to important decisions from other courts.

Scholars also have suggested that there are institutional and suprapositive concerns that may make it beneficial for courts to consider human rights law and the decisions of other high courts in constitutional adjudication. For example, some scholars suggest there is an empirical benefit to considering international and foreign law because it provides an opportunity for a judge to observe how a proposed rule operates in other systems.[74] In the United States, it also allows the Supreme Court to take part in a normative dialogue with human rights bodies and constitutional courts

68. Babcock, *supra* note 66, at 107–09.

69. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 14 (Mar. 31).

70. Sanchez-Llamas v. Oregon, 548 U.S. 331, 354–55 (2006).

71. Margaret E. McGuinness, Medellín, *Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 824–25, 828 (2006).

72. *See, e.g.*, Koh, *American Exceptionalism*, *supra* note 8, at 1513–14; McGuinness, *supra* note 71, at 770 (discussing judicial networks theory "that accounts for norm transfer as a reflection of judicial interaction"); Neuman, *supra* note 8, at 87–88 (discussing the institutional and suprapositive benefits of Supreme Court engagement in a normative dialogue with human rights tribunals and constitutional courts).

73. L'Heureux-Dubé, *supra* note 30, at 26; McGuinness, *supra* note 71, at 770–71.

74. Justice Stephen Breyer has noted that looking at other jurisdictions can "offer[] points of comparison," and Justice Ruth Bader Ginsburg has noted the benefit of looking to see what other jurisdictions "can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups." Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 266 (2003); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Acton: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999).

around the world. Moreover, if the Court declines to take part in the dialogue, it undermines its influence.[75]

Gerald Neuman describes the suprapositive aspect of human rights law as "the claim of the right to normative recognition independent of its embodiment in positive law."[76] He suggests that human rights law should be considered by U.S. courts for the normative insight human rights law may provide. Other scholars have suggested that in an increasingly globalized world, judicial legitimacy may require that the Supreme Court recognize the persuasive value of international law.[77] Indeed, in *Lawrence v. Texas* and *Roper v. Simmons*, two recent cases in which the Supreme Court cited foreign and international human rights law, the Court made clear that it was not bound by foreign sources, but also went out of its way to establish that its holding was consistent with international standards.[78]

Internationalist theories and an understanding of transnational legal processes are helpful in articulating how human rights compliance may occur. However, such theories tend to focus on the role of international and national government actors. Little attention is paid in the scholarship to the domestic process of social internalization. Similarly, accounts focusing on transjudicial dialogue fail to acknowledge the role of social movements and political pressure from below in internalizing human rights norms.[79] Thus, in order to gain a complete understanding of how human rights norms can be internalized in the United States, we need to look at the work being done on the state and local level by both government actors and social activists as well as on the international and national governmental level.

B. *Local Theories of Change*

1. State and Local Actors

Recently, scholars have begun to analyze human rights implementation at the subnational level. Their scholarship describes the role that state and local governments can play in human rights implementation by incorporating norms into local legislation and policy. It also emphasizes

75. Neuman, *supra* note 8, at 87.

76. *Id.* at 84.

77. *See, e.g.*, Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 420 (2000).

78. Roper v. Simmons, 543 U.S. 551, 575 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."); Lawrence v. Texas, 539 U.S. 558, 560 (2003) (stating that the right recognized in *Lawrence* has been accepted as an integral part of human freedom in many other countries and that "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent").

79. *See* Resnik, *supra* note 9, at 1576 ("Internationalists and sovereigntists are insufficiently attentive to the range of participants working out our relationships to transnational norms and the rule of law more generally.").

the importance of state and local governments as sites at which activists can be involved in the process of contesting, translating, and ultimately encouraging social internalization of human rights standards. Moreover, recognition that human rights change is as likely (and in many cases more likely) to come from pressure from the bottom up as from the top down helps to address claims made by opponents that there is an inherent democracy deficit in human rights advocacy.[80] If local level advocacy is successful in achieving human rights internalization, implementation of human rights norms need not solely rely upon the federal government's top down efforts to implement treaties. Instead implementation can result from social acceptance of human rights norms, which ultimately can be reflected in changes in positive law, policies, or judicial attitudes and decisions.[81] Thus, not only do subnational human rights efforts result in implementation at the local level, they also can support efforts for national human rights implementation by stimulating the process of norm internalization.

Catherine Powell uses the term "dialogic federalism" to describe the ways in which federal and subnational governments engage in a dialogue about rights.[82] Rejecting a hierarchical model that envisions imposition of human rights norms implemented by the federal government pursuant to the treaty power, Powell posits that dialogue between various levels of government "is critical to meaningful implementation of international human rights law in the United States."[83]

Similarly, Judith Resnik discusses how domestic federalism actually creates more opportunities to debate and establish new norms. Recognizing a multitude of state and local actors who import and export human rights law, including state courts, state and local legislative bodies, administrators, mayors, and others,[84] she suggests that "[l]aws, like people, migrate. Legal borders, like physical ones, are permeable, and seepage is everywhere."[85]

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80. Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 250 (2001); *see* John O. McGinnis, *The Comparative Disadvantage of Customary International Law*, 30 HARV. J.L. & PUB. POL'Y 7, 9 (2006) (arguing that there is a democracy deficit in enforcement of international law and discussing the importance of democracy in the process of norm creation).

81. *See generally* Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007); Resnik, *supra* note 9, at 1580 (stating that federal courts and national actors are "not necessarily the most effective means of either making [human rights] precepts constitutive of American identity or of altering the circumstances of people living in this country").

82. Powell, *supra* note 80, at 245–50.

83. *Id.* at 250.

84. Even at the local level, Judith Resnik emphasizes the importance of networks. She describes "translocal organizations" that connect local officials, such as the National League of Cities, the Conference of Mayors, etc., which serve as locations for officials to share learning. In a globalized environment, these organizations have broadened their scope, linking to subnational entities around the world. While concerns about trade and tourism may predominate the transnational agenda of these organizations, they also include human rights issues. Resnik, *supra* note 81, at 34.

85. *Id.* at 64.

As a result, rather than serving as an obstacle to change, "multiple sites for conflicts about social norms . . . permit problems to be argued in more than one forum and more than once."[86] These debates allow law to change through an "iterative process."[87] Thus, instead of viewing this process as a threat to American sovereignty, Resnik identifies it as a reflection of democratic federalism:

> When city councils or state legislatures propose provisions incorporating foreign norms or shaping local action seeking either to import transnational precepts or to have extraterritorial effects, these measures are put forth in public and voted up or down. From immigration to same-sex marriage, from land mines to apartheid and genocide, those debates have enabled law to change—in directions that can be characterized as liberal and as conservative—through an iterative process.[88]

While the process may be imperfect, Resnik argues that there are benefits to norms that are built over time through a multitude of local efforts because "the rules inscribed become more entrenched as localities embrace specific precepts and link their civic identity to them in a fashion that sovereigntists should admire."[89]

Another advantage of an iterative process that includes multiple sites to introduce and contest human rights norms is that it provides opportunities to translate international standards to a local context. In contrast to a hierarchal approach, where the federal government adopts human rights standards wholesale and seeks to enforce them at the local level unremediated by considerations of local context and values, engagement with human rights norms at multiple ports of entry can help domesticate the norm and build greater public acceptance. Powell posits that, "[b]y allowing incorporation of international law through multiple points of entry, dialogic federalism facilitates translation at various sites with broader participation, ensuring thicker, more complex understandings of human rights law."[90]

As a port of entry, state courts have a distinctive role to play. State courts can provide a site for legal internalization of norms. Because state constitutions are not coextensive with the Federal Constitution and many include positive rights that can be found in human rights and foreign law, there may be greater opportunities for the comparative use of such sources to interpret state constitutional provisions.[91] In addition, state constitutional courts often are more comfortable engaging in comparative law analysis than the Supreme Court.[92] By engaging in the comparative exercise, state

86. *Id.* at 41.
87. *Id.*
88. *Id.*
89. *Id.*
90. Powell, *supra* note 80, at 251–52.
91. Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 371–75 (2006); *see, e.g.*, Zazzali, *supra* note 30, at 680–83.
92. Marshall, *supra* note 30, at 1641.

courts can help to build a popular understanding of human rights law, even if they are not bound by international sources and/or ultimately do not find those sources to be persuasive. For instance, some state constitutions explicitly incorporate human rights concepts such as "dignity."[93] Other state constitutions include positive rights to welfare, health, education, and the right to work.[94] In such situations, international sources can help state courts develop their jurisprudence by providing empirical examples of how rights are enforced in other countries. In the context of economic and social rights, international and foreign law can provide insight into how other courts have made positive rights justiciable.[95] Accordingly, state courts can serve both as sites for legal internalization and as forums for dialogue to promote social internalization.

