

University of Pennsylvania Carey Law School

Penn Carey Law: Legal Scholarship Repository

Articles

Faculty Works

12-1-2009

Why Patients Sue Doctors: The Japanese Experience

Eric Feldman

University of Pennsylvania Carey Law School, efeldman@law.upenn.edu

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_articles

Recommended Citation

37 J. L. Med. & Ethics 792 (2009)

This Article is brought to you for free and open access by the Faculty Works at Penn Carey Law: Legal Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of Penn Carey Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

REFLECTIONS ON *MOBILIZING FOR HUMAN RIGHTS*

BETH A. SIMMONS*

I. INTRODUCTION 729

II. *MOBILIZING FOR HUMAN RIGHTS* – GOALS AND ACCOMPLISHMENTS 730

III. ENDURING PUZZLES: WHY RATIFY INTERNATIONAL LAW? 737

 A. *Why do states ratify?* 737

 B. *What is unique about International Law?* 744

IV. CONCLUSION: *MOBILIZING FOR HUMAN RIGHTS* IN PERSPECTIVE 748

I. INTRODUCTION

NYU Law’s symposium “From Rights to Reality: *Mobilizing for Human Rights* and Its Intersection with International Law” has been a valuable opportunity to reflect on the role that international law has played in the furtherance of human rights around the world over the past six decades. It has also been a stimulating forum to assess the state of our knowledge, experience, and research relating to the development of human rights law and its application in various settings around the world. The scholars and practitioners participating in this symposium have each made remarkable contributions to the development, interpretation, and application of human rights law internationally, and I am very grateful that they have taken the time to engage the arguments and evidence in *Mobilizing for Human Rights*.¹ The editors of the *Journal of International Law and Politics* are to be congratulated on a stimulating symposium and a valuable volume.

In this concluding article, I will describe what *Mobilizing for Human Rights* set out to do, what I think it did well, and what it did not, in the end, accomplish. There is much to mention on both scores. While the book was one of the first comprehensive efforts to theorize and test empirically the ef-

* Clarence Dillon Professor of International Affairs at Harvard University

1. BETH A SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

fects of international legal agreements on a broad range of rights indicators, the research necessarily fails to speak to some issues, raises additional questions, and opens up new avenues for empirical research. I will also engage the observations of my colleagues in the symposium, whose supportive as well as skeptical views I very much appreciate. I hope to make clearer how the research potentially connects with strategies for rights improvements. I conclude on a very humble note: the experience represented by the symposium participants far outstrips the scholarly findings of the book, but I am hopeful that discussion of the kind we have had leads both to better scholarship and broadly informed practice.

II. MOBILIZING FOR HUMAN RIGHTS – GOALS AND ACCOMPLISHMENTS

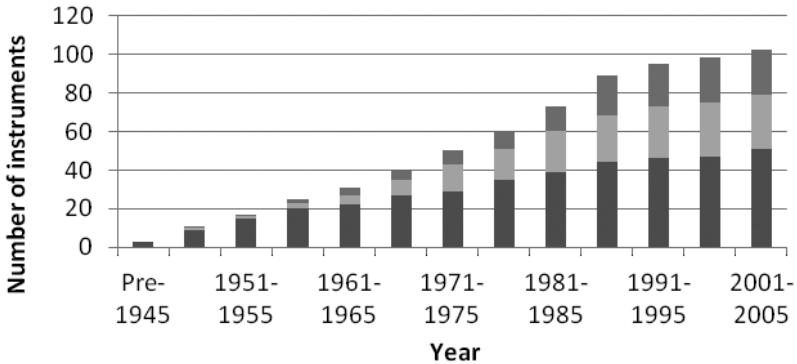
The millennium seemed an appropriate time for stock-taking with respect to the international law of human rights. The Universal Declaration of Human Rights had passed its half-century anniversary. The two most sweeping human rights treaties in history – the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights – were approaching theirs. The density of binding treaties, declarations, and a growing body of law representing best practices relating to human rights had been on the rise for decades, as Figure 1 indicates.

But to what end? Did this development really herald an age of rights with real improvements that individuals and groups could realize, or did it signal the development of legal structures that served only to distract from the problems of humankind?² Was this another instance in which international law had simply over-promised, raised hopes, but failed to deliver? Did it allow states to carry on as they always had – trampling rights wherever necessary to retain their power and prerogative?³

2. See DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 24–35 (2004) (arguing that the human rights movement has been counterproductive in achieving its goals).

3. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 107–34 (2005) (arguing that human rights law has little effect on state compliance with human rights norms).

FIGURE 1: INTERNATIONAL HUMAN RIGHTS INSTRUMENTS IN FORCE
 ■ Treaty ■ Declaration ■ Other



Source: United Nations, Office of the High Commissioner for Human Rights, <http://www2.ohchr.org/english/law/index.htm>. “Other” includes a wide range of nonbinding instruments, such as proclamations, understandings, principles, safeguards, guidelines, recommendations and codes of conduct.

When I began research for *Mobilizing for Human Rights* in 2001, there was almost no quantitative empirical research on human rights practices around the world. In political science and international relations, there was a burgeoning qualitative research program on the spread of human rights norms internationally.⁴ Interestingly, however, *legal* norms were rarely considered explicitly in the human rights social science literature of the 1990s and 2000s. Legal scholars had long been concerned with the impact of law on practice, and their writing reflects both their research as well as their remarkable range of experience.⁵ It was hard to know, however, whether many of their insights could be generalized in a rigorous way.

