

DISCOUNTING RIGHTS

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In many respects, there has never been a better time for basic rights. Violence around the world is at an all-time low and trending downward. Moreover, the rhetoric of rights—so-called rights talk—has never been more prevalent. It is against this backdrop that social scientists and lawyers have asked whether rights matter. There is mounting evidence that the legal instruments that guarantee these rights—both national constitutions and international agreements—have little measurable impact on State behavior. So, we are left with a puzzle: we are told that the norms underlying the most basic rights are thriving, and yet the rights themselves have failed. How can this be?

This Essay provides an answer. Legal scholars have attempted to answer the question, “Do rights matter?,” by counting the commitments that States make to basic rights—in domestic constitutions and international treaties—then weighing whether States live up to their commitments. I call this quantitative rights scholarship. This scholarship is part of a larger empirical turn in legal scholarship. But quantitative tools, for all their merit, are particularly unsuited to the task of assessing whether rights “matter” in any meaningful sense of the term. Quantitative rights scholarship, in other words, asks the wrong questions and seeks answers in the wrong places. This Essay critiques that scholarship and suggests several alternative lines of inquiry.

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I. INTRODUCTION

In many respects, there has never been a better time for fundamental rights.¹ The best data available suggests that violence around the world is at an all-time low and trending downward.² Moreover, the rhetoric of rights—so-called rights talk³—has never been more prevalent.⁴ Politicians routinely justify their actions in rights terms; courts around the world acknowledge and attempt to protect basic rights; and companies routinely issue rights impact statements, demonstrating to their customers and shareholders that they care about individual rights. It is against this backdrop that social scientists and lawyers have asked whether rights matter.⁵ There is mounting evidence that the legal instruments that guarantee these rights—both national constitutions and international human rights treaties—have little measurable impact on State behav-

1. I use the phrases “basic rights,” “human rights,” and “fundamental rights” interchangeably. I mean the loose set of rights that are thought to be guaranteed to the individual—either by a domestic constitution or an international agreement. To be sure, what counts as a human right or a civil right is a contested subject. I hope to sidestep that debate for the moment. Rather, what interests me is scholarship that purports to tell us something about the relationship between the legal instruments that guarantee certain rights—international human rights treaties and national constitutions—and the underlying rights themselves.

2. See STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE* (2011) (summarizing existing data about violence and indicators of violence around the world and concluding that violence is on the decline).

3. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (using the phrase “rights talk” to characterize claims on behalf of civil and human rights to the exclusion of more inclusive moral values and community norms).

4. See generally Emilie M. Hafner-Burton & James Ron, *Human Rights Institutions: Rhetoric and Efficacy*, 44 J. PEACE RES. 379 (2007) (surveying the literature demonstrating that human rights rhetoric is increasingly widespread).

5. See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1938–39 (2002) (using an original dataset to ask, “[a]re human rights treaties complied with? Are they effective in changing States’ behavior for the better?”).

ior.⁶ So we are left with an odd scenario. We are told that basic rights are thriving, and yet that rights law has failed. How can this be?

The short answer is: measurement error. Not the sort of small coding error that can be corrected with a few tweaks to a model. Rather, I mean that, when it comes to rights, we are asking the wrong questions and looking in the wrong places for answers. The last decade has witnessed a new wave of large-N quantitative studies of rights.⁷ These studies purport to answer vast questions—such as, “Do rights matter?”—by measuring whether States deviate from the commitments they make in their constitutions and international agreements.⁸ I call this research “quantitative rights scholarship.” It largely consists of measuring States’ legal commitments, whether in a constitution or an international instrument, against conditions on the ground, typically by relying on rights indicators that are themselves often the products of large-N quantitative studies.⁹

6. See Adam Chilton & Eric Posner, *An Introduction to the Empirical Evidence on the Effectiveness of International Human Rights Treaties* (forthcoming) (arguing that human rights treaties have largely been ineffective at changing State behaviors).

7. When I say large-N, I am referring to surveys of larger datasets—typically anything larger than twenty is considered “large-N.” David Collier, Jason Seawright & Henry E. Brady, *Qualitative versus Quantitative: What Might This Distinction Mean?*, 1 *Qualitative Methods* 1, 5 (2003).

8. See Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?* 60 *AM. J. POL. SCI.* 575 (2016) (arguing that rights make a greater difference if they impact government behavior); see also Adam S. Chilton & Mila Versteeg, *The Failure of Constitutional Torture Prohibitions*, 44 *J. LEGAL STUD.* 417, 446-48 (2015) (concluding that constitutional rights against torture have failed insofar as they have not had measurable impact on levels of State torture); Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 *ANN. REV. L. & SOC. SCI.* 201 (2009) (relying on large-N cross-country databases to draw conclusions about the link between constitutions and outcomes); David S. Law & Mila Versteeg, *Sham Constitutions*, 101 *CAL. L. REV.* 863, 896 (2013) (surveying most of the world constitutions and grading them as more or less of a “sham” if there is a large gap between rights enumerated in the constitution and conditions on the ground, as measured by indicators). *But see* William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 *S. CAL. L. REV.* 65, 68 (2001) (arguing that measures of State behavior are not the only indicator of whether rights matter).

9. For a survey of indicators in the rights context, see SALLY ENGLE MERRY, *THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS*,

In this Essay, I make the case that this research falls short of its promise—at least in the way it has been deployed—and actually tells us very little about the power or potential of rights. This is not to say that quantitative rights scholarship is without value. To the contrary, large-N quantitative studies can be useful for spotting global trends and, critically, for narrowing a potentially very large set of hypotheses about rights' influence.¹⁰ But to suggest that these quantitative rights studies answer deeper questions about whether rights “work” or whether they “matter” is to over claim. Imagine asking, “Does Catholicism work?,” and then attempting to answer the question only by measuring—with sophisticated quantitative tools—how the Vatican behaves towards Catholics. Not only is there a mismatch between the question and the empirical inquiry, but the question misses the point.

The first part of this Essay argues that cynicism about the future of rights drawn from studies that look only at State behavior is misplaced.¹¹ States are not the only—or even the

GENDER VIOLENCE, AND SEX TRAFFICKING 13-16 (2016) (describing the different types of indicators, including “counts” which do just that).

10. The best summary and critique of the comparative literature is Holger Spamann, *Empirical Comparative Law*, 11 ANN. REV. L. & SOC. SCI. 131, 138 (2015) (“Even if comparative data cannot identify any single causal theory, however, they are extremely important in narrowing down the set of plausible theories.”).

11. In fact, scholars and advocates with opposing normative commitments make the same mistake when they assume that State behavior is likely to change in the short term as a result of its rights commitments. Beth Simmons, Ryan Goodman, and Derek Jinks are some of the staunchest defenders of the existing human rights regime. They look to State behavior for proof that human rights law works. See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS* (2009) (offering empirical account of why States make human rights commitments and how those commitments change state behavior); see also Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) (discussing the various mechanisms through which international law can best influence State behavior with respect to human rights law). Posner and Hathaway draw the opposite conclusion, but they too look to State behavior for answers. See ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 69-78 (2014) (claiming that human rights treaties have little impact on State behavior, and thereby little impact on human rights practices within many States); Hathaway, *supra* note 5, at 1989-2001 (drawing upon a quantitative analysis of the relationship between countries' human rights practices and human rights treaties to conclude that little has actually been accomplished with respect to augmenting human rights practices).

best—units of analysis for measuring the impact of basic rights. The studies that scholars cite for the proposition that rights have failed do not in fact show that they have. Rather, these studies tell us that there is little evidence of a clear causal link between (a) State legal commitments to civil and political rights of a certain flavor and (b) State behavior towards its citizens regarding those civil and political rights. To conclude that this amounts to a failure of rights is to narrowly interpret the meaning of the words “failure” and “rights.”

