

# THE HEAVENS ARE ALWAYS FALLEN: A NEO-CONSTITUTIVE APPROACH TO HUMAN RIGHTS IN GLOBAL SOCIETY

GEOFFREY DANCY & CHRISTOPHER FARISS \*

## I

### INTRODUCTION

In the year 2018, on the 70<sup>th</sup> anniversary of the Universal Declaration of Human Rights, populist movements are assaulting global norms. While this may be expected in countries like Venezuela<sup>1</sup>, The Philippines<sup>2</sup>, Russia<sup>3</sup>, or South Africa<sup>4</sup>, hyper-nationalist campaigns have ripped through the heart of the Western world as well. Austria, Finland, Hungary, Norway, Poland, and Switzerland are all now governed by coalitions that include right-wing, populist parties.<sup>5</sup> Germany's fascist Alternative for Germany (AfD) party won seats in the

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\* Assistant Professor, Department of Political Science, Tulane University; Assistant Professor, Department of Political Science, University of Michigan

1. See Christopher Sabatini & Jimena Galindo, *It's Not Just Venezuela. Elected Governments Don't Necessarily Defend Democracy or Protect Human Rights*, WASHINGTON POST: MONKEY CAGE BLOG (Aug. 11, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/11/its-not-just-venezuela-elected-governments-do-not-necessarily-defend-democracy-or-protect-human-rights/?utm\\_term=.0e0ea21d3a22](https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/11/its-not-just-venezuela-elected-governments-do-not-necessarily-defend-democracy-or-protect-human-rights/?utm_term=.0e0ea21d3a22) [<https://perma.cc/UG6D-7F6P>] (reporting on Venezuela's tendency to rebuke human rights regimes); *Solidarity with the People?*, GLOBAL AMERICANS, <https://theglobalamericans.org/reports/solidarity-with-the-people/> [<https://perma.cc/9NVT-CSBS>] (last visited Jan. 1, 2018) (reporting that Venezuela has sought to bolster human rights violating nations in the past).

2. See Jessica Trisko Darden & Christopher J. Fariss, *Duterte Has Put Part of the Philippines Under Martial Law. Here's How Dangerous that Can Be*, WASHINGTON POST: MONKEY CAGE BLOG (June 14, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/14/the-philippines-is-under-martial-law-heres-how-that-can-be-dangerous-for-democracy/?utm\\_term=.e98a8f418b70](https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/14/the-philippines-is-under-martial-law-heres-how-that-can-be-dangerous-for-democracy/?utm_term=.e98a8f418b70) [<https://perma.cc/6675-P9UX>] (Last visited Jan. 1, 2018) (reporting on Philippine's President Rodrigo Duterte's recent imposition of martial law).

3. See John Keane, *History of Russian Populism Provides Important Lessons for Today*, THE CONVERSATION (Oct. 23, 2016), <https://theconversation.com/history-of-russian-populism-provides-important-lessons-for-today-67476> [<https://perma.cc/5CW2-A249>] (last visited Jan. 1, 2018) (chronicling Russia's history of populist politics).

4. See Chris Saunders & Henning Melber, *Populism on the Rise as South Africa and Namibia Gear up to Elect New Presidents*, THE CONVERSATION (May 25, 2017), <http://theconversation.com/populism-on-the-rise-as-south-africa-and-namibia-gear-up-to-elect-new-presidents-77887> [<https://perma.cc/Q2RB-3EVC>] (last visited Jan. 1, 2018) (reporting on the prominence of populism in South Africa's recent elections); *South Africa*, HUMAN RIGHTS WATCH <https://www.hrw.org/africa/south-africa> [<https://perma.cc/A5YJ-M4JV>] (last visited Dec. 27, 2017).

5. Michael Bröning, *The Rise of Populism in Europe*, FOREIGN AFFAIRS (June 3, 2016), <https://www.foreignaffairs.com/articles/europe/2016-06-03/rise-populism-europe> [<https://perma.cc/FS57-HYPW>] (last visited Dec. 22, 2017).

Bundestag in September 2017. The British government negotiates to leave the European Union, while still endeavoring to repeal the country's Human Rights Law.<sup>6</sup> And the United States, long seen as the steward of global liberalism, adopts an openly transactional approach to foreign policy<sup>7</sup>—allying with wealthy despots,<sup>8</sup> demanding supplication from foreign aid recipients at the United Nations,<sup>9</sup> and intentionally avoiding even passing mentions to human rights in speech or in action.<sup>10</sup>

Though today's national populist movements have very different policy priorities—and evince only a passing resemblance to populist politics of yesteryear—they share certain crucial features: a profound disdain for experts, a desire to limit exchange with cultural outsiders, and skepticism toward global rules and institutions.<sup>11</sup> What does the rise of populism mean for the future of human rights law and practice?

One answer is that the rise of populism is the beginning of the end. In this formulation, human rights, humanitarian, and international criminal legal regimes are in a crisis.<sup>12</sup> It is just a matter of time before these institutions will break under the weight of cruel political reality and become irrelevant. It is also possible that they have already broken, and we in fact live in a “post-human rights world.”<sup>13</sup> The question of whether to do justice even if the heavens should fall is now moot. The heavens have already fallen.

6. Conor Gearty, *The Human Rights Act Should Not Be Repealed*, U.K. CONSTITUTIONAL LAW BLOG, (Sept. 17, 2016), <https://ukconstitutionallaw.org/2016/09/17/conor-gearty-the-human-rights-act-should-not-be-repealed/> [<https://perma.cc/Y6MM-CS76>]; Alan Travis, *UK Would Have to Declare State of Emergency to Change Human Rights Laws*, THE GUARDIAN, June 7, 2017.

7. Jack Goldsmith, *The Trump Onslaught on International Law and Institutions*, LAWFARE (Mar. 17, 2017), <https://www.lawfareblog.com/trump-onslaught-international-law-and-institutions> [<https://perma.cc/EYQ4-925P>] (last visited Mar. 20, 2017).

8. Aaron Blake, *Analysis | Trump's Praise for Authoritarians vs. His Platitudes for Allies*, WASHINGTON POST, May 9, 2017, <https://www.washingtonpost.com/news/the-fix/wp/2017/05/09/trumps-praise-for-strongmen-vs-his-muted-posture-toward-allies/> [<https://perma.cc/8YD3-S3JB>] (last visited Dec. 22, 2017).

9. Mark Landler, *Trump Threatens to End American Aid: 'We're Watching Those Votes' at the U.N.*, THE NEW YORK TIMES, Dec. 20, 2017, <https://www.nytimes.com/2017/12/20/world/middleeast/trump-threatens-to-end-american-aid-were-watching-those-votes-at-the-un.html> [<https://perma.cc/Z72T-RXQN>] (last visited Dec. 20, 2017).

10. Nahal Toosi, *Leaked Memo Schooled Tillerson on Human Rights*, POLITICO, Dec. 19, 2017, <http://politi.co/2Benzkc> [<https://perma.cc/3LQA-94M3>] (last visited Dec. 22, 2017).

11. Yascha Mounk, *European Disunion*, THE NEW REPUBLIC (July 19, 2017), <https://newrepublic.com/article/143604/european-disunion-rise-populist-movements-means-democracy> [<https://perma.cc/2RNX-SLUN>] (last visited Dec. 22, 2017).

12. César Rodríguez Garavito & Sean Luna McAdams, *A Human Rights Crisis? Unpacking the Debate on the Future of the Human Rights Field* (2016) (unpublished manuscript) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2919703](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2919703) [<https://perma.cc/BD9Q-CLUC>]. For ease of exposition, we refer to these three regimes throughout the paper as “international human rights institutions,” or “human rights institutions.”

13. AMITAI ETZIONI, *HOT SPOTS: AMERICAN FOREIGN POLICY IN A POST-HUMAN-RIGHTS WORLD* (2012); Ingrid Wuerth, *A Global Downturn in Human Rights: Implications for International Law*, LAWFARE (June 27, 2016), <https://www.lawfareblog.com/global-downturn-human-rights-implications-international-law> [<https://perma.cc/PWV8-DDMH>].

In support of this worldview critical observers argue that the human rights legal regime is too rigid to adapt to new circumstances,<sup>14</sup> that it makes little direct contribution to social change,<sup>15</sup> that it generates counter-productive political backlash,<sup>16</sup> and that it is too easily hijacked by those favoring a politics of domination.<sup>17</sup> All of this translates into human rights institution fatigue, as well as withering support.<sup>18</sup> In advancing these arguments, scholars from across disciplines—including history, political science, and economics—challenge human rights law to reckon with the inescapable realities of politics. As this article will explain in greater depth, criticism like this, rooted in various forms of legal realism, can mean two different things: that human rights law and practice is *a*-political, to its detriment; or that human rights law and practice is *very* political, to its detriment. In the first instance, the goal is to show that human rights work is naïve because of its exclusive focus on liberal legalist ideals. In the second instance, the goal is to show that human rights law is corrupted because it deviates from normative purity in practice.

This Article outlines and advances an alternative viewpoint: the human rights legal regime and global political society are mutually constitutive. We call our approach neo-constitutive.<sup>19</sup> Under this approach, concern for rights is deeply embedded in transnational practices, and it will not be easily erased. Rather than calling human rights hollow or corrupt, we seek to understand why and how rights-based legal claims emerge and operate in today's world. This approach is still consistent with legal realism, and is decidedly not utopian. For a neo-constitutive thinker, human rights will not bring us to heaven, nor will they lead the heavens to fall. Instead, the heavens are always fallen. But this does not mean that human rights law and activism have no role to play in altering political interactions or limiting human suffering.

Critical arguments about the nature human rights law that have emerged over the last two decades are remarkably similar to those made in an earlier period of scholarly and policy discourse within American law and society literature that dates back to the 1970s. Arch-critiques of liberal legalism within Critical Legal Studies (CLS) and neo-institutionalist (NI) traditions provided a context for

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14. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

15. ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014); Adam S. Chilton & Eric A. Posner, *The Influence of History on States' Compliance with Human Rights Obligations* (Coase-Sandor Working Paper Series in L. and Econ. No. 719, 2015).