4. See generally DAVID P. FORSYTHE, *THE INTERNATIONALIZATION OF HUMAN RIGHTS* (1991); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006); *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse et al. eds., 1999); Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47 INT'L ORG. 411 (1993).

5. See generally *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* (Philip Alston & James Crawford eds., 2000); LOUIS HENKIN, *THE AGE OF RIGHTS* (1990); STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG*

But what was largely missing was a systematic empirical study about the effects of international law on a broad range of human rights practices. New tools and resources were becoming available to tackle this question with fresh evidence and methods. The United Nations had just started posting on their website the status of human rights treaty ratifications, reservations, understandings, and declarations (RUDs).⁶ Systematic, standardized accounts of human rights practices for nearly all states around the world were increasingly available in a very convenient format, from Amnesty International⁷ and the United States State Department.⁸ Even Freedom House, which had devised seat-of-the-pants assessment of civil liberties and political rights since the 1970s, was starting to justify and systematize their “civil liberties” and “political rights” ratings, allowing for a look under the hood at how they were arriving at their very influential judgments.⁹ The United Nations was beginning to collect interesting and usable data on such things as women’s access to education, employment and certain kinds of health care.¹⁰

Scholars and practitioners alike were hungry for a way to summarize trends over time and across a large number of cases. Several of the former launched major efforts to code (i.e., assign numbers to) the growing trove of descriptive and quantitative material that had been collated by these sources. The possibilities for systematic statistical analyses of international human rights were most definitely on the rise. The time

LEGACY(2001); Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J.1397 (1999).

6. Up to date information on the status of human rights treaty ratification can be found at *Ch. IV: Human Rights*, U.N. TREATY COLLECTION, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last visited Jan. 26, 2012).

7. *Human Rights by Country*, AMNESTY INT’L, <http://www.amnesty.org/en/human-rights/human-rights-by-country>(last visited Jan. 26, 2012).

8. *Human Rights Reports*, U.S. DEP’T OF STATE, <http://www.state.gov/g/drl/rls/hrrpt/> (last visited Feb. 1, 2012).

9. For access to historical systematized data, see *Freedom in the World Comparative and Historical Data*, FREEDOM HOUSE, <http://www.freedomhouse.org/template.cfm?page=439> (last visited Feb. 8, 2012).

10. For the latest version of such statistics, see *Statistics and Information on Men and Women*, U.N. STATISTICS DIV.,<http://unstats.un.org/unsd/demo-graphic/products/indwm/> (last visited Feb. 8, 2012).

seemed right for a study that drew on and contributed to these resources to piece together a picture of how international law has influenced practice.

Mobilizing for Human Rights was hardly, however, the first effort to analyze quantitatively the relationship between the ratification of human rights treaties and actual human rights outcomes. One of the first efforts to link an international treaty with outcomes using quantitative methods was Linda Camp-Keith's research on the International Covenant on Civil and Political Rights.¹¹ Oona Hathaway's path-breaking research and especially her careful creation of indicators for torture and for fair trials broke new ground and attracted much dismayed attention from the scholarly legal profession.¹² Neither of these important works came to the conclusion that international human rights treaties have had a positive impact on the countries that have ratified them.

Perhaps the problem was an underdeveloped theory of the *conditions* under which we might expect human rights treaties to influence state behavior and other human rights outcomes. It seemed to me that internationally, realists were correct when they asserted that no state had a real interest in enforcing human rights within the jurisdiction of other states.¹³ However, systematic accounts were hardly the end of the theoretical possibilities. Those actors with the most at stake might very well be expected to organize, to mobilize to demand the rights contained in treaties their governments ratified under certain conditions. The actors were likely to be domestic, and they would be most likely to organize to demand their rights where there was some probability these rights might be real-

11. Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95 (1999). One of the earliest book-length research projects to use quantitative evidence linking treaty ratification with human rights outcomes was TODD LANDMAN, *PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY* (2005).

12. See Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (analyzing whether human rights treaties are effective and whether they actually change states' behavior for the better).

13. Jack Goldsmith and Eric Posner write, for example, that "nations are not generally inclined to expend military and economic resources to prevent another nation from abusing its citizens." Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 668 (2000).

ized through their action. On the one hand, in highly democratic states, citizens have the means to be heard; by definition, they live in responsive regimes. But they also have a good many rights in place, especially political rights, so they are not likely to be strongly motivated to demand additional rights. On the other hand, in autocratic regimes, human rights treaties are hugely motivating, but the chances of political action ending in success are remote; think Tiananmen Square. In short: mobilization and, hence, political demands are unlikely to be operative in either stable democracies (where there is no motive) or stable autocracies (where there is really no means to influence the regime by political or social mobilization). There are clear reasons therefore to expect human rights treaties to have varying effects in different kinds of regimes, based on the expected value of mobilization of local stakeholders.