Moreover, this quantitative focus obscures better reasons to worry about rights. The second part of the Essay considers a number of these reasons, which include the fetish for compliance with commitments; the privileging of rights violations over rights promotions; the outsized role that moral outrage plays in regime design; and the way that rights talk emboldens political rivals, making compromise difficult.

Because many of these problems stem from the stubborn attempt to enhance human welfare through what is essentially a criminal law model of rights enforcement, the final part of the essay looks at three alternative models. One option is to model basic rights law on tort law, with its focus on deterring future harms. Another option is to model basic rights law on economic development, which would mean addressing economic rights as much or more than civil and political rights. Yet another model comes from the International Committee for the Red Cross, which manages to monitor and enforce rights commitments without relying on public shaming or moral outrage.

II. THE WRONG REASONS TO WORRY ABOUT RIGHTS

There is a growing body of scholarship attempting to answer the question of whether rights matter.¹² The bulk of this scholarship compares how States behave after making rights

12. Yonatan Lupu, *Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements*, 67 INT'L ORG. 469 (2013) (finding that State commitments to the ICCPR have not significantly improved State practices); see, e.g., SIMMONS, *supra* note 11, at 194–201 (evaluating State compliance with treaty commitments to protect civil and political rights and finding modest gains); Hathaway, *supra* note 5, at 1938–1939 (describing article's “large-scale quantitative analysis of the relationship between human rights treaties and countries’ human rights practices”).

commitments—both international treaty commitments and domestic constitutional commitments. These studies typically focus on several core rights instruments, and typically only civil and political rights.¹³ Not surprisingly, this approach yields little convincing evidence that States are heavily influenced by their (often unenforceable) international and constitutional commitments.¹⁴

A. *Asking the Wrong Questions*

Suppose that urban design scholars set out to study the bike share programs in three cities: Paris, New York, and Harare. Paris's program has a large ridership, but the program is costly and has not eased congestion on the subway. New York's program, by contrast, has reduced subway congestion at peak hours, and the program is revenue neutral, but it has a very low overall usage rate. Meanwhile, in Harare, a similarly designed program is an utter failure: the bikes are quickly stolen or left broken, and after a few weeks the program is abandoned.

Would it be sensible, in this context, to ask "Do bikes matter?" Surely not. We could hardly answer such a broad question about *bikes* based only on a study of *bike share programs*. Perhaps, then, the appropriate question is something narrower—something like, "Do bike share programs matter?" But even this question is problematic. If the goal of bike share programs is to ease demands on the public transportation system, then the New York program is succeeding, but the Paris pro-

13. These include the International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85. Few studies included the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Mar. 7, 1966, 660 U.N.T.S. 195; the Convention on the Rights of the Child (CRC), Nov. 20, 1989, 1577 U.N.T.S. 3; or the International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 1966, 993 U.N.T.S. 3.

14. One of the features that international law and constitutional law share is the lack of strong enforcement mechanisms. There are many other striking similarities. For a summary, see Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009) (discussing how all forms of law confront the same problems of uncertainty, enforcement, and sovereignty).

gram is not. But perhaps the goal is simply to increase overall levels of healthy activity, in which case the Paris program is working, but the Zimbabwe and New York programs are not. Or perhaps the goal is to save the city money, in which case the New York program might be working, but the Paris and Zimbabwe programs are not. It simply would not make sense to draw sweeping conclusions about the failure of an entire program based on its implementation across widely different scenarios.

Yet this is precisely what the quantitative rights scholars attempt to do with basic rights. The questions that motivate quantitative rights scholars are: “Do rights matter?” or “Have rights failed?”¹⁵ For example, Chilton and Versteeg ask whether constitutional rights against torture have “failed” and conclude that they have because torture persists, even in States that have committed to the right against torture—either in the form of a constitutional commitment or an international treaty.¹⁶ This inquiry makes a certain kind of common sense: it takes the State at its word and asks how it has performed. But, it also treats State commitments to basic rights extremely narrowly, as promises made by an individual and not as a political body reflecting such considerations as the results of a political campaign, attempts to appease a social movement, a statement of current values (if not practices), an attempt at shaping future values—the list goes on. On this account, a right is only a promise by the State not to behave a certain way that can easily be measured against future behavior.

This is how many activists understandably treat rights—as a sort of I.O.U. from the State, to be cashed in if the State fails to live up to its commitments. If the State makes a commitment not to do X and then does X, we expect that activists will seek to exploit the inconsistencies between what the State says and how it behaves. This might happen because those activists truly care about the norm underlying the right, or because they can exploit the State’s inconsistency for political gain, or both. If a State commits not to torture people and later does, civil society groups will campaign on the fact that the State is not living up to its promises. This kind of political pressure is

15. See *supra* text accompanying note 8.

16. Chilton & Versteeg, *The Failure of Constitutional Torture Prohibitions*, *supra* note 8.

to be expected—and may even be the reason the State made the commitment in the first place, as a sort of mast-tying device.

But, this is an exceedingly narrow conception of rights.¹⁷ Rights are more than just a promise to which the State can be held. Indeed, a case could be made that this is the least compelling aspect of a right. Rights can also be a language for articulating grievances, a tool for building a social movement, a specific aspirational goal for the country (e.g., “we don’t want to condone that kind of thing”), a general aspirational goal (e.g., “we want to be the kind of place that doesn’t do things of that nature”), and more. If people articulate their grievances in terms of those rights, build social movements out of those rights, and politicians are elected or not based on their views about those rights, it would hardly be fair to conclude that the rights themselves do not make a difference, just because the State’s behavior is not compliant with its legal commitments.

The quantitative rights scholars ignore these questions and instead ask whether State behavior has changed as a result of the legal commitment to the right. The assumption seems to be that the politics of rights—civil rights and human rights movements, for example—are epiphenomenal to the law, when the causal story very well may run the other way. Asking, “Do rights matter?” is like asking, “Does religion matter?” or, “Has language failed?” The questions assume an overly narrow frame for thinking about a huge topic. Rights—like language and religion—are a vehicle for communication, persuasion, aspiration, and more. This frame not only misses the complex ways in which rights create and reflect political dynamics, but it also encourages scholars to look in the wrong places for answers.

17. For an account of how most of us understand basic rights, see Richard Rorty, *Human Rights, Rationality and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 111 (Stephen Shute & Susan Hurley eds., 1993). For a nuanced account of how human rights relate to their legal instrumentation, see SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 177-190 (2010).

