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## The Idea of Humanity: Human Rights and Immigrants' Rights

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37 Colum. Hum. Rts. L. Rev. 627-658 (2006)

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# THE IDEA OF HUMANITY: HUMAN RIGHTS AND IMMIGRANTS' RIGHTS

David Cole\*

“The alien was to be protected, not because he was a member of one’s family, clan, or religious community; but because he was a human being. In the alien, therefore, man discovered the idea of humanity.”<sup>1</sup> So wrote Hermann Cohen, a Jewish philosopher, in a 19<sup>th</sup>-century commentary on the Bible. While Cohen was interpreting a very different source of authority, his words point toward the critical moral underpinnings of an international human rights strategy for furthering the rights of foreign nationals. Because they are predicated on one’s status as a human being, rather than on one’s affiliation with any particular nation-state, international human rights are both most relevant to, and most tested by, the treatment of foreign nationals.

In a landmark ruling in 2004, the Law Lords of Great Britain invalidated a statute authorizing indefinite preventive detention of foreign nationals who were suspected terrorists.<sup>2</sup> The Court found that the statute conflicted with the obligation not to discriminate against foreign nationals, an obligation found in the European Convention on Human Rights, which Britain had incorporated into

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\* Professor, Georgetown University Law Center. I thank Sean Abouchedid and Marian Fowler, my research assistants at Georgetown, for invaluable assistance in the research for this article. I presented this paper to a working group on human rights sponsored by Notre Dame Law School and at a human rights symposium sponsored by Fribourg University in Switzerland, and benefited greatly from the comments of the participants in both settings.

1. H. Freedman, ed., *Jeremiah, Hebrew Text & English Translation with an Introduction and Commentary*, 52 (A. Cohen, ed., the Sancio Press 1949) (quoting Hermann Cohen).

2. The Law Lords of Great Britain declared invalid a statute authorizing indefinite preventive detention of foreign nationals who were suspected terrorists. *A(FC) and others v. Secretary of State for the Home Department*, [2004] UKHL 56 (appeal taken from Eng.).

its own law in the Human Rights Act.<sup>3</sup> The Court reasoned that a “suspected terrorist” poses the same threat whether he is a British citizen or a foreign national, and therefore there is no justification for treating the two differently.<sup>4</sup> The Law Lords’ decision is the ideal model for the integration of human rights and immigrants’ rights. The Court relied on international standards, made part of domestic law, to enforce equality between all persons, regardless of nationality.

Just six months before the Law Lords ruled, the Supreme Court declared that the United States had violated Yaser Hamdi’s constitutional rights by holding him as an enemy combatant for two years without charges and without any hearing in which he could protest his innocence and confront the evidence against him.<sup>5</sup> The Court rested its decision on the Due Process Clause of the Fifth Amendment, which bars the government from depriving “any person” of life, liberty, or property without due process.<sup>6</sup> Yaser Hamdi, however, was not just any person—he was a United States citizen. And while the Court never explained what relevance that fact had to the constitutional inquiry (it has elsewhere stated that due process protects all persons in the United States, regardless of citizenship status), the Court managed to mention that Hamdi was a U.S. citizen eleven times.<sup>7</sup> The attitude reflected by the Court’s repeated mantra of citizenship could not be more different from the approach adopted by the Law Lords of Great Britain.

Are international human rights arguments likely to be effective in advancing immigrants’ rights in the United States? There are many reasons to be pessimistic. Despite its history as a nation of immigrants and the ever-increasing diversity of its populace, the United States remains a deeply parochial and nationalist culture, and the law shares that parochialism. International human rights arguments are often seen as the advocates’ last refuge, pulled out only when there is no other authority to cite. In the absence of an international forum with the power to hold the United States accountable, and in the face of Congressional directives that the international human rights treaties it has ratified are not “self-

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3. *Id.* at 22.

4. *Id.* at 19.

5. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

6. U.S. Const. amend. V.

7. *Hamdi v. Rumsfeld*, 542 U.S. at 509, 510, 511, 516, 524, 527, 528, 531, 532, 533, 537.

executing," international human rights feel aspirational, without the force of law. It is not surprising, then, that international human rights arguments are rarely advanced in domestic U.S. courts—in immigration cases or elsewhere. Nor should it be surprising that in those few instances where such arguments are broached, they are as often as not ignored or summarily dismissed.

Yet despite these substantial obstacles, there are also reasons to be optimistic about the potential for advancing immigrants' rights through international human rights. As Hermann Cohen's quotation implies, human rights are just that—*human* rights—and therefore generally do not acknowledge distinctions between citizens and noncitizens. The rights identified and protected in international human rights treaties derive from human dignity, and dignity does not turn on the type of passport or visa a person holds. Accordingly, human rights discourse offers tremendous normative power and potential for advancing social justice on behalf of foreign nationals in the United States. In some sense, it would be irresponsible *not* to explore that potential. And for a variety of reasons, now is an especially propitious time for such exploration.

This essay seeks to assess the role that international human rights law might have in the effort to protect, strengthen, and develop legal protections for immigrants. I will first outline in more detail the difficulties that any international human rights strategy will confront. I will then suggest, however, that the opportunities that this particular historical moment offers may outweigh the dangers, and that in any event historical trends strongly suggest that we will see increasing incorporation of international norms in the domestic setting. Finally, I will suggest that in order to be most effective, advocates should adopt a three-pronged strategy: advancing modest claims of statutory construction and constitutional interpretation in the courts; advocating more expansive conceptions of international human rights in the political and popular realms; and pushing for the creation of institutions and processes to bring international human rights considerations into domestic policymaking at the outset, before disputes arise.

## I. OBSTACLES

American law and culture pose at least three considerable impediments to a legal or political strategy aimed at furthering immigrants' rights through international human rights. The first is specific to this historical moment. The attacks of September 11

succeeded in terrorizing the American psyche and have led to a new wave of anti-immigration sentiment. That sentiment may make resort to international human rights claims in this area especially risky. The anti-immigrant feeling is in part due to the fact that all nineteen suicide bombers were noncitizens, backed by an international terrorist organization comprised almost entirely of foreign nationals. But discrimination against immigrants is also founded on the fact that, as in every other serious national security crisis in our past, government officials have found it easier to sacrifice the rights of non-voting foreign nationals for the purported security of the nation than to ask voting Americans to sacrifice their own rights and liberties in the name of promises of greater security.<sup>8</sup> Louis Post's description of the Palmer Raids of 1919-1920, which rounded up thousands of foreign nationals after a series of terrorist bombings, is equally applicable to the government's post-9/11 response: "the delirium caused by the bombings turned in the direction of a deportation crusade with the spontaneity of water seeking out the course of least resistance."<sup>9</sup> In such situations, deportation of foreign nationals is "the course of least resistance,"<sup>10</sup> especially when they are viewed as "them" in the us-them dichotomy that so often dominates public discourse and consciousness in a time of war.

The targeting of foreign nationals has taken many forms, from incommunicado detention and torture abroad to preventive detention, systemic surveillance, and ethnic profiling at home. Many of the most troubling initiatives have been undertaken through immigration law. Bent and twisted to serve purposes it was never designed to achieve, immigration law has led to widespread secret arrests without charges, secret trials, denials of access to counsel, detention without probable cause, and even the rendering of foreign nationals to other countries for torture.<sup>11</sup> Early in the aftermath of 9/11, Attorney General John Ashcroft discovered that the immigration laws afforded him wide-ranging discretion—a discretion he expanded far beyond its already capacious boundaries—to target foreign nationals as "suspected terrorists" on little or no evidence of

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8. For development of this point, see David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* 72-82 (2003).

9. Louis F. Post, *The Deportations Delirium of Nineteen-Twenty: A Personal Narrative of an Historic Official Experience* 307 (1923).

10. *Id.* at 307.

11. See Cole, *supra* note 8, at 17-82.

involvement in anything remotely close to terrorist activity.<sup>12</sup> Just as traffic regulations have enabled narcotics officers to engage in pretextual stops and searches, so immigration law has given federal agents the pretext they need to stop, search, monitor, and interrogate foreign nationals in the search for terrorists.