What the book set out to do was to explore the plausibility of this claim, and to show that international human rights treaties have positive consequences, at least in fluid, transitional regimes where the future is up for grabs and there is some hope for shaping new values and institutions. So one of the book's major contributions was to examine rights impacts in different kinds of political, social, and legal settings; from democracies to autocracies, from settings characterized by strong rule of law to those without, from secular to officially religious polities. A second contribution was the explicitly comparative look at different kinds of human rights. I tried to address the effects of international treaties across a range of issue areas, from civil and political rights to torture; from women's rights to those of children.¹⁴ A third contribution was methodological. Broad correlations were established using statistical methods. But since many of the processes implied by the correlations can only be evaluated through case studies, I included detailed analyses of mobilization to stop torture in Chile¹⁵ and

14. Multiple indicators were employed for each of these areas (with the exception of torture). These included fair trials, freedom of religion, and the death penalty (civil and political rights); freedom from torture; the ratio of girls to boys in elementary schools, the ratio of women to men in public employment, and access to modern forms of reproductive health care (women's rights); the prevalence of child labor, child soldiers, and immunizations (children's rights).

15. SIMMONS, *supra* note 1, at 285–96.

Israel¹⁶ and mobilization in Japan¹⁷ and Colombia¹⁸ to address women's rights. No one indicator, no one estimation, no one story, nails the case that international law has contributed to human rights improvements on average in many parts of the world. Together, however, the evidence that ratified treaties matter for rights on the ground is pretty compelling.

"Pretty compelling" is hardly the last word, of course. There is a tremendous amount of research yet to do to fully appreciate the connections between law and outcomes. Many of the contributions to the symposium and to this volume point to fruitful ways to push the research agenda forward. Geoff Dancy and Kathryn Sikkink's contribution to the symposium and to this volume is an excellent example. Their research demonstrates quite convincingly that specific treaty commitments are associated with much more domestic human rights litigation.¹⁹ Kathryn Sikkink's and Hunjoon Kim's earlier work confirms the link between domestic human rights litigation and improved rights outcomes.²⁰ This is an example of highly productive scholarship that explores the precise range of mechanisms by which treaties can be expected to influence human rights on the ground.

Mobilizing for Human Rights was in many ways a conservative piece of research. It focused on traditional interpretations of specific treaty provisions, and looked for "obvious" effects in ratifying countries. Many of the participants in the Symposium noted that this is quite a limited test of the impact of international law on human rights. For example, Catharine MacKinnon noted that gender crime fits the book's framework, but cuts across treaties. MacKinnon suggested that the question—why commit?—could be asked of men generally in the area of gender crime. Why do men cede "sovereignty" over their women to other men? Her contribution to the symposium pushes much harder than I did to problematize

16. *Id.* at 296–304.

17. *Id.* at 237–45.

18. *Id.* at 245–53.

19. See generally Geoff Dancy & Kathryn Sikkink, *Ratification and Human Rights Prosecutions: Toward a Transnational Theory of Treaty Compliance*, 44 N.Y.U. J. INT'L L. & POL. 751, 751 (2012).

20. Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT'L STUD. Q. 939, 957 (2010).

whether men even understood upon ratification that international human law would come to address various gender crimes. More could be done, Catharine MacKinnon noted, to explore the effect of international law on perceptions of “legitimate” behavior. While the data are hard to come by and a different method would be necessary (ethnography, in the style of Sally Merry’s persuasive work²¹) this is an important way forward for understanding international law’s more dynamic effects.

Every book—even one of 450 pages, testing 118 variables, and providing 30 figures, 24 tables, and 2 appendices (with 12 more posted online²²)—makes some simplifications, and Ruti Teitel’s symposium comments point out one major one made in *Mobilizing*: the *relative* neglect of regional legal processes, institutions, and values. I did find that there were strong regional influences on the decision to ratify a treaty: the density of ratification within one country’s region exerts in many cases a strong positive influence on a government to do so.²³ I also looked at the effects of regional treaties addressing torture in Chapter 6, and found that many of the patterns associated with the UN Convention Against Torture (CAT) had (weaker) echoes at the regional level.²⁴ But Teitel, with good justification, calls for a much more thorough examination of the dynamics that operate transnationally at the regional level. She argued that transnational civil society increasingly was appealing to regional courts, after exhausting domestic possibilities. These appeals have had important legal consequences; she cited changes in Chilean and Peruvian court rulings, which depended on the earlier rulings of the Inter-American Court for Human Rights. These local cases are part of a dynamic that is *continent* wide, in Teitel’s view. Attention to rights norms involves not only “international law in domestic politics,” but also regional law and transnational actors in domestic courts. Andrew Moravcsik’s symposium comments relating to vertical enforcement in the European Union context are similar in this regard. I agree that a more complex model of interna-

21. See generally MERRY, *supra* note 4.

22. Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, WEATHERHEAD CTR.INT’L AFFAIRS (Dec. 2009), <http://www.wcfia.harvard.edu/node/4858>.

23. SIMMONS, *supra* note 1, at 90–96.

24. *Id.* at 276–80.

tional law's influence would include regional actors, courts, and processes. But I also think that regional influences will have a significant impact where domestic actors take up the message and add a significant local voice to these regional trends.

III. ENDURING PUZZLES: WHY RATIFY INTERNATIONAL LAW?

The two issues that served most to furrow the brows of our symposium participants are these. First: *why do states ratify* treaties, when, evidently, they stimulate demands for compliance? Second: *why international law?* Why not change constitutions and domestic statutes, and are these not capable of mobilizing domestic groups in the same way as international treaties?

