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# The Exceptional Absence of Human Rights as a Principle in American Law

Mugambi Jouet\*

## I. Introduction

References to “human rights” are rare in American civil or criminal cases, including those addressing fundamental questions of justice. In the United States, human rights often evoke abuses faced by people in Third World dictatorships. In other words, human rights commonly refer to foreign problems, not domestic ones. The relative absence of human rights as a concept in American law is peculiar by international standards, as human rights play a far greater role in the domestic systems of other Western democracies.

This Article begins with a survey of references to “human rights” in landmark Supreme Court cases concerning racial segregation, the death penalty, prisoners’ rights, women’s rights, children’s rights, gay rights, and the indefinite detention of alleged terrorists during the “War on Terror.” The survey reveals that even liberal Justices seldom or never invoked “human rights” in these cases. This issue has not been addressed by recent scholarship and commentary, which have instead focused on certain Justices’ willingness to consider international law and the legal practices of foreign countries.<sup>1</sup> The latter are distinct concepts from human rights, although

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1. See, e.g., Martha Minow, *The Controversial Status of International and Comparative Law in the United States*, 52 HARV. INT’L L.J. ONLINE 1 (2010), [http://www.harvardilj.org/site/wp-content/uploads/2010/09/HILJ-Online\\_52\\_Minow.pdf](http://www.harvardilj.org/site/wp-content/uploads/2010/09/HILJ-Online_52_Minow.pdf).

they are at times related.

Beyond Supreme Court cases, references to domestic “human rights” are scarce in the U.S. legal, political, and normative debate as a whole. This is a facet of “American exceptionalism,” namely what objectively distinguishes America from other countries. The concept of “American exceptionalism” can lend to confusion because it has been heavily distorted by politicians and commentators who have equated it with American superiority.<sup>2</sup> “Exceptionalism” actually does not signify that America is “exceptional” in the sense of “outstanding” or “superior.”<sup>3</sup> It instead refers to how America is an *exception*. The concept has long been used in the fields of history, sociology, law, and comparative politics to assess how America differs from other Western democracies.<sup>4</sup> Identifying these disparities does not imply casting a normative judgment. For example, the fact that the United States is the only Western democracy that regularly refuses to adhere to international human rights treaties is a facet of American exceptionalism.<sup>5</sup> Yet, this singularity may be

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2. Republican presidential candidates Mitt Romney, Rick Santorum, and Newt Gingrich notably argued that they have faith in “American exceptionalism,” which they equated with American superiority. These candidates sought to distinguish themselves from President Barack Obama, whom they accused of trying to turn America into “socialist” Europe. *See, e.g.*, NEWT GINGRICH, *A NATION LIKE NO OTHER: WHY AMERICAN EXCEPTIONALISM MATTERS* (2011); Nicholas D. Kristof, *Why Is Europe a Dirty Word?*, N.Y. TIMES, Jan. 15, 2012, at SR11; James Traub, *I’m Sorry: The Scariest Words in Politics*, N.Y. TIMES, Dec. 4, 2011, at SR5; John Dickerson, *Exceptionally Thin: Rick Santorum’s Critique of Obama’s Foreign Policy Doesn’t Withstand Scrutiny*, SLATE MAG. (Apr. 29, 2011), [http://www.slate.com/articles/news\\_and\\_politics/politics/2011/04/exceptionally\\_thin.html](http://www.slate.com/articles/news_and_politics/politics/2011/04/exceptionally_thin.html).

3. *See* SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 18 (1997) (explaining that “American exceptionalism” is commonly misconstrued as a reference to American superiority); Mugambi Jouet, *An Exceptional Distortion*, GUERNICA MAG. (Sept. 19, 2013), <http://www.guernicamag.com/daily/mugambi-jouet-an-exceptional-distortion/>.

4. *See, e.g.*, *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* (Michael Ignatieff ed., 2005); JACK P. GREENE, *THE INTELLECTUAL CONSTRUCTION OF AMERICA: EXCEPTIONALISM AND IDENTITY FROM 1492 TO 1800* (1993); LIPSET, *supra* note 3, at 18; CHARLES LOCKHART, *THE ROOTS OF AMERICAN EXCEPTIONALISM: INSTITUTIONS, CULTURE AND POLICIES* (2003); *UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION*, at x (Peter H. Schuck & James Q. Wilson eds., 2008).

5. *See* Michael Ignatieff, *Introduction to AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 4, at 4-7.

interpreted in a positive or negative light depending on one's view of these treaties.

This Article examines legal, political, sociological, and historical factors behind the limited weight of human rights as a domestic principle in America. This absence is particularly remarkable given the prevalence of "exceptionalist" practices raising fundamental humanitarian issues. The United States notably has by far the highest incarceration rate worldwide;<sup>6</sup> is the only Western democracy to retain the death penalty;<sup>7</sup> and has openly tortured alleged terrorists.<sup>8</sup> In addition, America is the sole Western nation to lack universal health care, which is essentially considered a human right elsewhere in the West.<sup>9</sup>

Finally, the Article explores the societal implications of the issue. Americans seldom invoke "human rights," yet many invoke "civil rights," "constitutional rights," "fairness," "equality," or "due process of law" when denouncing practices that would be identified as human rights abuses elsewhere in the West. The difference between these concepts and human rights is sometimes semantic, albeit not always. The substantive scope of certain human rights goes beyond rights under domestic U.S. law. Human rights also have greater trenchancy than these other concepts in barring practices like the death penalty and torture. Americans opposed to these

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6. *Prison Population Rates Per 100,000 of National Population*, INTERNATIONAL CENTRE FOR PRISON STUDIES, <http://www.prisonstudies.org> [hereinafter ICPS Prison Population Rates] (last visited Aug. 29, 2014). As of 2014, the Seychelles technically surpassed America as the country with the highest incarceration rate. But since the incarceration rate represents the number of prisoners per 100,000 people and the overall population of the Seychelles is barely 90,000 people, that signifies they have roughly 800 prisoners in total compared to over 2.2 million in America. *Id.*; see also Lisa Mahapatra, *Why Are So Many People in US Prisons?*, INTERNATIONAL BUSINESS TIMES, March 19, 2014.

7. AMNESTY INTERNATIONAL, 2012 DEATH SENTENCES AND EXECUTIONS 50-51 (2013), <http://www.amnestyusa.org/sites/default/files/worlddpreport2012.pdf> [hereinafter 2012 DEATH SENTENCES AND EXECUTIONS].

8. R. Jeffrey Smith, *In New Memoir, Bush Makes Clear He Approved Use of Waterboarding*, WASH. POST, Nov. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110308082.html>.

9. See, e.g., CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 101-04 (2004).

practices frequently advance procedural concerns (e.g., the death penalty is applied discriminatorily against minorities and erroneously against innocents) or utilitarian arguments (e.g., torture is counter-productive). While these points have merit, they do not necessarily lead to the conclusion that such practices should be categorically abolished. Human rights, by contrast, are inalienable. Their limited weight as a principle in contemporary American law is all the more striking given that the United States has made substantial contributions to the development of individual rights ever since becoming the first modern democracy to emerge from the Enlightenment in the 18<sup>th</sup> century.

## II. A Survey of “Human Rights” in Landmark Supreme Court Cases

The words “human rights” do not appear once in multiple landmark Supreme Court cases addressing fundamental rights. The following survey of Supreme Court decisions focuses on test cases raising major humanitarian issues, as an examination of all Supreme Court cases is beyond the scope of this Article.<sup>10</sup> The survey begins in the post-World War Two era—the period when human rights gradually emerged as a salient principle in international law and the domestic systems of numerous Western democracies.<sup>11</sup>

In 1954, in *Brown v. Board of Education*, the Court abolished *de jure* racial segregation, which it essentially described as an affront to the principle of equality, but not as a “human rights” violation.<sup>12</sup> This omission was not only remarkable because racial persecution is one of the gravest human rights abuses, but also given the historical context. The U.N. General Assembly had passed its groundbreaking

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10. The absence of “human rights” as a concept in American law is relative, not absolute. A search for the phrase “human rights” in the Westlaw database of Supreme Court cases yielded approximately 300 results. Many of these cases make only passing references to the concept. I leave their analysis for another day.

11. See generally SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 1-4 (2010).

12. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see also *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

Universal Declaration of Human Rights in 1948, partly due to the efforts of American figures like Eleanor Roosevelt.<sup>13</sup> The Declaration is not a binding treaty but a statement of ideal human rights standards. It affirms the equality of all people<sup>14</sup> and explicitly condemns racial discrimination.<sup>15</sup> The existence of racial segregation in the United States therefore led to charges of hypocrisy.<sup>16</sup> The persecution of African-Americans had already undermined America's credibility in denouncing the racism of Nazi Germany.<sup>17</sup> The continuation of an American apartheid likewise called into question the United States' moral leadership in the Cold War.<sup>18</sup>

Accordingly, a reference to "human rights" in *Brown*—arguably the most significant rights case of a generation—would have been justified on substantive legal grounds and for political reasons in light of the global context. Supreme Court Justices are not oblivious to the political implications of their decisions. Under the stewardship of Chief Justice Earl Warren, the Court's unanimous opinion in *Brown* was crafted with the aim of striking a major blow to social injustice and reaffirming the Court's image as the guardian of American liberty.<sup>19</sup> The absence of any reference to "human rights" in *Brown* thus suggested that the concept was outside the frame of reference of American jurists.<sup>20</sup>

The human rights movement gained ground in subsequent decades.<sup>21</sup> Insofar as human rights were a relatively obscure

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13. See MOYN, *supra* note 11, at 63.

14. G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

15. See *id.* at art. 2.

16. See John Quigley, *Toward More Effective Judicial Implementation of Treaty-Based Rights*, 29 FORDHAM INT'L L.J. 552, 579-80 (2006).

17. See Mary L. Dudziak, *The Court and Social Context in Civil Rights History*, 72 U. CHI. L. REV. 429, 436-39 (2005).

18. See *id.*

19. See generally Cass R. Sunstein, *Did Brown Matter?*, NEW YORKER, May 3, 2004, available at [http://www.newyorker.com/archive/2004/05/03/040503crbo\\_books](http://www.newyorker.com/archive/2004/05/03/040503crbo_books).

20. It is noteworthy that Warren aimed to build a consensus against segregation among the Justices. See *id.* A reference to "human rights" or the Universal Declaration of Human Rights in *Brown* might have hindered such a consensus.

21. See generally MOYN, *supra* note 11, at 1-4.

concept in the 1950s when *Brown* was decided, that was no longer the case by the 1970s.<sup>22</sup> Nevertheless, human rights remained largely absent as a legal concept even when American courts were called upon to decide key rights issues with significant humanitarian implications.

In 1967, the Court invalidated bans on interracial marriage, a form of discrimination related to the segregation laws addressed in *Brown*.<sup>23</sup> Still, no allusion to “human rights” appeared in the Court’s decision.

In 1972, the Supreme Court affirmed the acquittal of William Baird, who was convicted for distributing contraceptives in violation of a Massachusetts statute penalizing that conduct except by registered physicians assisting married couples.<sup>24</sup> The First Circuit Court of Appeals reversed, holding that the statute was baselessly rooted in the notion that contraceptives are “immoral.”<sup>25</sup> “Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with *fundamental human rights*[.]” the First Circuit emphasized.<sup>26</sup> Its decision partly relied on the Supreme Court’s influential decision in *Griswold v. Connecticut*, which had struck an anti-contraception statute for violating the constitutional right to privacy.<sup>27</sup> Yet, the First Circuit’s holding went beyond *Griswold* since that opinion had made no mention of “human rights.” However, the Supreme Court affirmed the First Circuit’s decision on other grounds, sidestepping the issue of whether such legislation “conflicts with fundamental human rights.”<sup>28</sup>

In 1976, in *Gregg v. Georgia*,<sup>29</sup> the Supreme Court reauthorized the death penalty after having found it

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22. *See id.*

23. *See Loving v. Virginia*, 388 U.S. 1 (1967).

24. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972).

25. *See Baird v. Eisenstadt*, 429 F.2d 1398, 1402 (1st Cir. 1970).

26. *Id.* (emphasis added).

27. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

28. *See Eisenstadt*, 405 U.S. at 453 (“We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”).