B. *Seeking Answers in the Wrong Place*

1. *Restrictive Independent Variable*

To measure the efficacy of the international human rights regime, many scholars focus narrowly on what Beth Simmons calls “lawlike commitment[s]”¹⁸—commitments that have the hallmarks of legalization, meaning that they are meant to be binding and often that they delegate authority for their interpretation and enforcement to a third party.¹⁹ This makes sense from the perspective of empirical research design. It is far simpler to look at State legal commitments of a particular sort and ask how they influence State behavior than to attempt to explain how norms influence State action. But such a research design is of limited use, because common sense already tells us that a State’s commitments are unlikely, in the short term, to be a significant direct influence on that State’s behavior towards its citizens.

To see how limited this view is, consider the mechanism behind it: States make a commitment to treat their citizens a certain way and actors—domestic political actors and international actors—measure their actions against their commitments and shame them to encourage better behavior.²⁰ Human rights activists argue that the shame-and-blame methodology is the primary tool in their toolkit.²¹ But it is only *one* plausible mechanism through which human rights law exerts influence over State behavior, and it is hardly the only, or even the dominant, way that human rights are likely to influence State behavior.

For example, this model does little to explain why States comply with international laws that they have not committed to and, therefore, are not bound by. For example, the U.S. government has voluntarily granted certain humanitarian protections to civilians in warzones that it did not feel compelled

18. See Simmons, *supra* note 11, at 7.

19. See Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401, 404–08 (2000) (describing international legalization as a feature that can be modulated along three axes: precision, obligation, and delegation).

20. See Simmons, *supra* note 11, at 7 (noting that law-like commitments “raise expectations of political actors in new ways”).

21. See Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63, 67 (2004) (explaining the shame and blame methodology).

to extend under the laws of armed conflict.²² There are many possible explanations for this State behavior—explanations that have to do with epistemic communities, audience costs, and the influence of legal norms—but since the State has not made any legal commitments, the above mechanism does not offer much insight. Focusing only on the State’s commitment to its own citizens ignores the other ways that law can influence State practice. In this example, we see supererogatory actions by States to comply with human rights law—law that that particular State is not technically obligated to comply with—suggesting that the action of human rights law’s influence on State behavior at least partially lies outside the State commitment.

Moreover, in the real world of human rights advocacy, it hardly matters which human rights agreements are legally binding—that is, which rights are supposedly guaranteed by States’ law-like commitments. Advocates shame States for violating human rights regardless of a State’s particular legal commitments. China has not ratified the ICCPR, for example, but advocates are as critical of Chinese government efforts to limit free expression as they are of States that have made a “binding” commitment to freedom of expression; if anything, they are *more* critical of China’s measures to control speech. If, hypothetically, China ratified the ICCPR, would the State suddenly be much easier for human rights organizations to influence? That seems doubtful. States suffer criticism for their human rights record independent of their treaty obligations, suggesting that human rights advocacy does not directly depend on a State’s “law-like commitments.”

Even if one thinks that legal commitments are meaningfully different from nonbinding commitments, it is not clear that a particular State’s commitment matters. Perhaps, what really matters is widespread global adoption. That is, even if advocacy generally depends on States making legally binding commitments to human rights norms—because this raises the

22. For a recent example, see Marty Lederman, *Of So-Called “Folk” International Law and Not-So-Grey Zones*, JUST SECURITY (Oct. 2, 2014, 9:17 AM), <http://justsecurity.org/15830/folk-international-law-grey-zones/> (discussing the debate over the merits and effects of the White House’s 2013 Presidential Policy Guidance, which purports to offer stricter humanitarian protections to civilians than required under international law).

profile and importance of those norms worldwide—we may not expect that any particular State’s legal commitments would directly affect its own human rights practices. One point that advocates make when they criticize China for its lack of free speech rights is that the State is an outlier—not as a matter of commitment but as a matter of practice. It does not matter to those advocates whether China makes a commitment to free speech; what matters is that China is out of step with the rest of the world.

Perhaps a better inquiry would be to ask what is the relationship between the “legalization” of human rights norms through these instruments and the spread of—and political use of—those norms. This is not an easy thing to study, notably because it would require a decent way to measure the spread of human rights norms and a more realistic—and more complex—mechanism to explain the relationship between norms and law. But, it may prove to be a more fruitful subject over the long run than asking whether States change their behavior in response to signing an agreement.

2. *Restrictive Dependent Variable*

Even if State law-like commitments were the right independent variable, the dependent variable that most quantitative studies use—State practice towards its citizens—is far too narrow to tell us, on its own, whether human rights law matters. This is so for at least three reasons: (1) State practice only captures a part of the overall human rights picture; (2) most large indicators of human rights only capture civil and political rights, and even then, only some of those; (3) country-level indicators are notoriously flawed metrics, especially with regard to human rights.

First, studies rely on data sets that only measure State practice, not overall human rights conditions. For example, the data set most widely used by scholars studying the efficacy of international human rights law is the CIRI dataset compiled by Cingranelli and Richards.²³ This data set is explicitly limited to government actions related to human rights, and it excludes the actions of NGOs, INGOs, corporations, and individ-

23. See Chilton & Posner, *supra* note 6, at 3.

uals aimed at improving human rights.²⁴ One cannot get an accurate sense of whether human rights are thriving in a particular State by looking only to how the State behaves. Not all human rights issues are a function of State behavior, so focusing exclusively on State practices—rather than overall assessments of individuals' flourishing along certain human rights dimensions—is going to be under-inclusive of some human rights norms. Consider, for example, the human right to health. The World Health Organization proudly proclaims, “[E]very State has ratified at least one international human rights treaty recognizing the right to health.”²⁵ How does a State guarantee these rights? Certainly, there are things a State can do to enhance the health of its citizens—such as providing access to essential medicines—but what about the many health-related issues that turn on individual behavior, not State behavior?

For example, handwashing with soap is largely a function of individual choices—not State treatment of its citizens—yet it has enormous implications for the right to health. Many countries struggle with communicable diseases that are easily eliminated if people wash their hands with soap after defecating. This is true even where soap and clean water are widely available, and where there are high levels of awareness that soap eliminates deadly germs.²⁶ One study found that one of the most effective techniques to encourage handwashing with soap was to link soap use with feelings of disgust and to en-

24. See David L. Cingranelli & David L. Richards, *CIRI Human Rights Data Project: The Cingranelli-Richards (CIRI) Human Rights Data Project Coding Manual* (May 20, 2014), <http://www.humanrightsdata.com/p/data-documentation.html> (“A country’s human rights *conditions* constitute the whole universe of human rights-related events happening in a country. The state of a country’s human rights conditions can be caused by all kinds of things aside from that country’s government: foreign companies, domestic non-state actors such as guerilla groups, and so forth. CIRI only codes the practices of the government, not the overall human rights conditions of a country.”).

25. World Health Organization [WHO] & Office of the United Nations High Comm’r for Human Rights, *The Right to Health: Fact Sheet No. 31*, at 1, <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

26. See Beth E. Scott, David W. Lawson & Val Curtis, *Hard to Handle: Understanding Mothers’ Handwashing Behaviour in Ghana*, 22 HEALTH POL’Y & PLAN. 216 (2007) (noting that studies have generally failed to find a strong relationship between handwashing practices and the availability of handwashing facilities, education, and awareness of its importance).

courage that feeling after toilet use.²⁷ A pilot project in Ghana—launched with the help of soap makers including Unilever and Procter & Gamble—ran advertisements designed to make people feel disgust after toilet use.²⁸ In the communities exposed to these advertisements, soap use after toilet use was up by thirteen percent, and soap use before eating was up forty-one percent.²⁹

The relevant change in these cases was *individual* behavior change, not *State* behavior change, and it was mediated by a partnership between corporations and several academics. This sort of intervention is unlikely to be measured by a dependent variable that focuses on State practice towards its citizens. Moreover, interventions of this sort are unlikely to be directly tied to Ghana's signature on one of the international legal instruments guaranteeing a human right to health.