16. Stephen Hopgood, Jack L. Snyder, & Leslie Vinjamuri, *Introduction: Human Rights Past, Present, and Future*, in *THE FUTURE OF HUMAN RIGHTS* (Stephen Hopgood, Jack L. Snyder, & Leslie Vinjamuri eds., 2017).

17. NICOLA PERUGINI & NEVE GORDON, *THE HUMAN RIGHT TO DOMINATE* (2015).

18. Stephen Hopgood, *Fascism Rising*, *OPENDEMOCRACY* (Nov. 9, 2016), <https://www.opendemocracy.net/openglobalrights/stephen-hopgood/fascism-rising> [<https://perma.cc/Z6MH-HFFP>] (last visited Mar. 19, 2017).

19. The term constitutive is a reference to the work of Stuart Scheingold, which is described in Section III. Meant to indicate that law and politics are mutually constitutive, this usage should not be confused with other relevant uses of the term, like constitutive norms or the constitutive theory of statehood.

rethinking the narrative of progress attached to civil rights legal successes, like *Brown v. Board of Education*. CLS was broadly interpretive, where NI was variable-oriented. Yet both depicted a domestic legal terrain that held little promise for those struggling against oppressive structures. Out of these traditions emerged the neo-constitutive approach, which simultaneously accepts the fraught and political nature of law but still isolates productive mechanisms in rights-based legal practice. These mechanisms, which include hard-to-measure concepts like stigma and fear of social sanction, are difficult to observe systematically across different political and legal contexts, but have proven impactful. The lessons from the neo-constitutive approach to civil rights are relevant for understanding debates about international human rights law in the current environment. In short, human rights scholarship should embrace thinking that takes seriously the way that law and politics behavior shape each other over time.

## II

### CIVIL RIGHTS FATIGUE YESTERDAY, HUMAN RIGHTS FATIGUE TODAY

The international human rights regime has faced a number of broadside attacks over the last few years, but two of the most powerful are Eric Posner's *The Twilight of Human Rights Law* (2014) and Stephen Hopgood's *The Endtimes of Human Rights* (2013).<sup>20</sup> Similar in title, these volumes converge in two major respects: they both counsel abandonment of human rights law for the sake of human betterment, and they do so prior to the populist resurgence of 2016. Though these tracts may come to be seen as the twin harbingers of the post-human-rights world, the authors' approaches—like their personal and intellectual profiles—diverge radically.

#### A. The Posner Approach

Eric Posner's thinking is framed around the top-down causal impact of international legalization. The fundamental problem—Posner states matter-of-factly—is “that human rights law has failed to accomplish its objectives. More precisely, there is little evidence that human rights treaties, on the whole, have improved the well-being of people . . . .”<sup>21</sup> Crucially, Posner does not claim that the human condition has failed to improve since the earliest moves toward codification of the first international human rights covenants. Instead, his intention is to challenge the direct link between multilateral treaties and domestic political change. Though he constructs no statistical models or controlled comparisons, Posner confidently claims that the factors responsible for progress over the last four decades are the collapse of communism, the spread of the democracy, and economic growth.<sup>22</sup> As such, progressive activists would make

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20. POSNER, *supra* note 15; STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* (2013).

21. POSNER, *supra* note 15, at 7.

22. *Id.* at 26.

good on human rights by no longer focusing on the intricacies of rules attached to a ballooning list of protected rights—what he calls rights “hypertrophy”<sup>23</sup>—and instead experimenting with development economics. Implied in this tidy presentation of material are two unstated claims: first, that human rights law is separable and independent from other sources of global change like democracy; and second, that the pursuit of legal tactics represents a tradeoff with other, more economical and effective tactics for on-the-ground intervention.

One might draw a direct line between Posner’s approach to human rights law and the approach to civil rights law adopted by Gerald Rosenberg in the 1991 volume *The Hollow Hope*.<sup>24</sup> Rosenberg fixates on the observable effects of top-down phenomena, most notably the US Supreme Court decision in *Brown v. Board of Education*. Finding that significant increases in the rate of school desegregation and black voting did not occur until the late 1960s—over a decade after the landmark 1954 decision—Rosenberg concludes that court orders themselves are not catalysts for social change. Like Posner after him, Rosenberg finds an alternative factor to be more impactful. National legislation, he argues, outweighs the contribution of litigation. Specifically, because the 1964 Civil Rights Act and the 1965 Voting Rights Act were more temporally proximate to observable increases in mixed school enrollment and black voter registration, they are more causally powerful variables.<sup>25</sup> Also like Posner, Rosenberg extrapolates from his research that rights-based litigation is probably not the best tactic for activists who want to make good on rights.

This counterfactual claim is neo-institutionalist in nature because it highlights “the interactions between courts, legislatures, and public opinion.”<sup>26</sup> Neo-institutionalists consider each component of their argument as an independent variable whose causal power can be estimated, and note the long delay between the legal intervention and its intended effect on measurable outcomes. However, regardless of whether its object of focus is constitutional law or human rights law, academic writing in this vein shares two main characteristics. The first is a conservative posture: they function to remind readers of the political “feasibility constraints” that limit the reach of rights-based legal action.<sup>27</sup> That is, politics trumps law.

American institutionalists have maintained this line of reasoning for decades. In 1957, Robert Dahl wrote, “by itself, the Court is almost powerless to affect the

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23. *Id.* at 91.

24. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (2nd ed. 2008). We are not aware of anyone else who has drawn a connection between Rosenberg and Posner, but for an application of Rosenberg’s thought to questions of compliance with international human rights law, see BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 134 (2009).

25. ROSENBERG, *supra* note 24, at 51–61. For other work advancing a similar argument, see ROSENBERG, *supra* note 24, at 51–61.

26. Kenneth Mack, *Rethinking Civil Rights Lawyering in the Era Before “Brown,”* 115 *YALE L.J.* 256, 260 (2005).

27. Laura Valentini, *In What Sense Are Human Rights Political? A Preliminary Exploration,* 60 *POL. STUD.* 180, 181 (2012).

course of national policy.”<sup>28</sup> In 2014, Eric Posner’s message about human rights sounds much the same: “Realistically, one can have little confidence that the treaties have improved people’s lives.”<sup>29</sup>

A second feature of this kind of work is that its epistemology—which leans toward social science positivism—employs a model of causal inference based on Humean regularity: X causes Y if it precedes it; if X is present, and Y is not, no cause is present.<sup>30</sup> Because the *Brown v. Board of Education* decision (X) was not immediately followed by desegregation (Y), it did not cause it. Similarly, because human rights treaty ratifications (X) are not always followed improved human rights practices (Y), they do not cause such changes.

## B. The Hopgood Approach

In this, the work of neo-institutionalists like Posner is different from the critical-theoretic approach adopted by Stephen Hopgood in *The Endtimes of Human Rights*. There are no charts in Hopgood’s book, and while he makes frequent reference to trends, he does not present quantitative data. Hopgood’s interpretivist epistemology is less beholden to efforts at causal inference; instead, his method is to study meanings within the contemporary zeitgeist, through which he discovers a manifest aversion to institutionalism.<sup>31</sup> The downfall of the human rights legal project, he contends, is sown in its fixation on erecting a universal humanist church that raises funds, builds courts, and markets atrocity. This hollow empire<sup>32</sup> exposes its weakness each time it intervenes and butts heads with local religious and political authorities.

It is hard to do justice to the book, which is one part history of the humanistic impulse in the Western cultural-legal tradition and one part jeremiad against soulless technicism in human rights work. While Hopgood is no quantitative impact assessor, he is interested in the effects of law on global society, and in people’s ordinary lives. For our purposes, three of Hopgood’s broadly empirical claims stand out: (1) That global human rights norms are contingent—the relic of a particular historical moment in which American and European powers were ascendant. As such, rights are relative rather than universal.<sup>33</sup> (2) That human rights norms reify experiences of atrocity, converting the facts of human misery into abstract metanarratives that justify the expansion of a global “policing infrastructure.”<sup>34</sup> And (3) that human rights laws and claims are becoming less useful over time because the source of their supposed authority is now exposed

28. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L.J. 563, 580 (2001).

29. POSNER, *supra* note 15, at 78.

30. Henry E. Brady, *Causation and Explanation in Social Science*, THE OXFORD HANDBOOK OF POLITICAL SCIENCE (Robert E. Goodin ed. 2011).

31. HOPGOOD, *supra* note 20, at 18.

32. *Id.* at 145.

33. *Id.* at 19, 66. On relativity, see also J. A. Lindgren Alves, *The Declaration of Human Rights in Postmodernity*, 22 HUM. RTS. Q. 478–500 (2000).

