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Enforcing the Hidden U.S. Equal Rights Law

Ann Fagan Ginger

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ENFORCING THE HIDDEN U.S. EQUAL RIGHTS LAW

Ann Fagan Ginger*

INTRODUCTION

Since 1945 the law of the United States has required the United States government to take action to promote universal observance of human rights for all without distinction as to sex.¹ This equal rights for women law is part of the supreme law of the land, to be faithfully executed by the President and the Administration, to be enforced by the federal courts and by the courts of the several states, to be implemented by Congress, and to be obeyed by industry, reported by the media, and relied on and obeyed by the people in their daily lives.²

Busy practitioners representing women whose equal rights have been denied will save time and increase their effectiveness by making use of this hidden law. This is an opportune moment to rediscover and enforce it. The needs of women are becoming

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Perhaps of equal relevance, I did organizing and educational work for the United Electrical Workers-CIO, represented witnesses before unAmerican Activities Committees and worked for the National Lawyers Guild during the cold war, was a civil rights/anti-draft lawyer and working mother during the sixties and seventies and concentrated on direct action and peace law cases during the eighties.

I want to thank Carla Reilly and Tatiana Roodkowsky for their hard work over many months to help turn this from an outline into a fully-cited law review article, although most footnotes are exemplary rather than exhaustive due to time constraints; my husband, James F. Wood, for continuing to cook, shop, and debate throughout the writing process; and Jennifer Frankel, Jim Ginger and Constance de la Vega for their critical comments.

1. See *infra* notes 15 & 16 and accompanying text.
2. See *infra* text accompanying note 17.

more acute in the face of increasing attacks on women's advancement. At the same time the cold war is ending, and the peace dividend must make it possible to fund some reforms.

This equal rights law has been implemented by a long series of statutes,³ executive orders, and regulations⁴ that give the lie to the image painted by Presidents Reagan and Bush of a de-regulated U.S. federal government that relies on one thousand points of private light to solve human rights and other basic social problems. This law has never been rejected in a case involving equal rights for women. But it has seldom been mentioned or relied on by lawyers seeking equal rights for women, and has never been specifically enforced by U.S. courts for reasons that are not relevant in 1990, whether or not they were relevant earlier.⁵

Government statistics on the present status of human rights for women in this country, and continuing distinctions based on sex, make clear that it is necessary to enforce all aspects of this law in the United States in the 1990s.⁶

Broad laws "to promote" the rights of other groups have been on the books for well over 100 years. Laws "to promote" railroads⁷ and other private, profit-making enterprises were passed and enforced before and after the Civil War.⁸ Laws parallel to this law, to promote prosperity for the general public, have been enforced in the United States since the New Deal.⁹ Other laws that were long on the books but not enforced by the courts, especially our treasured first amendment, have now become significant factors in our law and in our lives.¹⁰

3. See *infra* text accompanying notes 105-97.

4. See *infra* text accompanying notes 198-212.

5. See *infra* text accompanying notes 255-67. For related laws that have been enforced, see *infra* text accompanying notes 231-50.

6. See *infra* text accompanying notes 83-102.

7. See U.S. PUBLIC LAND COMMISSION, REPORT 144-55 (1905), cited in GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 511 (1912); RAY GINGER, THE AGE OF EXCESS: THE UNITED STATES FROM 1877 TO 1914 *passim* (1965).

8. See GUSTAVUS MYERS, *supra* note 7, at 509-683.

9. See *infra* text accompanying notes 302-17.

10. See *infra* text accompanying notes 336-48.

These examples suggest the potential for enforcement of this equal rights for women law, leading to a discussion of how to resolve the legal problems that have prevented its full enforcement to date: the theory that it is too broad and that it is not self-executing.¹¹

Efforts to enforce this law may begin with demands that the United States collect solid statistics on the issues really basic to women's rights, including not only the extent of enforcement of all laws insuring such rights but also on the future of babies, as we now collect statistics on grain and hog futures, i.e., the likelihood that babies will grow to maturity and become productive members of society without distinction as to sex, race, nationality, or economic class.¹² This information can spark an educational and cultural campaign as vibrant as the movement for women's suffrage and the civil rights movement. National and local campaigns¹³ and cooperation with the United Nations¹⁴ can empower women of all generations finally to achieve greater equality.

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11. See *infra* text accompanying notes 301 & 318.

12. Eleven years ago, in the first *Women's Law Forum*, I proposed "An Agenda for Women Lawyers," calling it "Pandora's Box," 8 *GOLDEN GATE U.L. REV.* 387 (1979). In the intervening years I have become less poetic and much more specific as I have joined the computer age. See Ann Fagan Ginger, *An International Data Base on Human Rights*, 1 *INT'L REV. CONTEMP. L.: U.S. EDITION* 136 (1990). For a parallel proposal on collecting data on "the nature of the existing situation with respect to each right," see Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 *AM. J. INT'L L.* 365, 379 (1990).

13. See *infra* text accompanying notes 348 & 367.

14. See *infra* text accompanying note 372.

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I. THE HIDDEN U.S. EQUAL RIGHTS LAW

A. THE LAW

In 1945, the Senate passed and the President signed a law¹⁵ committing the United States government to "take . . . action" to "promote . . . universal . . . observance of human rights . . . for all without distinction as to . . . sex" ¹⁶

15. United Nations Charter, 59 Stat. 1546, 82 U.N.T.S. 279.

16. Article 55c provides:

[T]he United Nations shall promote:

.
(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 provides:

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

U.N. CHARTER arts. 55 & 56; see also *id.* arts. 1.3, 8, 13.1b, 62.2, 76c.

In keeping with this *Women's Law Forum* issue, this article focuses on distinctions as to sex, although many of the factual and legal arguments as to sex distinctions apply equally to distinctions based on race, language or religion, the other three categories in article 55c, or can easily be modified for that purpose. The double problems of women

This broad equal rights law was adopted as two articles in a multilateral treaty that is better known for establishing the United Nations as the international organization to keep and promote peace. Like all treaties, on signing by the President and passage by the U.S. Senate by a two-thirds vote, it became part of the "supreme law of the land" to be enforced by the courts, under the U.S. Constitution.¹⁷

This law requires the U.S. government to take both negative action to prevent all distinctions as to sex and affirmative action to "promote" observance of human rights for all. It requires the government to enforce all existing laws forbidding sex discrimination, and to find additional methods to cause all people to observe the human rights of women, i.e., "to promote" such rights.¹⁸ Since the definition of human rights includes economic, social and cultural rights not enumerated in the U.S. Constitution and Bill of Rights, this law greatly expanded the list of rights to be protected.¹⁹ Since many denials of human rights are committed by nongovernmental enterprises (employers, financial institutions, etc.), it greatly expanded the institutions forbidden to discriminate on pain of governmental action.²⁰

In order to "promote . . . universal . . . observance of human rights . . . for all without distinction," the U.S. government is required to take four types of actions:

1. The government must protect all people against denials of human rights. This is similar to broad first amendment protection against denials of freedom of expression, broad fifth

also subjected to discrimination on the basis of race, language or religion are alluded to but not properly addressed here. See *infra* text accompanying note 353.

17. U.S. CONST. art. II, § 2; art. VI, § 2; art. III, § 2.

18. See *infra* text accompanying note 370.

19. The ninth amendment protects unenumerated "rights . . . retained by the people." See *infra* text accompanying note 354.

20. The language of the proposed Equal Rights Amendment is limited to *denials and abridgements* of equality of rights by the United States and state governments and to *legislation* by Congress to enforce these rights:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

amendment protection against denials of due process of law, broad thirteenth amendment abolition of the system of slavery, and broad fourteenth amendment protection against denials of equal protection.

2. The government must protect women specifically against distinctions based on sex. This is similar to specific protection against denials of suffrage due to race, color, or previous condition of servitude in the fifteenth amendment, due to sex in the nineteenth amendment, due to poverty in the twenty-fourth amendment, and due to lack of majority age in the twenty-sixth amendment.

3. The government must also take affirmative action to promote human rights and to end distinction based on sex, as mandated by executive orders²¹ and civil rights statutes²² concerning government contracts, employment, credit, education, culture, social services, etc. in the spirit of the language "to . . . promote the general welfare" in the preamble to the United States Constitution.

4. The United States government must also fulfill its "pledge . . . to take joint and separate action in cooperation with the [United Nations] for the achievement of [these] purposes" ²³ In other words, the U.S. government specifically agreed to work on human rights questions within the United States, not only as a nation, as in the past, but in cooperation with an international organization, i.e., the United Nations, and under the watchful eye of the rest of the world.

B. THE STATUS OF THIS LAW TODAY

This U.S. equal rights law has been ignored for so long, not only by many agencies and officials of the federal government, but by most law professors, practicing lawyers, and judges, that it is necessary to recall that four of the nine Justices sitting when it became law relied on it to decide a case charging racial or national discrimination.²⁴ It will also be helpful to quote at

21. *See infra* text accompanying note 198.

22. *See infra* text accompanying note 120.

23. U.N. CHARTER art. 56; *see infra* text accompanying note 372.

24. *Oyama v. California*, 332 U.S. 633 (1948) (California Alien Land Law unconstitutional as contrary to 14th amendment); *id.* at 649 (Black, J., concurring, joined by

some length from the highest court to date to set forth the nature of this law and the extent of its acceptance in this country. The court is the Second Circuit Court of Appeals, which decided first a criminal and then a civil case.

In 1974, Toscanino, an Italian citizen, was kidnapped in Uruguay by the Uruguayan police (with the knowledge and active help of United States officials), brought against his will to Brazil and later to the United States, where he was convicted. On appeal, the defendant claimed his conviction was void because his presence within the territorial jurisdiction had been illegally obtained and the U.S. government had a duty to refrain from kidnapping, which violated defendant's due process rights under international law. In deciding to remand the case, the court quoted the United Nations Charter and the Charter of the Organization of American States as evidence of binding principles of international law that the U.S. government had violated.²⁵

Six years later, the Second Circuit faced a second case arising in a South American country run by a dictator, this time Stroessner of Paraguay, the longest-ruling head of state in the Western Hemisphere, and a close friend of the United States. The Court cited *Toscanino* in its strong opinion in *Filartiga v. Pena-Irala*.²⁶

Douglas, J.) (how could U.S. be faithful to its international pledge if such state laws are enforced?); *id.* at 673 (Murphy, J., concurring, joined by Rutledge, J.) (inconsistency with U.N. Charter article 55c one more reason statute must be condemned).

25. *United States v. Toscanino*, 500 F.2d 267, 276-79 (2d Cir. 1974).

26. 630 F.2d 876 (2d Cir. 1980). The opinion was written by Judge Irving Kaufman. There is speculation that his opinion in *Filartiga* was a delayed reaction to the international condemnation of human rights violations in his actions as trial judge in the case that undoubtedly led to his elevation to the Second Circuit, *Rosenberg v. United States*. In that case, the defendants were executed after many proceedings, *see, e.g.*, *Rosenberg v. United States*, *cert. denied*, 345 U.S. 965, 346 U.S. 271, 346 U.S. 273, 346 U.S. 324 (1953). For extensive criticisms of Judge Kaufman's conduct of the Rosenberg trial, see THE KAUFMAN PAPERS, U.S. government documents concerning the trial judge obtained from the FBI as a result of the Freedom of Information Act lawsuit instituted to force the release of all related government documents. The documents, issued by the National Committee to Reopen the Rosenberg Case (New York 1976) (on file at Meiklejohn Institute, Berkeley), include, *e.g.*, Memo addressed to the FBI Director from Agent Ladd reporting that Assistant U.S. Attorney Cohn had reportedly met privately with the judge and indicated to him that the death penalty would be appropriate for Julius and Ethel Rosenberg and Morton Sobell.

That case raises the broad issue: whether U.S. law today follows the law of nations as required by the Constitution, which, in article I, section 8, clause 10, gave Congress the power to define offenses against the law of nations. In 1789, the first Congress passed the Judiciary Act²⁷ giving district courts original jurisdiction over "all causes where an alien sues for a tort only [committed] in violation of the law of nations." *Filartiga* raises the specific issue: whether an alien can sue in a U.S. court for a tort committed in another country under color of official authority when the tort is torture.

The court in *Filartiga* held:

The United Nations Charter (a treaty of the United States, see 59 Stat. 1033 (1945)) makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern. It provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations * * * the United Nations shall promote * * * universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Id. Art. 55. And further:

All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Id. Art. 56.

While this broad mandate has been held not to be wholly self-executing, *Hitai v. Immigration and Naturalization Service*, 343 F.2d 466, 468 (2d Cir. 1965), this observation alone does not end

27. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 67, 77 (1789) (codified at 28 U.S.C. § 1350 (1988)).

our inquiry.²⁸ For although there is no universal agreement as to the precise extent of the "human rights and fundamental freedoms" guaranteed to all by the Charter, there is at present no dissent from a view that the guarantees include, at a bare minimum, the right to be free from torture."²⁹

The court of appeals proceeded to explain the role of the Universal Declaration of Human Rights in defining the "human rights and fundamental freedoms for all" enunciated in the U.N. Charter. The Court held that the prohibition against torture

has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948). . . .³⁰ The General Assembly has declared that the Charter precepts embodied in this Universal Declaration "constitute basic principles of international law." G.A. Res. 2625 (XXV) (Oct. 24, 1970).³¹

The *Filartiga* court referred to the famous case in which the Supreme Court expressly recognized the binding nature of customary international law on United States courts, *The Paquete Habana*.³² In that case, using the doctrine of incorporation, the U.S. Supreme Court determined the legality of a U.S. blockade squadron seizing a Cuban fishing vessel. The Court applied principles of customary international law, noting:

International law is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for determination. For this purpose, where there is no

28. In footnote 9, the court comments: "We observe that this court has previously utilized the U.N. Charter and the Charter of the Organization of American States, another non-self-executing agreement, as evidence of binding principles of international law. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974)" *Filartiga*, 630 F.2d at 882 n.9.

29. *Id.* at 881-82.

30. In footnote 10, the court comments: "Eighteen nations had incorporated the Universal Declaration into their own constitutions. 48 *Revue Internationale de Droit Penal* Nos. 3 & 4, at 211 (1977)." *Id.* at 882 n.10.

31. *Id.* at 882.

32. 175 U.S. 677 (1900).

treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations;³³

The Second Circuit in *Filartiga* went on to discuss the Declaration on the Protection of All Persons from Being Subjected to Torture,³⁴ which the United States has not yet ratified, commenting:

This Declaration, like the Declaration of Human Rights before it, was adopted without dissent by the General Assembly.³⁵

These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter. Since their adoption, “[m]embers can no longer contend that they do not know what human rights they promised in the Charter to promote.”³⁶ Moreover, a U.N. Declaration is, according to one authoritative definition, “a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated.”³⁷ Accordingly, it has been observed that the Universal Declaration of Human Rights “no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather an authoritative statement of the international community.”³⁸ Thus, a Declaration creates an expectation of adherence, and “insofar as the

33. *Id.* at 700. For a discussion of theories of incorporation of international law, see Sandra Coliver & Frank Newman, *Using International Human Rights Law To Influence United States Foreign Population Policy: Resort to Courts or Congress?*, 20 N.Y.U. J. INT'L L. & POL. 701, 701 n.1 (1987).

34. G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975).

35. “Nayar, ‘Human Rights: The United Nations and United States Foreign Policy,’ 19 Harv. Int'l L.J. 813, 816 n.18 (1978).” *Filartiga*, 630 F.2d at 883.

Notes 35-40 were part of the text in *Filartiga*.

36. “Sohn, ‘A Short History of United Nations and Human Rights,’ in *The United Nations and Human Rights, 18th Report of the Commission (Commission to Study the Organization of Peace ed. 1968)*.” *Filartiga*, 630 F.2d at 883.

37. “34 U.N. ESCOR, Supp. (No. 8) at 15, U.N. Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat).” *Filartiga*, 630 F.2d at 883.

38. “E. Schwelb, *Human Rights and the International Community* 70 (1964).” *Filartiga*, 630 F.2d at 883.

See *infra* text accompanying note 318.

expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States."³⁹ Indeed, several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law.⁴⁰

The opinion then refers specifically to U.S. government policy concerning internationally recognized human rights:

Our State Department reports a general recognition of this principle:

There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity.

Department of State, *Country Reports on Human Rights for 1979*, published as Joint Comm. Print, House Comm. on Foreign Affairs, and Senate Comm. on Foreign Relations, 96th Cong. 2d Sess. (Feb. 4, 1980), Introduction at 1.⁴¹

This part of the opinion concludes:

The treaties and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers

39. "34 U.N. ESCOR, *supra*." *Filartiga*, 630 F.2d at 883.

40. "Nayar, *supra*, at 816-17; Waldock, 'Human Rights in Contemporary International Law and the Significance of the European Convention,' *Int'l & Comp. L.Q.*, Supp. Publ. No. 11, at 15 (1965)." *Filartiga*, 630 F.2d at 883.

41. In footnote 15, the court comments:

The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law. As one commentator has put it, "The best evidence for the existence of international law is that every actual State recognizes that it does exist and that it is itself under an obligation to observe it. States often violate international law, just as individuals often violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law." J. Brierly, *The Outlook for International Law* 4-5 (Oxford 1944).

Filartiga, 630 F.2d at 884 n.15.

fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them.⁴²

Prior to *Filartiga*, some U.S. courts had decided that other actions constituted torts under international law.⁴³

The right to be free from "distinction based on sex" is also now among the "fundamental rights" that "international law confers . . . upon all people vis-a-vis their own governments," and lawyers can use the law enunciating this right to better protect and defend their women clients in many cases.

C. HUMAN RIGHTS FOR ALL DEFINED IN THE LAW

In 1948 the specific content of "human rights for all" in the 1945 law was spelled out authoritatively in twenty-eight articles in a law drafted under the chairmanship of a leading American, Eleanor Roosevelt, first lady for thirteen years and then U.S. delegate to the United Nations. The U.S. government strongly supported this law, the Universal Declaration of Human Rights,⁴⁴ which has become part of customary international law since its adoption without dissent by the U.N. General Assembly in 1948.⁴⁵ This means it is similar to customary domestic law,

42. *Id.* at 884-85. The court cited two sections of the Foreign Assistance Act of 1961: 22 U.S.C. § 2304(2) and § 2151(a), *id.* at 885 n.17, which are discussed *infra* in text accompanying notes 108 & 109 along with similar statutes passed before and after this decision.

43. *See, e.g.*, cases listed and described in Deborah R. Gerstel & Adam G. Segall, *Conference Report: Human Rights in American Courts*, 1 AM. U.J. INT'L L. & POL'Y 137, 159 n.68 (1986); *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857, 864-65 (D. Md. 1961) (mother's concealment of daughter's name and Lebanese nationality, inclusion of daughter in her Iraqi passport, and having her admitted to the United States thereunder were tortious acts under the law of nations); *cf. Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (dictum) (the illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort in violation of the law of nations).

44. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948) [hereinafter Declaration].

45. All of the rights set forth in the Universal Declaration of Human Rights are now enumerated in the two covenants drafted to turn this *standard* of achievement into *treaty law*: International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) and International Covenant on Civil and Political Rights, *id.* at 52.

i.e., the common law that develops on the national level and is authoritative in this country and in any common law country.

This twentieth century Declaration sets forth rights that are worth listing because they go beyond the list in the eighteenth century U.S. Bill of Rights, on which they were clearly based. They make it mandatory for lawyers to broaden their approach when they are engaged in representing clients in the United States charging violations of human rights and denials of equal protection or distinctions as to sex. Human rights for all are declared to include:

The right to live,⁴⁶ now leading to a distinct right to a healthy environment

The right to peace⁴⁷

The right to food and housing⁴⁸

46. Declaration, *supra* note 44, art. 3.

47. *See id.* Whereas para. 1 and arts. 26 & 28. This right is the basis of the emerging field of peace law, *see* Ann Fagan Ginger, *Finding Peace Law and Teaching It*, 10 *NOVA L.J.* 521 (1986).

Peace law starts with individuals and their governments. Like all basic law, it emerged from necessities: the holocaust, World War II, and the atomic age. Albert Einstein warned that the atomic bomb has changed everything except our way of thinking and thus we drift toward unparalleled disaster. Peace law is part of the new way of thinking to stem this drift.

Peace law breaks through our traditional separation of law into our domestic law, international law, and the domestic law of other nations. It requires lawyers and litigants to comprehend the reality that there is a cohesive body of law at the center of all three that must be included in consideration of many issues because they are no longer governed only by the domestic law of one country.

Peace law is based on the U.N. Charter and the Nuremberg Principles, on nations pledging to settle their international disputes by peaceful means, supplemented by treaties and the laws of many nations and by U.N. and regional covenants and conventions, including legislation passed by governmental bodies from city councils to the U.N. General Assembly. Peace law inspires actions for peace and protects peaceful activists. It is at war with much of traditional military law and ideology.