2. Social Movements

> It is the power of the people that can transform the cultural and ideological environment in such a way that government representatives will be respectful and responsive to human rights principles.[96]

As discussed above, government officials at the subnational level—judges, legislators, and executive branch staff—all play a critical role in implementing and internalizing human rights standards. But an account of human rights change would be incomplete without an examination of the role that activists and social movements play in bringing about such change. Legal scholars have recognized the important link between law and social movements, noting that where law reform is brought about through litigation without the support of a broader social movement, such reforms may be difficult to sustain and may even incur public backlash.[97] Social movements both create pressure to force governments to change and catalyze the changes in dialogue necessary for social internalization of new norms. Over time, these changes can be reflected in new law or policy or in changes in the interpretation of existing legal and constitutional standards.

Robert Post and Reva Siegel have developed a theory describing the role that social movements play in creating new forms of constitutional

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93. Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 21–27 (2004).

94. Davis, *supra* note 91, at 372.

95. *See Treatment Action Campaign v. Rath* 2007 (4) SA 563 (C) (S. Afr.).

96. Catherine Albisa, *First-Person Perspectives on the Growth of the Movement: Ajamu Baraka, Larry Cox, Loretta Ross, and Lisa Crooms*, *in* 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS, *supra* note 4, at 49, 53 (quoting Ajamu Baraka, Executive Director of the U.S. Human Rights Network).

97. *See, e.g.*, Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 766 (1991) (arguing that state legislatures were expanding legal access to abortion before *Roe v. Wade* and that "*Roe* may have taken national policy too abruptly to a point toward which it was groping more slowly, and in the process may have prevented state legislatures from working out long-lasting solutions based upon broad public consensus" (footnote omitted)).

understanding,[98] which is helpful in analyzing how social movements use human rights advocacy to bring about domestic change. Post and Siegel discuss the role that constitutional ideals play in expressing American identity and the need to "facilitate an ongoing and continuous communication between courts and the public" in order to ensure that constitutional interpretation remains closely tethered to popular understandings of fundamental rights.[99] They describe a process by which public and political actors engage in norm contestation to challenge existing constitutional interpretation that can lead to changes in constitutional interpretation over time.[100] Thus, "[d]emocratic constitutionalism affirms the role of representative government and mobilized citizens in enforcing the Constitution at the same time as it affirms the role of courts in using professional legal reason to interpret the Constitution."[101]

In a separate article, Siegel describes the battle over ratification of the Equal Rights Amendment (ERA) as an example of successful norm contestation. She describes how the ERA's proponents made "constitutional arguments in multiple arenas and employ[ed] practices of norm contestation to capture official sites of constitutional norm articulation."[102] The claim for equality was made across institutional settings, including efforts to enforce new forms of civil rights legislation, litigation under the Fourteenth Amendment, and the movement for a constitutional amendment. Over time, the "[l]ong running dispute about whether to amend the Constitution's text changed public understandings *of* the Constitution's text."[103] Thus, while the ERA was ultimately defeated, the norm contestation brought about a change in popular understanding of women's equality, which eventually was reflected in a change in the Supreme Court's equal protection jurisprudence to construe the Fourteenth Amendment to prohibit discrimination against women.

By articulating the role that social justice movements play in affecting Supreme Court jurisprudence, democratic constitutionalism provides a useful framework for scholars and activists alike. However, claims about constitutional meaning are not the only ways in which activists can provoke a normative discussion about social values. As discussed in Part I.A, human rights advocacy historically has been part of the domestic dialogue to contest and change domestic norms. Even dating back to the American

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

99. Post & Siegel, *supra* note 98, at 380.

100. Robert Post and Reva Siegel discuss how the appointment and approval process for Supreme Court nominees and the litigation and presidential rhetoric during the Reagan administration to challenge Warren Court precedents are examples of norm contestation. *Id.* at 381.

101. *Id.* at 379.

102. Siegel, *supra* note 98, at 1368.

103. *Id.* at 1369.

Revolution, ideas about natural law and human rights crossed oceans and supported the American colonists' claims that they could break their ties with the British Crown. Human rights claims and transnational advocacy helped to shape the early social movements in the United States that changed public and constitutional understandings (reflected in constitutional amendments) around slavery and women's suffrage.

For example, Siegel discusses how abolitionists and suffragists "repudiated officially sanctioned accounts of the Constitution's meaning and sought community recognition of new accounts of the Constitution's meaning."[104] Rather than accepting contemporaneous understandings of the Constitution as a document that protected slavery, Frederick Douglass promoted a vision of the Constitution that reimagined it as an "antislavery constitution."[105] Siegel refers to Douglass as a constitutional utopian, but Douglass was also a human rights activist who used the language of human rights to make a normative claim for rights not recognized under U.S. law. Indeed, while Enlightenment philosophers may have been the first to coin the term "human rights," Douglass popularized the term, "explicitly using the terminology of 'human rights' far more extensively than these earlier thinkers."[106] The suffragist movement similarly framed the quest for the vote in human rights terms.[107] As discussed in Part I.A, both movements were transnational, with U.S. activists gaining inspiration, ideas, and support from allies abroad.[108]

III. HUMAN RIGHTS ADVOCACY FOR REPRODUCTIVE RIGHTS IN THE UNITED STATES

This part tests the theories for human rights change discussed in Part II by applying international human rights standards to domestic debates regarding women's equality and reproductive rights, and exploring the ways in which human rights standards might become internalized in the United States. At the outset, it is important to note that a number of human rights standards are implicated by domestic reproductive rights issues. In many instances these standards can help to frame issues in a different, and often more progressive, way than the traditional arguments surrounding women's equality and reproductive rights in the United States. For example, on the issue of access to reproductive health care and services, international human rights treaties recognize a right to health care access as

104. *Id.* at 1355.

105. *Id.* at 1353.

106. Catherine Powell, *Louis Henkin and Human Rights: A New Deal at Home and Abroad, in* 1 BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES, *supra* note 7, at 57, 71 n.19.

107. Lauren, *supra* note 7, at 9.

108. *See* Resnik, *supra* note 9, at 1576–77 ("Equality efforts in the United States have always been a part of a global effort in which America was influenced by and affected events abroad through a lively 'reexport trade.'" (footnote omitted)); *supra* note 10 and accompanying text.

well as a governmental obligation to respect and ensure rights.[109] On the issue of abstinence-only education, international human rights treaties recognize a right to access to information not only as an element of the right to health,[110] but also as an important component of the right to life,[111] the

109. Article 12 of the International Covenant on Economic, Social and Cultural Rights guarantees women the right to "the highest attainable standard of physical and mental health." International Covenant on Economic, Social and Cultural Rights art. 12.1, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan 3, 1976) [hereinafter Economic, Social and Cultural Rights Covenant]. In its General Comment No. 14, the Committee on Economic, Social and Cultural Rights interpreted Article 12 as the right to maternal, child, and reproductive health care and, accordingly, requires states parties to implement measures to "improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information." U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 14, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (footnotes omitted); *cf.* Harris v. McRae, 448 U.S. 297 (1980) (upholding the Hyde Amendment's ban on the use of Medicaid funding for medically necessary abortions and finding that a woman's freedom of choice does not carry with it a constitutional entitlement to the financial resources necessary to avail herself of the full range of her protected choices).