34. HOPGOOD, *supra* note 20, at 57.

as a kind of social magic trick with shaky foundations.<sup>35</sup>

With these claims, *Endtimes* echoes a critique of rights-advanced scholars within the Critical Legal Studies (CLS) movement. CLS was a left-progressive intellectual school that first emerged in the late 1970s.<sup>36</sup> Influenced by Marxist theory and sociology, CLS probed the race, gender, and class hierarchies that pervade the practice of law. For CLS, jurisprudence in America is simply unable to deliver on social justice—or to promote equality—because it is dogged by contradictions inherent in liberal conceptions of legal rights. By 1984, works in this vein were numerous enough to warrant the publication of a bibliography in *Yale Law Journal* with hundreds of entries.<sup>37</sup> In that same year, in an act of creative destruction, Mark Tushnet produced a radical critique of liberal rights.<sup>38</sup> Tushnet's position centers on a virtually identical set of complaints that pulses through Hopgood's *Endtimes* thirty years later: (1) Specific articulations of rights, like the right to reproductive choice, are contingent to specific "social and technological facts," outside of which they would make no sense.<sup>39</sup> Ergo, they are relative, not universal. (2) Rights talk converts concrete human experiences of "solidarity and individuality" into an abstract language, losing meaning in the process of reification.<sup>40</sup> And (3) rights are an effective tool only when deployed against ignorant opponents, or so long as they escape capture by powerful interests. But the headway made by rights claimants halts the moment that one's enemies themselves "discover the critique of rights."<sup>41</sup>

Whether there is a direct intellectual lineage between the contemporary arch-critics of human rights highlighted above and the American neo-institutionalists and CLS progenitors from decades past remains indeterminate—though some other scholars stake out a position against both civil rights and human rights traditions.<sup>42</sup> However, these connections show that critiques of human rights in global society resemble critiques of legal rights in American society. Where neo-institutionalists find little hope in the direct effect of major court rulings using quantitative measures of social outcomes, they also see little comparative evidence of a positive effect for human rights treaty ratification. Where critical legal scholars see in the American myth of rights a disguise for power structures that prevent social justice, they also see a myth of human rights amplified onto

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35. *Id.* at 7, 117. See also Stephen D. Krasner, *Sovereignty, Regimes, and Human Rights*, REGIME THEORY AND INTERNATIONAL RELATIONS (Volker Rittberger & Peter Mayer eds., 1993).

36. The earliest stirrings of the CLS movement were published earlier. See, e.g., Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. SOC. REV. (1974).

37. Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461–490 (1984).

38. Mark Tushnet, *Essay on Rights*, 62 TEX. L. REV. 1363, 1363 (1984).

39. *Id.* at 1370.

40. *Id.* at 1383.

41. *Id.* at 1386.

42. Wendy Brown, for example, devotes energy to problematizing both American civil rights discourse as well as human rights discourse. WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY (1995); Wendy Brown, "'The Most We Can Hope For...': Human Rights and the Politics of Fatalism," 193 SOUTH ATL. Q. 451–63 (2004).

global society, meant to rationalize Western cultural and material domination. Furthermore, and perhaps surprising given that they employ different research methods and come from different ends of the left-right continuum, neo-institutional critiques and critical legal criticism converge around a central precept: that liberal legalism is to blame.

### C. Liberal Legalism & The Problem of Politics

It is not uncommon for neo-institutionalists and critical theorists to make frequent reference to one another. For instance, in the American context, critical race theorist Lani Guinier cites *The Hollow Hope* to bolster the claim that ultimately *Brown v. Board* failed in its purpose.<sup>43</sup> In the international context, this kind of cross-pollination is also apparent: Eric Posner cites to critical work that questions the contingent foundations of human rights,<sup>44</sup> and Stephen Hopgood cites empirical institutional research in order to make claims about rights outcomes.<sup>45</sup> While this may seem curious given their often different ontological and epistemological commitments, the reason for their alliance is clear: they have a common enemy in liberal legalism.

Liberal legalism is the attitude that moral and political conduct can be converted into a matter of rights rule-making and rule-following.<sup>46</sup> Insofar as movements for social change hold rights legalization and litigation as their primary aims, they may be called liberal legalist. Legalism, and the unthinking faith in lawyers and courts that it promotes, is anathema to critics. For neo-institutionalists, litigating rights in courts is a waste of resources because it distracts from other avenues of social change—including legislation—that are more productive.<sup>47</sup> For critical theorists, cause-lawyering removes political disputes to a stuffy forum that plays to the strength of conservative legal actors who then coopt, divert, or subvert the energies of movements for social justice.<sup>48</sup>

Ultimately, the positions of the Neo-institutionalists and Critical Legal scholars both end with the same bleak conclusion that rights legalization has a political problem. However, they argue this point in opposite ways. For institutional thinkers, legalists are “rule naïve,”<sup>49</sup> unaware that their program to

43. We think of critical race theory as being a particular offshoot of CLS. Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 93 (2004).

44. POSNER, *supra* note 15, at 10–20.

45. HOPGOOD, *supra* note 20, at 14.

46. See generally JUDITH SHKLAR, LEGALISM: LAW, MORALS AND POLITICAL TRIALS 1 (1986). For the related but slightly different term “legal liberalism,” see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1998).

47. See generally ROSENBERG, *supra* note 23; Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531–76 (1992); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2003).

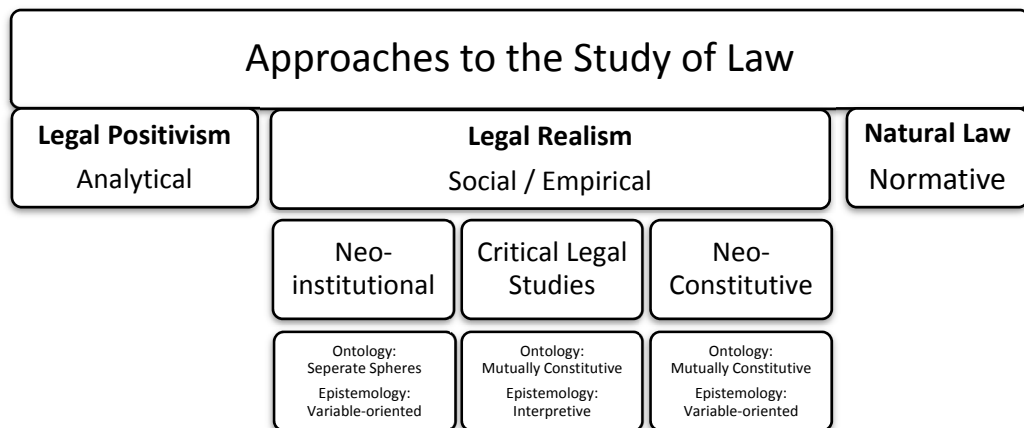
48. Guinier, *supra* note 44; Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

49. POSNER, *supra* note 15, at 7; See also ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM (2009).



advance a progressive agenda using law will inevitably be stymied by more fundamental political forces. Removed from the arena of participatory democracy, legalists engage in a hopelessly a-political exercise. They are formalists who endeavor toward meaningful political action, but get bogged in legal incrementalism. For critical thinkers, in contrast, legalists seek to escape politics for an arena of pure morality, untainted by the perversions of political interests. However, the legal sphere is laden with power and is inseparable from politics. In the neo-institutionalist formulation, legal analysts seek a rational politics and find themselves isolated within the peculiar world of law. In the critical formulation, natural legalists seek a pristine moral order and find only dirty politics. The difference is ontological: in the first account, law and politics are in fact separate social spheres; in the second, law and politics are mutually constituted within larger social structures.

Figure 1



The problem of politics is still a fresh new challenge for the study of human rights law, evidenced by the number of new volumes devoted to it.<sup>50</sup> However, American law and society scholars confronted these issues a long time ago, and they responded by folding political and economic structures into their empirical analyses of the impact of legalization. What has resulted is a third type of legal realism that is neither explicitly institutionalist nor wholly critical. It accepts the structural assumptions of CLS. However, it also endeavors to quantify systematically the impact of legal action using empirical evidence that accounts for and accommodates the amount of measurement precision that is possible, conditional on the quality of the available information. As explained in the next section, this is a neo-constitutive approach to law (See Figure 1). Such an

50. Geoff Dancy & Christopher J. Fariss, *Rescuing Human Rights Law from International Legalism and its Critics*, 39 HUM. RTS. Q. 1–36 (2017).

approach should be applied to human rights law because it takes seriously both the ontological and epistemological goals of these competing intellectual agendas.

### III

#### A NEO-CONSTITUTIVE APPROACH TO RIGHTS IN LAW

##### A. Civil Rights and the Origins of Constitutive Thinking

The intuition behind a constitutive approach to human rights law is that law and politics are not separate, or separable, spheres within society. Individuals have agency when generating preferences and taking actions in both spheres. It is true that legal reasoning possesses special qualities; that judges and lawyers adopt unique professional norms; and that the courtroom is distinct from a town hall, a parliament, or a boardroom. However, the process of legal claim-making, the mobilization of resources on behalf of legal causes, and the issuance of a court ruling are political acts. These acts occur within institutions designed to help define who gets what in society and specifies which behaviors are permissible in the pursuit of social ends. Instead of treating rights-based institutions as social units that mechanistically produce outcomes in independent and linear fashion, we must study how norms and institutions generate relations that both “constrain and facilitate the reflexive actions of research subjects.”<sup>51</sup> Hence the term “constitutive”: legal institutions and political behavior constitute one another.

This is not particularly controversial today, yet it was a break from legal tradition to take seriously the notion that law and political society are imbricated or layered so extensively as to resist separate consideration. As of the late 1950s, Americans were “not quite willing to accept the fact that [the Supreme Court] is a political institution and not quite capable of denying it...”<sup>52</sup> By the 1980s, this had changed. Part of this shift can be attributed to Stuart Scheingold, whose *The Politics of Rights* (1974) assessed the pervasiveness of the myth of rights in American society. For Scheingold, legal rights in America are simultaneously expressed as ideals, rules, and behaviors: “To think in terms of the mythic and ideological properties of rights is to see them as *constitutive* of, rather than simply a reflection of, social practice.”<sup>53</sup> Thus, to Scheingold, rights are not ends in themselves, but tools of political mobilization.<sup>54</sup>

Originally, this work was a corrective to civil rights research that may have inflated the progressive qualities of legal action in the Warren Court era. Legal activists and commentators alike had viewed civil rights jurisprudence through rose-tinted glasses, paying too little attention to unintended consequences. A

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51. Michael McCann, *Causal versus Constitutive Explanations (or, On the Difficulty of Being so Positive)*, 21 LAW SOC. INQ. 457, 462 (1996).

52. Dahl, *supra* note 28, at 563.

53. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* xxi (2d ed. 2011).

54. *Id.* at 148.

second contribution was to shift law, in social science terms, from a dependent variable to an independent variable. Rather than studying the changes to law itself, scholars would focus on how those changes translated into social outcomes. Those studying these questions would fork into the two schools explained above: variable-centered Neo-institutionalism or interpretive Critical Legal Studies.

