

3 Human Rights *and* Human Welfare: Looking for a “Dark Side” to International Human Rights Law

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International human rights law has attracted a barrage of criticism over the past decade or more. One critique views international human rights law as useless and argues that it has not managed to improve enjoyment of the rights it has set out to protect. Another critique goes further: it blames the legalization of international human rights norms for a series of negative outcomes, from the neglect of development to a crisis in the realization of social rights. Some even suggest that international legal obligations are to blame for the channeling of repressive tactics from areas that are clearly foreclosed by law to gray areas where rules are less clear.

These are important claims, because if true, they suggest that even if human rights treaties have improved some rights, the consequences might, on balance, be deleterious. If that is the case, we should rethink the strategy of legalizing human rights principles in formal agreements. But if these claims are wrong, they could undermine a global effort to improve the well-being of millions of people worldwide. Among liberal rights supporters, these claims, if correct, may reduce support for an international legal approach to human rights. Moreover, a vague belief that human rights norms have caused harm around the world adds fuel to an even more fundamental challenge: the “end times” of human rights that *all* governments should respect, and a concession to various religious entities, from the most humanitarian to the most brutal, to claim an unchecked moral authority to define and enforce, in any way they see fit, their own views of human rights and human wrongs.¹ We leave it to another paper to document the disastrous consequences for human well-being if either state or religious authority (or their combination) create alternatives to international human rights law that non-believers and non-nationals have no right to question.

¹ Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca: Cornell University Press, 2013).

We argue that claims that international human rights law has had negative effects simply cannot be substantiated with evidence. We agree such law has not had positive effects everywhere, though the evidence of positive effects on average is quite strong. But claims of *harm* as a result of human rights law are utterly apocryphal. Even if, as the critics of international human rights law graciously admit, the glass is only “half-full,”² harms claims rest on weak logic and no evidence.

In this chapter, we provide an empirical review that might plausibly speak to these claims. This is no easy task, because to answer fully and properly would require a series of counterfactuals about the world without international human rights law. Nor are the claims of the critics always articulated in ways that are amenable to empirical investigation. We think that an attempt to confront harms claims should address the following: Has the attention to human rights – especially those defined in the major treaties that seem to be favored by the Western World – diverted attention from more important matters, such as economic development or social justice? Have rights obligations in certain areas simply driven repression further underground, where it is harder to observe? We find there is practically no evidence that would justify answering these questions affirmatively. These issues are important because international human rights law is undergoing a profound challenge. Stephen Hopgood, for example, claims that the international legal system is cracking under pressure by sovereign governments who claim it does not bind, and by resurgent religious organizations that claim it has lost – or never had – the moral authority to describe a set of universal rights in the first place.³ The very legitimacy of the system seems to be under siege.

This chapter proceeds as follows. The first section outlines some of the claims in the literature about the deleterious consequences assumed to be associated with the postwar “obsession” with international human rights. We describe three claims about the net consequences of such attention. First, some commentators have suggested that when governments comply with one obligation (e.g., the rights contained in the ICCPR), they strategically and intentionally violate other rights (e.g., engage in disappearances of political opponents). Second, some commentators claim that attention to human rights has crowded out attention to economic well-being through economic development. Third, some claim that individual civil and political rights have crowded out attention to social rights, such as a right to be educated, a right to health, and a host of labor rights. All of these claims go beyond the observation that human rights are often

² Eric A Posner, *The Twilight of Human Rights Law* (Oxford University Press, 2014).

³ Hopgood, *The Endtimes of Human Rights*.

involved in political and policy trade-offs and thus are rarely perfectly realized. Rather, these critiques suggest that the legal regime *has done net harm*. Such musings have never been seriously tested with data and sound methods.