29. *Gregg v. Georgia*, 428 U.S. 153 (1976).

unconstitutional only four years earlier in *Furman v. Georgia*.<sup>30</sup> *Gregg* held that executions do not violate the Eighth Amendment's ban on "cruel and unusual punishments." New procedures for capital trials, notably a special sentencing phase where jurors would weigh aggravating and mitigating factors, were supposed to eliminate the problems of arbitrariness and discrimination recognized in *Furman*. But there was no mention of "human rights" in either the majority or dissenting opinions in *Gregg* even though the case focused on whether capital punishment is inherently degrading and impossible to administer justly. The concept of human dignity likewise received little to no attention except in the dissents of Justices William Brennan and Thurgood Marshall, who deemed executions unconstitutional *per se*.<sup>31</sup> *Furman* had previously constituted a slight exception to this trend. Brennan then argued that the Eighth Amendment offers a "basic guaranty of human rights" by citing language from a law journal article by ex-Justice Arthur Goldberg and Alan Dershowitz, who had called for abolishing the death penalty.<sup>32</sup>

In a 1987 test case, *McCleskey v. Kemp*, the Supreme Court dismissed a major challenge to racism in the administration of the death penalty.<sup>33</sup> By a 5-4 vote, the Court held that statistical proof of systemic racial discrimination in capital sentencing is irrelevant.<sup>34</sup> Defendants must demonstrate specific intent of racial discrimination in their own cases—a virtually unachievable burden of proof if one is precluded from considering systemic patterns. The Justices in the minority vigorously disagreed but made no mention of "human rights." This omission is striking given that by the time *McCleskey* was decided the death penalty was increasingly recognized as a human rights violation *per se* in other Western countries.<sup>35</sup>

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30. *Furman v. Georgia*, 408 U.S. 238 (1972).

31. *Gregg v. Georgia*, 428 U.S. 227, 228-30 (1976) (Brennan, J., dissenting); *id.* at 231-32 (Marshall, J., dissenting).

32. *Furman*, 408 U.S. at 268 (Brennan, J., concurring) (quoting Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1782 (1970)).

33. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

34. *Id.* at 314-19.

35. See FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 25-27 (2003).



Besides the acceptability of executions *per se*, *McCleskey*, *Furman*, and *Gregg*, touched upon other problems related to international human rights standards, namely the rights to a fair trial and to be free from racial discrimination. Capital punishment in the United States has long been applied arbitrarily,<sup>36</sup> as well as discriminatorily against both racial minorities<sup>37</sup> and indigent persons, including poor white people, who often are ineffectively represented by undercompensated counsel.<sup>38</sup> These practices arguably violate the right to a fair trial under the Universal Declaration of Human Rights<sup>39</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>40</sup> America did not ratify the ICCPR before 1992 after these cases were decided, but it could have been cited as persuasive authority by the dissenting Justices.<sup>41</sup> Racism in the administration of the death penalty also violates the Convention on the Elimination of Racial Discrimination.<sup>42</sup> The United States did not ratify this Convention until 1994, after *McCleskey* was decided, although the Convention came into force in 1969 and could likewise have been cited as persuasive authority.

As the U.S. penal system grew extraordinarily harsh by international standards,<sup>43</sup> the Supreme Court further

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36. See, e.g., Carol S. Steiker & Jordan M. Steiker, *Report to the ALI Concerning Capital Punishment* (Annex B), in REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 3, 11 (2009) [hereinafter Report of the Council to the Membership of the ALI].

37. See, *inter alia*, the dissenting opinions of Justices Blackmun, Brennan, and Stevens in *McCleskey*, 481 U.S. at 279. See generally Report of the Council to the Membership of the ALI, *supra* note 36.

38. See, e.g., *McFarland v. Scott*, 512 U.S. 1256, 1258 (1994) (Blackmun, J., dissenting) (noting that appointed counsel in capital cases “effectively may be required to work at minimum wage or below while funding from their own pockets their client’s defense[]”); see also *Maples v. Thomas*, 132 S. Ct. 912, 917 (2012) (noting that lawyers in capital cases are “undercompensated”); Report of the Council to the Membership of the ALI, *supra* note 36, at 17-20.

39. Universal Declaration of Human Rights, *supra* note 14, at art. 11.

40. S. TREATY DOC. NO. 95-20 (1966) [hereinafter ICCPR].

41. When the Senate ratified the ICCPR, it included a reservation stating that it retains the right to execute anyone but a pregnant woman. S. EXEC. REP. NO. 102-23, at 11 (1992).

42. See G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No.14, U.N. Doc. A/6014, at 47 (Mar. 7, 1966).

43. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND*

examined the constitutionality of “three strikes laws” mandating life sentences for recidivists with three felony convictions of limited gravity. In 1980, the Court upheld Texas’ three strikes law and affirmed the life sentence of a man who had been convicted of credit card fraud, passing a forged check, and obtaining money under false pretenses—non-violent property offenses worth less than \$230 in total.<sup>44</sup> The Court revisited the issue in 2003 and upheld California’s three strikes law.<sup>45</sup> The defendant in that case received a 50-year-to-life sentence for shoplifting videotapes worth only \$153 since he already had convictions for petty theft, burglary, and transporting marijuana.<sup>46</sup> A majority of Justices in both cases did not consider these punishments cruel or unusual. None of the dissenting Justices explicitly argued that such draconian sentences violate “human rights.”

A relative shift has occurred in the last dozen years as certain Justices have shown greater inclination to consider the practices of other nations, which has occasionally entailed referring to international human rights standards. Conservative Justices and political leaders have denounced this practice as a newfound form of liberal judicial activism,<sup>47</sup> although taking into account the legal practices of other countries is neither an unprecedented practice nor an exclusively liberal one.<sup>48</sup> Part of the reason why recent references to foreign law have drawn significant criticism from American conservatives is because they have largely come in major test cases, where a majority of Justices found U.S. practices incompatible with international standards.

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THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

44. *Rummel v. Estelle*, 445 U.S. 263, 286, 295 (Powell, J., dissenting) (1980).

45. *Lockyer v. Andrade*, 538 U.S. 63 (2003).

46. *Id.* at 66-68.

47. *See generally* Minow, *supra* note 1, at 3-5.

48. Justice Ruth Bader Ginsburg has notably defended this practice by citing *The Federalist Papers* and early Supreme Court precedents. *See* Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the United States, A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication, Address at the International Academy of Comparative Law, American University (July 30, 2010); *see also* Minow, *supra* note 1, at 2-3 (describing how U.S. courts have considered foreign sources for at least two centuries).

Considering the legal practices of other Western democracies—European nations, Canada, Australia, and New Zealand—often *implies* considering international human rights standards since they have greater weight in these countries than in the United States.<sup>49</sup> Still, references to foreign law can be made without acknowledging human rights. That is because they are ultimately distinct concepts. Illustratively, in *Atkins v. Virginia*, Justice John Paul Stevens’ opinion for the Court stated in a footnote that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>50</sup> But Stevens’ opinion made no reference to “human rights.” The Court held that executing the mentally retarded is unconstitutional without addressing that precise issue.

In *Roper v. Simmons*, the Court abolished the juvenile death penalty on the ground that it violates the Eighth and Fourteenth Amendments.<sup>51</sup> A fairly lengthy section of Justice Anthony Kennedy’s majority opinion addressed international standards; and how “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”<sup>52</sup> Kennedy’s prose made no direct reference to “human rights,” although his opinion indirectly referred to the concept by citing the American Convention on Human Rights (a treaty unratified by the United States) and an amicus brief from the Human Rights Committee of the Bar of England and Wales *et al.*<sup>53</sup>

Perhaps most importantly, Justice Kennedy relied for

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49. As noted above, the United States is the only Western country that tends to exempt itself from international human rights treaties. In addition, European countries are expected to comply with the decisions of the European Court of Human Rights. Furthermore, the death penalty is considered a human rights violation by the governments of all Western countries except America. Other American practices, such as life imprisonment for juveniles, are widely considered human rights violations. See Brief of Amici Curiae Amnesty International, et al. in Support of Petitioners, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646), 2012 WL 174238 [hereinafter Brief of International Amici in *Miller*]. This matter is addressed in greater detail in subsequent sections of the Article.

50. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

51. See *Roper v. Simmons*, 543 U.S. 551 (2005).

52. *Id.* at 574.

53. See *id.* at 576, 578.

persuasive authority on the Convention on the Rights of the Child, which is regarded as a human rights treaty. “Article 37 of the [Convention], which every country in the world has ratified save for the United States and Somalia,” Kennedy noted, “contains an express prohibition on capital punishment for crimes committed by juveniles under 18.”<sup>54</sup> Kennedy additionally cited the ICCPR, another human rights treaty.<sup>55</sup> It is nonetheless remarkable that Kennedy, who is known for his florid invocations of universal ideals,<sup>56</sup> did not specifically discuss the question of “human rights” when examining whether a person may be executed for a crime committed as a child. The only explicit discussion of “human rights” in *Roper* came in Justice Sandra Day O’Connor’s dissent, who briefly mentioned the concept despite finding the execution of juveniles constitutional.<sup>57</sup>

Around the same period, the Court issued its landmark decision in *Lawrence v. Texas*. The latter struck a seldom enforced Texas statute penalizing consensual sodomy between adult men.<sup>58</sup> As in *Roper*, Justice Kennedy’s opinion devoted attention to international standards and emphasized that penalizing homosexuality is now widely disapproved in the democratic world.<sup>59</sup> But his opinion again lacked a specific

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54. *Id.* at 576.

55. *See id.*

56. For instance, Justice Kennedy famously wrote that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)). This section of the *Casey* plurality opinion was written by Justice Kennedy. *See* JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 66-67 (2008).

57. *See Roper*, 543 U.S. at 605 (O’Connor, J., dissenting) (“[W]e should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental *human rights*. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus [against the juvenile death penalty], however, and the recent emergence of an otherwise global consensus does not alter that basic fact.” (emphasis added)).

58. *See Lawrence*, 539 U.S. at 558.

59. *See id.* at 573, 576-77.

discussion of “human rights” except by reference when citing the position of the European Court of Human Rights<sup>60</sup> and mentioning in passing the First Circuit’s aforesaid decision in *Eisenstadt*.<sup>61</sup> (By contrast, Kennedy’s subsequent opinion striking the Defense of Marriage Act omitted a discussion of either international standards or human rights.)<sup>62</sup>

*Lawrence* addressed discrimination on the basis of sex and gender, as did *Ledbetter v. Goodyear Tire & Rubber Co.*, a case decided three years later.<sup>63</sup> The plaintiff in that case argued that her employer paid her less than similarly qualified male colleagues because she was a woman. The Court nonetheless rejected her claim in a controversial 5-4 split. Justice Ruth Bader Ginsburg wrote a vigorous dissent joined by three Justices.<sup>64</sup> However, her dissent made no allusion to human rights. This was again a noteworthy omission, given that discrimination against women has long been considered a human rights violation.<sup>65</sup> By the same token, a discussion of human rights was absent in *United States v. Virginia*, an influential precedent regarding women’s rights.<sup>66</sup>

In 2010, in *Graham v. Florida*, the Court was called upon to decide whether imposing life imprisonment without parole on juveniles in non-homicide cases is “cruel and unusual.”<sup>67</sup> A majority of Justices held that this punishment indeed violates the Eighth Amendment. Justice Kennedy’s majority opinion cited the practice of other countries and the U.N. Convention on the Rights of the Child’s bar on life sentences for juveniles.<sup>68</sup>

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60. *See id.* at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) (holding that laws proscribing consensual homosexual conduct between adults violate the European Convention on Human Rights)).

61. *See id.* at 565.

62. *See United States v. Windsor*, 133 S. Ct. 2675 (2013).

63. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

64. *See id.* at 643 (Ginsburg, J., dissenting).

65. *See Convention on the Elimination of All Forms of Discrimination Against Women*, 1249 U.N.T.S. 13 (1979); *see also ICCPR*, *supra* note 40, at arts. 2, 3, 26; *Universal Declaration of Human Rights*, *supra* note 14, at art. 2.

66. *See United States v. Virginia*, 518 U.S. 515 (1996) (holding that the Virginia Military Institute’s policy of only admitting males violated the Equal Protection Clause).

67. *See Graham v. Florida*, 560 U.S. 48 (2010).

68. *See id.* at 80-81.

But the words “human rights” appear nowhere in his opinion except when mentioning the organization Human Rights Watch, which co-authored a report Kennedy cited.<sup>69</sup>

Moreover, the Court held in 2012 that life without parole cannot be a *mandatory* sentence for a murder committed by a juvenile.<sup>70</sup> The decision in that case, *Miller v. Alabama*, left the possibility of imposing life without parole so long as it is not the only sentencing option in a homicide case. Justice Elena Kagan delivered the Court’s opinion, which made no reference to human rights, the Convention on the Rights of the Child, or foreign law.

The fact that Justice Kagan authored the decision in *Miller*, whereas Justice Kennedy authored the decisions in *Graham*, *Roper*, and *Lawrence* may carry significance. Justice Kennedy is one of the Justices most interested in international human rights standards.<sup>71</sup> That being noted, Justice Kagan has also expressed support for considering the practices of foreign countries.<sup>72</sup> Besides, insofar as Kagan was disinclined to weigh international human rights standards in *Miller*, that did not preclude Kennedy or another Justice from raising that issue in a concurring opinion. That omission was revealing given the filing of an *amicus* brief by Amnesty International and multiple other international *amici*, from the Austrian Bar to the Law Council of Australia.<sup>73</sup> The international *amici* emphasized that the United States is essentially the sole country worldwide where any juveniles are sentenced to life imprisonment, and that such treatment violates international human rights standards.<sup>74</sup>

The Supreme Court’s landmark decisions regarding Guantanamo detainees confirm that the concept of human rights is hardly relied upon in domestic American law. As part of its “War on Terror,” the Bush administration argued that the President has the authority to detain any person accused of terrorism forever incommunicado under the pretense that

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69. *See id.* at 81.

70. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012).

71. *See TOOBIN*, *supra* note 56, at 213-17, 221-22.

72. *See Minow*, *supra* note 1, at 4.

73. *See Brief of International Amici in Miller*, *supra* note 49.

74. *See id.* at 2-6.

“enemy combatants” have no legal right to challenge their detention and that the U.S. military base in Guantanamo Bay, Cuba, is somehow completely outside the jurisdiction of American law. United Nations human rights experts stressed that the permanent detention of Guantanamo detainees without trial is a blatant violation of international human rights standards.<sup>75</sup> Coupled with the torture of alleged terrorists, a practice that President Bush personally licensed,<sup>76</sup> indefinite detention at Guantanamo greatly tarnished the United States’ global image.<sup>77</sup> Foreign critics commonly denounced America as a human rights violator.<sup>78</sup>

Nevertheless, even the Justices appalled by President Bush’s treatment of Guantanamo detainees<sup>79</sup> did not invoke “human rights” in seminal decisions rejecting the administration’s assertion of unchecked authority. In *Rasul v. Bush*, the Court held, by a rather narrow 6-3 margin, that a *habeas corpus* statute confers to Guantanamo detainees the right to judicial review of their executive detention.<sup>80</sup> Justice Stevens’ majority opinion underscored the historical significance of the writ of *habeas corpus*, which originated in English law several centuries ago and has become a bedrock principle of American law.<sup>81</sup> Stevens stressed that *habeas corpus* aims to protect individuals from the “oppressive and lawless” nature of executive imprisonment.<sup>82</sup> Even though *habeas corpus* is arguably an older legal concept than human

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75. See *United Nations Human Rights Experts Express Continued Concern About Situation of Guantanamo Bay Detainees*, U.N. OFFICE OF HIGH COMM’R FOR HUMAN RIGHTS (Feb. 4, 2005), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7870&LangID=E> [hereinafter *U.N. Human Rights Experts on Guantanamo Bay*].

76. See Smith, *supra* note 8.

77. See, e.g., ANTI-AMERICANISMS IN WORLD POLITICS 11, 277 (Peter J. Katzenstein & Robert O. Keohane eds., 2007) (describing global perception of America as a human rights abuser due to its actions in the “War on Terror”).

78. See *id.*

79. See TOOBIN, *supra* note 56, at 274-75, 372-74, 403 (describing the dismayed reaction of Justices Breyer, Ginsburg, Kennedy, O’Connor, Souter, and Stevens to President George W. Bush’s position regarding Guantanamo).

80. See *Rasul v. Bush*, 542 U.S. 466 (2004).

81. See *id.* at 473-74.

82. See *id.* at 474 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218-19 (1953) (Jackson, J., dissenting)).

rights,<sup>83</sup> Stevens or a concurring Justice could have added that the right to a trial and to be free from indefinite detention are fundamental human rights. The same observation can be made about the Court's reasoning in *Boumediene v. Bush*, which held that Guantanamo detainees have a constitutional right to *habeas corpus* but omitted references to "human rights."<sup>84</sup>

*Hamdi v. Rumsfeld*, a plurality opinion, additionally suggested that the Geneva and Hague Conventions preclude the indefinite detention of alleged terrorists.<sup>85</sup> In *Hamdan v. Rumsfeld*, the Court subsequently held that the military commissions devised by the Bush administration violated the Geneva Conventions.<sup>86</sup> But neither of these opinions framed the abuses of the "War on Terror" as "human rights" issues.

In sum, the survey reveals that there was essentially no head-on discussion of human rights in landmark Supreme Court cases decided in the post-World War Two era. It is remarkable that either a majority or minority of Justices in these cases found that they raised serious injustices or humanitarian problems, yet made no explicit reference to human rights violations. The Justices had the discretion to at least briefly advance arguments such as "racial discrimination is a human rights violation," "executing juvenile offenders is incompatible with fundamental human rights," or "the notion that alleged terrorists can be detained forever at Guantanamo without trial raises profound human rights issues." The absence of such reasoning by even the most liberal Justices suggests that "human rights" play a limited role as a concept in domestic American law.

While references to "human rights" are scarce in landmark Supreme Court cases addressing fundamental rights, the principle of "dignity" played a greater role in some of these

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83. See MOYN, *supra* note 11, at 1-43 (arguing that human rights are a relatively modern concept distinguishable from earlier conceptions of rights).

84. See *Boumediene v. Bush*, 553 U.S. 723 (2008).

85. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 520-21 (2004) (citing Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, [1955] 6 U.S. T. 3316, 3406; Hague Convention (II) on Laws and Customs of War on Land art. 20, July 29, 1899, 32 Stat. 1817); see also *Hamdi*, 542 U.S. at 549 (Souter, J., concurring) (noting that *Hamdi*'s indefinite detention appears to violate the Third Geneva Convention).

86. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).



cases. That observation is relevant insofar as the concept of inalienable human rights is related to the concept of intrinsic human dignity. In particular, the protection of “dignity” was a relatively important consideration in seminal decisions concerning abortion<sup>87</sup> and gay rights.<sup>88</sup> The Court has equally stated that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>89</sup> Nonetheless, the question of dignity has not been explicitly addressed in all major cases concerning cruel and unusual punishment.<sup>90</sup> An explicit discussion of dignity is also absent in decisions regarding the indefinite detention of alleged terrorists without trial even though critics have argued that such treatment is an affront to dignity.<sup>91</sup> In any event, Supreme Court jurisprudence is only the tip of the iceberg, as we will now see.

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87. *Casey*, 505 U.S. at 851 (upholding the right to abortion, under certain conditions, by taking into account the principle of “dignity,” among other factors); *id.* at 916 (Stevens, J., concurring) (“The authority to make such traumatic and yet empowering decisions is an element of basic human dignity.”); *id.* at 923-24 (Blackmun, J., concurring) (referring to the concept of “dignity”).

88. *Lawrence*, 539 U.S. at 567, 574, 575 (holding that criminalizing intimate homosexual relations is an affront to “dignity”); *Windsor*, 133 S. Ct. at 2693 (finding that the Defense of Marriage Act “interfere[s] with the equal dignity of same-sex marriages”).

89. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

90. No references to “dignity” appear in various landmark Eighth Amendment cases. *See Rummel*, 445 U.S. at 263 (upholding Texas three strikes law); *Lockyer*, 538 U.S. 63 (2003) (upholding California three strikes law); *Graham*, 560 U.S. at 48 (barring life sentences for juveniles in non-homicide cases); *Miller*, 132 S. Ct. at 2455 (barring mandatory life sentences for juveniles convicted of murder). Conversely, dignity has been explicitly discussed in other significant cases. *See Furman*, 408 U.S. at 238 (finding the death penalty unconstitutional); *Gregg*, 428 U.S. at 153 (finding revised death penalty statutes constitutional); *Roper*, 543 U.S. at 551 (abolishing the juvenile death penalty); *Brown v. Plata*, 131 S.Ct. 1910, 1929 (2011) (Ordering California to reduce prison overcrowding, as “[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity”); *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014) (finding Florida’s procedure for identifying mentally retarded defendants in capital cases unconstitutional, as it “contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world”).

91. *See generally Rasul*, 542 U.S. at 466; *Boumediene*, 553 U.S. 723; *Hamdi*, 542 U.S. 507; *Hamdan*, 548 U.S. at 557.

## III. Treating Human Rights Violations as a Foreign Problem

The negligible role of human rights as a principle in Supreme Court jurisprudence reflects a broader pattern. References to human rights are fairly rare in the U.S. legal, political, and normative debate as a whole. American legal scholars generally match the Justices by discussing fundamental constitutional rights without referring to human rights.<sup>92</sup> Only a limited segment of American scholars readily equate U.S. constitutional rights with human rights.<sup>93</sup> Even American progressive groups seldom invoke human rights.<sup>94</sup>

References to “human rights” in the United States typically evoke problems in *foreign countries*, particularly Third World dictatorships—not domestic problems faced by American society. Natsu Taylor Saito observed that “[h]uman

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92. For instance, no references to “human rights” appear in the following articles concerning fundamental rights: Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013); Dudziak, *supra* note 17; Nan D. Hunter, *Reflections on Sexual Liberty and Equality: “Through Seneca Falls and Selma and Stonewall”*, 60 UCLA L. REV. DISCOURSE 172 (2013); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423 (2013); Laurence H. Tribe, *Reflections on Unenumerated Rights*, 9 U. PA. J. CONST. L. 483 (2007); Robert Weisberg & Joan Petersilia, *The Dangers of Pyrrhic Victories Against Mass Incarceration*, 139 DAEDALUS 124 (2010).

93. While references to “human rights” only appear sporadically in scholarship regarding domestic U.S. problems, there are exceptions to this trend. *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 15 (2012) (describing mass incarceration as a “human rights nightmare”); Harold Hongju Koh, *A United States Human Rights Policy for the 21<sup>st</sup> Century*, 46 ST. LOUIS U. L.J. 293, 295 (2002) (arguing that America must promote human rights both abroad and “at home”); Natsu Taylor Saito, *Beyond Civil Rights: Considering “Third Generation” International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387 (1997); M.N.S. Sellers, *Universal Human Rights in the Law of the United States*, 58 AM. J. COMP. L. 533 (2010) (equating U.S. constitutional rights with “human rights”); Cynthia Soohoo, *Close to Home: Social Justice Activism and Human Rights*, 40 COLUM. HUM. RTS. L. REV. 7 (2008) (same); Stephen C. Thaman, *Is America a Systematic Violator of Human Rights in the Administration of Criminal Justice?*, 44 ST. LOUIS U. L.J. 999 (2000).

94. An exception is the Human Rights Coalition, a gay rights group. It is also noteworthy that the American chapter of Amnesty International appears less inclined to invoke human rights than its British chapter. *See* ZIMRING, *supra* note 35, at 46-47.

rights are frequently invoked as the basis for decisions about U.S. foreign policy, international relations, and humanitarian intervention.”<sup>95</sup> Conversely, she added, “[w]ithin U.S. legislation and judicial decisions, we see frequent references to civil rights, but rarely to human rights, and international human rights law is seldom considered part of the legal recourse available to individuals or groups in the United States today.”<sup>96</sup>

Little has changed since Taylor Saito made this observation in 1997. As discussed above, even liberal Supreme Court Justices did not explicitly discuss “human rights” in subsequent cases concerning fundamental aspects of human dignity: discrimination against women, the execution of teenage offenders and mentally retarded persons, the life imprisonment of juveniles, the criminalization of homosexuality, and the indefinite detention of alleged terrorists without trial.

Domestic rights violations are more likely to be framed as “human rights” issues in other Western nations. The European Court of Human Rights adjudicates a broad range of questions arising domestically in European states, such as freedom of speech, labor rights, discrimination, and criminal procedure.<sup>97</sup> Moreover, national human rights commissions exist in multiple countries. In France, for example, the Commission Nationale Consultative des Droits de l’Homme (National Consultative Commission on Human Rights) is an independent public organ charged with advising and evaluating the policies of the French government.<sup>98</sup> It monitors an array of human rights-related issues in France, including criminal procedure, prison overcrowding, anti-terrorism policies, racism, homophobia, and

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95. Taylor Saito, *supra* note 93, at 388.

96. *Id.*

97. See generally *Fact Sheets on the Court’s Case-Law*, EUROPEAN COURT OF HUMAN RIGHTS, <http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets> (last visited Apr. 13, 2014).

98. See generally NAT’L CONSULTATIVE COMM’N ON HUMAN RIGHTS, CONTRIBUTION OF THE CNCDH TO THE 2ND CYCLE OF THE UPR OF FRANCE (2013), <http://nhri.ohchr.org/EN/IHRS/UPR/Documents/CNCDH%20contribution%20for%20UPR%20Dec%202012.pdf>.

the rights of the elderly.<sup>99</sup> The French government does not necessarily abide by the Commission's recommendations, although what is of relevance here is how these domestic issues are considered human rights matters. Analogous bodies function in a host of countries, such as the Australian Human Rights Commission, Danish Institute for Human Rights, German Institute for Human Rights, New Zealand Human Rights Commission, and Scottish Human Rights Commission. These bodies focus largely or exclusively on monitoring *domestic* compliance with human rights standards.