By the turn of the 21<sup>st</sup> Century, though, American legal realism faced three big problems. First, it had been fighting a straw man. The common source of theorists' ire—unthinking liberal legalism—is difficult to find in the real world.<sup>55</sup> Few activists or lawyers actually advocate the position that expanding rights protections will alone be sufficient to address society's greatest ills. It is hardly the case that the cause lawyers behind *Brown v. Board* were committed liberal legalists. In a lengthy exploration of archival evidence, Kenneth Mack finds that the NAACP's tactics of litigation were embedded within a larger race uplift strategy that contained other non-legal goals like social mobilization and economic self-sufficiency.<sup>56</sup> Not even those lawyers who scored one of the greatest legal victories in history thought that such a ruling would be a magic bullet.

Second, legal realism went too far. Leaning heavily toward a “negative critique aimed at delegitimation,”<sup>57</sup> rather than an explicit endorsement of new strategies for creating social change, it became a scorched earth intellectual approach. There are instances where Neo-institutionalists and Critical legal scholars attempt to provide alternatives to a politics of rights. These alternatives tend to be totalizing, advocating for the erasure of common practice, or a wholesale reconceptualization of standing laws and norms. For instance: instead of using rights, scholars should use another language altogether to articulate legal and political claims.<sup>58</sup> Because a consciousness shift of this magnitude is impractical, such proposals fall short as “guides to action.”<sup>59</sup>

Third and relatedly, despite the fact that critics have for decades questioned the utility of rights-talk and litigation, rights are still social technologies that command a great deal of attention, time, and resources. One need look no further than the LGBT movement, which won a series of significant legal and social victories in the last few years, even though scholars like Gerald Rosenberg had declared this effort all but dead as of 2008.<sup>60</sup> Rights claims are resilient, and they stick around. Ignoring that fact means ignoring real-world phenomena that need explaining.

In the face of these problems, a group of law and society researchers have

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55. Dancy & Fariss, *supra* note 50.

56. Mack, *supra* note 26.

57. Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 554 (1984).

58. See, e.g., RAYMOND GEUSS, *HISTORY AND ILLUSION IN POLITICS* (2001).

59. Benjamin L. McKean, *What Makes a Utopia Inconvenient? On the Advantages and Disadvantages of a Realist Orientation to Politics*, 110 AM. POL. SCI. REV. 876, 880 (2016).

60. ROSENBERG, *supra* note 24, at Chs. 12-14.

adopted the neo-constitutive approach, which is infused with pragmatism.<sup>61</sup> It is pragmatic because it recognizes the insights of legal realism—including the problem of politics—but does not counsel wholesale rejection of rights-based action.

Charles Epp's *Making Rights Real* illustrates this approach.<sup>62</sup> Epp's primary finding is that starting in the 1970s, the emerging threat of tort liability—and the fear of lawsuits it created—led to systematic organizational and behavioral changes in policing in the United States. For example, many police departments adopted rules allowing for deadly force only when used in defense of life, and they also provided for more misconduct training and oversight.<sup>63</sup> These changes can only be explained by “the interaction between activist pressure for law-based reform and conflict within the managerial professions over how to respond.”<sup>64</sup> This illustrates three features of a neo-constitutive approach. First, it is possible to start with the premise that rights law is historically contingent and endogenous to relations of power yet avoid totalizing critique or rejection of rights-based strategies. For example, Epp recognizes that the United States has become more litigious over the last half century.<sup>65</sup> He also accepts that the trend toward greater legalization does not act independently on society; it is caught between sensationalist media, frustrated citizens, and procrustean law enforcement institutions that endeavor toward greater social control.<sup>66</sup> Still, he moves forward, tracing the evolution of legal practice and the way that it has influenced certain positive social outcomes like greater police transparency and lessened corruption.

A second way that Epp's work demonstrates a pragmatic, neo-constitutive approach is that, rather than asking whether the phenomenon of rights legalization causes social change, he instead asks a more open-ended question: how does rights legalization operate? In this sense, Epp relies less on a Humean regularity (covariance of X and Y), and more on mechanism-based causal inference. Mechanisms “are entities and activities organized such that they are productive of regular changes from start or setup to finish or termination conditions.”<sup>67</sup> The task for mechanism-based explanations is to demonstrate the ways that certain actions are endogenously linked to others in a network of reactions (a complex causal process). While it would be very difficult to demonstrate systematically covariance between a rise in torts and police

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61. See generally Geoff Dancy, *Human Rights Pragmatism: Belief, Inquiry, and Action*, 22 EUR. J. INT'L REL. 512 (2016).

62. CHARLES EPP, *MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE* (2009).

63. *Id.* at Ch. 5.

64. *Id.* at 14. See also generally Rachel Wahl, *No Justice, No Peace?: The Police, People of Color, and the Paradox of Protecting Human Rights*, 39 HUM. RTS. Q. 811 (2017).

65. EPP, *supra* note 62, at 8.

66. *Id.* at 15.

67. Peter Machamer, Lindley Darden & Carl F. Craver, *Thinking about Mechanisms*, 67 PHIL. SCI. 1, 3 (2000).

departments' internal reforms—especially because these changes occur in uneven and non-linear fashion—it is perhaps less difficult to trace mechanisms of influence. For instance, Epp shows that policing magazines started warning departments about legal liabilities in the late 1970s and early 1980s, and much of the alarm was caused not by actual lawsuits but by media-stoked fear that lawsuits were impending. Therefore, legalization in this milieu operated through a network of mechanisms involving rights mobilization, legal consciousness, and behavior-updating, all of which would be hidden from a nationwide study of the supposed causal covariation between the total number of torts across jurisdictions and the onset of police reform. For this complex causal process, one cannot draw a direct line between these macro-level variables; one can only draw a maze of vectors.

Third, for a methodological pragmatist like Epp, embracing mechanisms and the insights behind a relational ontology does not mean abandoning social science methods, or forfeiting the language of causality or consequences.<sup>68</sup> It does not mean one must wholeheartedly embrace postmodern types of research.<sup>69</sup> In fact, one can make use of whatever methods necessary to provide evidentiary support to claims. Eclectic in style, Epp proves to be quite well-versed in various social science methods. He performs archival research, interviews, and surveys. He also frames many of his analyses in terms of independent and dependent variables. However, Epp never presumes that he must demonstrate global, linear predictions between torts and police reforms to make his case because he understands the contingent circumstances that relate the mechanisms he identifies to one another and to the ultimate policy adoption that is the focus of his inquiry.

In short, adopting a neo-constitutive approach means seeing the world like a dense and dynamic network of relationships and working one's way through them one mechanism at a time. The network of relationships is dense because the mechanisms influence one another both directly and indirectly, which is why it is conceptually problematic to consider the spheres of law and politics as separate. The network is dynamic because its structure changes as the interactions between mechanisms unfold over time. It is possible to study complex systems, particularly if experimental interventions are considered. The power of an experimental design comes from its ability to equalize the complex network of mechanisms across treatment and control groups. Without this, observers and analysts are forced to grapple with this complexity using other social science tools.

## B. Applied to Human Rights

Human rights scholarship is very much stuck in the kinds of debates American law and society were having thirty years ago—about whether human rights law, as a whole, matters at all, or whether the whole artifice will soon

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68. Dancy, *supra* note 61.

69. McCann, *supra* note 51.

crumble. Analyses that take human rights law seriously must regularly issue proclamations about whether the entire enterprise is worth saving.<sup>70</sup> Meanwhile, critical and declinist works of the Posner and Hopgood variety are fine throwing out the human rights project in favor of developmentalist or public health agendas.<sup>71</sup> Human rights scholarship is at an inflection point, and it should be steered in the direction of a pragmatic neo-constitutive approach.

### 1. Rights Claims Are Popular

The first assumption for a neo-constitutive approach to human rights is that rights claims are popular. The language of human rights is a political claim-making discourse for judging governments and corporate actors.<sup>72</sup> This discourse competes with others in the repertoire of contention, meaning that political actors must choose whether to root their demands in, among other things, the language of religious principles, sovereignty, national interest, the will of the people, political order, or social justice. All of these are conceptual apparatuses capable of challenging the authority of governing institutions or empowering claimants with respect to those institutions. However, human rights are rather popular relative to the others. The global volume of written and verbal references to human rights shows few signs of contraction, and the respect that local populations have for human rights organizations is higher than some would expect.<sup>73</sup> In choosing which discourse to mobilize, many collective movements opt for human rights, whatever the flaws of that strategy.

What explains the resilience of human rights claims? First, one could argue that the language of human rights is hegemonic; it is supported by the most powerful actors in the world, and it commands a great deal of cultural and material resources. A second explanation is that the act of claiming human rights possesses distinct properties that other political or legal speech acts lack. The usefulness of such claims, as the trend line below suggests, is increasing (See Figure 2). Rights claims confer duties on other individuals or groups to refrain from harm, provide goods, or perform other specified actions for the rightsholder.<sup>74</sup> This is different from other types of claims, which do not clearly specify the need for a change in an interlocutors' behavior. A third explanation is that human rights are "unbearably light," meaning they travel across boundaries but remain "indeterminate, malleable, variable, and polyvalent."<sup>75</sup> In short, people frequently resort to human rights not because they are powerful but

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70. See generally KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY (2017).