The second section of this chapter searches high and low for empirical evidence of a dark side – i.e., of net harms of international human rights law. This is a real challenge, not least because many such claims are not articulated precisely enough to be tested with evidence. Nonetheless, we have attempted here to collect evidence relevant to the thrust of the above critiques. The third section presents some simple findings. We find no credible evidence that attention to and compliance with international human rights law is *causally* connected with any of the negative consequences advanced by its critics. This null finding has huge implications for policy going forward. It suggests that while human rights are obviously never easy to realize in full, international human rights law is not responsible for the series of bad outcomes critics have claimed. In conjunction with other research pointing to systematic improvements in the rights international law has sought to protect,⁴ we argue that many detractors have been far off base. Governments may claim they cannot possibly achieve economic development or social rights and live up to their human rights obligations at the same time, and a few may strategically alter their repressive behavior to keep within the letter of the law, but, on average, there is no evidence that human rights law has forced, or even encouraged, such consequences.

1 Human Rights Research

Research on the state of the art with respect to compliance with international human rights agreements has been reviewed in detail elsewhere.⁵ In this section, we provide only a very general discussion in order to set up the harms claimed by critics. For decades, there was little empirical research on the effects of treaty obligations. International lawyers seemed to assume human rights treaties were important and beneficial, while students of government (domestic and international) tended to be somewhat more skeptical. The most important empirical work on human rights in these fields was accomplished by scholars of non-governmental

⁴ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009).

⁵ Emilie Hafner-Burton, *Making Human Rights a Reality* (Princeton: Princeton University Press, 2013); Hans Peter Schmitz and Kathryn Sikkink, “International Human Rights,” in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, and Beth A Simmons (London: Sage, 2012), 827–51.

organizations, but these did not center directly on the effects of legal agreements. Risse, Ropp, and Sikkink edited an important book of case studies showing that ratification of human rights treaties has, in fact, been one common step in a “spiral model” that ends up trapping governments in their own rights-rhetorical snares.⁶ Treaties were largely seen as useful ways for governments to make tactical concessions, but whether governments actually complied with such agreements was not an explicit focus of study.

The “compliance debate” took an important evidentiary turn in 2002, when Oona Hathaway published ground-breaking – if controversial – evidence suggesting that treaties did not have much positive impact on the rights they were intended to protect.⁷ Research to the contrary followed, often making fairly nuanced arguments about the conditions under which we might expect treaties to matter.⁸ Many debates continue to surround the consequences of international human rights law. Some of these debates have been about the quality of data,⁹ others are methodological.¹⁰ Most of the research, however, has been focused on whether international human rights law has had its *intended* consequences; that is, they investigate whether treaty commitments are associated with improvements in rights practices that the treaties were designed to address.

While political scientists debated how to model causal inference, endogeneity, and selection effects surrounding treaties and their consequences, legal scholars began to question the entire project of “Human Rights” law, discourse, and advocacy. From the vantage of critical legal theory, David Kennedy criticized the “foregrounding”

⁶ Thomas Risse, Steve C. Ropp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change*, Cambridge Studies in International Relations; 66 (Cambridge, UK; New York: Cambridge University Press, 1999); Thomas Risse, Steve C Ropp, and Kathryn Sikkink, eds., *The Persistent Power of Human Rights: From Commitment to Compliance*, vol. 126, Cambridge Studies in International Relations; (Cambridge: Cambridge University Press, 2013).

⁷ Oona Hathaway, “Do Human Rights Treaties Make a Difference?,” *Yale Law Journal* 111, no. 8 (2002).

⁸ Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*; Courtenay R. Conrad, “Divergent Incentives for Dictators: Domestic Institutions and (International Promises Not to) Torture,” *Journal of Conflict Resolution* 58, no. 1 (2014); Emilia Justyna Powell and Jeffrey K. Staton, “Domestic Judicial Institutions and Human Rights Treaty Violation,” *International Studies Quarterly* 53, no. 1 (2009).

⁹ Christopher J Fariss, “Respect for Human Rights Has Improved over Time: Modeling the Changing Standard of Accountability,” *American Political Science Review* 108, no. 02 (2014).

