

# BEYOND THE HUMAN RIGHTS MEASUREMENT CONTROVERSY

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## I

### INTRODUCTION

The human rights measurement controversy of the past decade has reached its limits. One side contends that human rights law is little above contempt—it makes no difference, or next to it. The other side insists that human rights law deserves promotion or even celebration, even if it merely tweaks the world a tiny bit for the better. There is consensus on the facts, though intrepid researchers continue to accumulate new ones. But this very agreement makes it obvious that the essential difference between the two sides is that, in the face of the selfsame facts, one adopts an attitude of bitter cynicism and the other a stance of modest enthusiasm. Beyond the human rights measurement controversy lies the need for a philosophy of history, which neither side provides.

The controversy—which at first seems like a momentous choice—turns out to mainly require changing the subject. Granted, the contest of the past ten years is not necessarily uninteresting. It was diverting to watch its parties arm for contest. In fact, the controversy turns out to be highly revealing, though not in the way that the parties to the dispute intend or that their audience always recognizes. In the end, the situation is familiar. The most important thing to know about the human rights measurement controversy is that both sides have put similar or even identical intellectual and political options on the table. And neither can justify why they are happy or sad in response to their findings.

Nor can either the bitter cynics or modest enthusiasts justify why it is not worth holding out for something better, as their intense firepower is deployed on the picayune topic of whether human rights law makes a difference of some kind or other, no matter how small. When one hears of a dispute, in most circumstances, it is correct to gratify the temptation to pick sides. But if it turns out that the competitors share a lot more than people realize, and the real problem is how their common assumptions rule out other and better alternatives, then that temptation is a mistake. I will argue the human rights measurement controversy is not the general case but the special case—and therefore ought to end. And if so, in the face of those who want to divide the landscape between tearing down human rights law for making no difference or building it up for only

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making a little difference, it seems self-evident that we should look for something that makes a big difference. Whether it is another form of human rights thinking, politics, and law, or some radically distinctive approach, is the really important question.

## II

### AN EMPIRICAL DISPUTE THAT SETTLES NOTHING

When one focuses on the human rights measurement controversy, it is hard to miss large zones of overlap between the two sides to the dispute. It is actually quite difficult to figure out how they differ. For simplicity, I am going to look at two preeminent voices within the human rights measurement dispute: Eric Posner on the “no difference” side, and Beth Simmons on the “a little difference” side.<sup>1</sup>

Both sides agree in insisting that a particular style of empirical research will settle their long-standing political disputes—as if the main problem were contending anecdotes rather than contending ideologies. The rival denominations are all acolytes of the gospel of the “empirical turn in international law scholarship.”<sup>2</sup>

Posner and Simmons are hardly the first scholars to bring these empirical methods to bear on human rights. Ten years ago, Oona Hathaway’s trendsetting intervention asked whether human rights treaties make any difference—and proceeded to data-driven investigation to answer the question.<sup>3</sup> Believing in human rights law, both sides agree, cannot be like believing in God: faith, or even theology, is not enough. Of course, Hathaway’s once-scandalous query was, from another view, a stock application of a certain mode of political science investigation to a new problem.<sup>4</sup> Anecdotes pro or con must give way to—what else?—coding and regression. Following in the train of Hathaway’s article, the sides of the dispute are in collusion methodologically and operate within a powerful consensus about how to ask and answer questions.

A focus on the empirical guts of the dispute about human rights measurement—the preferred terrain for the contestants entering the fray—masks the fact that the partisans of different answers substantially agree about how to study politics. This powerful consensus is hardly unique to the human rights measurement controversy and there is no use spitting in the wind of contemporary political science. And clearly the doctrinal fetishism of traditional legal scholarship—which Posner says empiricism (and Simmons would presumably second him) is supposed to displace—is no improvement on

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1. ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2011).

2. See generally Tom Ginsburg & Gregory Shaffer, *The Empirical Turn in International Law Scholarship*, 106 AM. J. OF INT’L L. 1, 1–46 (2012).

3. See generally Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1942 (2002).

4. *Id.* at 1944.

contemporary scholars' current interest in counting.<sup>5</sup> Yet it is disturbing all the same that, for all the ostensible universality of human rights themselves, the human rights measurement controversy reflects hyper-local intellectual assumptions that do not even transcend America in the Anglophone world.<sup>6</sup>

Clearly, the theoretical and methodological identity of the investigators who concur about so much hardly makes their potential disagreements illusory. Yet as soon as one stops second-guessing empirical methods and assumptions and instead examines the large truths and life lessons the two sides claim to derive from them, the contest at the heart of the human rights measurement controversy conceals much more than it reveals.

### III

#### AGREEMENT ON NORMS VERSUS DISAGREEMENT ON TREATIES

The human rights measurement controversy is very narrowly about *law* and more specifically about *treaties*. In *The Twilight of Human Rights Law*, Posner concedes that human rights *norms* have been in the ascendant as applicable criteria of morality and movements in world politics for some time. The argument of Posner's book is not that human rights are bad in theory but instead that they are a failure in practice: that "human rights law has failed to accomplish its objectives."<sup>7</sup> Posner is thus (strategically, his opponents might suspect) willing to abstain from contesting norms to focus on what true believers in human rights say about *law*. If his position is deeply challenging for the human rights movement, it is not because he frontloads corrosive doubts about the validity of human rights in general or what he calls human rights discourse. Rather, Posner acknowledges human rights law's proliferation, and even the importance of its normative content (starting his book, as the genre requires, with an affecting story about a slum dweller in Brazil rounded up by police and disappeared). No heartless conservative who boldly insists that the plight of others around the world is not his problem, Posner seemingly acknowledges that much or at least some of the normative content of modern human rights is justified.<sup>8</sup>

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5. As Posner rightly says, "In the legal literature, a hundred papers parsing human rights doctrine to ever finer degrees are written for every paper that takes an empirical approach." POSNER, *supra* note 1, at 143. But while straightforward championship of empiricism is understandable, there are many of alternatives to doctrine, and empiricism itself also demands some larger account of what sorts of scholarship are popular in different places and times—and why we happen to be living in the place and time where this version of empiricism is orthodox.