In the United States, it encompasses constitutional limitations on the president's war powers, statutes enforcing neutrality, and portions of existing law: international, human rights, constitutional, criminal, environmental, administrative, commercial, tort, legislative, immigration, labor, military, municipal, and tax. It is also found in the peaceful customs of ethnic, racial, religious, and national groups, and has traditionally been especially close to the minds and hearts of women.

See ANN FAGAN GINGER, *PEACE LAW CASEBOOK* (in draft 1990); MEIKLEJOHN INSTITUTE, *PEACE LAW ALMANAC* (1990) for collection of basic documents; and Ann Fagan Ginger, *Using Peace Law To Advance Human Rights*, 46 *LAW. GUILD PRAC.* 33 (1989).

48. *See* Declaration, *supra* note 44, Whereas para. 2 and art. 25.

The right to share in the benefits of scientific advancement, now sometimes considered part of the emerging right to development⁴⁹

The right to security of the person⁵⁰

The right to family⁵¹

The right to work⁵²

The right to decent working conditions and wages, and to join labor unions to secure these rights⁵³

The right to social security and health care⁵⁴

The right to education (including education for peace) and to development of personality⁵⁵

The right to civil liberties⁵⁶

The right to equality before the law⁵⁷

The right to due process⁵⁸

The right to participate in government and in public service⁵⁹

The right to vote⁶⁰

The right to freedom of movement and to a nationality⁶¹

49. *Id.* art. 27.1; *see also id.* Whereas para. 5.

50. *Id.* arts. 3, 16.3.

51. Including the rights of families: *Id.* arts. 12, 16.1, 16.3, 25.1, 25.2, 26.3.

52. *Id.* art. 23.1, sometimes called the right to earn a living, to avoid confusion with the so-called "right to work" laws that limit the rights of labor unions.

53. *Id.* arts. 4, 23, 24; art. 23.3; and art. 23.4.

54. *Id.* arts. 22, 25.

55. *Id.* arts. 26 & 22.

56. *Id.* arts. 3, 18, 19, 20, including privacy, art. 12.

57. *Id.* arts. 1, 2, 6, 7.

58. *Id.* arts. 5, 6, 8, 9, 10, 11.

59. *Id.* art. 21.3 and art. 21.1.

60. *Id.* art. 21.3.

61. *Id.* arts. 13 & 14 and art. 15.

The right to own and to inherit property⁶²

The right to culture and artistic property.⁶³

Unlike the U.S. Bill of Rights, the Universal Declaration of Human Rights also includes certain duties owed to the community and by the community.⁶⁴ Article 30 makes clear that no "State, group or person" has the "right to engage in any activity . . . aimed at the destruction of any of the rights and freedoms set forth herein." Article 7 provides, "All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Paragraph 1 and article 22 place a duty on each nation to strive "through national effort and international cooperation" and "by progressive measures" to provide the "economic, social and cultural rights indispensable" for the "dignity and the free development" of the "personality" of each member of society.⁶⁵

62. *Id.* art. 17.

63. *Id.* art. 27 and art. 22.

64. Article 29 describes these duties: "Everyone has duties to the community in which alone the free and full development of his personality is possible." *Id.* art. 29.

These duties of each individual are spelled out further in the Nuremberg Principles I-V and VII, providing no defense of "superior orders" for committing, or being in complicity with the commission of crimes against peace, crimes against humanity, or war crimes, defined in Principle VI. DEP'T OF THE ARMY, FIELD MANUAL FM-10, THE LAW OF LAND WARFARE §§ 498-511 (1956); Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 546, 546-47; *see also* Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975). *See also infra* note 277.

In the U.S., certain duties to the community are assumed, although they are not stated in the Constitution; they are based on the constitutional powers of Congress, and include the duty to obey all laws, the duty to pay taxes, and the duty to serve in the U.S. Armed Forces when Congress passes a draft law.

65. Article 22:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Paragraph 1:

The General Assembly proclaims [t]his Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples

It is appropriate and necessary in some litigation and in some legislative testimony to refer to these duties of the community as part of the "common standard . . . for all peoples and all nations" referred to in the first paragraph of the Declaration.⁶⁶

D. HUMAN RIGHTS FOR WOMEN IN THE LAW

Seven rights in the Universal Declaration are particularly important to many women in the United States today as they seek to combine personal and occupational goals and work:

The right to reasonable limitation of working hours⁶⁷

The right to medical care⁶⁸

The right to security in the event of widowhood⁶⁹

The right to marry and to found a family based on free and full consent⁷⁰

The right of the family to protection by society and the State⁷¹

The right of motherhood and childhood to special care and assistance⁷²

The right of all children to equal protection, whether born in or out of wedlock.⁷³

E. HUMAN RIGHTS WITHOUT DISTINCTION AS TO SEX

Eight rights enumerated in the Universal Declaration guarantee equality for women today:

of Member States themselves and among the peoples of territories under their jurisdiction.

Declaration, *supra* note 44, art. 22 and para. 1.

66. See *supra* note 65 and *infra* text accompanying note 359.

67. Declaration, *supra* note 44, art. 24.

68. *Id.* art. 25.1.

69. *Id.*

70. *Id.* arts. 16.1 & 16.2.

71. *Id.* art. 16.3.

72. *Id.* art. 25.2.

73. *Id.*

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The right to equal pay for equal work⁷⁴

The right to be free and equal in dignity and rights⁷⁵

The right to exercise all rights without distinction as to sex⁷⁶

The right to be treated equally before the law and to equal protection against any discrimination and against any incitement to such discrimination⁷⁷

The right to equal rights as to marriage, during marriage and at its dissolution⁷⁸

The right to equal access to public service in one's country⁷⁹

The right to higher education on the basis of merit⁸⁰

The right to equal suffrage.⁸¹

II. THE NEED TO ENFORCE THIS LAW IN THE 1990s

All of the statistics in the *Statistical Abstract of the United States* for any year underline the ways in which the human rights of women are currently denied in the United States, and the degree to which we suffer from distinctions as to sex. While the 1990 census changes the numbers and perhaps some of the percentages, this new collection of statistics merely reiterates what the government has known for decades from its own statistics: that we do not have human rights for all or an end to distinction based on sex in this country. A comparison of figures over the past many decades indicates that there has not even been a serious, sustained effort "to promote" an end to these

74. *Id.* art. 23.2; today, this is often phrased "equal pay for work of comparable worth." This group of rights applies also to racial and religious groups and without regard to language.

75. *Id.* art. 1.

76. *Id.* art. 2.

77. *Id.* art. 7.

78. *Id.* art. 16.1.

79. *Id.* art. 21.1.

80. *Id.* art. 26.1.

81. *Id.* art. 21.3.

inequities and denials of human rights. In fact, the fastest growing category of people in poverty is women with minor children.

Statistics that appear to be simply numbers are useless. It is only when they conjure up images of the people represented by the numbers that they become a goad to action. The following numbers touch on a few of the major problems of women in the United States. Some women don't earn enough money to live on. Very few earn as much as men for work of comparable worth. Women with more education earn less than men with less education. Many older women live in poverty, and so do many younger women with young children to raise. Many women do not receive enough child support to pay for raising the children they bore, and many young unmarried women bear children whose lives are threatened by low birth weights. Women do not share proportionately in governing bodies at any level of government. Few enterprises provide childcare facilities.

Professional women, including lawyers, like other women workers, frequently face gender bias against their clients and themselves, sexual harassment, no maternity leave, and limited professional opportunities based on gender and childcare responsibilities.⁸²

A. THE LACK OF OBSERVANCE OF HUMAN RIGHTS FOR ALL

In 1987, according to government figures, 10.8% of all families in this country tried to live below the poverty level and 14.5% lived below 125% of the poverty level, numbering 9,458,000 people.⁸³ In 1987, 3,491,000 people sixty-five years old and over lived below the poverty level, including 218,000 women in families (12.6% of all women living in families) and 1,825,000

82. See, e.g., MASSACHUSETTS SUPREME JUDICIAL COURT, GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS, reprinted in 24 NEW ENG. L. REV. 745 (1990) (reprinting the *Executive Summary*, *Family Law*, and *Civil Damage Awards* sections), and in SUFFOLK U.L. REV. (1990) (forthcoming) (reprinting the *Introduction*, *Domestic Violence and Sexual Assault*, and *Gender Bias in Courthouse Interactions* sections); COMMITTEE ON WOMEN IN THE LAW, STATE BAR OF CALIFORNIA, WOMEN LAWYERS AND THE PRACTICE OF LAW IN CALIFORNIA (1989) (survey conducted by Laidlaw & Kipnis Associates); JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, JUDICIAL COUNCIL OF CALIFORNIA, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS (draft released for comment Mar. 23, 1990).

83. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 455, table 739 (1989) [hereinafter STATISTICAL ABSTRACT].

women living alone or in unrelated households (25.4%).⁸⁴ In the richest country in the world, 13.0% of female family householders and 6.1% of male family householders sixty-five years old and over tried to live below the poverty level.⁸⁵

Also in 1987, 20% of all children lived below the poverty level, including 15% of all white children, 45.1% of all black children, and 39.3% of all Hispanic children.⁸⁶

B. THE LACK OF OBSERVANCE OF RIGHTS WITHOUT DISTINCTION AS TO SEX

In 1987, median weekly earnings of men amounted to \$433 and for women, \$303. White men earned \$450, black men \$326, Hispanic men \$306, white women \$307, black women \$275, Hispanic women \$251.⁸⁷

In families maintained by one wage earner, median weekly earnings in 1987 were \$317. In families maintained by two wage earners headed by women, median weekly earnings in 1987 were \$329, and \$478 in families headed by men. In white families maintained by women, the median was \$329, by men, \$492; in black families maintained by women, \$284, by men, \$383; in Hispanic families maintained by women, \$285, by men, \$418.⁸⁸

84. *Id.* at 454, table 737.

85. *Id.* at 36, table 41.

86. *Id.* at 454, table 738. Race, color, and language designations are those given in the STATISTICAL ABSTRACT. The pervasiveness of discrimination on these grounds re-sounds in the tables. And in May 1990, because of unexpected increases in food prices, at least half the states moved to cut government food allotments for poor women and children, or to stop the aid altogether under the Special Supplemental Food Program for Women, Infants and Children (WIC), according to Robert Pear, *States Cut Food Aid to Women, Children*, San Francisco Chron., May 29, 1990, at A3; see *infra* note 179. At the same time, in the Soviet Union, 435 million rubles were allocated from the national budget and other centrally-controlled sources in 1990 to increase allowances paid for children, 20 million rubles were allocated for working women expecting babies, and funds were increased to improve the quality of meals at children's institutions, according to Vadim Savvin, *Living Standards in the USSR*, SOVIET LIFE, July 1990, at 45, 47. These statistics are presented on the chance that competition can lead to improvement.

87. STATISTICAL ABSTRACT, *supra* note 83, at 406, table 666.

88. *Id.* at 407, table 667. For an insightful study, see Margaret Burnham, *Scapegoating the Black Family*, NATION, July 24-31, 1989; see generally Symposium, *The Constitution and Race: A Critical Perspective*, 5 N.Y.U. J. HUM. RTS. 230-431 (1988), and specifically Richard America, *Unjust Enrichment and Restitution: Defining and Measuring Current Benefits From Past Wrongs—Estimation and Policy Implications*, *id.* at 415-23.

These statistics bear little relationship to the amount of education of men and women. In 1987, the average years of school completed by white men was 12.8, by white women 12.6, by black men 12.4 and 12.4 by black women, 12.1 by Hispanic men and 12.0 by Hispanic women.⁸⁹

As to higher education of men and women in 1986 in the United States, 5,885,000 men were enrolled in higher education institutions compared to 6,615,000 women. Of these, 5,779,000 women and 5,018,000 men were in undergraduate schools; 174,000 men and 96,000 women were in first professional schools; 694,000 men were in graduate schools with 741,000 women.⁹⁰ In 1986, 502,000 women and 486,000 men received bachelor's degrees; 145,000 women and 144,000 men received master's degrees; 49,000 men and 25,000 women received first professional degrees; 22,000 men and 12,000 women received doctor's degrees.⁹¹

To sum up on comparable worth, in mean money earnings among year-round, full-time workers eighteen years old and over, as of March 1987, of those with an elementary school education of less than eight years, women earned \$10,534, men earned \$15,593; of those who completed four years of high school, women earned \$15,402, men \$23,759; women with four years of college earned \$22,943, men \$37,538; women with five or more years of college earned \$28,629, men \$46,286. The greatest discrepancy affected those sixty to sixty-four years old who had completed four years of college: women's mean earnings were \$19,443, men's were \$46,447.⁹²

In terms of running the government, in 1986, 1,982,000 women had full-time employment with state and local governments, compared to 2,797,000 men; their median annual salaries

89. Persons 25 years old and over. STATISTICAL ABSTRACT, *supra* note 83, at 131, table 212.

90. *Id.* at 148, table 247.

91. *Id.* at 156, table 266.

92. *Id.* at 450, table 729.

were \$23,400 for men, \$18,100 for women.⁹³ In federal white-collar civilian employment in 1987, 48.2% were female. Job segregation and the pink-collar ghetto were omnipresent according to the federal government's own statistics: in grades 1-6 (paid \$9,619 to \$21,480), 74.9% were women; in grades 16-18 (\$63,135 to \$72,500), 6.9% were women.⁹⁴

In the elective arena, 15.8% of state legislators were women in 1988, up from 8.0% in 1975. In 1988 there were 40 women holding statewide elective offices (exclusive of judicial and appointed), 1,175 were in state legislatures, 1,594 were on county governing boards, and 14,672 were mayors and municipal council members.⁹⁵ In 1989 there were 25 Congresswomen and 2 women U.S. Senators; that is, more than half the population was represented by less than 6% of the Congressmembers and 2% of the Senators.⁹⁶

In terms of running the economy, the *Statistical Abstract* does not provide tables showing the number or percentage of women who were chief executive officers (CEOs) of large and small corporations or owners of farms. Observations indicate that the number and percentage are still infinitesimal. Secretary of Labor Elizabeth Dole announced in July 1990 that she has made the issue of job bias in the executive suite "a top priority," calling the present unwritten rules "a glass ceiling" preventing female, black and Hispanic employees who make up 30% or more of middle management of big corporations from increasing the percent at the level of chief executive, which is now less than 1%.⁹⁷

93. *Id.* at 294, table 481. White employees numbered 3,549,000 and "minorities" 1,230,000, with median annual salaries for whites of \$21,500 and \$19,600 for "minorities."

94. *Id.* at 318, table 513.

95. *Id.* at 256, table 431.

96. *Id.* at 252, table 423. On the need to have more than one woman in each room where important decisions are made, see Ann Fagan Ginger, *All Filled with Women and Men*, 2 PEACE REV. (no. 3), 1990, at 15.

97. See Peter T. Kilborn, *Labor Dept. Wants to Take On Job Bias in the Executive Suite*, N.Y. Times, July 30, 1990, at A1.

C. THE NEED TO PROMOTE OBSERVANCE OF THE RIGHTS OF WOMEN

In 1986, 23.4% of babies born to unmarried women had low birth weights. And in 1986, 23.1% of all white births were to unmarried women, as were 61.7% of all black births.⁹⁸

In 1987, 8,140,000 women (aged eighteen to forty-four) had a family income under \$10,000, and 614,114 of these women had a baby that year.⁹⁹

In 1985, 61.3% of women seeking child support for their own children under twenty-one years of age were awarded such payments, but 1,138,000 did not receive payments due, and the 3,243,000 who received payment received only 74% of what was due. Payment was not awarded to 3,411,000 women. The mean child support was \$2,215. Women who did not receive payments had a mean money income of \$10,837. Among women below the poverty level, 1,130,000 were awarded a mean income of \$1,383.¹⁰⁰ These are figures for a year, not a month.

Women in the United States constituted 44.8% of the total civilian employment in 1987, higher than in six major developed countries.¹⁰¹ At the same time, out of a total of 1,202,000 establishments with ten or more employees, only 2.1% provided employer-sponsored day care; 15.5% of these establishments permitted job-sharing.¹⁰²

Studies of the real effects of the short-lived War on Poverty launched by President Johnson prove that statistics like those

98. STATISTICAL ABSTRACT, *supra* note 83, at 66, tables 94 & 93.

99. *Id.* at 67, table 96.

100. *Id.* at 368, table 609. See also Patricia Tjaden, Nancy Thoennes & Jessica Pearson, *Will These Children Be Supported Adequately?*, 28 JUDGES' J. 5 (1989).

101. STATISTICAL ABSTRACT, *supra* note 83, at 829, table 1427.

102. *Id.* at 410, table 673. And President Bush successfully vetoed the 1990 Parental Leave Bill, H.R. 77, in July 1990. Well over half of California women lawyers with children think that having children limits their opportunity for advancement, according to the survey conducted by Lynne Laidlaw and Fran Kipnis in 1989, reported in *A Summary of Findings, Conclusions and Recommendations*, in COMMITTEE ON WOMEN IN THE LAW, STATE BAR OF CALIFORNIA, *supra* note 82. The survey apparently did not ask whether women lawyers with children think that having children expands their opportunity for understanding their clients' problems and their ability to come up with innovative approaches to the alleviation or solution of those problems.

above can be changed by well-thought out, well-organized programs targeting specific problems in a total social environment. Legislation did improve the lives of those who got a head start in education from the Head Start program¹⁰³ President Bush now promises to support, and those who got their first job from CETA (Comprehensive Education Training Act).¹⁰⁴

III. ENFORCEMENT OF THIS LAW FROM 1945 TO 1990

A. LEGISLATION

1. *Basing U.S. Foreign Assistance on Protection of Human Rights*

Since the U.N. Charter went into force in 1945, and especially since this country launched the cold war in 1946, the United States has increasingly based its open foreign policy¹⁰⁵ on insistence that other nations observe human rights in order to be on good terms with the United States as to trade, foreign assistance grants and loans, and supplying arms, etc. Since 1973, Congress and the President have repeatedly used the concept and language of "internationally recognized human rights" in U.S. foreign assistance legislation.¹⁰⁶ This policy is summed up in the introduction to *Human Rights Documents: A Compilation of Documents Pertaining to Human Rights* published by the House Committee on Foreign Affairs in 1983:

Since 1973, Congress has enacted a number of legislative provisions intended to assure that U.S. foreign policy formulation and practice include consideration of the status of human rights in other countries. Congress has written general

103. 42 U.S.C. §§ 9831-9852 (1988); see *infra* text accompanying note 317.

104. 29 U.S.C. § 834(a) (repealed 1982).

105. A study of U.S. *covert* foreign policy leads in a different direction that cannot be explored further here. See, e.g., admissions by the U.S. government in *United States v. North*, 716 F. Supp. 652 (D.D.C. 1989), *reprinted verbatim* in 46 LAW. GUILD PRAC. 65, 65-96 (1989).

106. Professor Frank Newman of the University of California at Berkeley-Boalt Hall School of Law credits U.S. Representative Don Fraser (Democrat, Minnesota) with this successful initiative. See FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS (1990); RICHARD B. LILICH & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY (1979). See also RICHARD FALK, FREDERICK KRATOCHWIL, & SAUL H. MENDLOVITZ, INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 473-518 (1985).

human rights provisions into bilateral and multi-lateral foreign assistance legislation, and it has limited or cut off assistance to a number of individual countries on human rights grounds. It has established within the Department of State an Assistant Secretary for Human Rights and Humanitarian Affairs, appointed with the advice and consent of the Senate. Congress has also mandated an annual report by the State Department of the status of human rights in all other member countries of the United Nations, and required other periodic reports.¹⁰⁷

The human rights provisions in foreign policy laws are divided into seven categories: general policy statements, prohibitions-restrictions, requirements for executive certification, reporting requirements, programs promoting human rights, and administrative and other executive actions.

In the Foreign Assistance Act, Congress made a finding that

fundamental political, economic, and technological changes resulted in the interdependence of nations. The Congress declares that the individual liberties, economic prosperity, and security of the people of the United States are best sustained and enhanced in a community of nations which *respect individual civil and economic rights and freedoms*.¹⁰⁸

In 1979, Congress set forth broad affirmative and negative rules on the relationship between human rights practices by other governments and U.S. foreign assistance to them:

107. 22 U.S.C. § 2151n(d) (1988). The phrase "human rights" has now been adopted by the Library of Congress and become part of its classification scheme, which has greatly expanded awareness of this concept by librarians and scholars from many disciplines. In 1979, Meiklejohn Institute shifted the title of its reporting service from *Civil Liberties Docket* to *Human Rights Docket*. In 1990, Meiklejohn published the sixth edition of its *Human Rights Organizations and Periodicals Directory 1990*, including entries on over 700 organizations and periodicals in the United States concerned about "human rights" in the U.S. and in other regions of the world, using subject headings from the Universal Declaration of Human Rights and U.N. Charter articles 55 and 56.

108. 22 U.S.C. § 2151(a) (1988) (emphasis added).

