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OH RIGHTEOUS DELINQUENT ONE: THE UNITED STATES' INTERNATIONAL HUMAN RIGHTS DOUBLE STANDARD— EXPLANATION, EXAMPLE, AND AVENUES FOR CHANGE

Amy C. Harfeld*

“. . .[O]nce freed from the conceit that others have no choice but to follow our example, how do we, in fact, persuade them on the merits of what we may have to offer?

[The] answer lies in our own rededication to the ideals that we would have others follow—for in the end, if our actions belie our ideals, there is no reason to expect others to take them more seriously than we do.”¹

I. INTRODUCTION

Righteous indignation should be reserved for the truly righteous. Relative to its size and power, the United States is presently one of the most insolent delinquents in the international human rights community. Despite this, we** continue to preach to and

* J.D., 2001, City University of New York School of Law; B.A., 1994, University of Michigan. I would like to thank Professor Penelope Andrews for providing me with the opportunity to let this article come to life; Professor Rhonda Copelon, who allowed me my first view into the United Nations; Professors Ruthann Robson, Maivân Lâm, Debbie Zalesne and Sharon Hom for their scholarly insight and encouragement; Professor Victor Goode, for being a wonderful mentor; Colman McCarthy, my teacher, friend, and guide through revolutions small and large for over a decade; and my parents, Doris B. Harfeld and Judge David I. Harfeld, for their love and faith irrespective of my choice to do well or good. A special thanks goes to Natalya Paul, former Editor-in-Chief of the N.Y.C. Law Review, for recruiting this article, and to all of the CUNY students who staff the N.Y.C. Law Review for their dedication to scholarship and for their hard work in allowing student voices to emerge and shine.

¹ William P. Alford, *Spreading Values by Example: Instead of Assuming China Should be Like America, the U.S. Must Rededicate Itself to its Own Ideals*, *L.A. Times*, June 2, 1999, at B7. Our criticisms of China, for their imperfect human rights record, are a prime example of the harm caused by our double standard. We are in no position to comment on the civil liberties denied by other regimes when our record regarding different rights is equally blemished.

** Please note my choice to use the collective terms “we” and “ours” in the text of this article. I have done so for two reasons. The first is personal. I believe that it is necessary in every individual’s journey through politics to take personal responsibility for one’s actions and own up to the problems and issues of one’s own country, state, or community. The idea for this article was born after I spent several years living abroad and investigating human rights issues in my host country. I made the decision

chastise other nations around the world for their human rights shortcomings. If we aim to sustain our credibility and to encourage a greater respect for and compliance with international human rights standards around the world, we must begin to practice as we preach.² We may begin to do so by washing our righteous hands of the practice of imposing the death penalty on our children.³

The U.S. holds itself out to be a pioneer and a continuing role model of the contemporary idea of rights.⁴ Indeed, we may legitimately claim to have led an expansion of the international human rights movement as a long-time member of the United Nations Security Council and other United Nations (hereinafter U.N.) bodies.⁵ At the end of the Second World War, President Franklin D.

that, before I continued to criticize those conflicts to which I was a stranger, I had an obligation to return home and apply the same critical eye to the human rights record of my own country. Every "we" and "our" I write gives me the opportunity to own the human rights shortcomings of which I speak.

The second reason is to make a point about developing a national collective conscience about human rights abuses within the United States. By using these collective terms, I intend to model the sort of example that I believe the United States could set forth if it were to practice as it preaches in the human rights context.

² Michael Posner, *Foreword: Human Rights and Non-Governmental Organizations on the Eve of the Next Century*, 66 *FORD. L. REV.* 627, 629 (1997) (Posner argues that if "we encourage the Chinese government to allow prison access to a U.N. working group on detention," we cannot ourselves deny full access to our prisons by a U.N. investigator).

³ It should be noted from the outset that when I speak of the juvenile death penalty, I am referring to the practice of imposing a sentence of death on a person who was under the age of 18 at the time the crime was committed. In reality, because of a drawn-out appeals process and backlogged courts, these children are usually no longer juveniles, but in their late twenties and even thirties by the time they are put to death. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), the petitioner is now a middle-aged man still awaiting his execution. See Stephen B. Bright, Rubin "Hurricane" Carter, Doreen Marguerite Koenig, William A. Schabas, and W.L. Seriti, *Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law?*, 67 *FORDHAM L. REV.* 2813 (1999).

⁴ LOUIS HENKIN, *THE AGE OF RIGHTS* 65 (1990).

⁵ Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?*, 23 *HASTINGS CONST. L.Q.* 727, 730 (1996) (exploring the reasons behind U.S. resistance to human rights treaty ratification, particularly of the Convention on the Elimination of All Forms of Discrimination Against Women, in the context of constitutionalist and ethnocentric justifications); see also M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 *DEPAUL L. REV.* 1169 (1993) ("[s]ince the inception of the United Nations, the United States has been a world leader in the development of human rights norms. Its influence in this field has been unparalleled by any other country"); see also Henkin, *infra* note 15, at 415 (Americans were prominent among the architects and builders of international human rights, and American Constitutionalism was a principal inspiration and model for them). See generally HAROLD BLAUSTEIN, *THE INFLUENCE OF THE UNITED CONSTITUTION ABROAD* (1986); and CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE

Roosevelt emphatically proclaimed that "the dawn of a new era of human rights had begun."⁶ He was so enthused by the notion of helping to build the foundation and set the tone of this growing field, that he encouraged the adoption of a "Second Bill of Rights."⁷ In the U.S., First Lady Eleanor Roosevelt was also instrumental in the formation of the United Nations and in the drafting of the Universal Declaration of Human Rights,⁸ which has become a "cornerstone of the international human rights movement"⁹ and which she referred to as "a Magna Carta for all mankind."¹⁰ Since that time, our domestic laws have generally proven adequate to protect and provide most of the human rights that have emerged as the international standard.¹¹ We have, albeit selectively, used

UNITED STATES CONSTITUTION ABROAD 383-403 (Louis Henkin & Albert J. Rosenthal eds., 1990).

⁶ Mayer, *supra* note 5, at 745. President Roosevelt viewed the Bill of Rights as deficient and during his State of the Union message in 1944 proposed an amendment to the Constitution that would address larger social and economic rights. *Id.* n.85, 90-1 Cong. Rec. 55, 57 (1944).

⁷ Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 516, 528 (1992). The ambitious agenda of this Second Bill of Rights would have included:

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.

(Citing from Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 423 (1987)).

⁸ G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 1, at 71, U.N. Doc. A/810 (1948).

⁹ Posner, *supra* note 2, at 627.

¹⁰ *Id.*

¹¹ Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard. Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 77 (2000). The United States provides quite an extensive array of rights usually classified as political and civil rights, or individual liberties, such as rights to free speech and demonstration, bearing of arms, and religious freedom. The areas we fall short in are those referred to as social and economic rights. These include the rights mentioned above by Roosevelt in his Second Bill of rights, and include the right to affordable health care, housing, food, clothing and education. See An-Na'im, *infra* note 47, at 992. The United States has been mindful of this gap as we have leveled criticism at other countries' human rights shortcomings. We generally limit our criticisms to the denial of rights that are well protected in the United States, thus trumpeting our own horn while sitting in judgment. Yet we remain silent about deprivations of economic and social rights in other countries, as pointing them out would call attention to our own weak spots.

our economic power and political influence to call attention to foreign human rights violations by placing embargoes and refusing aid to nations that persistently trample on human rights.¹²

While quick to condemn human rights violations abroad, the U.S. cannot brag about its own human rights record. Currently, we stand as the only major world power who has failed to fully ratify or adhere to any of the significant human rights instruments introduced by the U.N. or other human rights bodies.¹³ Worse, the U.S. has imposed and defended a host of domestic practices that directly contravene these treaties.¹⁴ Some attribute this contradiction to the illusion that the U.S. Constitution is the supreme instrument of rights and liberties.¹⁵ A deeper inspection, however, exposes us as "the country in which the highest court of the land permits the execution of possibly innocent people, and individuals with mental retardation, allows police to search vehicles on a neighbor's word of suspicion, upholds the kidnapping of foreigners for trial. . . and pardons police brutality in the name of 'good faith.'"¹⁶ Such conduct hardly befits a nation that appoints itself as a human rights model to be emulated. While the U.S. wields enor-

¹² See generally Andrew K. Fishman, *Between Iraq and a Hard Place: The Use of Economic Sanctions and Threats to International Peace and Security*, 13 EMORY INT'L L. REV. 687 (1999) (the most compelling example of this may be found in the sanctions placed on Iraq in 1991 following its invasion of Kuwait. These sanctions, imposed in response to Iraq's affront to democratic values and human rights, have produced a host of disturbing human rights violations suffered by the Iraqi people). See Cleveland, *infra* n.192, at 37 (the United States imposed sanctions for foreign policy purposes approximately sixty-one times between 1993 and 1996, noted in NATIONAL ASSOCIATION OF MANUFACTURES, A CATALOG OF NEW U.S. UNILATERAL ECONOMIC SANCTIONS FOR FOREIGN POLICY PURPOSES 1993-1996 (1997)).

¹³ See Henkin, *supra* note 4, at 66; Glendon, *supra* note 7, at 526; see generally, Alfred de Zayas, *The Potential for the United States Joining the Covenant Family*, 20 GA. J. INT'L. & COMP. L. 299 (1990).

¹⁴ See Harrington, *infra* note 16.

¹⁵ There may be some basis for this notion, though it must be viewed in a larger and more critical context. See generally Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988) (noting that the Bill of Rights has directly informed the creation of human rights charters adopted by a number of newly independent countries, and has served as a standard by which to review judicial, legislative, and administrative action in those new nations). See also Louis Henkin, *United States Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341. ("The United States will not undertake any treaty obligation that it will not be able to carry because it is inconsistent with the United States Constitution.") See also Lillich, *infra* note 57, at 60-61 (giving as an example a Supreme Court of Zimbabwe decision involving the whipping sentence of a male that took into consideration U.S. Supreme Court jurisprudence such as *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹⁶ James C. Harrington, *The Two Sides of Humanity*, L.A. TIMES, Feb. 28, 1993, at M6.

mous power in influencing other nations to further their protection of human rights, we have not yet taken the initiative and courage to turn the lens inward and solve our human rights contradictions.¹⁷

One particularly troubling paradox between what the U.S. practices and what it preaches in the realm of international human rights is our continued and increasing use of the death penalty on child offenders.¹⁸ Although we are members of more than one human rights convention that unequivocally prohibits such a sentence, we have reserved for ourselves a number of loopholes that enable us to continue the practice unfettered.¹⁹ These killings distinguish us as one of the only U.N. signatories to openly perpetuate the execution of juveniles.²⁰ Our hypocrisy undermines U.S. credibility in the eyes of the international human rights community and contributes to a general deterioration of the authority of international human rights law.²¹ Why should other countries abide by such treatises if the U.S. can get away with such a flagrant violation?

I chose this issue to explore because it seems to present the

¹⁷ See Lester, *supra* note 15, at 561. ("For the United States, human rights have been a kind of 'white man's burden,' and international human rights have been 'for export only'. . . [t]here is some reluctance to accept, and have our courts apply, standards perceived to have been created by others, even if they were borrowed from us and reflect our own values." (quoting Louis Henkin, *The United States and International Human Rights, in Justice for a Generation*, Papers presented in London, England, July 15-19, 1985 at the plenary sessions of a meeting between the American Bar Association, the Senate of the Inns of Court and the Bar, and the Law Society of England and Wales, at 373-80)). See generally Henkin, *supra* note 4.

¹⁸ I would like to acknowledge from the outset my own position and purpose in pointing to this example. My aim is to condemn this practice not only as immoral and inhumane, but particularly as one that has been almost universally condemned and prohibited, both legally and ethically, around the world. I would also like to point out here another issue that surfaces in dealing with the juvenile death penalty—the arbitrary age of 18 as the age of majority. This determination of a magical age at which children suddenly mature into adults for purposes of criminal culpability is imperfect, and often inappropriate. For obvious reasons of uniformity and objectivity, however, it is the most widely accepted age of maturity.

¹⁹ See *infra* Section IV.

²⁰ See Bright et al., *supra* note 3, at 2793 (observations by Stephen Bright).