¹⁰ Yonatan Lupu, “The Informative Power of Treaty Commitment: Using the Spatial Model to Address Selection Effects,” *American Journal of Political Science* 57, no. 4 (2013).

of human rights as a way to address human well-being, adding a critique of the legal professionalization that had poured effort into the cause.¹¹ Intellectual and legal historian Samuel Moyn articulated a crisis of liberalism, which he argues has privileged individual civil and political rights, while hugely short-changing economic and social rights.¹² Using the logic of law and economics, Eric Posner took the opportunity to assert a strict budgetary trade-off between the whole project of human rights on the one hand and that of economic development on the other.¹³ Even political scientists – once focused on the compliance debate – came to suggest that perhaps there was a risk in demanding adherence to treaties that governments would find a way to undermine by other, sometimes more atrocious, behavior.¹⁴

These critiques seem to contain important truths. We certainly acknowledge that governments make trade-offs involving human rights all of the time, at least in the short run. Michael Ignatieff, for example, has proposed a typology of trade-offs that governments often face, including derogations of human rights law for national security purposes; reservations to protect the primacy of domestic law; human rights compromises for foreign policy or diplomatic purposes; and trade-offs between competing human rights objectives themselves.¹⁵ In this chapter, we do not dispute that trade-offs among human rights and sometimes between human rights and other values are never made; of course they are. Despite protests from some activists, most pragmatists would find it surprising were it otherwise. Instead, we are arguing against claims that international human rights norms may have had *net negative consequences* because they have *crowded out* other important objectives or have had *unintended negative consequences*. In other words, we do not claim what is practically impossible – that human rights are perfectly realized in the face of other objectives. Rather, we provide evidence that the worst fears of the cynics – that attention to human rights has been detrimental to human well-being – has no empirical basis.

¹¹ David Kennedy, “International Human Rights Movement: Part of the Problem?,” *Harvard Human Rights Journal* 15 (2002); *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004).

¹² Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press of Harvard University Press, 2010).

¹³ Eric A. Posner, “Human Welfare, Not Human Rights,” *Columbia Law Review* 108 (2008).

¹⁴ Courtenay R. Conrad and Jacqueline H. R. DeMeritt, “Unintended Consequences: The Effect of Advocacy to End Torture on Empowerment Rights Violations,” in *Examining Torture: Empirical Studies of State Repression*, ed. Tracy Lightcap and James P. Pfiffner (New York: Palgrave Macmillan US, 2014).

¹⁵ Michael Ignatieff, “Human Rights and Politics: The Problem of Trade-Offs,” *Harvard Human Rights Faculty Colloquium* March 3 (2016).

There are at least two possible responses to the claim that the international human rights regime has imposed net costs on human well-being. One is to deny that such a cost calculus is morally justified, and insist that we should not be having such discussions at all. The second is to subject the asserted trade-off to empirical investigation. We make the second of these responses, since the data and methods are available to consider at least some of the unintended negative consequences of the rights focus of the past four decades. But we insist that it is not enough to show that signing treaties is associated with various harms. Rather, those who claim that international human rights law has had negative consequences must show that these consequences result from efforts to implement legal obligations. In short, we must test for a trade-off or a diversion between international human rights obligations and other harms done. The unintended deleterious outcome must not just exist alongside the rights regime; critics instead are claiming various harms *result* from putting human rights law compliance first. They often conclude that too much effort has been put into the construction of the international legal regime, at the *expense* of social justice, human welfare, and economic growth. They claim that well-intended legalization has been *responsible* for crowding out other worthy projects to improve the human condition, and that treaties *create* incentives for strategic governments to avoid obvious violations while substituting violations that are harder to detect. In order to validate these causal claims, we examine them in detail.

In some ways, this is a return to an old debate. For decades, human rights have been resisted on the basis of expected costs of various kinds. As Jack Donnelly has noted, “Twenty-five years ago, most states justified routine violations of human rights not only by appealing to national security (as opposed to personal security) and cultural relativism (as opposed to universal human rights) but also by appealing to the ‘higher’ imperatives of development and democracy (as opposed to the interests of particular individuals and groups).”¹⁶ Authoritarian governments have historically claimed that human rights essentially endanger a range of other values from development to political stability to local cultural practice. What is interesting is that mainstream Western academics are now making similar critiques, from very different perspectives.