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The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, *promote and encourage* increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.¹⁰⁹

In 1987, Congress added:

Assistance may not be provided under part V of this part to a country *the government of which engages in a consistent pattern of gross violations of internationally recognized human rights* unless the President certifies in writing to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that extraordinary circumstances exist warranting provision of such assistance.¹¹⁰

In 1987, Congress adopted the Harkin Amendment to the Foreign Assistance Act of 1961 prohibiting such assistance “unless such assistance will directly benefit the needy people in such country.”¹¹¹

The Arms Export Control Act declared:

It is the policy of the United States that no sales should be made, and no credits (including participation in credits) or guarantees extended to or for any foreign country, the laws, regulations, official policies, or governmental practices of which prevent any United States person . . . from participating in the furnishing of defense articles or defense services under this chapter on the basis of race, religion, national origin, or sex.¹¹²

109. *Id.* § 2304(a)(1) (1988) (emphasis added).

110. *Id.* § 2304(a)(2) (1988) (emphasis added).

111. *Id.* § 2151n(a) (1988); 7 U.S.C. § 1712(a) (1988).

112. *Id.* § 2755(a) (1988).

In 1978, Congress added another broad affirmative rule on U.S. foreign assistance: to “encourage and *promote* the participation of women in the national economies of developing countries and the improvement of women’s status as an important means of promoting the total development effort.”¹¹³

In the Agricultural Trade Development and Assistance Act of 1954, as amended in 1988, Congress became extremely specific:

No agreement may be entered into under this subchapter to finance the sale of agricultural commodities to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including *torture or cruel, inhuman, or degrading treatment or punishment*,¹¹⁴ prolonged detention without charges, causing the disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person, unless such agreement will directly benefit the needy people in such country . . . [meaning] either the commodities themselves or the proceeds from their sale will be used for specific projects . . . which the President determines would directly benefit the needy people The agreement shall specify how the projects . . . will . . . benefit the needy people and shall require a report to the President on such use within 6 months after the commodities are delivered to the recipient country.¹¹⁵

Anti-apartheid legislation¹¹⁶ is also based on a rejection of funding of nations that engage in gross violations of internationally recognized human rights, violations which are the basis of

113. *Id.* § 2151-1(b)(6) (1988) (emphasis added).

114. Note that this is the language of the Universal Declaration, article 5, not the more limited language of the eighth amendment forbidding “cruel and unusual punishments.”

115. 7 U.S.C. § 1712(a) (1988) (emphasis added).

116. Anti-Apartheid Program, 22 U.S.C. §§ 5001-5116 (1988); *id.* § 2151n(e)(2)(A) (1988).

apartheid rule. Events in South Africa in 1990 are proving the importance of external, international economic, social and cultural pressure against a government charged with committing the internationally-recognized crime of apartheid.¹¹⁷ In a significant move, the U.S. Supreme Court refused to overturn the Maryland Court of Appeals decision upholding the Baltimore anti-apartheid divestment ordinance urging city workers' pension systems not to invest in U.S. corporations doing business in South Africa and Namibia.¹¹⁸

Congress also passed foreign assistance legislation setting forth general findings that use the language of U.N. covenants and could be a model for domestic assistance as well:

[E]ffective family planning depends upon economic and social change as well as the delivery of services and is often a matter of political and religious sensitivity. While every country has the right to determine its own policy with respect to population growth, voluntary planning programs can make a substantial contribution to economic development, higher living standards, and improved health and nutrition.¹¹⁹

Many other statutes are cited in the congressional collection of human rights documents of 1983 and many have been adopted by Congress since that time, making clear the U.S. government's awareness that it made binding commitments in the U.N. Charter, that the Universal Declaration of Human Rights lists those rights to which the U.S. bound itself, and that those rights are clear and definite.

2. *Protecting the Human Rights of Women in the United States*

Since approval of the U.N. Charter by the Senate and President after World War II, Congress has repeatedly executed

117. International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973).

118. *Lubman v. Mayor of Baltimore*, 317 Md. 72 (1989), *cert. denied*, 110 S. Ct. 1167 (1990). See *infra* discussion of human rights ordinances based on the U.N. Charter in text accompanying note 367.

119. 22 U.S.C. § 2151b(a) (1988).

many of its provisions by passing laws on specific subjects covered in the Charter. This is particularly true of the rights of women and of those groups whose protection in articles 55 and 56 is based on their race, language and religion.

The most famous and significant of these laws is the Civil Rights Act of 1964,¹²⁰ with its Title VII prohibition of discrimination in employment based on sex.¹²¹ The Supreme Court summarized the sweeping Congressional objective in enacting Title VII: "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."¹²²

These statutes guaranteeing the rights of women do not mention the U.N. Charter or the Universal Declaration of Human Rights, unlike foreign policy statutes implementing these same documents.¹²³ However, as Constance de la Vega pointed out in her helpful article, *Using International Human Rights Law in Legal Services Cases*,¹²⁴ the legislative history of some of these acts demonstrates that Congress was well aware that the United States has been behind other Western nations (and sometimes also behind Eastern and Southern nations) in protecting or expanding women's rights:

The legislative history [of the Pregnancy Discrimination Act of 1978 (PDA)]¹²⁵ indicates that Congress was aware of the practices of other nations affording rights to pregnant workers. Senator Javits concluded his comments by saying: "And, finally and very importantly, ours is the only industrial country in the Western world which does not allow pregnancy disability as a form of disability. For all those reasons, I think the legislation is extremely well taken"¹²⁶

120. Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of the U.S.C.).

121. 42 U.S.C. § 2000e-2 (1988).

122. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

123. See *supra* text accompanying note 107.

124. Constance de la Vega, *Using International Human Rights Law in Legal Services Cases*, 22 CLEARINGHOUSE REV. 1242 (1989).

Notes 125-29 are quoted from this article.

125. "42 U.S.C. § 2000e(k) (1978)." Constance de la Vega, *supra* note 124, at 1247 n.42.

126. "Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st

Senator Mathias concluded his statement: "I am hopeful that a majority of the Congress will support this legislation and thus bring the United States in line with the policies of all other industrialized western countries."¹²⁷ Other persons had also referred to the laws of other nations as reasons for passage of the Pregnancy Discrimination Act.¹²⁸ In fact, de la Vega points out, Congress passed this Act to counter the effects of the decision of the Supreme Court¹²⁹ holding that Title VII of the Civil Rights Act of 1964 does not cover discrimination on the basis of pregnancy.

In other statutes, Congress set forth a broad policy of equal treatment of women and made specific findings on the evils of discrimination on the basis of sex in certain parts of the U.S. economy. These statutes obviously owe their language to New Deal legislation and the Civil Rights Act of 1964. At the same time, they implement article 55c of the U.N. Charter.

In the Equal Pay Act of 1963,¹³⁰ Congress found a series of five evils caused by distinction as to sex:

(a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

(1) depresses wages and living standards for employees necessary for their health and efficiency;

(2) prevents the maximum utilization of the available labor resources;

Sess. 5 (1977) (statement of Sen. Javits). . . ." Constance de la Vega, *supra* note 124, at 1247 n.43. For a discussion of discrimination against birth control, *see infra* note 366.

127. "*Id.* at 23 (statement of Sen. Mathias)." Constance de la Vega, *supra* note 124, at 1247 n.44.

128. "*Id.*, at 115, 290 (statements of Dr. Andre Hellegers, Wendy W. Williams, and Boris H. Block). *See also* *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 before the Subcomm. on Employment Opportunities by the Housing Comm. on Education and Labor, 95th Cong., 1st Sess. (1977)*" Constance de la Vega, *supra* note 124, at 1247 n.45.

129. "General Elec. Co. v. Gilbert, 429 U.S. 125 (1976)." Constance de la Vega, *supra* note 124, at 1247 n.41.

130. Pub. L. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1988)).

(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(4) burdens commerce and the free flow of goods in commerce; and

(5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.¹³¹

The courts asked to interpret this Act understood that it laid down a broad policy of eliminating subjective assumptions and traditional, stereotyped misconceptions regarding the value of women's work, as well as the rule of equal pay for equal work. This was not done simply out of concern about the injustice of discrimination, but also out of concern about the economic and social consequences of disparate wages paid to major portions of the nation's labor force, because such wages not only depress the standard of living of those receiving them, but also depress wages for all workers and particularly for workers in certain industries.¹³²

In the Equal Educational Opportunity Act of 1974 Congress declared "it to be the policy of the United States that— (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin;"¹³³

In the Equal Credit Opportunity Act of 1974, Congress found that

there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to

131. *Id.*

132. See *Shultz v. First Victoria Nat'l Bank*, 420 F.2d 648 (5th Cir. 1969); see also similar broad language in *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

133. 20 U.S.C. § 1701 (1988).

make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status.¹³⁴

Congress went on to describe the affirmative results to be achieved by treating women without discrimination on credit questions:

Economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of credit would be strengthened by an absence of discrimination on the basis of sex or marital status, as well as by the informed use of credit which Congress has heretofore sought to promote.¹³⁵

In some statutes, Congress was extremely specific, as in the Act of 1978 concerning the nomination of African Americans and women to federal judgeships:

The Congress—

(1) takes notice of the fact that only 1 percent of Federal judges are women and only 4 percent are blacks; and

(2) suggests that the President, in selecting individuals for nomination to the Federal judgeships created by this Act . . . give due consideration to qualified individuals regardless of race, color, sex, religion, or national origin.¹³⁶

This "suggestion" has led to some improvement in these statistics, although much remains to be done, as the statistics in part II of this article indicate.

Again, in establishing the policies of the National Science Board, Congress provided:

In making nominations under this section, the President shall give due regard to equitable representation of scientists and engineers who are women or who represent minority groups.¹³⁷

134. Pub. L. 93-495, 88 Stat. 1500 (codified at 15 U.S.C. § 1691 (1988)).

135. *Id.*

136. 28 U.S.C. § 133 note (1988).

137. 42 U.S.C. § 1863(c) (1988).

In a statute on grants for construction, Congress provided that

the Secretary shall give special consideration to applications which would increase minority and women's ownership of, operation of, and participation in public telecommunications entities. The Secretary shall take affirmative steps to inform minorities and women of the availability of funds under this subpart¹³⁸

In the Women's Educational Equity Act of 1978,

(1) The Congress finds and declares that educational programs in the United States, as presently conducted, are frequently inequitable as such programs relate to women and frequently limit the full participation of all individuals in American society.¹³⁹

The following list of statutes suggests the range of actions by Congress since 1945 requiring respect for and universal observance of the rights of women and forbidding distinctions as to sex. It is not a complete list. It is based on a 1980 list prepared by Secretary of State Edmund S. Muskie for President Jimmy Carter¹⁴⁰ and statutes listed under Women and related subjects in the index to the United States Code in 1989.¹⁴¹ The list is presented here, in the text, to suggest the breadth of Congressional action that is often missed in reading the daily papers or

138. 47 U.S.C. § 392(f) (1982). The violations of the spirit and letter of some HUD construction grants being revealed in 1989 and 1990 do not vitiate the affirmative purpose of this Act or the possibility of enforcing it properly in the future.

139. Pub. L. 95-561, sec. 931, 92 Stat. 2298.

140. App. F, Memorandum of Law: U.S. Law and the Convention on the Elimination of All Forms of Discrimination Against Women [hereinafter Memorandum of Law] (supporting U.S. ratification of the Convention), reprinted in MALVINA HALBERSTAM & ELIZABETH F. DEFEIS, *WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS AN ALTERNATIVE TO ERA?* (1987). (The U.S. Senate has not voted to ratify this Convention to date.)

This 1980 list does not include the protections for women in the Genocide Treaty Implementation Act, 18 U.S.C. §§ 1091-1093 (1988); see, e.g., Ann Fagan Ginger, *The New U.S. Criminal Statute, the First Amendment, and the New International Information Order*, 46 LAW GUILD PRAC. 16 (1989).

141. See General Index, U.S. Code Service. Some of these statutes have been repealed, amended, and/or recodified; see also *infra* text accompanying note 349.

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material in one's specialized field of interest, while at the same time making clear how much remains to be done.¹⁴²

Some of these statutes forbid discrimination based on sex and race; some promote equality through various programs.

Criminal Law:

Exploitation of Prostitutes (White Slave) Act¹⁴³

Juvenile Justice and Delinquency Prevention Act (1974)¹⁴⁴

Omnibus Crime Control and Safe Streets Act (1968)¹⁴⁵

Education:

Education Act Amendments (1972)¹⁴⁶

Equal Educational Opportunities Act (1974)¹⁴⁷

Headstart-Follow Through Act (1975)¹⁴⁸

Higher Education Act, as amended (1965)¹⁴⁹

Vocational Education Act (1976)¹⁵⁰

Women's Educational Equity Act (1978)¹⁵¹

Employment:

Civil Rights Act (1964)¹⁵²

142. See *supra* text accompanying notes 82-102.
143. 18 U.S.C. §§ 2421-2424 (1988).
144. 42 U.S.C. § 5672, incorporating *id.* § 3789d(c) (1988).
145. *Id.* § 3789d(c)(1) (1988).
146. Tit. IX, 20 U.S.C. § 1681 (1988).
147. 20 U.S.C. §§ 1701-1721 (1988).
148. 42 U.S.C. § 2930c (repealed 1981).
149. Tit. XII, 20 U.S.C. § 1142 (1988).
150. 20 U.S.C. §§ 2301-2471 (1988).
151. *Id.* §§ 3341-3347 (Supp. V 1987).
152. Tit. VII, 42 U.S.C. § 2000e (1988).

Comprehensive Employment and Training Act Amendments (1978)¹⁵³

To prohibit deprivation of employment or other benefit on account of. . .sex¹⁵⁴

Domestic Volunteer Service Act (1973)¹⁵⁵

Economic Opportunity Act (1964)¹⁵⁶

Economic Opportunity Act Amendments (1972)¹⁵⁷

Equal Opportunity in Science and Technology (National Science Foundation) (1980)¹⁵⁸

Equal Pay Act (1963)¹⁵⁹

Federal Judgeships: Congressional Nomination of Women (1978)¹⁶⁰

National Program for Women's Business Enterprises (1979)¹⁶¹

Telecommunications Special Consideration Concerning Participation in Ownership (1978)¹⁶²

Public Works and Economic Development Act Amendments (1971)¹⁶³

Public Works Employment Act, as amended (1976)¹⁶⁴

Women in Rural Areas, Tax Reform Act (1976)¹⁶⁵

153. 29 U.S.C. § 834(a) (repealed 1982).

154. 18 U.S.C. § 246 (1988), and *see supra* Criminal code sections.

155. 42 U.S.C. § 5057 (1988).

156. *Id.* § 2985g (re comprehensive economic development) (repealed 1981).

157. *Id.* § 2971c (repealed 1981).

158. *Id.* §§ 1863, 1873 note (1988).

159. 29 U.S.C. § 206(d) (1988).

160. 28 U.S.C. § 133 note (1988); U.S. Magistrates, *id.* § 631 (1988).

161. 15 U.S.C. § 631 note (1988) (Exec. Order No. 12,138).

162. 47 U.S.C. § 392 (1988).

163. 42 U.S.C. § 3123 (1988).

164. *Id.* § 6727 (1988).

165. 26 U.S.C. § 2032A (1988).

Energy:

Alaska Natural Gas Exploration Act (1976)¹⁶⁶

Energy Conservation in Existing Buildings Act (1976)¹⁶⁷

Energy Organization Act (1974)¹⁶⁸

Federal Energy Administration Act (1974)¹⁶⁹

Family:

Food For Pregnant and Lactating Women Act (1976)¹⁷⁰

Pregnancy Discrimination Act (1978)¹⁷¹

Unemployment Compensation for Pregnant Women
(1954)¹⁷²

Child Support Enforcement Amendments (1984)¹⁷³

Financial Transactions:

Equal Credit Opportunity Act (1974)¹⁷⁴

Health:

Food for Special Dietary Use (Lactating or Pregnant
Women) (1976)¹⁷⁵

Public Health Service Act, as amended¹⁷⁶

Public Health Service Act (1979)¹⁷⁷

166. 15 U.S.C. § 719o (1988).

167. 42 U.S.C. § 6870 (1988).

168. *Id.* § 5891 (1988).

169. 15 U.S.C. § 775 (1988).

170. 21 U.S.C. § 350 (1988).

171. 42 U.S.C. § 2000e(k) (1988).

172. 26 U.S.C. § 3304 (1988).

173. 42 U.S.C. § 651 (1988).

174. 15 U.S.C. § 1691 (1988).

175. 21 U.S.C. § 350 (1988).

176. Tit. VII, 42 U.S.C. § 292d (1988).

177. Tit. VIII, *id.* § 298b-2 (1988).

Women, Infant and Children Program (WIC) (1966)¹⁷⁸

History:

Women's Rights National Historical Park¹⁷⁹

Housing:

Fair Housing Act (1968)¹⁸⁰

Housing and Community Development Act (1974)¹⁸¹

National Housing Act (1934)¹⁸²

Shelters for Battered Women, Food Stamp Act (1964)¹⁸³

Public Works:

Airport and Airway Development Act Amendments
(1976)¹⁸⁴

Appalachian Regional Development Act Amendments
(1971)¹⁸⁵

Disaster Relief Act (1974)¹⁸⁶

Federal Aid to Highways Act (1973)¹⁸⁷

Federal Property and Administrative Services Act, as
amended¹⁸⁸

Federal Water Pollution Control Act (1972)¹⁸⁹

178. 42 U.S.C. § 1786 (1988).

179. 16 U.S.C. § 410ll (1988).

180. Tit. III, 42 U.S.C. §§ 3601-3631 (1988).

181. 42 U.S.C. § 5309(a) (1988).

182. 12 U.S.C. § 1735f-5 (1988).

183. 7 U.S.C. § 2012 (1988).

184. 49 U.S.C. § 1730 (repealed 1978); *see id.* § 306 (1982 & Supp. V 1987).

185. 40 U.S.C. app. § 223 note (1988).

186. 42 U.S.C. § 5151(a) (1988).

187. 23 U.S.C. § 324 (1988).

188. 40 U.S.C. § 476 (1988)

189. 33 U.S.C. § 1251 note (1988).

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Outer Continental Shelf Lands Act Amendments (1976)¹⁹⁰

Public Works and Economic Development Act (1971 amendments)¹⁹¹

Railroad Revitalization and Regulatory Reform Act (1976)¹⁹²

State and Local Fiscal Assistance Amendments (1976)¹⁹³

Surface Transportation Assistance Act (1976)¹⁹⁴

Trans-Alaska Pipeline Authorization Act (1973)¹⁹⁵

Territories:

Conveyance of Submerged Lands to Territories of Guam, Virgin Islands, American Samoa¹⁹⁶

Unemployment:

Unemployment Compensation Amendments (1976)¹⁹⁷

B. ADMINISTRATIVE ACTIONS ENFORCING ARTICLE 55 IN THE UNITED STATES

Many presidents have carried out the foreign policy initiatives based on human rights considerations spelled out in the statutes passed by Congress, discussed above. Several presidents have also moved to enforce U.N. Charter articles 55 and 56 in the United States through executive orders issued in response to

190. 43 U.S.C. § 1863 (1988).

191. 42 U.S.C. § 3123 (1988).

192. 45 U.S.C. § 803 (repealed 1983); *see* 49 U.S.C. § 306 (1982 & Supp. V 1987).

193. 31 U.S.C. § 6716 (repealed 1986) (revenue sharing).

194. 49 U.S.C. § 1615(a)(1) (1982).

195. 43 U.S.C. § 1651 note (1988).

196. 48 U.S.C. § 1708 (1988).

197. 26 U.S.C. § 3304 (1988) (Unemployment compensation must not be denied due to pregnancy or termination of pregnancy.).

the civil rights movement of the 1960s, leading to the first affirmative action orders by Presidents Kennedy¹⁹⁸ and Johnson,¹⁹⁹ followed by executive orders to promote equal rights for women, sparked by the women's movement of the 1970s. One example of such action is a regulation forbidding discrimination on the basis of marital status in the Equal Employment Opportunity Commission's 1972 Guidelines on Discrimination Because of Sex, promulgated in the absence of specific Congressional action on the subject.²⁰⁰

The memorandum of law supporting U.S. ratification of the Convention on the Elimination of All Forms of Discrimination Against Women includes a list of cooperative actions for equal rights by Congress and President Carter, and some by the President alone. For example, having signed the Convention, the President felt it was his duty to carry out the suggestion in section (a) of the Covenant to use "other appropriate means to its goal" *before Senate ratification*:

Accordingly, the President created and the Congress funded the Task Force on Sex Discrimination coordinated through the Attorney General, to conduct a comprehensive review of all federal laws, regulations, policies and programs for the purpose of identifying discrimination on the basis of sex and to effectuate appropriate modifications to eliminate discrimination identified. The Task Force is responsible for numerous changes in federal policy and law.

Congress also separately mandated that a comprehensive review of the Social Security System be conducted jointly by the then Department of Health, Education and Welfare and the Task

198. Exec. Order No. 10,925 (1961), 3 C.F.R. 448 (1959-1963).

199. Exec. Order No. 4246 (1965), 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. § 2000e note (1988).

200. 29 C.F.R. § 1604.4 (1990).