²¹ But see Jack Goldsmith, *International Human Rights Law & The United States Double Standard*, 1 GREEN BAG 2d 365 (1998) ("[p]erhaps the United States' failure to subject itself to these international processes undermines its moral authority to enforce human rights. It is not at all clear, however, that the efficacy of international human rights law depends on moral authority in this way. Compliance with human rights law depends on the costs of non-compliance. Effective coercive measures are usually carried out by or with the support of the United States. . . [t]he efficacy of these measures is not likely to be affected by the extent to which the United States itself engages the international human rights law process. United States' ability to present (or withhold) status in international organizations, is unaffected by [our] practice of executing juvenile murderers. . .").

most widely understood and obvious example of the sort of human rights delinquency of which I accuse the U.S. My purpose in this section is not to make an attempt at an exhaustive survey of the juvenile death penalty—the literature on this subject is already quite extensive. Rather, I use the issue as a way of “outing” the U.S. for its human rights double standard and the harm it causes both domestically and internationally.

It is time for the U.S. to acknowledge and correct this double standard. This may be accomplished three ways: 1) through the use of domestic law, legislation, and jurisprudence; 2) by promoting agitation and activism in U.S. civil society and international activism and press coverage; and 3) by utilizing the abilities of international adjudicative bodies’ to press for U.S. compliance with human-rights norms. Ultimately, abandoning our self-righteous attitude will further our ability to promote and model rather than erode human rights in the international community.²²

The United States seems to have benefited from a widespread presumption that, as one of the most assertive proponent of human rights on the world scene, it must be in substantial compliance with international human rights law. This view has persisted in spite of the U.S.’s insistence on upholding domestic standards that var[y] significantly from the relevant provisions of international law. It seems high time for the international community to reconsider its indulgent attitude vis-à-vis U.S. non-compliance with international norms generally.²³

This article explores the failure of the U.S. to keep pace with the international community in human rights evolution and compliance. Our failure to do so compromises our ability to contribute to the movement as a model. Throughout this article, I will interweave the already prolific literature on the topics of this article with my own perspectives and experiences, with the hope of formulating potential solutions that would ameliorate the U.S.’s history of human rights delinquency.

II. SETTING THE STAGE FOR HUMAN RIGHTS IN THE UNITED STATES

The atrocities of the Holocaust moved the international community to expand the traditional focus of international law from

²² Mayer, *supra* note 5, at 730 (pointing out a troubling pattern of U.S. legal parochialism in human-rights matters and a refusal to consider upgrading U.S. law on human rights to meet higher, international norms).

²³ *Id.* at 822.

concerns such as diplomatic immunity and rules of war, to include governance of the way a nation treats its citizens.²⁴ Suffering from guilt over our complacency to deter such atrocities and quick to draw attention away from our own civil rights crisis, the U.S. emerged as a leader in the growing human rights arena. Initially, the U.S. helped to develop new concepts of universal human rights, playing a key role in the birth of the U.N. and in the creation of the Universal Declaration of Human Rights.²⁵ Drafted to create interstate obligations, human-rights agreements encouraged societies to convert the negotiated principles into enforceable laws in their respective domestic legal systems. Therefore, it is no accident that the core of rights guaranteed by international human rights laws and those protected by the U.S. Constitution overlap considerably.

Our involvement in this burgeoning movement was marred, however, by the blight of racial segregation and discrimination taking place domestically.²⁶ Human rights were seen as a direct threat to the existing order of racial inequality at that time.²⁷ For instance, as the Truman Administration and human-rights leaders

²⁴ See Goldsmith, *supra* note 21, at 365.

²⁵ See generally Mayer, *supra* note 5.

²⁶ Gay J. McDougall, *Symposium: The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 How. L. J. 571 ("[r]acism has always been America's Achilles heel in international relations. . . . However, from the days of the slave trade to more modern instances of police brutality. . . the U.S. has resisted international scrutiny of domestic policies and practices that evidence racism"); see also Thomas, *infra* note 30, at 17 (the Civil Rights Congress filed a petition with the United Nations charging genocide under the Genocide Convention. Although no formal charges against the U.S. resulted, the appeal succeeded in drawing attention and ire against the U.S. for domestic race-based human rights violations).

²⁷ See Mayer, *supra* note 5, at 751; see also Thomas Buerghenthal, *The United States and International Human Rights*, 9 HUM. RTS. L.J. 141, 144 (1988). In many ways, human rights were indeed a threat to that domestic order. See also Thomas, *infra* note 30, at 18, citing a radio interview with Malcolm X just prior to his death:

([O]ur problem has to be internationalized. Now the African nations are speaking out and linking problems of racism in Mississippi with problems of racism in the Congo and also the problem of racism in South Vietnam. It's all racism. . . . And when these people in these different areas see that the problem is the same problem, and when 22 million black Americans see that our problem is the same as the problem of the people who are being oppressed in South Vietnam, and the Congo and Latin America, then the oppressed people of the earth make up the majority that can demand and not a minority that has to beg.

quoting from MALCOLM X: THE MAN AND HIS TIMES 257-58 (John Henrik Clarke ed., 1969)).

in the U.S. championed international human rights, Jim Crow laws, lynchings, as well as formal segregation of schools, transportation, and places of public accommodation continued unabated.²⁸ The reality for most African-Americans was, in fact, the antithesis of the human rights principles being advanced abroad.²⁹ Instead of joining the growing human rights wave to keep pace with the evolving standards of racial equality, the U.S. instead chose to distance itself from the U.N. human-rights system.³⁰

The decision in *Brown v. Board of Education*³¹ helped to assuage the indignation in the growing human rights community. This decision concluded that racial segregation and American constitutional rights were inconsistent with each other and would be reconciled through our own Constitution and domestic jurisprudence.³² The domestic human rights advances during this time did not represent a sudden ideological shift in the country, but rather reflected the relentless agitation of civil rights activists.³³ Similarly, throughout the international human rights movement, there have been numerous forces in North America that have strongly advocated for the ratification of, and compliance with, the range of human rights conventions supported by the U.N.³⁴

²⁸ NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION, at 14 (1990) (quoting from Robert Cushman's N.Y. Times article, *Our Civil Rights Become a World Issue*, NEW YORK TIMES MAGAZINE, N.Y. TIMES, Jan. 11, 1948, at 12).

Now that the war is over, this nation finds itself the most powerful spokesman for the democratic way of life, as opposed to the principles of a totalitarian state. It is unpleasant to have the Russians publicize our continued lynchings, our Jim Crow statutes and customs, our anti-Semitic discriminations, and our witch hunts; but is it undeserved? We cannot deny the truth of the charges; we are becoming aware that we do not practice the civil liberty we preach.

²⁹ See McDougall, *supra* note 26, at 575; see also Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 93-98 (1988).

³⁰ Dorothy Q. Thomas, *Advancing Rights Protection in the United States; An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15, 17 (1996).

³¹ 347 U.S. 483 (1954).

³² See Dudziak, *supra* note 29, at 118 (*Brown* laundered the principles of democracy in the eyes of the world. After *Brown*, the State Department could blame racism on the Klan and the crazies. They could argue that the American Constitution provided for effective social change); see also the progeny of desegregation decisions preceding *Brown* such as *Shelly v. Kraemer*, 334 U.S. 1 (1948); *Henderson v. United States*, 339 U.S. 816 (1950); *McLaurin v. Oklahoma*, 339 U.S. 637 (1950); and *Sweatt v. Painter*, 339 U.S. 629 (1950) (referred to collectively by Dudziak, as further proof to the international community of U.S. rejection of segregation and racial inequality).

³³ VIRGINIA PRATT, THE INFLUENCE OF DOMESTIC CONTROVERSY ON AMERICAN PARTICIPATION IN THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS (1986).

³⁴ See Mayer, *supra* note 5. Among these advocates have been politicians, lawyers and law professors, religious and civil rights leaders, non-governmental organizations,

On the other hand, vociferous domestic opposition has plagued the international human-rights movement from its very inception. To understand why, it is useful to remember the anti-communist and ultra-patriotic sentiments that dominated North-American discourse following World War II. For example, Frank Holman, a former president of the American Bar Association (ABA), persuaded many Americans, including some in the U.S. Senate, to garner severe skepticism and fear of the emerging international human-rights movement by characterizing it as a "Communist plot to destroy the American way of life."³⁵ Shortly after this, Senator John Bricker emerged as an anti-human rights fanatic, declaring the Universal Declaration of Human Rights "an attempt to repeal the Bill of Rights."³⁶ Aiming to undermine U.S. support for and involvement with human rights treaties, Senator Bricker proposed an *actual constitutional amendment* to "protect the sacred rights enjoy[ed] under the Bill of Rights and the Constitution."³⁷

The Bricker Amendment stated that "[a] treaty shall become effective in the United States only through domestic legislation which would be valid in the absence of a treaty."³⁸ This clause would have restricted the President's treaty making powers³⁹ and further rendered all treaties non-self-executing, or unenforceable without accompanying domestic legislation. As he fought for the adoption of this amendment, Senator Bricker stated, "[m]y purpose in offering this resolution is to bury the so-called Covenant on Human Rights so deep that no one holding high public office will ever dare to attempt its resurrection."⁴⁰

Although the Bricker Amendment never actually passed, it certainly left its mark, as evidenced by the Senate's reaction to the first human rights treaty "to cross their desks," the Genocide Con-

non-profit organizations, and other activists. *For example, see* McDougall, *supra* note 26, at 572 (noting that W.E.B. DuBois, Walter White, Mary McLeod Bethune, Mordecai W. Johnson and other African-American leaders participated as "activist observers" at the San Francisco Conference where the U.N. was founded). (Citing GERALD HORNE, *BLACK AND RED: W.E.B. DUBOIS AND THE AFRO-AMERICAN RESPONSE TO THE COLD WAR, 1944-1963*, 35-39 (1986)).

³⁵ See Mayer, *supra* note 5, at 749.

³⁶ See Kaufman, *supra* note 28, at 64.

³⁷ Henkin, *supra* note 15, at 343 (the U.S. record of human rights treaty ratification is marred by our consistent use of RUDs (reservations, understandings and declarations), and must be repaired by making the U.S. review this policy and begin to approach human rights treaties with more respect and humility).

³⁸ *Id.*

³⁹ See Thomas, *supra* note 30, at 19.

⁴⁰ See Henkin, *supra* note 15, at 349.

vention.⁴¹ Emanating from Nazi atrocities during World War II, its primary mission was the internationalization of the crime of genocide, a goal that could not have reasonably been controverted. However, due to the Senator and his followers, the treaty became one of the most controversial items on the legislative agenda.⁴² Relying on contemporary fears of communism and world government, and claiming that the treaty would lead to the abrogation of states' rights and to federal interference in segregation and race-related crimes in the South, opponents succeeded in labeling the Genocide Convention as distinctly un-American. It was almost forty years after President Truman sent the treaty to the Senate that they finally gave their consent.⁴³

By failing to ratify many other human rights treaties, and by incorporating self-defeating reservations into those we have ratified, the United States has not abandoned Senator Bricker's vision. Natalie Kaufman has conducted an outstanding survey of the history of U.S. anti-human rights rhetoric and tactics.⁴⁴ She demonstrates how the illusion that U.S. constitutional rights reign superior has been exploited to dupe Americans into believing that international human rights would be at best useless, and at worst, a dangerous threat to our freedom and autonomy. Opponents of human-rights treaty ratification have justified their position with a wide array of arguments that such instruments would: diminish fundamental American rights; violate states' rights; promote world government; subject citizens to trial abroad; enhance Communist/Socialist influence; infringe upon domestic jurisdiction; increase international entanglements; and create self-executing obligations.⁴⁵ Many of these concerns still reflect contemporary U.S. human rights policy and practice. Although we have evolved to a certain extent, our ongoing behavior reflects a continuing strain of the defensiveness and arrogance initially raised by Bricker and his progeny.

III. UNITED STATES' CONSTITUTIONALISM: A SHIELD AGAINST DOMESTIC HUMAN RIGHTS

As one of the remaining "superpowers" following the fall of the former Soviet Union in Europe, the U.S. currently enjoys un-

⁴¹ Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, entered into force January 12, 1951, 78 UNTS 277.

⁴² See generally Kaufman, *supra* note 28.

⁴³ See Goldsmith, *supra* note 21, at 367.

⁴⁴ See Kaufman, *supra* note 28.

⁴⁵ See Kaufman, *supra* note 28, at 2-3.

paralleled political and economic power and an almost untouchable status around the world today. Economic prosperity, technological innovations, and military power place the United States at the peak of global eminence.⁴⁶ This eminence does not, however, bleed over into the international human-rights context. It would surprise many inside and outside the U.S. to learn that our compliance with human rights norms lags far behind most other developed nations. Evaluating the origin of the exalted U.S. human-rights image helps to explain our behavior relative to human rights treaties and bodies. Such discernment facilitates narrowing the gap between the human-rights standards the United States demands abroad, and what it tolerates at home.