71. POSNER, *supra* note 15, at Ch. 7; HOPGOOD, *supra* note 20, at 21.

72. This may be referred to with the Latin term *iudicandum*. Valentini, *supra* note 27, at 181.

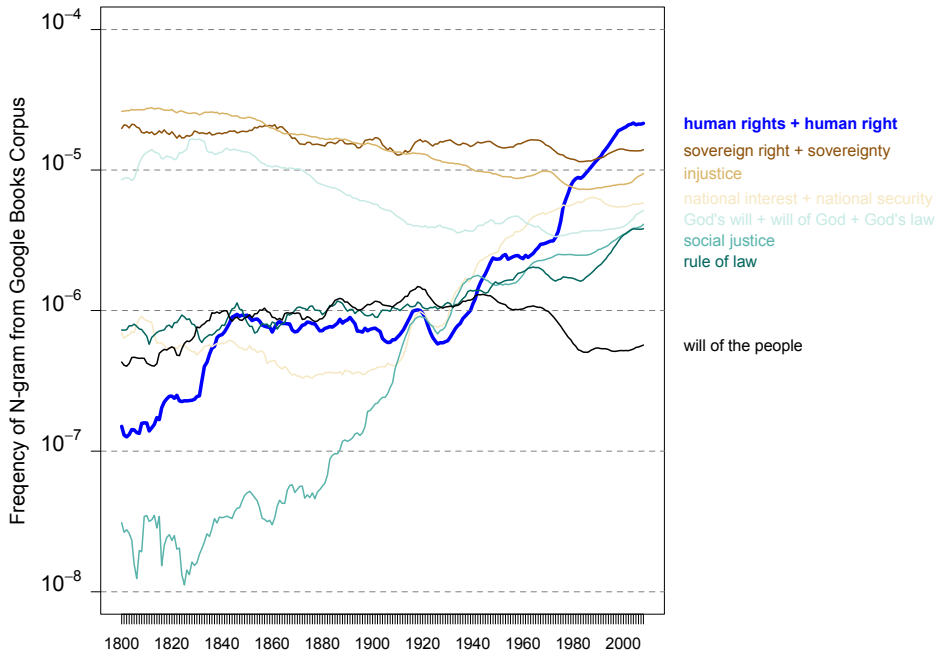
73. JAMES RON ET AL., TAKING ROOT: HUMAN RIGHTS AND PUBLIC OPINION IN THE GLOBAL SOUTH (2017).

74. Leif Wenar, *The Nature of Rights*, 33 PHIL. PUB. AFF. 223, 229 (2005); See generally WESLEY HOFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1919).

75. Michael McCann, *The Unbearable Lightness of Rights: On Sociological Inquiry in the Global Era*, 48 LAW SOC'Y. REV. 245, 248 (2014).

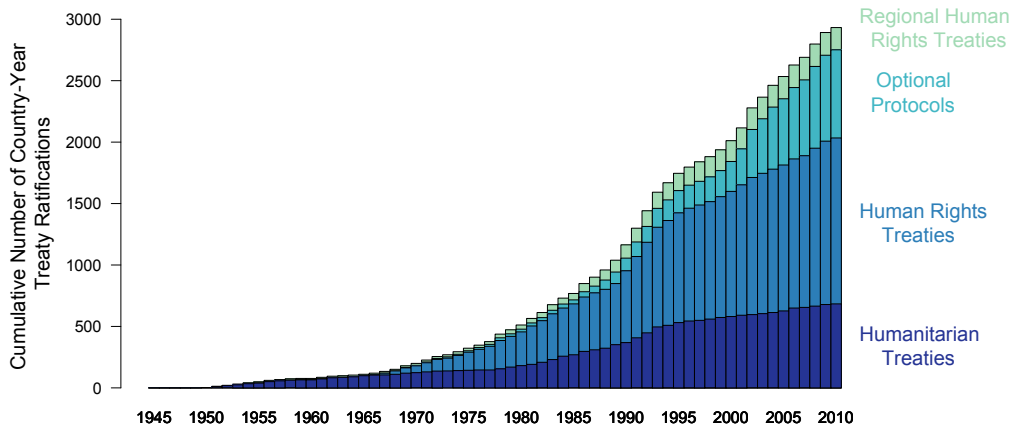
because they are vague, easily translated, and lacking in substantive content.

Figure 2: Use of “Human Rights” And Other Types of Political Claims Over Time.



Each of these points is debatable. However, these explanations also overlook another possibility: that human rights claims draw on a reservoir of legal agreements that provide useful resources to claim-makers. Empirically, the spike in human rights usage exists alongside other trends in human rights treaty ratifications. While it is difficult to articulate a clear causal story, the parallel rise of human rights talk and human rights laws suggests the possibility of a mutually reinforcing relationship.

Figure 3: All Ratifications of UN Humanitarian and Human Rights Treaties.



## 2. Law and Social Movements are Co-Productive

This leads to a second assumption of a neo-constitutive approach: law and social movements are co-productive. Human rights legalization is a positive program that derives from and amplifies the impulse to make human rights claims. However, the relationship is neither linear nor static; it is uneven and dynamic. The Universal Declaration of Human Rights was not a project of elitist global powers, but a network of representatives from Latin American states and the European intelligentsia that pushed for such a statement of principles prior to 1948.<sup>76</sup> In the 1960s, Amnesty International began its monitoring work on political prisoners *in the absence of* an international human rights legal apparatus,<sup>77</sup> and in the early 1970s, US Congress held human rights hearings, *before* the main Covenants had gone into force.<sup>78</sup> In this period, activists were not entirely legalist; they did not single-mindedly pursue the development of legal treaties. Yet once legalization picked up pace in the 1980s and 1990s, these laws served as a rallying point for a growing number of lawyers, social movement activists, and politicians. A neo-constitutive approach to understanding these processes means seeing the world like a dense and dynamic network of relationships. Thus, one may think of law as both an outcome of transnational social movements,<sup>79</sup> and a magnifier of local rights-based activism.<sup>80</sup>

Human rights law, however plural and complex, also serves a few functions

76. SIKKINK, *supra* note 70.

77. ANN CLARK, DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS 5-7 (2001).

78. KATHRYN SIKKINK, MIXED SIGNALS: U.S. HUMAN RIGHTS POLICY AND LATIN AMERICA (2004).

79. See, e.g., NEIL STAMMERS, HUMAN RIGHTS AND SOCIAL MOVEMENTS (2009); Thomas Risse & Stephen Ropp, *International Human Rights Norms and Domestic Change*, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse, Stephen Ropp, & Kathryn Sikkink eds., 1999).

80. SIMMONS, *supra* note 24.



for human rights claimants. First, it generates specific content that makes the discourse more precise; meaning that with legal instantiation, human rights lose some of their vagueness, or unbearable lightness. When one makes a claim that a government is violating a right to be protected from torture, this claim has specific referents in jurisprudence. Second, because human rights law is traditionally grounded in the work of resisters and the reform-minded, tapping this pool of laws means expressing a kind of solidarity with rights protagonists past and present. While this sounds almost spiritual, the notion of tapping is precisely the same kind of logic that popular constitutionalist theorists apply when considering what maintains a constitution's legitimacy after its founders have past; the answer, in short, is continued use.<sup>81</sup> A third and often unconsidered contribution that human rights law makes is that it provides activists with a source of sustained attention to their cause. Especially in a media environment blitzed with global crises, where the compassionate can easily lose interest and move onto another disaster, human rights bodies and courts provide a forum where experts—be they judges, lawyers, or NGO leaders—will continue to focus on the same case for years. For these reasons, human rights law and social movements reinforce one another.

Critically, this does not mean that the force of human rights is attributable to norm internalization. A neo-constitutive approach is distinct from constructivism, which often presumes that rights win out in the marketplace of ideas because of people are socialized to believe them. While some people do believe in human rights, this does not mean that faith or brainwashing is a necessary condition for influence. Human rights can exert effects simply because there is a constituency that supports them, relies on this legal vocabulary to make claims, and generates a kind of shared currency for judging political actors.

### 3. Human Rights Practice is Rooted in Real Bodies of Law

A third assumption of our neo-constitutive approach is that human rights practice is rooted in very real bodies of law that have developed an extensive and wide-reaching network of practices. Critics at times claim that the human rights regime—embodying multilateral treaties regulating state and individual criminal responsibilities—does not qualify as real law because it possesses weak enforcement mechanisms.<sup>82</sup> However, drawing equivalence between law and enforcement is an antiquated approach grounded in monarchist understandings of sovereignty and power.<sup>83</sup> The reality of human rights law is undeniable. Human rights lawyering and action command a great deal of global political

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81. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 *POL. THEORY* 766, 766–81 (2001).

82. See generally Raymond Geuss & Lawrence Hamilton, *Human Rights: A Very Bad Idea*, 60 *THEORIA* 83, 83–103 (2013).

83. For legal theorist Brian Tamanaha, this reflects flawed thinking traceable to Jeremy Bentham, who, in modeling law as the actions of a sovereign, relegated international law as a whole to marginal status. BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW* 154 (2017).

resources. Moreover, rights laws are now suffused into several regional and domestic legal systems, and these systems contain human rights trainees, experts, and specialists. The extensiveness—and indeed, the complexity—of this field is such that it would be difficult to erase. It might be the desire of some observers that human rights law be thrown in the dustbin of history, but pitching such a desire as a concern with reality is misleading. To the contrary, it may then represent a profound sense of *un*-realism to think that human rights law could be dispensed with, or that it will suddenly disappear any time soon.

#### 4. Human Rights Legal Discourse is Woven Into Political Interactions

The fourth assumption builds on the previous three. The human rights legal discourse is baked into political interactions. However, this is not the same as assuming that human rights are an inherently positive or progressive force. A neo-constitutive approach is intentionally agnostic on this question. Instead of sweeping proclamations about the overall good or bad of the human rights regime, a neo-constitutive approach seeks to achieve a fuller understanding of mechanisms linking legal developments to social and political outcomes. Human rights mobilizations can have intended and unintended effects. Whether these are positive or negative is a normative judgment left up to the observer. However, it is certainly the case that the human rights legal regime was assembled over the years to improve practices among those responsible for organized violence. It is useful to ask if, and how, it might do so.

This outline of a neo-constitutive approach to human rights should resonate because scholars are already doing this kind of work, even if their embrace of complexity and devotion to evidence-based mechanistic explanations does not earn as wide an audience as gun-blazing critical works. In the next section, we explain how a neo-constitutive approach helps create a more accurate picture of two big questions related to outcomes: (1) do states comply with international human rights law, and (2) does international criminal law deter groups or individuals from committing acts of mass political violence?