6. See ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 9 (2017).

7. POSNER, *supra* note 1, at 7.

8. Aficionados of Posner's writings may suspect that his endorsement of the normative substance of human rights can go so far because of the considerable overlap in practice between it and a global welfarist perspective he has normally defended as an alternative to human rights; my point is that the rhetoric of his new book skirts that prior (deadlocked or lost?) battle in order to target enforcement efforts he wants to claim are useless, and now not per some speculative theory of institutional capacity but per real data. Compare POSNER, *supra* note 1, with Eric Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1758–1802 (2008), and Eric Posner, *International Law: A Welfarist Approach*, 73 U. OF CHI. L. REV. 487, 487–543 (2006), and JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF

Before the modern era, by which Posner seems to mean the end of the Cold War, this normative content was not broadly accepted; now it is. The residual trouble is that these moral standards are accepted rhetorically in too many places. Human rights as a legal project fails to change the equation much. While implicitly still a welfarist, Posner does not directly confront rights on the terrain of ethics; and he is fully an internationalist in the problems to solve. Posner muses about the prospect of “abandon[ing] human rights law” but “without giving up” on “people who live in foreign countries, especially those who live under despotic or poorly functioning governments.”<sup>9</sup> Unlike his former self, he implicitly recognizes that a great many people insist they care about their fellow human beings, and there is no prospect of undoing globalized moral obligation for the sake of the status quo ante of autarkic states or even a merely welfarist calculus of what leaves peoplea better off. The twilight of human rights law, on Posner’s own account, is a minor phenomenon relative to the dawn of human rights discourse and the cosmopolitan duty associated with it.<sup>10</sup> Posner has frequently been tagged as a “new realist.”<sup>11</sup> But compared to the skeptics about human rights of the past, Posner is an unhinged enthusiast and idealist.

It is initially somewhat more puzzling that, in contrast to Posner, Simmons restricts her attention to law in general and treaties in international law in particular. Simmons might have constructed a much more powerful case about the positive effect of human rights had she taken up the revolution of expectations and values that Posner embraces, alongside social mobilizations that do not happen to claim the authority of international law or even law generally but do invoke the morality of human rights. However, Simmons is willing to concur in narrowing the optic of analysis because of her prior professional interest in international law and her goal to prove its value through empirical analysis. Of course, values are not something you can as easily count as you can how many countries have ratified a treaty or code as easily as how many people were reported tortured. Due to these factors, Posner and Simmons essentially agree to leave to one side whether human rights norms are the best ones and how as normative values or even as soft law they might have revolutionized the world, to debate whether they have made a difference as hard law.<sup>12</sup>

Equally strange, especially for Simmons’s work, is her focus is on international treaties rather than other areas such as regional arrangements like the European human rights regime that have incontestably “made a difference.”<sup>13</sup>

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INTERNATIONAL LAW 107–134 (2005).

9. POSNER, *supra* note 1, at 144.

10. *Id.* at ch. 1, where Posner reviews the rise of human rights in world politics.

11. See generally JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* (2015).

12. This is not completely true because Posner is not as intent as Simmons is to marginalize another position that worries about the imperialism of human rights. Where Simmons repudiates it emphatically (or nervously?) because she wants people to free themselves with help from international law, Posner honestly admits we will often find it difficult to square our universals with their local values. Compare SIMMONS, *supra* note 1, at 7, 142, with POSNER, *supra* note 1, at 68, 144–48.

13. By contrast, I think the least persuasive part of Posner’s book is his account of European affairs,

That the presumptive foes diverge so late in the dispute in order to reach the similar conclusions they do—that the hard law of global human rights makes a bit of difference or none—is the threshold point in understanding that there is more sound and fury than real substance to this controversy.

#### IV

##### LIVING TOGETHER IN A BLEAK INTERNATIONAL ORDER

Posner and Simmons also agree to engage on the basis of a prior agreement that the pursuit of national advantages and hierarchies of power and wealth set the rules of international affairs, even if sometimes morality has an opening in the play of interests. In her classic book, *Mobilizing for Human Rights*, Simmons famously argues that domestic politics is where international law proves useful, as citizens deploy a new tool for lawsuits and other mobilization against their own states. For Simmons, this conclusion stands out as fortunate, in part because she is herself so caustic about international forms of human rights enforcement. In general, Simmons's theoretical perspective on international relations is noticeably realistic.

Simmons's realism brings her work into proximity with her putative enemies in the human rights measurement controversy. For example, the prospect of international enforcement of human rights treaties, she forthrightly admits, is “a chimera.”<sup>14</sup> Moreover, she contends the United Nations Human Rights Council, consisting largely of Western-trained academics (no matter what their passports say), is plausibly charged with reflecting Western values and perhaps Western interests.<sup>15</sup> As for humanitarian intervention, Simmons acknowledges it is a great power game to which only weak states are subject, and in the course of which the intervening state advances its interests on the back of claims of victimhood, with the long-term results dubious at best.<sup>16</sup> On all counts, Simmons is almost Posnerian, with due allowance for the extra dose of acid rhetoric Posner routinely offers about the United Nations and other privileged forms of “global legalism.”<sup>17</sup> Taking these examples into account, one wonders whether, if there is indeed an “assault on international law” conducted by a set of malign forces today, Simmons is resisting or abetting it.<sup>18</sup>

That Simmons consents to the narrowing of terms, so as to reach the conclusions that international law tweaks the world slightly for the better by providing a new tool to domestic mobilization, thus follows from a set of assumptions that brings her into close proximity with her foe. Simmons does not

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in part because it stands as a major exception to the “no difference” thesis that he could have acknowledged without disturbing his general case. But few liberals might want to press the point, presumably because they do not want human rights effects locked up in one locale, or because incontestable success in one region distracts from the contest both sides want over global law.

