

REALIZING DOMESTIC SOCIAL JUSTICE THROUGH INTERNATIONAL HUMAN RIGHTS

FOREWORD

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Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.—Eleanor Roosevelt, 1958¹

For most in the United States, discussion of international human rights law brings to mind situations such as Abu Ghraib, the use of child soldiers in Africa, or the practices of the Taliban with regard to women. These egregious civil and political rights violations, without doubt, demand immediate and forceful attention from the human rights community. But to limit our conception of human rights to a few specific violations that occur outside of our borders radically narrows the potential that human rights have for moving us towards a more equitable society *within the United States*, free of grave harms such as homelessness, hunger, illiteracy, unnecessary morbidity and mortality, sweatshops, and severe social exclusion.

One of the greatest values of the international human rights legal framework is its recognition that civil, political, economic, social, and cultural rights are interdependent and must be respected and ensured as a unified whole. The role of economic and social rights is of particular importance in the United States, where these rights, at least at the national level, are virtually unrecognized. This set of rights, which includes housing, education, health, decent work, food, and

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1. Eleanor Roosevelt, Remarks to United Nations Commission on Human Rights, presenting IN YOUR HANDS: A GUIDE FOR COMMUNITY ACTION FOR THE TENTH ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (Mar. 27, 1958), <http://udhr.org/history/inyour.htm>.

social security, not only provide a necessary foundation for the exercise of many civil and political rights, and are of immense value in and of themselves to the majority of people, but are also critical to the functioning of a healthy democracy.

Growing social inequities are currently threatening the social fabric within the United States and this nation's identity as a "middle-class" country.² The images of survivors struggling through the chaos left in Hurricane Katrina's wake last year provided stark revelations about the state of race, class, and human rights in the United States. As the rest of the world saw this footage, a provocative secret was revealed: the income inequities and scarcity of resources experienced by poor countries are prevalent here, in the world's richest and most powerful nation, branded as the champion of freedom. For those inundated with our pop culture exports and familiar with our wealthy national leaders, this was probably hard to believe, but there it was, in a form too glaring to ignore. An even more shocking blow to the U.S. public image was the fact that its poor people, denied their human right to live with security and dignity, were often criminalized and attacked for their desperation. As unaddressed need escalated to the point of catastrophe, government officials promised to show "zero tolerance" to those struggling to withstand the nightmare by following the law of survival and scavenging for sustenance.

The social safety net protecting people from abject poverty in Louisiana, Mississippi, and Alabama was not there before this tragedy and has not emerged in its wake. Moreover, it is increasingly being dismantled across the United States, and economic disparity is rising. Despite reported growth in the overall national economy, the U.S. Census Bureau reported that 2004 household incomes stagnated and the nation's poverty rate rose to nearly 13%.³ It was the first time on record that household incomes failed to increase for five straight years.⁴ Children under eighteen made up the greatest proportion of people living in poverty at the United States. Children were only 25.2% of the total population, but represented 35.2% of the people in poverty.⁵ Meanwhile, 2003 data from the Internal Revenue Service indicate that income disparity increased significantly from 2002, with the income of the top 1% of the population growing and the bottom 75% on the decline.⁶ According to a 2005 report from

2. Portions of this and the next two paragraphs originally appeared as NESRI's commentary on Hurricane Katrina. Sharda Sekaran, NESRI Commentary: Disaster Exposes National Human Rights Crisis, http://www.nesri.org/media_updates/index.html#nesri (last visited Apr. 24, 2006).

3. CARMEN DEHAVAS-WALT, BERNADETTE D. PROCTOR & CHERYL HILL LEE, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004 3, 9 (2005), available at <http://www.census.gov/prod/2005pubs/p60-229.pdf>.

4. David Leonhardt, *Poverty in U.S. Grew in 2004, While Income Failed to Rise for 5th Straight Year*, N.Y. TIMES, Aug. 31, 2005, at A9.

5. DEHAVAS-WALT, PROCTOR & LEE, *supra* note 3, at 11.

6. See ISAAC SHAPIRO, CTR. ON BUDGET & POLICY PRIORITIES, NEW IRS DATA SHOW INCOME INEQUALITY IS AGAIN ON THE RISE 2 (2005), <http://www.cbpp.org/10-17-05inc.pdf> (providing overview of IRS data).

the Washington, D.C.-based Institute for Policy Studies and Boston-based United for a Fair Economy, the average chief executive officer's pay rose in 2004 to 431 times what the average worker earned.⁷

While economic and social needs are growing, social programs that provide basic services to secure the right to live with dignity are being cut. The needs of poor people are frequently misunderstood or an afterthought, rather than seen as a government responsibility to the human rights of its people. For those who have been paying attention to poverty in the United States, the faces of those most devastated by the hurricane were painful to watch but also predictable in their color. If the country were confronted with the images of those most impacted by preventable disease, underfunded schools, incarceration, infant mortality, hunger, and homelessness, they would also be overwhelmingly black, brown, or immigrant. However, whites are also facing these violations in increasing numbers. These issues are compelling, not only for moral reasons, but also because they are major indicators of the state of human rights in the United States, which ultimately affects all of us. We must be better at providing a basic safety net for all. The United States should not be forced by events this devastating to recognize the injustice of poverty, a much better target for "zero tolerance" than its victims.