The U.S. Constitution, composed in 1789, is the oldest constitution in force in the world today.⁴⁷ At the time of its signing, it represented a radiant model for the protection of individual rights and liberties in the context of a representative democracy.⁴⁸ The fact that our Constitution has survived basically intact for more than two centuries has led some to the conclusion that this must be because it is the best one.⁴⁹ Indeed, it seems at times to be worshipped almost as a religion unto itself.⁵⁰ This may be best illustrated by a description of the National Archives building where the Constitution is stored:

The high-ceilinged, dimly-lit display chamber is reminiscent of the interior of a Greek temple. . . . Americans from around the Country come to gaze at the Constitution, the Bill of Rights, and the Declaration of Independence. They stand silently in line, often with young children in tow, awaiting their opportunity to approach the display cases and feast their eyes on the faded script of the original documents. . . . Further indication of how the documents are treasured is the nightly procedure of sinking

⁴⁶ *Round Table Discussion on International Human Rights Standards in the United States: The Case of Religion or Belief*, 12 EMORY INT'L L. REV. 973, 997 (Abdullah An-Na'im ed., 1998) (although the focus of the conference was on religious rights, larger issues such as U.S. domestic implementation of international human rights norms were examined in depth.) (Statement of Morgan Cloud, expressing the view that because of the combined effect of American isolation and post-Cold War realities, judges and legislators are less likely to turn to and accept international norms now than at any time since World War II).

⁴⁷ See Mayer, *supra* note 5, at 729; see also CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1996) (comparing adoption dates of different nations' Constitutions); Glendon, *supra* note 7, at 20. (In the aftermath of World War II, many nations found it necessary to rewrite or formulate their Constitutions).

⁴⁸ See Mayer, *supra* note 5, at 742.

⁴⁹ See generally Henkin, *supra* note 4.

⁵⁰ Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 17 (1984).

the display cases underground into reinforced vaults so that the documents can survive even if the surrounding city of Washington is obliterated by a nuclear attack."⁵¹

The national pride and veneration inspired by the U.S. Constitution suggest its status as more of a "holy relic than a secular document laying out a scheme of national government."⁵²

Moreover, this vanity has produced a dangerous streak of "constitutional exceptionalism." In one remark reflecting this streak, it was exclaimed that the U.S. has "more than two hundred years of constitutional culture in this country and, by God, we are not going to allow some foreigner or some arid international document to tell us what we know best."⁵³ Also, the U.S. maintains a tendency to place our system of rights on a pedestal, beyond the reach of domestic and international criticism. Senator Jesse Helms best exemplifies this practice in his statement that, "[w]e would put the international community on notice that we regard our system as a superior protection of human rights than [sic] any other system in the world."⁵⁴ These examples of self-righteousness have served only to obfuscate intelligent discourse about human rights in the U.S.

In guarding its citizens' rights and liberties, the Constitution often serves to deflect the adoption and implementation of bolder human rights protections afforded under international law.⁵⁵ We must look beyond the text and mystique of the document and realize that, in addition to liberty and freedom, the Constitution has been used to embrace such institutions as slavery, sexism and xenophobia, and "could be construed as distinctly anti-human rights in content."⁵⁶ As a result, U.S. citizens unknowingly live without some of the basic guarantees of human rights enjoyed by people of many other developed nations.⁵⁷

This lack of awareness may be because in the U.S., human

⁵¹ Mayer, *supra* note 5, at 742-3; *see generally*, Grey, *supra* note 50.

⁵² *Id.*

⁵³ An-Na'im, *supra* note 46, at 982 (statement made by David Bederman.)

⁵⁴ Mayer, *supra* note 5, at 751.

⁵⁵ *See* Mayer, *supra* note 5, at 768, n.211 (noting this phenomenon particularly in regards to gender discrimination). (Though the U.S. prohibits gender discrimination in a number federal and state statutes, it has yet to pass the Equal Rights Amendment); Glendon, *supra* note 7, at 528. (Japan's constitution guarantees the right to receive an education and the right to work); *see also* Lester, *supra* note 15, at 539.

⁵⁶ Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J., 54 (1990). It should be remembered that the U.S. Constitution was originally an instrument designed in part to protect the interests of Protestant, white, male property owners against everyone else.

⁵⁷ *See* Mayer, *supra* note 5, at 728.

rights are discussed in the limited context of specific or general blights in countries deemed less sophisticated than the U.S. Human rights are pushed aside as someone else's problem, not to be thought of as issues within our own revered borders. Americans have been conditioned to discuss their own blights as "social ills," or under the various separate rubrics of homelessness, welfare, health care, criminal justice, or immigration—as isolated domestic problems, not as human-rights issues *per se*. The American media rarely, if ever, characterizes any of these domestic problems as human-rights issues. This attitude is widespread, and may be found duplicated on an infinite number of television screens, newspapers, church pulpits, courtrooms, and classrooms around the country. Americans must begin to make these connections, holding the United States accountable for its own human-rights record.

IV. INTERNATIONAL HUMAN RIGHTS IN THE UNITED STATES CONSTITUTION AND COURTS

Between explicit guarantees in the text of the Constitution and judge-made law interpreting these provisions, one may logically conclude that the U.S. is in fact required to comply with international law. The Constitutional provisions dealing with human rights are the original Bill of Rights and the Fourteenth Amendment. "Section 5 [of the Fourteenth Amendment] grants Congress the 'power to enforce, by appropriate legislation, the provisions of' the Fourteenth Amendment, including its broad protections against the denial of due process and equal protection."⁵⁸ Also known as the "enabling clause," this language is a positive grant of legislative power authorizing Congress to exercise its powers to determine what laws are necessary to secure protections afforded to U.S. citizens both domestically and internationally.⁵⁹ If so desired, this constitutional provision could serve as a valuable vehicle to implement human rights legislation.⁶⁰

Further, the Supremacy Clause dictates that: "[A]ll Treaties made, or which shall be made, under the authority of the United

⁵⁸ Michael H. Posner & Peter J. Shapiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1220 (1993).

⁵⁹ See *id.* at 1223.

⁶⁰ The full scope of the 14th Amendment as it relates to human rights and the application of international law is far too broad a topic to be adequately covered in this article. For an excellent introduction to the topic, see Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983).

States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . ."⁶¹ Traditionally, this provision's language is not called upon for the authority to make and adhere to international human rights treaties. However, the terms "all Treaties made. . . . under the authority of the United States" could be interpreted as providing a broad power to do so.

Additionally, the Offenses Clause of the U.S. Constitution provides that Congress has the power to "define and punish. . . offenses against the Law of Nations."⁶² By preventing individual states from violating international law, this provision empowers the federal government to present a unified voice on that front. The clause was primarily enacted to protect our reputation among other nations, a purpose that remains compelling. Unfortunately, this Constitutional provision has been underutilized. To date, there has never been a statute questioned, much less struck down, as an invalid exercise of the Offenses Clause power. In fact, the courts often defer to Congress to define offenses against the Law of Nations.⁶³ Hence, this is another avenue by which to pursue a human-rights agenda based on the U.S. Constitution.

On the other hand, U.S. jurisprudence has produced a sizeable body of judge-made law related to the consideration, interpretation, and implementation of international human rights norms.⁶⁴ Subject to changing political ideologies, the Supreme Court's attitude towards international law has ranged from Justice Frankfurter's venerable admiration⁶⁵ to Justice Scalia's suspicious disdain.⁶⁶

One of the earliest cases to comment on the interplay between domestic and international law was *The Charming Betsy*, a maritime

⁶¹ U.S. CONST. art. VI, cl. 2.

⁶² U.S. CONST. art. I, § 8, cl. 10; see also Posner and Spiro, *supra* note 61, at 1223.

⁶³ *Id.* at 1225; see also *id.* at n.75 (listing a number of statutes enacted pursuant to the Offenses Clause, including the Alien Tort Claims Act.)

⁶⁴ Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543 (1989) (The Supreme Court has generally hedged away from upholding international human rights treaty obligations, but has repeatedly recognized that human rights norms and instruments can be useful in providing additional authority in interpreting constitutional and statutory rights).

⁶⁵ Kimberly Satterwhite, *Defender or Offender: America's Role in the Protection of International Human Rights?*, 29 U. RICH. L. REV. 175, 177 (1994) (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 469 (1947) (Frankfurter, J., Concurring)).

⁶⁶ See *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (Scalia, noting that execution of juveniles is not contrary to the "evolving standards of decency that mark the progress of a maturing society" that had been laid out and accepted since *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

case from 1804.⁶⁷ This case established the principle that whenever possible, domestic law should be interpreted so as to require the U.S. to fulfill its international obligations.⁶⁸ Over a century later, the supremacy of the Law of Nations was revisited when the Supreme Court held, in *Asakura v. Seattle*, that “[t]reaties are to be construed in a broad and liberal spirit and when two constructions are possible, one restrictive of rights which may be claimed under it, and the other favorable to them, the latter is preferred.”⁶⁹ Furthermore, in *The Paquete Habana*, this “liberal spirit” of construction was manifested when the court held in favor of the claimant based on the “general consent of the civilized nations of the world.”⁷⁰

Following this legal reasoning in *The Paquete Habana*, a new and fairly novel approach to international human rights began in 1980 when the Alien Tort Claims Act⁷¹ was resurrected. The first notable case using the Act was *Filartiga v. Pena-Irala*, where the court held that a citizen of Paraguay might be liable under the Alien Tort Claims Act for torturing and killing a fellow Paraguayan citizen.⁷² Here, the court granted jurisdiction to an alien of the U.S. to sue a government official in his “mother” country. In its decision, the court emphasized the increasingly significant role of international law, and of human rights norms specifically, in U.S. courts:

[Throughout the course of] the twentieth century, the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights. . . In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. . . Our holding today. . . is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.⁷³

⁶⁷ *Brzonkala v. Morrison*, Brief Amici Curiae on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners, page 2 (citing *The Charming Betsy*, 6 U.S. 64, 118 (1804)).

⁶⁸ *The Charming Betsy*, 6 U.S. at 118 (“an act of Congress ought never be construed to violate the law of nations, if any other possible construction remains”).

⁶⁹ *Asakura v. Seattle*, 265 U.S. 332, 342 (1924).

⁷⁰ Cathleen E. Hull, “*Enlightened by a Humane Justice*”: An International Law Argument Against the Juvenile Death Penalty, 47 U. KAN. L. REV. 1079, 1098-99 (1999); see also *The Paquete Habana* 175 U.S. 677 (1900).

⁷¹ 28 U.S.C. § 1350 (1994) (The Act, adopted in 1789, permits aliens to sue in U.S. courts for torts committed in violation of the “Law of Nations” or of a U.S. treaty).

⁷² *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

⁷³ *Id.* at 890.

Recently in *Kadic v. Koradzic*, the majority supported this analysis and under the Act awarded over five billion dollars to survivors of egregious human rights violations.⁷⁴ Although the circuits are split on how these cases should be interpreted, the "liberal spirit" construction suggested in *Asakura* and by the Alien Tort Claims Act allows U.S. courts to adjudicate an increasing number of cases involving abuses of international human-rights law.⁷⁵

Still, another source for advocates to rely upon exists in international law doctrine.⁷⁶ In *Fernandez v. Wilkinson*,⁷⁷ the appellant, a Cuban detainee, sought relief through *habeas corpus*, claiming that his detention violated international law. Specifically, the appellant cited the Universal Declaration of Human Rights and the American Convention on Human Rights (ACHR).⁷⁸ Although the court recognized the difficulty of using international agreements as valid legal authority, it relied in part on these agreements and on the International Covenant on Civil and Political Rights (ICCPR) "as indicative of the customs and usages of civilized nations."⁷⁹ In granting *habeas corpus*, the court stated, "though the indeterminate detention of an excluded alien cannot be said to violate the U.S. Constitution or our statutory laws, it is judicially remedial as a violation of international law."⁸⁰ The court's statement represents an

⁷⁴ *Kadic v. Karadzic*, 70 F.3d at 232 (2d Cir. 1995) (ordering Bosnian Serb leader Radovan Karadzic to pay \$745,000,000 and then another \$4,500,000,000 in damages to victims of rape, torture, and genocide).