The second reason that human rights studies are too narrow is that they tend to focus exclusively on civil and political rights (CPRs), and they tend to ignore economic and social rights (ESCRs). CPRs are often easier to study because their violation is typically easier to identify, whereas violations of ESCRs tend to be more diffuse and harder to pin on a particular actor or action. For example, it is comparatively easy to show that a State has violated an individual's freedom of expression when it censors the press, whereas it is much harder to show exactly how the State violated an individual's right to education or health.³⁰ Unfortunately, this measurement bias echoes and perhaps reinforces the pre-existing bias that some western and western-funded NGOs have towards civil and political rights, which receive the brunt of their attention.³¹

27. See Beth Scott et al., *Health in Our Hands, but Not in Our Heads: Understanding Hygiene Motivation in Ghana* 22 HEALTH POL'Y & PLAN. 225, 230, 232 (2007) (explaining that feelings of disgust serve as a prime motivator for handwashing after defecating, and hygiene in general).

28. One of the advertisements showed a purple stain on someone's hands that would only go away after washing with soap. Charles Duhigg, *Warning: Habits May Be Good for You*, N.Y. TIMES (July 13, 2008) at 8.

29. *Id.*

30. See SALLY ENGLE MERRY, *THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS, GENDER VIOLENCE, AND SEX TRAFFICKING* 165 (2016) (noting that until very recently, the best indicators focused exclusively on civil and political rights).

31. See Makau Mutua, *Human Rights International NGOs: A Critical Evaluation*, in *NGOs AND HUMAN RIGHTS: PROMISE AND PERFORMANCE* 151, 156

A measure of human flourishing along certain human rights dimensions might better capture the goal of the rights in the first place. Rather than attempt to tick through a series of binary qualities about a State (e.g., Do the state's citizens have the right to vote? Do they have freedom of expression?), a better approach would attempt to capture overall human welfare in the State. The international human rights regime is guided by a set of agreements that outline a surprisingly long list of rights. Given that these rights can at times come into conflict with each other, we can fairly assume that the goal of the regime is to maximally protect as many peoples' human rights as possible. This inherently means making tradeoffs. It means that if prosecuting a warlord would destabilize a region and lead to more bloodshed, then despite the demands of retributive justice—and at times our moral intuitions—a consequentialist approach may call for holding off on prosecution. But under the conventional approach to both human rights advocacy and human rights scholarship, the State or region that elected to grant amnesties to secure peace would reflect one thing: warlords can violate human rights with impunity.

This situation helps explain one of the starker absurdities of the modern human rights regime: the fact that China gets little to no credit for its advances in human rights. If economic rights mean anything, they ought to mean improving the chances of finding work that pays a living wage. China has lifted hundreds of millions of people out of poverty—one of the singular human rights accomplishments of the last quarter century—and yet China is typically portrayed as a rogue State when it comes to human rights.³² This is not just advocacy bluster; it is reflected in scholarship about China's human rights record. The CIRI data set, for example, gives the impression that human rights in China have not improved much in the last thirty years. This is because the data set only measures a tiny portion of the ESCRs—workers' rights and women's

(Claude E. Welch Jr., ed., 2001) (describing Human Rights Watch's "history of skepticism towards economic and social rights").

32. For example, news coverage of China's human rights record tends to focus on China's poor civil rights record and to ignore its rather impressive economic growth. See, e.g., Benjamin Haas, *Amnesty Criticises 'Rogue State' China As Global Death Penalty Toll Falls*, GUARDIAN (Apr. 10, 2017) <https://www.theguardian.com/world/2017/apr/11/amnesty-criticises-rogue-state-china-as-global-death-penalty-toll-falls>.

rights—and on these two measures of economic rights, the CIRI data set gives China the same score for every year from 1981 to 2011.³³ Any measure of human rights that does not adequately reflect the advances of China's economy is too narrow to be meaningfully considered comprehensive.

Even for those who only care about civil and political rights, China is a confounding case. China's citizenry is more expressive, better educated, and has more influence on government decisions than it did thirty years ago. When a series of train crashes occurred in 2011, Chinese citizens banded together using microblogging services to demand safer public housing and transportation, putting considerable pressure on the government.³⁴ Surely this represents an advancement in civil and political rights, even if citizens do not enjoy those rights to their fullest extent. Yet human rights scholarship suggests that China has made zero advancement in civil and political rights. The CIRI data set gives China a score of "0" on freedom of association for every year going back thirty years. Any metric that does not capture this shift in China's citizenry towards greater freedom to associate is not adequately measuring the extent to which people need the protections guaranteed them by international human rights law.

3. *Short Time Horizons*

The temporal dimension of rights promotion is an additional problem. If State commitments to rights shape State behavior—as quantitative rights scholars assume—how long after a State makes a commitment to a particular right should we expect to see change? In a year? In ten years? In a hundred? The answer depends on what is being measured, of course. If the measure is of a more powerful political rhetoric for advocacy, then we may see successful campaigns very soon after States make rights commitments.³⁵

33. See David L. Cingranelli, David L. Richards, & K. Chad Clay, *The CIRI Human Rights Dataset* (2014), <http://www.humanrightsdata.com/p/data-documentation.html>.

34. See Yang Yi, *China's Micro-Blog Revolution*, DIPLOMAT (Aug. 12, 2011), <https://thediplomat.com/2011/08/chinas-micro-blog-revolution/>.

35. See Hafner-Burton & Ron, *supra* note 4, at 379–80 (explaining that the real-world impact of increased human rights discourse is not easily discernible).

But if the goal is narrowly defined as shaping State behavior, it may be too early to tell whether the law has failed or succeeded. It seems unreasonable to expect that State practice would change significantly five years after signing a treaty, and it seems even more unreasonable to say that the legal regime has failed outright if State practice has not changed in that time frame. Indeed, there is some evidence that longer time horizons change the results of quantitative rights studies. Chilton and Versteeg look at constitutional rights against torture on a ten-year time horizon.³⁶ But, this may not be enough time to register any meaningful change in State behavior. As Elkins, Ginsburg, and Melton have shown, attempts to study State commitments to rights without very careful attention to time effects—both long time horizons and period effects—will have errors.³⁷

The same is true in the domestic setting, where laws are considerably easier to enforce. Core civil rights—like the right to vote—have taken years to be implemented, and there is still a great deal of work to be done.³⁸ Yet, few would say that voting rights in the United States have failed.³⁹ The same might be said about other civil rights. It takes time for rights to ripen and mature—to be both reflected in community values and also fully implemented. In the early days of the United States, when many of the rights guaranteed in the Bill of Rights had little practical meaning, would it have been fair to say that the Constitution had failed? That would have been both prema-

36. Chilton & Versteeg, *The Failure of Constitutional Torture Prohibitions*, *supra* note 8, at 429.

37. See Zachary Elkins, Tom Ginsburg & James Melton, *Response: Comments on Law and Versteeg's The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 2088, 2091–92 (2012) (showing that Law and Versteeg mistakenly draw conclusions based on a dataset that starts with WWII, but extending the dataset back another hundred years yields different results).