There is growing interest and commitment to building a human rights approach into U.S. advocacy to address the ongoing structural barriers to human development created by poverty and racism.⁸ This approach includes legal activism through the courts, legislatures, and international legal mechanisms. Through its interdependent framework, human rights represent a revolution in values with the goal of promoting social and economic justice at home and on a global scale. Underlying all human rights work in the United States is an ongoing challenge to the U.S. government's refusal to accept that global human rights standards apply within the United States and protect all people within its borders. "Examining the United States through the lens of human rights" helps identify "persistent inequities in U.S. society and offers" a vision for social change.⁹ In the current political climate—where civil liberties are being systematically attacked and the gap between rich and poor is persistently growing—it is more important than ever to claim these rights and pressure the U.S. government to guarantee them.

The use of international human rights by domestic courts is undoubtedly

7. SARAH ANDERSON, JOHN CAVANAGH, SCOTT KLINGER & LIZ STANTON, EXECUTIVE EXCESS 2005: DEFENSE CONTRACTORS GET MORE BUCKS FOR THE BANG 1, 13–15 (2005), <http://www.faireconomy.org/press/2005/EE2005.pdf>.

8. Portions of this paragraph were derived from NESRI, Human Rights in the U.S., http://www.nesri.org/human_rights_us/index.html (last visited Apr. 25, 2006). See generally FORD FOUND., CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN THE UNITED STATES (2004) (providing overview of the advocacy work of several U.S. organizations, including NESRI, and upon which portions of the NESRI site are drawn).

9. FORD FOUND., *supra* note 8, at 6.

growing, with several major Supreme Court cases recently making reference to either comparative or international human rights law.¹⁰ This relatively new embrace of human rights principles and practices by U.S. courts in a series of groundbreaking decisions may be a harbinger of a shift in American concepts of rights and the policies we derive from them, depending on the impact of recent changes on the Court. These legal developments have resulted from a combination of a “judicial globalization” and “globalized advocacy.” Much legal and other activism in the United States has seized upon universal human rights standards as its organizing principle, while simultaneously, U.S. judges and justices are increasingly exposed to foreign law through travel to international conferences. These peer-to-peer interactions, together with internationalized advocacy strategies, appear to have significantly influenced the perspective of our federal courts. Additionally, the use of comparative human rights principles in the courts is now also emerging at the state level, with the high court in Massachusetts taking the lead.¹¹ But courts are not the only legal venues in which human rights, and economic and social rights in particular, are becoming increasingly relevant. Human rights resolutions, several with economic and social rights as a major focus, have been passed at the state and local level.¹² And, as the articles in this issue will reflect, advocates are regularly addressing the question of economic and social rights in the United States in regional and international fora.

The application of economic and social human rights to domestic issues is unquestionably a cutting-edge area of law in the United States. This exciting and timely special issue by the *N.Y.U. Review of Law & Social Change* examines the promises and limits of this approach and how it might contribute to achieving economic and social justice in our own country. The success of social justice legal activism so often depends on an effective integrated strategy where legal work is part of movement building, so as to ensure both legal victories and real-world change. Human rights facilitate such a strategy by providing a common language to be used by activists from disparate movements, and to link a range of strategies including legal work, organizing, public and community education,

10. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (citing international practice in opinion striking down death penalty for juveniles); *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (citing international practice in opinion striking down antisodomy law).

11. *Goodridge v. Dep’t of Health*, 798 N.E.2d 941 (Mass. 2003) (ruling that state laws limiting marriage benefits to heterosexual couples violated state equal protection clause). See also 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) (Supreme Judicial Court of Massachusetts Chief Justice’s commentary on comparative analysis in state courts).

12. See, e.g., S.F., CAL., ADMIN. CODE, ch. 12K, Ord. 128-98 (Apr. 13, 1998), amended by Ord. 325-00, (Dec. 28, 2000), available at http://www.sfgov.org/site/cosw_page.asp?id=10849 (San Francisco’s adoption of international women’s rights convention); H.R. Res. 144 (Pa. 2003); H.R. Res. 473 (Pa. 2002) (Pennsylvania legislation mandating investigation of incorporation of international human rights standards in state law).

and scholarship. This special issue strives to contribute to such a common language beyond the rhetorical use of human rights. It asks and answers questions such as: What do these rights mean? What are the components of a right? What must governments both state and federal do to ensure them? How do courts identify a violation and craft a remedy? How do you address the deep cultural and social issues underlying human rights abuses? And, most importantly, how do the answers to these questions inform—and change—advocacy?