110. The human right to the "highest attainable standard" of health also requires that individuals have access to accurate information, including information related to sexual and reproductive health. U.N. treaty bodies that monitor compliance with human rights treaties have repeatedly discussed the importance of sexual education and information as a means of ensuring the right to health because such education contributes to reduction of the rates of maternal mortality, abortion, adolescent pregnancies, and HIV/AIDS. *See, e.g.*, ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Libyan Arab Jamahiriya*, ¶ 36, U.N. Doc. E/C.12/LYB/CO/2 (Jan. 25, 2006); ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Senegal*, ¶ 47, U.N. Doc. E/C.12/1/Add.62 (Sept. 24, 2001); ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ukraine*, ¶ 31, U.N. Doc. E/C.12/1/Add.65 (Sept. 24, 2001); ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Bolivia*, ¶ 43, U.N. Doc. E/C.12/1/Add.60 (May 21, 2001); ECOSOC, Comm. on Econ., Soc. & Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Honduras*, ¶ 27, U.N. Doc. E/C.12/1/Add.57 (May 21, 2001); U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Burundi*, ¶ 62, U.N. Doc. A/56/38 (Feb. 2, 2001); U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Belize*, ¶¶ 56–57, U.N. Doc. A/54/38 (June 25, 1999) [hereinafter CEDAW Observations, Belize]; U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Chile*, ¶¶ 226–27, U.N. Doc. A/54/38 (June 25, 1999); U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Dominican Republic*, ¶ 349, U.N. Doc. A/53/38 (Feb. 3, 1998) [hereinafter CEDAW Observations, Dominican Republic]; U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Dominican Republic*, ¶ 37, U.N. Doc. CRC/C/15/Add.150 (Feb. 21, 2001); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, ¶ 61, U.N. Doc. CRC/C/15/Add.144 (Feb. 21, 2001); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Colombia*, ¶ 48, U.N.

right to education,[112] and adolescents' rights.[113] On the issue of access to contraceptives and family planning services, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) recognizes a right to control the number and spacing of children.[114] Numerous international human rights documents recognize a right to privacy,[115] and international human rights bodies have also linked the failure to provide access to a safe and legal abortion to violations of a woman's right to life.[116] In addition, one international human rights body

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Doc. CRC/C/15/Add.137 (Oct. 16, 2000); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Cambodia*, ¶ 52, U.N. Doc. CRC/C/15/Add.128 (June 28, 2000).

111. The right of all people to "seek, receive and impart information and ideas of all kinds," including information about their health, is guaranteed by the International Covenant on Civil and Political Rights, which was ratified by the United States in 1992. International Covenant on Civil and Political Rights art. 19, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. In providing Concluding Observations on the periodic reports of states parties to the Covenant, the U.N. Human Rights Committee, the interpretative body of the ICCPR, has linked the obligation to provide accurate and objective sexuality education to the treaty's right to life provision. *See* U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: Poland*, ¶ 9, U.N. Doc. CCPR/CO/82/POL (Dec. 2, 2004).

112. The Committee on the Rights of the Child has recognized that the provision of information and life skills necessary to develop a healthy lifestyle is an important component of the human right to education. *See* U.N. Comm. on the Rights of the Child, *General Comment 1: The Aims of Education, Article 29(1)*, ¶ 2, U.N. Doc CRC/GC/2001/1 (Apr. 17, 2001).

113. The Convention on the Rights of the Child (CRC) requires that governments "ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health." Convention on the Rights of the Child, G.A. Res. 44/25, art. 24(2)(e), U.N. Doc. A/44/49 (Nov. 20, 1989) (entered into force Sept. 2, 1990) [hereinafter CRC]. The Committee on the Rights of the Child has provided additional guidance regarding countries' obligations to provide adolescents with access to information, stating that countries must ensure that adolescents have access to "sexual and reproductive information, including on family planning and contraceptives, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted diseases (STDs)." U.N. Comm. on the Rights of the Child, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, ¶ 28, U.N. Doc. CRC/GC/2003/4 (July 1, 2003) [hereinafter CRC General Comment No. 4].

114. *See* Convention on the Elimination of All Forms of Discrimination Against Women art. 16(1)(e), *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW]; Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Beijing Declaration and the Platform for Action*, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995) [hereinafter Beijing Declaration and Platform for Action]; International Conference on Population and Development, Cairo, Egypt, Sept. 5–13, 1994, *Programme of Action of the International Conference on Population and Development*, princ. 8, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994) [hereinafter Cairo Programme of Action].

115. *See* CRC, *supra* note 113, arts. 16.1–16.2; ICCPR, *supra* note 111, art. 17; Beijing Declaration and Platform for Action, *supra* note 114, ¶ 274(e); Cairo Programme of Action, *supra* note 114, ¶ 7.45.

116. The ICCPR provides an explicit pronouncement of the right to life. *See* ICCPR, *supra* note 111, art. 6(1). The Human Rights Committee's General Comment No. 28 on equality of rights between men and women asks states parties reporting on the right to life protected by Article 6 to "give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-

has stated that denial of access to abortion in some circumstances can constitute cruel, inhuman, and degrading treatment.[117] International human rights law also links the right to be free from discrimination on the basis of race to the enjoyment of a number of economic, social, and cultural rights, including the right to reproductive health, and therefore prohibits discrimination in reproductive health care services that disproportionately affects women of color.[118] Each of these human rights standards could help to change the dialogue around reproductive rights issues and provide activists with interesting new advocacy opportunities.[119] However, in order to provide a more concrete example of how a particular human rights standard could help to expand protection of reproductive rights in the

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threatening clandestine abortions." U.N. Human Rights Comm., *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000). In addition, the Committee on the Elimination of Discrimination Against Women has framed the issue of maternal mortality as a result of unsafe abortions as a violation of a woman's right to life. CEDAW Observations, Belize, *supra* note 110, ¶ 56; U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Colombia*, ¶ 393, U.N. Doc. A/54/38 (Feb 5, 1999); CEDAW Observations, Dominican Republic, *supra* note 110, ¶ 337. For additional discussion of human rights law's protection of a woman's right to life and a woman's access to a safe and legal abortion, see Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 255–62 (2008).

117. The Human Rights Committee has held that denial of a legal abortion of a nonviable fetus violated a seventeen-year-old's right to be free from cruel, inhuman, and degrading treatment. *See* K.N.L.H. v. Peru, U.N. Human Rights Comm., Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2006).

118. Article 5(e)(iv) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) mandates that states parties ensure that all people, without distinction as to race, national or ethnic origin, or color, have the right to "public health, medical care, social security and social services." Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 5(e)(iv), U.N. Doc. A/6014 (Dec. 21, 1965) [hereinafter CERD]. The right to nondiscrimination in health includes equal access to reproductive and sexual health services for racial and ethnic minorities. U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations: United States of America*, ¶ 33, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008) (recommending that the United States "improve access to maternal health care, family planning, pre- and post-natal care and emergency obstetric services"); U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations: India*, ¶ 24, U.N. Doc. CERD/C/IND/CO/19 (May 5, 2007) (recommending "that the State party ensure equal access to . . . reproductive health services"); U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations: China*, ¶ 250, U.N. Doc. A/56/18 (Aug. 9, 2001) (recommending that the next state party report contain "information on measures taken to prevent gender-related racial discrimination, including in the area of . . . reproductive health"); *see also* Paul Hunt, Special Rapporteur, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 25, *delivered to the U.N. Comm'n on Human Rights*, U.N. Doc. E/CN.4/2003/58 (Feb. 13, 2003) ("The right to health is a broad concept that can be broken down into more specific entitlements such as the rights to . . . [m]aternal, child and reproductive health . . . .").

119. *See, e.g.*, Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006) (discussing the use of international human rights standards to challenge abstinence-only education programs in New York).

United States, the next section compares domestic and international human rights approaches to women's right to equality.

A. *Reproductive Rights and Women's Equality*

U.S. equal protection analysis currently fails to take into account men's and women's biological differences. The failure to "reconcile the ideal of equality with the reality of biological difference"[120] prevents domestic activists from using sex equality arguments to advance women's reproductive rights. Current legal jurisprudence derives from the Supreme Court's determination that because men and women are not "similarly situated" in relation to reproduction, any disparate treatment or impact women experience in connection with reproduction can be attributed to nature, rather than discrimination. The most famous example of this line of cases is *Geduldig v. Aiello*, a 1974 case that held that pregnancy discrimination does not constitute a violation of the Equal Protection Clause of the Fourteenth Amendment.[121] While the impact of *Geduldig* has been limited by state courts' refusal to follow the decision[122] and the enactment of the Pregnancy Discrimination Act of 1978 (PDA),[123] the decision continues to "ma[k]e it more difficult to claim that reproductive freedom is an aspect of sex-based equality."[124]

This section examines how international human rights law's articulation of women's equality could provide advocacy opportunities to assist activists in developing a theory of domestic sex equality that takes into account the reality of biological differences. In particular, CEDAW[125] and recent law from the European Union,[126] which articulate a principle of equality between men and women that acknowledges and accommodates women's actual differences, could support dialogue on the development of new domestic sex equality standards.