14. SIMMONS, *supra* note 1, at 154.

15. *Id.* at 370.

16. *Id.* at 122.

17. ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* (2009).

18. OHLIN, *supra* note 11.

focus on law, and find domestic politics the forum of its progressive uses as she does, because of mere professional disposition to study something she finds interesting and something she can count. Rather, Simmons's work may also derive from an agenda to locate a vanishing hope in a world about which she and fellow liberals are, in fact, deeply pessimistic.<sup>19</sup>

True, Simmons's conclusion that domestic politics proves the worth of international human rights law is providential. (Everyone likes a victory snatched from the jaws of a defeat.) But her conclusion follows from the fact that she has consented in advance to the general realist picture in which universal norms superficially overlay the realities of interstate power relations. In this way, Simmons's scholarship is not far off from Posner's. Like Posner, Simmons is operating within the set framework of the extant international order, asking merely how the various treaties of international human rights law might—or might not—alter state behavior.<sup>20</sup>

Simmons's professed goal of proving in some absolute sense that human rights make the world a better place is routinely understood as ratifying the status quo of human rights activism and law.<sup>21</sup> Yet it is equally possible to read her as emphasizing exasperatingly small accomplishments restricted to very particular situations, given the endurance of an interstate order that realist assumptions explain best. One might even take Simmons's book as a call for the profound rethinking that Posner purports to offer. In short, just as Posner's reputation fails to match his embrace of human rights discourse, one wonders how true believers in international law could tolerate Simmons's skepticism. More than their admirers might realize, both heroes accept the norms, and both accept that they generally have little purpose in a world of more powerful state interests.

## V

### THE BATTLE JOINED?: HUMAN RIGHTS LAW MAKES A LITTLE DIFFERENCE

The knights are standing pretty close to each other before their lances cross, but do they ever engage? I am not totally certain. After limiting the scope of her inquiry, Simmons does insist that human rights laws are productive insofar as they provide tools allegedly unavailable before to domestic actors mobilizing from below. However, domestic mobilization works only when Goldilocks consents—hard authoritarian states obliterate the causal pathways for mobilization to tweak democracy further, while so-called “stable democracies”

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19. Samuel Moyn, *Do Human Rights Treaties Make Enough of a Difference?*, in *CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW* (Costas Douzinas & Conor Gearty eds., 2012). Many of my claims about Simmons's position are better substantiated and (I hope) argued in this earlier piece, written before the beginning of Posner's pushback, which is therefore more the focus of this essay.

20. See RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013) (offering a similar but slightly different pathway involving peer pressure).

21. See Alexander Cooley, Beth Simmons, & Kenneth Roth, *Mobilizing for Human Rights* (November 2010), <https://www.youtube.com/watch?v=lo9Q8SrwiaU> [<https://perma.cc/L4DZ-JNZN>] (focusing on Human Rights Watch Executive Director Kenneth Roth's comments on Simmons).

make improvement through these mechanisms redundant. Only in between, especially in transitional democracies, can international human rights law abet the efforts of domestic actors in ways that are neither blocked nor redundant.

Amazingly, despite rumors of opposition, it appears Posner pretty much concedes Simmons's core argument, once it is narrowed in this way to the claim that human rights law may make a little bit of difference under highly restricted conditions. Posner claims that "[u]nderstood in the best possible light, these studies suggest that a small number of treaty provisions may have improved a small number of human rights outcomes in a small number of countries by a small . . . amount."<sup>22</sup> According to Posner, human rights law did not fail; it is merely unimpressive. Even so, there is background agreement about the intransigence of the world before the effort of reform, and agreement that such reform is nonetheless not altogether useless.

In short, the sides are nearly identical, even though their self-presentation suggests all-out war. Simmons's massive effort begins by depreciating the plural and more visible forms of human rights advocacy such as international enforcement, crossborder pressure, informational politics, and humanitarian intervention, to build up just one the use that domestic actors might make of international law. Reciprocally, though perhaps grudgingly, Posner acknowledges Simmons might be correct that in a highly restricted set of cases treaty law enables domestic mobilization of human rights.

Thus, the real—and sole—contrast between Posner and Simmons seems to be simply that in the face of very similar empirical findings one standard-bearer sees a glass half full and the other one half empty. While for Simmons the situation is rousing within stark limits, for Posner, Simmons is unaccountably celebrating "minor qualifications" within the general picture in which they concur that human rights law has no effects.<sup>23</sup> Posner wants everyone to abandon human rights law with its utopian aspirations, as if Simmons has not already reconstructed her commitment to human rights law on non-utopian grounds.<sup>24</sup> Perhaps the real problem is that neither side is utopian, not that human rights law ever was.