The utility of immigration law and immigrant targeting to law enforcement officials and politicians means that invoking international human rights in this realm presents considerable risk. If immigration law is driven by the politics of fear and the course of least resistance, the invocation of international human rights in this setting may do more to harm international human rights than to help immigration law. The incentives to target foreign nationals may prove too powerful, and may lead courts, Congress, the executive, and the public at large to take a rather dim view of the legal limitations posed by international instruments. Nowhere has this been more evident than in the Administration's detention and interrogation of foreign nationals abroad. The international laws of armed conflict recognize the power of a state in wartime to hold those fighting for the other side for the duration of the conflict, but impose basic limits on that power, including guarantees of fair process and prohibitions on torture and inhumane treatment.<sup>13</sup> Claiming that this is a new kind of war, the Administration has sought to employ the extraordinary powers of war while evading the international law limits on those powers, refusing until suffering defeat in the Supreme Court to provide Guantanamo detainees with any sort of hearing to assess their status<sup>14</sup> and maintaining in secret Justice Department and Pentagon memos that the international law prohibition on torture cannot constrain the President in wartime.<sup>15</sup> It

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12. See U.S. Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) (describing ways that the Justice Department abused immigration law to hold foreign nationals "of interest" to the 9/11 investigation on little or no basis for suspicion); see also Cole, *supra* note 8, at 17-21.

13. See generally Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 1, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 138 (establishing standards relating to the detainment of prisoners of war).

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

15. Memorandum from Jay S. Bybee to Alberto Gonzales, Regarding Standards for Conduct for Interrogation under 18 U.S.C. §§2340-2340A (Aug. 1, 2002), *reprinted in* Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror*, 115 (2004) [hereinafter *Torture Memo*]. Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment

has long been said that civil liberties are some of the first casualties of war, but international human rights may be even earlier to go.

The second reason to be pessimistic about the effectiveness of international human rights claims lies in the skeptical reception such claims have long been given in the United States. Until recently, a lawyer litigating for social change in the United States would use international human rights arguments only after all statutory and constitutional law arguments had failed, and even then without much hope of actually prevailing. American legal culture has long viewed international human rights as “mere surplusage” when it comes to domestic law. Many assume that international human rights norms are not likely to provide greater guarantees than does the Constitution. Congress has often made this a self-fulfilling prophecy by adopting reservations in ratifying international human rights conventions providing that the treaties not be read as mandating anything more than what American constitutional law guarantees.<sup>16</sup> There is a dearth of lawyers trained to employ international human rights arguments, and judges are unaccustomed to hearing such arguments, much less to taking them seriously. A variety of legal doctrines erect barriers to private enforcement of international human rights in domestic courts, and there is no effective international legal forum for enforcement against the United States.<sup>17</sup> All of these circumstances combine to make

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of Legal, Historical, Policy and Operational Considerations (April 4, 2003), reprinted in *id.* at 187.

16. Congress adopted a reservation for Article 16 of the Convention on Torture that the prohibition on “degrading treatment” was no more than a prohibition against “cruel and unusual punishment” within what the Eighth Amendment guarantees. Resolution of Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment §I(1), 101st Cong. 136 Cong. Rec. 17491 (1990). Congress also adopted a reservation for Article 6 of the ICCPR negating the provision against the death penalty for minors. Resolution of Ratification of the International Covenant on Civil and Political Rights §I(2), 102nd Cong., 138 Cong. Rec. 4783 (1992) (enacted). See generally Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 Chi. J. Int'l L. 347 (2000) (discussing practice of treaty reservations).

17. See Michael Byers, *The Law And Politics Of The Pinochet Case*, 10 Duke J. Comp. & Int'l L. 415, 418 (2000), for a general analysis of the difficulties faced prosecuting international human rights violations in domestic courts. . See also *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (stating that the plaintiff alleging participation by the Drug Enforcement Agency in his abduction from Mexico for trial in the United States was not entitled to a remedy under the Alien Tort Statute).



international human rights appear illusory and utopian, not real constraints to be taken seriously by the political or legal branches of government.

The skepticism is evident in Supreme Court opinions. In 2004, the Supreme Court narrowly interpreted the Alien Tort Statute, which had for twenty years been the principal avenue for development of international human rights law in U.S. courts.<sup>18</sup> The Court limited the Alien Tort Statute to enforcement of those international human rights norms that already have the specificity and uniform consensus that characterized the three international law violations recognized as affording private individuals a cause of action at the time of the Alien Tort Statute's enactment in 1798—injuries against ambassadors, denial of safe conduct, and piracy.<sup>19</sup> While the Court significantly left “the door ajar” to U.S. courts' *enforcement* of such widely established international human rights claims,<sup>20</sup> its limitation on the types of claims that are cognizable is likely to make U.S. courts inhospitable for the *development* of international human rights claims in Alien Tort Statute lawsuits.

As I will suggest later, the *Sosa* decision is by no means a fatal bar to international human rights advocates in domestic courts, particularly where they invoke international law as a guide to the interpretation of statutory or constitutional questions rather than as an independent source of relief. But perhaps more significantly, the Court's reasoning for its narrow construction of the Alien Tort Statute reflects substantial judicial discomfort with playing an active role in the development of international human rights law. The Court listed several reasons for construing the judicial role narrowly, and all are likely to be cited by defendants in international human rights cases as reasons for judicial restraint in this domain generally. The Court noted that while it has long been recognized that the law of nations is a part of federal common law, modern conceptions of both common law and the role of federal courts contemplate a much more limited role for courts than was assumed at the time of the Framers, when it was thought that common law was found, not made, by courts.<sup>21</sup> The Court also reasoned that modern jurisprudence disfavors judicially created private rights of action and that the interpretation of international human rights will often

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18. *Sosa*, 542 U.S. at 692.

19. *Id.* at 725.

20. *Id.* at 729.

21. *Id.* at 725.

implicate matters of foreign relations best left to the political branches.<sup>22</sup> Moreover, the Court saw “no Congressional mandate to seek out and define new and debatable violations of the law of nations.”<sup>23</sup>

Finally, even apart from the specific challenges posed by the post-9/11 era, immigration law is an especially difficult arena for advancing individual rights claims of any kind, much less those based on international law. The Supreme Court has long characterized the immigration power as “plenary,” and government lawyers inevitably open their briefs in immigrants’ rights cases by quoting decisions suggesting that the principal limits on that “plenary power” are political, not legal, in nature.<sup>24</sup> The Supreme Court has only rarely declared an immigration law unconstitutional, and the casebooks are replete with examples of injustices that would plainly not be tolerated (legally or politically) had the victims been U.S. citizens.<sup>25</sup> As the Supreme Court reiterated in 2002, upholding a statute imposing mandatory preventive detention on foreign nationals, a practice that would never pass constitutional muster if applied to citizens, “Congress regularly makes rules [for aliens] that

22. *Id.* at 727.

23. *Id.* at 728.

24. *See, e.g.,* *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952) (“[The Court is] urged to apply some doctrine of atonement and redemption. Congress might well have done so, but it is not for the judiciary to usurp the function of granting absolution or pardon [for immigrants]. We cannot do so for deportable ex-convicts, even though they have served a term of imprisonment calculated to bring about their reformation.”); *Matthews v. Diaz*, 426 U.S. 67, 79 (1976) (“[I]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”); *see generally* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 *Geo. Immigr. L.J.* 365 (2002) (arguing that although the *Zadvydas* decision purports to establish constitutional limits to Congress’s plenary power over immigration, it is unlikely to do so in practice); Cornelia T. L. Pillard and T. Alexander Aleinikoff, *Skeptical Scrutiny Of Plenary Power: Judicial And Executive Branch Decision Making In Miller v. Albright*, 1998 *Sup. Ct. Rev.* 1 (1998) (criticizing the Supreme Court’s use of a deferential standard derived from Congress’s plenary power over immigration to evaluate the constitutionality of a discriminatory immigration statute instead of using heightened scrutiny); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 *Hastings Const. L.Q.* 925 (1994-1995) (reviewing the development of the plenary power doctrine up to the mid-1990s and advancing predictions for its future).