1. Domestic Sex Equality Arguments for Protecting Reproductive Rights

A brief history of relevant Supreme Court cases and the political context in which they were decided is helpful in understanding why current equal protection and reproductive rights jurisprudence fails to take into account

120. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 962 (1984).

121. Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)).

122. *See* Kim Shayo Buchanan, Lawrence v. Geduldig: *Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1236 & n.4 (2007).

123. 42 U.S.C. § 2000e(k) (amending Title VII to prohibit pregnancy discrimination).

124. Law, *supra* note 120, at 985.

125. *Supra* note 114.

126. The principle of equality between men and women is a general principle of European Union (E.U.) law, but given the special nature of the European Union, the principle has been implemented so far only in the field of employment and occupation and in access to goods and services. *See supra* notes 164–66.

women's biological differences.[127] Siegel contends that the Supreme Court's failure to adopt sex equality arguments to support constitutional protections of women's reproductive autonomy reflects both contemporaneous political pressures on activists to abandon such claims in the reproductive rights realm and doctrinal developments in the Court's right to privacy and equal protection jurisprudence.[128]

In the early 1970s, as the Supreme Court began to develop an equal protection jurisprudence that encompassed discrimination against women, it declined to include equality claims based on laws or practices that disadvantaged women as a result of biological differences. Thus, in 1973, Justice Harry Blackmun's majority decision in *Roe v. Wade* analyzed claims for reproductive autonomy and abortion as a privacy rights issue and as a form of liberty protected by the Due Process Clause, rather than as an issue of equality or equal protection.[129] In the same year, the Supreme Court in *Frontiero v. Richardson*[130] began developing equal protection doctrine as related to sex-based state action, but did so without mentioning laws regulating reproduction. Then, in 1974, in *Geduldig*, the Supreme Court declined to apply heightened scrutiny to a disability insurance program that excluded pregnancy from the list of covered disabilities.[131] Although biological differences between men and women would mean that only women would be affected by the exclusion, the Court held that the regulation did not constitute a sex-based classification.[132]

In *General Electric Co. v. Gilbert*,[133] the Supreme Court extended the holding of *Geduldig* to its interpretation of Title VII of the Civil Rights Act of 1964.[134] In response to *Gilbert*, Congress enacted the PDA to amend Title VII and define discrimination "on the basis of pregnancy, childbirth, or related medical conditions" as prohibited sex discrimination.[135] Legal scholars have argued that the PDA was meant to create a standard of sex equality that took into account all of women's unique sex-specific characteristics,[136] but most courts have declined to interpret it

127. *See* Law, *supra* note 120, at 962.

128. *See* Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 823–28 (2007).

129. *See* Roe v. Wade, 410 U.S. 113 (1973).

130. 411 U.S. 677 (1973).

131. *See* Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).

132. *Id.*

133. 429 U.S. 125 (1976) (holding that pregnancy-based discrimination does not constitute sex discrimination under Title VII).

134. 42 U.S.C. § 2000e-2(a)(1) (2000).

135. *Id.* § 2000e(k).

136. *See* Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 974–75 (2007) (arguing that the "point of the PDA . . . was not just to mandate formal equality in the employment and benefits offered to women and men, but also to 'ensure that women would not be disadvantaged in the workplace either because of their pregnancies or because of their ability to have children'" (quoting U.S. Equal Employment Opportunity Commission, Decision on Coverage of Contraception (Dec. 14, 2000), *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html)).

accordingly.[137] Instead they have interpreted the PDA to require that an employer treat a pregnant woman "'as well as it would have if she were not pregnant,'" rather than accommodate women's biological differences as related to pregnancy.[138]

In addition to reflecting legal and strategic judgments that privacy provided a stronger constitutional guarantee for reproductive rights than sex equality, the Court's decision in *Roe* also reflected activists' political choices.[139] Sylvia Law explains that feminists in the 1970s were apprehensive about claims that women and men should be treated differently based on their biology because of the historic use of biology and paternalistic ideas of women's need for "protection" as the main justifications for the subordination of women.[140] Accordingly, advocates adopted an assimilationist vision of sex equality, which presumed that sex-based differences are never legally significant.[141]

Moreover, women's rights activists began to see a strategic necessity in abandoning sex equality arguments that included protection of women's reproductive rights as part of the fight over the ERA.[142] Siegel details how opponents of the ERA effectively mobilized opposition to abortion to build a new conservative movement to defeat the ERA and any perceived threats to women's traditional roles in the family.[143] As a result, ERA supporters purposefully began to separate abortion and reproductive rights from sex equality and equal protection.[144] Accordingly, during this time period, reproductive rights and women's equality jurisprudence developed independently. This separation of reproductive rights and equality

137. In fact, the majority of courts have interpreted the Pregnancy Discrimination Act (PDA) as creating a new category of discrimination entirely—discrimination that is related to pregnancy. *See* Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679 (8th Cir. 1996) (refusing to apply protection of the PDA to prescription contraception coverage because contraception does not constitute a "medical condition related to pregnancy"). *But see* Saks v. Franklin Covey Co., 316 F.3d 337, 345 (2d Cir. 2003) (finding that the PDA did not introduce a "new classification of prohibited discrimination based solely on reproductive capacity" but instead requires that "pregnancy, and related conditions, be properly recognized as sex-based characteristics of women").

138. Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1313 (11th Cir. 1999) (quoting Piraino v. Int'l Orientation Res., Inc., 84 F.3d 270, 274 (7th Cir. 1996)) (holding that employer's policy of only providing light-duty work to employees with a work-related illness or injury and corresponding refusal to provide pregnant employee with such work as required by her doctor did not violate the PDA because pregnant employee was not similarly situated with employees suffering work-related injuries); *see also* Troupe v. May Dep't Stores Co., 20 F.3d 734, 738–39 (7th Cir. 1994) (holding that termination of pregnant employee for late arrivals due to morning sickness did not constitute sex discrimination because PDA requires employer to "ignore an employee's pregnancy, but . . . not her absence from work, unless the employer overlooks the comparable absences of nonpregnant employees").

139. *See* Law, *supra* note 120, at 981–82.

140. *Id.* at 958.

141. *Id.* at 963–67.

142. *See* Siegel, *supra* note 128, at 827–28.

143. *Id.*

144. *Id.*

jurisprudence and the corresponding failure to acknowledge women's and men's actual biological differences within the definition of equality has been posited as the reason why the Supreme Court has been quick to strike down legislation that uses rationales regarding women's reproductive physiology to subordinate women in the public sphere while simultaneously upholding laws that use similar rationales to regulate sexual activity and reproduction.[145] Indeed, Law has argued that the failure of constitutional equality doctrine to address laws that regulate biological differences has undermined not only sex equality arguments for protecting reproductive rights, but also has weakened strong equality analysis in challenges brought against sex-based classifications.[146]

By the 1980s, the defeat of the ERA and the growing campaign to overturn *Roe* led to a renewed interest in developing sex equality arguments as a basis for sexual and reproductive rights.[147] This was supported by language in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that discussed how the "ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[148]

Indeed, during this time period, "equality reasoning began to emerge as a dominant rationale for [reproductive rights] in the legal academy."[149]

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145. Kim Shayo Buchanan looks at how the Supreme Court has treated arguments based on women's biological differences when they are used to subordinate women in the workplace, such as the Supreme Court's decision in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), which upheld the Family Medical Leave Act based on a finding that states had historically discriminated against women on the basis of sex in connection with pregnancy leave. *See* Buchanan, *supra* note 122, at 1285–86. She then compares the Supreme Court's treatment of arguments of difference in sex-based classification cases, such as *Hibbs*, with the Court's treatment of arguments based on reproductive differences when what is being regulated is sexual activity, as in *Nguyen v. INS.* In *Nguyen*, the Supreme Court upheld a facially discriminatory citizenship law that grants automatic citizenship to children born abroad to unwed American women with foreign men, but denies such citizenship to the children of unmarried American men with foreign women. Nguyen v. INS, 533 U.S. 53 (2001); *see* Buchanan, *supra* note 122, at 1287–90. By contrasting the Court's treatment of arguments of biological difference in these cases, Buchanan points out that, when dealing with sex-based classifications used to subordinate women in the workplace or in education, the Court, using a heightened scrutiny analysis, usually finds sex discrimination has occurred, but when dealing with a statute that is regulating sexual activity, the Court disregards the applicable heightened scrutiny standard and upholds the regulation on the basis of "real" differences between men and women. Buchanan, *supra* note 122, at 1258–90.

