

America and the World - 2017 and Beyond

"Human Rights and the Trump Administration"

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“Don’t tell me it doesn’t work—torture works,” then presidential candidate Donald Trump said at a February 2016 campaign event in Bluffton, South Carolina. “Okay, folks, Torture—you know, half these guys [say]: ‘Torture doesn’t work.’ Believe me, it works, Okay?”¹ Whether or not the President-elect’s promise of a return to Bush era waterboarding (or forced deportations or building his “beautiful wall”) will be realized is anybody’s guess, but the Trump presidency is unlikely to be remembered for its vigorous championing of human rights. Perhaps more surprising is the ever-diminishing place of the United States in the making of a global human rights order long before Donald Trump appeared on the political scene.

One arresting indication of the United States’ marginality in the contemporary global human rights imagination is the sharp decline of the U.S. Constitution and its Bill of Rights as the model for drafters of written charters in new states. As late as 1987, *Time* magazine reported that of the 170 countries then in existence, as many as 160 used the American model for their constitutions. By the beginning this century, however, the use of the U.S. constitution had gone into what one legal scholar terms a “free fall.”² No single document has replaced it; instead, contemporary constitution making is shaped by a pluralist sensibility drawn from newer national constitutions like the 1982 Canadian Charter of Rights and Freedoms and the 1996 South African Constitution, along with international and regional human rights instruments such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

¹ *Washington Post*, 17 February 2016, https://www.washingtonpost.com/news/post-politics/wp/2016/02/17/donald-trump-on-waterboarding-torture-works/?utm_term=.ae3e093c677e.

² “‘We the People’ Loses Appeal with People Around the World,” *New York Times*, 6 February 2012, A1; *Time*, 6 July 1987: 92.

Associate Justice of the U.S. Supreme Court Ruth Bader Ginsberg has said, “I would not look to the American Constitution if I were drafting a constitution in the year 2012.”³ Similarly, judges around the world, who had habitually gone first to the decisions of the U.S. Supreme Court to craft their own judgments during much of the second half of the twentieth century, no longer do so. Instead they more frequently cite decisions by the European Court of Human Rights.⁴

As much of the world is turning away from the United States for its human rights inspiration, the continuing reticence of the American state to engage in the global human rights order is also striking. The United States has always been slow to embrace international human rights treaties and norms. The U.S. Senate only ratified the Genocide Convention in 1988, some forty years after it was adopted by the United Nations. In 2017, the United States remains the only country in the world that had not signed the Convention on the Rights of the Child. It is among only seven countries that have failed to ratify the Convention on the Elimination of All Forms of Discrimination Against Women. The United States is not a participant in the International Criminal Court. It signed the Rome Statute that established the court but there has been vigorous opposition to bringing the statute forward in the Senate for ratification. The United States was the twenty-second country to legalize gay marriage.

American courts also use international and regional human rights law in their jurisprudence far less often than other national courts. In the rare instances that they do, such as the U.S. Supreme Court’s 2003 *Lawrence v. Texas* decision striking down that state’s sodomy laws that drew on similar decisions by the European Court for Human Rights, their invocation stirred a political tempest. In his dissent to *Lawrence*, Justice Antonin Scalia called the majority’s use of foreign law a “[d]angerous dicta.” This court, he wrote, “should not impose foreign moods, modes, or fashions on Americans.” Other members of the Court have viewed foreign law more generously but their actual use of it remains parsimonious.⁵ The broader American political climate has not been encouraging. Since the *Lawrence* decision, a resolution circulates annually in the U.S. House of Representatives calling for a constitutional amendment that would prohibit U.S. courts from basing opinion on international law.⁶ This American allergy to international human rights law suggests that the ghost of the challenge by conservative Republican senators in the 1950s through what became known as the Bricker

³ “U.S. Supreme Court Justice Ruth Bader Ginsberg to Egyptians: Look to the Constitutions of South Africa or Canada, Not to the U.S. Constitution,” Middle East Media Research Institute TV Monitor Project, 30 January 2012 (<http://www.memritv.org/clip/en/3295.htm>).

⁴ “U.S. Court, a Long Time Beacon, is Now Guiding Fewer Nations, *New York Times*, 18 September 2008: A1. On these processes more generally, see David S. Law and Mila Versteeg, “The Declining Influence of the U.S. Constitution,” *New York University Law Review* 87(June 2012): 762-858; and Hanne Hagtvedt Vik, “How Constitutionalism Concerns Framed the US Contribution to the International Human rights Regime From its Inception, 1947-53,” *International History Review* 34.4 (December 2012): 887-909

⁵ *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting). By contrast, Associate Justice Stephen G. Breyer offers a robust defense of the use of international law by American courts in his *The Court and the World: American Law and the New Global Realities* (New York: Alfred Knopf, 2015).

⁶ See, for instance, H.J.Res.54, “Proposing an amendment to the Constitution of the United States relating to the use of foreign law as authority in Federal courts,” 113th Congress (2013-2014), <https://www.congress.gov/bill/113th-congress/house-joint-resolution/54>.

Amendment and brought a retreat from U.S. support for United Nations (UN) human rights norm making—a challenge that stopped U.S. ratification of the International Covenant on Political and Civil Rights and the Genocide Convention in its tracks for decades—continues to cast a long shadow.