To the contrary, the Tom Lantos Human Rights Commission, an arm of the U.S. Congress, focuses on the human rights records of *foreign* countries.<sup>100</sup> American government organs whose mission centers on "human rights" typically do not address domestic questions. The U.S. State Department has a Bureau of Democracy, Human Rights, and Labor that examines human rights abroad.<sup>101</sup> By the same token, the Justice Department's Human Rights and Special Prosecutions Section addresses cases with an international dimension.<sup>102</sup> On the other hand, domestic matters generally fall under the purview of the Justice Department's Civil Rights Division, which not only has anti-discrimination subdivisions but also a Criminal Section to prosecute the "federal criminal violation of an individual's *civil rights*."<sup>103</sup> That separation at the Justice Department exemplifies how Americans normally associate "human rights" with foreign issues and "civil rights" with domestic ones. An exception to this trend is the report on human rights in America that the State Department submits to the U.N. pursuant to the Universal Periodic Review process.<sup>104</sup>

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99. See generally NAT'L CONSULTATIVE COMM'N ON HUMAN RIGHTS, RAPPORT D'ACTIVITÉ 2012 [2012 ACTIVITY REPORT] (2013), [http://www.cncdh.fr/sites/default/files/cncdh\\_rapport\\_activite\\_2012.pdf](http://www.cncdh.fr/sites/default/files/cncdh_rapport_activite_2012.pdf).

100. See *Hearings and Briefings*, TOM LANTOS HUMAN RIGHTS COMM'N, U.S. CONGRESS, <http://tlhrc.house.gov/hearings.asp> (last visited Feb. 1, 2014).

101. See *Bureau of Democracy, Human Rights, and Labor*, U.S. DEP'T OF STATE, <http://www.state.gov/j/drl/> (last visited Feb. 1, 2014).

102. See *Human Rights and Special Prosecutions Section*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/hrsp/> (last visited Feb. 1, 2014).

103. *Criminal Section, Civil Rights Div.*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/about/crm/> (emphasis added) (last visited Feb. 1, 2014).

104. See U.S. DEP'T OF STATE, REPORT OF THE UNITED STATES OF AMERICA

Human rights litigation in America has largely concentrated on foreign problems, not domestic ones. The controversial Alien Tort Statute has led U.S. courts to adjudicate civil lawsuits alleging human rights abuses, although these cases have predominantly centered on abuses committed abroad by foreigners against other foreigners.<sup>105</sup> (The Supreme Court virtually barred such cases in a 2013 decision.)<sup>106</sup>

Human rights in America have perhaps made more headway at the state level than federal level, as suggested by the existence of organs like the Illinois Department of Human Rights, Iowa Department of Human Rights, Minnesota Department of Human Rights, New York State Division of Human Rights, and Tennessee Human Rights Commission. These state organs address domestic matters, yet their jurisdiction is typically limited to discrimination in employment, housing, and a few other areas.<sup>107</sup> Human rights issues like inadequate access to health care, police misconduct, or draconian criminal punishments do not fall within their mandate.<sup>108</sup> However, the Iowa organ does not focus solely on discrimination, but also on issues related to criminal and juvenile justice, as well as poverty.<sup>109</sup>

The relative absence of human rights as a principle in modern America is remarkable given how influential American leaders actively promoted the concept in its infancy. President Franklin Delano Roosevelt invoked “human rights” in his “Four

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SUBMITTED TO U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW (2010), <http://www.state.gov/documents/organization/146379.pdf>.

105. See Minow, *supra* note 1, at 14-15.

106. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (holding that the Alien Tort Statute does not apply extraterritorially). See also Roger Alford, *Lower Courts Narrowly Interpret Kiobel* (OPINIO JURIS, Sept. 23, 2013), <http://opiniojuris.org/2013/09/23/lower-courts-narrowly-interpret-kiobel/>.

107. See Illinois Human Rights Act, 775 ILL. COMP. STAT. ANN. 5 (West 2013); Minnesota Human Rights Act, MINN. STAT. ANN. § 363A (West 2013); New York Human Rights Law, N.Y. EXEC. LAW § 290 (McKinney 2013); Tennessee Human Rights Act, TENN. CODE ANN. § 4-21-101 (West 2013).

108. See sources cited *supra* note 107.

109. See generally IOWA DEP'T OF HUMAN RIGHTS, [http://www.humanrights.iowa.gov/about\\_us.html#](http://www.humanrights.iowa.gov/about_us.html#) (last visited Feb. 1, 2014).

Freedoms Speech” of 1941.<sup>110</sup> In addition, FDR was apparently responsible for inserting “the duty to preserve human rights” in the momentous Declaration of the United Nations (the Allies) of 1942.<sup>111</sup> Eleanor Roosevelt was among the architects of the Universal Declaration of Human Rights of 1948.<sup>112</sup> As the human rights movement progressed in later decades, Martin Luther King said in 1968 that “[w]e have moved from the era of civil rights to an era of human rights.”<sup>113</sup> While that may be true for much of the democratic world, it is still not the case for America in the early 21<sup>st</sup> century.

#### IV. Practices Contrary to International Human Rights Standards

The limited weight of human rights as a domestic principle in the United States is paralleled by the prevalence of practices running contrary to contemporary international human rights standards. We will now explore this dimension of American exceptionalism by examining U.S. practices in three areas—criminal justice, health care, and the “War on Terror”—and by describing how “human rights” are absent from the legal, political, and normative debate over these issues.

##### A. *Draconian Criminal Punishments*

The U.S. criminal justice system is exceptionally harsh. America is the only Western democracy to retain the death penalty, which has now been abolished by two-thirds of all countries in law or practice.<sup>114</sup> It is also among the five countries that execute the most people worldwide, a distinction placing it in the company of authoritarian regimes like China, Iran, and Saudi Arabia.<sup>115</sup> Furthermore, America has the

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110. See MOYN, *supra* note 11, at 48.

111. See *id.* at 49.

112. See *id.* at 63.

113. See James C. Harrington, *King and the Fight for Justice*, HOUS. CHRON. (Jan. 18, 2013), <http://www.chron.com/opinion/outlook/article/King-and-the-fight-for-justice-4206889.php>.

114. See 2012 DEATH SENTENCES AND EXECUTIONS, *supra* note 7, at 50.

115. *Id.* at 48.

world's top incarceration rate by far,<sup>116</sup> as it engages in mass incarceration on a scale unprecedented in human history.<sup>117</sup> It has five percent of the world's population but twenty-five percent of its prisoners.<sup>118</sup> It is likewise alone in authorizing life imprisonment for juveniles, a practice denounced as a human rights abuse elsewhere in the West.<sup>119</sup> Moreover, the juvenile incarceration rate in America dwarves those of other industrialized nations.<sup>120</sup>

Other modern Western democracies have abolished capital punishment for decades and do not resort to the draconian prison terms that are commonplace in America.<sup>121</sup> While there has been a drive to make sentences longer in Europe, it has focused on serious violent crimes.<sup>122</sup> There has been no push to make sentences extremely harsh for all offenders like in America, where a large proportion of the condemned are minor non-violent offenders.<sup>123</sup> The latter are often convicted for petty offenses as part of the "War on Drugs," which is discriminatorily waged against impoverished African-Americans.<sup>124</sup> In addition, America is essentially the sole democratic country to disenfranchise former convicts.<sup>125</sup>

America equally stands apart from other democracies due to its relatively frequent reliance on solitary confinement,

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116. See ICPS Prison Population Rates, *supra* note 6.

117. See, e.g., David Garland, *Introduction: The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1 (David Garland ed., 2001).

118. See SUZANNE M. KIRCHHOFF, ECONOMIC IMPACTS OF PRISON GROWTH (2010), <https://www.fas.org/sgp/crs/misc/R41177.pdf>.

119. Brief of International *Amici* in *Miller*, *supra* note 49.

120. Neal Hazel, CROSS-NATIONAL COMPARISON OF YOUTH JUSTICE 59 (2008). Even though the U.S. juvenile incarceration rate has decreased since the publication of this comparative study, it remains extremely high by international standards. See Annie E. Casey Foundation, REDUCING YOUTH INCARCINATION IN THE UNITED STATES 1 (2013).

121. See WHITMAN, *supra* note 43.

122. See *id.* at 71.

123. See *id.* People imprisoned for non-violent crimes represent approximately sixty percent of U.S. prisoners. See John Schmitt, Kris Warner, and Sarika Gupta, THE HIGH BUDGETARY COST OF INCARCERATION, CENTER FOR ECONOMIC AND POLICY RESEARCH 1 (2010), <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

124. See generally ALEXANDER, *supra* note 93.

125. See *id.* at 154.

which is often imposed for protracted periods regardless of its extremely harmful effects on prisoners' mental health.<sup>126</sup> The U.N. Special Rapporteur on Torture—Juan E. Méndez, an Argentine expert—has urged U.S. prisons to restrict their use of solitary confinement, describing it as a form of torture contrary to international human rights standards.<sup>127</sup> The Rapporteur illustratively pointed to the cases of two men who spent over four decades confined alone in tiny cells.<sup>128</sup> Notably, the average period of solitary confinement in California is approximately 7 years.<sup>129</sup> Solitary confinement is regularly used in U.S. juvenile facilities as well.<sup>130</sup>

Nonetheless, references to “human rights” are scarce when Americans debate criminal punishment. As noted by Franklin Zimring, “whether executions violate a human right recognized by international authorities (*or any other human rights standard*) is almost never debated in the United States.”<sup>131</sup> Similarly, the extraordinary repressiveness of other U.S. penal practices is seldom framed as a “human rights” issue in America.

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126. See Atul Gawande, *Hellhole*, NEW YORKER, Mar. 30, 2009, [http://www.newyorker.com/reporting/2009/03/30/090330fa\\_fact\\_gawande](http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande).

127. See U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/66/268 (Aug. 5, 2011), <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>; see also *California Jails: “Solitary Confinement Can Amount to Cruel Punishment, Even Torture” – UN Rights Expert*, U.N. OFFICE OF HIGH COMM’R FOR HUMAN RIGHTS (Aug. 23, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13655&LangID=E>.

128. See *US: “Four Decades in Solitary Confinement Can Only Be Described as Torture” – UN Rights Expert*, U.N. OFFICE OF HIGH COMM’R FOR HUMAN RIGHTS (Oct. 7, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13832&LangID=E>.

129. AMNESTY INTERNATIONAL, USA: THE EDGE OF ENDURANCE: PRISON CONDITIONS IN CALIFORNIA’S SECURITY HOUSING UNITS 43 (2012), <http://www.amnestyusa.org/sites/default/files/edgeofendurancecaliforniareport.pdf>.

130. This issue has been particularly covered by Nell Bernstein, a journalist who spent years covering the U.S. juvenile justice system. See ‘Burning Down the House’ Makes the Case Against Juvenile Incarceration, National Public Radio (Interview of Nell Bernstein by Dave Davies), June 4, 2014, <http://www.npr.org/templates/transcript/transcript.php?storyId=318801651>.

131. ZIMRING, *supra* note 35, at 46 (emphasis added).



Part of the reason for the abolition of life imprisonment for juveniles and the death penalty for all crimes in Europe, Canada, Australia, and New Zealand is that most public officials and a significant share of the public identify such punishments as human rights violations.<sup>132</sup> The draconian sentences that are routinely imposed on minor offenders in America would be widely denounced as an affront to human dignity if they existed in other Western countries.<sup>133</sup> That is not to say that these countries' penal systems are exemplary. For instance, prison overpopulation has reached national record levels in France.<sup>134</sup> Still, the incarceration rate in France is seven times lower than in America, where the magnitude of the problem is unmatched.<sup>135</sup>

### B. *Limited Access to Health Care*

In comparison to America, the domestic legal principles of other Western democracies give greater importance to social

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132. See, e.g., Brief of International *Amici* in *Miller*, *supra* note 49 (arguing that sentencing juveniles to life imprisonment is a human rights violation). While the death penalty was abolished by left-wing parties against the popular will in various Western countries, there is now a consensus among mainstream politicians on both the left and right that executions are a human rights violation. A significant share of the public in abolitionist countries still supports executions, yet what distinguishes America is the *intensity* of popular support. See ZIMRING, *supra* note 35, at 11, 23. Further, polls show that opposition to executions has risen in Europe since abolition. See *id.* at 10-11, 23; see also Romain Lemaesquier, *Trente Ans Après l'Abolition de la Peine de Mort, que de Chemin Parcouru*, RADIO FRANCE INTER. (Sept. 30, 2011), <http://www.rfi.fr/france/20110930-30-ans-abolition-peine-mort-quel-chemin-parcouru/>; Johan Nylander, *Sweden Enjoys 100 Years Without Executions*, SWEDISH WIRE (Nov. 23, 2010), <http://www.swedishwire.com/component/content/article/2:politics/7344:sweden-enjoys-100-years-without-death-penalty>; Survey for Channel 4 on Attitudes Towards the Death Penalty, IPSOS MORI (Oct. 28, 2009), <http://www.ipsos-mori.com/researchpublications/researcharchive/poll.aspx?oItemId=2504>.

133. For instance, James Whitman has underlined that continental European states like France and Germany “share a deep commitment to the proposition that criminal offenders must not be degraded—that they must be treated with *respect* and *dignity*.” WHITMAN, *supra* note 43, at 8.

134. See *id.* at 76; see also Editorial, *Prisons Surpeuplées ou Peuple Suremprisonné?*, LE MONDE, Aug. 3, 2011, [http://www.lemonde.fr/idees/article/2011/08/03/prisons-surpeuplees-ou-peuple-suremprisonne\\_1555668\\_3232.html](http://www.lemonde.fr/idees/article/2011/08/03/prisons-surpeuplees-ou-peuple-suremprisonne_1555668_3232.html).