38. See Ed Pilkington, *NAACP To Call on UN To Investigate Voter Disfranchisement in US*, *Guardian* (Mar. 9, 2012), <https://www.theguardian.com/world/2012/mar/09/naacp-un-voter-disfranchisement-us> (discussing legislative attempts to allegedly disenfranchise millions of black and Latino voters across the United States).

39. See, e.g., *Shelby Cty. v. Holder*, 133 S.Ct. 2612, 2652 (2013) (Ginsburg, J., dissenting) (“[T]he [Voting Rights Act] is no ordinary legislation For a half century, a concerted effort has been made to end racial discrimination in voting. Thanks to the Voting Rights Act, progress once the subject of a dream has been achieved and continues to be made.”).

ture and unrealistic in terms of what to expect from a young constitution. It is similarly premature and too demanding of basic rights—especially those that have only recently been adopted—to point to State practice in light of State rights commitments and declare that the rights themselves have failed. Perhaps in a hundred years we will have a better answer to the question.⁴⁰ But if it really does take a hundred years to study the effects of rights commitments on State behavior, then we have a measurement problem because there is very little reliable data on country practices going back that far.

III. BETTER REASONS TO WORRY ABOUT RIGHTS

The quantitative rights scholarship does not offer a sufficient basis to conclude that rights have failed. But there are still a number of reasons to worry about rights as vehicles for improving human welfare. This section discusses four such reasons. One finding that emerges from this analysis is that, contrary to conventional wisdom, there is considerable tension between the goals of basic rights law and the goals of the wider basic rights movement.⁴¹ The human and civil rights movements are typically understood as inseparable from human and civil rights law. The movements rely on basic rights commitments to give the movement's principles the force of law. Conversely, State compliance with basic rights commitments is partly possible because rights advocates put pressure on States to comply with those commitments. The political movements and the legal instruments are seen as mutually beneficial and mutually reinforcing. In fact, as this Part shows, the social movement for basic rights and the legal regime for basic rights

40. Sally Merry suggests that in fact the longer that time passes, the more resistant indicators are to change. See MERRY, *supra* note 30, at 7–8 (2016) (describing the “temporal dimensions” of indicators, which are slow to develop and slow to change).

41. The focus of this essay is on basic rights law, not the rhetoric or wider human rights movement. But, it is impossible to talk in any comprehensive manner about the rights regime's success or failure without talking about the way it has been implemented by advocates. Even if we wanted to look only to law, it is impossible to separate it from the movement because the law is a part of the movement—even if it were never inevitable that it would turn into a legal regime—and because the law has had a significant impact on the movement. For a nuanced account of this complicated relationship, see MOYN, *supra* note 17, at 210–14.

are in conflict to a much greater degree than is typically acknowledged. That is, law is problematic for the movement to a greater degree than has been shown, and the movement is bad for law to a greater degree than is typically recognized.

A. *The Commitment Fetish*

Human rights advocates and scholars focus on commitments against which they can measure an actor's behavior.⁴² Compliance with commitments becomes a fetish on its own, independent of the promotion of the underlying norm. Worse, it seems, is that rights groups sometimes seek to secure commitments from various actors to basic rights, even where doing so could actually jeopardize the rights themselves from being fulfilled.

To see how this works, consider the following scenario. Facebook is widely assumed to be considering establishing an Internet presence in China.⁴³ Knowing that this is the case, human rights groups have been pressuring Facebook to abandon its "real name" policy—which prohibits user aliases—on the grounds that such policies are bad for human rights activists in repressive regimes.⁴⁴ Facebook has resisted these efforts, treating threats to user rights as engineering problems rather than political causes.⁴⁵ But perhaps this is optimal for the promotion of human rights: Facebook says it will not go out of its

42. See Beth A. Simmons, *From Ratification to Compliance: Quantitative Evidence on the Spiral Model*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 43, 57 (Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., 2013) (describing how human rights scholarship looks to "the ways in which purposive actors have used international human rights norms to persuade, cajole, pressure and shame governments to live up to the commitments they have made to respect the rights of their own people").

43. See Jessi Hempel, *Facebook's China Problem*, *FORTUNE* (Sept. 10, 2012).

44. See Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Mark Zuckerberg, Chairman and CEO of Facebook, Regarding Human Rights Considerations Before Entering China Market (May 10, 2011), <https://www.hrw.org/news/2011/06/03/letter-mr-mark-zuckerberg-chairman-and-ceo-facebook-regarding-human-rights> (asking whether Facebook would alter its real name policy if the company were to enter China).

45. See Alexis C. Madrigal, *The Inside Story of How Facebook Responded to Tunisian Hacks*, *ATLANTIC* (Jan. 24, 2011), <http://www.theatlantic.com/technology/archive/2011/01/the-inside-story-of-how-facebook-responded-to-tunisian-hacks/70044/>.

way to help human rights activists, thereby making it less likely that the online service will be blocked in repressive regimes, yet the company can engage in foot-dragging and other steps to resist government requests for information that ultimately benefit activists. Assuming that Facebook and related services would be kicked out of the repressive regime if they announced their commitment to helping human rights activists, those activists should prefer that Facebook be either inexpressive or hypocritical about human rights. Not only is Facebook better situated to provide services if they are in a country, but the aliases that activists use are more valuable if no one knows they are aliases. In this scenario, Facebook's reticence about online activism gives it a measure of plausible deniability to tell the repressive State that it is not directly inciting activism there. Yet, human rights activist organizations like Human Rights Watch still want Facebook to make a public commitment to human rights, even though doing so might be suboptimal from the standpoint of maximizing the promotion of human rights in China.⁴⁶

B. *The Rights Violations Fetish*

A related concern is the fetishizing of rights violations, and, in particular, civil and political rights violations committed by identifiable perpetrators. Rights advocates' backwards-looking orientation is narrowly concerned with identifying right violations to the detriment of other forms of rights promotion. This is partly a consequence of the nature of rights law, which can be difficult to legislate and administer but comparatively easy to judge. So, judges tend to lead the development of international human rights law, but judges and courts have a number of significant biases that are suboptimal from the standpoint of the movement.

One of these biases is that judges take the universe of potential human rights claims—the list is long—and reduce it down to an identifiable set of things that can be measured as rights violations.⁴⁷ This means that rights promotion is seen

46. My conversations with both technology firms and human rights groups, including Human Rights Watch, suggest that this is not strategic behavior by both groups who are secretly "in" on the strategy to trick China.