25. *See, e.g., Galvan v. Press*, 347 U.S. 522 (1954) (upholding retroactive application of immigration laws to make a foreign national deportable for conduct that was legal at the time he engaged in it).

would be unacceptable if applied to citizens.”<sup>26</sup>

These concerns make clear that international human rights arguments are no magic sword in the stone for immigrants' rights advocates. In their own respective spheres, advancing immigrants' rights and international human rights have been uphill battles. Combining the two might well be dismissed as “naïve and dangerous” idealism, as President Bush might put it.<sup>27</sup> But as I will show in the next section, each of the obstacles identified above simultaneously provides an opportunity. With the right emphasis and tactics, international human rights arguments may well prove a critical tool in the arsenal of those who seek to advance immigrants' rights.

## II. OPPORTUNITIES

It may not always be true that the flipside of obstacle is opportunity, but in this instance each of the phenomena described above has a correlative benefit. First, while anti-immigrant fear and bias pervade the post-9/11 atmosphere, the realities of waging a war against an international organization or organizations dispersed in a large number of countries underscore the need for global legitimacy and have the potential to shore up arguments for respecting our international obligations. Second, although skepticism about international human rights remains a significant strand in American legal culture, the trend line appears headed in the opposite direction, toward a transnational legal justice system in which, as Harold Koh has argued, the national and the international increasingly merge.<sup>28</sup> In my view, we may well be in the midst of a paradigm shift on the subject of international authority with interesting parallels to the shift from state to federal power that the United States experienced in the wake of the New Deal. Finally, the source of the “plenary

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26. *Matthews v. Diaz*, 426 U.S. 67, 79 (1976); *see also* *Demore v. Kim*, 538 U.S. 510, 521-22 (2003); *see* David Cole, *Not Too Much for an Alien*, Wash. Post, May 7, 2003, at A3; *see generally* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003 (2002) (criticizing the contemporary practice of indefinitely detaining aliens subject to a final order of deportation for the sole purpose of carrying out 9/11-related criminal investigations, which have thus far proven fruitless).

27. Commission on Presidential Debates, Second Presidential Candidates' Debate, October 8, 2004, available at <http://www.debates.org/pages/trans2004c.html> (criticizing John Kerry's proposal for bilateral relations with North Korea as “naïve and dangerous”).

28. *See* Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int'l. L. 43, 56 (2004).

power” of immigration has long been identified as international law itself, and therefore international law is already implicated in the definition and scope of that power. In the early days of the republic, international law considered power over immigration as inherent in sovereignty itself.<sup>29</sup> But the evolution of international human rights has placed significant restrictions on sovereignty, and since the immigration power rests in significant part on international legal foundations, it may be particularly susceptible to those restrictions.

The double-edged nature of the post-9/11 atmosphere has been made painfully clear by the revelations of torture and other degrading treatment at Guantanamo Bay, Abu Ghraib Prison in Iraq, Bagram Air Force Base in Afghanistan, and unnamed CIA detention centers around the world.<sup>30</sup> The path to Abu Ghraib was paved by the Administration’s desire to push the limits of torture in coercing detainees to talk in interrogation rooms around the world. That desire led to a truly astounding opinion from the Office of Legal Counsel (OLC)—supposedly the legal conscience of the Executive Branch—that treated the torture prohibition as if it were a tax code, and as if the main function of the lawyer was not to ensure that the letter and spirit of the law be honored, but to find loopholes in the code.<sup>31</sup> The OLC opinion argued that it was permissible to threaten a detainee with death, as long as it was not a threat of “imminent death;” that it was permissible to administer personality-altering drugs as long as they did not “penetrate to the core of an individual’s ability to perceive the world around him;” that infliction of mental harm was appropriate as long as it was not “prolonged;” and that physical pain was acceptable as long as it was not the kind of severe pain that might accompany “organ failure.”<sup>32</sup> It even went so far as to argue that the President could authorize out-and-out torture in his capacity as Commander-in-Chief and that it would be unconstitutional for international human rights treaties or federal statutes to ban him from doing so.<sup>33</sup> The Convention Against Torture, which the United States has signed and ratified,

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29. See *Beharry v. Reno*, 183 F. Supp.2d 584, 598 (E.D.N.Y. 2002) (citing Supreme Court decisions noting that immigration power stems from international law conceptions of sovereignty) (and cases cited therein), *rev’d on other grounds*, 329 F.3d 51 (2d Cir. 2003).

30. See generally Danner, *supra* note 15 (providing extensive reporting of the Abu Ghraib torture scandal).

31. See Bybee Memorandum, August 2, 2002, *supra* note 15.

32. *Id.* at 119-25.

33. *Id.* at 146-49.

categorically forbids torture under any circumstances.<sup>34</sup> Yet as the Justice Department memo demonstrated, the war on terrorism creates powerful temptations to flout international law.

Once the photos from Abu Ghraib were released worldwide, politicians in and out of the Administration almost immediately realized that this instance of pushing the bounds of international law had backfired. Reactions in and around Washington sometimes expressed concern for the injuries suffered by the Iraqi detainees, but nearly always reserved their deepest concern for the disastrous impact these pictures would have on American foreign policy.<sup>35</sup> That expression of concern illustrated what the 9/11 Commission later noted in its report—that success in fighting terrorism turns in large measure on perceptions of the United States held around the world.<sup>36</sup> If we are seen as pursuing illegitimate means in the effort to keep ourselves secure, we will suffer serious consequences, as we will find it more difficult to obtain the cooperation we need in order to find and incapacitate terrorist threats, and Al Qaeda and other terrorist groups will find it easier to find willing recruits to the fight against us.

The Defense Department itself has recognized that we must take seriously the battle for “hearts and minds.”<sup>37</sup> That reality

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34. The Convention Against Torture provides that, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” UN Convention on Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art. 2, S. Treaty Doc. No. 100-20, at 20, 1465 U.N.T.S. 85, 114 (entered into force June 26, 1987) [hereinafter *Convention on Torture*].

35. “[N]egligence is anything but benign in the damage it threatens to our national security and foreign policy interests, at a particularly dangerous time.” Statement Of Senator Patrick Leahy On The Abuse Of Prisoners in U.S. Military Custody (May 5, 2004), *available at* <http://leahy.senate.gov/press/index.html>; “I think it was a failure of political judgment or public relations judgment not a failure to do his job and see that the investigations got done and the people got punished.” Representative James Woolsey, quoted in *Online NewsHour, Rumsfeld Under Fire* (May 6, 2004) [http://www.pbs.org/newshour/bb/white\\_house/jan-june04/rumsfeld\\_5-06.html](http://www.pbs.org/newshour/bb/white_house/jan-june04/rumsfeld_5-06.html).

36. National Comm’n on Terrorist Attacks upon the United States, *The 9/11 Commission Report* 375, 376 (2004).

37. “The information campaign—or as some still would have it, ‘the war of ideas,’ or the struggle for ‘hearts and minds’—is important to every war effort.” Office of the Under Sec’y of Def. for Acquisition, Tech. & Logistics, Report of the Def. Sci. Bd. Task Force on Strategic Comm’n 39 (September 2004), *available at* <http://www.acq.osd.mil/dsb/reports/20>

creates an opportunity for advocates concerned about the treatment of foreign nationals in the war on terrorism. The way we treat other countries' nationals is covered extensively in the foreign media, and arguably much of the anti-American resentment so prevalent around the world today can be attributed to the perception that the United States is not willing to accord to "them" the dignity and respect that international human rights demand, and is not willing to play by the rules that international law sets out.<sup>38</sup> Moreover, the very fact that foreign nationals are so often the first targets of our security initiatives makes foreign nations and foreign media potential partners in calling attention to violations of international human rights here at home.