146. *See* Law, *supra* note 120, at 988–1002 (arguing that the Court's failure to accommodate biological differences has led it to deviate from the intermediate scrutiny standard for sex-based classifications and afford more deference to the government body that adopted a challenge rule).

147. *See* Siegel, *supra* note 128, at 828–30.

148. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 835 (1992); *see* Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of* Planned Parenthood v. Casey, 45 AM. U. L. REV. 77, 142 (1995) (arguing that the rhetoric of *Casey* creates an opening for "constructive application of equal protection jurisprudence to abortion cases," even though its holding does not utilize equal protection analysis).

149. *See* Siegel, *supra* note 128, at 829.

Although sex equality theories vary, they all have one thing in common—the recognition that domestic ideas of women's equality must change to encompass an understanding of biological differences if equality arguments are going to prove viable in the area of reproductive rights. To this end, domestic scholars and activists will benefit from looking to international human rights law's definition of women's equality when attempting to develop a new vision for women's equality in the United States.

2. Human Rights and Women's Equality

Accommodating biological differences in regulation of women's sexual activity and reproduction requires learning how to reframe law and policies to create a theory of women's equality that values sex and gender differences.[150] As described above, in the United States, equal protection and Title VII gender discrimination cases apply a "similarly situated" analysis, which requires no more than that those who are the same be treated the same. However, if women's equality is going to be fully recognized, especially in the area of reproductive rights, the right to equality must encompass more than the right to be treated the same as men in those situations where men's and women's differences bear no relation to their ability to perform or contribute to society.[151] It also must include a treatment of women's differences that adequately respects and accommodates those differences. In contrast to current U.S. law, CEDAW and recent articulation of equality principles from the European Union provide a theory of substantive equality that incorporates both equal treatment under the law and recognition of the reality of women's differences.[152]

In contrast to U.S. approaches to equality, CEDAW reflects a "broad interest in transforming women's opportunities in public and private arenas."[153] Accordingly, CEDAW has adopted a substantive equality

150. *See* Rebecca Cook & Susannah Howard, *Accommodating Women's Differences Under the Women's Anti-Discrimination Convention*, 56 EMORY L.J. 1039, 1040 (2007).

151. *See* Law, *supra* note 120, *passim*; Catherine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286–95 (1991).

152. International human rights law can add more to the discussion of protection of women's reproductive rights than just a new definition of substantive equality. As discussed at the beginning of this part, reproductive rights issues implicate a number of human rights standards that are different from those we traditionally use in the United States when evaluating restrictions of women's reproductive rights. These standards include, but are not limited to, the right to health, the right to access information, the right to control the spacing of one's children, and the right to be free from cruel and inhuman treatment. Unfortunately, we do not have space here to discuss how these standards can inform the development of domestic reproductive rights jurisprudence. For a detailed discussion of the human rights standards implicated by reproductive rights, see CTR. FOR REPROD. LAW & POLICY & UNIV. OF TORONTO INT'L PROGRAMME ON REPROD. & SEXUAL HEALTH LAW, BRINGING RIGHTS TO BEAR: AN ANALYSIS OF THE WORK OF UN TREATY MONITORING BODIES ON REPRODUCTIVE AND SEXUAL RIGHTS (2002), *available at* http://www.reproductiverights.org/pdf/pub_bo_tmb_full.pdf; and Zampas & Gher, *supra* note 117.

153. Resnik, *supra* note 9, at 1580.

approach to discrimination, which differs from U.S. law by "focus[ing] on the purpose and effect on women of laws or actions rather than on the intent of a particular legal rule."[154] To perpetuate its goal of substantive equality, CEDAW's definition of women's equality "moves from a norm of nondiscrimination on grounds of sex to a norm of the elimination of all forms of discrimination against women."[155] Article I of CEDAW defines "discrimination against women" as

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[156]

The Committee on the Elimination of Discrimination Against Women monitors states' compliance with their obligations under CEDAW. The Committee has developed the concept of equality embodied in CEDAW through its application of the treaty's nondiscrimination principles to the laws, policies, and practices of the states that are parties to CEDAW. One way the Committee has articulated CEDAW's concept of substantive equality is through the publication of Concluding Observations on the periodic reports of states parties, and another is through the issuance of General Recommendations on articles of CEDAW, which provide states with additional guidance on how to fulfill their periodic reporting obligations.[157]

The Committee's General Recommendations suggest that an equality standard that merely treats women the same as men in circumstances where they are the same as men and allows for treatment that has an unequal effect upon women when they are different, such as the "similarly situated" analysis used in the United States, is grossly insufficient to eliminate discrimination against women. Accordingly, General Recommendation 25 states that "[i]t is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account."[158] The recommendation goes on to state that "[u]nder certain circumstances, non-identical treatment of women and men will be required in order to address such differences."[159] In this way, CEDAW recognizes that the goal of substantive equality entails addressing "the underlying causes of discrimination against women" and adopting measures "towards a

154. *Id.* at 1638.
155. *See* Cook & Howard, *supra* note 150, at 1043.
156. CEDAW, *supra* note 114, art. 1.
157. *Id.* arts. 18, 21.
158. U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women, on Temporary Special Measures*, annex I, ¶ 8, U.N. Doc. A/59/38 (Jan. 12–30 and July 6–23, 2004).
159. *Id.*

real transformation of opportunities, institutions and systems" that have historically been used to subordinate women.[160]

CEDAW's standard of substantive equality further requires that states achieve women's equality in recognition of their biological differences by assuring them the same security in life, health, and dignity with respect to reproductive choices that men expect in activities in their lives.[161] For example, Article 12 of CEDAW requires states parties to eliminate all forms of discrimination against women in the context of health.[162] The Committee has provided guidance as to the meaning of this right in General Recommendation 24 on Women and Health, which states, "Measures to eliminate discrimination against women are considered to be inappropriate if a health-care system lacks services to prevent, detect and treat illnesses specific to women. It is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women."[163]

Equality between men and women also is a fundamental principle of the European Union; the Treaty Establishing the European Community provides that it "shall aim to eliminate inequalities, and to promote equality, between men and women."[164] The European Parliament and the Council of the European Union have issued directives to the European Union concerning employment and occupation and access to and supply of goods and services that define discrimination as including both direct and indirect discrimination. According to the directives, indirect discrimination occurs "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion, or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary."[165] The directives also specifically provide that

160. *Id.* ¶ 10.

161. *See* Cook & Howard, *supra* note 150, at 1046.

162. *See* CEDAW, *supra* note 114, art. 12.

163. U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 24: Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women—Women and Health*, ¶ 11, U.N. Doc. A/59/38 (May 4, 1999). While this fundamental principle is set forth in the Treaty Establishing the European Community, it is in fact a principle of the entire E.U. The distinction between European Community (E.C.) law and E.U. law is based on the treaty structure of the E.U. The E.C. constitutes one of the "three pillars" of the E.U. and concerns mainly the social and economic foundations of the single market. The second and the third pillars—Common Foreign and Security Policy, and Police and Judicial Cooperation in Criminal Matters—were created by the Treaty of the European Union (the Maastricht Treaty). "E.C. law" denotes anything to do with the first pillar, and "E.U. law" denotes the law regarding all three pillars.

164. Treaty Establishing the European Community art. 3, ¶ 2, Nov. 10, 1997, 1997 O.J. (C 340) 3; *see also* Council Directive 2004/113/EC, ¶ 5, 2004 O.J. (L 373) 37, 37 (EU) [hereinafter Directive on Goods and Services], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:EN:PDF.