In this case, then, empiricism settles nothing. Or at least, the ideological distinction between preexisting sides that the rise of empiricism in the last decade has allowed reframing is minor temperamental difference about how impressed to be about the fact that international human rights law works at all. This is not a titanic fight. Rather, it is a mere tiff about whether describing the same thing as

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22. POSNER, *supra* note 1, at 78 (footnote omitted). Surprisingly, in her own biting review of Posner's book, Simmons fails to notice that he agrees with her rejection of the null hypothesis and thus the central purpose of her work. Beth A. Simmons, *What's Right with Human Rights*, DEMOCRACY, Winter 2015. I acknowledge that, though they reach similar answers on their math problems, Posner contests various aspects of the work Simmons shows to get there—but I do not purport to adjudicate those micro-controversies. Eric Posner, *Some Skeptical Comments on Beth Simmons's Mobilizing for Human Rights*, 44 NYU J. OF INT'L L. AND POL. 819, 819–31 (2012).

23. POSNER, *supra* note 1, at 76.

24. *Id.* at 7.

mildly uplifting or rather depressing makes more sense. If there is any daylight between them, Posner and Simmons diverge not on empirical results but on what one may legitimately hope for in view of the mismatch between cosmopolitan norms and a very unpromising history to date. As for what would really settle the dispute, a theory of what counts as sufficient progress, it is not something empiricism could ever provide.<sup>25</sup>

## VI

### AN ALTERNATIVE PATHWAY OF CHANGE?: CONSTITUTIONS AND DOMESTICATION

Now consider another way in which Posner—aside from accepting the moral importance of human rights norms—risks conceding a large part of the current liberal impulse in the human rights measurement controversy, and thus ruining his opposition to it. For the liberals are in motion. Back in the 1990s, they may have placed excessive focus on transnational and international political and legal processes from crossborder human rights activism to military invasion, but Simmons (among many others) seems to have little interest in those. In this, she represents, or even epitomizes, the analytical domestication of human rights occurring today.

The domestication of human rights is transparently a path-dependent search for human rights law's residual efficacy in the realm of domestic politics. And now it has gone far further than the form that Posner rose to undermine. In her book, Simmons at least insisted on the indispensable role of international treaty law as a tool for domestic forces. In a new stage, the empirical mind—including that of Simmons herself since her masterpiece—seeks evidence that it is not through the international law function of the human rights covenants (and related treaties) that progressive norms have made their way. Rather it is through the *template function* of sources beginning with the Universal Declaration of Human Rights that rights have been, and may continue to be, constitutionalized for the sake of domestic politics.<sup>26</sup> It is a new stage of domestication because the enthusiastic side in the debate does not rely on international law but rather on the constitutionalization of norms to achieve progress.

This is so pronounced and interesting an intellectual development in our time that it deserves some extra and digressive comment. Everyone, it seems, is responding to the failure of human rights millennialism that characterized the 1990s. In doing so, scholars are recoiling, in particular, from conceptualizing human rights as the index of a new sort of crossborder or global politics.

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25. Immanuel Kant long ago recognized that empirical facts were relevant to mustering hope, but not without other moves to avoid either disabling paralysis in the face of human folly or unreasonable enthusiasm about inevitable progress. IMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Perspective*, in TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY (2016).

26. See Zachary Elkins, Tom Ginsburg, & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L. J. 61, 61–95 (2013).



Consider, among progressive theorists, Jean Cohen's important recent study *Globalization and Sovereignty*, which essentially concludes that rights have to be reclaimed at home from their misleading advertising and false promise as supranational tools. After all, the global space is where the hegemonic power of the usual suspects stacks the deck in favor of its own interests.<sup>27</sup> Conversely, among more centrist contemporary liberal philosophers, the order of the day, in parallel, is to abstract from any and all definition of human rights in terms of their international functions and instead to offer a more general account of moral entitlements and obligations. Or, as Jeremy Waldron has it in a slightly different version, it is imperative to shift from a "human concern" to a "human bearer" approach to human rights. Waldron contends that one virtue of his approach is that it will not primarily motivate an inquiry about when international events trigger the duty of humanitarian intervention, but instead start from what human beings everywhere deserve.<sup>28</sup> The point, in both cases, is to rescue human rights from John Rawls's pioneering but now apparently erroneous reduction of them to their crossborder purposes—presumably not least in view of their abuses when defined that way.

After human rights 1990s-style became another god that failed, most scholars seem to be concluding that they were looking for hope in the wrong places. Studiously denying the motivational context of their abstraction, philosophers are nonetheless self-evidently responding to it by keeping the idea of human rights pure, or looking for more plausible enactments at home. Put differently, for thinkers from Cohen to Waldron, it is presumably in view of more abstract and pre-political values that are not now tainted by interventionism and above all of domestic and certainly non-military uses that human rights will have to be appealing if destructive skepticism is not to win out.

In other words, the sudden analytical prominence of the constitutionalization of human rights, even within the small ambit of the empirical turn of political scientists, is part of a larger development. Unsurprisingly, this development has nothing per se to do with the empiricist vogue, since neither Cohen, nor Waldron, nor others think the way to return to domestic politics is by counting what happens there. The reason why this analytical reorientation is occurring seems to be depression about the role people once hoped human rights would play in the remaking of the international order. The now disappointing experience of mass human rights advocacy and treaty promotion since the 1970s has taken advocates towards a different, and perhaps more modest, plan: to lay out a template of norms and spread them through constitutions and movements around them, rather than through international treaties. There is clearly much more to say

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27. JEAN L. COHEN, *GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM* (2012). Cohen claims, for example, that "rights advocates should shift the focus *back* to the domestic arena and the empowering and emancipatory role that human rights discourses still have to play therein." *Id.* at 165 (emphasis added).