⁷⁵ *Abebe-Jiri v. Negewo*, 72 F.3d 844 (1996) (awarding a judgement against the torturer of three Ethiopian women); *Paul v. Avril*, 901 F. Supp. 330 (1994) (awarding a \$41 million dollar judgement to the human rights victims of a Haitian dictator); *Todd v. Panjaitan*, 1994 WL 827111 (D. Mass., Oct 26, 1994) (awarding \$14 million to the mother of a young boy who was murdered by Indonesian troops in East Timor during a massacre). In addition, two cases have been filed accusing oil companies of human rights abuses against Nigerian citizens; Zimbabwe's President Robert Mugabe was served papers last year while in the U.S. alleging human rights abuses stemming from his country's elections; Former Chinese premier Li Peng was served on behalf of Chinese students protesting China's actions during the Tiananmen Square protests in 1989. A group of women filed a class action against the Japanese government alleging that they were sex slaves, or "comfort women," during World War II. See generally Joyce Wadler, *Public Lives: Making Her Case Against Foreign Leaders*, N.Y. TIMES, September 29, 2000, at <http://channel.nytimes.com/2000/09/29/nyregion/29prof>; Elizabeth Amon, *Alien Tort Claims Act Provides a Legal Forum for the World*, THE NAT'L L. J., Oct. 19, 2000, on Law.com; Daphne Eviatar, *A Victim's Bill of Rights*, THE AMERICAN LAWYER, Jan. 2, 2001, on Law.com; Mark Hamblett, *Nigerian Rights Suit Against Shell OK'd by 2d Circuit*, N.Y.L.J., Sept. 15, 2000, on Law.com.

⁷⁶ See Hull, *supra* note 72, at 1099.

⁷⁷ 505 F. Supp. 787 (D. Kan. 1980).

⁷⁸ *Id.* at 795-97.

⁷⁹ *Id.* at 797.

⁸⁰ *Id.* at 798.

other step in the evolution of U.S. jurisprudence that legitimizes international law and norms in its consideration of human-rights issues.

V. U.S. INSULATION FROM DOMESTIC APPLICATION OF HUMAN RIGHTS - RUDs

There is a two-tiered system governing acceptance of and membership to human-rights treaties. States express their support for the principles of a treaty by signing the agreement, but they only become domestically liable through ratification, which communicates a state's commitment to provide for, and protect those rights within their own legal system. Each time the U.S. has crossed the threshold to ratification, it has done so only with numerous "reservations, understandings and declarations" (commonly referred to in the conglomerate as RUDs).⁸¹ This practice has enraged and inflamed even long-time allies of the United States,⁸² who take their obligations under ratified treaties much more seriously.⁸³

According to the Vienna Convention on the Law of Treaties, a reservation is a "unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."⁸⁴ States enter reservations that effectively modify or restrict the impact of the treaty. However, this right is a limited one, subject to the conditions enumerated in Article 19 of the Vienna Convention. A nation may not formulate a reservation

⁸¹ See generally David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993).

⁸² Henkin, *supra* note 15, at 343; see also *id.* at n.11, (At least 10 states have objected to one or more of the RUDs attached by the United States to its ratification of the Covenant on Civil and Political Rights. Citing MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL, STATUS AS AT 31 DECEMBER 1993, U.N. Doc. ST/LEG/SER.E/12, at 134-37.)

⁸³ See Mayer, *supra* note 5, at 747 (contrasting the U.S. with other nations that "do not treat international human rights as a force threatening the integrity of their constitutions and domestic systems of rights. Instead, their constitutions may treat international human rights as a friendly entity and endorse them by express constitutional provisions." Mayer goes on to describe provisions in the Spanish, Czech and German Constitutions that explicitly incorporate international human rights as dictated in various treaties and covenants into their respective constitutions in a manner that is binding) (citing CONSTITUTIONS OF THE WORLD, *supra* note 47).

⁸⁴ Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, entered into force Jan. 27, 1980, U.N. Doc. A/CONF. 39/26, 1155 U.N.T.S. 331, at art. 2 (1)(b).

that is prohibited by the treaty, or one that is incompatible with the object and purpose of the treaty.⁸⁵ If it is determined that a reservation is invalid under the rules set out above, there are two possible effects. First, the illegal reservation can be severed from the treaty, rendering the state a full party.⁸⁶ Alternatively, if the reservation cannot be severed, the state is not considered to be a party at all.⁸⁷ Thus, U.S. compliance to domestic human rights standards that fall short of those in ratified treaties serves to undermine the overarching aim of the international human-rights movement.⁸⁸

Since the inception of the modern human-rights movement, the U.S. has manifested a defensive and threatened stance towards human-rights treaties. Though we feel compelled to sign and ratify some of them, we are equally compelled to insulate ourselves against their domestic application. The result is a qualified ratification process that is "designed to ensure that these treaties would have virtually no domestic legal effect in enhancing human rights."⁸⁹ Proponents of RUDs argue that the reservations serve an important function in protecting our courts from a terrifying flood of litigation. However, this contention has been addressed and deflected by Henkin.⁹⁰ This fear is for the most part unfounded, as most potential human rights cases that would be brought under a human rights convention could already arise under the Constitution or civil rights laws, and those that do not should arise under implementing legislation passed pursuant to our ratification of the conventions.⁹¹ There are many explanations for these RUDs, some of which point towards America's sense of international political

⁸⁵ See *id.*

⁸⁶ See generally William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?* 21 BROOKLYN J. INT'L L. 277 (1995).

⁸⁷ See Hull, *supra* note 73, at 1087.

⁸⁸ See Henkin, *supra* note 15, at 343 (Henkin has expressed serious concern about this practice of conditional ratification, noting that the purpose of human rights conventions is to have countries assume obligations to respect recognized rights in accordance with international standards. Allowing states to enter reservations that signal that they do not intend to comply with some of the provisions therein defeats the entire purpose of setting universal norms).

⁸⁹ Mayer, *supra* note 5, at 755; see also PAUL L. HOFFMAN & NADINE STROSSEN, ENFORCING INTERNATIONAL HUMAN RIGHTS LAW IN THE UNITED STATES, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY, 478 (1994); and Kaufman, *supra* note 28, at 197 (the U.S. package of attachments to human rights covenants "makes a mockery of the international human rights consensus. . .")

⁹⁰ See Henkin, *supra* note 15, at 346).

⁹¹ See *id.*

and legal superiority;⁹² all of which serve to keep the United States free from the grasp of international law.

As a whole, the range of RUDs that qualify U.S. ratification of human-rights conventions suggest that "behind the invocations of its Constitution, there lurks a banal preference for upholding domestic laws and policies that afford weaker protections. . . than are found in international law."⁹³ As a result, the U.S. consistently ratifies human-rights treaties in this manner prompting countries to doubt our good faith in the process.⁹⁴ "The Senate's practice of *de facto* rewriting treaties, through reservations, declarations, understandings, and provisos, leaves the international credibility of the U.S. shaken and its reliability as a treaty-negotiating partner with foreign countries in doubt."⁹⁵ The U.S. contributes to undesirable consequences both for itself and for the international community when it places itself above the established ratification process.

Human-rights conventions exist to promote and demand respect for human rights standards. Countries are encouraged to assume mutual legal obligations to act in accordance with international standards set forth in those conventions.⁹⁶ This very object is frustrated to the point of defeat when the U. S., through RUDs, attempts to ensure that ratification of a convention will not require any changes in U.S. law, policy or practice, even where we

⁹² See Henkin, *id.* at 341. Henkin provides a useful framework of five principles that have informed U.S. RUDs:

1. The United States will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the United States Constitution.
2. The United States adherence to an international human rights treaty should not effect—or promise—change in existing U.S. law or practice.
3. The United States will not submit to the jurisdiction of the International Court of Justice to decide disputes as to the interpretation or application of human rights conventions.
4. Every human rights treaty to which the United States adheres should be subject to a federalism clause so that the United States could leave implementation of the convention largely to the states.
5. Every international human rights agreement should be non-self-executing;

see also Goldsmith, *supra* note 21, at 367-8 (adopting and applying the same set of principles to explain American resistance to international human rights treaties and norms).

⁹³ Mayer, *supra* note 5, at 820.

⁹⁴ See Hull, *supra* note 72, at 13 (this might also be because eighty-five percent of all multilateral treaties do not contain any reservations, thus further demonstrating how the U.S. places itself above others in the human rights community); see also *infra* notes 173 and 176.

⁹⁵ Bassiouni, *supra* note 5, at 1173.

⁹⁶ See Henkin, *supra* note 15, at 343.

fall below internationally accepted standards. Indeed, if every state subjected its ratification to the sort of reservations undertaken by the U.S., the conventions would be rendered toothless and meaningless. The U.S. seeks to sit in judgement on the human-rights records of others, but vehemently refuses to be subjected to that same scrutiny. At the very least, this suggests an intolerable level of hypocrisy on the part of the U.S.; at worst it works to trivialize and de-legitimize the international human-rights movement as a whole. Nowhere is this dangerous hypocrisy clearer than in our continued imposition of the death penalty on children.

VI. THE JUVENILE DEATH PENALTY IN THE UNITED STATES—A WORST-CASE SCENARIO

You may hang these boys; you may hang them by the neck until they are dead. But in doing it you will turn your face toward the past. In doing it you are making it harder for every other boy who, in ignorance and darkness, must grope his way through the mazes which only childhood knows. . . . You may save them and make it easier for every child that sometime may stand where these boys stand. You will make it easier for every human being with an aspiration and a vision and a hope and a fate.⁹⁷

- Clarence Darrow

The most glaring illustration of the contradiction between the perception of the United States as a human-rights beacon and the reality of the human rights record of the U.S. is our imposition of the death penalty against children.⁹⁸ According to the acclaimed death penalty expert Steven Bright, the United States holds the auspicious title of being the world leader in the execution of juvenile offenders.⁹⁹ The list of countries that have either formally abolished this practice or refused to implement it for a substantial

⁹⁷ Lisa Kline Arnett, *Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles*, 57 U. CIN. L. REV. 245 (1988) (citing ATTORNEY FOR THE DAMNED 86 (A. Weinberg ed., 1957) (excerpt from Clarence Darrow's closing argument in Loeb-Leopold murder trial)).

⁹⁸ See Geer, *supra* note 11, at 92. A full survey or analysis of the already prolific literature regarding the juvenile death penalty is beyond the scope and purpose of this paper. For further reading see Victor Streib, *JUVENILE JUSTICE IN AMERICA* (1978); Julian S. Nicholls, *Comment, Too Young to Die: International Law and the Imposition of the Juvenile Death Penalty in the United States*, 5 EMORY INT'L L. REV. 617 (1991); Michael J. Spillane, *Comment, The Execution of Juvenile Offenders: Constitutional and International Law Objections*, 60 UMKC L. REV. 113 (1991); David Weissbrodt, *Execution of Juvenile Offenders by the United States Violates International Human Rights Law*, 3 AM. U. V. INT'L. L. & POL'Y 339 (1988).

⁹⁹ See Bright, *supra* note 20, at 2796-97.

period of time is quite long.¹⁰⁰ The United States stands among only a handful of human rights pests to cling to this practice.¹⁰¹ This section will give an overview of the juvenile death penalty in U.S. practice, outlining the relevant jurisprudence as it has developed, noting when international law and human rights standards have been considered. Finally, the juvenile death penalty will be examined and analyzed in light of U.S. treaty obligations and potential obligations among existing international legal standards and norms. This section will demonstrate how different U.S. practice is in relation to the international community and how important that hypocrisy makes us as a human-rights leader.

Currently, thirty-eight states and the federal government authorize the use of the death penalty. Two of these states, Illinois and Maryland, have imposed moratoriums on executions.¹⁰² Seventeen states currently permit the execution of sixteen-year-olds, and another five states allow seventeen-year-olds to be put to

¹⁰⁰ Kha Q. Nguyen, *In Defense of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States*, 28 Geo. WASH. J. INT'L. L. & ECON, 401, 423-24 (1995). As long as ten years ago, countries which had abolished the death penalty entirely included: Australia, Austria, Cape Verde, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, Finland, France, Germany, Haiti, Honduras, Iceland, Kiribati, Liechtenstein, Luxembourg, Marshall Islands, Micronesia, Monaco, The Netherlands, Nicaragua, Norway, Panama, Philippines, Portugal, San Marino, Solomon Islands, Sweden, Tuvalu, Uruguay, Vanuatu, Vatican City State and Venezuela. Quoting from AMNESTY INTERNATIONAL, *WHEN THE STATE KILLS, THE DEATH PENALTY: A HUMAN RIGHTS ISSUE*, 259 (1989). The countries that have eliminated the practice of executing juveniles, either by law or by treaty are: Albania, Algeria, Angola, Antigua, Antigua and Barbuda, Argentina, Bahamas, Bahrain, Belgium, Belize, Bolivia, Botswana, British Virgin Islands, Brunei Darussalam, Bulgaria, Burundi, Cameroon, Canada, Cayman Islands, Central African Republic, Cote d'Ivoire, Cuba, Czechoslovakia, Dominica, Egypt, Ethiopia, Gabon, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Hungary, Iran, Iraq, Jamaica, Japan, Jordan, Kenya, Korea (Democratic People's Republic), Kuwait, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritius, Mongolia, Montserrat, Namibia, New Zealand, Niger, Paraguay, Poland, Qatar, Romania, Rwanda, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Saudi Arabia, Senegal, Sierra Leone, South Africa, Sri Lanka, Sudan, Suriname, Swaziland, Syria, Tanzania, Togo, Trinidad and Tobago, Tunisia, Turkey, Turks and Caicos Islands, Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom, Western Samoa, Yemen (People's Democratic Republic), Yugoslavia and Zambia. Quoting Amnesty International, *WHEN THE STATE KILLS* at 264-65.