2 Three “Trade-offs”

This section examines three kinds of causal claims about the negative consequences of the legal regime for international human rights. Each

¹⁶ Jack Donnelly, “Human Rights, Democracy, and Development,” *Human Rights Quarterly* 21, no. 3 (1999): 610.

involves a causal claim about the (largely unintended) consequences of insisting on legal protections for international human rights. First, some argue that the pressure to comply with easily observed human rights cause violation-shifting to less visible practices. Second, foregrounding human rights has been at the expense of development. Third, emphasizing civil and political rights has degraded social rights. We explore these claims in turn.

Rights Guarantees Shift Violations to Less Visible Practices

Commitment to international human rights treaties seems to have drawn attention to the problem of compliance, focusing intergovernmental, non-governmental, and domestic attention on specific and observable indicators of human rights performance. When torture is banned, governments are likely to move away from practices that leave obvious signs of abuse on the human body and toward practices that leave fewer traces of their perpetration. There is a constant demand for suppression. Treaties obligations do not affect this underlying demand, they only displace it from one kind of violation to another. When torture is banned, governments will shift from “scarring torture” to “stealth torture.”¹⁷

More generally, researchers have argued that when scrutiny focuses on one form of repression, governments find substitutes, with no or even negative impact on net repression. Conrad and DeMeritt argue that since not all forms of repression can be scrutinized and shamed, governments will decrease torture but ramp other forms of repression.¹⁸ Similarly, Yonatan Lupu finds that ratification of the International Covenant on Civil and Political Rights (ICCPR) correlates with improved political rights *and* with increased victims of disappearances.¹⁹ Based on this, Lupu suggests that the “results provide empirical evidence that such substitution may occur.”²⁰ But because this claim is based on two separate models that do not actually connect these correlations to one another, it is not a direct test of the substitution hypothesis. In Section 3 we examine this substitution claim more closely, and show there is no reason to attribute negative *causal* effects to international human rights commitments.

¹⁷ Darius M. Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2007). For discussion of torture data that makes the distinction see Ursula Daxecker, “Dirty Hands: Government Torture and Terrorism,” *Journal of Conflict Resolution* (2015).

¹⁸ Conrad and DeMeritt, “Unintended Consequences: The Effect of Advocacy to End Torture on Empowerment Rights Violations.”

¹⁹ Yonatan Lupu, “Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements,” *International Organization* 67, no. 03 (2013).

²⁰ *Ibid.*, 492.

Human Rights at the Expense of Economic Development

There are many versions of the claim that developing countries must choose between human rights and development. Very few people make the crude claim anymore that there is a simple trade-off between civil and political liberties and development. While a few countries – China and Singapore are the most commonly cited examples – have achieved impressive growth and development under repressive regimes, no one has shown that repression has positively contributed to such development; at most, and only in these few cases, political repression and development seem compatible.²¹

One of the most vocal critics of the international legal regime for human rights has proposed that rights talk has crowded out developmental objectives. Eric Posner describes international human rights law as rigidly refusing “to allow states to trade off different values – for example, to allow states to violate political rights in order to enhance the overall well-being of the population.”²² He is right in this regard. But the argument defies logic. How do rights violations improve overall well-being? Posner believes international law gives far more attention to negative rights (the right to be free from repression, the right not to be tortured, the right to exercise freedom of conscience) rather than to positive rights (the right to a minimum income, for example).²³ He argues that governments regularly excuse their lack of attention to economic rights by pointing out their dedication to civil and political rights. By expending so much effort on such protections – as fair trials, freedom of speech and association, and training to teach security officers how not to torture, remaining resources are scarce for the more important task of promoting general welfare through economic development. In short,” Posner claims, “human rights obligations interfere with welfare-promoting activities of the government, and these welfare-promoting activities should be given priority.”²⁴ Posner is concerned that human rights and human welfare are literally in competition with each other for scarce resources: “It is possible,” he ventures, “that a state might cite its positive rights obligation to supply health care under the ICESCR as a justification for its failure to fully respect the negative rights obligation not to torture under the ICCPR.”²⁵ Budgets are limited, and states may “decide to reduce poverty rather than tackle negative rights violations committed by the police or military.”²⁶ International law provides no guidance on such matters, but

²¹ Donnelly, “Human Rights, Democracy, and Development,” 627–28.