135. See ICPS Prison Population Rates, *supra* note 6.

and economic rights, including universal health care.<sup>136</sup> The right to health care is also covered in the International Covenant on Economic, Social and Cultural Rights (ICESR),<sup>137</sup> which is more of a declaration of rights and aspirations than a binding treaty.<sup>138</sup> Virtually all countries but America have ratified it.<sup>139</sup> As a matter of public policy, the ICESR has limited weight insofar as it has been ratified by myriad impoverished developing countries whose population has scant access to medical care. However, America's refusal to recognize a human right to health care is indicative of its distinctive approach. Compared to other wealthy countries possessing the economic means to provide affordable medical care to all their population, America stands alone in lacking universal health care. This singularity is a salient dimension of American exceptionalism.

Opponents of reform often contend that no one is denied the legal right to health care in the United States because emergency rooms are always available.<sup>140</sup> While hospitals are indeed obligated to treat people facing certain emergencies, such treatment is not free and can be prohibitively expensive.<sup>141</sup> Moreover, routine and preventive care is unavailable in emergency rooms; and various grave medical problems do not qualify as "emergencies."<sup>142</sup>

Lacking health insurance is hazardous. According to a 2009 study, "[t]he uninsured have a higher risk of death when compared to the privately insured, even after taking into account socioeconomics, health behaviors and baseline health."<sup>143</sup> Up to 45,000 annual deaths in America were

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136. See SUNSTEIN, *supra* note 9, at 101-04.

137. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (Dec. 16, 1966).

138. See SUNSTEIN, *supra* note 9, at 101-04, 209.

139. See *id.* at 101.

140. See Paul Krugman, *Death by Ideology*, N.Y. TIMES, Oct. 15, 2012, at A25.

141. See Timothy S. Jost, *The Affordable Care Act: What's There to Like About It?*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 13-14 (2012).

142. See *id.*; see also Aaron Carroll, *Why Emergency Rooms Don't Close the Health Care Gap*, CNN (May 7, 2012), <http://www.cnn.com/2012/05/07/opinion/carroll-emergency-rooms/>.

143. *Harvard Study Finds Nearly 45,000 Excess Deaths Annually Linked*

attributable to the lack of health insurance.<sup>144</sup>

Prior to the enactment of the Obama administration's controversial health care reform, the Affordable Care Act of 2010, approximately fifty million Americans lacked medical insurance<sup>145</sup> and twenty-five million were seriously underinsured.<sup>146</sup> A comprehensive study indicated that medical expenses were a key factor behind sixty-two percent of U.S. bankruptcies in 2007.<sup>147</sup> The majority of bankrupted individuals were not poor but middle-class.<sup>148</sup> Three-quarters had health insurance, although they were direly underinsured.<sup>149</sup> It must be noted that this particular study may have overstated its conclusions.<sup>150</sup> In any event, "[m]edical bankruptcy, whatever its actual frequency, is an extreme example of a much broader phenomenon," namely medical debt.<sup>151</sup> Compelling evidence otherwise suggests that in other developed countries exorbitant medical fees hardly ever lead to severe financial hardship, unlike in America.<sup>152</sup>

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*to Lack of Health Coverage*, PHYSICIANS FOR A NAT'L HEALTH PROGRAM, Sept. 17, 2009, [http://www.pnhp.org/news/2009/september/harvard\\_study\\_finds\\_.php](http://www.pnhp.org/news/2009/september/harvard_study_finds_.php) (quoting Interview with Andrew Wilper, Doctor, Harvard Med. Sch.).

144. *See id.*

145. Reed Abelson, *Census Numbers Show 50.7 Million Uninsured*, N.Y. TIMES, Sept. 16, 2010, <http://prescriptions.blogs.nytimes.com/2010/09/16/census-numbers-show-50-million-uninsured/>.

146. Reed Abelson, *Ranks of Underinsured Are Rising, Study Finds*, N.Y. TIMES, June 10, 2008, <http://www.nytimes.com/2008/06/10/health/policy/10health.html>.

147. David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, AM. J. MED. (2009), [http://www.pnhp.org/new\\_bankruptcy\\_study/Bankruptcy-2009.pdf](http://www.pnhp.org/new_bankruptcy_study/Bankruptcy-2009.pdf).

148. *Id.*

149. *Id.*

150. *See* Edward Fitzpatrick, *Former U.S. Rep. Patrick Kennedy Says Most Bankruptcies in U.S. Are Due to Health Care Costs*, POLITIFACT (July 29, 2012), <http://www.politifact.com/rhode-island/statements/2012/jul/29/patrick-kennedy/former-us-rep-patrick-kennedy-says-most-bankruptci/>.

151. Robert W. Seifert & Mark Rukavina, *Bankruptcy is the Tip of a Medical-Debt Iceberg*, 25 HEALTH AFF. W89, W89 (2006).

152. *See* T.R. REID, THE HEALING OF AMERICA: A GLOBAL QUEST FOR BETTER, CHEAPER, AND FAIRER HEALTH CARE 31 (2009); Ezra Klein, *Why an MRI Costs \$1,080 in America and \$280 in France*, WASH. POST, March 15, 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/15/why-an-mri-costs-1080-in-america-and-280-in-france/>.

Ironically, the Affordable Care Act will only go so far in making care more affordable because it encompasses limited measures to regulate the uniquely steep pricing of medical drugs and treatment in the United States, where providers make exceptionally large profits over people's health problems.<sup>153</sup> Steven Brill, an investigative reporter, uncovered multiple examples illustrating this trend, such as a company making a \$30,000 profit on the sale of an implantable device, a \$15,000 bill charged to a patient for lab tests worth a few hundred dollars, or the sale of a cancer drug for \$13,700 at a 400 percent profit margin.<sup>154</sup> Such practices are not possible in other Western nations due to regulations on the pricing of medical drugs and treatment,<sup>155</sup> not to mention ethical norms curtailing such profiteering by health care providers.<sup>156</sup>

Even though the United States has by far the most expensive health care system worldwide, Americans have far less access to affordable care than other Westerners.<sup>157</sup> Other developed countries generally have equal or better health outcomes than the United States at a drastically lower cost.<sup>158</sup> While the Congressional Budget Office has projected that the Obama administration's reform will expand access to health care, an estimated thirty-one million people will remain uninsured following its full implementation.<sup>159</sup>

Technical problems with the inauguration of online health insurance exchanges under the Affordable Care Act gained

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153. See Steven Brill, *Bitter Pill: Why Medical Bills Are Killing Us*, TIME MAG., Feb. 20, 2013.

154. *Id.*

155. *Id.*

156. See, e.g., Klein, *supra* note 152.

157. See generally *Why Is Health Spending in the United States So High?*, ORG. FOR ECON. CO-OPERATION & DEV. (2011), <http://www.oecd.org/unitedstates/49084355.pdf>.

158. See, e.g., REID, *supra* note 140, at 52-68.

159. *Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014*, CONG. BUDGET OFFICE (2014), [http://www.cbo.gov/sites/default/files/cbofiles/attachments/45231-ACA\\_Estimates.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/45231-ACA_Estimates.pdf); see also Rachel Nardin et al., *The Uninsured After Implementation of the Affordable Care Act: A Demographic and Geographic Analysis*, HEALTH AFF. BLOG (June 6, 2013), <http://healthaffairs.org/blog/2013/06/06/the-uninsured-after-implementation-of-the-affordable-care-act-a-demographic-and-geographic-analysis/>.

significant attention.<sup>160</sup> In fact, these challenges, which were partly internet-related, do not signify that the legislation will necessarily be plagued by recurrent administrative problems, as critics contend.<sup>161</sup> But these challenges exemplify a broader issue. As T.R. Reid underlined, even after the implementation of the Obama administration's health care reform, "the United States will still have the most complicated, the most expensive, and the most inequitable health care system of any developed nation."<sup>162</sup>

Other Western democracies have had universal health care for decades, which is now widely considered a sacrosanct human right<sup>163</sup> by both mainstream right-wing and left-wing political parties.<sup>164</sup> If these countries faced a situation like the United States, where dozens of millions of people are bereft of affordable health care, much of the public and the political leadership would most probably depict this situation as a human rights problem. Yet, even liberal Americans seldom or never invoked "human rights" when calling for affordable health care or when denouncing the predicament of people denied medical treatment by insurance companies due to preexisting medical conditions. This singularly American practice<sup>165</sup> was ultimately barred by the Affordable Care Act.<sup>166</sup> Calls for a fairer system were commonplace but the legal debate over this legislation focused narrowly on whether it was constitutionally permitted by Congress' commerce and taxing powers.<sup>167</sup> Whether Americans should have a fundamental human right to health care was scarcely part of the debate.

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160. Michael D. Shear & Robert Pear, *Obama Admits Web Site Flaws on Health Law*, N.Y. TIMES, Oct. 21, 2013, at A1.

161. *See id.*

162. REID, *supra* note 152, at 251.

163. *See* SUNSTEIN, *supra* note 9, at 101-04.

164. *See generally* REID, *supra* note 152.

165. *See id.* at 38, 233.

166. *Patients with Pre-Existing Health Conditions Buoyed by High Court Ruling*, L.A. TIMES (June 28, 2012), <http://latimesblogs.latimes.com/lanow/2012/06/los-angeles-healthcare-supreme-court-preexisting-condition.html>.

167. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012) (holding that the Affordable Care Act is constitutional).

*C. Torture and Indefinite Detention of Alleged Terrorists*

No other modern Western democracy has gone remotely as far as the United States in disregarding international human rights standards as part of anti-terrorism measures. Former President George W. Bush and former Vice President Dick Cheney proudly admitted to licensing waterboarding,<sup>168</sup> which was a primary means of torture under the Spanish Inquisition.<sup>169</sup> Other torture methods used by the military and Central Intelligence Agency (C.I.A.) in interrogating suspected terrorists were copied from a 1957 Air Force study of techniques used by Chinese communists during the Korean War to elicit confessions from U.S. prisoners.<sup>170</sup> These methods included sleep deprivation, exposure, and prolonged stress positions.<sup>171</sup> America previously identified these methods as “torture.”<sup>172</sup> It was subsequently revealed that the C.I.A. also beat detainees by slamming them into walls.<sup>173</sup> There is no question that torture and the indefinite detention of alleged terrorists without trial squarely violate international human rights standards.<sup>174</sup>

Nevertheless, multiple Republican politicians have campaigned by defending indefinite detention at Guantanamo and “enhanced interrogation techniques,” a euphemism for torture.<sup>175</sup> At a campaign debate in the 2008 election, Mitt Romney illustratively argued that alleged terrorists have no legal rights.<sup>176</sup> “I want [terrorists] on Guantanamo, where they

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168. See Smith, *supra* note 8.

169. See CULLEN MURPHY, *GOD’S JURY: THE INQUISITION AND THE MAKING OF THE MODERN WORLD* 94 (2012).

170. See Scott Shane, *China Inspired Interrogations at Guantanamo*, N.Y. TIMES, July 2, 2008, <http://www.nytimes.com/2008/07/02/us/02detain.html?pagewanted=all>.

171. *Id.*

172. *Id.*

173. See Scott Shane, *U.S. Practiced Torture After 9/11, Nonpartisan Review Concludes*, N.Y. TIMES, Apr. 16, 2013, at A1

174. See U.N. Human Rights Experts on Guantanamo Bay, *supra* note 75.

175. See Editorial, *A Question of Torture*, WASH. POST, May 17, 2007; Chris McGreal, *John McCain ‘Very Disappointed’ with Waterboarding Support at GOP Debate*, GUARDIAN, Nov. 14, 2011.

176. See MARC J. HETHERINGTON & JONATHAN D. WEILER,

don't get the access to lawyers they get when they're on our soil," Romney insisted.<sup>177</sup> "Some people have said, we ought to close Guantanamo. My view is, we ought to *double* Guantanamo," he added, before vowing to support "enhanced interrogation techniques."<sup>178</sup> These remarks led Romney to receive the loudest applause of the debate.<sup>179</sup>

Conversely, torture and indefinite detention by the United States have been widely condemned by European politicians, including conservative leaders like David Cameron<sup>180</sup> and Angela Merkel.<sup>181</sup> The change to a Democratic government has not been synonymous with an end to human rights violations in the "War on Terror." On one hand, it appears that President Obama discontinued torturous interrogation methods.<sup>182</sup> He also vowed to close the Guantanamo detention camp within one year of his inauguration,<sup>183</sup> yet his proposal was blocked by both Democratic and Republican members of Congress, neither of whom wanted Guantanamo detainees brought to America for trial or prolonged detention.<sup>184</sup> On the other hand, Obama asserted that habeas corpus protections do not apply to alleged terrorists held in Bagram, Afghanistan, whom he claimed can be held indefinitely and without judicial review.<sup>185</sup> Obama equally asserted the legal authority to detain alleged terrorists

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AUTHORITARIANISM & POLARIZATION IN AMERICAN POLITICS 136 (2009).

177. *Id.*

178. *Id.* (emphasis added).