## IV

### EMPIRICAL EXAMPLES

#### A. Compliance

Neo-constitutive thinking could assist in understanding variations in state compliance with multilateral human rights agreement. The question of compliance is one that has commanded a tremendous amount of scholarly attention over the last fifteen years, especially in International Relations (IR). Much of the work in this field has a neo-institutional flavor, examining the “independent” effect that multilateral human rights treaties and bodies have on state repressive practices. In this approach, human rights law is modeled as an external legal force that may or may not act on rational political calculations at the domestic level. This separate-spheres ontology is coupled with a Humean

epistemology based on covariation.

IR scholars present two divergent arguments about treaty effectiveness. In the first, treaty ratification constrains states by creating costs for noncompliance, which modifies state behaviors.<sup>84</sup> Alternatively, treaty ratifications only occur in cases in which the regime would have complied with the provisions of a treaty already. Treaty ratification is thus a hollow act that reflects the existing political regime. As such, treaties have no effect on human rights compliance,<sup>85</sup> or on international legal compliance writ large.<sup>86</sup>

However, for all its statistical rigor, this line of research hides a few weaknesses. First, it makes heroic assumptions about how quickly and significantly law should exert impacts: most statistical models are specified in such a way that the researcher is looking for a relationship between treaty ratifications in one year and a change in human rights practice in the next one, or sometimes two, years. Second, the externality, or independence, of human rights legal instruments is assumed for the sake of statistical modeling, even though creation of human rights legal institutions is a long process involving several endogenous actors and institutions. If a state's foreign ministry simultaneously handles various treaty negotiations at the UN, along with reporting to the Human Rights Committee and to the Committee on Torture, should one really model these processes as distinct? And third, this research has traditionally been weak on mechanisms, passing over the multiple ways that human rights legalization and the politics of repression interact. Neo-institutionalist research basically leaves us with dozens of correlations between treaties and outcomes, but with little examination of the broader social or political context the influence behavior.<sup>87</sup>

The neo-constitutive approach offers major points of departure from existing empirical research on compliance. The first occurs at the level of global law and society, where newer relational work challenges the notion that international law has a political problem. For example, Terman and Voeten argue that naming and

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84. James D. Morrow, *When Do States Follow the Laws of War?*, 101 AM. POL. SCI. REV. 559, 559–72 (2007); Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819, 819–35 (2000); Beth A. Simmons & Daniel J. Hopkins, *The Constraining Power of International Treaties: Theory and Methods*, 99 AM. POL. SCI. REV. 623, 623–31 (2005).

85. Emilie M. Hafner-Burton & James Ron, *Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes*, 61 WORLD POL. 360, 360–401 (2009); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1373–1411 (2005); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RES. 407, 407–25 (2007); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 11 YALE L.J. 1935, 1935–2042 (2002).

86. George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 50 INT'L. ORG. 379, 379–406 (1996); Jana Von Stein, *Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance*, 99 AM. POL. SCI. REV. 611, 611–22 (2005).

87. A similar “reductionist” problem exists in the study of open economy politics. See Thomas Oatley, *The Reductionist Gamble: Open Economy Politics in the Global Economy*, 65 INT'L. ORG. 311, 311–41 (2011).

shaming via the Human Rights Council inspires action when countries receive criticism from allies, or ideologically “close” partner states; however, when states are criticized by rival delegations during Universal Periodic Review, they are unlikely to follow up on recommendations.<sup>88</sup> In short, international legal mechanisms may be most effective when they are channeled through existing political relationships. The overall embeddedness of states in what are often highly social international institutions makes a difference.<sup>89</sup> After controlling for a state’s probability of ratifying the CEDAW based on its general affinity to all United Nations agreements, Yonatan Lupu finds that CEDAW member states are more likely to protect women’s political (i.e., right to vote, run for office, and petition government officials); economic (i.e., right nondiscrimination in the workplace and equality in hiring, promotion, and pay); and social rights (i.e., the right to equal inheritance, marriage and divorce rights, and education).<sup>90</sup>

The mutually constitutive relationship between international law and global political society is also becoming more apparent at the regional level. Helfer and Voeten uncover evidence that the European Court of Human Rights, whose decisions are only binding *inter partes*, somehow still manage to have an *erga omnes* effect across and beyond the region of Europe.<sup>91</sup> Though by legal fact the Court’s decisions are meant to apply only in the state whose nationals brought the litigation, other states often react to decisions as if they are binding. When critical rulings are made regarding issues like LGBT rights in a single state, it sparks a wave of legislation across other states. One reason is that the ECHR’s decisions have “persuasive authority,” and change interactions between political and legal actors region-wide.<sup>92</sup> Helfer and Voeten’s work is constitutive because it seeks to discover and explain the indirect effects of legal action on global political society. These regional relationships would be unobservable if one simply studied independent correlations, or asked whether single states in isolation complied with every element of ECHR’s legal rulings.

Yet another global phenomenon captured only by work that adopts a flexible relational ontology is the changing nature of human rights data itself. As the menu of human rights practices monitored by NGOs and IGOs expands, many types of abuses are more likely to be observed.<sup>93</sup> This is because the standard of accountability used to understand human rights is changing. What makes observing the temporal patterns of this process difficult is that no one individual,

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88. Rochelle Terman & Erik Voeten, *The Relational Politics of Shame: Evidence from the Universal Periodic Review*, 13 REV. INT’L. ORG. 1, 1–23 (2018).

89. Alistair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT’L. STUD. Q. 487, 487–516 (2001).

90. Yonatan Lupu, *Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements*, 67 INT’L. ORG. 469, 469–503 (2013); SIMMONS, *supra* note 24.

91. Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT. ORG. 77, 77–110 (2014).

92. *Id.* at 81.

93. Christopher J. Fariss, *Respect for Human Rights has Improved Over Time: Modeling the Changing Standard of Accountability*, 108 AM. POL. SCI. REV. 297, 297–318 (2014).

organization, or government is responsible for defining it or gathering information by which to assess it. The standard of accountability is a constitutive process, through which transnational activists continuously remind their audience that the reality of situations “on the ground” are dire, and far short of legal norms and ideals. But the growing gap between ideal and real is by design. Human rights monitoring organizations, lawyers, judges, and other members of international civil society work to hold governments to increasingly stringent legal standards of behavior. When human rights data is modeled to account for this changing standard of accountability, a new picture emerges: globally, respect for human rights is improving, and this coincides with the increasing embeddedness of countries within the international human rights regime.<sup>94</sup> These results are important because much of the neo-institutional theorizing in IR builds upon puzzling findings that are knowable only through macro-level statistics—like the apparent negative correlation between ratification of the Convention against Torture and worsening scores on indicators of torture.<sup>95</sup> However, it is likely the case that such correlations are a relic of a much larger and unaccounted-for changes in the nature of human rights data. Stricter legal standards have altered the way that actors in global society interact with information on human rights violations, in some ways making everyone harsher judges of governments. In short, law is constitutive of the human rights data-generation process.<sup>96</sup>

The examples presented here are global, or supranational relational phenomena. But the neo-constitutive approach offers a second, micro-level departure from common research on compliance, by shifting the analytical focus and unit of analysis away from an all-powerful “black box” state with rationally calculating leaders. Instead, individuals and groups are embedded in social and political environments that they, by necessity, must understand and navigate. Evidence from mechanism-oriented research suggests positive, albeit conditional relationships between human rights law and compliance given certain domestic political conditions.<sup>97</sup> For example, Convention against Torture member states

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94. Christopher J. Fariss, *The Changing Standard of Accountability and the Positive Relationship between Human Rights Treaty Ratification and Compliance*, 48 BRIT. J. POL. SCI. 239, 239–71 (2018).

95. EMILIE M. HAFNER-BURTON, MAKING HUMAN RIGHTS A REALITY (2013); POSNER, *supra* note 15; Emilie M. Hafner-Burton, Kiyoteru Tsutsui & John W. Meyer, *International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties*, 23 INT’L. SOC. 115, 115–41 (2008); James R. Hollyer & B. Peter Rosendorff, *Why Do Authoritarian Regimes Sign the Convention Against Torture? Signaling, Domestic Politics and Non-Compliance*, 6 Q.J. POL. SCI. 275 (2011); James Raymond Vreeland, *Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture*, 62 INT’L. ORG. 65, 65–101 (2008).

96. Ann Marie Clark & Kathryn Sikkink, *Information Effects and Human Rights Data: Is the Good News about Increased Human Rights Information Bad News for Human Rights Measures*, 35 HUM. RTS. Q. 539, 539–568 (2013); Fariss, *supra* note 94; Ryan Goodman & Derek Jinks, *Measuring Effects of Human Rights Treaties*, 14 EUR. J. HUM. RTS. (2003).

97. TODD LANDMAN, PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY (2005); HEATHER SMITH-CANNOY, INSINCERE COMMITMENTS: HUMAN RIGHTS TREATIES, ABUSIVE STATES, AND CITIZEN ACTIVISM (2012); Courtenay R. Conrad, *Divergent Incentive for Dictators: Domestic Institutions and (International Promises Not to) Torture*, 56 J. CONFLICT. RESOL. 1, 1–34 (2012); Courtenay R.

curb torture in cases in which leaders are secure in their jobs,<sup>98</sup> or when many legislative veto players are present and constrain political leaders based on rules written into law.<sup>99</sup>

Indeed, neo-constitutive work disaggregates compliance. Many groups and individuals actively pursue rights-compliant or rights non-compliant behaviors, but sometimes these developments do not immediately affect aggregate “scores.” Modeling such dynamic patterns is challenging, but new experimental designs and methods for such analyses are increasingly common. Experimental interventions are designed at once to improve and systemically evaluate rights-based programs. This is because it is difficult to paint a clear picture of human rights law if we simply examine the correlation between ratification of key treaties and changes in repressive practices aggregated at the country-year level. Doing so is akin to measuring the effects of a criminal justice system by overall level of crime in the United States for each year and state. Such an analysis is not able to track the constitutive processes—the individual level interactions happening between judges, lawyers, lawmakers, citizens, and any individual caught up in some portion of the legal system. Instead, to recognize the emergent properties of the legal system, one needs to examine the wide range of institutional and behavioral changes that derive from the practice of international human rights law. What makes law ineffective at one moment in time and effective in another is a generative process that is hard to observe. The power of an experimental design comes from its ability to equalize the complex network of mechanisms across treatment and control groups. Without the aid of an experimental intervention, observers and analysts are forced to grapple with this complexity using other social science tools.