¹⁰¹ See Hull, *supra* note 72, at 1080; see also Bright et al., *supra* note 20, at 2797 (the other countries who continue to permit the execution of juveniles are Iran, Saudi Arabia, Bangladesh, Pakistan and Nigeria) (citing Amnesty Int'l USA, *The USA to Confirm its Position as World Leader in Killing Child Offenders* (last modified Jan. 25, 1999) (<http://www.amnestyusa.org/news/1999/25101199.htm>).

¹⁰² Deborah T. Fleischaker, Director, Death Penalty Mortorium Implementation Project, American Bar Association, during an interview October 25, 2002.

death.¹⁰³ Prior to *Stanford v. Kentucky*¹⁰⁴ just over a decade ago, five states authorized the death penalty for fourteen-year-olds, and Mississippi set the minimum age at thirteen.¹⁰⁵ The number of juvenile offenders facing the death penalty has increased 142% between 1983 and 2002.¹⁰⁶ Over our two hundred year history as a nation, we have executed approximately 350 children and have another 83 currently on death row.¹⁰⁷ This is hardly a record to brag about.

Laws regarding the juvenile death penalty have shifted back and forth over time. The first of two seminal cases on the issue was actually decided with great deference to the standards and sentiments of the international human-rights community. In 1988, in *Thompson v. Oklahoma*,¹⁰⁸ the Supreme Court held that a fifteen-year-old did not possess the requisite culpability to be eligible for the death penalty and cited *Eddings v. Oklahoma*, where the Court stated that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults."¹⁰⁹ Moreover, *Thompson* recognized that the death penalty does not deter children, making its imposition "nothing more than the purposeless and needless imposition of pain and suffering. . .."¹¹⁰ In this case, evidence of a broad spectrum of professional organizations' vehement opposition to the juvenile death penalty was introduced to the Court by such groups as the American Bar Association and the American Law Institute.¹¹¹

¹⁰³ <http://www.deathpenaltyinfo.org> (States with a minimum age of sixteen: Alabama, Arizona, Arkansas, Delaware, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Nevada, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Wyoming. States with a minimum age of seventeen: Florida, Georgia, New Hampshire, North Carolina, Texas).

¹⁰⁴ *Infra* note 115.

¹⁰⁵ See Hull, *supra* note 72, at 1108.

¹⁰⁶ See <http://www.deathpenaltyinfo.org>, *supra* note 103.

¹⁰⁷ Connie de la Vega & Jennifer Brown, Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty? 32 U.S.F.L. Rev. 735, 736 (1998); see also Victor L. Streib, <<http://www.law.onu.edu/faculty/streib/juvdeath.htm>>, June 30, 2002.

¹⁰⁸ 487 U.S. 815, 834 (1988).

¹⁰⁹ 455 U.S. 104, 115-16 (1982).

¹¹⁰ *Id.* at 833 (quoting *Coker v. Georgia* 433 U.S. 584, 592 (1977)).

¹¹¹ Ved P. Nanda, The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights, 42 DEPAUL L. REV. 1311, 1334-35 (1993). In addition to Amnesty International, in *Stanford v. Kentucky* and other similar cases, a large number of authoritative professional organizations gave powerful voice to the argument that the death penalty is unethical and inappropriate for juvenile offenders. Briefs were filed by the following organizations: International Human Rights Law Group, Child Welfare League of America, The National Parent and Teachers Association, National

Justice Stevens noted this impressive display of domestic opposition to the juvenile death penalty. Justice O'Connor, in her concurring opinion, referred to *Trop v Dulles*,¹¹² and recognizing that other nations' practice was informative to the Court as to the "evolving standards of decency that mark the progress of a maturing society."¹¹³ The Court realized that most nations had rejected the death penalty altogether, or at the very least, rejected it with respect to juveniles. They also recognized that it would serve neither national nor international interests to set ourselves apart as the only civilized nation who kills our children for their crimes. This indication was the first by the Supreme Court that human-rights standards might be treated as legitimate authority in the consideration of contemporary domestic constitutional matters.

Unfortunately, this decision was overruled a year later when the Court announced its current approach to the juvenile death penalty in *Stanford v. Kentucky*.¹¹⁴ The *Stanford* plurality rejected the notion expressed in *Thompson* that the death penalty is disproportionate because juveniles lack the requisite culpability. Flaunting international standards, the Court stated that though eighteen is indeed an arbitrary age, most minors understand right from wrong. This understanding between right and wrong was apparently equated with fully developed adult moral culpability. It was further held that the juvenile death penalty is in accordance with common-law tradition¹¹⁵ and is in no way contrary to "evolving

Council on Crime and Delinquency, Children's Defense Fund, National Association of Social Workers, National Black Child Development Institute, National Network of Runaway and Youth Services, National Youth Advocate Program, American Youth Work Center, National Legal Aid and Defender Association, National Association of Criminal Defense Lawyers, American Society for Adolescent Psychiatry, American Orthopsychiatric Association, The American Baptist Churches, American Jewish Committee, American Jewish Congress, Christian Church Disciples of Christ, Mennonite Central Committee, National Council of Churches, General Assembly of the Presbyterian Church, Southern Christian Leadership Conference, Union of American Hebrew Congregations, United Church of Christ Commission for Racial Justice, United Methodist Church General Board of Church and Society and the United States Catholic Conference.

¹¹² 356 U.S. 861 (1958).

¹¹³ *Id.* at 861.

¹¹⁴ 492 U.S. 361 (1989).

¹¹⁵ *Id.* at 374. Justice Scalia stated in the opinion, "[T]here is. . . no relevance to the laws cited by petitioners in their *amici* which set 18 [sic] or more as the legal age for engaging in various activities. . . It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards." *Id.*

standards of decency.”¹¹⁶ Notably, this Court did not draw upon or defer to international human-rights standards as it did the previous year in *Thompson*.

This newly articulated standard of decency has “evolved” in such a manner to allow for the execution of people like Johnny Garrett.¹¹⁷ Seventeen years old when he raped and murdered an elderly nun, Johnny had a history of mental illness and, according to medical experts, was extremely mentally impaired, chronically psychotic, and brain-damaged as a result of several severe head injuries suffered during his childhood.¹¹⁸ “There was also evidence that, as a child, Johnny was physically beaten, raped, and forced to participate in homosexual pornographic films.”¹¹⁹ Dwayne Allen Wright had a similar story.¹²⁰ In spite of medical findings that he had suffered from depression, psychotic episodes, had signs of brain damage, and was borderline retarded, he was sentenced to death in Virginia, in 1991, for a murder he committed at the age of seventeen.

In exercising the death penalty against juvenile offenders, much less against those whose mental capacity is questionable, the U.S. stance is blatantly inconsistent with international human-rights standards, and of international law.¹²¹ Unless the Court would “posit that the decency and the dignity of Americans are somehow lower than those of the rest of the world,”¹²² our current practice in this area must be revisited immediately. Our own children’s rights and criminal justice advocates, along with our treaty partners and peers in the international human-rights community, must refuse to allow this situation to continue. There is no need to oppose the practice on a moral or theoretical basis when there is ample authority in binding international human rights instruments

¹¹⁶ *Id.* at 379 (quoting *Trop v. Dulles*, 356 U.S. at 101).

¹¹⁷ Nguyen, *supra* note 100, at n.26 (citing AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: DEATH PENALTY DEVELOPMENTS IN 1992, at 6; also citing *Ex Parte Garret*, 831 S.W.2d 304 (Tex. Crim. App. 1991)).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Juvenile Offender Facing Execution in Virginia—a Step Backwards*, Amnesty International- News Release (Oct. 9, 1998) at <http://www.amnesty.org/news/1998/25107698.htm>.

¹²¹ See An-Na’im, *supra* note 47, at 1003 (a formal finding against the U.S. was made by the Inter-American Commission on Human Rights for juvenile executions in case 9647, discussed *infra* note 179).

¹²² See Nanda, *supra* note 111, at 1338 (“if U.S. law and practice truly aim at a standard of decency, the Court must certainly incorporate an acknowledgement that almost the entire world’s standard of decency is far higher. . .”). *Id.* at 1339.

and general international legal norms to force the U.S. to acknowledge its record and begin to reshape it.

The International Covenant on Civil and Political Rights¹²³ is among the most powerful and significant human-rights instruments to which the U.S. is a ratified party. Among the specific rights enumerated in the ICCPR are: freedom of thought, conscience, and religion; the right of peaceful assembly; the right to vote; the right to privacy; freedom of movement, residence, and emigration; freedom from slavery and forced labor; and the general right to protection of life, including protection against the death penalty.¹²⁴ To that effect, Article 6(5) of the ICCPR prohibits imposition of the death penalty "for crimes committed by persons below eighteen years of age."¹²⁵ However, the United States agreed to ratify the Covenant only with the following reservation:

The United States reserves the right, subject to its Constitutional constraints [sic], to impose capital punishment on any person (other than a pregnant woman) duly convicted. . . including such punishment for crimes committed by persons below eighteen years of age.¹²⁶

This reservation, like many others, was consistent with a federalism argument. Essentially, the U.S. argues that certain treaty provisions like the one here may only be exercised by the federal government to the extent that they have control over states in such matters. Since each state in the U.S. has its own criminal law provisions and powers, it is argued that dictating the minimum age for executions would itself intrude upon state rights. This argument, however, is weak when used to perpetuate a practice in half of our states that has been ceased, rejected, and condemned by almost every other country in the world.

It is unclear whether this reservation is even valid. As outlined earlier, the Vienna Convention states that any party "may, when signing, ratifying, accepting, or acceding to a treaty, formulate a reservation unless. . . the reservation is incompatible with an object and purpose of the treaty."¹²⁷ According to this standard, the U.S. reservation to article 6(5) of the ICCPR is unacceptable, as it di-

¹²³ International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992) (hereinafter ICCPR).

¹²⁴ *Id.*

¹²⁵ *Id.* at art. 6(5).

¹²⁶ Multilateral Treaties deposited with the Secretary-General: Status as of 31 December 1994, at 126, U.N. Doc. ST/LEG/SER.E/13 (1995).

¹²⁷ See Vienna Convention, *supra* note 85, at Sec. 2, art. 19.

rectly undermines an essential purpose of the Covenant.¹²⁸ Although the U.S. has reserved for itself the right to execute minor defendants, I would assert that its reservations are null and void, as they are incompatible with the object and purpose of the ICCPR.

This attitude is also reflected in our refusal to ratify two other human rights instruments: the Convention on the Rights of the Child (Child Convention) and the American Convention on Human Rights (ACHR).¹²⁹ The Child Convention seeks to provide specific guarantees to juveniles because "childhood is entitled to special care and assistance."¹³⁰ As of 1998, every U.N. member had ratified the Child Convention aside from the U.S. and Somalia.¹³¹ The primary reason for U.S. non-ratification of this convention is Article 37(a), which provides that "[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age."¹³² A few months before signature of the Child Convention, the U.N. Human Rights Committee took advantage of its prerogative to invalidate and forbid any reservation concerning the execution of children. This embarrassing position results, once again, in our self-identification as a human rights delinquent.

The same is true of our failure to ratify the ACHR, which states that "[c]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age. . . ."¹³³ The U.S. participated in the drafting of this Convention and signed it, but because of this provision the U.S. will not have it ratified. U.S. insistence on subjecting juvenile capital offenders to the death penalty not only offends the principles of these human rights treaties and covenants, it offends even more fundamental international legal notions such as customary international law and *jus cogens*.

Customary international law emanates from tradition and

¹²⁸ See de la Vega, *supra* note 107, at 755 (citing Edward Sherman, *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT'L L.J. 69, 79 (1994)).

¹²⁹ The Convention on the Rights of the Child. U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc A/RES/44/25 (1989).