Guantanamo is a perfect example. Nationals of forty-two separate nations have been held there,<sup>39</sup> and as a result Guantanamo quickly became a focal point for international condemnation of the United States' policies in the war on terror, even in Great Britain, our closest ally in the war on terrorism and the war in Iraq.<sup>40</sup> The international condemnation directed at Guantanamo, articulated in terms of international law, in turn affected the legal landscape at home, and very likely played a significant role in the Supreme Court's decision not only to hear the Guantanamo detainees' cases, but to resoundingly reject the Administration's position that its actions at Guantanamo were immune from any judicial or legal limitations. Thus, while the war on terror makes immigrants the likely targets of most of the worst excesses, that fact in turn makes fundamental international norms more relevant, in both diplomatic and legal terms.

Phrasing rights claims in the language of international human rights may facilitate international pressure. When one charges that the United States government has violated the First or

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38. Cole, *supra* note 8, at 183-204.

39. *A Place in the Sun, Beyond the Law*, Economist, May 10, 2003, at 12; David Cole, *Korematsu II?*, The Nation, Dec. 8, 2003, at 6.

40. British Law Lord John Steyn stated, "Ought the British Government to make plain publicly and unambiguously its condemnation of the utter lawlessness at Guantanamo Bay?" Lord Steyn also called the treatment of prisoners "a monstrous failure of justice." Anthony Sampson, *The Damaging Legacy Of Our Silence Over This Offshore Haven For Torturers*, The Independent (London), June 19, 2004 at 39; Brief of 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Petitioners at 12-16, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-343, 03-334).

Fifth Amendments to the Constitution, foreign observers are likely to defer to Americans on the issue. What basis does a Swiss or Saudi citizen have to judge whether given actions violate American constitutional norms? Where, by contrast, the charges are framed in terms of international human rights, they speak a transnational language, one with which citizens and lawyers from any number of countries will feel more comfortable. There is no need to defer to the United States, for example, on what the International Covenant on Civil and Political Rights or the Geneva Conventions say. Thus, international human rights language facilitates international moral and legal pressure on troubling U.S. practices.

The second obstacle to international human rights advocacy—the unfamiliarity, skepticism, or even hostility of American judges, lawyers, and others to international law arguments—also has a flipside. “Nationalists” opposed to the intervention of international standards remain in significant positions of power—see, for example, President Bush’s summary dismissal during the 2004 presidential debates of Senator Kerry’s suggestion of a “global test” for going to war, or see Justice Scalia’s scathing criticism of any invocation of international or foreign court decisions in interpreting our Constitution.<sup>41</sup> But the path of history toward globalization suggests that adoption of a more transnational or international perspective is virtually inevitable.

Indeed, when historians look back at the current period, they may well conclude that we are in the midst of a fundamental paradigm shift on the subject of international law—akin to the shift from state to federal power that the nation experienced in the post-New Deal era with respect to business and labor regulation under the Commerce Clause and individual rights under the Fourteenth Amendment’s Due Process Clause. Just as the post-New Deal and civil rights eras saw a shift in authority based on a recognition of the increasing importance of uniform federal standards with respect to the rights of workers, consumers, criminal defendants, and members of minority groups, so too today we may be seeing a shift in attitudes about the role of national and international law in the regulation of business and basic human rights. Just as the integrated national

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41. George W. Bush, Remarks at the First Presidential Debate between President George Bush and Senator John Kerry (Sept. 30, 2004) (transcript available from The Washington Post), *available at* [http://www.washingtonpost.com/wp-srv/politics/debatereferee/debate\\_0930.html](http://www.washingtonpost.com/wp-srv/politics/debatereferee/debate_0930.html); *Roper v. Simmons*, 125 S. Ct. 1183, 1226-29 (2004) (Scalia, J., dissenting).

economy required more centralized national power, so the forces of globalization today are rendering national borders less critical in the articulation and protection of legal rights.

The New Deal transformation in American constitutional law was so significant that Professor Bruce Ackerman has labeled it a “constitutional moment,” likening it to constitutional amendments that fundamentally alter the understanding of our governing framework.<sup>42</sup> Prior to the New Deal, business regulation was thought to be a matter for local and state regulation, and Congress was authorized to act only when it sought to regulate commerce that was actually *interstate*.<sup>43</sup> The Court accordingly struck down a range of federal statutes designed to protect workers from exploitation by employers. Similarly, protection of individual rights was generally considered a matter for the states. The Court generally viewed the Bill of Rights as applying only to the federal government, and not to the states.<sup>44</sup> But the post-New Deal era saw both of these rules reversed. The Court, recognizing that we now had an integrated national economy, acknowledged Congress’s “plenary power” to regulate any conduct that Congress might rationally believe affected interstate commerce.<sup>45</sup> Also, the Court increasingly interpreted the Fourteenth Amendment’s Due Process Clause to “incorporate” the specific protections of the Bill of Rights and apply them to the states.<sup>46</sup> Both developments had the effect of harmonizing the obligations imposed on federal and state governments and giving the federal government substantially greater power, in recognition of the need for federal protection of the rights of workers, consumers, and minority groups.

There are signs of a similar shift toward globalization and international human rights today. The international human rights movement, a product of the past fifty years, has grown from a nascent idea into a vast network of international treaties,

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42. See Bruce Ackerman, *Reconstructing American Law* (1984).

43. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

44. See, e.g., *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908).

45. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

46. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968).



institutions, and non-governmental organizations.<sup>47</sup> The U.N. Declaration of Rights dates back to 1948.<sup>48</sup> In its wake came the International Covenant on Civil and Political Rights in 1966 and regional human rights treaties for the Americas, Europe, and Africa.<sup>49</sup> In the 1990s, Congress ratified three important human rights treaties—the ICCPR, the Convention Against Torture, and the Convention Against All Forms of Racial Discrimination.<sup>50</sup> Similar trends are evident elsewhere. Great Britain has incorporated the European Convention on Human Rights into its own domestic law by enacting a Human Rights Act, and numerous Eastern European countries have signed on to the European Convention on Human Rights and its transnational enforcement regime.<sup>51</sup> Meanwhile, here at home, human rights non-governmental organizations have increasingly turned their human rights scrutiny homeward, bringing the tactics of shaming to bear on their home country in reports criticizing the United States' treatment of immigrants, racial minorities, and criminal defendants, especially those on death row.<sup>52</sup>

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47. See Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (2d ed. 2003).

48. Universal Declaration of Human Rights, G.A. Res. 217 (III)(A), U.N. GAOR, 3d Sess., Supp. No. 127, U.N. Doc. A/810 (1948).

49. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 9, S. Exec. Doc. E, 95-2, at 26 (1978), 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; African Charter on Human and Peoples' Rights, art. 13, June 26, 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, *reprinted in* 21 I.L.M. 58 (1982); American Convention on Human Rights, art. 23, Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 222.

50. ICCPR, *supra* note 49; Convention on Torture, *supra* note 34; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. NO. C, 95-2 (1978), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

51. Human Rights Act, 1998, c. 42 (Eng.); all Council of Europe member states are party to the European Convention on Human Rights. The Council of Europe, *Chart of Signatures and Ratifications*, available at <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>.

52. See, e.g., Human Rights Watch, *Scores of Muslim Men Jailed Without Charge* (June 27, 2005), available at <http://hrw.org/english/docs/2005/06/27/usdom11213.htm>; Amnesty International, *USA (Texas): Death Penalty: David Martinez* (July 22, 2005), available at <http://web.amnesty.org/library/Index/ENGAMR511152005?open&of=ENG-USA>; Amnesty International, *Report 2005, United States of America*, available at <http://web.amnesty.org/report2005/usa-summary-eng>.