A. *Why do states ratify?*

Mobilizing for Human Rights rejected the notion that treaty ratification was utterly meaningless. While many people have emphasized the importance of international costs, the theory developed in the book suggested that there were also potentially risks of ratifying human rights treaties at the domestic level. Local citizens, I claimed, would use these treaties under certain circumstances, to make demands on their government. The international relations literature refers to "audience costs" as the risk that a government will be punished for taking positions, making commitments or staking claims from which they subsequently back down.²⁵ These costs are a mechanism for holding governments accountable for their promises. *Mobilizing for Human Rights* develops a theory that assumes these costs may kick in when a government ratifies a human rights treaty, and concludes that such ratification is not likely to be costless.²⁶

Since the publication of the book, I have had the opportunity to do follow up research on this question of domestic audience costs. In surveys administered between 2005 and 2011 in both the United States and Colombia, I have sought to

25. See generally James D. Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs*, 41 J. CONFLICT RESOL. 68 (1997); Kenneth A. Schultz, *Looking for Audience Costs*, 45 J. CONFLICT RESOL. 32 (2001); Michael Tomz, *Domestic Audience Costs in International Relations: An Experimental Approach*, 61 INT'L ORG. 821 (2007).

26. SIMMONS, *supra* note 1, at 59–64.

determine whether there is any evidence that people hold governments accountable for their treaty commitments. I asked a sample of people I would consider well-informed opinion leaders²⁷ the following question:

There is currently a debate about whether the United States [Colombia] should tighten rules for interrogating detainees limiting psychological forms of abuse. ***These forms of abuse are outlawed by the Convention Against Torture, which the U.S. has ratified.*** Do you think the U.S. [Colombia] should follow rules limiting psychological forms of detainee abuse, even if it makes it more difficult to collect intelligence information from them? Please circle one: Yes, Possibly, No, Don't Know.²⁸

Half of each survey sample randomly received the entire question, and half received the question with the bolded italicized sentence removed. Thus, we can think of exposure to information about the fact and nature of the United States [Colombian] commitment under international law as the "treatment" in this experiment.

The results suggest that when people are aware of the existence of an international legal commitment, they hold their governments accountable to these commitments. While the answers of the Colombians appear to be a bit more tolerant of torture, in both countries the suggestion of an international legal commitment increases by between 11-13% for the United States and Colombia, respectively, the share of people who

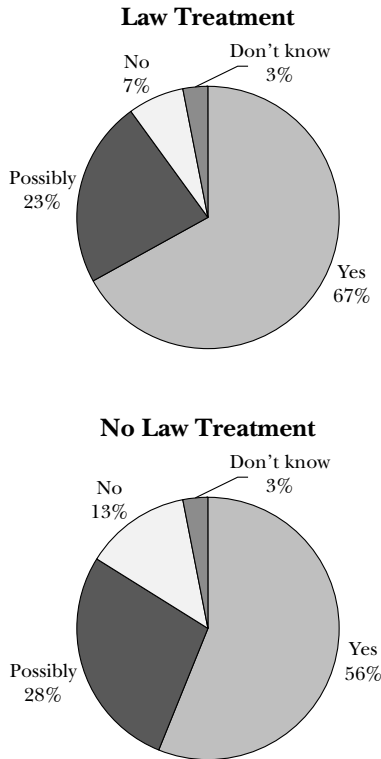
27. Surveys were administered at the University of Illinois (2005) to students and faculty; the Western International Studies Association meeting in Pasadena California (2011), at the Northeastern International Studies Association, Providence Rhode Island (2011), and the Bi-annual Conference of the Colombian International Relations Network (Redintercol), Bogotá, Colombia (2011).

28. The translation into Spanish, including some modifications to make the question more appropriate to the Colombian context, was as follows: "Existe un debate en Colombia sobre si el Estado debere formular las reglas que rigen las practicas de interrogacion de los acusodos de crimenes relacionados con el terrorismo y el narcotrafico con el fin evitar los tratoscuales o inhumanos, asicomo la tortura. ESTOS SON PROHIBIDOS POR LA CONVENCION CONTRA LA TORTURA DE LA ONU, QUE COLOMBIA HA RATIFICADO. Pregunta> Cree usted que el Estado colombiano deba aprobar medidas para limitar las practicas de interrogacion incluso si ello hace mas dificil recoger infomacion de inteligencia?"

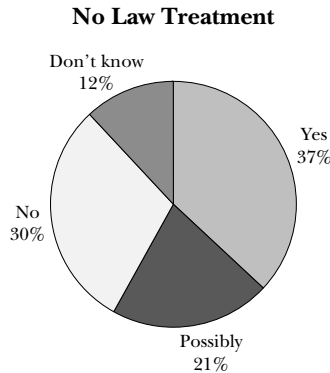
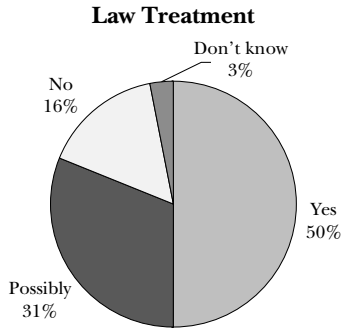
think that their country should follow torture norms, even if they help to glean useful intelligence. This suggests – of course, it does not prove – that people care about the nature of the international legal commitments their government makes. Much more could be done to explore the nature and extent of domestic audience costs related to international legal obligations.