²² Posner, “Human Welfare, Not Human Rights,” 1763. ²³ *Ibid.*, 1768.

²⁴ *Ibid.*, 1771. ²⁵ *Ibid.*, 1773. ²⁶ *Ibid.*, 1775.

Posner suspects there is more external political pressure for human rights than there is for human welfare.

That state budgets are limited is an obvious point, but many of the negative rights Posner discusses are not especially costly – a right to privacy, a right to enjoy one’s own culture, women’s right to participate in community activities, to name just a few.²⁷ That said, some are: health care, housing, and education, for example. But no one thinks the expensive items have to be achieved in the next budget cycle. And further, such rights contribute to productivity and to development; they can be expected in the medium-to-long run to *contribute* to the growth and development approach that Posner advocates.²⁸ The important question is: has attention to human rights really *crowded out* concerns about human welfare, or has it in fact legitimated them? A treaty calling for childhood immunization can be used in a debate about the relative value of providing basic health care versus renovating the presidential mansion. Human rights obligations are useful tools for a populace to demand more attention to basic human rights and needs than the state may be currently devoting. Posner insists rights are on a fixed budget and that advocates will have to fight it out among themselves for funding. But if there is any way to strengthen domestic demands for more humanely targeted development resources, international treaties could help – and certainly cannot hurt – in making the case. The logic for viewing human rights and human welfare as a trade-off is weaker than a logic which views these as mutually reinforcing.

Indeed, many human rights experts with some knowledge of development issues simply do not see a trade-off here. Philip Alston refers to the development agenda and the human rights agenda as disconnected, yes, but highly congruent: “two agendas resemble ships passing in the night, even though they are both headed for very similar destinations.”²⁹

²⁷ Posner, *The Twilight of Human Rights Law*.

²⁸ On the link between education and economic development see: Ingemar Fägerlind and Lawrence J. Saha, *Education and National Development: A Comparative Perspective* (Elsevier, 2014). On the positive developmental impact of closing the educational gap for disadvantaged ethnic groups see Matthew Calver, “Closing the Aboriginal Education Gap in Canada: The Impact on Employment, GDP, and Labour Productivity,” *International Productivity Monitor*, no. 28 (2015). On the impact of both health and education on productivity and growth, see Shahzad Alvi and Ather Maqsood Ahmed, “Analyzing the Impact of Health and Education on Total Factor Productivity: A Panel Data Approach,” *Indian Economic Review* 49, no. 1 (2014). On the impact of adequate housing on development see Richard Harris and Godwin Arku, “Housing and Economic Development: The Evolution of an Idea since 1945,” *Habitat International* 30, no. 4 (2006).

²⁹ Philip Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals,” *Human Rights Quarterly* 27, no. 3 (2005).

Yet others view development and human rights as *positively* connected in the practical work of intergovernmental and non-governmental organizations.³⁰ Whether rights have indeed crowded out development is an empirical issue, which we test in Section 3.

Civil and Political Rights at the Expense of Social Justice

Finally, we turn from claims of budget constraints inspired by law and economics to claims of constraints on the political imagination of liberal thought itself. The final harm of the modern approach to human rights is an indictment of what liberalism itself has become. Samuel Moyn claims that contemporary liberalism's fascination with civil and political rights have crowded out greater ambitions for welfarism and even social justice: "The drastic curtailment of liberalism's ambition through the rise of its foreign policy of human rights promotion" has sent us back to the negative liberties of Hobbes and Locke.³¹ Moyn speaks of civil liberties' "competing ideals – social peace, national emancipation, economic growth, and collective welfare prominent among them."³² Setting aside for now his phobia of evidentiary demonstrations, Moyn registers his disappointment in liberalism's focus on civil and political rights to the detriment of social justice. Freedom has overtaken equality; the international human rights project reflects and even facilitates the death of justice beyond liberty. What use are human rights treaties in recovering liberalism's earlier glory? "And how plausible is it," he asks, "that ragtag activists 'mobilizing' to make use of the extra tool of international law to update their domestic citizenship in political terms will pave the way for a more generous transformation of citizenship that makes room for welfarist justice?"³³