These developments have not been lost on the courts. The federal courts have entertained tort suits for violations of core human rights norms since 1980,<sup>53</sup> and while the Supreme Court's *Sosa* decision will slow that trend, it significantly left "the door ajar" to such claims in the future.<sup>54</sup> In a series of recent constitutional decisions, over the spirited dissents of "nationalists," the Supreme Court has increasingly looked to international and foreign law decisions in construing our own Constitution. In *Lawrence v. Texas*, the Supreme Court cited decisions of the European Court of Human Rights in concluding that a prohibition on same-sex sodomy violated the right to privacy (and overturning a contrary decision from only seventeen years earlier in which the Court had not even mentioned the European Court of Human Rights' decision).<sup>55</sup> Justice Ginsburg cited international treaty materials in her concurring opinion upholding affirmative action in the University of Michigan Law School case.<sup>56</sup> In *Atkins v. Virginia* and *Roper v. Simmons*, the Court relied on international and foreign law developments around the world in declaring that imposing the death penalty on juveniles and those with mental retardation was "cruel and unusual" in violation of the Eighth Amendment.<sup>57</sup>

Just as judicial developments in the post-New Deal and civil rights eras reflected changes in the society at large, so too these glimmers of attention to international human rights principles arise in the context of globalization.<sup>58</sup> Economic treaties like NAFTA and the GATT and institutions like the World Trade Organization and the European Community all point in the same direction—toward more transnational regulation. Businesses are increasingly organized on an international scale, and nationalist protectionism interferes

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53. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

54. Julian Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 *Emory Int'l L. Rev.* 205, 208 (2005).

55. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

56. *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

57. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Roper v. Simmons*, 125 S. Ct. 1183, 1194-95 (2005); *see also Patterson v. Texas*, 536 U.S. 984, 984 (2002) (Stevens, J., dissenting from denial of cert.) (noting consensus in the international community against executing juveniles).

58. *See* Thomas Friedman, *The Lexus and the Olive Tree* 327-47 (2000) (discussing the "backlash" of people who feel brutalized by globalization); Thomas Friedman, *The World is Flat* (2005) (discussing globalization's effect on the stability of certain cultural institutions and norms, including human rights concepts).

with free trade and development. Meanwhile, the internet and cheaper and faster international travel have shrunk the world and made international exchange at all levels much more prevalent. While there are voices of opposition, to be sure, the trend line seems clear. And as the world grows increasingly interdependent and transnational, international human rights standards are likely to command greater respect from our own domestic institutions. In the midst of a paradigm shift, its significance is not always self-evident.<sup>59</sup> We now know that the shift from a local to a national economy had momentous implications for the constitutional balance of powers; it seems possible that an equally historic shift may be taking place on the global level now. And if that is true, Congress, the President, and the courts will have to be increasingly open to international law arguments in the years to come.

The third obstacle identified above is specific to immigration law—the plenary power doctrine. As Judge Jack Weinstein has written, however, the fact that the plenary power doctrine finds its source in international law conceptions of sovereignty makes it especially susceptible to developments in international law that restrict the prerogative of the sovereign:

The Supreme Court has repeated that the basis for Congress's extremely broad power over aliens comes not from the Constitution itself, but from international law. . . . Since Congress's power over aliens rests at least in part on international law, it should come as no shock that it may be limited by changing international law norms. . . . It is inappropriate to sustain such plenary power based on a 1920 understanding of international law, when the 2002 conception is radically different.<sup>60</sup>

The Tenth Circuit made a similar point in applying international law limits to the power to detain indefinitely excludable Mariel Cubans: “[W]e note that in upholding the plenary power of Congress over exclusion and deportation of aliens, the Supreme

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59. See *United States v. Lopez*, 514 U.S. 549, 615 (1995) (Souter, J., dissenting) (“Not every epochal case has come in epochal trappings. *Jones & Laughlin* did not reject the direct-indirect standard in so many words; it just said the relation of the regulated subject matter to commerce was direct enough. But we know what happened.”) (internal citations omitted).

60. *Beharry v. Reno*, 183 F. Supp.2d 584, 598 (E.D.N.Y. 2002), *rev'd on other grounds*, 329 F.3d 51 (2d Cir. 2003). The district court cited numerous Supreme Court decisions noting that the immigration power is founded on international law conceptions of sovereignty, including *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892), and *Harisiades*, 342 U.S. at 587-88.

Court has sought support in international law principles. It seems proper then to consider international law principles for notions of fairness . . .<sup>61</sup> The concept that international law might affect immigration law is not novel. Indeed, the domestic rules governing asylum, withholding of deportation, and relief from removal under the Convention Against Torture are each predicated on international treaties.<sup>62</sup> Thus, international human rights norms have already been applied in the immigration setting, and therefore extending those norms further may be easier here than in areas of the law that have not traditionally been framed by international law.

These opportunities, taken together with the universalist foundation of *human* rights, suggest an almost natural alliance between international human rights and immigrants' rights. The considerable obstacles to progress should not be minimized, but the opportunities are so significant, and the trend toward transnational norms so strong, that it would be irresponsible not to seek better integration of international human rights concepts into the effort to protect and advance immigrants' rights in the United States.

### III. STRATEGIES

There is no one grand strategy for incorporating international human rights into immigration law. Different forums and different issues are likely to dictate different approaches. Nonetheless, three broad themes emerge. In litigation, international human rights law should be invoked primarily as a guide to the interpretation of immigration statutes and of constitutional protections for foreign nationals. In the political arena of public advocacy, however, activists need not tie their arguments to the interpretation of domestic statutes and constitutional provisions. They should invoke international human rights norms directly. In the public advocacy realm, it is particularly important to be cognizant of the potential for bringing international pressure to bear on the United States. Finally, advocates should give thought to developing and supporting institutional mechanisms that might encourage the political branches to consider the international human rights implications of their actions proactively.

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61. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10<sup>th</sup> Cir. 1981).

62. Convention Relating to the Status of Refugees, *adopted* July 28, 1951, art.1, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force April 22, 1924); Convention on Torture, *supra* note 34.

### A. Litigation

When bringing international human rights claims in United States courts, litigants are more likely to be successful if they can frame their arguments in statutory or constitutional terms. Direct invocation of international human rights laws is extremely difficult, because, as noted above, most international human rights treaties that we have ratified are said to be “non-self-executing,” meaning that they do not create a private right of action absent express Congressional legislation. In addition, as the Supreme Court noted recently in *Sosa*, there are significant obstacles to raising customary international law claims directly as a part of federal common law. While a subset of such claims remains viable after *Sosa*, the Court signaled that courts should be hesitant to find such claims actionable absent a high degree of specificity and international consensus about the right invoked.<sup>63</sup>

Courts have been more hospitable, however, to arguments that international human rights norms are an appropriate guide for statutory or constitutional interpretation. In 1987, for example, the Supreme Court relied on our obligations under the Refugee Convention in interpreting the “withholding” provision of the Immigration and Nationality Act, although it justified doing so on grounds of specific legislative intent—Congress had made clear that it enacted the “withholding” provision precisely to bring the United States into conformity with the Refugee Convention.<sup>64</sup> In *Ma v. Reno*, the Ninth Circuit relied on international law prohibitions against arbitrary detention to construe immigration law to prohibit indefinite detention of foreign nationals who were subject to final deportation orders but could not be removed.<sup>65</sup> District courts have also relied on international protections of aliens and children to restrict the deportation power, interpreting immigration law bars on humanitarian relief for “criminal aliens” not to apply retroactively where application of the bar would infringe on international law.<sup>66</sup>

The Supreme Court has long ruled that it is appropriate as a

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63. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732, 738 (2004).

64. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

65. *Ma v. Reno*, 208 F.3d 815, 818-20, 829 (9th Cir. 2000), *vacated and remanded on other grounds*; see also *Zadvydas v. Davis*, 533 U.S. 678 (2002).

66. *Beharry v. Reno*, 183 F. Supp.2d 584, 598 (E.D.N.Y. 2002), *rev'd on other grounds*, 329 F.3d 51 (2d Cir. 2003); *Maria v. McElroy*, 68 F. Supp.2d 206, 231 (E.D.N.Y. 2002); *Mojica v. Meissner*, 970 F. Supp.2d 130 (E.D.N.Y. 1997). All three of these decisions were written by Judge Weinstein.

background rule of statutory construction to *presume* that Congress seeks to legislate in conformity with our international obligations. Thus, Chief Justice John Marshall famously declared in *The Charming Betsy* that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>67</sup> While Congress may—as a matter of domestic law—override international law, this presumption means that absent a clear conflict, courts should interpret federal statutes to *conform* to international law obligations. To do so, the courts must by necessity take account of and interpret applicable international law norms.