165. Parliament and Council Directive 2006/54/EC, art. 2, ¶ 1(b), 2006 O.J. (L 204) 23, 26 (EU) [hereinafter Directive on Matters of Employment], *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:EN:PDF; Directive on Goods and Services, *supra* note 164, art. 2(b).

unfavorable treatment of a woman related to pregnancy or maternity constitutes discrimination on grounds of sex.[166]

CEDAW and the European Union provide useful examples of how adopting a substantive equality approach to nondiscrimination law might help to support a theory of sex equality in the United States that recognizes and accommodates women's biological differences. By defining discrimination to include instances where seemingly neutral policies have a discriminatory effect on women, CEDAW and the European Union provide an opportunity to recognize the effects biological differences have on women's equality.

B. *Theories of Change for Reproductive Rights Advocacy in the United States*

1. Transnational Legal Processes: Interaction and Interpretation

Within U.S. civil society there is a growing awareness of international and regional human rights bodies as forums in which to provoke[167] "transnational interactions that generate legal interpretations" of U.S. human rights obligations. For instance, in 2007, over 120 U.S. social justice activists traveled to Geneva to participate in a review of U.S. compliance with the Convention on the Elimination of All Forms of Racial Discrimination (CERD). There also has been exponential growth in the number of petitions filed against the United States with the Inter-American Commission for Human Rights, the regional human rights body for the Americas.[168] Not only are U.S. activists actively using international and regional human rights forums, they are also becoming increasingly sophisticated in linking international advocacy to their grassroots work.[169] This section focuses on current activism and opportunities around reproductive health and rights.

Because the United States has not ratified CEDAW and the International Covenant on Economic, Social and Cultural Rights (CESCR), there are

166. Directive on Matters of Employment, *supra* note 165, art. 2, ¶ 2(c); Directive on Goods and Services, *supra* note 164, ¶ 20, art. 4, ¶ 1. The directives define unfavorable treatment related to pregnancy or maternity as direct discrimination and explain that such a definition is derived from the case law of the European Court of Justice. Directive on Matters of Employment, *supra* note 165, ¶ 23 ("It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be directly covered by this directive.").

167. Koh, *American Exceptionalism*, *supra* note 8, at 1502 (emphasis omitted).

168. Soohoo, *supra* note 4, at 84 (noting that there were only seven decisions involving the United States in the 1970s and 1980s and that, in 2006, seventy-five cases against the United States were filed).

169. *See, e.g.*, *id.* at 98 (describing how activists in Texas effectively publicized U.N. criticism of racial profiling by a local sheriff in local newspapers and read U.N. statements into the record of a state assembly meeting and how resulting pressure from state legislator and the mayor caused the sheriff to change his practices).

fewer opportunities to provoke a transnational interaction concerning the U.S. record on reproductive health and rights compared to other human rights issues, such as racial discrimination or torture.[170] To date, attempts to use the treaty bodies that oversee U.S. compliance with two of the treaties it has ratified—CERD and the International Covenant on Civil and Political Rights (ICCPR)—have been met with mixed success. The United States has not agreed to give U.N. committees (also known as treaty bodies), which oversee compliance with the treaties, authority to hear individual complaints.[171] Thus, the treaty review process provides the primary forum for U.S. activists to provoke transnational interaction and interpretation of U.S. human rights obligations.

The ICCPR includes a provision regarding discrimination against women, and the Human Rights Committee, the treaty body that oversees compliance with the Covenant, has issued General Recommendations and Concluding Observations about a number of reproductive rights and health issues.[172] However, given the scope of the rights and issues covered by the ICCPR, there was limited opportunity to engage the Committee in a discussion of reproductive health and rights issues during its last review of the United States in 2006. The 2006 review was somewhat unusual because a substantial portion of the Committee's Concluding Observations were devoted to antiterrorism measures enacted by the United States post-9/11.[173] Almost half of the Committee's principal subjects for concern and recommendations involved the United States' post-9/11 war on terror activities.[174] Although activists raised reproductive health issues,[175] the Committee failed to discuss any reproductive health or rights issues except the shackling of women prisoners during childbirth, which was discussed as part of a comment on the treatment of persons in prison.[176] Given the number of rights and issues under the Human Rights Committee's purview and the fact that the ICCPR does not include economic and social rights,

170. In addition to the ICCPR and CEDAW, the United States has also ratified the Convention Against Torture and two Optional Protocols to the CRC.

171. The United States has not ratified the Optional Protocol to the ICCPR, *supra* note 111, and has not declared the Committee on the Elimination of Racial Discrimination competent to receive and consider individual communications under Article 14 of CERD.

172. *See supra* notes 111, 116, 117 and accompanying text.

173. U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) [hereinafter Human Rights Comm. Observations, United States]; *see also supra* notes 111, 116, 117 and accompanying text.

174. Twelve paragraphs concerning specific issues involved the war on terror, and sixteen paragraphs concerned other substantive issues. *See* Human Rights Comm. Observations, United States, *supra* note 173; *see also supra* notes 111, 116, 117 and accompanying text.

175. *See, e.g.*, CTR. FOR REPROD. RIGHTS, WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES: A SHADOW REPORT (2006), *available at* http://www.reproductiverights.org/pdf/HRC_shadow-FINAL6-30-06.pdf.

176. *See* Human Rights Comm. Observations, United States, *supra* note 173, ¶ 33.

such as the right to health,[177] finding a way to persuade the Committee to focus at length on reproductive health and rights issues in future U.S. reviews may continue to be an uphill battle.

In 2008, domestic activists working on reproductive health and rights issues succeeded in getting the Committee on the Elimination of Racial Discrimination to comment on pervasive racial disparities in reproductive health outcomes and access to services.[178] Like CEDAW, CERD prohibits both policies and programs that have a discriminatory purpose or effect. Thus, in advocating before the Committee, domestic activists could challenge policies that are harmful to women of color that may not otherwise be illegal under U.S. law.

In its Concluding Observations, the Committee expressed concern that "wide racial disparities continue to exist in the field of sexual and reproductive health."[179] In particular, it highlighted disparities in maternal mortality rates, unintended pregnancies and abortion rates, and HIV infection rates.[180] In order to address the disparities, the Committee recommended that the United States (1) "improv[e] access to maternal health care, family planning, pre- and post-natal care and emergency obstetric services," including the reduction of "eligibility barriers for Medicaid coverage," (2) "facilitat[e] access to adequate contraceptive and family planning methods," and (3) "provid[e] adequate sexual education aimed at the prevention of unintended pregnancies and sexually-transmitted infections."[181] The Committee's observations and recommendations were significant because they marked the first time that it has commented on family planning issues.

Unfortunately, there were no immediate signs of political internalization following the "interaction and interpretation" from the Committee. However, activists are working to promote legislative internalization by raising the Committee's findings and the broader issue of health disparities with legislators through congressional briefings and testimony.[182]

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177. The Committee can, of course, look at economic and social rights issues where discrimination is alleged.

178. The Center for Reproductive Rights participated in the CERD review and provided them with testimony and a shadow letter documenting these disparities. *See* Letter from Nancy Northup, President, Ctr. for Reprod. Rights, to Nathalie Prouvez, Sec'y, U.N. Comm. on the Elimination of Racial Discrimination (Dec. 19, 2007), *available at* http://www.reproductiverights.org/pdf/CERD%20Shadow%20Letter%20Final_07_08.pdf.

179. U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 33, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008) [hereinafter CERD Observations, United States].

180. *Id.*

181. *Id.*

182. For instance, on April 24, 2008, the Center for Reproductive Rights participated in a congressional briefing concerning unequal health outcomes in the United States and the United States' obligation to address health disparities under CERD. In June 2008, the Center, the National Latina Institute for Reproductive Health, and the National Asian Pacific Women's Forum submitted joint testimony and information to the congressional committee on racial disparities in reproductive health care and included the concluding comments of the

Other possible forums for transnational interaction concerning U.S. reproductive health and rights policies include the U.N. thematic special procedures, the new Human Rights Council, and the Inter-American Commission for Human Rights. The Human Rights Council initiated a new universal periodic review for all countries in 2008. It is still too early to determine the scope of the periodic reviews and how effective they will be. Because the Council's review is not tied to rights contained in any particular human rights treaty, the potential scope of issues under its purview is quite large, including not only civil and political rights, but also economic and social rights, which would expand the discussion of reproductive rights protections. However, this broad scope may make it difficult for activists to persuade the Council to engage in reproductive health and rights issues in any meaningful way (or at all). U.N. rapporteurs, human rights experts with specific thematic mandates,[183] might provide an additional site for engagement. Special rapporteurs can help publicize human rights abuses through the issuance of reports or statements. They also engage with governments to investigate allegations of abuse and to make recommendations. Since 1997, there have been over seven visits to the United States by special rapporteurs.[184] In addition to providing material for the rapporteurs' reports, these visits can provide an opportunity to publicize rights abuses in the United States.