¹³⁰ *Id.* Preamble, at 3.

¹³¹ See Hull, *supra* note 72, at 1092 (citing Michael J. Dennis, *The Fifty-Third Session of the U.N. Commission on Human Rights*, 92 Am. J. Int'l L. 112, 116 n.27 (1998)).

¹³² See Convention on the Rights of the Child, *supra* note 129, at 17.

¹³³ American Convention on Human Rights: (Pact of San Jose), Nov. 22, 1969, OASTS 36, O.A.S. Off. Rec. OEA Ser.L/V/II.23,doc.21, rev.6 (1979), 1144 U.N.T.S. 144 art. 4(5), at 146.

practice, rather than from any body of legislation. "The fundamental idea behind the notion of custom as a source of international law is that states in and by their international practice may implicitly consent to the creation and application of international legal rules," unless they have persistently objected to a particular norm.¹³⁴ In other words, if a nation wishes to participate in international trade, politics, or tourism, it automatically subjects itself to customary law. Thus, in areas where the U.S. has not been a persistent objector,¹³⁵ customary law may be said to become supreme federal law and will supersede all inconsistent state and local law.¹³⁶

Among the practices that have been found to breach customary law are genocide, murder, torture, prolonged arbitrary detention, and systemic racism.¹³⁷ An internationally accepted practice becomes customary law when it meets three elements: generality, duration, and *opinio juris*.¹³⁸ First, generality requires that the practice be condemned by a geographically broad and extensive array of nations. Although universal condemnation is not required, there should be a consensus that the practice breaches some ele-

¹³⁴ Hull, *supra* note 72, at 1093 (citing MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 42 (2d ed. 1993)); see also Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 147, 150 (1996).

¹³⁵ See Arnett, *supra* note 97, at n.113

A nation may exempt itself from being bound by a rule of customary international law by establishing itself as a persistent objector if it makes an explicit objection to the coalescing norm and has maintained a consistent opposition since the inception of the norm. The United States, however, has not effectively done this in regard to the norm against juvenile executions. For example, the United States voted for adoption of the ICCPR in the General Assembly in 1966 without objecting to article 6(5). Subsequently, President Carter signed the Covenant without opposition to article 6(5). When he transmitted the Covenant to the Senate, he did include a memorandum from the State Department proposing a reservation on the question of capital punishment. This proposed reservation, however, was never acted on by the Senate and came 12 years after the Covenant was adopted by the General Assembly. Thus, the United States has not made a persistent objection to the norm since its inception and does not qualify as a persistent objector.

¹³⁶ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, comment e, at 66, (1987); contrast Lillich, *supra* note 57, at 69-70; with Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORD. L. REV. 371 (1997) (federal political branches in the U.S. may authorize international human rights litigation if they wish, through, for example, application of international customary law as federal law, but they have thus far resisted to doing so, making such litigation without any legitimate legal basis).

¹³⁷ See *id.* at § 702.

¹³⁸ BURNS H. WESTON *et al.*, International Law and World Order 109-111 (3rd ed. 1997) (quoting DAVID H. OTT, PUBLIC INTERNATIONAL LAW IN THE MODERN WORLD 13-16 (1987)).

ment of human dignity.¹³⁹ The juvenile death penalty meets the generality requirement when all but five countries in the world have adopted laws prohibiting the practice, signed treaties agreeing not to impose it, or desisted from enforcing it. The second element is duration, or how long the particular practice has existed.¹⁴⁰ A custom may have evolved among civilized nations over hundreds of years, such as a prohibition against racial violence, or it may have developed quickly, such as the freedom to explore outer space or the Internet. A state practice has ripened into a customary norm when the rule is "both extensive and virtually uniform."¹⁴¹ Many developed nations have never endorsed capital punishment of adults or children. Still more have never permitted its application to children. The virtually world-wide policy of not allowing children to be subject to the death penalty has endured long enough to qualify as a customary norm.

Finally, a state practice becomes customary law when it fulfills the psychological element of *opinio juris*. "*Opinio juris* is usually defined as a conviction felt by states that a certain form of conduct is required by international law."¹⁴² When most states implicitly recognize the existence of a certain rule, it is thus presumed that the rule exists. *Opinio juris* is satisfied in this case because only a small number of states still maintain a practice of imposing the juvenile death penalty. Thus, our continuation of this practice offends customary law on all levels.

On the other hand, even if there were no such obligation we would still bound by the norms of *jus cogens*.¹⁴³ *Jus cogens*, otherwise known as peremptory norms, is defined in Article 53 of the Vienna Convention on the Law of Treaties as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."¹⁴⁴ Very few practices are authoritatively concluded to meet the threshold of *jus cogens*.¹⁴⁵ "To be con-

¹³⁹ *Id.*

¹⁴⁰ See Hull, *supra* note 72, at 1095.

¹⁴¹ *Id.* at 1096.

¹⁴² *Id.*

¹⁴³ See *id.* at 1096-1097.

¹⁴⁴ See Vienna Convention, *supra* note 86, at art. 53. It has further been understood as an "expression of the belief that, in the absence of a supranational entity governing the international community, there must exist ethical and moral restraints on a state's positivist powers to enter into agreements or engage in practices hostile to the public order." See Nguyen, *supra* note 100, at 420.

¹⁴⁵ Hull, *supra* note 72, at 1101 (citing RESTATEMENT (THIRD) OF FOREIGN RELA-

sidered *jus cogens*, an international norm must meet three criteria: 1) a large number of states consider it necessary for international public order; 2) multilateral agreements prohibit derogation from the norm; and 3) international tribunals have applied the norm."¹⁴⁶ As previously discussed, all three of these requirements have been met in regard to the juvenile death penalty. Almost all states in the world have either overtly or implicitly refused to impose the death penalty on children, because this practice violates a number of multilateral human agreements including the ICCPR, the Convention on the Rights of the Child, and the American Convention.¹⁴⁷ Finally, as will be discussed in section VI of this paper, the IACHR has already heard a case against the U.S. for implementing this practice and found that it did violate regional norms of *jus cogens*.¹⁴⁸ As the U.S. is one of only five countries to continue to execute juvenile offenders, and such a practice is morally and legally condemned by most of the world, *jus cogens* seems to be satisfactorily met. This makes the U.S. reservation to article 6 paragraph 5 of the ICCPR void, and as such absolutely requires us to abolish the practice nationally.

The United States' perpetuation of the death penalty, even against juveniles, was not so anomalous fifty years ago.¹⁴⁹ Many

TIONS LAW OF THE UNITED STATES §702 (1987)), lists six rules governing the characteristics of *jus cogens* norms: A state violates international law if, as a matter of state policy, it practices, encourages, or condones:

- a) genocide
- b) slavery or slave trade
- c) the murder or causing the disappearance of individuals
- d) torture or other cruel, inhuman, or degrading treatment or punishment
- e) prolonged arbitrary detention'
- f) systematic racial discrimination

¹⁴⁶ *Id.* at 1101 (citing Nguyen, *supra* note 101, at 443); *see also* de la Vega, *supra* note 107, at 761 (determining factors of a *jus cogens* norm also include the 'strength and intention of the supporting states and the significance of the opposition.' While the United States is considered a significant force in the international community, its opposition alone cannot overcome the creation of a peremptory norm. . . . Just as South Africa could not overcome the prohibition against apartheid, the U.S. should not be able to overcome the prohibition against death penalty eligibility for juveniles).

¹⁴⁷ *See* De La Vega, *supra* note 107, at 760.

¹⁴⁸ It should be noted that some found the IACHR finding unpersuasive as the "regional" standard of *jus cogens* it recognized in its holding was a new concept, and perhaps not yet acknowledged by the international human rights community as a whole.

¹⁴⁹ *See* Bright, *supra* note 20, at 2796-7 (citing Eric Procosch, *Human Rights v. The Death Penalty: Abolition and Restriction in Law and Practice, in Europe. A Death-Penalty-Free-Zone* (unpublished)). Fifty years ago, only eight countries had formally abolished the death penalty.

countries at one time in their history have allowed the imposition of capital punishment. However, it is both natural and appropriate for domestic law and jurisprudence to evolve and mature over time. To date, the U.S. has not kept pace with the maturation of international law, which has been toward complete abolition of the death penalty.¹⁵⁰ That trend has played out consistently around the world, except in the U.S., where more and more children are being tried as adults, and executions of both minors and adults are on the rise.¹⁵¹ Engaging in this backward and near-universally condemned practice, the U.S. has relegated itself to the bottom of the human-rights heap. We need not, however, remain mired in this grim international hypocrisy.¹⁵² We have the means by which to improve our human-rights record and reaffirm our commitment to human rights.

VII. AVENUES OF RECOURSE

There is no need to accept this double standard or to remain complacent in its ongoing practice. There are a variety of practical and realistic means by which the U.S. might reconcile its domestic laws with the international human rights norms it champions. These avenues of recourse may be divided into several categories: domestic legal remedies, international legal remedies, and remedies pressed by U.S. and international civil society, the press, and Non-Governmental Organizations (NGOs). If international human rights law is to maintain credibility as an authoritative source of power and pressure—and it must—it needs to be clear that its delinquents will be reprimanded.

1. Domestic Legal Solutions

There are a number of constitutional, executive, judicial and legislative prerogatives that could be taken to rectify U.S. contravention of human rights. First, Article III of the U.S. Constitution authorizes the judiciary to interpret and enforce international treaty law.¹⁵³ “By using international law to inform or aid in the

¹⁵⁰ See Geer, *supra* note 11, at 75.

¹⁵¹ See Hull, *supra* note 72, at 1080; see also Suzanne D. Strater, *The Juvenile Death Penalty: In the Best Interests of the Child?*, 26 LOY. U. CHI. L.J. 147, 160 (1995). Several scholars have noted the increasing trend to try children as adults (thus maximizing the possibility that they will be subject to the death penalty) obscures more proactive efforts to address the reasons why such juveniles commit such violent crimes and rehabilitate them before adulthood.

¹⁵² See Hull, *supra* note 72, at 1108.

¹⁵³ U.S. CONST. art. III, § 2 provides: “The judicial power shall extend to all cases, in

interpretation of a constitutional right, the right attains greater credence as one that has universal recognition."¹⁵⁴ Curiously, this power to enforce international standards domestically has been left untapped. The framers of our Constitution intended for international law to play an active role in domestic law. Therefore, ignoring this source would defeat the intent considered vital to authentic constitutional interpretation. "To disregard the international perspective when deciding issues of human rights law is to ignore a vital source of law."¹⁵⁵

The Constitution offers other potential avenues through which to pursue domestic human rights. As discussed earlier, the Offenses Clause of the U.S. Constitution¹⁵⁶ provides Congress another means by which to enact the necessary legislation that would bring parity between international norms and current U.S. standards of human rights. The Supremacy Clause offers an additional viable constitutional venue for the pursuit of domestic human rights.¹⁵⁷ Also, the Supreme Court has recognized an un-enumerated "foreign affairs" power entrusted to Congress, whose bounds have yet to be explored.¹⁵⁸ Furthermore, the U.S. Constitution has often been interpreted according to evolving social and political realities. Once used to justify slavery, it was then used to abolish it. The various constitutional provisions discussed here provide a diverse and exciting array of human-rights enforcement options whose limits have yet to be stretched.

Our second source of positive domestic authority to promote and defend human rights is the President. U.S. presidents have taken varied interests and roles as proponents and opponents of the human-rights movement.¹⁵⁹ President Carter, for example, signed all five major human rights covenants during his Administration and sent them to the Senate for ratification.¹⁶⁰ President Reagan, on the other hand, avoided any human rights involvement

law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority. . . ." This implies that the U.S. judiciary is entitled to draw upon treaty law to which the U.S. is a party in determining related domestic issues.

¹⁵⁴ Satterwhite, *supra* note 67, at 189 (quoting Lisa K. Arnett, Comment, *Death at an Early Age: International Law Argument Against the Death Penalty for Juveniles*, 57 U. CIN. L. REV. 245, 261 (1988)).

¹⁵⁵ *Id.* at 190.

¹⁵⁶ See U.S. CONST., *supra* note 64.

¹⁵⁷ See U.S. CONST., *supra* note 64.

¹⁵⁸ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Perez v. Brownwell*, 356 U.S. 44 (1958).

¹⁵⁹ See Mayer, *supra* note 5, at 753-54.

¹⁶⁰ See Lillich, *supra* note 56, at 68.

during his tenure, and some say, expressed "benign neglect" and even outright hostility towards any domestic application of international human rights.¹⁶¹ President Bush, other than broadcasting to the world the egregious human rights violations perpetuated by Sadaam Hussein in Iraq during the Gulf War crisis, did almost nothing to further domestic participation in the international human-rights framework.