Force on Sex Discrimination to determine provisions that discriminated on the basis of sex or resulted in a disparate impact on the basis of sex.²⁰¹

The President went further:

Section (e) raises several issues pertaining to nondiscrimination on the basis of sex by private organizations and establishments. The President under Executive Order 11246 and Executive Order 11375 has subjected federal contractors to nondiscrimination requirements including prohibitions against sex discrimination and specifically required affirmative action efforts. The Department of Labor has proposed a regulation that would prohibit federal contractors from paying membership fees or other expenses for its employees to join or participate in private organizations that exclude persons on the basis of, *inter alia*, sex, 45 Fed. Reg. 4954 (January 22, 1980). Also, a similar prohibition by the Federal Reserve System became effective October 11, 1979, 44 Fed. Reg. 60406 (October 19, 1979).²⁰²

The detailing of this Executive's actions in order to conform to international standards *prior to ratification of the Covenant enunciating those standards* supports the law of nations making treaties binding when signed, even though not ratified,²⁰³ and indicates the extent to which the U.S. government has committed itself to affirmative steps to redress the ancient and persistent wrongs against U.S. women.

These actions make clear the falsity of the image painted now of a deregulated U.S. federal government that relies on one thousand points of private light to solve social problems rather

201. Memorandum of Law, *supra* note 140 (citing Convention article 11). Such a review today would greatly assist in establishing a United States database on human rights, proposed *supra* in text accompanying note 12.

202. Memorandum of Law, *supra* note 140.

203. The most famous examples of enforcement of this law are the U.S. observance of the SALT II treaty (signed by President Carter but never ratified by the U.S. Senate) and the continued observance of the SALT I treaty of 1972, 23 U.S.T. 3462, T.I.A.S. No. 7504, 11 I.L.M. 791, after the date of its termination, Oct. 3, 1977.

than on government action. The regulations and statutes demonstrate the commitment to affirmative action by the federal government to promote civil rights and the rights of women when office holders are pushed by popular movements and the need to get re-elected.

In 1976, the Senate and President ratified the Convention on the Political Rights of Women,²⁰⁴ committing the U.S. government to “[d]esiring to implement the principle of equality of rights for men and women contained in the Charter of the United Nations” and “desiring to equalize the status of men and women in the enjoyment and exercise of political rights, in accordance with the provisions of the Charter of the United Nations and of the Universal Declaration of Human Rights.”²⁰⁵

The U.S. government thus reiterated its commitment to the broad provisions of the U.N. Charter and the Universal Declaration in a treaty on a specific subject covered by those documents in the broad sense. In addition, the United States for the first time made a commitment *to the international community* to guarantee that women can vote and run for office “on equal terms with men, without any discrimination.”²⁰⁶ This makes it appropriate to consider how this provision and U.N. Charter article 55c can be used to enhance the nineteenth (suffrage) amendment by promoting an answer to the common problem of women not being able to get equal funding with men when they run for office, which prevents them from running “on equal terms.”

Participants in a working conference on the implementation of international human rights law in United States courts provided two examples of the successful use of administrative proceedings to enforce human rights.²⁰⁷

204. G.A. Res. 640, 7 U.N. GAOR Supp. (No. 20) at 27, U.N. Doc. A/2361 (1952). The Convention entered into force for the U.S. July 7, 1976, 27 U.S.T. 1909, T.I.A.S. No. 8299, 193 U.N.T.S. 135.

205. *Id.* paras. 1 & 2.

206. *Id.* art. I.

207. Deborah R. Gerstel & Adam G. Segall, *supra* note 43, at 147-49. Notes 208-12 are quoted from this report.

In the *South African Coal Case*,²⁰⁸ in 1975 the United Mine Workers and the State of Alabama attacked a South African law that effectively obliged black miners to work under contracts enforceable by penal sanctions. Petitioners asked the Commissioner of Customs Services to prevent the release of South African coal being imported by a utility company, arguing that the importation of coal mined under these circumstances violated a statute against importing goods produced by indentured labor.²⁰⁹ The Commissioner of Customs Services dismissed this complaint for plaintiffs' failure to satisfy a statutory proviso fixing a domestic consumptive demand.²¹⁰ The hearing nonetheless created favorable media coverage, helped define "indentured labor," and may have helped lead the South African government to repeal all of its penal servitude laws.²¹¹

In another administrative hearing, the Chairman of a House Foreign Affairs subcommittee, members of the Congressional Black Caucus, and others intervened directly to challenge an application to waive a moratorium on the importation of cape fur seal skins harvested in Namibia. The State Department presented its view that the importation of Namibian seal skins would be inconsistent with treaty obligations and contrary to

208. "Importation of Coal From the Republic of South Africa Case, Treasury Dep't, U.S. Cust. Serv., Res. 3-R:E:R 703971 T (1975)." Deborah R. Gerstel & Adam G. Segall, *supra* note 43, at 147 n.24.

209. "The relevant text of the Tariff Act of 1930, 19 U.S.C. § 1307 reads:

All goods . . . mined [or] produced . . . wholly or in part in any foreign country by convict labor . . . under penal sanctions shall not be entitled to enter at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision."

Deborah R. Gerstel & Adam G. Segall, *supra* note 43, at 147 n.25.

210. "*Id.*, Section 1307 provides that '[i]n no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.'" Deborah R. Gerstel & Adam G. Segall, *supra* note 43, at 147 n.26.

211. "The repeal was set out in § 51 of the Second General Law Amendment Act of 1974 (Act No. 94 of 1974). Butcher, *Southern African Issues in United States Courts*, 26 *How. L.J.* 601, 623, n.73 (1983)." Deborah R. Gerstel & Adam G. Segall, *supra* note 43, at 147 n.27.

U.S. foreign policy interests. This led to a decision by the Director of the National Marine Fisheries Service to enforce the moratorium.²¹²

C. LITIGATION

1. *Enforcing Human Rights in the United States*

There are numerous examples of U.S. courts enforcing human rights when counsel for parties have explicitly brought to the courts' attention standards based on internationally recognized human rights.

California Federal Savings and Loan Association sued the state agency enforcing the California pregnancy leave statute charging that the statute was inconsistent with and preempted by Title VII of the Civil Rights Act. The federal district court granted the plaintiffs' motion for summary judgment and invalidated the law.²¹³ According to de la Vega:

The issues of the case were especially appropriate for arguments based on international human rights law, since they involved the interpretation of a domestic statute and a wealth of multilateral treaties as well as the laws of other nations. The latter could be used to insist upon an interpretation of the statute so that it would be in compliance with the international norms.²¹⁴

A new mother on maternity leave and Human Rights Advocates urged the Supreme Court to consider the laws of other nations and treaties in interpreting the Pregnancy Discrimination Act (PDA), pointing out in an amicus brief that laws of 127 countries provide maternity protection for working women, including maternity leave. The brief also outlined the clauses of several treaties as evidence of a customary international norm that provided these rights to pregnant workers.

212. "In re Fouke Co. to Waive the Moratorium on the Importation of Cape Fur Seal Skins, Doc. MMPAH No. 1, National Marine Fisheries Serv., Dept. of Commerce (1975)." Deborah R. Gerstel & Adam G. Segall, *supra* note 43, at 148 n.29.

213. California Fed. Sav. & Loan Ass'n v. Guerra, 33 Empl. Prac. Dec. (CCH) ¶ 34,227, 34 Fair Empl. Prac. Cas. (BNA) 562 (C.D. Cal. 1984), *rev'd*, 758 F.2d 390 (9th Cir. 1985), *aff'd*, 479 U.S. 272 (1987).

214. Constance de la Vega, *supra* note 124, at 1247. The citations in notes 217-26 are taken from this article.

The U.S. Supreme Court upheld the California statute²¹⁵ because the legislative history made it "abundantly clear that Congress intended the PDA to provide relief for working women and to end discrimination against pregnant workers."²¹⁶ The Court did not accept the challenge to base its decision on international law. In footnote 18 of the opinion, the Court referred to testimony mentioned in the amicus brief by Professor Wendy Williams:

American women, almost alone among working women of the world, face the disabilities associated with no income protection The passage of this bill would provide a tool for bringing the treatment of American women somewhat into line with the more enlightened world practice.²¹⁷

In *Boehm v. Superior Court (County of Merced)*,²¹⁸ the judge did refer to article 25 of the Universal Declaration and ruled that "it defies common sense and all notions of human dignity to exclude clothing, transportation and medical care from the minimum subsistence grant."²¹⁹ De la Vega discussed this and several other cases in which international human rights law played a role. In *Tayyari v. New Mexico State University*,²²⁰ the court cited and relied on U.S. Department of State policy to reject actions by university regents denying admission or readmission to Iranian students in the wake of the Iranian hostage crisis. The affidavit of David Newson, Undersecretary for Political Affairs, supported the development of international human rights standards as expressed in the Universal Declaration and the International Covenant on Economic, Social and

215. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

216. *Id.* at 284-85.

217. *Discrimination on the Basis of Pregnancy*, 1977, *supra* note 126, at 115 (testimony of Wendy Williams).

The proper description is not "American women" but "women of the United States," because women of all nations of North, Central, and South America are "American women." Throughout this article I have endeavored not to use the easier and more common but inaccurate phrase, "American women," but I may not have been absolutely consistent.

218. 178 Cal. App. 3d 494 (1986).

219. *Id.* at 502.

220. 495 F. Supp. 1365 (D.N.M. 1980).

Cultural Rights,²²¹ particularly equal access for all to higher education without discrimination on the basis of national origin or other status,²²² and it concluded that “[t]he introduction of such discrimination by law within a jurisdiction of the United States would be damaging to United States efforts to promote the widest realization internationally of human rights goals and standards.”²²³ The court held simply that the regents’ action would violate equal protection on the basis of alienage and national origin.

In *Cerrillo-Perez v. INS*,²²⁴ the Ninth Circuit, in a deportation case, reversed and remanded for consideration of whether the potential family separation caused by the alien parents’ deportation would constitute extreme hardship for the U.S. citizen children. The court first discussed U.S. law confirming the “importance and centrality of the family,”²²⁵ going on to cite the *U.N. High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status* and the Universal Declaration, article 16(3).²²⁶

Many earlier court decisions citing the U.N. Charter and the Universal Declaration are summarized in articles by human rights experts.²²⁷ Outstanding state and federal court judges have also played important roles in explicitly construing domestic law in light of U.N. law in Oregon,²²⁸ Connecticut,²²⁹ and California.²³⁰ Their work indicates the importance of thinking globally and acting locally.

221. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

222. *Id.* art. 26(1).

223. *Tayyari*, 495 F. Supp. at 1379.

224. 809 F.2d 1419 (9th Cir. 1987).

225. *Id.* at 1423.

226. *Id.*

227. RICHARD B. LILICH & FRANK NEWMAN, *supra* note 106, at 116-21; Kathryn Burke, Sandra Coliver, Constance de la Vega, & Stephen Rosenbaum, *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT’L L.J. 291, 299-308 (1983).

228. *See, e.g.*, Linde, J., in *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981).

229. *See, e.g.*, Caboran, J., in *Lareau v. Manson*, 507 F. Supp. 1177, 1187-89 n.9 (D. Conn. 1980), *modified on other grounds*, 651 F.2d 96 (2d Cir. 1981).

230. *See, e.g.*, Newman, J., in *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 130 n.2, 610 P.2d 436, 439 n.2, 164 Cal. Rptr. 539, 542 n.2 (1980).

2. *Enforcing Related Laws in the United States*

Expert testimony on international law has recently played a major role in jury verdicts in criminal law cases against people arrested while peacefully protesting U.S. government policies on nuclear weapons and other issues.

A study of these cases²³¹ makes clear that many politically active people are familiar with the U.N. Charter and internationally recognized standards of conduct for governments and individuals and are committed to helping enforce them. This study demonstrates that citizens selected for jury duty can also become committed to the right of their fellow citizens to act on this commitment.

The foreman of a four-person jury in a Salt Lake City suburb said recently²³² that expert testimony on international law and the first-strike capability of the Trident II missile convinced him to vote for acquittal of three people who politely²³³ and peacefully trespassed at Hercules, Inc., which makes parts for Trident. The jury acquitted after a three-day trial²³⁴ in which all three defendants explained their reasons for trespassing in terms of their commitment to the U.N. Charter, articles 2.3²³⁵ and 2.4,²³⁶ and the Nuremberg Principles.²³⁷

231. The Peace Law and Education Project of Meiklejohn Institute has since 1984 collected information on all cases in which issues of peace law were raised. The project provides the unique service of recording cases concluded by jury verdicts that would otherwise go unreported and therefore uncollected. Peace law is defined in note 47, *supra*.

The peace law collection now includes files of lawyer work-product in 425 cases, which are edited for use in PEACE LAW PACKETS on 10 issues, including International Law, the Nuremberg Principles Defense, the First Amendment Defense in Federal Courts, etc. The cases are also reported in biennial editions of PEACE LAW DOCKET; the most recent edition, covering 1945-1990, is in press (Meiklejohn Institute 1990).

232. According to an interview with defense counsel Bruce Plenk, Mar. 24, 1990, reported to the author, who was an expert witness; my testimony is available at Meiklejohn Institute, Berkeley.

233. According to the police report.

234. *West Valley City v. Hamilton*, Nos. 891003031-3MC (Utah Cir. Ct., Salt Lake County, West Valley Dep't, Jan. 24, 1990) (Thorne, J.).

235. "All members shall settle their international disputes by peaceful means in such a manner that international peace, and security, and justice, are not endangered."

236. "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any member or state, or in any other manner inconsistent with the purposes of the United Nations."

237. Enunciated in the Agreement for the Prosecution and Punishment of Major War Criminals of European Axis, Charter of the International Tribunal, Aug. 8, 1945,

Juries also acquitted after hearing expert testimony on international law in a federal criminal case for violation of the Immigration Act;²³⁸ in a state criminal trespass case;²³⁹ in a state disorderly conduct, trespassing and school disturbance case;²⁴⁰ in a state disorderly conduct case for blocking traffic at a munitions factory;²⁴¹ in an Arizona state trespass case for protesting against nuclear weapons testing at a Department of Energy office;²⁴² in a Washington State College sit-in at the state capitol in support of a South African divestment bill;²⁴³ in a Chicago demonstration against apartheid at the office of the South African Consul,²⁴⁴ and on the porch of the South African Consul's

Oct. 6, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279. See *The Nuremberg Trial*, 6 F.R.D. 69 (1946). They particularly relied on Principle I: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."

Principle VI defines crimes against peace, war crimes and crimes against humanity; defendants testified they believed these included the production, storage, and transportation, as well as testing and use of nuclear weapons.

Principle VII: "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."

These principles are also set forth in *DEPT OF THE ARMY*, *supra* note 64. See also *infra* note 277.

See Note, *The Nuremberg Principles: A Defense for Political Protesters*, 40 *HASTINGS L.J.* 397 (1989) (authored by Frank Lawrence), which draws on Meiklejohn Institute case files to describe in detail efforts to use the Nuremberg Principles in recent trials.

238. *United States v. Martinez and Remer-Thamert*, No. 87-476 Cr. (D.N.M.), *described in PEACE LAW DOCKET 1945-1988*, PL-137, at 1 (Ginger ed., Meiklejohn Institute 1988) [hereinafter *PEACE LAW DOCKET*].

239. *Colorado v. Bock* (Denver County Ct. 1986), in *PEACE LAW DOCKET*, *supra* note 238, PL-174, at 19.

240. *Massachusetts v. [Amy] Carter*, No. 86-45 Cr. 74-75 (Hampshire Dist. Ct. 1987), in *PEACE LAW DOCKET*, *supra* note 238, PL-187, at 19.

241. *Vermont v. McCann*, No. 2857-7-86CnCr (Vt. Dist. Ct., Unit 2, Chittenden Cir.), unreported opinion in 44 *LAW GUILD PRAC.* 101 (1987), *appeal dismissed*, 149 Vt. 147, 541 A.2d 75 (1987) (state appealed trial court ruling to permit defendant to present necessity defense).

242. *Arizona v. Kahn*, No. 9895516-OC (Phoenix Mun. Ct.), in *PEACE LAW DOCKET*, *supra* note 238, PL-201, at 20.

243. *Washington v. Bass*, Nos. 4750-038, -395 to -400 (Thurston County Dist. Ct. 1987), in *PEACE LAW DOCKET*, *supra* note 238, PL-219, at 20.

244. *Chicago v. Streeter* (Cook County Mun. Ct.), *discussed in 42 LAW GUILD PRAC.* 110-11 (1985), and in *PEACE LAW DOCKET*, *supra* note 238, PL-123, at 16.

residence in Seattle;²⁴⁵ in a Great Lakes Naval Base demonstration case protesting U.S. involvement in Central America;²⁴⁶ and a Pledge of Resistance protest at Arlington Heights Army Reserve Training Center.²⁴⁷

In three cases, after the trial judge or traffic commissioner agreed to consider expert testimony on international law, the prosecutor dropped all charges against defendants protesting nuclear weapons at Lawrence Livermore Laboratory,²⁴⁸ at the Hanford Nuclear Reservation,²⁴⁹ and protesting CIA recruiting on campus.²⁵⁰

D. EDUCATION TO PROMOTE RESPECT FOR THE RIGHTS OF WOMEN

Social historians can perform a useful service by spelling out efforts in the United States to promote respect for the rights of American women since 1945, both those efforts explicitly based on treaties and those efforts that did not mention these international commitments of the United States but were based on existing U.S. domestic laws. Such a study would certainly focus on U.S. ratification of the U.N. Charter, support for the Universal Declaration of Human Rights, ratification of the Convention on the Political Rights of Women,²⁵¹ signing (and stalled efforts to

245. *Washington v. Heller* (Seattle Mun. Ct. 1985), in *PEACE LAW DOCKET*, *supra* note 238, PL-151, at 17.

246. *Illinois v. Jarka*, Nos. 002170, 002196-002212, 00214, 00236, 00238 (Lake County, 19th Jud. Cir.), *discussed in* 42 *LAW GUILD PRAC.* 108-10 (1985), *and in* *PEACE LAW DOCKET*, *supra* note 238, PL-123, at 16.

247. *Illinois v. Fish* (Cir. Ct., Skokie), in *PEACE LAW DOCKET*, *supra* note 238, PL-329, at 22.

For 19 cases in which juries convicted after trial judges refused to permit expert testimony on international law, see *PEACE LAW DOCKET*, *supra* note 238, PL-1, PL-3, PL-4, PL-9, PL-11, PL-31, PL-33, PL-71, PL-117, PL-118, PL-127, PL-138, PL-162, PL-197, PL-210, PL-240, PL-281, PL-283, and PL-306 at 23-29, 31-33.

See Laura J. Schulkind, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 *N.Y.U. L. REV.* 79 (1989).

248. *California v. Jerome*, Nos. 5450895, 54516177, 5516159 (Traffic Div., Alameda County Mun. Ct., Livermore-Pleasanton Jud. Dist. 1987), in *PEACE LAW DOCKET*, *supra* note 238, PL-222, at 20.

249. *Washington v. Karon*, Nos. J85-1136-39 (Benton County Dist. Ct. 1985), in *PEACE LAW DOCKET*, *supra* note 238, PL-148, at 17.

250. *Colorado v. Erb*, No. 86 M2511 Cr. (Boulder County Ct., Div. 8), *discussed in* 45 *LAW GUILD PRAC.* 33 (1988), *and in* *PEACE LAW DOCKET*, *supra* note 238, PL-245, at 21.

251. See *supra* notes 204-06 and accompanying text.

ratify) the Convention on the Elimination of All Forms of Discrimination Against Women,²⁵² and participation in the U.N. Decade for Women: Equality, Development and Peace (including the appropriation to support this participation²⁵³ and the effects on the U.S. movement for women's rights of the document coming out of the 1985 Nairobi Conference).²⁵⁴

For purposes of this discussion, it is sufficient to summarize the situation by stating that U.N. Charter articles 55c and 56 have been at the root of the education of many women in the United States, and the men concerned about their status. From the U.N. and its many agencies and efforts, these women and men have learned new ways to promote human rights for all without distinction as to sex. This knowledge has furthered the enforcement of U.S. domestic laws (like the Civil Rights Act, Title VII) but it has probably done more to cause people in the United States to work on international human rights issues *abroad*.

IV. WHY THIS LAW HAS NOT BEEN FULLY ENFORCED

A. ECONOMIC, SOCIAL AND CULTURAL REASONS

Massive numbers of women and men in this country have never heard that the U.N. Charter contains articles 55c and 56, or that they can use U.N. work and law in their efforts for equal rights in the United States. The reasons are discussed below.

252. G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979); *see supra* text accompanying note 201.

253. 22 U.S.C. § 2151k (1988): "Not less than \$500,000 of the funds made available under this chapter for . . . 1982 shall be expended on international programs which support the original goals of the United Nations Decade for Women."