The Inter-American Commission for Human Rights is also available to U.S. activists as a site for thematic hearings and for consideration of individual petitions. In 2007, the Center for Reproductive Rights briefed the Commission about disparities in access to reproductive health services in the United States as part of a general hearing on the Reproductive Rights of Women in the Americas.[185] To date, no individual petitions have been brought to the Commission concerning reproductive health and rights issues in the United States.[186]

Committee on the Elimination of Racial Discrimination (testimony and a letter to the House Ways and Means Committee are on file with the authors).

183. Mechanisms of potential interest to reproductive health and rights activists include the Special Rapporteurs on the Right to Health and Violence Against Women and the Independent Expert on Human Rights Defenders. For a list of thematic special procedures, see Office of the United Nations High Commissioner for Human Rights, Special Procedures Assumed by the Human Rights Council: Thematic Mandates, http://www2.ohchr.org/english/bodies/chr/special/themes.htm (last visited Oct. 23, 2008).

184. *See* Huang, *supra* note 46, at 109–10. In 2008, the Special Rapporteur on Racism visited the United States. *See* American Civil Liberties Union, United Nations Special Rapporteur on Racism Visits the U.S., http://www.aclu.org/intlhumanrights/racialjustice/sronracism.html (last visited Oct. 23, 2008).

185. Press Release No. 54/07, Annex, Inter-Am. Comm'n on Human Rights, IACHR Concludes Its 130th Regular Sessions (Oct. 19, 2007), *available at* http://www.cidh.org/Comunicados/English/2007/54.07eng.htm.

186. In 1981, the Commission rejected a right to life claim brought on behalf of an aborted fetus under the American Declaration of the Rights and Duties of Man. Case 2141 (United States), Inter-Am. C.H.R., Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981).

In order to trigger more effectively transnational legal processes to encourage U.S. compliance with human rights norms concerning reproductive rights and health issues, more sites for interaction must be developed. Although there are opportunities for advocacy before the Human Rights Committee and Committee on the Elimination of Racial Discrimination, the United States has not ratified the human rights treaties that arguably have the most to say about reproductive health and rights. In addition to CEDAW and CESCR, the United States also has failed to ratify the Convention on the Rights of the Child (CRC), which encompasses significant legal issues concerning adolescents' rights to access reproductive health care and information.[187] Activists need to push for U.S. ratification of CEDAW, CESCR, and the CRC in order to open up additional forums for the United States to engage in a constructive dialogue on reproductive rights and health issues. Another way to encourage interaction with treaty bodies would be for the United States to agree to grant them authority to receive and consider individual communications concerning the treaties it has ratified. Activists also must look for more opportunities to engage U.N. special rapporteurs and the Inter-American Commission. In addition to increasing opportunities for transnational bodies to interpret U.S. human rights obligations or criticize violations, INGOs and domestic activists can create their own "interpretations" of U.S. human rights obligations by producing human rights reports concerning reproductive health and rights issues in the United States.

Once interaction and interpretation occur, there are still substantial barriers to human rights internalization in the United States. The United States has attached a declaration to all ratified human rights treaties, stating that they are not self-executing.[188] The declaration has been interpreted to prevent direct claims based on the treaties in U.S. courts.[189] Thus, treaties will not be judicially internalized automatically, and there are no formal structures in place to encourage political internalization. In order to support the process of norm internalization, the United States should consider development of permanent institutional mechanisms to facilitate treaty compliance and encourage a coordinated approach to treaty implementation at the federal, state, and local levels.[190] In addition, greater awareness of the United States' human rights treaty obligations and the role of treaty

187. *See* CRC General Comment No. 4, *supra* note 113, ¶ 39(c); *supra* note 113 and accompanying text.

188. *See, e.g.*, ICCPR, *supra* note 111, *Declarations and Reservations: United States*, *available at* http://www2.ohchr.org/english/bodies/ratification/docs/DeclarationsReservations ICCPR.pdf ("[T]he United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.").

189. *See, e.g.*, Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001) (construing non-self-executing declaration attached to the ICCPR to mean "that absent any further actions by the Congress to incorporate [the treaty] into domestic law, the courts may not enforce" it (emphasis omitted) (internal quotation marks omitted)).

190. The Committee on the Elimination of Racial Discrimination has suggested that the United States consider establishing an independent national human rights institution. CERD Observations, United States, *supra* note 179, ¶¶ 12–13.

bodies among government officials at all levels could help to pave the way for internalization of the decisions of human rights bodies.

In the absence of formal legal or governmental structures to accomplish human rights internalization, activists have a crucial role to play as norm entrepreneurs. By consistently raising human rights obligations and standards before political, legislative, and judicial bodies, activists can encourage internalization by using either persuasion or political pressure. For instance, even though U.S. courts are not required to enforce U.S. treaty obligations, human rights standards can be used by judges to inform their interpretation of domestic legal obligations and constitutional standards, and their consideration of human rights treaties as persuasive authority need not be limited to ratified treaties. Both CEDAW and the CRC have been cited as persuasive authority by the Supreme Court.[191] Thus, activists can use human rights norms articulated in CEDAW, CESCR, and the CRC in domestic litigation. Activists can also raise human rights standards and U.S. treaty obligations before governmental officials, legislators, and the public.

2. State and Local Actors: Organizing and Internalization

Because the sites for transnational interaction and formal modes of human rights internalization at the federal level are limited, state and local governments and activists have a critical role to play in the internalization of international human rights standards concerning reproductive health and rights. Given that there are very few sites available at which to trigger transnational interaction and interpretation of U.S. obligations concerning reproductive health and rights, activists participating in transnational advocacy networks can play an important role as direct importers of international human rights standards contained in treaties or human rights conference documents. After activists import these standards into their local advocacy, the activists and state and local governments can play an important role in translating and "thickening" the human rights standards,[192] domesticating them, and giving them concreteness. This section describes two instances of "direct importation" of human rights standards by local activists who participated in U.N. human rights conferences that inspired them to bring human rights—and, in particular, women's human rights—home. The first section discusses local efforts to implement CEDAW. The second section looks at the growing reproductive justice movement in the United States.

191. *See* Roper v. Simmons, 543 U.S. 551, 576 (2005) (citing the CRC); Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing CEDAW).

192. Scholars have criticized direct implementation (or importation) of human rights treaty provisions because they are often vague and lack sufficient concreteness to function as a workable legal rule. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. PA. L. REV. 399, 400 (2000).

a. *Local CEDAW*

Although efforts to ratify CEDAW at the national level have languished under the Bush administration, local efforts are flourishing. As of 2004, forty-four cities, eighteen counties, and sixteen states have passed or considered legislation concerning CEDAW.[193] Some of the legislation explicitly calls for the United States to ratify CEDAW, engaging local governments in the national dialogue about human rights treaty ratification. Other legislation adopts provisions or principles from CEDAW as part of state or local law.[194] In addition to potentially resulting in local legislative internalization of human rights norms, these local efforts usually result from local organization and mobilization to support the proposed law's ordinances, which serve as a powerful means of social internalization.

Local CEDAW efforts were born in 1995, when two U.S. women's rights activists, Krishanti Dharmaraj and Wenny Kusuma, were inspired by the U.N. Fourth World Conference on Women in Beijing to think about how they might "bring human rights home." Rather than opt for a national strategy, Dharmaraj and Kusuma decided to focus their efforts on their hometown of San Francisco. They founded the Women's Institute for Leadership and Development for Human Rights, known as "WILD for Human Rights" (WILD) and launched a campaign with local Amnesty International staff and the San Francisco's Women's Foundation to enact CEDAW as part of San Francisco law.[195]

While the campaign sought to draw attention to the United States' failure to ratify CEDAW, the ordinance itself was written to incorporate and respond to local concerns.[196] The San Francisco CEDAW ordinance adopts CEDAW's definition of discrimination, but "[i]n other respects . . . [it] is tailored to municipal goals in ways that reflect the spirit, but not the precise text, of CEDAW."[197] Thus, the San Francisco ordinance requires that city departments undergo a gender analysis to determine if their practices or service delivery discriminate against women and creates an affirmative obligation for departments to address any problems identified.[198] While adoption of a gender analysis procedure is consistent with CEDAW's goals of eliminating discrimination against women, there is nothing in the treaty itself that specifically contemplates the creation of such a procedure.