179. *Id.*

180. See Nicholas Cecil, *David Cameron Blasts George Bush: Guantanamo Has Made Britain Less Safe*, LONDON EVENING STANDARD, Nov. 11, 2010.

181. *Merkel: Guantanamo Mustn't Exist in Long Term*, SPIEGEL ONLINE (Jan. 9, 2006), <http://www.spiegel.de/international/spiegel-interview-merkel-guantanamo-mustn-t-exist-in-long-term-a-394180.html>.

182. See Charlie Savage, *Election Will Decide Future Interrogation Methods for Terrorism Suspects*, N.Y. TIMES, Sept. 28, 2012, at A14.

183. See Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut Down Guantánamo*, N.Y. TIMES, Jan. 22, 2009, at A1.

184. See David M. Herszenhorn, *Funds to Close Guantánamo Denied*, N.Y. TIMES, May 20, 2009, <http://www.nytimes.com/2009/05/21/us/politics/21detain.html?pagewanted=all>.

185. See Glenn Greenwald, *Obama Wins the Right to Detain People with No Habeas Review*, SALON (May 21, 2010, 1:22 PM), [http://www.salon.com/2010/05/21/bagram\\_6/](http://www.salon.com/2010/05/21/bagram_6/).

forever at Guantanamo even though he declared that he does not intend to do so.<sup>186</sup>

The heavy “collateral damage” caused by U.S. drone strikes on alleged terrorists in Muslim countries raises additional human rights issues. Drone attacks started under President Bush, although President Obama significantly increased them.<sup>187</sup> A 2012 study indicates that drones killed between 2,562 and 3,325 people in Pakistan, including between 474 and 881 civilians, since 2004.<sup>188</sup> “High-level” terrorists comprised only two percent of those killed.<sup>189</sup> Another study determined that several attacks in Yemen by U.S. drones and other aerial weapons killed 82 people, including at least 57 civilians.<sup>190</sup> The inhabitants of the targeted regions commonly live under acute fear of being instantaneously struck by U.S. drones.<sup>191</sup> Not only does this policy raise humanitarian concerns, it also fosters terrorism by radicalizing people, as evidenced by how terrorist groups mention drone strikes in their recruitment efforts.<sup>192</sup>

The methods used in the “War on Terror” have stirred controversy in America. In particular, torture and permanent detention without trial have sharply divided U.S. public

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186. Peter Finn & Anne E. Kornblut, *Obama Creates Indefinite Detention System for Prisoners at Guantanamo Bay*, WASH. POST, Mar. 8, 2011.

187. Living Under Drones: Death, Injury, and Trauma to Civilians from U.S. Drone Practices in Pakistan, Joint Report by Global Justice Clinic (NYU School of Law) and International Human Rights and Conflict Resolution Clinic (Stanford Law School), September 2012, p. 10-12 [hereinafter Living Under Drones].

188. *Id.* at vi.

189. *Id.* at vii.

190. HUMAN RIGHTS WATCH, “BETWEEN A DRONE AND AL-QAEDA”: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN (2013), [http://www.hrw.org/sites/default/files/reports/yemen1013\\_ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/yemen1013_ForUpload_1.pdf) [hereinafter Between a Drone and Al-Qaeda].

191. Living Under Drones, *supra* note 187 at vii, 83-88; AMNESTY INTERNATIONAL, WILL I BE NEXT? US DRONE STRIKES IN PAKISTAN (2013), <http://www.amnesty.org/en/library/asset/ASA33/013/2013/en/041c08cb-fb54-47b3-b3fe-a72c9169e487/asa330132013en.pdf>; Declan Walsh and Ihsanullah Tipu Mehsud, *Civilian Deaths in Drone Strikes Cited in Report*, N.Y. TIMES, Oct. 22, 2013.

192. Living Under Drones, *supra* note 187 at vii-viii, 131-37; Between a Drone and Al-Qaeda, *supra* note 190 at 24-27.



opinion.<sup>193</sup> But only a segment of the Americans who have denounced these practices have depicted them as “human rights” abuses. The human rights argument has been especially advanced by organizations like Amnesty International and Human Rights Watch, namely experts in international human rights.<sup>194</sup> Many American politicians, media commentators, and private citizens opposed to torture did not invoke “human rights.” They instead argued that torture is immoral, unlawful, ineffective, and counter-productive.<sup>195</sup> While references to “human rights” were not entirely missing from the debate in America,<sup>196</sup> they did not play a central role, particularly in comparison to other Western democracies. Much of the reason why U.S. practices in the “War on Terror” have been widely criticized elsewhere in the West is because people often perceive these practices precisely as human rights abuses.<sup>197</sup>

In sum, a range of contemporary American practices violate international human rights standards, as illustrated by the “War on Terror,” draconian criminal punishments, and limited access to health care. The prevalence of such

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193. See, e.g., *Poll Results: Waterboarding Is Torture*, CNN (Nov. 6, 2007),

<http://edition.cnn.com/2007/POLITICS/11/06/waterboard.poll/> [hereinafter *Poll Results re Waterboarding*] (noting that 58 percent of Americans oppose waterboarding whereas 40 support it).

194. See, e.g., HUMAN RIGHTS WATCH, *GETTING AWAY WITH TORTURE* (2011), available at <http://www.hrw.org/node/100262/section/1>.

195. See, e.g., Steve Cohen, *Torture: Ineffective, Illegal, and Unprincipled*, N.Y. OBSERVER, May 4, 2009; Clarence Page, *Cheney's Tortured Argument*, CHI. TRIB., Apr. 29, 2009; Editorial, *The Problem with Republican Support for Waterboarding*, WASH. POST, Nov. 14, 2011; Editorial, *Torture Memo*, SALT LAKE TRIB., Dec. 22, 2008; Editorial, *Terror and Torture*, CHI. TRIB., Feb. 10, 2008; Editorial, *President Should Prohibit Specific Acts of Torture*, DENVER POST, Aug. 2, 2007; R.M. Schneiderman, *New Research Suggests Enhanced Interrogation Not Effective*, DAILY BEAST (May 25, 2012), <http://www.thedailybeast.com/articles/2012/05/25/new-research-suggests-enhanced-interrogation-not-effective.html>.

196. See, e.g., Editorial, *The Road We Need Not Have Traveled*, N.Y. TIMES, Apr. 8, 2012, at SR10 (depicting torture as a “human rights” violation); John McCain, Op-Ed, *Bin Laden's Death and the Debate Over Torture*, WASH. POST, May 11, 2011 (mentioning “human rights” amid other reasons to oppose torture).

197. See, e.g., ANTI-AMERICANISMS IN WORLD POLITICS, *supra* note 77, at 11, 277.

“exceptionalist” practices is plausibly exacerbated by the relative absence of human rights as a principle in domestic U.S. law. Before exploring this question, however, we will consider why America is an outlier.

#### V. Explaining the Absence of “Human Rights” as a Domestic Principle

Why are references to domestic “human rights” relatively rare in the United States? Naturally, there is no single answer to this intricate question, although diverse legal, political, sociological, and historical factors warrant examination.

At the outset, it must be noted that the absence of the concept should not be simply equated with an absence of human rights *per se*. America is a vast country of considerable diversity, and some of its states have been well ahead of their time regarding certain issues. For example, Michigan and Wisconsin definitively abolished the death penalty as early as 1846 and 1853.<sup>198</sup> A dozen American states have been among the world’s trailblazing jurisdictions when it comes to recognizing gay marriage and civil rights.<sup>199</sup> America also has an exemplary human rights record for freedom of speech and religion.<sup>200</sup>

After all, America is a nation with a longstanding tradition of civil liberties. It was the first modern democracy to emerge from the Enlightenment, as the American Revolution of 1776 preceded the French Revolution of 1789.<sup>201</sup> Horst Dippel surveyed the rights conferred by the federal and state

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198. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited April 26, 2014).

199. See Mugambi Jouet, *Why Gay Marriage Is So Controversial in America*, HUFFINGTON POST (June 1, 2012), [http://www.huffingtonpost.com/mugambi-jouet/gay-marriage-controversy\\_b\\_1556992.html](http://www.huffingtonpost.com/mugambi-jouet/gay-marriage-controversy_b_1556992.html).

200. See generally Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 4, at 29.

201. Naturally, notions of democracy and equality in the new American republic were very restrictive by modern standards, as epitomized by slavery and the restriction of the franchise to propertied white males. That being noted, European governments were responsible for comparable abuses.

Constitutions of the United States between 1776 and 1849.<sup>202</sup> Dippel concluded that “[a]most the whole catalog of classic human rights is to be found here,” such as “the right of resistance, the right to vote, the liberty of the press, religious liberty, the right to assemble and to petition, just compensation, the right to remedy, the principle *nulla poena sine lege*, the presumption of innocence, and others.”<sup>203</sup> But the fact that Dippel equated these rights with “human rights” is perhaps revealing of his perspective as a German academic. We saw above that few American scholars readily equate U.S. Constitutional rights with “human rights.”<sup>204</sup>

Further, the paucity of references to the concept in America does not necessarily imply hostility to human rights. While progressive Supreme Court Justices may not refer to “human rights,” they effectively support them in practice. The concept of “human rights” is manifestly outside the frame of reference of numerous Americans, yet other concepts are part of their lexicon, such as “civil rights,” “constitutional rights,” “fairness,” “equality,” and “due process of law.”

To some Americans, however, “human rights” have no place in U.S. domestic law because they are either superfluous or contrary to American values. As noted by M.N.S. Sellers, “in the eyes of the U.S. government and courts most international covenants and treaties recognizing universal human rights are simply restatements of existing U.S. law and established constitutional guarantees.”<sup>205</sup> Insofar as international human rights standards differ from U.S. practices, “American officials have usually preferred their own longstanding precedents to more recent (and less well-established) interpretations of human rights law.”<sup>206</sup>

In other words, the limited mention of “human rights” partly reflects a *substantive* objection to the principle, especially on the part of conservative Americans. Hostility to the concept is embodied by the predominantly Republican

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202. Horst Dippel, *Human Rights in America, 1776-1849: Rediscovering the States' Contribution*, 67 ALB. L. REV. 713, 728 (2004).

203. *Id.*

204. *See supra* note 92 and accompanying text.

205. Sellers, *supra* note 93, at 535.

206. *Id.*

opposition to the ratification of human rights treaties, such as the Rome Statute creating the International Criminal Court, the U.N. Convention on the Elimination of All Forms of Discrimination Against Women, and the U.N. Convention on the Rights of the Child.<sup>207</sup>

Still, opposition to human rights treaties among the American public should not be overstated. Much of the reason why the United States does not adhere to multiple treaties is that its Constitution requires that a treaty be ratified by two-thirds of the Senate, a super majority. Legislatures in other democracies normally ratify treaties by a simple majority vote.<sup>208</sup> The U.S. Constitution thus empowers a minority of opponents, mainly hard-line Republicans, to exempt America from international law.<sup>209</sup> Illustratively, in 2012, the Senate failed to ratify the U.N. Convention on the Rights of Persons With Disabilities even though 61 out of 100 Senators voted for it, virtually all of them Democrats.<sup>210</sup>

Notwithstanding peculiarities in the U.S. treaty ratification procedure, suspicion of human rights treaties remains exceptionally strong in America compared to other Western countries. Opponents of the treaty on the disabled oddly professed that it would infringe on U.S. sovereignty, thereby exemplifying how hostility to treaty ratification in certain segments of American society is fueled by a virulent suspicion of international law and the U.N.<sup>211</sup> That treaty would hardly have burdened America since it was modeled on the Americans With Disabilities Act.<sup>212</sup>

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207. As underlined by Andrew Moravcsik, “the Senate has never ratified an international human rights treaty (even with reservations) when Democrats held fewer than fifty-five seats.” Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 4, at 147, 184.

208. *See id.* at 187.

209. *See id.* at 184.

210. *US Senate Rejects UN Treaty on Disability Rights Amid GOP Opposition*, GUARDIAN, Dec. 4, 2012, <http://www.theguardian.com/world/2012/dec/04/senate-rejects-un-treaty-disability>.

211. *See id.*

212. *See id.*; *see also* Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725, 730 (2013) (noting that this treaty is based on the American With Disabilities Act).

Human rights have not made headway into domestic American law partly for the same reason as international human rights treaties have been resisted by certain Americans. Human rights are commonly perceived as a foreign or international concept. No controversy arises when “human rights abuses” refer to the actions of authoritarian regimes like China, Russia, or Syria. But the notion that “human rights” should be incorporated into domestic American law has triggered intense polemic.

Numerous Republican jurists, politicians, and ordinary citizens have vehemently criticized references to international standards in Supreme Court decisions abolishing the death penalty for juveniles and the mentally retarded, and barring the criminalization of consensual homosexual relations.<sup>213</sup> In Justice Antonin Scalia’s words, “irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”<sup>214</sup> Foreign practices “cannot be imposed upon Americans through the Constitution[,]” he stressed.<sup>215</sup>

Justice Samuel Alito echoed this perspective while making a rare mention of human rights during his Supreme Court confirmation hearings.<sup>216</sup> “I don’t think that foreign law is helpful in interpreting the Constitution[,]” he made clear, before affirming that the United States “has been the leader in protecting individual rights.”<sup>217</sup> “If you look at what the world looked like at the time of the adoption of the Bill of Rights,” Alito went on, “I don’t think there were any [countries] that

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213. *See, e.g.*, Minow, *supra* note 1, at 3-5; TOOBIN, *supra* note 56, at 231, 290.