254. *The Nairobi Forward-Looking Strategies for the Advancement of Women*, G.A. Res. 40/108, 40 U.N. GAOR Supp. (No. 53) at 223, U.N. Doc. A/40/53 (1985) (adopted by the General Assembly without a vote). *See also* INT'L ASS'N OF DEMOCRATIC LAWYERS, REPORT FROM CONFERENCE IN CAMBRIDGE, ENGLAND, THE ROLE AND POSITION OF WOMEN: IN LAW AND PRACTICE (1979) (one of the many outgrowths of article 55c, the Universal Declaration, and the U.N. Decade), *reprinted in* 37 LAW GUILD PRAC. 1, 1-44 (1980). At the March 1990 I.A.D.L. Congress in Barcelona, the Working Group on Women reported an increase in attacks on advances women have made in employment and status in Spain, the Sudan, India, the Middle East, the United States, Japan, and several other areas, attacks often bolstered by appeals to the fundamentalist precepts of several religions, particularly in periods of economic stagnation or recession.

1. *Cold War/American Century Policies*

As the architects of the cold war report that the war is now over, it should become possible finally to write an accurate history of this war and its devastating effect on the lives of the people of the United States and of many other parts of the world. It should become possible to define openly who were the protagonists, what were the real reasons for their attacks, how they selected their targets, what they hoped to gain, what goals they achieved, and how they were stymied or partially defeated. It will finally become possible to count the individual victims and victimized institutions and ideas, if not the careers destroyed, the families smashed, the laws violated, the books unwritten, the movies unmade, the lessons untaught, the songs unsung.

Any accurate summary of the effects of the cold war on enforcement of articles 55c and 56, the hidden equal rights law for women, can only be written after this broad canvas has finally been painted. We need an assessment of the effects of the cold war on the development of the United Nations, on the enforcement of the U.N. Charter in the United States, and on the setting of U.S. policies on both foreign affairs and domestic issues.

It can certainly be asserted without contradiction that the cold war had a chilling effect on the recognition in the United States of the new world realities attached to formation of the U.N., ratification of the U.N. Charter, and promulgation of the Universal Declaration of Human Rights. The cold war ideology simultaneously fed the desire of some to return to isolationism and of others to make this the American Century.²⁵⁵ Both of these groups sought to defeat the one-world concept launched by the Republican candidate for president in 1940, Wendell Willkie, and supported by the Democratic president from 1933 to 1945, Franklin Roosevelt.

These cold war attitudes played a role in discouraging enforcement of every document connected with the U.N., including articles 55c and 56, and fed the illusion that the United States was automatically now and forever the world leader in enunciating and enforcing human rights law, and that it did not need to

255. See Shirley Hazzard, *Breaking Faith-I*, NEW YORKER, Sept. 25, 1989, at 63-99.

turn to any other source, particularly an international organization, for a list of human rights to be included in its law.

2. *Cold War Attacks on Women and the Women's Movement in the United States*

The effects of the cold war period on the movement to enforce equal rights for women in the United States can only be told when many women have written about the effects of that war on their individual lives, dreams, families, work, and organizations. Lillian Hellman, an outstanding American writer on American women, among other subjects, confessed in 1976 that she had made two previous failed attempts to write about her life during the Truman/McCarthy period, and that she didn't want to do it even then; it was too painful. In her book, *Scoundrel Time*,²⁵⁶ she dealt primarily with the effects of the cold war on Hollywood, Broadway, writers and other intellectual workers. Hellman summarized:

There were many broken lives along the path [McCarthy's] boys had bulldozed, but not so many that people needed to feel guilty if they turned their backs fast enough and told each other, as we were to do again after Watergate, that American justice will always prevail no matter how careless it seems to critical outsiders.²⁵⁷

One of the reasons that American justice did not prevail in that tragic time was our carelessness of the U.N. Charter and particularly articles 55c and 56. During the Truman/McCarthy era, the U.N. was a dirty word and the Attorney General's list of "subversive organizations"²⁵⁸ included American Women for Peace, Syracuse and Massachusetts Women for Peace, Congress of American Women, and Central Council of American Women of Croatian Descent, as well as many other organizations with the word "Peace" or "Rights" in their titles or that worked on

256. LILLIAN HELLMAN, *SCOUNDREL TIME* (1976).

257. *Id.* at 151-52.

258. Exec. Order No. 9835 (March 21, 1947), amended by Exec. Order No. 10,450 (Apr. 27, 1953), revoked quietly by President Nixon by Exec. Order No. 11,785, 39 Fed. Reg. 20,053 (June 4, 1974), reprinted in 5 U.S.C. § 7311 note (1988). For a brief analysis of the types of organizations listed, see Ann Fagan Ginger, *Using Peace Law To Advance Human Rights*, 46 LAW. GUILD PRAC. 32, 37 (1989).

these issues, including the California Labor School and the National Negro Labor Council.²⁵⁹

Some women active in labor unions have described cold war attacks on themselves and their unions as they were fighting for equal pay for work of comparable worth and for increasing the number of women in leadership on the job and in unions.²⁶⁰

We are beginning to learn how many African American performers were blacklisted in that era for their political beliefs, including their belief in the rights of women, peace, and integration.²⁶¹

Women who had been active in movements for peace and human rights were cited for contempt of unAmerican Activities Committees,²⁶² convicted and sent to prison on charges of conspiracy to cause false nonCommunist oaths to be filed by labor leaders²⁶³ and for conspiracy to advocate the violent overthrow of the government,²⁶⁴ while others were arrested for deportation and several were deported.²⁶⁵ They were attacked, in part, for their "aggressive" styles and for expressing their views on women's rights, which many of them had gained from reading the classic work on the causes of women's oppression, *Origin of the Family, Private Property and the State*, by Frederick Engels.²⁶⁶ None was charged with committing any illegal act.

259. See descriptions of attacks on the latter organizations in *THE COLD WAR AGAINST LABOR* 627-44, 137-51, 564-66 (Ann Fagan Ginger & David Christiano eds., Meiklejohn Institute 1987).

260. *Id.* at 137-56, 172-86, 385-98, 472-90, 592-614, 645-47.

261. See *Brown Sugar* (PBS television special, Jan. 22, 1989).

262. *E.g.*, Anna Morgan in *Morgan v. Ohio*, 360 U.S. 423 (1959) (author was counsel).

263. *E.g.*, Marie Reed Haug in *United States v. West*, 274 F.2d 885 (6th Cir. 1960), *cert. denied*, 365 U.S. 811 (1961) (author was of counsel); see *THE COLD WAR AGAINST LABOR*, *supra* note 260, at 671-78.

264. *E.g.*, Elizabeth Gurley Flynn in *United States v. Flynn*, 216 F.2d 354 (2d Cir. 1954), *cert. denied*, 348 U.S. 909 (1955).

265. *E.g.*, Claudia Jones, Eulalia Figuerido, Luisa Moreno, Beatrice Siskind Johnson; see ANN FAGAN GINGER, *HUMAN RIGHTS LAWYER: CAROL WEISS KING* (work in progress). For discussions of the difference between censoring Marxism, as in the cold war period, and attacking racist hate speech, see Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2358-60 (1989) and Doris Brin Walker, *Limiting Racist Speech in the United States vs. "Freedom" of Speech: A Marxist View of the Apparent Constitutional Dilemma*, 3 NATURE, SCIENCE & THOUGHT 85 (1990).

266. First published in 1884.

Each blacklisting of an organization of women and of an individual independent-minded woman who had achieved some success in her field inhibited other women from working politically for progressive goals, including the goals of equal rights for women and peace. Each contempt citation against a woman leader had the same effect on her own generation and also on the younger generation.

The years after ratification of the U.N. Charter and the definition of human rights in the Universal Declaration of Human Rights were the worst years of the cold war witchhunts.²⁶⁷ They explain much about the ignorance of women in the U.S. today concerning the content of the U.N. Charter in general and the value in particular of articles 55c and 56.

Again during the Nixon / Mitchell / Hoover era, the COINTELPRO program of the federal government targeted the Women's International League for Peace and Freedom, an international organization active since 1915 on peace questions and on the rights of women. WILPF has brought information to women in the United States about the United Nations and has worked ceaselessly in its New York and Geneva offices. This attack inhibited education in the United States on the U.N. Charter and its provisions.

The failure of most law professors, famous lawyers and judges to fight openly and consistently against the cold war made it more difficult for victims and their lawyers to win their specific cases. It also slowed down the process, under way when the cold war was launched, of integrating the U.N. Charter into the framework of U.S. law. In 1978, volume 1 of the *Harvard Women's Law Journal* included an article on the international legal instruments dealing with the status of women.²⁶⁸ By 1990,

267. For descriptions of thousands of big and little civil liberties cases from 1955-1969, see CIVIL LIBERTIES DOCKET vols. 1-13 (Ann Fagan Ginger ed., National Lawyers Guild 1954-1968) and vol. 14 (Meiklejohn Institute 1969). For citations to these cases, see ANN FAGAN GINGER, HUMAN RIGHTS CASEFINDER: THE WARREN COURT ERA (1953-1969) (Meiklejohn Institute 1972). See also *Keeney v. United States*, 218 F.2d 843 (D.C. Cir. 1954) and descriptions of this and cases of 18 other U.S. employees of the U.N. dismissed without cause in 1949 in Shirley Hazzard, *supra* note 255, at 63.

268. Natalie Kaufman Hevener, *International Law and the Status of Women: An Analysis of International Legal Instruments Related to the Treatment of Women*, 1 HARV. WOMEN'S L.J. 131 (1978), published just before U.N. adoption of the Convention

U.S. women's law journals were rarely publishing articles on international human rights law or mentioning U.N. Charter article 55c or other U.N./peace law in discussing law relevant to U.S. women's rights.²⁶⁹

3. *The Lack of Integration of the Women's Movement with Other Movements*

For many historic reasons that cannot be elucidated here, the U.S. women's movement since the easing of the cold war has not allied itself closely with those parts of other movements that have been turning to the U.N. and using human rights and peace law to support their causes.²⁷⁰ The Native American movement has always understood the importance of U.S. treaty law because its grievances are based on the refusal of the U.S. government to obey treaty obligations with many tribes. The movement of African Americans has always included many organizations that have turned to the U.N. for redress of the grievances of African Americans and black Africans, relying on peace law. Chicanos and Mexicans often mention treaty obligations of the United States arising from the treaty ending the Mexican-American War. Puerto Rican movements for equality and for independence have necessarily turned to the U.N. and the Charter to support their claims.

While many individual women and many women's organizations in the United States have been active for peace and have worked with the U.N. and the human rights law enunciated in the Charter and the Universal Declaration, these have not tended to be the women in the leadership of the feminist movement for rights for women within the U.S., a movement that began in London at an international meeting against slavery in the United States and in many other countries.

on the Elimination of All Forms of Discrimination Against Women (1979), see *infra* note 364. For a review of MALVINA HALBERSTAM & ELIZABETH F. DEFEIS, *supra* note 140, see Barbara Stark, Book Review, 12 WOMEN'S RTS. L. REP. 51 (1990).

269. See, e.g., Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25, 59 (1989), putting a discussion of U.S. treaty obligations beyond the scope of her article. Inexplicably, Nadine Strossen does not include in the list of treaties the U.S. has signed but not ratified the Convention on the Elimination of All Forms of Discrimination Against Women, in Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 810 n.20 (1990).

270. For a definition of peace law, see *supra* note 47.

The result of these two trends has been a relatively slow inclusion of women of color in the U.S. feminist movement for equal rights and a relatively slow integration of demands for the enforcement of U.N. law as domestic law in the United States.

And yet, the history of statutory protections for the rights of women in the United States is interwoven with the history of statutory protections for African Americans.²⁷¹ The most significant statute to date, Title VII of the Civil Rights Act of 1964 forbidding discrimination in employment on the basis of sex, was a clear gift of the Black liberation and civil rights movements to the women of the United States, some of whom had worked hard for civil rights but had not yet built a women's movement that could have achieved inclusion of the word "sex" in the protected classes covered in Title VII in 1964.²⁷²

B. NEGATIVE LEGAL PRECEDENTS

1. *The Truman/Hot War Fujii Period*

In the period immediately after creation of the United Nations and drafting of the U.N. Charter, U.S. lawyers, like their counterparts throughout the world, joined in the popular dream of a bright future. They envisioned an era of peace and international cooperation to bind up the planet's wounds and to develop the world's economies in order to eradicate fear and want.²⁷³

271. See generally ELEANOR FLEXNER, *CENTURY OF STRUGGLE* (1972); ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* (1981); JEAN FAGAN YELLIN, *WOMEN AND SISTERS: THE ANTI-SLAVERY FEMINISTS IN AMERICAN CULTURE* (1989), and sources cited therein. The author's experiences in working for the rights of women and African Americans since 1941 confirm this conclusion.

272. "Sex" was added to "race, color, religion, and national origin" during argument on the bill on the floor of the Senate. Passage of the bill in 1964 was assured by the giant civil rights march on Washington led by Rev. Martin Luther King, Jr. See *LEGAL ASPECTS OF THE CIVIL RIGHTS MOVEMENT* 272-73 (Donald B. King & Charles W. Quick eds. 1965). However, it was Senator Smith of Virginia, an opponent of civil rights, who introduced the amendment adding "sex" to Title VII, and the Senate conversation on the amendment can scarcely be dignified with the label "debate." One prevalent theory is that some Southern senators believed that the addition of "sex" would increase opposition from legislators who might favor the racial equality aspects of the bill but balk at sexual equality. See, e.g., 110 CONG. REC. 2577, 2578; see Ann Fagan Ginger & Anthony Mischel, *Which Side Are You On? The Contradictions when Homemakers Protected Blue Collar Workers*, 1 *WOMEN'S L.J.* (no. 2), 1977, at 27, 32.

273. See, e.g., *THE NATIONAL LAWYERS GUILD: FROM ROOSEVELT THROUGH REAGAN* 60-65, 72-75 (Ann Fagan Ginger & Eugene Tobin eds. 1988).

This shining moment was a brief six weeks, from the date of the signing of the U.N. Charter in San Francisco on June 26, 1945, to the date on which the United States, unilaterally and without warning even to one of its allies, dropped the first nuclear weapon on the civilian city of Hiroshima on August 6, 1945.²⁷⁴

Two days later, the four major powers signed the London Agreement and Charter²⁷⁵ enunciating the principles to be used in the forthcoming trials of the Axis war criminals. The Nuremberg Principles²⁷⁶ are considered to be a new Ten Commandments or Golden Rule for the world, placing on each individual the duty not to commit, and not to be complicit in one's government committing, war crimes, crimes against peace or crimes against humanity.²⁷⁷ This step led to the trial of the Nazis and Japanese who had committed such crimes before and during World War II, first heads of government and industry,²⁷⁸ then individuals.

But the signing of these Principles and even these trials did not put the world back on the U.N. track as the cold war began in earnest.²⁷⁹

274. See Ann Fagan Ginger, *Finding Peace Law and Teaching It*, *supra* note 47.

275. Oct. 6, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279, Aug. 8, 1945.

276. *Id.*

277. The U.N. General Assembly unanimously affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal," G.A. Res. 95(I), 188 U.N. Doc. A/64/Add.1 (1946); International Law Commission formulation, [1950] 2 Y.B. INT'L L. COMM'N 374-78, U.N. Doc. A/CN.4/SER.A/1950/Add.1. The currently used definition of "crimes against humanity" is:

Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

Central Council Law No. 10, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50-55 (1946) (not limited to crimes charged in the first Tribunal at Nuremberg), in FRANK NEWMAN & DAVID WEISSBRODT, *supra* note 106, at 716; *see id.* at 714-17.

278. *See, e.g.*, The Nuremberg Trial, 6 F.R.D. 69 (1946); *In re Yamashita*, 327 U.S. 1 (1946).

279. For one account by a U.S. woman lawyer who fought for the right to participate as a prosecutor at Nuremberg, *see* Mary Kaufman, *War Crimes and Cold War Conspiracies*, in ANN FAGAN GINGER, *THE RELEVANT LAWYERS* 184-201 (1972).

Lawyers like William L. Patterson, African American lawyer turned political activist, had done creative work in the Depression to make it possible to bring to the U.S. Supreme Court the problem of racial discrimination in the criminal justice system, organizing the defense of the so-called "Scottsboro Boys."²⁸⁰ He and Paul Robeson, African American lawyer turned singer/actor and political activist, conceived the idea of appealing to the new United Nations to act on the massive problems of all African Americans. They filed a petition in New York and Paris simultaneously, but found no procedure for judgment or action by the new organization.²⁸¹

In this early period, a number of clients and lawyers cited the U.N. Charter articles 55 or 56 in litigation challenging racist and sexist practices of homeowners, a union, and a city.²⁸²

In 1952, during an attack on U.S. participation in the United Nations, a man born in Japan who had long lived in the United States appealed to a state supreme court from a judgment that land he had purchased had escheated to the state. Years after the closing of World War II concentration camps for Americans of Japanese descent, the California Alien Land Law still made it impossible for noncitizens from Japan to own land

280. *Powell v. Alabama*, 294 U.S. 45 (1932) and *Norris v. Alabama*, 294 U.S. 578 (1935); for an insider's view of this litigation, see ANN FAGAN GINGER, *HUMAN RIGHTS LAWYER: CAROL WEISS KING* (work in progress).

281. See *WE CHARGE GENOCIDE: THE CRIME OF GOVERNMENTS AGAINST THE NEGRO PEOPLE, A PETITION TO THE UNITED NATIONS* (Civil Rights Congress 1951) and WILLIAM L. PATTERSON, *THE MAN WHO CRIED GENOCIDE, AN AUTOBIOGRAPHY* 169-214 (International Publishers 1971).

282. See examples in RICHARD B. LILlich & FRANK NEWMAN, *supra* note 106, at 115-21, including: *Kemp v. Rubin*, 188 Misc. 310, 69 N.Y.S.2d 680 (Sup. Ct. 1947) and *Sipes v. McGhee*, 316 Mich. 614, 25 N.W.2d 638, 644 (1947) (refusal to sell to Negroes; courts found the U.N. Charter "merely indicative of a desirable social trend and an objective devoutly to be desired by all well-thinking peoples"); *Namba v. McCourt*, 185 Ore. 579, 204 P.2d 569 (1949) (challenge of Oregon Alien Land Law, similar to *Fujii*, discussed *infra* at note 283, court holding article 55 of the Charter one of the factors it took into account in finding statute invalid); *Wilson v. Hacker*, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950) (court cited Universal Declaration prohibition against distinctions based on sex in article 2 in finding for plaintiff bar owner seeking injunction to prevent picketing by unions that did not allow women to join).

Other courts made no finding on the enforceability of the U.N. Charter but almost all bowed to its moral force: See *Curran v. City of New York*, 191 Misc. 229, 77 N.Y.S.2d 206 (Sup. Ct. 1947); *Ruiz Alicea v. United States*, 180 F.2d 870 (1st Cir. 1950); *Boyer v. Garrett*, 183 F.2d 582 (4th Cir. 1950); *Keeney v. United States*, 218 F.2d 843 (D.C. Cir. 1954).

at a time when federal law made them ineligible for citizenship. As his first claim, his lawyers contended that this law had been invalidated and superseded by the provisions of the United Nations Charter pledging the member nations to promote the observance of human rights and fundamental freedoms without distinction as to race in article 55c.

The California Supreme Court held for the plaintiff in *Sei Fujii v. State*²⁸³ and cautioned:

The humane and enlightened objectives of the United Nations Charter are, of course, entitled to respectful consideration by the courts and Legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities. The charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs.²⁸⁴

Then the justices invalidated the law under the California and U.S. Constitutions. But before they did so, in one of those ironic twists with which history is dotted, they wrote a great deal of dicta that was intended to quiet attacks on the U.N. and international law,²⁸⁵ but had the reverse effect. They wrote:

It is clear that the provisions of the preamble and of article 1 of the charter which are claimed to be in conflict with the alien land law are not self-executing. They state general purposes and objectives of the United Nations Organization

283. 38 Cal. 2d 718, 242 P.2d 617 (1952).

284. *Id.* at 724, 242 P.2d at 622.

285. The then pending Bricker Amendment sought to stop the use of the U.N. Charter and other treaties to give the United States government power to protect civil rights from violations by the states. See S.J. Res. 1, 83rd Cong., 1st Sess., 99 CONG. REC. 6777 (1953). The Amendment ultimately did not pass and the civil rights movement caused the federal government finally to enforce these rights against state segregation laws and practices as required by the 14th amendment. This ended the need to be cautious about relying on the U.N. Charter to discourage support for the Bricker Amendment's passage, but it did not stop the dicta of *Fujii* from being used to limit enforcement of the U.N. Charter in the post-1964 Civil Rights Act era.

and do not purport to impose legal obligations on the individual member nations or to create rights in private persons. It is equally clear that none of the other provisions relied on by plaintiff is self-executing. Article 55 declares that the United Nations "shall promote . . ." and in article 56 the member nations "pledge themselves . . ." Although the member nations have obligated themselves to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.²⁸⁶

No citations are given for these assertions. The dicta continues:

The language used in articles 55 and 56 is not the type customarily employed in treaties which have been held to be self-executing and to create rights and duties in individuals.²⁸⁷

In light of the subsequent history of the dicta in this opinion, it is instructive to read its actual conclusion, which is limited to the issue in the case:

We are satisfied, however, that the charter provisions relied on by plaintiff were *not intended to supersede existing domestic legislation*, and we cannot hold that they operate to invalidate the Alien Land Law.²⁸⁸

This dicta in a state supreme court opinion was commented upon by legal scholars throughout the world since they had no other opinion by any court anywhere on the enforceability of the U.N. Charter, and they were anxious to write on the fascinating issues raised by the new international organization of nations,

286. *Fujii*, 38 Cal. 2d at 722, 242 P.2d at 620-21.