FIGURE 2: RESPONSES TO THE TORTURE SURVEY

A. “Audience Costs” for United States Respondents:



B. “Audience Costs” for Columbian Respondents:



One of the continuing puzzles, then, is why governments ratify these agreements in the first place, especially if, as the above evidence suggests, domestic actors may hold governments accountable for their commitments? One of the most widespread assumptions – judging from passing comments in the literature – is that governments decide to ratify human rights treaties because they are offered inducements from the advanced democratic countries to do so. For example, Eric Posner has written that, “Developing states have ratified the treaties for more diverse reasons. Some developing states succumbed to pressure from western states that tied aid and other benefits (such as EU membership) to treaty ratification.”²⁹

²⁹ Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1769 (2008).

Many other scholars have made similar assertions.³⁰ Others emphasize the intangible benefits of ratifying treaties – praise from other governments for ratification, or at least a hoped-for end to shaming.³¹ Joel Trachtman’s “theory of exchange,” by which states who value improved human rights extract international legal commitments (e.g., treaty ratification) in exchange for other “valuable consideration,”³² rests entirely on the idea that ratification of human rights treaties would often not happen were it not for the willingness of other states to in some way pay off the resisters. In *Mobilizing for Human Rights*, I found evidence that most countries were sincere ratifiers or non-ratifiers; for example, democracies tended much more readily to ratify human rights agreements than did autocracies. But there are indeed some cases in which governments with short time horizons have ratified agreements with which they likely had little intention to comply. I presented some evidence that autocratic governments were more likely to ratify treaties toward the end of their hold on power than were democratic governments, consistent with a theory of appeasing a *domestic* audience for short-term political gain.³³ I also found

30. For example, Oona Hathaway refers to “expressive” benefits, that is, “rewards for positions rather than for effects” Hathaway, *supra* note 14, at 2007. She asserts, “Simply put, states join treaties like the Convention against Torture in no small part to make themselves look good. In so doing, they may hope to attract more foreign investment, aid donations, international trade, and other tangible benefits.” Oona Hathaway, *The Promise and Limits of the International Law of Torture*, in TORTURE: A COLLECTION 207 (Sanford Levinson & Alan M. Dershowitz eds., 2004). Similarly, to explain ratification of the Convention Against Torture (CAT), Darren Hawkins and Jay Goodliffe argue that “with credibility established by [CAT ratification], other states and third party actors (corporations and NGOs) reward that state through investment, trade, aid and positive political relationships.” Darren Hawkins & Jay Goodliffe, *Explaining Commitment: States and the Convention Against Torture*, 68 J. POL. 358, 361 (2006). Similar assertions are made by Bernhard Boockmann and Uta Oberdörster. Bernhard Boockmann, *The Ratification of ILO Conventions: A Hazard Rate Analysis*, 13 ECON. & POL. 281 (2001); Uta Oberdörster, *Why Ratify? Lessons from Treaty Ratification Campaigns*, 61 VAND. L. REV. 681, 681–712 (2008).

31. E.g., Darren Hawkins, *Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms*, 48 INT’L STUD. Q. 779, 793 (2004).

32. Joel Trachtman, *Who Cares About International Human Rights? The Supply and Demand of International Human Rights Law*, 44 N.Y.U. J. INT’L L. & POL. 851, 886 (2012).

33. SIMMONS, *supra* note 1, at 88–90.

evidence of a lot of regional emulation in ratification behavior, which was especially strong during times and in regions in which information was very thin. I interpreted the evidence to mean that governments tended to ratify treaties they favor, but a few copied the behavior of others when they thought they could get away with it. But I never addressed the question of whether states are motivated by external rewards for ratification directly.

In follow-up work I have done with Richard Nielsen, we explicitly tested an exchange theory of human rights treaty ratification.³⁴ We tested a series of empirical models that attempted to link ratification of the ICCPR and the CAT with future inflows of foreign direct investment, international trade, and (most plausibly) foreign aid. We found *virtually no evidence* that ratification attracts any of these tangible economic rewards. That is, we found no correlations that are statistically distinguishable from zero effect. If anything, in the case of trade, we found that non-OECD ratifiers tended to experience a *drop* in their foreign trade with the OECD countries after ratification, although this result was statistically significant only for ratification of the ICCPR's First Optional Protocol. We followed up with interviews with German³⁵ and Norwegian³⁶ aid officials, who confirmed that ratification was never even an informal condition for the receipt of foreign aid. We then looked for evidence that ratifiers reaped "intangible" benefits – praise, even a positive comment – from respected peers, regional organizations or non-governmental organizations, when they ratify one of these key human rights treaties. Examining the 3,625 daily press briefings given by the Department of State between January 2, 1991 and December 23, 2008, we have found that the United States Department of State completely ignores ratification of human rights agree-

34. Richard Nielsen & Beth A. Simmons, *Rewards for Rights Ratification? Testing for Tangible and Intangible Benefits of Human Rights Treaty Ratification* (Aug. 13, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1451630>.

35. E-mail Correspondence with Peter Rothen, Former Head of the German Foreign Office's Human Rights Dep't (2003–2008) (Aug. 11, 2009) (on file with author).