Invoking international law not directly, but as an aid to statutory construction, is responsive to many of the concerns that have been raised about more direct reliance on international human rights claims. The concerns articulated in *Sosa* about the dangers of generating common law through customary international law are either not raised or muted substantially when international law is invoked only as an interpretive guide. For example, the Court’s concerns about the propriety of judicial lawmaking are not so sharply at stake when the Court is interpreting a statute enacted by Congress, for statutory construction has always been viewed as an appropriate judicial function. Moreover, if Congress disagrees with the Court, it is free to amend the statute to reflect that disagreement. Thus, the exercise of this power is always subject to a democratic check. Similarly, the concern about creating private rights of action is not implicated where the courts rely upon international law not to give rise to a lawsuit, but to inform the parameters of a federal statute in the course of a lawsuit authorized by that statute. Thus, using international human rights to inform interpretation of immigration law raises far fewer concerns about judicial activism than allowing parties to bring tort suits directly under customary international law.

Statutory construction arguments also avoid the problem of non-self-executing treaties. The fact that an international treaty is not self-executing, while generally a bar to direct invocation of that treaty by individual litigants, does not preclude an argument that U.S. statutes should be interpreted in light of the treaty. The decision to ratify a treaty without making it self-executing is a

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67. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The Supreme Court reiterated this injunction in *Lauritzen v. Larson*, 345 U.S. 571 (1953), in which it held that admiralty law under the Jones Act should be interpreted in conformity with international law.

decision to deny litigants a private right to sue directly under the treaty. But even where it is not self-executing, a signed and ratified treaty obligation is nonetheless an *obligation* of the United States, and therefore subject to the interpretive mandate of *The Charming Betsy*.<sup>68</sup> As one court has said, "Congress can be assumed, in the absence of a statement to the contrary, to be legislating in conformity with international law and to be cognizant of the country's need . . . to set an example with respect to human rights obligations."<sup>69</sup>

Using international human rights law as a guide to the interpretation of statutes is also consistent with a general feature of the courts' immigration law jurisprudence, which has often sought to resolve cases through statutory construction.<sup>70</sup> Thus, the Supreme Court has rarely held any immigration law unconstitutional, but has often interpreted immigration law to avoid constitutional problems. It did so most recently in a pair of cases decided in its 2000 term. In the first, *Zadvydas v. Davis*,<sup>71</sup> the Court interpreted a statute that appeared to authorize indefinite detention of foreign nationals subject to deportation orders. Noting the serious constitutional concerns that would arise were the statute so construed, the Court interpreted it to require release of such foreign nationals after six months if removal was not reasonably foreseeable in the future.<sup>72</sup> In the second, *INS v. St. Cyr*,<sup>73</sup> the Court faced a statute that appeared on its face to deny any judicial review to foreign nationals ordered deported based on certain criminal convictions. The Court noted that a serious constitutional issue would be raised if such persons were denied habeas corpus, and interpreted the statute to preserve habeas

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68. See Ralph Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev. 1163, 1180-82 and n.332 (1990); Louis Henkin, *Evolving Concepts of International Human Rights and the Current Consensus*, 170 F.R.D. 275, 281 (1997); Paul Meehan, *Combating Restrictions on Immigrants' Access to Public Benefits: A Human Rights Perspective*, 11 Geo. Immigr. L.J. 389, 409-10 (1997); Gordon Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analysis*, 52 U. Cin. Law. Rev. 3 (1983).

69. *Maria*, 68 F. Supp.2d at 231; see also *Beharry*, 183 F. Supp.2d at 593.

70. See generally Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545 (1990) (arguing that the Supreme Court has consistently resolved constitutional issues in the immigration setting through the tactic of statutory construction).

71. 533 U.S. 678, 701 (2001).

72. *Id.*

73. 533 U.S. 289, 300-02 (2001).

corpus review.<sup>74</sup>

Thus, the Court is accustomed to interpreting immigration statutes against their apparent meaning in order to avoid constitutional difficulties. Arguments that immigration statutes should also be construed to avoid clashes with international human rights law should therefore sound familiar to judges deciding immigration cases.

Using international human rights law to inform *constitutional* interpretation poses a different and more controversial issue. In the statutory construction setting, the argument is that Congress should be assumed to have acted consistently with our international law obligations, just as it should be assumed to have acted consistently with its constitutional obligations. In the constitutional setting, litigants are often invoking relatively recent developments in international human rights law to inform an evolving conception of constitutional rights. Originalists object that international norms developed in the past fifty years have little or no relevance to the meaning of constitutional provisions drafted two hundred years ago. Others note that international human rights norms do not have the democratic legitimacy of the Constitution, as “we the people” did not define them, nor do “we the people” have the power to change them if we dislike them. In addition, the stakes are much greater with constitutional interpretation. When the courts interpret a statute to conform to international law, it is always open to Congress to disagree simply by amending the statute to make clear its intention to override international law. But when the courts interpret a constitutional provision in light of international law developments, the political branches are more limited in their ability to respond.

Nonetheless, as summarized above, the Supreme Court has been open to relying on international law in interpreting a range of constitutional provisions. Arguments for the relevance of international law are strongest with respect to those constitutional provisions that most clearly contemplate the development of evolving norms. The Eighth Amendment’s prohibition on “cruel and unusual punishment,” for example, has long been understood to articulate an evolving standard, and evidence from human rights treaties and other countries’ practices may therefore be relevant evidence as to

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74. *Id.*



what is considered “cruel and unusual” today.<sup>75</sup> The Due Process Clause has also been understood to express an evolving understanding of protected liberties, and the Supreme Court has looked to the practices of “English-speaking peoples”<sup>76</sup> in assessing what liberties were fundamental to “ordered liberty” and therefore incorporated under the Due Process Clause and applicable to the states.<sup>77</sup> Thus, challenges to the fairness of deportation and detention procedures in the immigration context can profitably look to international standards to guide the interpretation of the constitutional rights that apply.

Two examples of this approach from recent cases illustrate the different ways in which international law arguments may be employed. In *Clark v. Martinez*,<sup>78</sup> the Supreme Court considered whether the rule it established in *Zadvydas v. Davis* for deportable aliens ought to be extended to excludable aliens. As noted above, the *Zadvydas* ruling was based on statutory interpretation, but that interpretation was in turn driven by a concern that the statute might be unconstitutional were it interpreted to authorize indefinite detention. In *Clark*, the government argued that even though the same statute governs the detention of excludable and deportable aliens, the statute need not be construed in the same manner for excludable aliens because, as foreign nationals who have not been admitted to the United States, they are not entitled to constitutional protections.

The Court in *Clark* ultimately resolved the case by interpreting the statute without reference to international law. It reasoned that the same statute should not mean two different things for two different categories of persons, where nothing in the statutory language suggested that the excludable/deportable distinction was relevant to Congress’s consideration.<sup>79</sup> But one can imagine the decision being written differently, relying on international law arguments either to support the Court’s statutory construction or to inform its constitutional analysis.

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75. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (looking to developments in international law to inform Eighth Amendment ban on cruel and unusual punishment); *Atkins v. Virginia*, 536 U.S. 304 (2002) (same).

76. *Adamson v. California*, 332 U.S. 46, 67 (1947); *Wolf v. Colorado*, 338 U.S. 25, 28 (1949).

77. *Adamson*, 332 U.S. at 54 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

78. 543 U.S. 371 (2005).

79. *Id.* at 725-26.

First, the Court might have used international law to inform its statutory construction. Assuming *arguendo* that foreign nationals outside the United States do not have the same *constitutional* rights as foreign nationals within the United States, they might well have the same rights under *international human rights law*, which generally does not distinguish between human beings based on citizenship or location. If that were the case, then the Court would be obliged to seek to interpret the statute to conform to international law. Thus, where the Court in *Zadvydas* interpreted the detention statute narrowly to avoid the constitutional concerns that would arise were it read to authorize indefinite detention, so too the Court in *Clark* could have interpreted the detention statute in the same way in order to avoid the international human rights concerns that would arise were it read to authorize indefinite detention. In this argument, international human rights prohibitions on arbitrary detention do the same work in guiding statutory construction as the constitutional prohibition on arbitrary detention did in guiding statutory construction in *Zadvydas*.