287. *Id.* at 722-23, 242 P.2d at 621.

288. *Id.* at 724-25 (emphasis added).

the United Nations, and its founding document, the U.N. Charter.²⁸⁹ And in the cold, then hot, then frigid political climate in the United States that lasted into the late 1980s, *Fujii* was cited as authority for refusing to uphold claims in U.S. courts that were not seeking "to supersede existing domestic legislation," as in *Fujii*, but to *carry out* domestic policies.

In the affirmative, anti-racist spirit of the civil rights movement of the 1960s, the New York City Board of Elections pressed upon a three-judge court in the District of Columbia the need to uphold the 1965 Voting Rights Act because of the U.S. signing of the U.N. Charter including article 55. Although that court instead upheld the state literacy-in-English test,²⁹⁰ the U.S. Supreme Court reversed, solely on the basis of the fourteenth amendment, section 5, and the supremacy clause, article VI. The seven to two majority found it unnecessary to consider whether the Voting Rights Act could be sustained on many other grounds, including "as a measure to discharge certain treaty obligations of the United States, see Treaty of Paris of 1898, 30 Stat. 1754, 1759; United Nations Charter, Articles 55 and 56, . . ."²⁹¹

2. *The Reagan/Cold War Post-Filartiga Period*

The opinion of the Second Circuit in 1980 upholding the enforcement of international law in the U.S. federal courts on a charge of torture in the *Filartiga* case²⁹² might have ushered in a period of enforcement of the U.N. Charter in the spirit of the Nuremberg Principles if it had been handed down in the era when Earl Warren sat as Chief Justice and the highest Court had included several New Deal Justices. Such was not the situation.

Nonetheless, government officials at all levels sometimes referred to and relied on the Charter, the Universal Declaration, or other U.N. human rights conventions in litigation. A few examples are helpful.

289. See *infra* discussion in text accompanying note 318.

290. *Katzenbach v. Morgan*, 247 F. Supp. 196 (D.C. Cir. 1965), *rev'd*, 384 U.S. 641 (1966).

291. *Katzenbach v. Morgan*, 384 U.S. 641, 647 n.5 (1966).

292. See *supra* notes 26-42 and accompanying text.

In 1981 a badly divided Third Circuit ruled against claims by a former U.S. soldier for injuries due to compelling him to participate in a radiation test of a nuclear device. The court relied on the existence of an alternative remedy under the Veterans' Benefit Act in *Jaffee v. United States*.²⁹³ But the majority commented, "Our distinguished colleague, Judge Gibbons, has written a forceful and eloquent dissent" based on the Universal Declaration, the Covenant on Civil and Political Rights,²⁹⁴ the Geneva Convention, the Declaration on the Protection of All Persons from Being Subjected to Torture,²⁹⁵ and the Nuremberg Code.

In 1989, the District of Columbia Circuit commented, "Hardly anyone would assert that [the Board for International Broadcasting Act, 22 U.S.C. § 2871(1)] is unconstitutional unless it also requires the United States to make grants opposing the rights set forth in section 2871." That section stated the purpose of the Act to include the "*promot[ion of] the right of freedom of opinion and expression, including the freedom 'to seek, receive, and impart information and ideas through any media and regardless of frontiers,' in accordance with article 19 of the Universal Declaration of Human Rights.*"²⁹⁶

After these and similar strong but unsuccessful efforts, scholars and practitioners of international law in 1985 concluded that:

Filartiga remains an exception to the general unwillingness of the federal courts to hear cases brought under the Alien Tort Statute. The courts have declined to exercise jurisdiction in Alien Tort cases primarily because they have refused to

293. 663 F.2d 1226 (3d Cir.), *cert. denied*, 456 U.S. 972 (1982).

294. *Jaffee*, 663 F.2d at 1240; *id.* at 1247 (Gibbons, J., dissenting); Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

295. G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975).

296. *DKT Memorial Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 290 (D.C. Cir. 1989), rejecting a challenge to AID's policy of not funding organizations performing abortions in other countries.

recognize that the alleged tortious acts constituted violations of universally recognized norms of international law.²⁹⁷

However, in *Von Dardel v. Union of Soviet Socialist Republics*,²⁹⁸ the court issued a default judgment against the defendant under the Tort Claims Act, based on violations of two treaties to which both the United States and the Soviet Union were signatories. The court concluded that it "would rob each of those agreements of substantive effect, and would render meaningless the act of the Soviet Union in signing them" if they were not "given effect by the courts in appropriate cases."²⁹⁹

V. LEGAL ARGUMENTS SUPPORTING ENFORCEMENT NOW

The major legal barriers to enforcement of article 55c have been the repeated statements that it is too broad to be enforced or enforceable and that the U.N. Charter is not self-executing. Both of these theories are now being discredited,³⁰⁰ which should lead to consideration of how now to enforce this hidden 1945 equal rights law.

297. Deborah R. Gerstel & Adam G. Segall, *supra* note 43, at 159 n. 68, citing and describing, e.g., *Benjamins v. British European Airways*, 572 F.2d 913, 916 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (air disaster, even if caused by willful negligence, does not violate law of nations); *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49, 52 (2d Cir. 1960) (denial of free trade access to harbor not a violation of international law); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 630 (6th Cir. 1978) (no discernible rule of international law governing child custody); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (eighth commandment "Thou shalt not steal" not part of the law of nations); *Abiodun v. Martin Oil Serv.*, 475 F.2d 142, 145 (7th Cir.), *cert. denied*, 414 U.S. 866 (1973) (breach of contract through fraud and deceit not a violation of international law); *Cohen v. Hartman*, 490 F. Supp. 517, 519 (S.D. Fla. 1980), *aff'd*, 634 F.2d 318, 320 (5th Cir. 1981) (neither conversion nor breach of fiduciary duty violates international law); *Valanga v. Metropolitan Life Ins. Co.*, 259 F. Supp. 324, 327-28 (E.D. Pa. 1966) (refusal to pay life insurance proceeds not violation of law of nations); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 293-97 (E.D. Pa. 1963) (neither unseaworthiness nor negligence constitutes tortious violation of international law).

Strossen proposes that U.S. courts at least use international human rights norms to resolve judicial process issues, being faithful to U.S. constitutional precedents and "to the burgeoning movement for the internationalization of individual rights." Nadine Strossen, *supra* note 269, at 809.

298. 623 F. Supp. 246 (D.D.C. 1985).

299. *Id.* at 256.

300. See *infra* text accompanying notes 301 & 318.

A. "TO PROMOTE" IS "CLEAR AND DEFINITE" LANGUAGE

The court in *Fujii*³⁰¹ maintained, "It is significant to note that when the framers of the charter intended to make certain provisions effective without the aid of implementing legislation they employed language which is clear and definite and manifests that intention."³⁰²

Is that a valid test of the self-executing character of a treaty? Since a treaty is, like a statute, part of the supreme law of this land, must it be any more "clear and definite" than a statute? If not, if the standard for treaty and statute are the same, are there any U.S. statutes written in the same language as the Charter that have been found enforceable?

The twentieth century answer to this question can be found most quickly in statutes passed in periods of social turmoil and striving for progress, similar to the period in which the Charter came into being. In fact, many of the U.S. roots of the U.N. Charter, Universal Declaration, and Nuremberg Principles, like the roots of the U.N. organization itself, lie in the Depression and New Deal, and the awareness of the rise of fascism and its terrible tenets.

Historically, the U.S. government has had "to promote" a series of programs for the good of the people at those times when free market economic forces have led to disaster and the people have demanded a change, as in the Great Depression of 1929-1939, leading to the New Deal of 1933-1936. And the government has had to define and fight for "human rights for all without distinction as to race, sex, language, or religion" when the industrial/military forces of fascism have threatened the survival of democracy.

In 1933, the new President finally had to report the truth to the people of the United States, after the old President had reiterated the lies that there had been a chicken in every pot and a car in every garage before the 1929 crash and that soon things would be back to normal. President Roosevelt reported that one-

301. See *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952); see also text accompanying note 283.

302. *Fujii*, 38 Cal. 2d at 723, 242 P.2d at 621.

third of the nation was ill housed, ill fed, and ill clothed. Congress finally had to pass emergency legislation to restrain the free market forces that had led to this condition, had to take affirmative actions to create jobs, housing, payment for unemployed workers, protection for labor unions and for unorganized workers and farmers. The Supreme Court finally had to declare these laws were constitutional under the commerce power.³⁰³

And the President had to attack the principles espoused by Adolph Hitler, including the rule that women's role is in the kitchen, the nursery, and the church.

The statutes and executive orders of the New Deal reflect this broad understanding of realities. They enunciated the goal of the government: to promote the general welfare, a better life for all the people. Without this goal, Franklin D. Roosevelt could not have been elected once, let alone four times.

In 1935, Congress passed the historic Wagner National Labor Relations Act, for the first time in the United States enunciating the legal right of workers to organize unions. Section 1, setting forth findings and policy, is explained in paragraph 3:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and *promotes* the flow of commerce by removing certain recognized sources of industrial strife and unrest,³⁰⁴

This language was retained in the 1947 Taft-Hartley amendments to this Act, which changed the law profoundly in other ways.³⁰⁵

Reading the findings in the Fair Labor Standards Act of 1938 (FLSA), and recalling the long struggle to gain passage of a national standard for minimum wages and maximum hours, it is

303. For a fascinating, month-by-month unfolding of executive, congressional and judicial actions responding to the Depression, see THE INTERNATIONAL JURIDICAL ASSOCIATION BULLETIN 1932-1942, edited by Carol King (3 vols., Ann Fagan Ginger ed., reprint ed. DaCapo Press 1982).

304. 29 U.S.C. § 151 (1988) (emphasis added).

305. See THE COLD WAR AGAINST LABOR, *supra* note 259 and accompanying text.

interesting to compare the language of the Act with that of the Universal Declaration, article 25:

Section 202(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the *minimum standard of living necessary for health, efficiency, and general well-being of workers . . .* [burdens commerce, leads to labor disputes, etc.].³⁰⁶

Article 25.1 Everyone has the right to a *standard of living adequate* for the health and well-being of himself and of his family, including food, clothing, housing and *medical care and necessary social services, . . .*.³⁰⁷

The next subsection of the Act declared it to be the policy of the FLSA "to correct and as rapidly as practicable *to eliminate the conditions* above referred to . . ." In subparagraph 5 of the Act, Congress specifically found, for the first time, that "the employment of persons in domestic service in households affects commerce."³⁰⁸ In other words, this basic law was written both very broadly and with some specificity, even in its findings section.

Broad enabling language was also written into the Social Security Act of 1935 and this sweeping language was written into a Social Security amendment in 1956:

It is the purpose of this title (a) *to promote* the health of the Nation by assisting States to extend and broaden their provisions for meeting the costs of medical care for persons eligible for public assistance by providing for separate matching of assistance expenditures for medical care, (b) *to promote* the well-being of the Nation by encouraging the States to place greater emphasis on

306. Fair Labor Standards Act, 29 U.S.C. § 202(a) (1988) (emphasis added).

307. Declaration, *supra* note 44, art. 25.1 (emphasis added). *Cf. id.* art. 23.3: "Everyone who works has the right to just and favorable remuneration, ensuring for himself and his family *an existence worthy of human dignity, . . .*" (emphasis added).

308. FLSA, 29 U.S.C. §§ 202(b), 202(a)(5) (1988) (emphasis added).

helping to strengthen family life and helping needy families and individuals attain the maximum economic and personal independence of which they are capable,³⁰⁹

Courts knew how to interpret this language: "Intent of this Chapter is to ameliorate some of life's rigors."³¹⁰

The Full Employment and Balanced Growth Act of 1978 set "medium term goals" more precise than merely "to promote . . . full employment":

(1) reducing the rate of unemployment . . . to not more than 3 per centum among individuals aged twenty and over and 4 per centum among individuals aged sixteen and over within a period not extending beyond the fifth calendar year after the first such Economic Report;

(2) reducing the rate of inflation . . . to not more than 3 per centum within a period not extending beyond the fifth calendar year after the first such Economic Report: . . . and

(3) reducing the share of the Nation's gross national product accounted for by Federal outlays to . . . 20 per centum or less by 1983 and thereafter, or the lowest level consistent with national needs and priorities: *Provided*, That policies and programs for achieving the goals specified in this clause shall be designed so as not to impede achievement of the goals and timetables specified in clause (1) of this sub-section for the reduction of unemployment.³¹¹

The language of article 55c is no more broad, and its meaning is no more unknowable or unenforceable than the New Deal, Eisenhower and Carter era statutes quoted above. Article 55c requires the United States "to promote" universal observance of human rights for all with no distinction as to sex.

309. 42 U.S.C. § 301 note (1988) (emphasis added).

310. *Dvorak v. Celebrezze*, 345 F.2d 894, 897 (10th Cir. 1965).

311. 15 U.S.C. § 1022a(b) (1988).

The language “to promote” is broad language. It is similar to the broad language of the first amendment (“Congress shall make no law . . . abridging the freedom of” expression); to the broad language of the fifth amendment (“No person shall be . . . deprived of . . . due process of law”); to the broad language of the fourteenth amendment (“No state shall . . . deny . . . the equal protection of the laws”); and to the very broad language of the thirteenth amendment (“Neither slavery nor involuntary servitude . . . shall exist within the United States”).

While the language “to promote” is not different in its breadth from these constitutional protections that have proved enforceable, it is different in its affirmance of government action rather than in its protection *against* government action.

The government has had “to promote” a series of programs for the good of certain segments of the people when racism has destroyed democracy and the people have demanded a change through the civil rights movement (since 1959), and when sexism has destroyed opportunities and the people have demanded a change through the women’s movement (since 1970).³¹²

President Johnson initiated a program during the activist 1960s to promote economic advancement of the people by waging a war on poverty and building a great society leading to the Food Stamp Act of 1964, which set forth broad language: “to *promote* the general welfare, to safeguard the health and well-being of the Nation’s population by raising levels of nutrition among low-income households . . . [which] will *promote* the distribution in a beneficial manner of the Nation’s agricultural abundance”³¹³

In the Fair Housing Act of 1968, Congress set forth the policy of the United States in similar broad language:

312. Many other movements, of Native Americans, Puerto Ricans, the disabled, have sought changes, some successfully, which are chronicled in many recent books and articles outside the scope of this presentation; see, e.g., Americans with Disabilities Act of 1990, S. 933, signed by President Bush July 26, 1990.

313. 7 U.S.C. § 2011 (1988) (emphasis added).

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.³¹⁴

In 1975, Congress passed an Act whose purpose was “to promote the goal of economic and social self-sufficiency for American Indians, Native Hawaiians, . . . and Alaskan Natives.”³¹⁵

In 1978, Congress moved in the same direction in its foreign policy, apparently recognizing that the much-touted free market economy was leading to disaster in many nations:

The Congress, recognizing the desirability of overcoming the worst aspects of absolute poverty by the end of this century by, among other measures, substantially lowering infant mortality and birth rates, and increasing life expectancy, food production, literacy, and employment, *encourages the President to explore with other countries, through all appropriate channels, the feasibility of a worldwide cooperative effort to overcome the worst aspects of absolute poverty and to assure self-reliant growth in the developing countries by the year 2000.*³¹⁶

President Bush, in his 1990 State of the Union address, proposed federal assistance to promote child care and Headstart educational programs in the United States.³¹⁷

In the face of these statutes and presidential initiatives, it is absurd to suggest that “to promote” language in article 55c does not fit within the enforceable U.S. legal framework.

B. THE U.N. CHARTER IS SELF-EXECUTING

Three arguments support the thesis that articles 55c and 56 of the U.N. Charter are self-executing. First, that the theory of non-self-executing treaties is wholly false or at least it does not apply to the U.N. Charter. Second, that the Senate and the President intended the Charter to be self-executing, or at least

314. 42 U.S.C. § 3601 (1988).

315. *Id.* § 2991a (1988).

316. Foreign Assistance Act, 22 U.S.C. § 2151-1(c) (1988).

317. N.Y. Times, Feb. 1, 1990, at 1.

they intended articles 55c and 56 to be self-executing, and treated them as such. Or third, in the alternative, that the theory of non-self-executing treaties is valid and that the Charter was not intended to be self-executing at the time it was ratified, but that Congress and the Presidents have repeatedly executed or implemented this treaty, or at least articles 55c and 56, so that today this part of the treaty is self-executing.

1. *The Non-Self-Executing Treaty Theory Does Not Apply*

The theory that the U.N. Charter is a non-self-executing treaty is based on the decision in the *Fujii* case.³¹⁸ The state court in that case was asked to overturn a state law on the basis of articles 55c and 56. Instead, the court very properly turned to the law nearest at hand, first to the state constitution, then to the U.S. Constitution, which meant it was unnecessary to reach the U.N. law question.

Since the much cited dicta in that case, few efforts have been made to use the Charter to overturn or "supersede existing domestic legislation," the evil feared by the *Fujii* court. Most litigators who have turned to the Charter for support on domestic issues have sought to enhance or promote overt, clearly stated goals of the Constitution, Congress or Executive.³¹⁹ Efforts of noncitizens to use the Charter to challenge acts in their native countries are quite different and cannot be dispositive of the domestic use of the Charter.³²⁰

In retrospect, it seems incredible that this slender reed of dicta has been cited all over the world against enforcement of the Charter articles 55c and 56. This is all the more inappropriate since the racist anti-Japanese citizenship law at the root of the case was soon overturned at the federal level by act of Congress³²¹ and most of the efforts to enforce articles 55 and 56 have

318. *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952); see *supra* text accompanying note 283.

319. See *supra* text accompanying notes 213, 218-30.

320. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

321. Walter-McCarran Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (1988).

not required the overturning or superseding of existing domestic legislation.³²²

By 1990, many legal scholars around the world had come to the conclusion that the *Fujii* "rule" was always bad law; it was dicta and it was issued by a state court. Many had come to attack the concept that treaties are divided into those that are self-executing and those that are not self-executing. Professor Jordan J. Paust has concluded from a study of the text of the Constitution, the predominant views of the Founders, from early and more modern trends in judicial decisions, and after consideration of the Restatement of Foreign Relations Law,³²³ that

all treaties are self-executing except those (or the portions of them) which, by their terms considered in context, require domestic implementing legislation or seek to declare war on behalf of the United States. All treaties are supreme federal law, but some treaties, by their terms, are not directly operative. Finally, even non-self-executing treaties can produce and have produced domestic legal effects through indirect incorporation, by which a treaty norm is utilized as an aid in interpreting the Constitution, a statute, common law or some other legal provision.³²⁴

2. *The Senate and the President Intended This Law To Be Self-Executing*

In order to determine whether the U.S. government intended the U.N. Charter to be self-executing at the time it came into being it is necessary to recreate the popular mood during the years Franklin and Eleanor Roosevelt occupied the White House, and the years in which the United States was an ally of the British empire under Churchill, the Free French under DeGaulle, and the Soviet Union under Stalin seeking to defeat the combined power of Hitler ruling Germany, Mussolini ruling

322. See, e.g., *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), discussed *supra* in text accompanying note 213.

323. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987).

324. Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 782 (1988); see also Sandra Coliver & Frank Newman, *supra* note 33, at 709 n.31.

Italy, and Hirohito ruling Japan. This recreation is virtually impossible after the presidencies of Nixon, Reagan and Bush, but it is necessary to make the effort.

FDR left clear signals that he supported the broad language of the Charter and meant it to stand with the Bill of Rights of the U.S. Constitution and to be enforced in the same broad manner. The first signal was the proposal for a New Bill of Rights drafted by his advisors in 1942.³²⁵ A second signal was FDR's promulgation of Executive Order 9346 establishing the first Fair Employment Practices Committee³²⁶ (precursor of the Equal Employment Opportunity Commission of the later era), in response to demands by the Negro people, to act as a goad to the military and the Congress. Roosevelt knew that World War II could not be won as a racist war because one of the evils of Hitler was his racism and one of the untapped resources of the United States was its people of color—in the military and in the shops. He knew that World War II could not be won as a sexist war because women had to be lured out of their households and into the factories to replace the men going into the Service. That was the only way to build the weapons of war quickly.

A third signal of FDR's commitment to the Charter language was his own augmented proposed Second Bill of Rights presented to Congress and printed in the Congressional Record³²⁷ at the beginning of 1944, looking ahead to the end of the war. Another signal was FDR's participation in the drafting of the London Agreement and Charter enunciating the Nuremberg Principles which, again, set forth broad, basic principles to be enforced by an international court of justice in the trial of the Axis war criminals if/when they were defeated on the battlefields.³²⁸

The language of these documents is incorporated in the language of the U.N. Charter and of the Universal Declaration.