36. Interviews with Anne Marchant, Ambassador, and Geir Løkken, Assistant Director General, Norwegian Ministry of Foreign Affairs, in Oslo, Nor. (Aug. 6, 2009).

ments in its public statements. Using 34,335 EU briefings available between 1985 and 2010, we found only very weak evidence of slight recognition from the European Union in the case of the Convention Against Torture. Nor did Amnesty International ever pull punches or offer much praise for ratifiers. These findings provide practically no empirical support for an external “exchange” model of treaty ratification.

James Hollyer and Peter Rosendorff offer a domestic explanation that is counter-intuitive, to say the least.³⁷ They argue that repressive states ratify international human rights agreements in order to raise their cost of violating the agreement. Hollyer and Rosendorff argue that some of the most repressive states in fact *want* to bear very high international audience costs for torturing their domestic opponents, and violating an agreement such as the Convention Against Torture sends a (perverse) signal to their domestic opponents that they are willing to pay high costs to keep their opposition down. This, Hollyer and Rosendorff say, resolves the puzzle as to why repressive governments who ratify the CAT in fact torture more than repressive governments who do not.³⁸

Hollyer and Rosendorff’s Bad Boy theory of ratification has some plausibility problems on its face. It just doesn’t square with other empirical regularities we observe with respect to torture. If their theory was correct – if repressive governments wanted to bear costs for torture – they would *publicize* their exploits; instead, almost all governments, even the worst of the Bad Boys, *deny* they engage in torture.³⁹ Moreover, if a government really wanted to send an unmistakable signal of its “type”, it would just take its opponents out to the public square and execute them – television cameras rolling. Ratifying a treaty hardly seems like much of a signal that one is “tough” to one’s political opponents. But if this mechanism is

37. James Hollyer & Peter Rosendorff, *Do Human Rights Agreements Prolong the Tenure of Autocratic Ratifiers?*, 44 N.Y.U. J. INT’L L. & POL. 791, 791 (2012).

38. There is only a fraction of a category difference in the average torture score among repressive countries that have and have not ratified the CAT. Among the “stable autocracies” in MOBILIZING FOR HUMAN RIGHTS, between 1985 and 1996 (the years for which Hollyer and Rosendorff test), the difference on Hathaway’s 5-point Torture scale averages about .4 of a point.

39. See, for example, the extensive discussion in STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING (2001).

at work in a few cases, it depends on the value and legitimacy that domestic actors place on the treaty that the government has ratified, which would provide an answer to those who question the unique value of treaty ratification in the first place.

B. *What is unique about International Law?*

Some international law scholars remain puzzled about why a state would want to use *international* law to improve rights, when they have the *autonomous* ability to create rules to protect rights. Edward Swaine makes this point at great length. He argues that domestic rules can alter agendas, serve as bases for litigation and mobilize groups to demand enforcement, noting constitutional changes, whatever their inspiration, may involve just about as much deviation from ordinary politics as treaty ratification.⁴⁰ Joel Trachtman's contribution to this volume also puzzles over this question. He asserts that *Mobilizing for Human Rights* "fails to explain the use of *international* law to make commitments, by low depth states or by high depth states."⁴¹ He argues that if a state intends to improve its rights, international legal obligations are redundant. If not, they are irrelevant.

Let's begin with the "puzzle" of redundancy by states who basically want to respect rights (the sincere ratifiers in *Mobilizing for Human Rights*). Redundancy is simply not a puzzle, least of all for actors interested in developing a robust legal system. Scholars of public administration regard redundancy as "a powerful device for the suppression of error."⁴² Sociologists of the law interpret redundancy as a legal strength; it permits the communication about norms and expectations in a complementary yet consistent manner, ultimately contributing to system durability in the case of competing, contradictory demands.⁴³ Dualist systems are premised on the redundancy of international and domestic law, inasmuch as the former are not enforceable unless implemented domestically. In the

40. Edward T. Swaine, *Ersatz Treaties*, 44 N.Y.U. J. INT'L L. & POL. 833, 834 (2012).

41. Trachtman, *supra* note 32, at 855 (emphasis added).

42. Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346, 347 (1969).

43. Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136, 143-46 (1988-89).

common law tradition, redundancy is a virtue: the more precedents that can be produced, the better. As Martin Shapiro has written, “Legal discourse in the style of *stare decisis* [itself is] an instance of communication with extremely high levels of redundancy.”⁴⁴

Redundancy is found throughout the international human rights regime, yet we hardly puzzle over that. The core international human rights agreements in particular have highly redundant provisions.⁴⁵ And yet, states do not usually *substitute* the ICCPR for the CEDAW; empirically we find that if a state has ratified the former it is likely to ratify the latter as well.

Hollyer and Rosendorff, as I have noted above, would respond that international human rights treaties raise costs of violations – perhaps uniquely so. But there is no need to go this far. Constitutions, statutes and court cases can also affect domestic political debates in crucial ways. These are not alternatives, but often the *mechanisms* through which the norms contained in treaties become enmeshed in domestic settings. *Mobilizing for Human Rights* looked at direct treaty effects in the quantitative tests. The qualitative tests looked explicitly at the inspiration ratified treaties have provided for statutory change and domestic constitutional development. These changes in domestic law then become crucial in supporting human rights demands. The case of women’s access to modern forms of reproductive health care in Colombia is an extended discussion of just such a case of constitutional law development.⁴⁶

New research has focused on the role that international law plays in inspiring domestic legal change, often in the form of implementing legislation. Thania Sanchez, for example,

44. Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J.LEGAL STUD. 125, 129 (1972).