47. Andrew K. Woods, *Moral Judgments & International Crimes: The Disutility of Desert*, 52 VA. J. INT'L L. 633, 653-55 (2012) (describing how the interna-

through the political and legal lens of accountability and justice—a backwards-looking and often retributive lens⁴⁸—rather than a forward-looking and consequentialist analysis of optimal policies. If a regime designer has \$100 to spend on human rights promotion, and he is given a choice between better training for police investigators and prosecuting past episodes of police brutality, the standard approach is to take the latter course, even where it is unclear that prosecution will accomplish much in human rights terms.⁴⁹

This has a number of unfortunate effects on the promotion of human rights. First, it orients the human rights regime to ignore human rights violations where a single violator—a potential defendant in a human rights trial—cannot be easily identified. As a result, ESCRs receive much less attention than CPRs. As Kenneth Roth, director of Human Rights Watch, has argued, violations of ESCRs are harder to pin on an individual perpetrator, which makes accountability considerably more difficult.⁵⁰ Using the same hypothetical \$100 mentioned above and giving a human rights bureaucrat the choice between buying and distributing rice to those in need and punishing bad actors, the standard approach would be to take the latter path—even where there is no evidence that doing so will mean fewer human rights violations. In the wake of the civil war in Sierra Leone, for example, the Special Court for Sierra Leone indicted fourteen persons at a cost of \$300 million—money that might have instead been spent on roads, electricity, and so on.⁵¹

Courts are good at resolving disputes between two parties; less so at untangling complex social phenomena and crafting sweeping social policy. Yet in the international human rights context, they are asked to do just that. Calls for accountability

tional criminal system reduces hugely complex social and political situations to a list of chargeable offenses).

48. *Id.* at 638 (describing how the international criminal regime exhibits a number of retributive features).

49. *Id.* at 647-669 (listing reasons for skepticism about the utility of addressing rights violations through criminal charges).

50. Roth, *supra* note 21, at 68 (“[W]ho is responsible for the violation, and what is the remedy?”).

51. Lansana Gberie, *The Special Court for Sierra Leone Rests-For Good*, Africa Renewal (April 2014), <http://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests—good>.

tend to focus on individual bad actors and ignore social situations that are on the whole more harmful to the promotion of human rights. As the Nuremberg court noted—and as many international criminal courts have since repeated—“Crimes against international law are committed by men, not by abstract entities, and *only by punishing individuals who commit such crimes can the provisions of international law be enforced.*”⁵² This is a remarkable statement. It reflects the assumption behind the current international criminal regime: that *because* individuals commit crimes, the best social policy is to punish bad individuals. To see how narrow this statement is, consider how it might work in the domestic context. Imagine a public official justifying enormous expenditures on criminal trials by saying, “Poverty does not commit crime, men do.” That statement might tell you why there is a retributive criminal regime, but on its own it would not be a compelling justification for using criminal prosecutions to deter crime.

Perhaps in the Nuremberg era, the court was evincing a spirit of “we must do something, and this is all we know how to do.” But that can hardly be true today. We have come to learn a great deal about how those once-abstract concepts—social situations, economic and political conditions—can lead to human rights abuses. Yet few human rights institutions, even those with enormous budgets, spend their resources trying to alleviate these conditions; instead, they focus on identifying the individuals who might plausibly be held accountable for rights violations.

Why does the modern rights regime exhibit these worrying features? Part of the explanation lies in the very nature of rights. Rights call to mind both bright moral lines and entitlements against the State—two things that exacerbate these tendencies.⁵³ But today’s basic rights regime seems to exhibit

52. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945—1 OCTOBER 1946, at 223 (1947) (emphasis added).

53. For an account of how rights cause people to think in non-consequentialist ways, see Joshua David Greene, *The Terrible, Horrible, No Good, Very Bad Truth About Morality and What to Do About It* 295 (Nov. 2002) (unpublished Ph.D. dissertation, Princeton University), <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=6BB33B23C1B60F3DF4C29EA49DD20BE2?doi=10.1.1.174.5109&rep=rep1&type=pdf> (“The notion of *rights* epitomizes the practical failure of moral realism, the stubbornness, rigidity, and

these features to a greater degree than one might have predicted. The best explanation for this is that human rights law—the regime, its courts, its advocates—appears to be modeled on domestic criminal law. It looks at human rights violations and asks: Who is the victim? Who is the defendant? Where and when do we go to trial? It was not always inevitable that human rights violations would be criminalized. As international criminal scholar Cherif Bassiouni notes, “The three major Allies (Great Britain, U.S., and U.S.S.R.) did not start out with the clear intention of establishing international judicial bodies, whether at Nuremberg or Tokyo, to prosecute accused offenders.”⁵⁴ Yet today, these bodies are central institutions for regulating the worst rights abuses—specifically, crimes against humanity, war crimes, and genocide.⁵⁵

C. *Moral Outrage*

The central ambition of human rights advocacy is to get people to care about the suffering of others.⁵⁶ Advocates make emotional appeals to moral outrage in an effort to arouse strong retributive impulses and gather the political will to prosecute international human rights abuses.⁵⁷ This is celebrated in the literature. The conventional wisdom suggests that, because moral intuitions can be harnessed for political

irreconcilable differences that emerge when people believe that they, unlike their perverse opponents, *clearly* have the moral truth on their side.”).

54. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 1-2 (2d ed. 1999).

55. I focus in particular on these three “international crimes” and do not address transnational crimes. These are the crimes laid out in the Rome Statute, which created the International Criminal Court. *See* Rome Statute of the International Criminal Court, art. 5, July 17, 1998, 2187 U.N.T.S. 900 [hereinafter Rome Statute]. I do not discuss here the crime of aggression, which is not yet an actionable offense in the International Criminal Court.

56. *See generally* STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* (2001) (describing the tactics that human rights advocates use to arouse sympathy for victims of faraway suffering, a particularly difficult task given that audiences are bombarded daily with images of suffering in the news).

57. *Id.* at 196 (describing the “outrage into action” strategy deployed by Amnesty International and other advocacy groups).

power, human rights advocates and policymakers should embrace them.⁵⁸

But convincing research shows that moral outrage can crowd out more deliberative thinking, leading people to make suboptimal policy decisions—policy decisions they would not defend under cooler conditions.⁵⁹ As I have noted previously:

Psychologists elegantly demonstrated this with an experiment about a hypothetical set of damages awards. Subjects were given a fact pattern detailing the evidence of a tort and asked to determine damage awards—the experimental group received a fact pattern that was designed to evoke strong feelings of moral outrage while the treatment group received a similar but more neutrally-worded fact pattern. After reading charged fact patterns that evoked strong intuitions like moral outrage and indignation, respondents set very high damage awards—both when they were told the high damages would have no effect on the company's behavior and, separately, when they were told the high damages would have *harmful* effects, such as forcing the company to stop manufacturing its other socially-beneficial products. In this scenario, subjects who were outraged were *willing to create a net social harm* in order to satisfy their deep retributive impulses.⁶⁰

This is a particular risk in the human rights realm. First, somewhat perversely, stories of rights violations are the coin of the realm for human rights work—not stories of human flourishing. These stories encourage sympathy for the victim—almost always, it should be added, a victim of civil and political rights violations—and they encourage outrage against the identifi-

58. See, e.g., Richard Rorty, *Human Rights, Rationality and Sentimentality*, in ON HUMAN RIGHTS 111, 118–124 (Stephen Shute & Susan Hurley eds., 1993) (discussing how moral intuitions can be strengthened to feelings of moral obligation within people).

59. See generally Cass R. Sunstein, *Some Effects of Moral Indignation on Law*, 33 Vt. L. Rev. 405 (2009) (surveying the literature on moral outrage and its implications for law and policy).