For scholars focused on strengthening the rule of law, legal compliance might be more effectively analyzed at the level of the legal task. Designing and experimentally evaluating specific modifications to existing regulatory schemes<sup>100</sup> provide analytic focus on local sources of non-compliance, which are often rooted in low government capacity.<sup>101</sup> For example, in Haiti, evidence suggests that noncompliance is an unintentional outcome rather than a deliberate government policy, and efforts to augment bureaucratic capacity are effective at inducing legal compliance on a case-by-case basis.<sup>102</sup> Haiti provides a useful case for

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Conrad & Emily Hencken Ritter, *Treaties, Tenure, and Torture: The Conflicting Domestic Effects of International Law*, 75 J. POL. 397, 397–410 (2013); Geoff Dancy & Kathryn Sikkink, *Induced Enforcement: Treaty Ratification and Domestic Human Rights Prosecutions* (forthcoming) (on file with authors); Lupu, *supra* note 90; Yonatan Lupu, *Legislative Veto Players and the Effects of International Human Rights Agreements*, 59 AM. J. POL. SCI. 578 (2015); SIMMONS, *supra* note 23.

98. Conrad and Ritter, *supra* note 97.

99. Lupu, *supra* note 97.

100. Downs, Rocke & Barsoom, *supra* note 86.

101. Abram Chayes & Antonin Chayes, *On Compliance*, 47 INT'L. ORG. 175, 175–220 (1993); Thomas Risse, *Human Rights in Areas of Limited Statehood: From the Spiral Model to Localization and Translation*, in HUMAN RIGHTS FUTURES 135, 135–58 (Stephen Hopgood, Jack Snyder, & Leslie Vinjamuri eds., 2017).

102. Tara Slough & Christopher J. Fariss, *Illegal Detention with Intent? Experimental Evidence of*

isolating the relationship between misgovernance and human rights abuse because annual human rights reports, qualitative interviews, and original administrative data provide no evidence that the government purposefully represses the over 8,000 individuals held in prolonged pretrial detention, which is the largest form of illegal imprisonment globally. External rule of law programs focused on the legal task limiting the duration of pretrial detention in Haiti have helped the country act more in line with international legal standards.<sup>103</sup> The typical theoretical assumption of a purposely repressive leader or regime is not always valid.<sup>104</sup> Absent leaders who strategically repress to keep themselves in power, capacity-building legal interventions can be quite politically effective.<sup>105</sup>

## B. Deterrence

A second question that could be better illuminated by a neo-constitutive approach is whether international criminal law deters mass atrocity and core crimes violations in the future. Interest in this question budded when lawyers made hopeful claims about the potential for the ad hoc tribunals of the 1990s to prevent future violence and war,<sup>106</sup> and then blossomed when hope was channeled into the Rome Statute, establishing the International Criminal Court. Even before the permanent ICC began operating in 2003, scholars questioned its potential to deter violence.<sup>107</sup> Neo-institutionalist observers have maintained skepticism, finding little promise in the ICC because there is no global executive to order the arrest of war criminals.<sup>108</sup> As such, there is very little reason for alleged or would-be agents of atrocity to fear arrest and transferal to The Hague.<sup>109</sup> For their part, critical theorists find the Court to be not only impotent, but also insidious because it serves as a vessel of selective Western justice against African states.<sup>110</sup> As one scholar notes, the relationship between African states

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*Misgovernance*, (Sept. 14, 2018) (unpublished manuscript) (on file with authors).

103. *Id.*

104. *Id.*

105. THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE, (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink eds., 2013).

106. M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 20 (Autumn 1996); Jennifer L. Balint, *The Place of Law in Addressing Internal Regime Conflicts*, 59 LAW CONTEMP. PROBS. 103, 103–126 (Autumn 1996).

107. See, e.g., David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L. L.J. 473, 473–88 (1999).

108. David Kaye, *Who's Afraid of the International Criminal Court?* FOREIGN AFF. (Apr. 18, 2011), <https://www.foreignaffairs.com/articles/2011-04-18/whos-afraid-international-criminal-court> [<https://perma.cc/GWS2-ZGUC>] (last visited Oct. 27, 2015).

109. Helena Cobban, *International Courts*, FOREIGN POL'Y 22, 22–28 (2006); Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, 7 INT'L. J. TRANSITIONAL JUST. 434, 434–54 (2013). For statistical research positing little relationship between the ICC and patterns of violence, see Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U.L.Q. 777 (2006); JAMES D. MEERNIK, INTERNATIONAL TRIBUNALS AND HUMAN SECURITY (2016); *id.*

110. PHILIP CLARK, AS THE BULLETS FLY, DOING JUSTICE FROM AFAR: CHALLENGES FOR THE ICC IN THE AFRICAN GREAT LAKES (2011); KAMARI MAXINE CLARKE, FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN

and the ICC is “more political than legal.”<sup>111</sup>

More recent work, though, has moved away from narrowly rationalist and top-down analyses or universal criticism of international criminal law, toward focus on the agency of individuals and the entry points that these individuals use to engage with the institutional structures. As such, it allows for theorizing and analysis from the bottom up and does not need to be strictly rationalist to be ontologically tractable. Neo-constitutive scholars are not surprised by the political nature of international tribunals. Instead, they accept and analyze the way that these legal institutions operate through politics, and vice versa.<sup>112</sup> A first lesson of this work is that, whether or not one agrees that the ICC or other tribunals manage to serve justice, there is little questioning that the demand for justice is a powerful force rooted deeply in routinely-victimized populations. This demand was the initial inspiration behind the ICC’s creation, to the chagrin of the world’s great powers,<sup>113</sup> and it continues to animate annual meetings of the ICC’s Assembly of State Parties. As Jane Stromseth writes, “[e]ach year hallway tables overflow with reports and documentation of atrocities crying out for redress.”<sup>114</sup> The ICC is built atop a groundswell of popular rights-based claims and politically charged calls for accountability.

A second lesson is that tribunals’ interventions into particular countries are very much shaped by already-existing political constituencies. For example, in Kenya, an ICC investigation into 2008 post-election violence became a contested issue between “pro-compliance and anti-compliance” groups within the country.<sup>115</sup> These groups can cut across other cleavages. In Kenya, those victimized by post-election violence are more likely to support the ICC, even if they are members of the same ethnic group targeted by the Court’s investigations.<sup>116</sup> Survey analyses also show that victims who interact with the

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AFRICA (2009); Mahmood Mamdani, *The International Criminal Court’s Case Against the President of Sudan: A Critical Look*, 62 J. INT’L. AFF. 85, 85–92 (2009); Celestine Nchekwube Ezennia, *The Modus Operandi of the International Criminal Court System: An Impartial or a Selective Justice Regime?*, 16 INT’L. CRIM. L. REV. 448, 448–79 (2016); Alana Tiemessen, *The International Criminal Court and the politics of prosecutions*, 18 INT’L. J. HUM. RTS. 444, 444–461 (2014).

111. Rowland JV Cole, *Africa’s Relationship with the International Criminal Court: More Political Than Legal*, 14 MELB. J. INT’L L. 670 (2013).

112. See generally STEVEN C. ROACH, *POLITICIZING THE INTERNATIONAL CRIMINAL COURT: THE CONVERGENCE OF POLITICS, ETHICS, AND LAW* (2006).

113. DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT’S BATTLE TO FIX THE WORLD, ONE PROSECUTION AT A TIME* 6–8 (2014); T. MARKUS FUNK, *VICTIMS’ RIGHTS AND ADVOCACY AT THE INTERNATIONAL CRIMINAL COURT* (2010).

114. Jane E. Stromseth, *Is the ICC Making a Difference?* JUST SECURITY (DEC. 6, 2017), <https://www.justsecurity.org/47717/icc-making-difference/> [<https://perma.cc/BAD2-YQ43>] (last visited Dec. 6, 2017).

115. Stephen Chaudoin, *How Contestation Moderates the Effects of International Institutions: The International Criminal Court and Kenya*, 78 J. POL. 557, 557–71 (2016).

116. Tessa Alleblas et al., *Is the International Criminal Court Biased Against Africans? Kenyan Victims Don’t Think So*. WASHINGTON POST: MONKEY CAGE BLOG (Mar. 6, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/06/is-the-international-criminal-court-biased-against-africans-kenyan-victims-dont-think-so/?utm\\_term=.c96591f7dfa6](https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/06/is-the-international-criminal-court-biased-against-africans-kenyan-victims-dont-think-so/?utm_term=.c96591f7dfa6) [<https://perma.cc/EQ49-KRR7>] (last visited May 14, 2017).



ICC or the ICTY are relatively satisfied with their experiences.<sup>117</sup> That tribunals attract political support for some groups seems a positive development, but it is also the case that nationalist or anti-justice groups detest international tribunals enough to mobilize publicly against them. In Serbia, for example, the operation of the ICTY has helped to produce a “war criminal cult” that refuses to accept responsibility for atrocities committed during the 1990s.<sup>118</sup>

However, a third lesson is that tribunals are not simply captured by local politics; they also alter political interactions in a way that produces impacts. For example, Dancy and Montal demonstrate that an ICC investigation creates a “willingness game” between the ruling coalition and legal reformers within the country, who use ICC attention as an opportunity to file more claims against abusive state agents.<sup>119</sup> The ruling coalition, concerned for its reputation, responds by allowing some of these legal cases to go forward. The authors support this argument with variable-oriented methods, showing a strong positive relationship between ICC investigations and domestic prosecutions for everyday human rights violations.