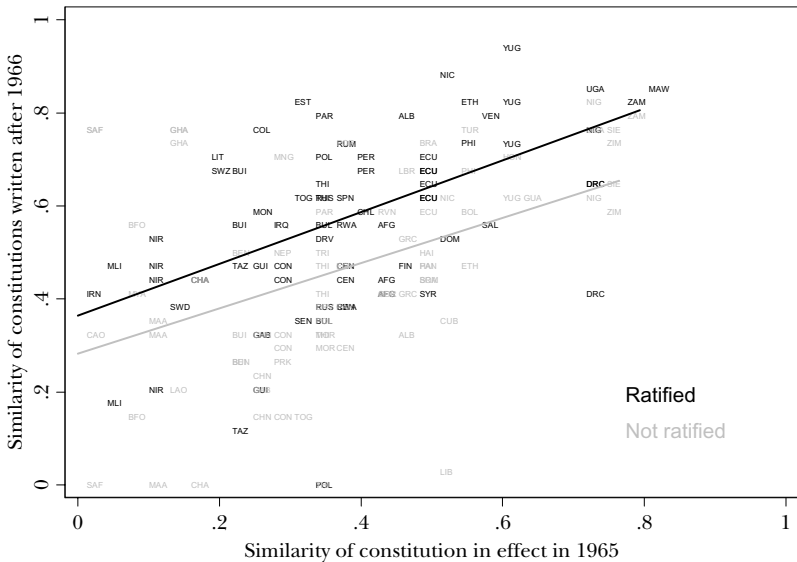
45. To give only a few examples: “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” is found verbatim in the preambles of the ICCPR, the ICESCR and the CRC (it is paraphrased in the CERD). A “right to equality” is found in the ICESCR (art. 3), ICCPR (art. 3), and the CEDAW (art.2(a)). A right to vote is found in the CERD (art. 5(c)), CEDAW (art. 7(a)), and ICCPR (art.25(b)). The right to self-determination is included in the ICCPR (art. 1(1)) and ICESCR (art. 1(1)).

46. SIMMONS, *supra* note 1, at 245–53.

has researched in great detail the extent to which the requirements of the CAT have become implemented in the criminal codes of Latin American countries.⁴⁷ She finds that ratification of the CAT has led to domestic legal change in many but not in all cases

In follow up work with Tom Ginsburg and Zachary Elkins, we looked carefully at the relationship between treaty ratification and the contents of national constitutions. Based on their impressive database of constitutional provisions, we have found that states that have ratified the ICCPR for example are much more likely to contain similar provisions than those that have not ratified. This is illustrated in Figure 3 below.

FIGURE 3: SIMILARITY OF NATIONAL CONSTITUTIONS TO THE ICCPR (COMPARISON OF ICCPR RATIFIERS AND NON-RATIFIERS)



Source: Elkins, Ginsburg and Simmons (2011). Based on data from the Comparative Constitutions Project, 2011 (<http://www.comparativeconstitutionsproject.org/>)

To create this figure, we devised an “index of similarity” between the rights contained in the ICCPR and each national constitution in existence, using data from the Comparative

47. Thaniz Sanchez, forthcoming (on file with author).

Constitutions Project.⁴⁸ Note that the post-1965 constitutions of countries that have ratified the ICCPR (in bold face) are in fact much more similar in their rights content than countries that have not ratified (in shadow face). This was corroborated in our empirical model, which found that countries that ratified the ICCPR had new constitutions that were much more similar to the ICCPR than they had before ratification, and more than was the case for countries who did not ratify.⁴⁹

We hypothesized, consistent with communications theories that emphasize the usefulness of redundancy in message transmission, “If legal and treaty obligations are signals, presumably the intensity of the signal increases with the number of iterations of it. Thus adopting a norm at both the international and domestic levels reinforces the strength of the signal to the relevant audiences.”⁵⁰ Furthermore, we found that, indeed, there are three distinct channels for improved human rights outcomes: treaty ratification, constitutional provisions, and treaty ratification *mediated by* constitutional provisions. We concluded, “[W]hile both treaties and constitutions exert their own direct influence on compliance, there also appears to be a mediating effect of constitutions on actual rights protection. One way in which international norms work is *through* adoption in national constitutional texts. This result is consistent with a theory that constitutions and international treaties supplement each other in terms of enforcement mechanisms. Adoption of a norm at both levels increases the probability that the norm will actually be enforced, because it provides

48. The Comparative Constitutions project identified 801 unique constitutional systems since 1789. As of this analysis, data had been gathered on roughly two-thirds of these cases. The sample for the present chapter includes 549 of the world’s 801 constitutions written during this period. Most countries of the world now have a document identified as a constitution integrated into a single document. For a small number of countries (Israel for example), we rely on a series of documents that form the highest normative level in the legal system. We exclude the United Kingdom entirely from our analysis. For more on the project see <http://www.comparativeconstitutionsproject.org/>.

49. ZACHARY ELKINSET AL., *GETTING TO RIGHTS: TREATY RATIFICATION, CONSTITUTIONAL CONVERGENCE, AND HUMAN RIGHTS PRACTICE IN THE LATE TWENTIETH CENTURY* (2010).