28. See, e.g., John Tasioulas, *Towards a Philosophy of Human Rights*, 65 *CURRENT LEGAL PROBLEMS* 1, 1–30 (2012); Jeremy Waldron, *Human Rights: A Critique of the Raz/Rawls Approach*, in *HUMAN RIGHTS: MORAL OR POLITICAL?* (Adam Etinson ed., 2018) (defending the views described).

about this reorientation on its own intellectual ground, but that transcends the purposes of this article.<sup>29</sup> What is interesting for now is that Posner has prepared his skeptical rebuttal of international human rights law as if the new front in the search for hope had not already opened even further in the direction of domestic politics, entirely apart from international law (except for its template function, assuming the Universal Declaration wasn't sufficient by itself for this purpose).

If the move Simmons and her colleagues make beyond hard treaty law to the hazier influence of human rights norms in national constitutions and domestic politics across the world arguably represents a new phase in the path-dependent domestication process of scholars looking for hope, it is remarkable that Posner essentially concedes that this latest pathway of posited change may well be analytically hard to close off. In his book, Posner is willing to allow the empirical finding that human rights have percolated into national constitutions through some kind of templating mechanism.<sup>30</sup> New constitutions are not written in a void, even if there has never been one template for rights and the prestige of different templates has changed sometimes drastically over the decades. And, if only because it serves his skeptical purposes when it comes to international law, Posner is willing to lend a fair bit of credence to national enforcement of rights once constitutionalized (though the usual conservative noises about the incompetence of judges also show up in his text).<sup>31</sup>

It is precisely because constitutional rights have not “failed,” Posner argues, that the shipwreck of international rights stands out more glaringly. “Judicial enforcement of constitutional rights, represented most fully by the U.S. system, is for some people the inspiration for international human rights law,” he writes. “However, I am going to argue the other way around: that when one thinks carefully about judicial enforcement of constitutional rights, it becomes easier to see what is wrong with international human rights law.”<sup>32</sup> More generally, though

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29. As Elkins and his colleagues seem to recognize, domestication in general and constitutionalization in particular are dangerous waters for analysts seeking to be upbeat about human rights, because it seems perfectly possible that the world might have been very similar to now without the whole triumphal story we tell about Universal Declaration and its uptake. See Elkins et al., *supra* note 26. After all, if human rights are chiefly propagated through the Universal Declaration's template function, one must acknowledge the long prior existence of an *informal template* for liberal constitution-makers, who (notably in the aftermath of World War I, but also after World War II, immediately prior to 1948) had no need of a Universal Declaration to enshrine largely similar rights in new constitutions they wrote. In a more recent paper, Elkins and his colleagues explore a world without the Universal Declaration. Zachary Elkins et al., *Imagining a World without the Universal Declaration*, (2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2469194](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2469194) [<https://perma.cc/9Z7V-EFE9>]. But of course we do not need to imagine such a world; it already existed before 1948, and it is the one in which human rights first became constitutional norms and proliferated globally. The founder of comparative constitutional law worked precisely with a model of an informal template. See BORIS MIRKINE-GUETZÉVITCH & ALPHONSE AULARD, *LES DÉCLARATIONS DES DROITS DE L'HOMME: TEXTES CONSTITUTIONNELS CONCERNANT LES DROITS DE L'HOMME ET LES GARANTIES DES LIBERTÉS INDIVIDUELLES DANS TOUS LES PAYS* (1929).

30. See POSNER, *supra* note 1, at 76–77 (citing Elkins, *supra* note 29).

31. See *id.*, esp. 110–11.

32. *Id.* at 108.

Posner wants to direct his ire at the notion that ratification of treaties is leading more or less directly to a better world, he has no trouble acknowledging that things have been improved in a series of key respects in the age of rights. True: so far Posner is not prepared to acknowledge the Universal Declaration's role in this improvement, because the relevance of other factors like the fall of communism is plainer to him.<sup>33</sup> As of today, still, it does not seem as if Posner's animosity towards international human rights law is likely to be as easy to reproduce when it comes to the newly discovered pathway of constitutionalization of abstract norms.

Correspondingly, neither side of the measurement controversy makes the point that the constitutionalization move is unpromising. Both sides often write as if the constitutional lawyers down the hall, especially progressive scholars, have not spent a generation undermining much hope of change following from the mere existence of rights on constitutional paper. Simmons is at least aware that she has to side with the literature insisting that constitutional rights enforcement provides more than a "hollow hope," as Gerald Rosenberg famously dubbed courts as prospective agents of social change.<sup>34</sup> Ironically, the widespread attempt, after Rosenberg's shocking work, to prove that constitutional politics in America's civil rights era had positive effects would mostly demonstrate the international law tools Simmons tried to prove valuable in *Mobilizing for Human Rights* are, in fact, dispensable.<sup>35</sup>

Posner's argument for constitutional rights protection is hardly more uplifting, since its prime motivation is not so much to offer cheerful optimism about the prospects of local enforcement of rights through constitutional law, but merely to contrast a regime where covenants are backed up by swords, however blunt and rusty, with the wholesale unenforceability of international legal rights around the world. Constitutional politics is where hope flees after human rights millennialism dies, but it is already long since dubious there.<sup>36</sup>

## VII

### IGNORING DISTRIBUTIONAL RIGHTS AND SOCIAL JUSTICE

There is one further commonality between the contestants and it may matter more than any of the others. Both sides in the human rights measurement controversy focus their attention, almost entirely, on civil and political liberties, rather than economic and social rights. Once again, it seems clear why in each

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33. *Id.* at 6–7.

34. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

35. MOYN, *supra* note 19.

36. The latest empirical research indicates, for example, that it has made no difference to results to constitutionalize the prohibition on torture—perhaps because constitutional rights in general are ineffective under most circumstances. See Adam S. Chilton & Mila Versteeg, *The Failure of Constitutional Torture Prohibitions*, 44 J. OF LEGAL STUD. 417 (2015); Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?* (U. of Chi. Coase-Sandor Institute for L. & Econ. Research Paper No. 694, 2015).

case. But the comparison most clearly reveals the emotional dispute to be not about different facts, or even whether they authorize a sunny disposition. When the socioeconomic domain is put in view, the really disheartening thing is that both sides concur in a historic crisis of hope.

The more enthusiastic side in the human rights measurement controversy currently prioritizes freedoms of speech and person, judging them to be lexically prior (in John Rawls's vocabulary) to the others or institutional preconditions for the enforcement of economic and social rights.<sup>37</sup> And it is pretty clear what would happen if liberals tried to code for transformative compliance thanks to the International Covenant on Economic, Social, and Cultural Rights—or even thanks to the constitutionalization of the relevant norms. Posner would win: the effect of international law, and even the radiance of the Universal Declaration into national fora, is clearly nugatory or close enough to it so far. If so, even the liberal championship of modest difference as a rousing outcome would fail badly when it comes to the socioeconomic domain.

Posner, unsurprisingly, is gleefully aware of this fact, citing the latest literature.<sup>38</sup> Even if human rights law makes some negligible difference, it has proved wholly disappointing in the socioeconomic domain. That Posner does not exploit this truth to the hilt one might initially chalk up to the suspicion that when it comes to economic rights he can drop any (strategic?) fidelity to the norms themselves. After all, fundamental economic and social rights are far more contested, especially in an American setting where liberals and conservatives alike are comparatively so libertarian in taking the superiority of the unregulated free market as an article of faith. But within the confines of Posner's book, it would be fairer to say that he doesn't even need to go there, and indeed, with his implicitly welfarist perspective, Posner may indirectly endorse the main substance of some economic rights. It may not help to pursue basic subsistence of our fellow humans by creating a legal right to food, housing, and the like.

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37. Note in passing that this lexical or institutional prioritization did not occur in the actual experience of American history (killing Indians to clear the land, enslaving blacks to work it, etc.), and in my view is a surprisingly recent liberal response to the horror of decolonization, as Westerners perceived it—though in one of the most interesting moments in his new book, Posner appears somewhat more tolerant than most other observers of Chinese growth strategies which indirectly achieve social and economic rights first while softpedalling liberal political norms. POSNER, *supra* note 1, at 91. Though famous for his defense of the priority of liberty, recall that Rawls actually supposed that it might well be justifiable to abridge many (not all) political rights in a “less fortunate” society for the sake of “long-run benefits,” on condition that doing so would help it become one in which all liberties are enjoyed. JOHN RAWLS, *A THEORY OF JUSTICE* 247–48 (1971); *see also id.* at 62–63. Cass Sunstein also presents his case for achieving political and civil liberties first and foremost especially in places where markets need to be unleashed to provide growth. *See* Cass Sunstein, *Against Positive Rights*, 2 *EAST EUROPEAN CONST. REV.* 35, 35–38 (1993); CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO*, 221–238 (2010).

38. Posner cites Christian Bjørnskov & Jaco Mchangama, *Do Social Rights Affect Social Outcomes?* (AARHUS Univ. Working Papers, 2013), but my favorite (albeit anecdotal) piece is David Landau, *The Reality of Social Rights Enforcement*, 53 *HARV. INT'L L. J.* 401, 401–59 (2012) (correcting the misrepresentation in American literature of the South African experience and shows that social rights in courts chiefly benefit the well-off [mainly, pensioners protecting vested rights] rather than the poor).

Clearly, though, if everyone would be better off *ceteris paribus*, it is more likely that they will enjoy those minimal decencies. Instead, Posner limits himself to the observation that even where they are philosophically and politically accepted, economic rights are largely rhetorical anyway—not least, he suggests (mistakenly), for the relevant United Nations treaty body. (In fact, this treaty body recognizes resource constraints, real trade-offs, and does not always treat the rights package it supervises as legally enforceable).<sup>39</sup>

It is not, however, as if economic and social rights are absent from the human past. Indeed, a pronounced egalitarianism that focused not solely on the construction of floors of protection in the socioeconomic domain but also on the creation of ceilings on social inequality was once the central focus of political and ideological strife.<sup>40</sup> That at least in some places in the middle of the twentieth century both floors and ceilings were in fact built, albeit long obvious to historians of the North Atlantic welfare state, has now been famously confirmed thanks to Thomas Piketty with the obligatory rigor of the empirical turn of today.<sup>41</sup>

The coincidence of these events with the Universal Declaration of Human Rights, with its various socioeconomic promises, is too obvious not to give food for thought. Indeed, it is perhaps most plausible to regard the Universal Declaration, in its original world historical setting, as little more than charter for national welfare states rather than the anticipation of a new transnational movement or international order.<sup>42</sup> And correspondingly, since the 1970s, the period at which Posner generously agrees human rights underwent a revolution in prominence, the crisis of the national welfarist state has created a radically new situation—sometimes called neoliberal.<sup>43</sup> Poverty is slowly being eradicated in the age of the ascendancy of human rights, though mainly through the agency of the Chinese state, rather than thanks to the promotion of economic and social rights. But in almost all national settings, inequality has galloped across the same period.<sup>44</sup>

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39. POSNER, *supra* note 1, at 33–36, 86–89; UNITED NATIONS COMMITTEE ON ECONOMIC SOCIAL, AND CULTURAL RIGHTS, GENERAL COMMENT 3: THE NATURE OF STATES PARTIES' OBLIGATIONS (1990) (prioritizing not just the legalization but the justiciability of a “minimum core” of economic and social rights).