Perhaps not *utterly* unlikely, it turns out. Recent empirical work on social rights understood as some form of social equality do not support claims of a trade-off. In one important study, Wade Cole found that states that ratified the International Covenant of Economic Social and Cultural Rights (ICESCR) had better outcomes with respect to social justice than those that had not done so. Using a methodology that accounts for selection and reverse causality, he has shown that membership in the ICESCR is associated with more economic equality than among states

³⁰ Paul J. Nelson and Ellen Dorsey, "At the Nexus of Human Rights and Development: New Methods and Strategies of Global NGOS," *World Development* 31, no. 12 (2003).

³¹ Samuel Moyn, "Human Rights and the Crisis of Liberalism," in *The Future of Human Rights*, ed. Jack Snyder, Leslie Vinjamuri, and Stephen Hopgood (New York: Cambridge University Press).

³² Ibid. ³³ Ibid.

that are not parties. The finding was true for both developing and developed countries, although the effect was somewhat stronger for the developed states.³⁴

Coming from a critical tradition, David Kennedy makes many of the same points as Samuel Moyn, though without any obvious nostalgia for the traditional liberal project. However, he agrees that social justice has fallen by the wayside, as international human rights law has drained attention of good people away from other important humanitarian concerns.³⁵ According to Kennedy: “Human rights foregrounds problems of participation and procedure, at the expense of distribution . . . However useful saying ‘that’s my right’ is in extracting things from the state, it is not good for extracting things from the economy, unless you are a property holder.”³⁶ There is an “imbalance between civil/political and social/economic rights” and this reflects “power balances in the world.”³⁷ Kennedy and Moyn both believe that human rights have swamped concerns for social welfare, basic fairness, and society-wide commitments to equality.

So what should we make of the world’s (and many nations’) growing inequality?³⁸ Clearly, the international human rights regime has not solved the problem of maldistribution of the world’s wealth. But no one has produced convincing evidence that a devotion to rights – even an outsized attachment to negative rights – has caused or even contributed to the world’s distribution of resources; indeed, Cole’s evidence seems to suggest otherwise. Below we will explore whether states that ratify international human rights treaties to improve their civil and political rights have done so at the expense of improvements in social justice, or at the expense of throwing a higher proportion of their population into poverty.

3 Data and Testing

All of the arguments discussed above have a common structure: they suggest a specific mechanism for why international human rights law

³⁴ Wade M. Cole, “International Human Rights and Domestic Income Inequality: A Difficult Case of Compliance in World Society,” *American Sociological Review* (2015).

³⁵ Kennedy, “International Human Rights Movement: Part of the Problem?,” 119–20.

³⁶ Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, 11.

³⁷ *Ibid.*

³⁸ There are debates in the literature, which we set aside for purposes of argumentation, as to whether global income inequality is on the rise or on the decline. Much depends on the concept of inequality the analyst has in mind. See Branko Milanovic, “Global Income Inequality in Numbers: In History and Now,” *Global Policy* 4, no. 2 (2013). Jan Luiten van Zanden et al., “The Changing Shape of Global Inequality 1820–2000: Exploring a New Dataset,” *Review of Income and Wealth* 60, no. 2 (2014).

worsens human outcomes. One mechanism is that international human rights treaties lead states to *substitute between competing outcomes*. For example, a state wanting to engage in repressive behavior may, in response to a specific treaty commitment, choose to strategically substitute one form of repression (disappearances) for forms of repression banned by new civil or political rights guarantees (e.g., through the ICCPR). Alternatively, a government with a constrained political agenda may choose to allocate its limited political capital toward improving human rights in response to international pressure instead of policies aimed at growth or development (Posner's argument). Another mechanism is simply a general *crowding out* of international effort expended toward different objectives. The international community's obsession with human rights generally diverts energy from efforts at economic development, or the primacy of negative rights within public discourse crowds out arguments for a focus on social justice. In each of these cases, critics are making a causal argument about the mechanisms connecting specific legal obligations, families of human rights obligations (e.g., negative rights), or international human rights law generally to adverse outcomes. These are hypotheses in need of evidence. In the subsequent sections, we first illustrate how a researcher would go about uncovering evidence of such a mechanism from empirical data. We then demonstrate that the evidence for such trade-offs is very weak, if not non-existent.