Second, international human rights law could have been invoked to inform constitutional interpretation in *Clark* as a guide to what due process itself requires for a foreign national in Martinez's position. In the 1950s, the Supreme Court ruled that foreign nationals held at the border who had not entered the country were not entitled, as a constitutional matter, to due process with respect to their entry,<sup>80</sup> and some have interpreted those decisions as holding that foreign nationals outside the borders are not entitled to constitutional protections.<sup>81</sup> But that interpretation is contestable,<sup>82</sup> and one could argue that Martinez should be entitled to the same constitutional due process protections, at least with respect to indefinite detention, as was *Zadvydas*. International human rights law, which prohibits arbitrary detention without regard to the citizenship status of the detainee, might be invoked to inform the

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80. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

81. The government has frequently advanced this view. *See, e.g.*, Brief for the Respondents, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334); Reply Brief for the Petitioners, 125 S. Ct. 716 (2004) (No. 03-878).

82. *See* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003, 1033 (2002) (arguing that cases such as *United States ex rel. Knauff v. Shaughnessy* establish "only . . . that because non-citizens have no liberty or property interest in entry they have no right to object to the procedures used to exclude them.").

Court's understanding of constitutional due process.

Cases like *Clark*, which raise claims on behalf of foreign nationals who have never been admitted to the United States, are an especially important locus for international human rights claims precisely because U.S. constitutional law is often viewed as extending few or no rights to foreign nationals in that status. The Supreme Court's decision in *Rasul v. Bush*<sup>83</sup> to extend the writ of habeas corpus to foreign nationals held as enemy combatants at Guantanamo Bay suggests that the Supreme Court may be ready to question some of its earlier precedents in this regard, or at least to limit them to their facts. Arguments that international human rights law demands that such persons be afforded basic protections may offer important support in that development.

International human rights claims are also important to pursue in the context of detentions and deportations involving people who have been admitted to the United States. While these individuals are generally protected by those provisions of the Constitution that are not expressly limited to citizens, the content of the rights extended to foreign nationals remains ambiguous. Because domestic law already accords such individuals constitutional rights, litigants may be less likely to advance international human rights claims. But invocations of international law may nonetheless be helpful as a guide to the formulation of the domestic guarantees at issue.

In *Turkmen v. Ashcroft*,<sup>84</sup> for example, a case I am working on with the Center for Constitutional Rights, foreign nationals swept up in the post-9/11 preventive detention campaign sued the Attorney General and other government officials for violations of a wide range of rights in connection with their detentions. They assert constitutional and international human rights violations, and seek money damages. The international human rights claims have triggered the usual litany of threshold objections. But international human rights principles might also inform the constitutional claims we have advanced. For example, we argue that detaining foreign nationals in immigration proceedings without evidence that they are dangerous or a flight risk, and continuing to detain them after their immigration cases have been finally resolved and they were ready and willing to leave, violates due process because it constitutes

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83. 542 U.S. 466 (2004).

84. *Turkmen v. Ashcroft*, No. 02-CV-2307 (JG) (E.D.N.Y. filed April 2002). See [www.ccr-ny.org](http://www.ccr-ny.org).

arbitrary detention. The international human rights prohibitions against arbitrary detention that we cite as an independent basis for recovery might also be employed to buttress our constitutional claims. The fact that international human rights treaties prohibit arbitrary detention<sup>85</sup> could be said to shore up the constitutional arguments for a due process prohibition on arbitrary detention. And international human rights decisions defining arbitrary detention might provide guidance in outlining the contours of the Due Process Clause.

The government argues that its detentions were authorized by immigration law, but here, too, international human rights law may be informative, much as it was in *Ma v. Reno*.<sup>86</sup> If the immigration law were interpreted to permit detention of foreign nationals without evidence of danger or flight risk, and to permit continued detention even after their immigration cases have been resolved, it would conflict with international human rights norms against arbitrary detention. Accordingly, under *The Charming Betsy*, the court should interpret immigration law not to authorize such detention.

International law claims may also have a less direct effect on the interpretation of statutes. In *Rasul v. Bush*,<sup>87</sup> the Guantanamo enemy combatant case, lawyers for the families of the detainees challenged the detentions on a variety of grounds, including international law. One of their most prominent claims was that the laws of war required that detainees be afforded some sort of hearing to determine whether in fact they were enemy combatants.<sup>88</sup> The Supreme Court did not address these claims because it limited its review to the threshold jurisdictional question whether the litigants had any access to U.S. courts at all. But while the Court's ultimate decision reads as a wholly domestic interpretation of the habeas corpus statute, its result was very likely driven by the international human rights concerns raised by the Administration's position that it

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85. See, e.g., ICCPR, *supra* note 49, and American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 7, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 147 (entered into force July 18, 1978) [hereinafter American Convention], which both include provisions barring arbitrary detention.

86. 208 F.3d 815 (9th Cir. 2000), *vacated and remanded on other grounds*; see also *Zadvydas v. Davis*, 533 U.S. 678 (2001).

87. See *Rasul*, 542 U.S. 466.

88. Brief on the Merits for Petitioners at 23-29, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334), available at [http://www.ccr-ny.org/v2/rasul\\_v\\_bush/legal/unitedStates/Brief%20for%20Petitioners%20Rasul%20v.%20Bush.pdf](http://www.ccr-ny.org/v2/rasul_v_bush/legal/unitedStates/Brief%20for%20Petitioners%20Rasul%20v.%20Bush.pdf).

has unfettered authority to impose indefinite incommunicado detention without any legal limit.

#### B. Public Advocacy

The *Rasul* litigation also illustrates the critical role that international human rights law can play in the larger sphere beyond the courtroom. The Guantanamo litigants prevailed not because of the strength of their legal arguments in court—the majority's statutory construction argument is more than a little strained, as Justice Scalia amply illustrates in his dissent—but because Guantanamo had become an international embarrassment to the United States. Until Abu Ghraib, Guantanamo was the symbol around the world for what was wrong with the United States' "war on terror." The Administration's position that it could lock up any national of any country indefinitely and incommunicado without so much as a hearing was widely viewed as a blatant disregard of basic principles of the laws of war and human rights law. That international condemnation, reflected in open criticism from British law lords, public demonstrations, highly critical foreign press accounts, and diplomatic complaints, very likely played a role in the Supreme Court's decision to hear the case in the first place, and in its ultimate decision to reject the Administration's position of unfettered detention power.

This example illustrates the opportunities that the current situation may present for international human rights advocacy *outside* the courts. As noted above, many of the Administration's worst initiatives from a human rights standpoint have been directed at nationals of other countries, including the torture at Abu Ghraib, the detentions at Guantanamo and in undisclosed overseas locations, and the ethnic profiling and preventive detention campaigns at home. Precisely because these initiatives are selectively targeted at foreign nationals, they may be susceptible to challenge on grounds of international human rights law, as the British law lords' decision discussed above demonstrates. Human rights law, predicated on human dignity, does not distinguish between citizens and noncitizens. Furthermore, the international community is likely to take a special interest in burdens that the United States selectively places on foreign nationals.

In part in reaction to these initiatives, international human rights groups in the United States appear to have directed increased scrutiny at the United States' practices, and have been effective in

issuing reports and shaping news coverage. Human Rights Watch has played an especially key role in the fallout from Abu Ghraib.<sup>89</sup> It also issued an early report on the plight of the domestic detainees,<sup>90</sup> the findings of which were confirmed some months later when the Office of Inspector General issued its own comprehensive and highly critical report on the treatment of immigration detainees after 9/11.<sup>91</sup> Human Rights First released two excellent, comprehensive reviews of the war on terrorism, one in September 2002, and the other six months later, and now publishes an online review of the major developments of interest to the human rights community in connection with the war on terrorism.<sup>92</sup> Amnesty International has issued a major report on racial and ethnic profiling, and published one of the first extensive reports on the mistreatment of domestic detainees after 9/11.<sup>93</sup>

These efforts, which employ the traditional tactic of reporting human rights abuses with the idea of “shaming” perpetrators into respecting human rights norms, have been very effective in galvanizing resistance to the Administration’s abuses, both here and abroad. By speaking the language of international human rights, rather than utilizing an exclusively domestic constitutional or

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89. Reed Brody, Human Rights Watch, *The Road to Abu Ghraib* (2004), <http://www.hrw.org/reports/2004/usa0604/usa0604.pdf>; see also Kenneth Roth, Human Rights Watch, *Darfur and Abu Ghraib*, available at <http://www.hrw.org/wr2k5/darfurandabughraib/darfurandabughraib/pdf>.