In order to gain support for the ordinance, WILD engaged in an intensive local organizing and education strategy, reaching out to "people working on every level of the community" for over a year.[199] This process of education

193. Resnik, *supra* note 81, at 56.
194. *Id.* at 57–58.
195. Martha F. Davis, *Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights*, *in* 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS, *supra* note 4, at 127, 135–37.
196. *Id.* at 135–36.
197. *Id.* at 136–37.
198. *Id.* at 137.
199. *Id.* at 136.

and organizing supported the broader process of social norm internalization and built the political pressure and support needed to encourage local legislative internalization. In 1998, the San Francisco Board of Supervisors passed the CEDAW ordinance by a unanimous vote.

The efforts in San Francisco have inspired activists working in other localities to propose similar legislation, and a network of state and local activists has sprung up to support their work. According to Resnik, as of 2007, there were "190 civic, religious, educational, environmental, and legal organizations" participating in the coalition, which provides "model resolutions for localities to 'recognize' equal rights and to endorse efforts to obtain U.S. ratification."[200] Activists in the coalition are undoubtedly inspired by the work of the San Francisco organizers and their colleagues from other states and cities, but their efforts also continue to be inspired by interactions with transnational networks. For instance, activists working on a New York version of the CEDAW ordinance that combines the principles behind CEDAW and CERD began their efforts when they became inspired to "bring human rights home" following their participation the U.N. World Conference on Racism in Durban in 2001.

b. *Reproductive Justice*

In addition to local and grassroots groups who are organizing around CEDAW efforts, women of color groups in the United States are actively linking with the global women's movement and using a human rights framework as part of the domestic "reproductive justice" movement. Reproductive justice is a women of color movement, which emphasizes that women have a right to have or not have children, as well as to parent the children they have. It also recognizes that "enabling conditions" are necessary to realize these rights.[201] Reproductive justice was founded in response to the singular focus of the pro-choice movement on abortion[202] and is conceived as a movement to bring about a paradigm shift in reproductive rights advocacy in the United States.[203]

Like the local CEDAW initiatives, the reproductive justice movement was inspired in part by activists' participation in international human rights conferences. After attending the 1994 International Conference on Population and Development in Cairo, a group of African American women came together to "Bring Cairo Home" by adapting agreements from the

200. Resnik, *supra* note 81, at 56.

201. Loretta Ross, Understanding Reproductive Justice 1–2 (May 2006) (unpublished paper, on file with authors). Loretta Ross notes that the women of color reproductive health activists began organizing against sterilization abuse and teen pregnancy in the 1980s and that "[i]t was the rapid growth of women of color reproductive health organizations in the 1980s and 1990s that helped build the organizational strength (in relative terms) to generate an analysis and campaign for reproductive justice in the 21st century." *Id.* at 5.

202. *Id.* at 5–7.

203. Kirsten Sherk, *Reproductive Rights, Sexual Rights and Human Rights*, A—THE ABORTION MAGAZINE, Winter 2008, at 6, *available at* http://www.ipas.org/Publications/asset_upload_file661_3322.pdf.

Cairo Programme of Action to a U.S. specific context.[204] According to Loretta Ross, a founder of the reproductive justice movement and Executive Director of SisterSong: Women of Color Reproductive Health Collective, one of the goals of reproductive justice is to compel U.S. compliance with international agreements from Cairo and the 1995 Fourth World Conference for Women in Beijing: "We are concerned that without effective pressure through organizing women for fundamental social change, our country will continue to evade or betray its responsibilities towards women in the United States and around the world."[205]

However, Ross also acknowledges the need to adapt international human rights standards to respond to the local context and the goals of advocacy work. In particular, the Cairo platform reflected international compromises between a "population control" and "rights based" approach to family planning. Reproductive justice activists "did not feel compelled to limit [their] vision to the confines imposed by fundamentalists and conservatives at Cairo."[206] Thus, "bringing Cairo home," involved a process of translating and domesticating its principles to reflect the goals and aspirations of reproductive justice activists.[207]

In addition to being inspired by the international human rights framework, reproductive justice seeks to link domestic reproductive health advocacy to the global women's movement. Like early transnational movements concerning the abolition of slavery and women's suffrage, reproductive justice activists acknowledge the value of learning from movements in other countries. In particular, they recognize the value of learning from the experience had by advocates from other countries in using international human rights standards, especially economic, social, and cultural human rights, as part of their organizing work.[208] As explained by Ross,

> Every domestic attack on women's rights has its global counterpart and vice versa. SisterSong believes that connecting our domestic issues to the global reproductive health and sexual rights movement will strengthen our domestic advocacy, help move the debate from the paralyzing pro- and anti-choice stalemate, and bring new voices into the reproductive justice movement.[209]

CONCLUSION

Over the past several years, it has become clear that the call to "bring human rights home" to the United States is gaining support from international and domestic activists as well as the American public.

204. Ross, *supra* note 201, at 6.
205. *Id.* at 8.
206. *Id.* at 6.
207. *Id.* at 4, 6.
208. *Id.* at 8.
209. *Id.*

Abandoning the recent separation between human rights activists (who focused on rights violations abroad) and civil rights and social justice activists (who focused on rights violation domestically), internationalists are increasingly focused on the United States. Domestic activists have joined them in the struggle to ensure that the United States meaningfully engages in the international human rights system as well as respects and ensures human rights at home. It is important to note that domestic human rights advocacy is not new. It has a long history and tradition in the United States. However, post–World War II international and domestic politics successfully stifled activists' attempts to use international forums and adopt a broader human rights frame for their social justice work. Globalization, the expansion and development of international human rights strategies and forums, and recent changes in the domestic advocacy environment have encouraged renewed interest in domestic human rights advocacy.

Scholars of international law and international relations have developed theories on how nations internalize human rights law to bring about domestic change. While helpful in demonstrating how national governments can be made to comply with their international human rights obligations, internationalist theories of human rights change neglect to take into account the role of state and local governments and activists in the process of internalizing human rights norms. Recently legal scholarship has been developed to fill in this gap and provide analysis of human rights implementation at the subnational level. These local theories of human rights change help complete the picture of how both national and subnational efforts result in internalization of human rights standards by describing how state and local actors and social activists play a role in bringing about normative change.

Both internationalist and local theories of human rights change can provide helpful insight in examining and developing strategies for domestic advocacy of women's equality and reproductive rights. Numerous human rights standards are implicated by women's equality and reproductive rights, and each could provide opportunities to expand domestic rights dialogue. For instance, international human rights law could be used to develop a domestic equality model that recognizes sex equality claims where laws or practices disadvantage women as a result of biological difference. Domestic activists have begun to successfully raise reproductive rights issues before international human rights bodies. Groups are also working at the local level to incorporate CEDAW's provisions into state and local law and are linking their advocacy work with the global women's movement. In order to fully realize the potential of human rights standards to transform domestic advocacy around women's reproductive rights issues in the United States, more interaction, interpretation, and internalization needs to be done, and activists must continue to engage in human rights advocacy at all levels.

The role of activists is particularly important in the U.S. context because of the relatively few opportunities for transnational interactions and

interpretation and the absence of formal legal and governmental structures for human rights internalization. Activists can act as "direct importers" of human rights treaties and standards, they can generate their own human rights interpretations through human rights reports, and they can serve to disseminate the human rights interpretations of transnational human rights bodies. By serving as norm entrepreneurs who bring human rights standards to government officials, legislators, and judges, activists facilitate and encourage legal and political internalization. They also play a crucial role in organizing and educating to build broader popular acceptance of human rights norms. Indeed, in the United States, the role of social movements cannot be underestimated as a force for domestic change, and the process of social internalization often forces legal and political internalization, rather than vice versa.