Other neo-constitutive work fixates on the ways in which ICC interventions affect internal conflict dynamics. As of 2016, 80% of ICC investigations were initiated amid situations of active civil wars.<sup>120</sup> Early studies were either very hopeful that the ICC could help end conflicts by ostracizing war criminals,<sup>121</sup> or suspicious that ICC intervention would lead war criminals to dig in their heels so as to avoid arrest.<sup>122</sup> More recent research suggests that the ICC’s impact is not uniform. Through a tactic one team of researchers calls “international legal lasso,” some leaders in Africa have sought to direct ICC investigations toward violent domestic opponents, effectively neutralizing them.<sup>123</sup> As Mark Kersten shows, this can have the effect of actually encouraging rebel leaders like Joseph

117. STEPHEN SMITH CODY ET AL., *THE VICTIMS’ COURT? A STUDY OF 622 VICTIM PARTICIPANTS AT THE INTERNATIONAL CRIMINAL COURT* (2015); HELENA VRANOV SCHOORL ET AL., *ECHOES OF TESTIMONIES: A PILOT STUDY INTO THE LONG-TERM IMPACT OF BEARING WITNESS BEFORE THE ICTY* (2016), [http://www.icty.org/x/file/About/Registry/Witnesses/Echoes-Full-Report\\_EN.pdf](http://www.icty.org/x/file/About/Registry/Witnesses/Echoes-Full-Report_EN.pdf) [<https://perma.cc/U4PX-6HKJ>]; Kimi Lynn King & James D. Meernik, *THE WITNESS EXPERIENCE: TESTIMONY AT THE ICTY AND ITS IMPACT* CAMBRIDGE UNIVERSITY PRESS (2017), <http://www.cambridge.org/gb/academic/subjects/law/human-rights/witness-experience-testimony-icty-and-its-impact> [<https://perma.cc/3LQG-5LUZ>] (last visited May 10, 2018).

118. Izabela Steflja, *The Production of the War Criminal Cult: Radovan Karadžić and Vojislav Šešelj at The Hague*, forthcoming NAT’L. PAP. (2017). See also JELENA SUBOTI, *HIJACKED JUSTICE: DEALING WITH THE PAST IN THE BALKANS* (2009).

119. Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions*, 111 AM. J. INT’L. L. 689, 691 (2017).

120. David Mendeloff, *Punish or Persuade? Assessing the Compellence Logic of International Court Intervention in Cases of Civilian Violence*, forthcoming INT’L. STUD. REV. (2017).

121. Payam Akhavan, *The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT’L. L. 403–21 (2005).

122. Adam Branch, *Uganda’s Civil War and the Politics of ICC Intervention*, 21 ETHICS INT’L. AFF. 179–98 (2007).

123. Courtney Hillebrecht & Scott Straus, *Who Pursues the Perpetrators? State Cooperation with the ICC*, 39 HUM. RTS. Q. 162–88 (2017).

Kony to negotiate, though the inability of the ICC to rescind an arrest warrant means that those same rebel leaders are less likely to make a deal.<sup>124</sup> Together, then, these countervailing forces have meant observable but mixed impacts for ICC interventions. In some cases, core crimes violations have decreased in the wake of ICC involvement,<sup>125</sup> while in others they have increased.<sup>126</sup> In short, the ICC is not a universally positive instrument of specific deterrence.

Still, this is not the full picture. Neo-constitutive research also demonstrates that the ICC may have a more general deterrent effect. While it does not necessarily stop specific actors from again committing core crimes after they have already crossed that line, it might dampen the impulse for would-be war criminals to engage in grave acts of mass violence. Such an inference is very difficult to make, and it means looking at a network of relationships, rather than examining any one correlation between two variables. For example, the empirical record shows that acts of mass violence have become far rarer in the group of states that have ratified the Rome Statute, even among rebels.<sup>127</sup> Furthermore, the onset of ICC jurisdiction in individual ratifying countries like Colombia was clearly accompanied by a precipitous drop in certain forms of state violence.<sup>128</sup> Though these pieces of evidence are by no means definitive, they suggest that the mere existence of the ICC, and the extension of its jurisdiction to new territories, makes agents of violence more hesitant to engage in certain acts. This response may be irrational; after all, the ICC has arrested and imprisoned very few bad actors. But just like Charles Epp demonstrates that a socialized fear of legal liability led American police departments to reform, it might be that a socialized fear of international stigma causes leaders to avoid attracting the attention of international courts.<sup>129</sup> Only with an evidence-focused but flexible constitutive approach could one make such connections.

For example, the International Criminal Court appears to deter atrocity, even though it does not have the support of great powers, nor does it significantly increase the risk that any given state agent will be held criminally accountable.<sup>130</sup> One reason may be that the ICC changes the perceptions of domestic reformers,

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124. MARK KERSTEN, *JUSTICE IN CONFLICT: THE EFFECTS OF THE INTERNATIONAL CRIMINAL COURT'S INTERVENTIONS ON ENDING WARS AND BUILDING PEACE* (2016).

125. Courtney Hillebrecht, *The Deterrent Effects of the International Criminal Court: Evidence from Libya*, 42 INT. INTERACT. 616–43 (2016).

126. For a full review, see Geoff Dancy, *Searching for Deterrence at the International Criminal Court*, 17 INT'L. CRIM. L. REV. 625–55 (2017).

127. Benjamin J. Appel, *In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?*, forthcoming J. CONFLICT RES. (2016), <http://jcr.sagepub.com/cgi/doi/10.1177/0022002716639101> [<https://perma.cc/5BGR-KAFG>] (last visited June 19, 2016); Dancy, *supra* note 125; Hyeran Jo & Beth Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT. ORGAN. 443–75 (2016).

128. Dancy, *supra* note 125, at 649.

129. Geoff Dancy & Florencia Montal, *From Law Versus Politics to Law in Politics: A Pragmatist Assessment of the ICC's Impact*, 32 AM. U. INT'L. L. REV. 645, 645–706 (2017).

130. Jo & Simmons, *supra* note 126; Dancy, *supra* note 125.

while also isolating targeted leaders in international society.<sup>131</sup>

## V

### MOVING FORWARD

What does the future hold for human rights law and practice?<sup>132</sup> This is certainly a very difficult question, but it seems like those answers offered by mainstream legal realists are limited. For neo-institutionalists and critical theorists, the human rights regime does very little, and will soon be swept away by political backlash. Yet if this is truly the case, then the purpose of this scholarship is rather limited in scope: it resigns itself to document the fall.

Scholars should aim for more. This article presents a neo-constitutive approach to the impact of human rights and international criminal law.<sup>133</sup> The intuition behind such an approach is that law and politics are conjoined spheres within society. It also presumes that there is such a thing as world society, and that within that society, human rights cannot simply be wished or argued away. Furthermore, given how sedimented legal systems are, one cannot easily make counterfactual claims about what society would exist in the absence of entire bodies of law. Instead of treating rights-based legal institutions as social units that mechanically produce outcomes in independent and linear fashion, researchers must study how norms and institutions generate relations that both “constrain and facilitate the reflexive actions of research subjects” in non-linear ways that are hard to observe.<sup>134</sup>

Epistemologically, the neo-constitutive approach allows scholars to remain open to various research design techniques for assessing the reach of law and legal claim-making. As we write, scholars in human rights,<sup>135</sup> comparative politics,<sup>136</sup> and development economics<sup>137</sup> are coming to grips with this new empirical landscape. If the new generation of experimental researchers adopts a flexible neo-constitutive ontology,<sup>138</sup> then the results could be greatly productive:

131. Dancy & Montal, *supra* note 118.

132. For a variety of answers, see HUMAN RIGHTS FUTURES (Stephen Hopgood, Jack Snyder, & Leslie Vinjamuri eds., 2017).

133. Dancy & Fariss, *supra* note 50.

134. McCann, *supra* note 51.

135. Ana Bracic, *Reaching the Individual: EU Accession, NGOs, and Human Rights*, 110 AM. POL. SCI. REV. 530, 530–46 (2016); Kyla Jo Mcentire, Michele Leiby & Matthew Krain, *Human Rights Organizations as Agents of Change: An Experimental Examination of Framing and Micromobilization*, 109 AM. POL. SCI. REV. 407, 407–26 (2015); Slough and Fariss, *supra* note 102.

136. Christopher Blattman, Alexandra C. Hartman & Robert A. Blair, *How to Promote Order and Property Rights under Weak Rule of Law? An Experiment in Changing Dispute Resolution Behavior through Community Education*, 108 AM. POL. SCI. REV. 100, 100–20 (2014); Jasper Jack Cooper, *Policing When State Capacity is Low: Field Experimental Evidence from Papua New Guinea*, Working Paper (2018).

137. Matthieu Chemin, *The Impact of the Judiciary on Entrepreneurship: Evaluation of Pakistan’s Access to Justice Programme*, 93 J. PUB. ECON. 114–25 (2009); Esther Duflo et al., *Truth-telling by Third-party Auditors and the Response of Polluting Firms: Experimental Evidence from India\**, 128 Q. J. ECON. 1499, 1499–1545 (2013).

138. Gráinne de Búrca, *Human Rights Experimentalism*, 111 AM. J. INT’L. L. 277, 277–316 (2017).

instead of seeking to validate or invalidate the whole human rights project with every book, article, or note, they can think constructively about how different pieces of evidence fit together in support of more modest inferential claims. When shared, the outcome would be greater cross-disciplinary dialogue about how to improve lives.

In our contemporary environment, replete with information and misinformation, rare is the intervention that is heralded as an unmitigated success. We are all aware that progress is slow-going, difficult, and at times impossible. Nevertheless, human rights institutions remain a site through which individuals empower themselves, seek meaning together, and resist cruelty. Instead of promising the oppressed heaven, or reminding them of hell, we should carefully follow the nature of their struggle here and now.