214. *Atkins v. Virginia*, 536 U.S. 304, 347-48 (2002) (Scalia, J., dissenting).

215. *Id.* at 348. Various other dissenting or concurring opinions similarly denounce reliance on foreign law. *See, e.g., id.* at 322 (Rehnquist, C.J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 622-28 (2005) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting); *Foster v. Florida*, 537 U.S. 990, 990 (2002) (Thomas, J., concurring).

216. Transcript of U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito’s Nomination to the Supreme Court, Jan. 10, 2006, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html>.

217. *Id.*

protected human rights the way our Bill of Rights did. We have our own law. We have our own traditions.”<sup>218</sup>

This resistance to international human rights standards may be interpreted either as legal protectionism, isolationism, insularity, nationalism, or chauvinism. The notion that America has nothing to learn from other countries’ laws is arguably buoyed by the popular belief that it is a special country chosen by God to be a beacon of light to the world. Polls indicate that approximately eighty percent of Americans agree that the U.S. has a unique character that makes it the greatest country in the world.<sup>219</sup> Six in ten Americans additionally believe that “God has granted America a special role in human history.”<sup>220</sup>

However, opposition to human rights is ultimately defined by substantive objections rather than by mere resistance to foreign influences. The main reason why figures like Justices Scalia and Alito have profound reservations about international human rights standards regarding, say, the death penalty or children’s rights, is because they do not agree with the *nature* of these rights. Justice Scalia notably considers that executing juvenile offenders does not violate the Eighth Amendment’s bar on “cruel and unusual punishment.”<sup>221</sup> While he opposes references to international standards in principle, he mainly denounces these standards because they do not comport with his narrow view of prisoners’ rights.

Other substantive objections have animated hostility to the human rights movement. Support for racial segregation spurred early resistance to human rights treaties in the United States. Fear that the U.N. would start focusing on the

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218. *Id.*

219. Jeffrey M. Jones, *Americans See U.S. as Exceptional; 37% Doubt Obama Does*, GALLUP, <http://www.gallup.com/poll/145358/americans-exceptional-doubt-obama.aspx> (last visited Apr. 26, 2014).

220. *Old Alignments, Emerging Fault Lines: Religion in the 2010 Election and Beyond*, PUB. RELIGION RES. INST. (Nov. 17, 2010), <http://publicreligion.org/research/2010/11/old-alignments-emerging-fault-lines-religion-in-the-2010-election-and-beyond/>.

221. *Roper v. Simmons*, 543 U.S. 551, 607 (2005) (Scalia, J., dissenting). This case was decided before Justice Alito joined the Court. Both Justices Alito and Scalia dissented from subsequent decisions curtailing life sentences for teenagers. See *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010).

persecution and lynching of African-Americans led Southern segregationists to lobby against American ratification of the Convention on the Prevention and Punishment of Genocide.<sup>222</sup> Further, Southern pressure was largely responsible for President Eisenhower's decision to cease America's involvement in drafting the International Covenant on Civil and Political Rights in the 1950s.<sup>223</sup> The United States did not ratify the Convention before 1988 and the Covenant before 1992,<sup>224</sup> although they respectively came into force in 1951 and 1976.

The extraordinary weight of Christian fundamentalism in the United States compared to other modern Western democracies<sup>225</sup> is another factor behind opposition to modern human rights standards. Christian fundamentalism fosters ultra-traditional social attitudes,<sup>226</sup> which are a key reason why numerous Republicans have blocked the ratification of the Convention on the Elimination of Discrimination Against Women.<sup>227</sup> Christian fundamentalists and other religious ultra-conservatives (falsely) claim that the Convention would bolster reproductive rights, including access to abortion.<sup>228</sup> Religious hard-liners opposed to secular public schools have likewise played a role in blocking the Conventions on the rights of children and disabled people, which they say would interfere with homeschooling.<sup>229</sup> Given that such treaties are

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222. See Moravcsik, *supra* note 189, at 178-79, 192; John Gerard Ruggie, *American Exceptionalism, Exemptionalism, and Global Governance*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 4, at 304, 323.

223. See Ignatieff, *supra* note 5, at 1, 19.

224. See Moravcsik, *supra* note 189, at 179, 185.

225. See Mugambi Jouet, *The Politics of Faith and American Exceptionalism*, HUFFINGTON POST (Apr. 29, 2012), [http://www.huffingtonpost.com/mugambi-jouet/faith-politics-americans\\_b\\_1462655.html](http://www.huffingtonpost.com/mugambi-jouet/faith-politics-americans_b_1462655.html).

226. See Jouet, *supra* note 181.

227. See James Dao, *Senate Panel Approves Treaty Banning Bias Against Women*, N.Y. TIMES, July 31, 2002, <http://www.nytimes.com/2002/07/31/world/senate-panel-approves-treaty-banning-bias-against-women.html> (describing Republican opposition to the treaty).

228. See *id.*; AMNESTY INTERNATIONAL, A FACT SHEET ON CEDAW: TREATY FOR THE RIGHTS OF WOMEN (2005), [http://www.amnestyusa.org/sites/default/files/pdfs/cedaw\\_fact\\_sheet.pdf](http://www.amnestyusa.org/sites/default/files/pdfs/cedaw_fact_sheet.pdf).

229. See Michael Smith, *Home-Schooling: Losing Ground All Over*

spearheaded by the United Nations, it is noteworthy that certain Christian fundamentalists identify the rise of the U.N. as an omen of the looming Apocalypse and Second Coming of Christ.<sup>230</sup> Such eschatological ideas are not limited to a tiny fringe. Approximately forty percent of Americans expect Jesus to return by 2050.<sup>231</sup>

Geopolitical considerations are equally a driving factor behind American resistance to international human rights standards. When a country is powerful it can be tempted to play by its own rules. John Bolton, a fierce opponent of the International Criminal Court,<sup>232</sup> may be the most outspoken advocate for the notion that international law should not constrain American power. “It is a big mistake for us to grant any validity to international law even when it may seem in our short-term interest to do so[.]” Bolton argued, as in his view “the goal of those who think that international law really means anything are those who want to constrict the United

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*Europe*, WASH. TIMES, June 28, 2009, <http://www.washingtontimes.com/news/2009/jun/28/home-schooling-losing-ground-all-over-europe/>; see also Gail Collins, Op-Ed, *Santorium Strikes Again*, N.Y. TIMES, Dec. 6, 2012, at A35.

230. See Dana Milbank, Op-Ed, *Guess Who Came to the Evangelicals' Dinner*, WASH. POST, Oct. 12, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/11/AR2007101102537.html>.

231. PEW RES. CTR., LIFE IN 2050: AMAZING SCIENCE, FAMILIAR THREATS 15-16 (2010), <http://www.people-press.org/files/legacy-pdf/625.pdf>. Moreover, around forty percent of Americans are convinced that “the severity of recent natural disasters is evidence of what the Bible calls the ‘end times.’” *Few Americans See Earthquakes, Floods and Other Natural Disasters a Sign From God*, PUB. RELIGION RES. INST. (Mar. 24, 2011), <http://publicreligion.org/research/2011/03/few-americans-see-earthquakes-floods-and-other-natural-disasters-a-sign-from-god-2/> (the press release’s title is inapposite given the prevalence of this belief). Prior polls confirm that belief in apocalyptic Biblical prophecies is commonplace in America. See Nancy Gibbs, *Apocalypse Now*, TIME MAG., July 1, 2002, <http://content.time.com/time/magazine/article/0,9171,1002759,00.html>; Kenneth L. Woodward, *The Way the World Ends*, NEWSWEEK, Nov. 15, 1999, <http://www.culteducation.com/reference/millennium/millennium43.html>; *Forty Percent of Americans Believe the World Will End as the Bible Predicts*, PR NEWSWIRE, Oct. 24, 1999, available at <http://www.prnewswire.com/news-releases/newsweek--forty-percent-of-americans-believe-the-world-will-end-as-the-bible-predicts--a-battle-between-jesus-and-the-antichrist-at-armageddon-76809152.html>.

232. International Criminal Court, *Let the Child Live*, ECONOMIST, Jan. 25, 2007, <http://www.economist.com/node/8599155>.



States.”<sup>233</sup>

Last but not least, part of the reason why human rights have hardly made headway as a principle in domestic American law is that the emergence of “human rights” as a prominent concept is a relatively modern development. Samuel Moyn, a historian, has described how the principle of “human rights” has gained greater practical significance since the late 1970s.<sup>234</sup> Illustratively, the European Convention on Human Rights was enacted in 1953, thereby giving birth to the European Court of Human Rights, which was formally established in 1959.<sup>235</sup> Nevertheless, the European Court of Human Rights only decided a small number of cases until its caseload surged in recent decades.<sup>236</sup>

Moreover, research suggests that the human rights argument did not play a decisive role in the abolition of the death penalty in Western Europe.<sup>237</sup> For instance, the British government created a Commission of Inquiry on Capital Punishment in 1949, which essentially suggested abolition but did not discuss “human rights.”<sup>238</sup> In addition, countries like the United Kingdom and France mainly considered abolition a domestic issue, as the anti-death penalty movement then lacked the internationalism that now characterizes it.<sup>239</sup> The United Kingdom abolished the death penalty in 1973 and France did so in 1981.<sup>240</sup> Capital punishment was abolished

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233. Samantha Power, *Boltonism*, NEW YORKER, Mar. 21, 2005, [http://www.newyorker.com/archive/2005/03/21/050321ta\\_talk\\_power](http://www.newyorker.com/archive/2005/03/21/050321ta_talk_power).

234. See, e.g., MOYN, *supra* note 11, at 1-4. Illustratively, the Appendix to Moyn’s book provides a chart tracking references to “human rights” in Anglo-American news. Moyn’s theory is insightful, albeit not flawless, as critical reviewers have noted. See Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 HARV. L. REV. 2043 (2013); Caroline Anderson, Book Note, *Human Rights: A Reckoning*, 53 HARV. INT’L L.J. 549 (2012).

235. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Section II, Nov. 4, 1950, 213 U.N.T.S. 221.

236. See MOYN, *supra* note 11, at 80; see also Polly Curtis, *What’s Wrong With the European Court of Human Rights?*, GUARDIAN, Jan. 25, 2012, <http://www.theguardian.com/politics/reality-check-with-polly-curtis/2012/jan/25/european-court-of-human-rights>.

237. See ZIMRING, *supra* note 35, at 25, 31-32, 200.

238. See *id.* at 20-22.

239. See *id.* at 24-25.

240. *Death Penalty: Countries Abolitionist For All Crimes*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/death-penalty/countries->

earlier in various other European nations, such as the Netherlands (1870) and Norway (1905).<sup>241</sup> But it was not until the death penalty was abolished in Western Europe that abolition evolved into a genuine international human rights movement.<sup>242</sup> The broader human rights movement had by then gained traction,<sup>243</sup> thereby emboldening influential Western European leaders as they started framing capital punishment as a fundamental human rights issue.<sup>244</sup> Abolishing the death penalty became a condition for entry into the Council of Europe and European Union, which encouraged former Soviet bloc countries of Central and Eastern Europe, as well as Turkey, to abolish capital punishment.<sup>245</sup> In 1996, Russia also declared a moratorium on executions to gain entry in the Council of Europe.<sup>246</sup>

Given that the death penalty often symbolizes the divide on human rights between America and other Western countries, another caveat merits consideration. As David Garland has noted, “[t]he sociological language of Exceptionalism suggests that America’s current use of capital punishment is not a transient phase of penal policy but is, instead, anchored in a kind of socio-cultural bedrock.”<sup>247</sup> To the contrary, Garland argues that America appears to be on the same historical path towards abolishing the death penalty followed by other Western nations in prior decades.<sup>248</sup> Various trends lend support to this theory, such as the gradual reduction in the range of capital offenses and death-eligible

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abolitionist-for-all-crimes (last visited Apr. 26, 2014).

241. *Id.* These dates concern the abolition of the death penalty for ordinary crimes. The dates of abolition for war crimes differ by country.

242. *See* ZIMRING, *supra* note 35, at 25-27, 39.

243. *See* MOYN, *supra* note 11, at 1-4.

244. *See* ZIMRING, *supra* note 35, at 26-27, 200.

245. *Id.* at 35-37; *Ankara to Scrap Death Penalty in Wartime*, GUARDIAN, Mar. 3, 2006, <http://www.theguardian.com/world/2006/mar/04/turkey.eu>.

246. *Official Calls for Death Penalty in Russia Again*, N.Y. TIMES, Feb. 26, 2005, [http://www.nytimes.com/2005/02/25/world/europe/25iht-doomed.html?\\_r=0](http://www.nytimes.com/2005/02/25/world/europe/25iht-doomed.html?_r=0).