40. It is an interesting fact Posner's newest book belatedly discovers the pertinence of distributive equality, recommending its pursuit through better marketization, rather than the regulatory and redistributive mechanisms through which it was once actually achieved. ERIC POSNER & E. GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* (2018).

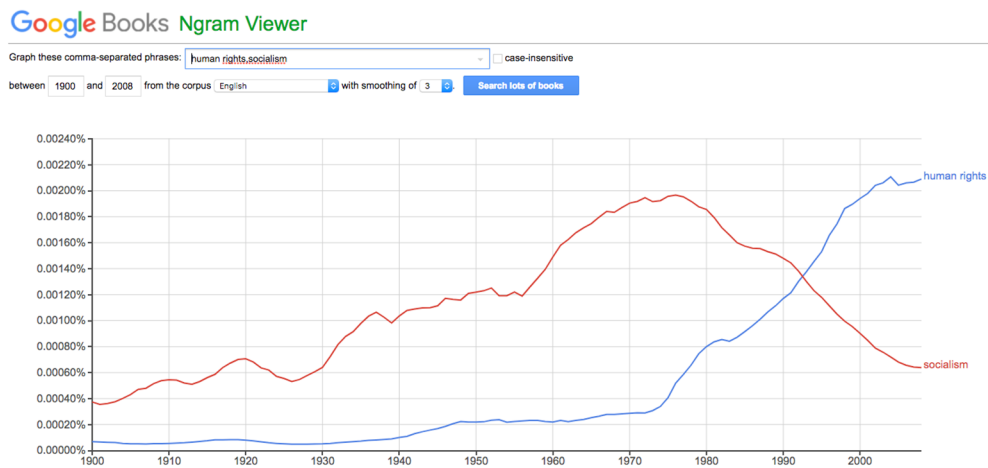
41. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014).

42. See SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (2018) (ch. 2).

43. See POSNER, *supra* note 1, at 18–20; SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

44. See MOYN, *supra* note 42 (ch. 7); see STEVEN PINKER, *ENLIGHTENMENT NOW: THE CASE FOR REASON, SCIENCE, AND PROGRESS* (2018) (chs. 7 on poverty and 9 on inequality).

It is a disturbing conjuncture: if it was not in the 1940s but in the 1970s that human rights suddenly became prestigious, the same is true of the neoliberalism that soon brought the welfare state low. (An anecdote: Milton Friedman and Amnesty International won their respective Nobel prizes in 1976 and 1977). Since that moment of breakthrough, market fundamentalism and human rights have companionably risen far and fast—to the detriment not simply of previously more autarkic welfarist development, especially in the global south, but also of certain ideological movements—socialism, for example—that have waned deplorably across the same time that human rights discourse has prospered. (See the chart below, based on Google Books data, for my own attempt at an empirical turn on this score, noting the common inflection points.)



I am the last person to indict the honor of the search for floors of protection in the socioeconomic domain, which the international human rights movement has come to belatedly pursue, especially since the end of the Cold War. But, if I agree with Posner that international human rights law and movements haven't successfully provided economic floors (unlike the Chinese state, which has saved more people from poverty across the same time span than any other agent in history to date), it is not because I think political change and legal reform are unfailingly useless.<sup>45</sup> Before the collapse of their ideologies, the great irony is that North Atlantic and even some global southern proponents of welfare states—whether of liberal, Christian Democratic, socialist, or communist stripes—were much better than recent law and policy have been at achieving a modicum of distributional equality. Granted, the welfare state was local. Even so, though admittedly bounded and indeed exclusionary, its national project was egalitarian—and efficacious. The international human rights movement, when it faces distributive justice, is neither.<sup>46</sup> As for a globalized welfarism that aims at

45. See MOYN, *supra* note 42 (ch. 7).

46. See Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 *LAW*

floors of protection and ceilings on inequality beyond the national setting, the problem is as much that no one has the will to dream of it as that the policies have not been formulated to bring it about.<sup>47</sup>

Insofar as it is possible to discern, the response of both sides of the recent human rights measurement controversy to these harsh realities is—one last time—overlapping and unedifying. As mentioned above, the desire to vindicate empirically the little bit of good international treaty law does, in Simmons's work at least, is not transferred to the socioeconomic domain.<sup>48</sup> In fairness, Simmons insists nobody ever said human rights were going to be a silver bullet, and remains optimistic about what treaties protecting political and civil liberties can achieve, on condition of relieving the human rights project of heavier burdens than it can bear.<sup>49</sup> Even so, the fact remains that Simmons expends a huge amount of scholarly capital simply to maintain optimism that human rights law makes some difference however small—just not in the socioeconomic domain where so much about the basic life outcomes of our fellow humans is determined. The measurement dispute matters in part because it reflects this highly limited optimism even for Simmons's side. Perhaps this is because of liberal fatalism about larger changes than the tiny fixes human rights set out to achieve.<sup>50</sup>

Posner's response is also hopeless, albeit differently so. At the end of a book concluding that human rights law has almost completely failed (even though he acknowledges that it has made a positive difference), he offers a fresh start.<sup>51</sup> But the reader might be forgiven for seeing this fresh start as a dead end. Posner says that the field of development economics is slightly ahead of human rights scholarship, not least in hewing to empiricist orthodoxy. (He does not mention that the development enterprise historically committed deadly and horrendous mistakes, especially during the Cold War, compared to organized human rights promotion).<sup>52</sup> Just as important, development economics, on Posner's description, accepts stark limits to prior dreams and insists on local diversity that defeats earlier uniform planning.<sup>53</sup>

Even with the transfer of attention away from human rights towards development economics, however, Posner expresses corrosive doubt about whether the superior approach will make much difference to the world.