The format of this issue provocatively links legal theory and analysis with strategies for advocacy. In the first part, Martha Davis and Gaylynn Burroughs examine the legal possibilities and limits of implementing human rights law in the United States. In the second part, Maria Foscarinis and Janet Hostetler provide case studies of how such implementation might aid economic and social rights advocacy groups in the United States. Each pairing also juxtaposes an article by an established human rights scholar or advocate with an article by a younger scholar in the field, to show how the scholarly and activist tradition in this area of inquiry is carried forward by a new generation of advocates.

In “The Spirit of our Times: State Constitutions and International Human Rights,” Martha Davis, Associate Professor at Northeastern University School of Law, articulates the possibilities for state court implementation of international and comparative human rights law. Pointing to principles of federalism and inherent differences between the federal constitution and state constitutions, she finds there are several entry points through which state courts can consider international human rights law and comparative law when deciding cases. Davis analyzes each of these entry points, comparing the federal debate concerning reliance on international law with the prudential and policy issues raised by state court consideration of that law. The article also sets out a case study of the application of article XVII, section 3 of the New York State Constitution, which guarantees provision for the public health, to abstinence-only-until-marriage education initiatives. In light of the section’s constitutional history and the inherently international nature of public health, the article concludes that international human rights law is relevant to determining the scope and content of the state constitutional public health provision.

In the second article in this issue, “More than an Incidental Effect on Foreign Affairs: Implementation of Human Rights by State and Local Governments,” Gaylynn Burroughs, an LL.M. candidate at New York University School of Law, evaluates the benefits of local adoption of human rights laws for two purposes: 1) “inward-looking” legislation to implement international human rights norms in U.S. cities and states; and 2) “outward-looking” attempts to offer support for foreign implementation of human rights standards. She then examines the potential barriers to these types of local initiatives under U.S. constitutional law. While exposing particular obstacles to “outward-looking” human rights legislation, the article argues that the current approach to federalism and foreign affairs is too closely bound to a foreign/domestic dichotomy that is becoming less salient in an era of intense globalization.

Burroughs argues that the Supreme Court should abandon this dichotomy and develop a jurisprudence that would better allow states to exercise their voice legitimately in the global arena, so long as there is no positive conflict between federal and local law. A shift in this direction would be a useful step towards creating a culture of human rights in the United States and abroad that may open up, or enhance, new ways of articulating and actualizing a broad range of civil, political, economic, and social rights.

Maria Foscarinis, Executive Director of the National Law Center on Homelessness and Poverty, contributed the third article in this issue, "Advocating for the Human Right to Housing: Notes from the United States." Summarizing her testimony and that of other housing advocacy groups before a March 4, 2005 meeting of the Organization of American States' Inter-American Commission on Human Rights (IACHR), the article presents a concrete example of the human rights work U.S. advocacy groups are performing on the ground every day. Foscarinis closes her inspiring account of the IACHR hearing with strategic recommendations for future advocates and organizers to use in their efforts to secure internationally recognized housing rights for U.S. citizens.

Recent New York University Law graduate and law clerk in the Eastern District of New York Janet Hostetler's "Testing Human Rights: The Impact of High-Stakes Tests on English Language Learners' Right to Education in New York City" applies an international human rights analysis to the current policy and legal debate on standardized testing and school accountability heightened by the No Child Left Behind Act. The article evaluates the impact of high-stakes graduation tests on English language learner (ELL) students' right to education in New York City through the internationally defined "4-A framework" of accessibility, acceptability, adaptability, and availability. ELLs' right to accessible education is limited both by the practice of pushing out students who score lower on tests and by the tests' disparate impact on ELLs. The focus on test scores hampers the right to acceptable education by providing incentives for schools to teach test strategies or to teach only to a few failing students who seem incapable of moving above a passing score. Current punitive measures tied to high-stakes tests threaten the availability of schooling for ELL students. Finally, high-stakes tests hinder the adaptability of education in New York City, since schools are not meeting the special needs of ELL students, many of whom will be unable to graduate without extra resources and services. Hostetler concludes that the current implementation of graduation tests in New York City is incompatible with international human rights norms for ELLs, and substantial reforms are necessary to address this problem.

These authors are making a valuable contribution to the ongoing conversation about human rights in the United States and to the efforts to ensure human rights for all people in the United States. As Mary Robinson, Former United Nations High Commissioner for Human Rights, put it: "[w]e must also win the war of ideas and make the case that a world of true human security is only possible when the full range of human rights—civil and political, as well as

economic, social, and cultural—are guaranteed for all people.”¹³ I cannot close this foreword without expressing our appreciation to the staff and board of the *N.Y.U. Review of Law and Social Change* for their perseverance and commitment to this publication and to 2004–2005 Articles Selection Editors Janet Hostetler, Angelica Jongco, Rashida Ogletree, and Naomi Sunshine, who continued to devote effort to the project long after their graduation.

13. Mary Robinson, *What We Expect from America*, AM. PROSPECT, Oct. 1, 2004, at A32, available at <http://www.theamericanprospect.org/web/printfriendly-view.wv?id=8561>.