President Clinton presented himself as a strong human rights advocate in the 1990s, and made some superficial efforts to follow through with action. In 1998, for example, President Clinton issued Executive Order 13107 entitled, "Implementation of Human Rights Treaties."¹⁶² This order made bold claims and commitments, but is more impressive on paper than in practice.¹⁶³ Though the Executive Order used strong language in support of international human rights and announced responsible initiatives to hold the U.S. accountable for its actions, the Order failed to lend any feasible legal mechanism to alter our human rights status quo.

Clinton should also be noted for his recent signing of the International Criminal Court statute (ICC). Although the U.S. was among the loudest and most emphatic objectors during its negotia-

¹⁶¹ *Id.* at 54.

¹⁶² Executive Order 13107 – Implementation of Human Rights Treatise, 34 Weekly Comp. Pres. Doc. 2549 (Dec. 14, 1998).

¹⁶³ Section 1 reaffirms a commitment to the protection and promotion of human rights and to respecting and implementing our obligations under the treaties to which we are a party. It further asserts that it is the policy and practice of the U.S. to promote respect for international human rights in our relationship with other countries and by working to strengthen bodies such as the U.N. . Sections 2-4 establishes the responsibilities of U.S. executive departments and agencies to fulfill their respective obligations to facilitate U.S. compliance with international human rights norms. These sections also establish an "Interagency Working Group on Human Rights Treaties" to provide guidance and oversight regarding U.S. adherence to human rights obligations. Subsection vii of section 4 states that the working group will conduct an ". . . annual review of United States reservations, declarations, and understandings to human-rights treaties, and as to matter as to which there have been nontrivial complaints or allegations of inconsistency with or breach of international human rights obligations, in order to determine whether there should be consideration of any modification of relevant reservations, declarations, and understandings to human rights treaties, or United States practices or laws. . . ." This is followed, however, by an insulatory provision. Section 6 states that "nothing in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person. This order does not supercede Federal statutes and does not impose any justiciable obligations on the executive branch." This section renders the rest of the proclamation mere theory, much in the same way that the Reservations, Understandings and Declarations made by the U.S. renders its treaty ratification toothless and superficial.

tion, we gave in and signed on New Year's Day, 2001. However, our embarrassing resistance to the ICC once again revealed our human rights double standard, as our primary objections to it rested on a deep concern that U.S. troops and other federal officials might actually be subjected to the Tribunal's jurisdiction. Convinced that we could utilize an RUD consequence to escape that consequence, or find some other means to place ourselves beyond its jurisdiction, we conceded to sign it with the knowledge that the Senate must still ratify it. While Clinton demonstrated the potential of the Presidential office in respect to human rights, it appears highly unlikely that our newly elected President George W. Bush will be a champion of human rights in the U.S.

Our third source of positive domestic authority is the courts. They can serve as instruments of enforcement of international legal obligations as well as work as respectful proponents of international human-rights norms.¹⁶⁴ Courts possess the constitutional authority, the precedent and the moral responsibility to do so. Separation of power principles and judicial review should prevent us from being condemned to ratifying treaties on paper and ignoring them in practice.¹⁶⁵

We are unique in having an independent judiciary that has the power to strike down acts of Congress and acts of state legislatures and a long tradition of actively doing so. The American position is that, "if these fuzzy ideals are written into law, they will be actually enforced. . . . [S]eparation of powers and judicial review in the United States mean that we do not have the option that a lot of countries have of ratifying treaties on paper and ignoring them in practice. I assume Iraq has ratified a lot of international treaties, but there are no independent enforcement mechanisms in that country that would make ratification meaningful."¹⁶⁶

This is as it should be, for what purpose is served by ratifying a treaty that had no chance of being enforced? Our courts have demonstrated, albeit sporadically, that they are willing to consider international law in their decisions. U.S. jurisprudence should revisit the guiding rationale of *Weems v. United States*,¹⁶⁷ which held

¹⁶⁴ See Paust, *supra* note 66, at 596-611 (concluding that although domestic courts have historically refused to view human rights treaty obligations as binding and justiciable in domestic courts, the Supreme Court has recognized that human rights norms may provide legitimate and helpful insights in interpreting domestic constitutional and statutory law).

¹⁶⁵ See An-Na'im, *supra* note 46, at 992-3.

¹⁶⁶ *Id.* (statement by Douglass Laycock).

¹⁶⁷ 217 U.S. 349 (1910).

that the death penalty "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."¹⁶⁸ Some members of the current Supreme Court support the notion of pursuing this enlightenment by considering the views of the international human rights community.¹⁶⁹ Hence, human rights advocates should encourage this enlightenment at home and abroad.

As evidenced by a recent string of cases decided under the Alien Tort Claims Act, international human rights do seem to be taking a more prominent role in U.S. courts.¹⁷⁰ Some U.S. courts have demonstrated that they offer a hospitable forum for the prosecution of international human rights violations by foreign plaintiffs against foreign state actors.¹⁷¹ In doing so, they have also showed a willingness to entertain human rights claims made by American citizens for violations committed by foreign actors.¹⁷² To this point, however, there is no viable domestic forum for hearing human-rights claims that implicate the U.S. government or state actors.¹⁷³ The establishment of this forum will be the final frontier of the U.S. human-rights evolution, and will allow the U.S. to begin to harmonize its human rights preachings with its practice to harmonize.

Our fourth source of positive domestic authority is Congress. The legislature has considerable power and responsibility to do their part in holding the U.S. legally accountable for our human-rights issues. Members of Congress must find the courage and dignity to restore our status as a credible leader in the human-rights community, while raising our laws up to par with those of the international community. As Henkin writes, "[o]ur trumpet in the cause of human rights has . . . been muffled by our continued failure to ratify the principal international human rights covenants

¹⁶⁸ *Id.* at 378.

¹⁶⁹ *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (the plurality opinion, written by Justice Stevens as well as Justice O'Connor's concurring opinion, expressed a willingness to consider the international human rights perspective in determining the scope of cruel and unusual punishment. Concededly, Justices Scalia and White disagreed most vehemently with this approach in their dissent).

¹⁷⁰ See generally, 28 U.S.C. §1350, *supra* note 73.

¹⁷¹ Mark Gibney, *Human Rights Litigation in U.S. Courts: A Hypocritical Approach*, 3 BUFF. JOUR. INT'L L. 261 (1996-97).

¹⁷² *Id.*

¹⁷³ *Id.* (American courts have purposely excluded themselves from an entire class of human rights cases alleging death, destruction and suffering at the hands of the U.S. government and its agents. To ease their doubts (or consciences), our courts claim that they would otherwise be interfering with both U.S. foreign policy and the separation of powers doctrine).

and conventions."¹⁷⁴

Congress must embark upon two crucial processes forthwith. First, they must eliminate all RUDs to ratified covenants that insulate the U.S. from domestic implementation of the rights secured by the treaties. The reactionary and isolationist attitude espoused by Senator Bricker and others in the 1950s must be purged from the Senate and from our legislation. Second, Congress must enact legislation that grants domestic force to the rights guaranteed by the conventions ratified by the U.S.¹⁷⁵ Individuals must be able to file suit in U.S. courts for violations of rights protected under human-rights covenants. In doing this, the U.S. would earn both the credibility and integrity it already claims to have in the estimation of its international peers.¹⁷⁶

2. The United States as Defendant: Formal Complaints and Actions against the United States

The United States need to take advantage of such international adjudicatory bodies as the International Court of Justice and the Inter-American Commission as a means of hearing cases against the U.S. . The International Court of Justice (ICJ), a body created by the U.N. Charter and designed to be the principal judicial arm of the U.N., presents another avenue of enforcement for international human rights in the U.S. . Article 38 of the Statute of the ICJ recognizes both international agreements and custom as primary sources of international law. Thus, the ICJ could find violations of any human rights that are contained in agreements which the U.S. has ratified or which have the force of international customary law.¹⁷⁷

In the past, the U.S. has demonstrated indifference when criti-

¹⁷⁴ See Henkin, *supra* note 15, at 384 (citing the Convention on the elimination of All Forms of Discrimination Against Women, adopted December 18, 1979, entered into force Sept. 3, 1981, BA Res. 34/180, 34 UN GAOR, Supp. (No. 46), UN Doc. A/34/46, (1979); and International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, entered into force January 3, 1976, G. .A. Res. 2200A (XXI), UN Doc. A/6316 (1966), 993 UNTS 3.

¹⁷⁵ See Henkin, *supra* note 15, at 395. This does not mean that we must constitutionalize any new rights, but rather enable those we have already formally recognized to be made available to U.S. citizens.

¹⁷⁶ See Dudziak, *supra* note 29, at 62 (noting that the U.S. credibility in foreign policy matters with numerous countries in Asia, Africa, and Latin America was tarnished in the early stages of the international human rights movement by the contradictions between American political ideology and practice). Just as this contradiction posed a threat to U.S. credibility in the international human rights community then, we must reassess it now and work toward its radication.

¹⁷⁷ See generally Berta Esperanza Hernandez-Truyol, Kimberly A. Johns, *Global Rights,*

cized by the ICJ.¹⁷⁸ International pressure, the media, and greater public recognition of the power of this body could give their decisions some muscle. Admittedly, the ICJ is viewed by the international community as mired in bureaucracy and overly dependent on the initiative of member nations to self-enforce and, as such, it is not the most powerful means of liability for human-rights violations. It does, however, present a valid and underutilized avenue for increased accountability.

The Inter-American Commission on Human Rights (IAC), is yet another possible forum for the adjudication of human-rights violations in the United States. The IAC conducts studies on state compliance with human rights goals based on which they make recommendations to the member states.¹⁷⁹ The IAC serves to process individual complaints concerning violations, to prepare country reports on violations, and to propose remedial measures regarding human rights violations. Ultimately, the IAC provides individuals with a forum where they can bring human rights complaints against the U.S. . Under the American Declaration, the IAC can find violations of certain protected human rights and issue a resolution condemning such practices. Of particular interest, in 1987, the IAC condemned the U.S. because of its continued implementation of the death penalty against juveniles.¹⁸⁰

Like the United Nations' ICJ, however, the IAC's findings have only a nominal impact on the U.S. because it offers no effective mechanism for enforcement. "The effectiveness of such a permanent body depends upon the international community's agree-

Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform", 71 S. CAL. L. REV. 547, 596 (1998).

¹⁷⁸ This is so primarily due to the non-self-executing provisions the United States uniformly attaches to its ratification of human rights instruments. This practically means that we have not submitted to any other court's jurisdiction.

¹⁷⁹ WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 511 (2d ed. 1995).

¹⁸⁰ Case 9647, Inter-Am. C.H.R. 147, OEA/ser. L./V./II.71, doc. 9 rev. 1 (1987); reprinted in *INTER-AMERICAN YEARBOOK ON HUMAN RIGHTS* 260 (1987). The case involved two seventeen year olds who committed murder and were sentenced to death, one in Texas and one in South Carolina. The U.S. Supreme Court declined to review either sentence, and both boys were executed in 1986. Petitioners claimed that the U.S. violated the American Declaration of the Rights and Duties of Man, as well as customary international law in carrying out these sentences. The IACHR held that the prohibition of the death penalty had reached the status of a regional *jus cogens*, though the rule had not ripened yet into a customary norm. The Commission avoided a finding on the issue of whether these executions were unacceptable per se, because an appropriate age to delineate adulthood was not yet established. However, the U.S. was condemned for this practice using an equal protection framework, under the reasoning that the inconsistent determination of a uniform age of "adulthood."

ment and commitment to a reconstruction and re-conceptualization of sovereignty as a principle that holds human rights as sacrosanct and behind which violators will not be offered umbrage."¹⁸¹ The international community itself must focus on the creation of effective mechanisms, both domestic and global, that will prohibit States from hindering the promotion of international human rights.

Various U.N. Commissions and procedures also exist to evaluate state compliance with international human rights covenants. Where violations are found to have occurred, they have issued *reprimands*. The U.N. may, for example, send an envoy or *rappporteur* to study a particular violation or appoint an *ad hoc* committee to conduct an investigation into an alleged violation. Though these processes are painfully slow, and sometimes vulnerable to political influence, they can be quite effective. For instance, in 1998, the United Nations Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions issued a report about the death penalty in the U.S., specifically condemning the continued execution of children.¹⁸² This biting report is now available as a resource to human-rights activists and scholars around the world.