The reluctance by the American state to fully embrace global human rights is mirrored in contemporary civil society. A National Association for the Advancement of Colored People (NAACP) delegation did travel to Geneva in 2012 to bring the question of voting rights in the United States to the attention of the United Nations Human Rights Commission. In what was a conscious reprise of the organization's 1947 *An Appeal to the World* led by W.E.B. Du Bois that sought to make visible racial discrimination in the United States at the United Nations, the NAACP presented its report *Defending Democracy: Confronting Modern Barriers to Voting Rights in the United States* to draw global attention to state legislation that threatened the voting rights of millions of persons of color.⁷ American gay rights and Native-American rights activists also continued to employ global human rights vocabularies as they had beginning in the 1970s. These were, however, largely the exceptions that proved the rule, and even there the presence of human rights was muted.

Most of today's major American social movements—among them the Occupy Protests, the Fair Immigration Movement, the Fight for \$15, the Marriage Equality Movement and Black Lives Matter—take primary inspiration from alternative political and moral lexicons. In their challenges to the mounting chasm in wealth and income between the top one percent of Americans and the rest, the mass incarceration of African-Americans, the escalating detentions and deportations of immigrants and growing racial disparities in policing, education, and income, these movements might have turned to the language of the Universal Declaration of Human Rights and its promises of universal guarantees to economic and social rights, to free movement and to live without racial and gender discrimination. At times they have made rhetorical gestures to the lexicon of human rights but their energies and tactics on the ground operated largely around a domestic space in which the global human rights remained in a minor key. With the number of families in the United States living in \$2-a-day poverty having more than doubling since 1996, human rights is losing some of its moral power to instruct in an era when structural arguments about economics and race are displacing other kinds of oppositional political discourses.

The declining significance of human rights as a powerful political or moral vocabulary in the United States cannot be seen apart from the deployment of torture as a key instrument of American state power after September 11, 2001. American public opinion was initially skeptical about the turn to torture. In a 2004 Pew Research Center poll, the majority of respondents said torture could never be justified. But over the next seven years, public opinion began a slow reversal, with a majority in 2011 saying torture can often or sometimes be justified.⁸ Trump is not alone.

It was not always so. In the 1940s the United States was fully present at the creation of a global rights order and Japanese Americans joined African Americans and Native Americans in their embrace of UN-sanctioned human rights norms to fight cases of domestic discrimination. The rise of President Jimmy Carter's human

⁷ "NAACP Brings U.S. Voting Rights Problems Before UN Human Rights Commission," n.d., <https://donate.naACP.org/news/entry/naACP-brings-u.s.-voting-rights-problems-before-un-human-rights-commission>.

⁸ Pew Research Center, "About Half See CIA Interrogation Methods as Justified," December 2014 (<http://www.people-press.org/files/2014/12/12-15-14-CIA-Interrogation-Release.pdf>).

rights diplomacy in the late 1970s was almost a sideshow compared to the four hundred U.S.-based human rights organizations established over the decade. Many of them were self-styled grassroots and decidedly local operations, while others, like Human Rights Watch, came to be national if not global in scope. At the same time a host of American professional organizations that had previously been unconcerned with global rights questions took up the cause of human rights. For the first time in American history, doing something about human rights became a part of everyday practice. Doctors, lawyers, journalists, physicists, bankers, accountants, chemists, university and high school teachers, students, senior citizens, social workers, ministers, librarians, grants officers at the nation's leading foundations, psychologists and psychiatrists, dentists, statisticians, and even civil engineers all found human rights in the 1970s.⁹

To some extent they never let go. If the 1970s marked the beginning of human rights as vocation, the professional turn has only intensified in the twenty-first century. Human rights are now deeply embedded in the curriculums of most professional schools, from Schools of Medicine and Law to Business. There are a proliferation of undergraduate and graduate programs in human rights at American colleges and universities, with many of their graduates going to work in what is now considered 'the human rights field' at non-profits or in government and business. Indeed the quotidian spread of human rights into the fabric of contemporary American society can be quite remarkable. New York state fifth graders spend as much time reading the Universal Declaration of Human Rights as they do Mark Twain's *Tom Sawyer*. A middle school shop teacher in Des Plaines, Illinois switched out his usual cuckoo-clock project and instead had his students build birdhouses to illustrate the Universal Declaration's Article 25 guarantee of the right to shelter. The simple acts of buying a coffee or a piece of fish are now mediated through human rights concerns with fair trade and slavers.¹⁰

The language of human rights is still there for the taking today. It offers a set of vocabularies and practices that could mobilize Americans, if not the American state, to make human rights and the kind of political work they might do at home and abroad their own again. Recovering the moral power of human rights may in fact become an unintended consequence of Donald Trump's presidency.

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⁹ On these histories, see my *The World Reimagined: Americans and Human Rights in the Twentieth Century* (Cambridge: Cambridge University Press, 2016).

¹⁰ "English Class in the Common Core Era," *New York Times*, 19 June 2015, 1; *Fair Trade: The Challenge of Transforming Globalization*, eds. Laura T. Raynolds, Douglas Murray and John Wilkinson (New York: Routledge, 2007); "Slavery and the Shrimp on Your Plate," *New York Times*, 21 June 2014.