247. David Garland, *Capital Punishment and American Exceptionalism* 8 (April 26, 2013) (unpublished paper presented at the American Exceptionalism Conference, University of Missouri St. Louis) (on file with author).

248. *See id.* at 19, 25.

offenders in American society.<sup>249</sup> While the future of the U.S. death penalty remains unforeseeable, it is possible that future generations of Americans will come to increasingly regard it as a human rights violation.

Seen in this light, the negligible references to human rights in the American legal, political, and normative debate are not as exceptional as may appear at first glance. Over the past decade, certain Supreme Court Justices have shown greater inclination to consider international human rights standards, which suggests that human rights might gain prominence in domestic American law in the future. But it is just as conceivable that American exceptionalism in this area will persist.

## VI. Implications

Does the relative absence of human rights as a principle in the U.S. legal and political debate explain why modern-day America has a dismal human rights record? Or does relative support for human rights violations explain why human rights are rarely invoked in U.S. law and politics? While determining such cause-and-effect relationships is intricate, these two dynamics are not mutually exclusive. It is plausible that an interrelationship exists between the absence of human rights as a domestic principle and the prevalence of practices violating international human rights standards.

In this section, we will explore whether framing issues like the death penalty and torture as human rights violations could strengthen opposition to these practices in the United States. One may understandably question whether such a change would carry any significance. An appreciable share of Americans already argue that capital punishment<sup>250</sup> and

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249. *See id.* at 25-26. For instance, the Supreme Court has held that the death penalty is no longer a constitutional punishment for rape or for any offense committed by a juvenile. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008) (barring the death penalty for the rape of a child); *Roper v. Simmons*, 543 U.S. 551, 554 (2005) (abolishing the juvenile death penalty); *Coker v. Georgia*, 433 U.S. 584 (1977) (barring the death penalty for the rape of an adult woman).

250. A third of Americans oppose the death penalty, which is not an insignificant minority. *Death Penalty*, GALLUP,

torturous interrogation methods like waterboarding<sup>251</sup> violate, say, “civil rights,” “constitutional rights,” “fairness,” “equality,” or “due process of law.” Depicting perceived abuse in these terms or as “human rights violations” might merely present a semantic problem.

However, “human rights” arguably carry greater symbolic depth than principles like “civil rights.” Human rights are inalienable and held by everyone simply by virtue of being human. The inalienable nature of human rights makes it particularly difficult to challenge them. Stripping people of their civil rights sounds terrible—it would be like stripping them of their citizenship in a nation-state. Stripping people of their human rights sounds even worse—it would amount to stripping them of their very humanity. In other words, human rights have a supranational dimension even though, in practice, nation-states largely carry the responsibility of enforcing these rights. The concept of “human rights” additionally enjoys greater global recognition than the concept of “civil rights” due to the advent of the international human rights movement.<sup>252</sup>

A variant on the aforesaid semantic critique is that “human rights” merely restate rights already existing under domestic U.S. law.<sup>253</sup> For instance, invoking the human right to a fair trial under the International Covenant on Civil and Political Rights,<sup>254</sup> would not necessarily add anything to raising the right to a fair trial under the Sixth Amendment to the U.S. Constitution. That being noted, the substantive scope of certain human rights goes beyond rights under domestic U.S. law, as previously discussed with regard to health care, criminal punishment, and the “War on Terror.”

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<http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Feb. 7, 2014).

251. Six in ten Americans opposed waterboarding by the Bush administration. *See Poll Results re Waterboarding*, *supra* note 175.

252. The internationalism surrounding the human rights movement may be a double-edged sword in America’s case. On one hand, growing international support has increased the legitimacy of the human rights movement. On the other hand, such internationalism exacerbates suspicion towards the human rights movement among certain Americans, as we saw earlier.

253. *See Sellers*, *supra* note 93, at 535.

254. ICCPR, *supra* note 40, at arts. 9, 14.

Furthermore, because certain human rights aim to preserve human dignity and bar degrading treatment, they have greater trenchancy than other rationales frequently invoked in America to oppose abusive practices. When waterboarding and other brutal interrogation methods were intensely debated during the presidency of George W. Bush, numerous opponents of torture did not argue that it violates “human rights.”<sup>255</sup> To be sure, there was an ethical dimension to the position of Americans against torture, who typically argued that such degrading treatment is immoral.<sup>256</sup> But many also emphasized that torture is counter-productive—a utilitarian argument. They claimed that torture would yield unreliable statements because people may admit to anything under agony.<sup>257</sup> They equally argued that torture tarnishes America’s reputation, thereby hindering its ability to act as a global leader.<sup>258</sup> Yet, concluding that torture is counter-productive does not necessarily imply that it is unacceptable, and suggests that it remains an option under certain circumstances. Conversely, freedom from torture is an inviolable human right, as torture constitutes an intrinsic assault on human dignity.<sup>259</sup>

More to the point, American death penalty opponents commonly emphasize procedural concerns: the risk of erroneously killing innocent people, racial discrimination, as well as discrimination against indigent defendants of all races.<sup>260</sup> They also frequently advance utilitarian arguments: the death penalty does not deter crime and is a financial burden due to the high cost of the lengthy and complex legal process in capital cases.<sup>261</sup> While these arguments are valid, they do not necessarily imply that the death penalty is wrong

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255. *See supra* note 195 and accompanying text.

256. *Id.*

257. *Id.*

258. *Id.*

259. For instance, see the reference to “the inherent dignity of the human person” in the preamble to the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51, at 197 (1984).

260. *See generally* Report of the Council to the Membership of the ALI, *supra* note 36.

261. *See id.*

*per se.*

In theory, albeit not in practice,<sup>262</sup> such problems could be “fixed” by ensuring that no innocent is executed, that discrimination is avoided, that executions are swiftly conducted so as to increase their deterrent value, and that costs are reduced. These are indeed the points advanced by death penalty supporters or people ambivalent about the issue.<sup>263</sup> Framing the death penalty as a human rights issue, as is often the case in modern Europe, Canada, Australia, and New Zealand,<sup>264</sup> provides a stronger rationale to oppose the execution of anyone under any circumstances. If the death penalty is a human rights violation, it can never be applied “fairly.”

Zimring’s comparison of anti-death penalty pamphlets by the British and American chapters of Amnesty International illustrates this point. The British pamphlet stressed that “[n]o matter what reason a government gives for executing prisoners and what method of execution is used, the death penalty cannot be separated from the issue of human rights.”<sup>265</sup> The American pamphlet overlooked human rights and emphasized administrative and utilitarian objections to capital punishment.<sup>266</sup> Similarly, the comprehensive 49-page report on the death penalty prepared by Carol and Jordan Steiker on behalf of the American Law Institute (ALI) suggests that the death penalty should be abolished<sup>267</sup> but does not explicitly discuss “human rights” except once when describing

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262. The administration of the death penalty has remained intractable since the Supreme Court reauthorized it in its 1976 *Gregg* decision, which licensed new sentencing statutes that were supposed to make the capital punishment system “fair.” See generally *Gregg v. Georgia*, 428 U.S. 153 (1976); Report of the Council to the Membership of the ALI, *supra* note 36.

263. See generally *Death Penalty*, CRIMINAL JUSTICE LEGAL FOUND., <http://www.cjlf.org/deathpenalty/deathpenalty.htm> (last visited Feb. 11, 2014) (describing the position of the Criminal Justice Legal Foundation, a pro-death penalty group).

264. ZIMRING, *supra* note 35, at 27, 39.

265. *Id.* at 46-47.

266. See *id.*

267. See Report of the Council to the Membership of the ALI, *supra* note 36, at 49 (“[T]he preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved.”).

international opinion.<sup>268</sup>

There is a remarkable unwillingness to advance humanitarian objections to executions even among American opponents of capital punishment. By contrast, death penalty supporters commonly draw on moral arguments, as they contend that killing killers is just deserts and principled retribution to satisfy victims. The Steikers' report acknowledges the moral arguments for and against executions, although it emphasizes that "[r]esolution of these competing claims falls outside the expertise of the Institute," which they deemed only qualified to "evaluate the contemporary administration and legal regulation of the death penalty."<sup>269</sup>

Whether this stance is justified or not, it seems quite exceptionally American in the modern Western world. Contemporary European, Canadian, Australian, and New Zealander jurists are arguably less inclined than their American counterparts to say that they simply cannot assess humanitarian issues and must focus solely on procedural problems. In particular, many would profoundly disagree with the notion that it is not their duty to assess whether executions violate human dignity.<sup>270</sup>

That is not to say that all American jurists are unwilling to consider humanitarian issues or that such considerations are altogether absent from the legal debate. After all, the Supreme Court has made "evolving standards of decency" a key criterion in determining what constitutes "cruel and unusual punishment."<sup>271</sup> The Steikers' report opposed a motion by Roger Clark and Ellen Podgor, fellow ALI members, who argued that the ALI should declare its opposition to capital punishment.<sup>272</sup> Clark and Podgor advanced familiar administrative and utilitarian points, although they also argued that executions

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268. *See id.* at 17 ("the lawfulness or appropriateness of the death penalty is now viewed by many as being as much a question of international human rights as of penal policy").

269. *Id.* at 5-6.

270. *See, e.g.,* WHITMAN, *supra* note 43, at 8 (describing how safeguarding the dignity of prisoners is a major consideration in modern European law).

271. *See, e.g.,* *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

272. Report of the Council to the Membership of the ALI, *supra* note 36, at 1, 5-6.

inherently violate “human dignity.”<sup>273</sup> The ALI Council eventually voted to withdraw the influential death penalty section of the Model Penal code that it had promulgated in 1962.<sup>274</sup> But its resolution stipulated that the ALI would take no stance on the “moral” questions raised by Clark and Podgor’s motion, which divided the ALI Council.<sup>275</sup>

A glaring contradiction in a prominent death penalty case further exemplifies how humanitarian considerations are commonly eclipsed in American law. In July 2013, a Georgia state trial judge stayed the execution of Warren Hill, a man convicted of murder, on the ground that the state’s new lethal injection secrecy law is unconstitutional.<sup>276</sup> The law aims to keep secret the identities of companies that manufacture and supply lethal injection drugs in order to shield them from public pressure to cease their involvement in executions.<sup>277</sup> The judge held that this law made it impossible to “measure the safety of the drug that would be used to execute [Hill].”<sup>278</sup> Yet, how could a lethal drug possibly be “safe” even if an execution is painless? The reference to a “safe” poison is striking.<sup>279</sup>

## VII. Conclusion

Compared to other Western democracies, the principle of

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273. Roger S. Clark & Ellen S. Podgor, *Motion on Capital Punishment* (Annex 1), in Report of the Council to the Membership of the ALI, *supra* note 36.

274. See Message from Lance Liebman, ALI Dir., American Law Institute (Oct. 23, 2009), available at [http://www.ali.org/\\_news/10232009.htm](http://www.ali.org/_news/10232009.htm).

275. See *id.* (cross-referencing Report of the Council to the Membership of the ALI, *supra* note 36, at 5); see also Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES, Jan. 5, 2010, at A11.

276. Hill v. Owens et al., 2013-CV-233771 (Ga. July 18, 2013) [hereinafter Hill Stay Order].

277. See G. CODE ANN. § 42-5-36 (2010); see also Andrew Cohen, *The Warren Hill Execution: A Late Challenge Over Lethal-Injection Drug*, ATLANTIC (July 15, 2013), <http://www.theatlantic.com/national/archive/2013/07/the-warren-hill-execution-a-late-challenge-over-lethal-injection-drug/277776/>.

278. Hill Stay Order, at 3.

279. Granted, the legal issue presented to Judge Gail Tusan was not whether lethal injection is inhumane *per se*, although such paradoxical language is revealing.



inalienable human rights plays a limited role in domestic American law and politics. This relative absence is shaped by a host of factors; and is relevant to understanding why modern-day America has a comparatively dismal human rights record in areas like the “War on Terror,” criminal justice, and access to health care.

Procedural, administrative, and utilitarian arguments play a dominant role in the legal and political debate. Even liberal Americans seldom invoke human rights when defending progressive reforms. Equally remarkable is the aversion of numerous American jurists to considering human rights standards or, to an extent, humanitarian arguments *per se*. Eclipsing the humane dimensions of issues like torture, the death penalty, mass incarceration, and limited access to health care signifies that the heart of these questions is often overlooked.

These facets of modern American society stand in sharp contrast with the nation’s early contributions to the progress of both democracy and human rights. The American Revolution of 1776 predated the French Revolution of 1789, thereby leading the United States to become the first democracy to arise from the Enlightenment. American leaders like President Franklin Roosevelt and Eleanor Roosevelt subsequently played a consequential role in promoting the emerging principle of human rights in international relations. American scholars, diplomats, and lawyers, among other citizens, have likewise made significant contributions to the development of human rights in international law. If human rights have not achieved meaningful recognition as a domestic legal principle in the United States, it partly reflects the contradictions of American society.