60. Andrew K. Woods, *The Limits of Moral Intuitions for Human Rights Advocacy*, 9 L. & ETHICS HUM. RTS. 91, 98 (2015) (referencing Jonathan Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17 (1993)).

able perpetrator.⁶¹ It would be easy to dismiss this as advocacy strategy with no real impact on real world policy, but legal institutions respond to and foment this outrage. Moreover, this is not just a feature of advocacy. International criminal courts are tasked with identifying the individuals who bear the greatest responsibility for otherwise diffuse but terrible group crimes.⁶² From the standpoint of moral outrage, that individuation is not ideal. Studies have shown that, just as people are more sympathetic and generous towards identifiable victims, they are more punitive with identifiable wrongdoers, even when the identity of the wrongdoer is irrelevant to the wrongness of the act.⁶³ The international criminal regime, in its effort to individuate justice, is in fact creating special distortion effects—unique opportunities for moral outrage to crowd out deliberative thinking.

D. *Naïve Realism*

One of the underappreciated costs of rights rhetoric—the language of deontological rights and wrongs—is that it encourages naïve realist thinking and therefore inhibits compromise. Naïve realism, a term coined by psychologist Lee Ross, is the idea that people tend to think the world is the way they perceive it, and that anyone who disagrees with them is either stupid or biased.⁶⁴ When people adopt a naïve realist point of

61. See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L. L.J. 201, 227–233 (2001) (discussing the need for a compelling narrative when publicizing individual victims of human rights to mobilize sufficient public outrage against the victimizer).

62. See Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 580–81 (2005) (explaining how the scope of international typically only attaches itself to a small set of perpetrators for each crime, thereby leaving large numbers of killers unexamined and unpunished).

63. See Deborah A. Small & George Loewenstein, *The Devil You Know: The Effects of Identifiability on Punishment*, 18 J. BEHAV. DECISION MAKING 311 (2005) (showing that experiment subjects are more punitive to identified wrongdoers than to unidentified wrongdoers).

64. See Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in VALUES AND KNOWLEDGE 103 (Edward S. Reed, Elliot Turiel & Terrance Brown eds., 1996) (describing how naïve realist thinking emboldens rivals and inhibits meaningful negotiation).

view, they tend to question the motives of others, and they are much less likely to compromise.

Numerous studies confirm this. One experiment by Ross, for example, “showed that both pro-Arab audiences and pro-Israeli audiences watching the same news coverage of the Israeli invasion of Lebanon in 1982 thought the coverage was biased against them.”⁶⁵ Similar results were found when “Dartmouth and Princeton fans watching the same football game judged the fairness of the game differently.”⁶⁶ Moreover, “[a] related and perhaps more troubling study showed that when Palestinians and Israelis were given proposals for a solution to the contentious Israeli settlements, both sides preferred the others’ proposals if and only if they thought it was in fact proposed by their side.”⁶⁷

The naïve realist scholarship teaches us that we tend to see our own way of looking at the world as objective, and we assume that alternative views are biased or irrational. As Ross and Ward argue, this mindset makes it harder to negotiate compromise between two parties.⁶⁸ Moreover, when parties see an issue in moral realist terms—black and white, right and wrong—they become emboldened and less willing to negotiate.⁶⁹

Human rights law amplifies this bias. It takes complex situations of harm and attempts to sort out the good from the bad. As admirable as that may be from a corrective justice perspective, it also introduces costs in the form of emboldening political rivals to see their conflict in naïve realist terms. When an armed conflict breaks out, an international human rights monitor will visit the conflict zone and produce a thoughtful

65. Andrew K. Woods, *Moral Judgments & International Crimes: The Disutility of Desert*, 52 VA. J. INT’L L. 633, 666 (2012) (citing Robert P. Vallone, Lee Ross & Mark R. Lepper, *The Hostile Media Phenomenon: Biased Perception and Perceptions of Media Bias in Coverage of the ‘Beirut Massacre’*, 49 J. PERSONALITY & SOC. PSYCHOL. 577, 577-85 (1985)).

66. *Id.* (citing Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 129-34 (1954)).

67. *Id.* (citing Susan Hackley, Max Bazerman, Lee Ross & Daniel L. Shapiro, *Psychological Dimensions of the Israeli Settlements Issue: Endowments and Identities*, 21 NEGOT. J. 209, 212 (2005)).

68. See Ross & Ward, *supra* note 64 (explaining how, even when presented with the same set of objective facts, the latent biases and experiences of individuals can lead to polarizing views on certain topics).

69. *Id.*

report detailing all of the wrongs committed by each side. What happens with this report? It is immediately used by the public affairs officers on each side of the conflict to say, "See how horrible our enemies are!" and to recruit support for their efforts in the conflict. This may not be ideal from the perspective of maximizing human rights protections if it fuels anger and even recruitment, thereby leading to larger and longer conflicts.

IV. RETHINKING THE WAY WE PROMOTE RIGHTS

If so many of the human rights regime's troubling features stem from the current—largely criminal—model of promoting rights, what would be the merits of adopting a different model? This section briefly considers three alternatives: (1) the tort model, (2) the development model, and (3) the Red Cross model.

A. *The Tort Model*

Many of the problems identified above stem from a deontological approach to rights abuses. Even if regime actors are consequentialists to the core, they use the deontological language of retributivism.⁷⁰ A tort model—at least one premised on minimizing the costs of rights abuses—may alleviate some of these problems, even if it introduces new concerns.⁷¹ First, such an approach would be forward looking in a way that criminal law often is not. Rather than treat rights violations as opportunities for shaming, a torts approach might treat rights violations as costly accidents to avoid going forward. Second, a torts approach would encourage negotiated settlements rather than binary determinations of guilt or innocence, placing less emphasis on identifying winners and losers. Third, a potential benefit of focusing so explicitly on deterrence is that it may

70. See Woods, *supra* note 65, at 647-58 (describing why the consequentialist argument for using retributive rhetoric is unconvincing in the context of international criminal law).

71. There is a camp of scholars who see tort law as a vehicle for corrective justice. See, e.g., Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1811-12 (1997). Here, I am referring to the other camp of scholars who treat torts as accidents to be avoided and who construct rules so as to maximize overall welfare. See Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, 114 HARV. L. REV. 961, 1046-48 (2001).

paper over clashes of cultural values, where a retributive approach would likely exacerbate them.⁷²

To be sure, such an approach raises a number of concerns. For one, we may fear that pricing human rights abuses would crowd out competing normative objections.⁷³ Since this approach still depends to an enormous degree on courts to implement human rights policy, to the extent that it solves one of the ailments described above it may exacerbate another. But this merits further study, and a tort approach to human rights abuses may in fact lend itself to quantitative measurement.⁷⁴

B. *The Development Model*

Another alternative approach to human rights would be to borrow from the development field and focus on human capabilities. There are several advantages to such an approach. Rather than focus on moral wrongs—and individual perpetrators or individual victims—development economists tend to evaluate policies in terms of welfare maximization.⁷⁵ This approach would focus on inherent or structural features that lead to human rights abuses—things like poverty, human biases, food scarcity, and political instability—and less on particular instances of rights violations. Accordingly, the development approach would likely emphasize economic rights as much or more than civil and political rights.

To implement such an approach would require sweeping and politically impractical changes to the existing human

72. See Woods, *supra* note 65, at 646 (applying Kahan's idea of the secret ambition of deterrence in the context of international criminal law).