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AND CONTEMP. PROBS. 147, 147–70 (2014), *see also* MOYN, *supra* note 42.

47. *See* MOYN, *supra* note 42 (ch. 4) (describing the global south's attempt to create a global welfare structure, before "human rights" emerged).

48. In fairness, Simmons's measurement of gender rights, especially in education, certainly counts as an exception to this generalization. *See* SIMMONS, *supra* note 1 (ch. 6).

49. *Compare* SIMMONS, *supra* note 1, at 373 with Beth A. Simmons, *The Future of the Human Rights Movement*, 28 ETHICS AND INT'L AFF. 183, 183–96 (2014).

50. For the claim that human rights politics forsake the range of ends and above all the political ambition of prior liberalism, *see* SAMUEL MOYN, *Human Rights and the Crisis of Liberalism*, in HUMAN RIGHTS FUTURES (Stephen Hopgood et al. eds., 2017).

51. POSNER, *supra* note 1, at 137–148.

52. *See* THE DEVELOPMENT CENTURY: A GLOBAL HISTORY (Stephen Macekura and Erez Manela eds., 2018).

53. POSNER, *supra* note 1, at 137–148.

According to Posner, development economists are themselves caught in an analogous codependency where some have no hope and others only a little and they spend their time bickering. Indeed, Posner says, the basic determinants of global ills in the socioeconomic domain may well have been laid in the Neolithic age.<sup>54</sup> Whether glumly given the extent of global suffering, or jubilantly given the puncturing of modish thinking it allows, Posner concludes his demolition of human rights law with an inspiring message: “[t]here is very little the West can do for poor countries. It turns out that foreign countries really are foreign.”<sup>55</sup> One wonders: how is this a fresh start? The dusk of development economics is hardly preferable to the night of human rights law.

One final time, it appears that Posner is very close to those he is attacking. With neither side of the measurement controversy rising to the empirical defense of the project of raising floors of protection in the socioeconomic domain through human rights law, neither is interested in any ceiling on socioeconomic equality.<sup>56</sup> In their apparent intuitions about distributional fairness, Posner and Simmons overlap, much as their minor difference in the human rights measurement controversy occurs against the backdrop of their acceptance of a set interstate order. The bone of contention between them is merely whether to be completely or only mostly depressed given that human rights law’s traditional emphasis on first generation political and civil liberties is the sole place to seek threadbare hope against a profound background agreement about an essentially forlorn and refractory world.

It is the age of moralism, but all are cynics now.

## VIII CONCLUSION

One might ask in view of all this: who is winning the human rights measurement controversy? After all, each side has conceded a lot to the other already before it begins, the gory contest expected never seems to occur, and the terms of engagement already seem to be shifting beyond international law proper. Moreover, the contestants appear to concur that socioeconomic rights enforcement is so unlikely to have been improved that it is not worth counting (unless it is to gloat that human rights law fails comprehensively), and neither camp views socioeconomic equality as a viable ideological and political project. Those frustrated with the state of this debate therefore have many reasons to refuse its terms. The important task, rather, is to distract from the minor differences the debaters claim to care about in order to ask for major differences—and not only when it comes to the change human rights law is called

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54. See *id.* at 145, 147; see also Adam Chilton & Eric Posner, *The Influence of History on States’ Compliance with Human Rights Obligations*, 52 VA. J. OF INT’L L. 211, 211–64 (2016).

55. POSNER, *supra* note 1, at 146.

56. There is no sign in his human rights work through his book on the subject, including in his endorsement of development there, that just a few years later Posner would turn to equality as an important policy concern.



upon to make.

Posner's skepticism, like Simmons's optimism, is valuable precisely but also only to the extent the water is very far from the top of the glass, not because it is especially crucial to say that the glass is either half empty or full. What is the purpose of wrangling on that point? At a very minimum one would need the partisans in that fight to defend why such similar facts leave one side roused and the other scornful—which entails a theory of what counts as sufficient and sufficiently rapid progress. Neither provides it, or even sees the need for it.

As when Chinese premier Zhou En-lai in the late twentieth century said he was not sure yet how much difference the French Revolution made, perhaps it is simply too soon to judge the human rights revolution of our time wanting. Not enough time has passed, one might suppose, for it to gather full strength and enjoy its real impact. But I doubt it. To this extent, Posner is onto something. Having barely gotten off the ground as even a modest project of improving the world, human rights “have done far more to transform the terrain of idealism than they have the world itself.”<sup>57</sup> A few decades on, I worry that we have seen all we are likely to see from that revolution and the burning debate ought to be about what follows minor success or overall failure, whichever it is. Human rights provide one citizenship language among others that sometimes works; internationally, they stigmatize without solving. In neither domain do human rights suffice.

Met by a world not very different than it was before human rights law, it is improper to conclude that recent idealism is worth celebrating or castigating, only that we may have chosen too selective a version of idealism and have not yet begun to vindicate it. Incessant debate over human rights law's marginal capacity for change is of decreasing interest and should no longer occupy the center of empirical scholarship, let alone define the terms of scholarship in the field in general. The true choice is either to give up the ideals for which the human rights movement has stood, as well as more ambitious ones such as distributive equality, or to seek some other framework and strategy to advance them. Unlike the recent options in the human rights measurement controversy, this choice really is stark. But it is not difficult. And to demand a politics that allows humankind to live out its hopes is infinitely superior to spending one's life counting as a cynic.

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57. MOYN, *supra* note 43, at 9.