325. By the National Resources Planning Board, made public and reported in the N.Y. Times, Nov. 15, 1942.

326. 8 Fed. Reg. 7183 (1943).

327. 78th Cong., pt. 1, 90 CONG. REC. H57 (Jan. 10, 1944).

328. See *United States v. Goering* (Trial of Major War Criminals before the International Military Tribunal), 6 F.R.D. 69 (1946); see also *infra* note 277.

Roosevelt died before the San Francisco conference establishing the United Nations and drafting the U.N. Charter, but the report to President Truman of the results of the first U.N. conference supports these signals and understandings. The language of Secretary of State Stettinius quoted in *Fujii*³²⁹ does not turn the language of articles 55 and 56 into non-self-executing clauses when he says that article 56 “pledges the various countries to cooperate with the organization by joint and separate action in the achievement of the economic and social objectives of the organizations without infringing upon the right to order their national affairs according to their own best abilities, in their own way, and in accordance with their own political and economic institutions and process.”³³⁰ The Secretary did not suggest that a signatory power could ignore or violate article 55 or 56, only that the method or process of enforcing the articles should be according to the nation’s own system, which is the essence of all international agreements, unless specific methods are agreed upon between the parties, which can usually be done only on very specific points.

A study of the history of 1945 indicates that basic changes were occurring in many nations as a result of the defeat of the Axis and the end of World War II. They resembled, in some ways, the rapid basic changes that have been occurring in many nations in 1989 and 1990 as a result of the ending of the cold war. There was then, as there is now, a fear of descent into anarchy and chaos unless decisive action was taken. Formation of the United Nations organization, drafting and adoption of the U.N. Charter, and ratification of the Charter without reservations or delay all seemed critical in the spring, summer and fall of 1945 when the United States participated in these actions. It was in that spirit that the U.N. Charter was ratified by the Senate, after debate, by a vote of eighty-nine to two. At that moment, there was no proposal or agreement that the Charter be a non-self-executing treaty.

That spirit accepted the need for the federal government to guarantee full employment, if necessary by taking action to create jobs when unemployment reached a certain percent. While

329. *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952).

330. *Id.* at 724, 242 P.2d at 622.

the 1945 Full Employment Bill got watered down by the time it became the Employment Act of 1946,³³¹ the Act was an execution of the provisions of U.N. Charter article 55a.

Thirty years later, President Carter clearly understood that it was his duty as president to see that U.N. covenants spelling out article 55c protections for human rights should be faithfully executed. That is the language of his Secretary of State, Muskie, in his memo on ratification of the Covenant on the Elimination of All Forms of Discrimination Against Women. First he described a provision in section (a) and then said, “*Accordingly*, the President created and the Congress funded the Task Force on Sex Discrimination” (emphasis added).³³² In other words, the President acted to carry out the provisions of a Covenant not yet ratified because the United States was already committed to this policy through previous law, in this case, the U.N. Charter, as well as by the President’s signature on an unratified international document.

3. *Congress and the Presidents Have Executed This Treaty*

Since 1973, Congress and the Presidents have explicitly used the language of the U.N. Charter article 55c in statutes and executive orders concerning U.S. foreign policy,³³³ and have used the concepts of articles 55c and 56 in statutes and executive orders establishing U.S. domestic policy and spelling out programs to promote human rights.³³⁴

By their actions, they have executed these articles of the treaty to the point that it no longer matters whether the original intent of the Senate and the President was that these articles be immediately self-executing or that they be executed by specific legislation and executive actions. By 1990, these articles had become self-executing. Litigants and lawyers are entitled to cite them in support of claims that a particular statute should be interpreted more broadly to promote human rights for women,

331. 15 U.S.C. § 1021 (1988). This commitment to “promote . . . full employment” in article 55a was strengthened by passage of the Humphrey-Hawkins Full Employment and Balanced Growth Act of 1978, *id.*; see *infra* text accompanying note 354.

332. See *supra* notes 201 & 202 and accompanying text.

333. See *supra* text accompanying notes 106-16.

334. See *supra* text accompanying notes 120 & 130-212.

that a statute or regulation must be interpreted to forbid distinctions based on sex, or that a statute or regulation should be adopted in order to carry out these purposes.³³⁶

This conclusion flows naturally from a review of the history of human rights efforts since 1945 and the resulting acts of Congress and the Executive.

VI. OTHER HIDDEN LAWS EVENTUALLY ENFORCED

One of the stated reasons for assuming that articles 55c and 56 are not enforceable by equal rights litigants is that they have not been enforced to date by U.S. courts. This argument falls in the face of several historic precedents.

A. THE FIRST AMENDMENT

If most people in the United States are asked how soon after the first amendment was ratified in 1791 the Supreme Court upheld free speech in a case, they barely pause to ponder. They assume it must have been very soon indeed. They make this assumption because the first amendment is so deeply ingrained in the thinking of people in the United States that we assume it became ingrained by being enforced in the courts.

In fact, the Supreme Court did not seriously consider a claim of free speech until after World War I in the case of *Schenck*, charged with incitement to resist the draft as a violation of the Espionage Act of 1917. That was 128 years after the first amendment became law, and even in that case, the reliance on the first amendment was rejected by the Court.³³⁶ The first conviction of a defendant overturned because his conviction violated the first amendment was probably *Fiske v. Kansas* in 1927,³³⁷ and the Court in that case did not mention the first amendment, relying on the fact that the evidence did not support the conviction.

335. See *infra* text following note 369. This effort seems particularly timely as leading Roman Catholic organizations and individuals placed an advertisement in the *New York Times* calling on the church to ordain women, among other reforms. *San Francisco Chron.*, Feb. 28, 1990, at A5.

336. *Schenck v. United States*, 249 U.S. 47 (1919).

337. 274 U.S. 328 (1927).

The first time a statute was overturned for violating the first amendment apparently was *Stromberg v. California*,³³⁸ handed down 140 years after the first amendment was ratified.

During the cold war, tens of thousands of people desperately needed the protection of the first amendment to save them from answering questions about their political beliefs, affiliations and actions. They had engaged in political action and believed they were protected by the first amendment. Now the Supreme Court turned down every effort to rely on this amendment.³³⁹ This led people to *think* first amendment and *use* fifth amendment, the privilege against self-incrimination.³⁴⁰ But failure of the Congress and the courts to enforce the first amendment precisely when it applied and was most needed did not change the legal status of that law as part of the Constitution and enforceable as such.

It is now 45 years since ratification of the U.N. Charter, including articles 55c and 56. That gives us, if we need them, another 83 years in which to convince the Supreme Court to decide a case based on these articles if we are to keep pace with the Court's consideration of our beloved and much touted first amendment.

B. RECONSTRUCTION CIVIL RIGHTS LAWS

1. *Federal Law*

In 1866 Congress passed a law forbidding discrimination in housing based on race.³⁴¹ In 1968 for the first time the Supreme Court upheld a challenge to the practice of refusing to sell a home to a Negro, enforcing this law. The Court rejected the respondents' argument that it would be revolutionary to enforce a statute dormant for 100 years, and that it therefore should not be done:

Stressing what they consider to be the revolutionary implications of so literal a reading of § 1982,

338. 283 U.S. 359 (1931); see ZACHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES passim* (1941).

339. See *Trumbo v. United States*, 176 F.2d 49 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950), the so-called "Hollywood Ten" case.

340. See *Quinn v. United States*, 349 U.S. 155 (1955).

341. 42 U.S.C. § 1982 (1988).

the respondents argue that Congress cannot possibly have intended any such result. Our examination of the relevant history, however, persuades us that Congress meant exactly what it said.³⁴²

This language of the Court may be apposite as to other congressional legislation whose history will reveal that Congress meant exactly what it said. This includes the language in article 55c as of the moment it was passed by the U.S. Senate, whose members must have been watching the footage on the horrors of the Nazi concentration camps revealed in the new post-war world, and must have agreed with leaders the world over that racism, sexism, and war must be illegalized and defeated.

2. *Local Law*

In 1872 the Legislative Assembly of the District of Columbia made it a crime to discriminate against a person on account of race or color or to refuse service on that ground, and in 1873 the Assembly passed a second, similar act. But when Congress, in 1878, enacted the Organic Act, reorganizing the government of the District of Columbia, the Acts of 1872 and 1873 were not mentioned, and they were left out of the District of Columbia Code when it was revised.

In 1948, after World War II, older Negro and white people in the District, recalling something about "lost laws," asked a lawyer to try to find them as a legal basis for attacking the system of department stores seeking patronage of Negro customers to buy goods but refusing to serve them at their lunch counters. Joseph Forer looked deeply and, in an old copy of the code prior to 1878, he found the nondiscrimination laws, which had been hidden for 69 years.

In 1953, a unanimous Supreme Court upheld the conviction of John R. Thompson Company,³⁴³ one of the District's largest department stores, for violating this section, writing:

342. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968).

343. *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953). See Marvin Caplan, *Eat Anywhere*, in 1 WASHINGTON HISTORY 25 (Washington Historical Society 1989).

Cases of hardship are put where criminal laws so long in disuse as to be no longer known to exist are enforced against innocent parties. But that condition does not bear on the continuing validity of the law; it is only an ameliorating factor in enforcement.³⁴⁴

C. INCORPORATION THEORY

The Civil War in the United States ended in 1865. The thirteenth amendment was ratified in 1865, the fourteenth amendment in 1868 and the fifteenth amendment in 1870. These events clearly changed the character of the relationship between the state and federal governments, since the federal government became responsible to prevent states from depriving any person of life, liberty or property without due process of law, or denying them the equal protection of the laws.

Yet the first time the United States Supreme Court overturned a conviction by a state court under the fourteenth amendment was probably in 1923.³⁴⁵ And it was not until 1925 that the Supreme Court held that the fourteenth amendment protection of life, liberty and property against state attacks included attacks on the rights set forth in the first amendment.³⁴⁶

The Supreme Court did not declare that the fourteenth amendment equal protection clause, won after the Civil War, was applicable to the federal government until *Bolling v. Sharpe*,³⁴⁷ the school desegregation case companion to *Brown v. Board of Education*,³⁴⁸ decided in 1954.

Fifty years turns out to be a short time in the history of enforcement of a new law that protects people's rights in the United States.

344. *John R. Thompson Co.*, 346 U.S. at 117.

345. *Moore v. Dempsey*, 261 U.S. 86 (1923).

346. *Gitlow v. New York*, 268 U.S. 652 (1925).

347. 347 U.S. 497 (1954).

348. 347 U.S. 483 (1954).

VII. HOW BEST TO ENFORCE THIS LAW FOR WOMEN IN THE 1990s

A. BY A POPULAR MOVEMENT FOR EQUAL RIGHTS

1. *Confronting Sexism*

If the movements for equal rights for women decide to embrace article 55c, they will develop new techniques for enforcement of the statutory protections now written into U.S. laws. They will demand their broad interpretation based on article 55c. Organizations and their lawyers will also demand that guarantees of equality be integrated into *all* legislation and regulations at all levels, seeking basic changes in the way government and businesses operate.

At the federal level, a movement for equal rights must openly confront the low priority the U.S. government has so far placed on promoting universal observance of human rights for women without distinction. A quick way to quantify this lack of concern is simply to count the number of laws passed on this subject compared to the number passed on other subjects. Congress did not begin passing statutes concerning women until long after it had begun passing statutes on other subjects, which accounts for some of the disparity even 70 years after passage of the nineteenth (suffrage) amendment. Nonetheless, the figures are startling. The latest general index of the United States Code includes³⁴⁹ 1.3 columns of items on Women and another 1.6 columns on related subjects.³⁵⁰ On Beef Research and Information, it includes 8.5 columns of items,³⁵¹ on Beer, 4.5 columns, and on Tobacco, 11 columns.³⁵²

349. In the General Index, U.S. Code Service (1989).

350. *Id.* Related subjects include Women, Infants and Children Program; Women's Army Auxiliary Corps; Women's Educational Equity; etc.

351. The reason to compare statutes on Women with statutes on Beef is historical. My memory is that this was one of the arguments made by the militant suffragettes of the 1910s when they demanded creation of a Women's Bureau to collect statistics and propose some remedial legislation on women's issues. They compared the studies and work of the Department of Agriculture on cattle with the lack of studies or remedial legislation on women's rights. Ultimately the needs of women workers in munitions plants led to the Women in Industry Service of the Department of Labor in 1918 and to the Women's Bureau in 1920. See ELEANOR FLEXNER, *supra* note 271, at 288.

352. This is further evidence of the regulated, not free market, economy that has long existed in the United States for the protection or benefit of certain special interests. See *supra* text accompanying note 7.

A national campaign for equal rights for women will call on the active participation of women in Congress, in administrative agencies, and on the bench to address these shameful statistics.

It will have to address the fear that it will cost too much money to pay women what their work is really worth and to treat them equally in all respects. Studies will show that no one need suffer from enforcing this law. The profits of the military/industrial complex will go down when they start paying equally, but they will not go broke on this account. And enforcement will release massive energies of women when they do not have to worry about earning enough to pay for proper child care and they can find high quality caretakers for children, seniors, and sick and disabled family members. It will change the character of the workplace when women are not constantly furious as they compare their pay checks with their male friends' and relations'.

The national campaign will lead to a study of the problems of conversion, in this case, from underpayment of women to proper payment. This problem is similar to, although easier to solve, than the larger problem facing society in the 1990s: the need to convert from massive over-spending for military weaponry and personnel to massive spending for education, the environment and the infrastructure, medical care, and for civilian goods and social services. As marginal, small employers first had to face the problem of obeying the Fair Labor Standards Act (FLSA) in the New Deal, and the Equal Pay Act and Title VII of the Civil Rights Act passed as a result of the civil rights movement, so the movement for equal rights for women must assist small employers to survive this new step forward for all of society. Such assistance falls under the "to promote" language in article 55c.³⁵³

2. *Rights for Women and Other Groups*

The section of article 55c that protects the rights of women is only part of that article; 55c also protects the rights of racial, national, and religious groups. In most situations, work for the

353. The policy would be the same as that set forth in the FLSA: "to correct and as rapidly as practicable to eliminate the conditions . . . referred to . . . *without substantially curtailing employment or earning power.*" 29 U.S.C. § 202(b) (1988) (emphasis added).

rights of women will be strengthened by work for the rights of these three other groups. While the specific violations of rights for each group are different, each group has a greater chance for success if it unites with the other oppressed groups for enforcement of article 55c.

Competition by women for low-paying jobs or for advancement over people of color and immigrants will not lead to equality for anyone. The old slogans apply today: "An Injury to One Is an Injury to All!" "In Union There Is Strength!" "Black and White: Unite and Fight!" "Solidarity Forever!"

3. *Equal Rights and Other Rights*

Article 55c is part of the larger article 55, which provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

(c) universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

In many situations, it will strengthen the demand for enforcement of article 55c as to women to also demand enforcement of articles 55a and b. As members of the Council of Europe pointed out, "poverty exists because of those who are not poor. . . . The

drive to eradicate poverty is very largely a matter for those who are not poor."³⁵⁴

An equal rights campaign will begin to spread the word that enforcement of this broad human rights law will save society enormous sums of money in welfare payments, for medical care due to malnutrition, for prisons and drug enforcement programs. Preventive medicine and crime prevention have always been less expensive than hospitalization and incarceration.³⁵⁵ Enforcing human rights law will save us from even larger measures of human suffering and degradation. It will make possible proper payment for some of the most important work done in any society: the care, education, and training of the next generation.

One way and another, we are being led to understand that life is a seamless web; that political, privacy and economic rights of women can only be enforced when economic and environmental, civil rights, and peace concerns of all people are also addressed.³⁵⁶

4. *Cultural Rights*

The language of affirmative action in the U.S. has so far been restricted to some economic, educational and social rights. The concept of "cultural rights" embedded in the U.N. Charter, the Universal Declaration and the International Covenant on Economic, Social and Cultural Rights has not been explored in

354. COUNCIL OF EUROPE: EXCHANGE OF VIEWS ON POVERTY IN EUROPE, 30 SEPTEMBER - 1 OCTOBER 1986; "Conclusions as presented by the Special Rapporteur, Mr. G. Sarpelton. EVP (86)5," quoted in Asbjørn Eide, *Realization of Social and Economic Rights—The Minimum Threshold Approach*, INT'L COMM'N JURISTS (no. 43), Dec. 1989, at 40, 46 n.17.

355. See a study of the costs of an increase of one percentage point in unemployment in a community in terms of divorces, physical abuse, murders, heart attacks, mental illness, incarceration in mental hospitals and prisons, etc., in M. HARVEY BRENNER, *INFLUENCE OF THE SOCIAL ENVIRONMENT ON PSYCHOPATHOLOGY: THE HISTORIC PERSPECTIVE* (Division of Operations Research and Department of Behavioral Sciences, Johns Hopkins University), reprinted in *The Social Costs of Unemployment: Hearing Before the Joint Economic Comm.*, 96th Cong., 1st Sess. 8-24 (1979).

356. See Asbjørn Eide, *supra* note 354, for an international approach to enforcement of economic rights. For a realistic, and maximum, approach, see Philip Alston, *supra* note 12. Professor Alston pointed out that Dutch courts have applied the provisions of the Covenants in domestic cases and "the Dutch, Greek, Portuguese, Spanish, Swedish and Swiss Constitutions all explicitly recognize at least some human and social rights; and the Scandinavians have consistently accorded prominence to those rights in the context of their domestic political agendas" (footnotes omitted), *id.* at 375-76.

the United States since World War II. However, during the Great Depression and New Deal, the federal government funded many cultural projects throughout the country and made it possible for artists from many disciplines to survive and create before they became famous enough to earn their livings from selling their work. The National Endowment for the Arts carries on this tradition today in a more pallid and underfunded form.³⁵⁷

The article 55 requirement that the U.S. government “promote” cultural rights as one of the human rights opens new vistas beyond the scope of this article but will hopefully be the subject of other articles in the near future. Basic changes in many of the images of women are needed in order to gain universal observance of their human rights. Enforcement of this law should lead to funding projects to encourage historically accurate, positive images of women in media portrayals of U.S. history. Women’s History Month in March provides platforms for constructive and creative projects in schools and colleges at all educational levels, and in the media. The March month can build on the older and prestigious February Black/African American History Month, which also includes many positive images of women. Such attention to culture is particularly appropriate as many developing nations are demanding implementation of the New International Information and Communication Order (NIICO), which seeks to end the Western media monopolists’ domination of the gathering and dissemination of

357. On the Federal Arts Projects, *see, e.g.*, THE WPA GUIDE TO CALIFORNIA: THE FEDERAL WRITERS’ PROJECT GUIDE TO 1930S CALIFORNIA at xvi-xvii (1939 & Pantheon ed. 1984) (introduction by Gwendolyn Wright); H.F. DAVIS, ARENA (1940) on the Arts/Film Projects.

On the underfunding of projects by and about women and minorities, *see* the 1990 study by Women and Foundations/Corporate Philanthropy finding that “[w]omen and minorities are largely absent from the boardrooms of the nation’s wealthiest foundations,” reported in Nanette Asimov, *White Males Dominate Foundation Boards*, San Francisco Chron., June 25, 1990, at A5.

For an inspiring demand by high school students for a required course on ethnic studies, *see* STUDENTS TOGETHER OPPOSING PREJUDICE . . . S.T.O.P., ETHNIC STUDIES REQUIREMENT FOR THE BERKELEY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION (on file at Meiklejohn Institute, Berkeley), prepared by an organization of Berkeley High School students and presented to the school board May 7, 1990.

news. These new U.N. standards include concern for accurate portrayals of women on television.³⁵⁸

B. ENFORCING EQUAL RIGHTS AS A STANDARD

The most basic message lawyers need to convey to legislative bodies, administrative agencies, courts and corporations at all levels is that article 55c has become a standard for every action of government and industry. This is not a new standard, and was not even a new standard when it was written down in 1945, but was as old as the idea of equality.

By now, equality for women has become part of the common law of nations binding on all states, the *jus cogens*. It has received less attention than torture and terrorism for the same reasons that the issue of women's rights has seldom been a high priority in any society since the days of the matriarchies.³⁵⁹ But women increasingly are taking their places in the visible, productive and commercial mainstream of this country while continuing to bear its children. This requires society to address the many and complex rights of women.

358. For the NIICO documents, see KAARLE NORDENSTRENG, ENRIQUE GONZALES MARNET, WOLFGANG KLEINWÄCHTER, *NEW INTERNATIONAL INFORMATION AND COMMUNICATION ORDER: SOURCE BOOK 95-374* (International Organization of Journalists, Prague 1986). See also special issue on *The Law, Peace, and the Mass Media*, 46 *LAW GUILD PRAC.* 1-32 (1989) and material by the Union for Democratic Communication and the Lawyers Guild Subcommittee on Media Monopoly, Disinformation and the First Amendment (on file at Meiklejohn Institute, Berkeley).