73. Cf. Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000) (discussing the effects that fines had on behavior in the context of parents picking up their children from a day-care center).

74. For a recent example, see Darin Christensen & David K. Hausman, *Measuring the Economic Effect of Alien Tort Statute Liability*, 32 J. L. ECON. & ORG. 794 (2016) (showing that the most recent human rights tort case in the U.S. Supreme Court lowered the cost of doing business, under regimes with records of human rights violations, for foreign firms by exempting them from tort liability in the United States).

75. For a summary of both macro- and micro-development economics literature, see Dani Rodrik, *The New Development Economics: We Shall Experiment, but How Shall We Learn?* (Harv. Kennedy Sch., Working Paper No. RWP08-055, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296115.

rights regime. For example, courts would likely play a much smaller role than they currently do in human rights policy making. In fact, the only crimes that one might imagine being systematically addressed under this development model might be incitement and related crimes where an individual is responsible for changing an entire social situation, rather than directly violating another person's human rights.

There are costs associated with this approach, to be sure. Just as international human rights are criticized for being a western imposition, development aid from the North to the South suffers similar neocolonialist critiques⁷⁶—and with good reason. The track record of development aid is hardly confidence inspiring.⁷⁷ The argument for adopting a development-based approach to human rights would not be that development aid “works”; rather, the argument would be that a development model is more likely to yield results that can be measured, with policies that can be tested. There is simply more experimentation in development—both entrepreneurship and experimental social science—than in international law. Because it would be difficult to randomly assign treatment and experimental groups in law—and people would likely object to randomizing policies explicitly promising to deliver justice—it is difficult to gain convincing empirical data about, for example, amnesties as compared to prosecutions after mass atrocity. In development, rather than controlling for countless variables and attempting to draw a causal pathway back to some policy, scholars can simply run an experiment.⁷⁸

C. *The Red Cross Model*

Yet another model for promoting basic rights comes from humanitarian law. The International Committee for the Red

76. See, e.g., WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* 237-272 (2006) (explaining western development aid as a form of neocolonialism).

77. *Id. passim* (providing an overview of the harms produced by foreign development aid).

78. For a description of the experimental turn in development, see ABHIJIT V. BANERJEE & ESTHER DUFLO, *POOR ECONOMICS: A RADICAL RETHINKING OF THE WAY TO FIGHT GLOBAL POVERTY* 14-15 (2011) (describing the promise of using randomized controlled trials to produce insights about which development policies work and why).

Cross (ICRC), in particular, has adopted a method of legal compliance that is radically at odds with the backwards-facing approach adopted by most human rights groups. Where human rights advocates use public shaming to enforce international and constitutional legal commitments, the ICRC rarely names and shames the actors it seeks to influence, choosing instead to arrange private meetings, offering confidentiality and even secrecy.⁷⁹ This enables the ICRC to engage with and influence the practices of armed groups that otherwise might never agree to meet. Not only does the ICRC guarantee confidentiality, but it also remains purposefully ambiguous about its own legal interpretations of a particular armed conflict.⁸⁰ This runs contrary to the “shame and blame” model of advocacy pursued by many NGOs and is “a compelling counter-narrative to international law’s emphasis on inducing compliance through identification of violations via detailed interpretation of rules, followed by procedures for correction of them.”⁸¹ On this account, the ICRC’s secrecy and ambiguity are crucial to the organization’s success.⁸² The ICRC fights—sometimes quite hard—to preserve this confidentiality, including refusing to disclose to courts of law the sources and details of ICRC investigations.⁸³

79. For a detailed overview of the role of secrecy in ICRC communications with combatants, see Steven R. Ratner, *Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War*, 22 EUR. J. INT’L L. 459, 460 (2011) (noting that while human rights groups publicize and shame rights violations, the ICRC “rarely identifies any party, state or non-state, by name as violating international humanitarian law, including by keeping its application of the law secret; it leaves its legal position on many key issues ambiguous, sometimes even from the target of its discussions . . .”).

80. *Id.* at 474 (noting that ICRC “sometimes deliberately keeps its position on legal matters ambiguous”).

81. *Id.* at 505.

82. *Id.* at 489–90 (noting the difficulty of measuring the success of particular ICRC strategies, partly because of the secrecy with which they are implemented, but that the identity of the organization is bound together with its embrace of secrecy and ambiguity).

83. See Gabor Rona, *The ICRC Privilege Not to Testify: Confidentiality in Action*, 845 INT’L REV. RED CROSS 207 (2002); see also Jane Sutton, *ICRC Says Opening Its Guantanamo Files Would Set Dangerous Precedent*, REUTERS (June 18, 2013), <https://www.reuters.com/article/us-usa-guantanamo/icrc-says-opening-its-guantanamo-files-would-set-dangerous-precedent-idUSBRE95H16X20130618> (reporting ICRC attorney William MacLean’s objec-

For the human rights regime to adopt such an approach, it would have to embrace unprincipled action—that is, celebrate the times that States and corporations promote human rights, even when they do so for the so-called wrong reasons. Imagine, for example, a military commander in charge of a detention facility begrudgingly decides that respecting detainees' basic human rights is good for winning hearts and minds.⁸⁴ Rather than ask for a public commitment to basic rights, the ICRC model seeks incompletely theorized agreements with different actors and forges alliances to promote human rights, even when one actor is unwilling to make a commitment to broader human rights principles.

V. CONCLUSION

To ask whether constitutional rights and/or international human rights treaties matter misses the point. Human rights treaties are as much symptom as cause, and not something we ought to expect to prompt immediate changes to State behavior. Rather, they are a manifestation of and contribution to a larger political movement. That is not to say that they do not have any independent effect. To be sure, such treaties focus attention and give people a common vocabulary for articulating their grievances. But, they are unlikely to change State behavior overnight. Rather than count States' rights commitments and measure them against crude indicators of State conditions, a more fruitful line of inquiry would be to ask under what conditions law is the best tool for improving human welfare.⁸⁵ And here, there are a number of reasons to be skeptical, at least in the manner that human rights law is currently used by its advocates. The human rights regime is overly concerned with individual rights perpetrators and insufficiently concerned with the conditions that make rights abuses more

tions to a court order to disclose its confidential report made while visiting Guantanamo Bay prisoners accused of planning the September 11 attacks).

84. See Andrew K. Woods, *The Business End*, FIN. TIMES WEEKEND MAG. (June 28, 2008), <https://www.ft.com/content/71c42ec0-40ca-11dd-bd48-0000779fd2ac> (describing how a military general embraced human rights protections for detainees in order to garner better publicity).

85. See Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758 (2008) (arguing for a welfare treaty rather than one focused on individual rights).

or less likely, and it has an unjustifiable bias for civil and political rights over economic and social rights.

We are not stuck with the rights regime that exists today. We can look to other regulatory regimes and actors to forge a different path for human rights. But, there are significant political hurdles to changing the course of basic rights advocacy. Human rights law and human rights rhetoric may be locked in a vicious cycle: Advocates rely on State legal commitments to stoke moral outrage and to gather the political will to shift the course of State policy, despite the fact that there is abundant evidence that moral outrage causes people to make suboptimal policy decisions. Human rights scholarship should confront these problems head on, rather than determining—as many advocates do—whether bad actors comply with their legal commitments.