90. Cesar Muñoz Acebes, Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* (2002), <http://www.hrw.org/reports/2002/us911/USA0802.pdf>.

91. U.S. Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) (released June 2, 2003).

92. See, e.g., Lawyers Committee for Human Rights, *A Year of Loss: Reexamining Civil Liberties Since September 11* (2002), [http://www.humanrightsfirst.org/us\\_law/loss/loss\\_mail.htm](http://www.humanrightsfirst.org/us_law/loss/loss_mail.htm); Lawyers Committee for Human Rights, *Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties* (2003), [http://www.humanrightsfirst.org/us\\_law/loss/imbalance/imbalance.htm](http://www.humanrightsfirst.org/us_law/loss/imbalance/imbalance.htm).

93. For the report on racial and ethnic profiling, see Amnesty International, U.S. Domestic Human Rights Program, *Threat and Humiliation: Racial Profiling, National Security, and Human Rights in the United States* (2004), [http://www.Amnestyusa.org/racial\\_profiling/index.do](http://www.Amnestyusa.org/racial_profiling/index.do). For a report on detainee mistreatment, see Amnesty International, Memorandum to the US Attorney General—Amnesty International’s concerns relating to the post 11 September investigations (November 2001), <http://web.amnesty.org/library/index/engAMR511702001!Open>.

statutory framework for their analysis, these reports have greater potential to be influential abroad, and thereby to galvanize international opposition along the lines seen around Guantanamo and Abu Ghraib.

Some of the most effective human rights work involves a combination of public advocacy appealing to first principles with litigation pursuing more narrow legal theories. Again, Guantanamo is a prime example. The litigation served as a dramatic focal point for opposition to the Administration's policies, but human rights advocates here and around the world simultaneously took on the Administration in the public arena for flouting international law principles and basic human dignity. In the end, that broader public advocacy very likely played a significant role in the victory in the Supreme Court. And the Supreme Court's rejection of the Administration's position in turn galvanized still further opposition, for it showed that concrete results are possible.<sup>94</sup>

### C. Institutional Reform

A third way to pursue international justice in the domestic arena might be more institutional or process-oriented. Instead of using traditional forums such as the media, public relations, and the courts to advance human rights concerns, advocates might think about building human rights consciousness into the processes of political decision making. In a recent article in *American Prospect*, Elisa Massimino describes a Clinton Administration innovation designed to do just this. Executive Order 13107, issued in 1998, sought to integrate human rights considerations into the domestic policymaking agencies, so that rather than an afterthought raised by human rights groups through reports, letters, or lawsuits, these concerns became the everyday concern of the executive branch.<sup>95</sup> As

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94. For law firms' defense of Guantanamo Bay prisoners, see, e.g., Bill Rankin, *Lawyers fight for detainees; Ga. firm assails Guantanamo*, *The Atlanta Journal-Constitution*, Nov. 30, 2005 (Allen & Overy's representation of several detainees). For statements calling for the closing of the Guantanamo Bay prison camp, see, e.g., *Biden Urges U.S. to Take Steps To Close Prison at Guantanamo*, *New York Times*, June 6, 2005 (noting that the prison camp serves as a propaganda tool for terrorists); *Cheney: U.S. Not Aiming to Close Guantanamo; Other Republicans Say Prison is a Liability*, *Washington Post*, June 13, 2005 (Senators Chuck Hagel, Mel Martinez, and Patrick Leahy call for closure of the detention center).

95. Exec. Order No. 13107 (Dec. 1998) (*Implementation of Human Rights Treaties*) (committing the United States to enforcement of human rights treaties

Massimino details, the Order created an Interagency Working Group with a mandate to:

[P]repare treaty compliance reports to the United Nations; respond to complaints about human-rights violations; vet proposed legislation for conformity with treaty requirements; monitor and analyze state law and practice on human rights; educate the public about human rights; and conduct a yearly review of all U.S. reservations, understandings, and declarations to see whether they can be withdrawn or whether U.S. law should be altered to make them unnecessary.<sup>96</sup>

The Working Group apparently died under the Bush Administration (ironically, just when it was most needed). But such efforts to “incorporate” international human rights thinking into domestic lawmaking and administration should be pursued wherever possible. Perhaps the central challenge for international human rights advocates focused on the United States is to get domestic actors to take human rights seriously. As noted above, globalization has set in motion a series of incentives that are likely to make international law increasingly more familiar, and increasingly more critical to domestic decision making. But it is also important to work on this relationship from the inside out, by creating mechanisms and actors within executive institutions whose role is precisely to promote early consideration of human rights. Crises like Abu Ghraib—and memos like the Office of Legal Counsel’s August 2002 torture memo<sup>97</sup>—illustrate the critical importance of infusing policymaking at the outset with greater sensitivity to international law concerns. Initiatives like Executive Order 13107 offer that hope.<sup>98</sup>

#### IV. CONCLUSION

Advancing immigrants’ rights in the United States has never been an easy task. While the Supreme Court has often paid lip service to the notion that foreign nationals, at least those living in

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and creating an Interagency Working Group to provide guidance, oversight, and coordination), <http://www.fas.org/irp/offdocs/eo13107.htm>.

96. Elisa Massimino,  *Holding America Accountable*, *The American Prospect*, Oct. 2004, at A14.

97.  *See Torture Memo, supra note 15.*

98. The Bush Administration’s indifference to this concept suggests that it might be advisable to create such an office through legislation. Otherwise, the only administrations that will have one will be those already inclined to pay attention to international law.



the United States, are entitled to the same basic rights as U.S. citizens (some political participation rights aside), the nation's record of anti-immigrant abuse, and the Court's record in reviewing that abuse, does not live up to the Court's promises. Foreign nationals are often "the course of least resistance," and the courts have rarely stepped in to protect this class, one that by definition cannot protect itself through the political process.

There are, to be sure, many reasons to be skeptical about how much international human rights can do to improve the lot of foreign nationals in the United States. First, the suspicion and fear of immigrants in the wake of the terrorist attacks of September 11 threaten to taint any argument associated with immigrants' rights and to bring international human rights down with it. Second, lawyers and judges in the United States have traditionally been skeptical toward the entire domain of international human rights. And third, immigration law in particular is especially impervious to rights-based claims, whatever their provenance, because it is so deeply defined by the notion that the immigration power is "plenary" and that decisions regarding the fate of immigrants are largely a matter of political discretion only loosely constrained by legal limits.

But there are also reasons for hope. The attacks of September 11 and their aftermath have made it clearer than ever that we are dependent upon the good will of the rest of the world, and fidelity to international human rights is critical to maintaining the legitimacy of our security efforts. The skepticism of lawyers and judges is giving way to the realities of a globalized world, in which transnational exchange makes transnational norms more and more necessary. And because immigration law's "plenary power" finds its source in international law conceptions of sovereignty, it is especially well-suited to the limitations that international law is beginning to impose on sovereignty, in particular through the last half-century's development of human rights.

In exploiting these opportunities, it seems best to take a three-pronged approach: (1) argue narrowly in court, using international human rights law principally as a guide to statutory and constitutional interpretation rather than as an independent and freestanding source of rights of action; (2) turn the human rights activist's more traditional tactics of "shaming" on the United States itself, attempting to mobilize international opinion by invoking internationally based claims; and (3) seek out ways to "institutionalize" human rights concerns into the domestic lawmaking and law enforcement policy process.

History is likely to identify the current period as a paradigm shift. We have the forces of history on our side. If we pursue these aims through thoughtful invocations of international human rights, we may yet rediscover the “idea of humanity” that Hermann Cohen so eloquently described more than 100 years ago.