For a Marxist perspective on the relationship between the recent attacks on the dignity and equality of women and attacks on the National Endowment for the Arts, see Toby Terrar, *A Justification Based on Women's Press Freedom and the New World Information Order for Defending the National Endowment for the Arts but Not Pornography*, 47 *LAW GUILD PRAC.* 82 (1990).

359. FREDERICK ENGELS, *ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 42-50 (International Publishers ed. 1967). One stumbling block to achievement of women's rights has been the eternal teaching that it is sinful for a woman not to do the dishes promptly. For the contrary view, see Ann Fagan Ginger, *On Doing the Dishes*, including this stanza:

If you come to believe that it is sinful not to write a
book—
As sinful as not to write an article or answer a letter
Or wash the dishes pronto,
The choice each day is whether to tidy up
The room you call your kitchen
Or the room you call your office
Or the room you call your mind.

Poem on file at Meiklejohn Institute, Berkeley.

C. THROUGH LEGISLATIVE WORK

1. *At the National Level*

The Rehnquist Supreme Court has made it clear that it will not enunciate a general rule of law on women's rights similar to the liberating "separate is not equal" rule of *Brown v. Board of Education*.³⁶⁰ It will not even protect the right of each woman to privacy in determining whether to remain pregnant, the right to knowledge about methods of birth control, and the right to funded medical care for an abortion when without funds. In *DeShaney v. Winnebago County Department of Social Services*, the majority reiterated holdings that the fifth and fourteenth amendments' due process clauses "generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."³⁶¹

The Rehnquist Court message has sent people to work on the right to choice in the legislative arena and to the electoral arena. Candidates for many offices are being asked to express their views on these issues.

This kind of electoral and legislative work makes it appropriate to add women's human rights demands to the agenda. At the national level, congressional and senatorial aides can be reminded to have their Congressmembers and Senators insert the words "without distinction as to sex" in every regulatory bill where it is appropriate. They can be encouraged particularly to include the words "to promote human rights for all without distinction as to sex" in many budget items. Every Senator can be asked to follow the successful ratification of the Genocide Treaty³⁶² (after decades of education by Wisconsin Senator William Proxmire and others) and the specific implementation of that treaty (in the Genocide Treaty Implementation Act of

360. 347 U.S. 483 (1954).

361. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1003 (1989).

362. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force Jan. 22, 1951) (in force for U.S. Feb. 23, 1989).

1988)³⁶³ with support for ratification of the most important Covenants protecting the rights of women.³⁶⁴

Active, continuous efforts by Congresswomen can cause equal rights for women to permeate every aspect of congressional work. Active, continuous networking with the Congressional Black Caucus can move this work forward. The Caucus has proved its effectiveness on many occasions, most recently in its work on anti-apartheid legislation. One of its members, the first labor union official to be elected to Congress, Charles Hayes (Democrat, Illinois), is the author of H.R. 3077 to promote respect for human rights and freedoms through teaching and education.³⁶⁵ This bill is a natural introductory step to all of the work suggested here to make article 55c an integral part of the letter and spirit of our law.

It is appropriate to convince Congress in the 1990s that the security and well-being of the people of the United States depend on actions *within this country* as well as abroad. This should lead to a finding that only needs to add nine domestic

363. 18 U.S.C. §§ 1091-1093 (1988).

364. The United States President has signed but the Senate has not ratified three of the basic human rights covenants: the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); and the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979), discussed *supra* in text accompanying notes 201-03.

The U.S. President must also be convinced to sign and the Senate must be convinced to ratify the Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) 59, U.N. Doc. A/6316 (1967); the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (1966), and the Convention on the Rights of the Child, 28 I.L.M. 1448 (1989) (adopted Nov. 20, 1989, by the General Assembly).

See National Lawyers Guild Resolution 10-12a-90 to the Conference of Delegates of the State Bar of California supporting U.S. ratification of the International Covenant on Civil and Political Rights, 1990 (submitted by the author), rejected by the Executive Committee of the Conference as outside the purview of the Conference under the restrictive decision in *Keller v. State Bar of Cal.*, 110 S. Ct. 2228, 2236-38 (1990) (State Bar may not use mandatory fees for non-germane activities that have "political or ideological coloration" at the "extreme ends of the spectrum," e.g., "to endorse or advance a . . . nuclear weapons freeze initiative," *id.* at 2237). All materials on file at Meiklejohn Institute, Berkeley.

365. H.R. 3077, 101st Cong., 1st Sess., introduced Aug. 2, 1989, referred to the Committee on Education and Labor.

words to the finding Congress made in the Foreign Assistance Act:

that fundamental political, economic, and technological changes have resulted in the interdependence of men and women and of nations. The Congress declares that the individual liberties, economic prosperity, and security of the people of the United States can best be sustained and enhanced in a nation and in a community of nations which respect individual civil and economic rights and freedoms.³⁶⁶

2. *At the Local and State Levels*

In order to achieve equal rights for women in this country, local campaigns must accompany (or precede) national work. Great progress for peace education has resulted from following the slogan: "Think Globally, Act Locally." It has led to campaigns for Nuclear Free Zones, which are multiplying in the United States and around the world.³⁶⁷ This is a propitious moment for campaigns for cities to pass a Human Rights Ordinance based on articles 55 and 56. On July 10, 1990, the City Council of Berkeley unanimously adopted such an ordinance:

Article 1. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among the people of this city and region, based on respect for the principle of equal rights [. . .] of people, the *City of Berkeley* shall promote:

366. 22 U.S.C. § 2151(a) (1988) (emphasized words added); see *supra* text accompanying note 108. Another example of the United States taking better care of how it spends its money abroad than at home is the failure to fund birth control studies in this country while showing sensitivity to this problem abroad in 22 U.S.C. § 2151b(a) (1988); see *supra* text accompanying note 119. Carl Djerassi, a Stanford chemist who helped develop the first Pill, observed, "The U.S. is the only country other than Iran in which the birth-control clock has been set backward," *U.S. Lags in Birth Control Studies*, San Francisco Chron., Mar. 9, 1990, at B6.

367. For up-to-date information, see forms initiated by the City of Berkeley, California, Commission on Peace and Justice to avoid buying from and investing in institutions engaged in nuclear weapons work or in South Africa, on file at Meiklejohn Institute, Berkeley, and material by Nuclear Free America, 325 E. 25th St., Baltimore MD 21218.

a. Higher standards of living, full employment, and conditions of economic and social progress and development;

b. Solutions of *local* economic, social, health and related problems; and *regional* cultural and educational cooperation, and

c. Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 2. *The City of Berkeley* pledge[s] to take joint and separate action *in cooperation with Alameda County, Association of Bay Area Governments, the State of California and the United States Government* for the achievement of the purpose set forth in Article 1, and in cooperation with the United Nations *where appropriate*.³⁶⁸

Integration of this policy into city contract, license, permit, and budget language is now in process.

This is also a propitious moment to use the law of articles 55 and 56 in fighting against the rising tide of hate speech against women and other groups in academia. One national bar association, the National Lawyers Guild, was founded in 1937 in part because the American Bar Association would not admit Negroes to membership; in some Northern cities like Cleveland, Ohio, African American lawyers could not rent office space in the downtown area, and in Southern cities these lawyers could not use the only local law libraries. At its June 1990 convention, after hearing first-hand reports of the problems of hate speech on many campuses, and after lengthy debate on the basic issues between what has become the "traditional ACLU" position for "inaction by government," and the Lawyers Guild's "affirmative action" position, the Guild adopted a resolution finding that:

368. Berkeley, Cal., Ordinance 5985 (July 10, 1990). Words in italics modify the words in articles 55 and 56 for city jurisdictions.

In the interval between thinking of this idea while writing the first draft of this article and cite checking on the third draft, I made this proposal to my fellow Commissioners on Peace and Justice, who proposed it to the City Council of Berkeley, which adopted it unanimously.

the principle of non-discrimination is universally recognized, for example in the U.S. Constitution, and the principles of the promotion of human rights are part of U.S. law and treaty law in the Civil Rights Laws, the United Nations Charter, the Genocide Convention, and the Genocide Implementation Act;

and demanding that "campus administrators in conjunction with faculty, staff, and students" take a series of affirmative steps not previously demanded.³⁶⁹

D. THROUGH STATUTORY CONSTRUCTION

As more lawyers start using article 55c in their work, they will select with care the cases in which to seek enforcement of this law in order to obtain good precedents at best, footnote mention at second best, and to avoid bad precedents at worst. The following suggestions may prove helpful in this effort.

369. See THE NATIONAL LAWYERS GUILD: FROM ROOSEVELT THROUGH REAGAN, *supra* note 273, at 5.

The steps in the resolution are: (1) "adopt measures consistent with constitutional principles to eliminate acts and messages of hate within academia"; (2) "discharge their affirmative obligations to minimize and eliminate the hostile environment caused by such hate speech, including measures that ensure student and faculty diversity" and "serious study" of group exclusion from society; and (3) develop "a model policy" incorporating these principles and determining "when it would be proper . . . to impose discipline on those who propagate such hate messages," all "consistent with constitutional principles"

with particular attention to those cases of intentional verbal or non-physical assault directed at members of historically subordinated and victimized groups, those based on race, gender, alienage, ethnicity, religion, sexual orientation, and physical and mental disability.

The full text of the resolution is in 14 GUILD NOTES, Sept.-Oct. 1990, at 12.

See a similar statement on file at Meiklejohn Institute: *ACLU-NC Policy Concerning Racist and Other Group-Based Harassment on College Campuses*, approved by the ACLU of Northern California Board of Directors March 8, 1990, requiring campus administrators to meet "all of the following conditions: 1. The code of conduct reaches only speech or expression that: a) is specifically intended to and does harass . . . specific individuals" on the basis of the characteristics mentioned, b) "is addressed directly to the individual," c) "creates a hostile and intimidating environment which the speaker reasonably knows . . . will seriously and directly impede the educational opportunities of the individual," and 2. "The code of conduct is enforced in a manner consistent with due process protections," etc.

Compare the forthright discussion of the real problems and alternatives in Mari J. Matsuda, *supra* note 265, with the superficial reportage in Steve France, *Hate Goes to College*, 76 A.B.A. J. 44 (1990), which ignores the relevant law on this subject made in the U.N. Charter and other treaties and conventions. *Cf. Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (University code of conduct to suppress speech offensive to minorities held unconstitutionally overbroad).

1. "To Promote"

"To promote" is the language of the preamble to the United States Constitution, written at the uplifting moment when a new nation, conceived in liberty, decided what must be included in its basic law. It was agreed that one purpose of government to be announced in the Constitution was "to . . . promote the general Welfare" Today, to "promote . . . observance of human rights . . . for all" is the only way to promote the general welfare of a nation more than half of whose residents are women.³⁷⁰

370. For the view that *white men* need affirmative action to succeed in achieving equality for women and people of all racial and religious groups *because* white men alone cannot prevent nuclear war or nuclear accidents, cannot assure peace or solve the severe economic, social, environmental, cultural and political problems of the United States in this epoch, see Ann Fagan Ginger, *Who Needs Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 265, 270-75 (1979). This 1979 article was dubbed by its editors "A Personal Analysis" because I insisted on using personal experiences (in raising my children and becoming a charity patient due to the cold war in academia) to illustrate or prove a point, as famous men traditionally have described how they came to a new idea by talking with justices, professors and other famous men. Now I am beguiled by African American, Japanese American, Latino, and women scholars who are following the same approach but have given it a name: "outsider's jurisprudence," which makes it acceptable, or more acceptable, in scholarly circles:

There is an outsider's jurisprudence growing and thriving alongside mainstream jurisprudence in American law schools. The new feminist jurisprudence is a lively example A related, and less-celebrated, outsider jurisprudence is that belonging to people of color . . . [characterized by] a methodology grounded in the particulars of their social reality and experience . . . consciously both historical and revisionist, From the fear and namelessness of the slave, from the broken treaties of the indigenous Americans, the desire to know history from the bottom has forced these scholars to sources often ignored: journals, poems, oral histories, and stories from their own experiences of life in a hierarchically arranged world The description is realist, [accepting] the standard teaching of street wisdom: law is essentially political.

Mari J. Matsuda, *supra* note 265, at 2323-24 (footnotes deleted) (including important writings by Professors Richard Delgado and Derrick Bell).

Without categorizing what I was doing, I had followed the same approach of combining "research" and "scholarship" with "personal experiences" in an article entitled *Due Process in Practice*, subtitled *Or Whatever's Fair*, a phrase I picked up from my sons growing up in Berkeley in the 1960s, 25 HASTINGS L.J. 897 (1974).

In my article for the first *Women's Law Forum*, I said, "I am beginning to try to cite oral history, since women, for example, have only been literate for a century (along with many working class men, blacks and immigrants). Although they have been wise for centuries, women have seldom written down their wise thoughts and sayings." Ann Fagan Ginger, *An Agenda for Women Lawyers: Pandora's Box*, 8 GOLDEN GATE U.L. REV. 387, 388 n.1 (1979).

Clearly if women are ever to make their unique contribution to legal philosophy, practice, and the attainment of peace and justice, they will have to be permitted—nay,

“To promote” has been used repeatedly in social legislation in the United States, including the many statutes cited earlier.³⁷¹ It is the language of affirmative action, which has been upheld repeatedly.

2. “*Universal Observance Of*”

As a first step toward enforcement of this equal rights for women law, lawyers may start referring to the more specific language of article 55c in their cases, demanding “universal . . . *observance of* human rights . . . for all,” with appropriate citations to the definition of “human rights.” It may be wise temporarily to underplay “universal *respect for*” these rights because this may be considered less precise (legalistic) language.

As judges become accustomed to enforcing 55c in their interpretations of other statutes and as a basic part of U.S. common law, it will be appropriate to demand *universal respect for*, as well as *observance of*, these rights. Respect is the goal and a natural outcome of the observance of human rights for all.

Women lawyers, and men concerned about their rights, can appeal directly to women judges and men judges concerned about women’s rights to use article 55c as a standard wherever it applies.

encouraged—to draw openly on their unique personal experiences as mothers, daughters, wives, sisters, partners, and as workers. If we must fit our creative thoughts into existing molds, made by men, our unique contribution cannot emerge. (For a parallel view, see interview with poet Larisa Vasilyeva, founder of the Soviet Women Writers Federation, by Arladna Nikolenko, *Feminism in Creative Writing?*, SOVIET LIFE, July 1990, at 27: There are “four aspects of human life: morals, ecology, relations among ethnic groups, and economics. We’ll never see a better society until feminine principles gain a firm footing in these four spheres.”)

371. See *supra* text accompanying notes 301-305, 309, 313, 315.

One example of outstanding efforts at the state level to promote the purposes set forth in article 55c is a leaflet published by the California Department of Fair Employment and Housing and the Fair Employment and Housing Commission, YOUR RIGHT TO FREEDOM FROM VIOLENCE (Feb. 1989), listing and describing all laws forbidding “threats, verbal or written, physical assault or attempted assault, graffiti, and vandalism or property damage.”

E. THROUGH COOPERATION WITH THE UNITED NATIONS

This discussion has focused on enforcement of U.N. Charter article 55c and has mentioned the related enforcement of articles 55a and 55b. The structure of the Charter, and of the United Nations, also includes cooperation by individual nations with the United Nations, as set forth in article 56. This requires not only joint work, but reporting of national work.

In addition to the work that can be done by U.S. women lawyers in the United States on women's rights, there are opportunities for U.S. women lawyers to work in the United Nations on women's rights, both the rights of women of other countries and, often indirectly, the rights of women of the United States. Sandra Coliver has written an insightful article on how to better U.N. machinery on women's rights,³⁷² concluding that United Nations actions to promote women's rights expanded markedly during the 1980s.

The Commission on the Status of Women, a functional commission of the Economic and Social Council and the chief intergovernmental body charged with monitoring and promoting women's rights, and CEDAW, the Committee on the Elimination of Discrimination Against Women, which consists of twenty-three experts elected for four-year terms, suffer from the same problem. As Coliver explains, that is the failure of powerful countries and countries where some of the worst violations are being committed to ratify the Convention on the Elimination of All Forms of Discrimination Against Women, adopted in 1979 and now ratified by ninety-seven nations.

Coliver says CEDAW

has evidenced promise of being an assertive promoter of women's rights. Nearly 60 percent of the 159 countries that are members of the U.N. (including such population giants as China, the USSR, and Indonesia) have become parties to the

372. Sandra Coliver, *United Nations Machineries on Women's Rights: How Might They Better Help Women Whose Rights Are Being Violated?*, in *NEW DIRECTIONS IN HUMAN RIGHTS* 26-49 (E. Lutz, Hans Hannum, Kathryn Burke eds. 1989). See also Heide Schutz, *Report to the Peace Education Commission of IPRA on the 33rd Session of the Commission on the Status of Women Mar. 29-Apr. 7, 1989*, 28 *INT'L PEACE RES. NEWSL.* 38 (1990).

Women's Convention, and the number of parties continues to grow Though more than a third of the Convention's 94 parties currently are delinquent in meeting their reporting obligations, several have displayed a responsiveness to CEDAW's scrutiny. [But ratification] by more countries, especially by the United States and India, would considerably strengthen CEDAW's influence as well as the influence and credibility of those governments in advocating compliance with human rights standards³⁷³

The International Labor Organization has also adopted four conventions dealing with specific rights of women, as well as nine conventions containing provisions relating to the status of women. One of the first type is ILO Convention 89 concerning Night Work of Women Employed in Industry (revised 1948); an example from the second type is ILO Convention 158 concerning Termination of Employment at the Initiative of the Employer (1982). The United Nations Educational, Scientific and Cultural Organization (UNESCO), another Specialized Agency, adopted the Convention against Discrimination in Education in 1960, to promote equality of opportunity and treatment for men and women in education.³⁷⁴

It is helpful to begin (or to continue) keeping up with the activities of the United Nations in general, as well as their specific actions on human rights.³⁷⁵

CONCLUSION

The first amendment was a force in the United States long before the courts began to mention or enforce it. People who read the first amendment at an early age became members and

373. Sandra Coliver, *supra* note 372, at 26, 45.

374. See Robert W. Schaaf, *International Documentation: International Conventions on the Status of Women*, 17 INT'L J. LEGAL INFO. 261, 262 (1989). On the movement for the United States to rejoin UNESCO, see Americans for the Universality of UNESCO, P.O. Box 18418, Asheville NC 28814, and UNESCO Association/USA, 5815 Lawton Ave., Oakland CA 94618.

375. In addition to U.N. publications, see, e.g., *Human Rights and International Law*, 1 WORLDVIEW DIG., Feb. 1989, published by the International Center for Peace and Justice in San Francisco, California.

leaders of movements to develop and expand liberty. The Declaration of Independence was a force in the United States despite the fact that the courts did not mention or enforce it. Generations of workers held in chattel slavery learned the language of the Declaration at an early age and became members and leaders of the abolitionist movement. They appealed to their fellow Americans to make real their commitment to the truth in the Declaration that "all men are created equal" and have "certain unalienable Rights."

Today, with inspired work by women of the United States and the men who support their rights, article 55c can join the language of the first amendment and the Declaration of Independence to become a major force in the movements for equality in the United States. This can be true long before the courts begin to mention and enforce article 55c.

People who read article 55 at an early age can become members and leaders of such movements. They will hold onto the U.N. Charter and draw sustenance from its words and its history as some of us clutched the first amendment during the cold war; as we held onto the fourteenth amendment before, during and since the civil rights movement; as we have clung to the promise of equality surrounding the nineteenth (suffrage) amendment since 1920.

The campaign for enforcement of article 55c can help stem the rise in hate speech. It can clear the path for equal civil, political, economic, social and cultural rights for women, and equal rights for racial, national and religious minorities. This will benefit society as a whole and lead to a more peaceful world.

We shall overcome.

We shall be free.

We shall be equal.

We shall survive.³⁷⁶

376. I began this article in the hopeful fall of 1989 as peace broke out between the U.S. and the U.S.S.R., as the Soviet Union affirmed its commitment to the U.N., as

democratic rights emerged in many Eastern European countries, and as the peace dividend became a real possibility. I finally finished it as the media reported on August 10, 1990, that President Bush had ordered 50,000 to 250,000 U.S. troops to defend Saudi Arabia from possible invasion by Iraq, following the latter's invasion of Kuwait.

The prompt, unanimous action of the U.N. Security Council in condemning the invasion and calling for economic sanctions will clearly strengthen the U.N. and the ability to enforce the U.N. Charter and international standards. At the same time, the situation contains an enormous contradiction. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1989 (Feb. 1990) describes gross violations of internationally-recognized human rights in Saudi Arabia and Kuwait, as well as in Iraq, with particular attention to rejection of the very concept of equality for women. *See id.* on Saudi Arabia at 1549-60, Kuwait at 1455-67, Iraq at 1411-22. *See also Blood, Oil and the Law*, MEIKLEJOHN PEACENET BULL. No. 6, Aug. 10, 1990 (available from Meiklejohn Institute, Berkeley).