Less formal criticism at the U.N. may also be an effective means of pressuring countries to increase human-rights protections. German human rights expert Eckart Klein made a particularly harsh critique of the U.S. in view of its obligations under the ICCPR:

The United States representatives had consistently focused on the United States Constitution in their answers to the Committee, reflecting their Government's view that the Constitution already met all its obligations under the Covenant, with allowance made for the reservations. The United States was right to be proud of its Constitution, including the Bill of Rights, but it was not the only decisive norm. . .

The signing of human rights treaties must represent the Government's recognition of its duty to guide its people and strive for change wherever needed. The world needed the United States to lead the way in the promotion and protection of human

¹⁸¹ Hernandez, *supra* note 176, at 614.

¹⁸² See Bright et al., *supra* note 20, at 2799 (citing Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, U.N. ESCOR, Hum. Rts. Comm., 54th Sess., Provisional Agenda Item 10, U.N. Doc. E/CN.4/1998/68* (1997)); see also de la Vega, *supra* note 107, at 768 (the Rapporteur recommended, among other things, that the U.S. cease its imposition of the death penalty on persons under eighteen, lift its reservations to the ICCPR, particularly to article 6, and ratify the Convention of the Rights of the Child).

rights, and it would do so best by fully accepting international standards and its own international human rights responsibilities.¹⁸³

Such public admonitions in the U.N. are no doubt embarrassing for the U.S., and they communicate an important message: one's leadership and influence is only as good as one's record.

The U.N. mandates member countries to issue periodic reports on their domestic progress and compliance with international human-rights instruments to which they are full parties. The U.S. has traditionally resisted such reporting requirements, but did issue its first report in 1994. Reflecting upon its compliance with the ICCPR, the Assistant Secretary of State for Democracy, Human Rights, and Labor admitted: "while the state of human rights protection in the United States has advanced significantly over the years, many challenges and problems remain."¹⁸⁴ Acknowledging to our international critics that we have an imperfect human-rights record was an important first step in rectifying our conduct. The next step is to take action to remedy our most egregious violations, such as continued implementation of the juvenile death penalty.

3. Civil Society's Role in "Outing" the United States.

Finally, we must capitalize on the power of domestic rights groups, non-governmental organizations (NGOs), international human rights groups, and the media to call attention to our human rights double standard, organize against it, and apply pressure to encourage compliance with international norms. Enforcement of human rights relies to a great extent on the voluntary compliance of states that fear the exercise of moral or political force by other states. Unfortunately, the United States is known for "flagrantly ignoring international pronouncements as to its express breaches of norms. . . . Thus, voluntary compliance is not a comfortable source upon which to rely to urge the United States to remedy [its domestic] human rights violations."¹⁸⁵ However, jointly, do-

¹⁸³ Mayer, *supra* note 5, at 822-23 (quoting U.N. GAOR, Hum. Rts. Comm., 53rd Sess., 1406th mtg. at 7-8, U.N. Doc. CCPR/C/SR. 1406 (1995)).

¹⁸⁴ John Shattuck, Civil and Political Rights in the United States, Statement introducing the first report addressing the U.S. compliance with the International Covenant on Civil and Political Rights, in 9/19/94 U.S. Department of State Dispatch 628.

¹⁸⁵ Hernandez, *supra* note 177, at 589; *referring to* Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.) 1984 I.C.J. 392 (Nov. 26); John H. Jackson, *Helms-Burton, the U.S. and the W.T.O.*, ASIL Insight (Mar. 1997) (internet document on file with the author).

mestic and international civil society may wield enough power and influence so that we need not rely on U.S. voluntary compliance with international human-rights norms.

The court of public opinion is at times more powerful and effective than any court of law. It would be interesting to survey American citizens and determine how many are aware that we are among a small minority of developed nations to implement the death penalty on such a grand scale and almost alone in enforcing it upon children. I would venture to guess that most would be surprised by this information. The international community is much more aware of this anomaly, I believe, and has openly criticized and condemned the practice.¹⁸⁶ One Italian citizen commented in a letter to the Philadelphia Inquirer:

We cannot comprehend how people of a democratic, free, and independent nation—who have fought and continue to fight with courage and self-denial for the democracy, freedom, and independence of other people; who after the atrocities of World War II and Nazi concentration camps had the strength to forgive their enemies, will not grant one of its children a chance to make amends.¹⁸⁷

U.S. civil society must begin to take a more active role in bringing this double standard to the public's attention and applying pressure to rectify it. This tactic proved effective before, as shown by the Civil Rights movement's ability to "exploit international political relations and rivalries in order to pressure the U.S. to get its own house in order."¹⁸⁸ This strategy could be replicated in other human-rights contexts, especially with the juvenile death penalty. The power of shame and guilt should not be underestimated.¹⁸⁹ It

¹⁸⁶ See Bright, *supra* note 3, at 2797 (citing Richard Boudreaux, *To Italy, A U.S. Convict Symbolized the Crime of Capital Punishment*, L.A. TIMES, Aug. 17, 1997 at A11) (Stephen Bright notes that various nations, such as, Mexico, Australia, and South Africa are among those to wonder and point the finger at the U.S. for persisting to implement a practice that has been abandoned by their countries and by most Western democracies).

¹⁸⁷ Hull, *supra* note 73, at 1079 (citing Strater, *infra* note 150, at 169 and (quoting Amy Linn, *Should We Kill Our Children? The Death Penalty Debate*, PHILADELPHIA INQUIRER, Oct. 4, 1987, at 12 which quotes a letter from an Italian National to Governor Orr of Indiana)).

¹⁸⁸ Thomas, *supra* note 30, at 17. It has also, for example, proven effective abroad in the women's rights movement to combat rape in Pakistan. See *id.* at 23 (citing Hina Jilani, *Diversity in Character and Role of Human Rights NGO's*, in *Claiming Our Place* 108-14 (Margaret A. Schuler, ed., 1993)). (This movement cast the rape prevalent there not only as a criminal act under domestic law, but also as a human rights violation. This internationalized strategy not only advanced domestic legal reforms, but also influenced how the international community viewed the issue).

¹⁸⁹ See de la Vega, *supra* note 107, at 770.

is time to raise our voices, at home and abroad.

In addition, substantive public sanctions by other nations, possibly even economic sanctions, must be leveled against the U.S. . Such punishment will capture international attention and levy significant economic repercussions for non-compliance. We have utilized this strategy for decades against a panoply of nations including South Africa, Iran, and Iraq, Libya, Haiti, Burma, and Nicaragua.¹⁹⁰ We are not above the same sort of scrutiny and admonition. The implementation of this strategy would be complicated. The U.S. presently enjoys unparalleled economic and military power in the world and would not suffer as much from these sanctions as would less prosperous nations.¹⁹¹ Moreover, many nations fear leveling such sanctions against the U.S., because of the potential loss of much-needed foreign aid that they receive from us. However, even if sanctions and reprimands from less powerful nations had an effect like minnows nipping at the shark's fin, they continue to hold a symbolic significance.

Finally, NGOs regularly publish studies and issue reports regarding a wide array of international human rights issues. Their efforts serve to educate U.N. delegates on pertinent issues as well as to inform the general public of political and social concerns around the world, and to mobilize support around those issues.¹⁹² Amnesty International, Human Rights Watch, the International American Red Cross, and the Lawyers' Committee for Human Rights regularly submit damaging reports against the U.S. to the U.N., which pushes the U.S. to bring its domestic practices closer in line with international human-rights standards. These NGOs have generated a fair amount of press coverage and sparked pressure on the U.S. to comply with international human-rights standards.

The impact of such investigation and publicity could be even more effective if it included an increased effort to introduce and oversee concrete solutions to human rights problems.¹⁹³ NGOs could further bolster their efforts by collaboration with domestic

¹⁹⁰ Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 41-43 (2001) (various national security statutes, such as the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (2000), and the Export Administration Act of 1979, 50 U.S.C. App. §§ 2401-2420 (1988), give the President broad power to impose trade restrictions for foreign policy reasons, which may, at the President's discretion, include human rights concerns); *see id.* at 35.

¹⁹¹ *See* An-Na'im, *supra* note 46, at 997.

¹⁹² *See* Jilani *supra* note 186; *see also* Thomas *supra* note 30, at 123-29.

¹⁹³ *See* Posner, *supra* note 2, at 628.

civil-rights groups who are more intimately involved with the problems. Such collaboration is a tried and true method of exerting the maximum degree of pressure in all the right places.¹⁹⁴ The avenues of recourse available to confront the U.S and demand change regarding its human rights double standard are numerous and exciting. Though the task seems daunting, it will be accomplished if all the available avenues are diligently traversed.

VII. CONCLUSION

In 1948, President Truman proclaimed to Congress: "If we wish to inspire the peoples of the world. . .we must correct the remaining imperfections in our [own] practice of democracy."¹⁹⁵ Although the international human-rights landscape looks drastically different in the 21st century than it did then, his words still ring true. This does not mean, however, that we have failed as a member and leader of the human-rights movement. This movement has grown, matured, and achieved a great deal since its inception, as have most countries involved in the community. The U.S. has evolved as well, but our arrogance and self-righteousness prevents us from reaching the established norms.

Our human-rights responsibilities cannot be discharged by dictating to others what standards they must comply with, or by shielding our own culture and society from the influence and dictates of more progressive nations.¹⁹⁶ Concomitantly, this leadership role cannot be fully realized by placing all energy on domestic compliance with international norms while turning a blind eye to the human-rights crises around the world. The two undertakings must be carried out simultaneously, with genuine respect and humility. Civil society and government institutions must each do

¹⁹⁴ See Thomas, *supra* note 30, at 123-25 ("[i]n 1993, a joint effort between Human Rights Watch and the American Civil Liberties Union succeeded in issuing a joint report on the U.S. failure to comply with certain provisions of the ICCPR. The report led to a U.N. inquiry of the U.S. about ongoing issues of racism and sexism as well as the treatment of juvenile offenders").

¹⁹⁵ Harry Truman, *Public Papers of the Presidents: Harry S. Truman*, 1948, p. 126, quoted in William C. Berman, IN THE POLITICS OF CIVIL RIGHTS IN THE TRUMAN ADMINISTRATION 85 (1970).

¹⁹⁶ See Mayer, *supra* note 5, at 759 ("[w]hen adherence to the Constitution is perfectly compatible with acceptance of the higher international norm, it is not [necessary] to uphold constitutional supremacy that compels the United States to reject the higher international norm. The invocation of the Constitution in such a situation is simply a smoke screen to obscure the political decisions that prevent persons who would benefit from the higher international norms from being able to enjoy enhanced rights").

their part to achieve this by choosing their preferred avenue of recourse to help us live up to the standards we claim to embrace.

The failure of the U.S. to participate in the shared framework of the international human rights system weakens our credibility as a legitimate force in the movement as a whole. International law is powerful in its capacity to draw attention to human rights abuses around the world, and to garner public opinion to pressure countries to change their ways. We must continue to search for the bravest, most creative, and most effective solutions to human rights dilemmas, both domestically and abroad. The general inefficacy of the presently existing international human-rights constructs to proscribe, prevent, or punish human rights violations should not be construed as an indication of "weakness in the system or as a failure of its aspirations."¹⁹⁷ The three avenues reviewed here represent a smattering of approaches that may be taken in order to narrow the gap between what the U.S. practices and preaches in its role as a model of international human rights. The human-rights discipline is very young and rapidly evolving. We must be patient but relentless in helping the U.S. domestic human-rights record catch up to its ambitious agenda for the rest of the world.

AUTHOR'S POSTSCRIPT

Just prior to this article going to press, the Supreme Court was once again faced with the constitutionality and human rights implications of the juvenile death penalty in *In Re Keven Nigel Stanford*, 537 U.S. ____ (2002) No. 10-10009, October 21, 2002. Although the Court denied certiorari on the case by a slim majority, Justices Stevens, Souter, Ginsburg, and Breyer joined in a seething dissenting opinion which alluded to the embarrassing double standard espoused by the U.S. in our continued implementation of the practice. Justice Stevens concluded the dissent by stating that, "[O]ffenses committed by juveniles under the age of 18 do not merit the death penalty. The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice."

In an interview conducted immediately after this case was considered, Deborah Fleischaker, director of the American Bar Association's Death Penalty Moratorium Implementation Project, indicated that the Supreme Court will likely be forced to consider

¹⁹⁷ Hernandez, *supra* note 177, at 607.

this issue yet again in the near future. She suggested that as popular opinion and international pressure continue to gravitate toward ending the practice, Justice O'Connor may well become the fifth justice required for the Court to put an end to the execution of juveniles in the U.S. once and for all.