50. *Id.* at 24.

multiple monitors and alternative forums in which to challenge government behavior.”⁵¹

In short, I do not dispute Edward Swaine’s point that “states may in theory be jump-started by the appearance on the international scene of a negotiated treaty regardless of whether it is one they themselves have ratified.”⁵² But the data suggest that treaties both have an independent “jump start” effect, *and* inspire constitutional innovations that appear to have similar consequences.

IV. CONCLUSION: *MOBILIZING FOR HUMAN RIGHTS* IN PERSPECTIVE

This symposium has pushed hard on the idea that international human rights law has mattered much to the status actual human rights practice around the world. Much to their credit social scientists have started to take seriously and to explore mechanisms behind the claim that international law constrains various kinds of state behavior. Even more to their credit, legal scholars have grappled with the trend toward quantitative empirical research, and sought to understand both its potential and its limitations. Philip Alston’s contribution to the symposium is very useful in this regard: numbers can be biased, even wrong. I would add, even when they are reasonably accurate – or even when we try to correct their biases with statistical means – they can only take us so far. Social science theorists and statistically oriented researchers will always need experienced voices to tell us whether our theories and findings bear any resemblance to the real world. For the most part, the claims made in *Mobilizing for Human Rights* ring true for those who have worked hard toward treaty implementation. One reaction to the claims in the book has been that I have been pushing on an open door for the past decade.

Where do we go from here? When Eric Posner complains that the empirical work was done only on “a handful of [treaty] provisions,” is he calling for more or for less work of this sort? When he complains of potential bias, claiming that “countries may well be less likely to comply with provisions that do not require easily measurable outcomes—precisely because

51. *Id.* at 22.

52. Swaine, *supra* note 40, at 838 n.17.

observers cannot easily tell whether the state has complied with the treaty term,”⁵³ is he calling for more (and better) empirical research, or for more thought experiments that begin with the command, “*Suppose. . .*”?⁵⁴ *Mobilizing for Human Rights* hardly closes the door on the possibilities for empirical work, but what, would Eric Posner and others suggest, is the way forward?

I envision a research agenda that builds on the efforts of scholars such as Kathryn Sikkink, Thania Sanchez, Sally Merry, James Vreeland, James Hollyer and Peter Rosendorff, and others who have inquired into the consequences of treaty ratification at the domestic level. Litigation, implementation, and constitutionalization constitute the main cluster of legal consequences of interest. Political competition, (counter-mobilization, and the translation into the local vernacular, to use Merry’s words, constitute some of the main social and political consequences. Scholars have only scratched the surface in understanding how human rights treaties create opportunities for mobilization, organization, articulation, and competition that differs from the counterfactual we might expect in their absence.

We will also benefit from a variety of research methods. Two kinds of methods have dominated the empirical research on international law and human rights: case studies and quantitative work based on the country-year as the unit of analysis. By no means have we reached the saturation point with these two approaches, but there are other options that researchers should at least keep in mind. One is experimental research through surveys, which I illustrated with the torture question above. Not only could this method be used to address the importance of an international legal commitment, but with larger samples, it could be used to compare international to domestic law effects (although, as I have argued, these should be thought of as complements rather than competitors for purposes of the mechanisms I discuss in *Mobilizing*). Another

53. Eric A. Posner, *Some Skeptical Comments on Beth Simmons’ Mobilizing for Human Rights*, 44 N.Y.U. J. INT’L L. & POL. 819, 826 (2012).

54. In one of his main article in which Posner outlines his thoughts on the effects of human rights treaties, he asks us to “suppose” a series of facts seven times. See Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758 (2008).

method might be to explore computerized textual analyses for large corpuses of comparable documents to look for trends in language and meaning over time.⁵⁵ Textual analysis is quite appropriate for empirical work in a constructivist theoretical vein where language and issue framing are crucial to action. The research discussed above based on State Department, European Union, and Amnesty International statements is one example.

It is important to continue research on international law and human rights because the claim that the former has had important consequences for the latter is one of the more important claims of this century. It is nonetheless a modest claim. *Mobilizing* did not show that international law is a magic bullet; nor did it show that it was the most important factor influencing human rights worldwide. As I wrote in that book's conclusion, the achievement of democracy, peace, and development would do much on their own to support improved rights practices around the world. None of us should accept the idea that to negotiate and ratify treaties is to "do enough" to improve the human condition. Another aspect of our research should be to consider seriously the assertions of those from Eric Posner to David Kennedy, that there is a *theoretical possibility* that law has been accepted as a weak substitute – even a trade-off – for real improvements in human welfare. While most people who have taken this position refuse to do the hard empirical work it would take to support it, putting the positive consequences into broader policy perspective – including a careful weighing of the costs and consequences of a broad range of policy tools – would seem to be the next major research challenge. As long, however, as we do not become complacent that treaties have solved all problems for all time, we should continue to support international legal agreements with rhetoric, policy, and action.

55. See Beth A. Simmons & Andrew B. Breidenbach, *The Empirical Turn in International Economic Law*, 20 MINN. J. INT'L L. 198, 203–05 (2011) (describing research involving statistical analysis of Supreme Court decisions and of treaties between the United States federal government and Native American tribes).