Strategic Substitution: Formal Compliance With New Forms of Repression

When governments face a consistent need to repress in order to maintain security and control, they are thought highly likely to substitute less costly forms of repression for those that are banned. Despite its apparent simplicity, the strategic substitution hypothesis involved two distinct causal claims:

- 1) A commitment to protect human rights in one area (e.g., civil and political rights) causes some new forms of repression (e.g., disappearances) to crop up.
- 2) This effect is due to an improvement (e.g., in civil and political rights) in the first place.

The first part is a straightforward causal effect. Without it, there would be no evidence that negotiating or signing a treaty generates the negative outcome to begin with. The second component is a hypothesis about the mechanism through which the effect of treaty ratification is transferred. Without claim two, there would be no support for the idea that ratifying

a treaty stimulates substitution between the two outcomes. Strategic substitution requires showing that any negative rights effect of ratification is causally attributable to an actual improvement in human rights in the first place. Otherwise, there would be no reason for the state to compensate by increasing repression in other ways. That is, there must in reality be a causal pathway such that **Ratification** → **Human Rights Improvement** → **Negative Outcome**. Rights improvements necessarily mediate the effect of law on new rights abuses in strategic substitution models.

To understand the intuition of why we need evidence of the full mechanism, suppose that international human rights law has no effect. If the trade-off hypothesis were true, without some rights improvements, governments would have no incentive to substitute alternative forms of repression. If blocking the causal pathway by intervening on both ratification *and* human rights practices does not mitigate the observed correlation between ratification and repression substitution, then there is either some other unrelated mechanism behind the effect of a treaty on the negative outcome, or else the correlation is simply spurious. Illustrating this difference in effects – with the causal pathway “on” (mediated by rights improve) and “off” (no mediating improvement) – is necessary to support a claim of trade-offs.

Evidence for this substitution effect cannot be demonstrated by a single regression model. Instead, we need two models – one for the effect of the mediator on the outcome, and a second model for the effect of the intervention on the outcome *after accounting for the effect of the mediator*. This approach allows us to estimate the “controlled direct effect” of an intervention, holding fixed some mediating variable.³⁹ If the difference between the overall effect with the mediator “on” and the “controlled” effect with the mediator “off” is negligible, then the causal story of substitution is simply not supported.⁴⁰ We therefore evaluate the strategic substitution hypothesis by testing the null of no substitution: that the total effect of ratification

³⁹ Blackwell, Acharya, and Sen argue that this quantity is appropriate for evaluating stories about causal mechanisms. They suggest researchers compare the total effect (TE) of an intervention to the controlled direct effect (CDE) in order to evaluate the general importance of a particular causal mechanism. They outline a simple approach to estimating the CDE using two regression models known as “sequential g-estimation.” See Avidit Acharya, Matthew Blackwell, and Maya Sen, “Explaining Causal Findings without Bias: Detecting and Assessing Direct Effects,” *American Political Science Review* (Forthcoming).

⁴⁰ In Blackwell et al.’s terms, if the Controlled Direct Effect is essentially equal to the Total Effect, then it is unlikely that the mediating mechanism explains much of the effect on the outcome.

on the negative outcome is equal to the controlled direct effect of ratification *holding constant* mediating conditions (a state's human rights practices).

To demonstrate how claims of strategic substitution are exaggerated relative to their empirical support, we test for evidence of substitution between forms of repression that is attributable to international human rights law. To illustrate, we re-examine the data in Lupu⁴¹ on the relationship between ICCPR ratification and various measures of rights drawn from the Cingranelli et al. (CIRI) human rights dataset.⁴² Lupu finds evidence of a marginal *positive* relationship between ICCPR ratification and CIRI indicators of freedom of association, freedom of speech, and religious freedom. However, there is also some evidence of an association between ICCPR ratification and *increased* incidence of disappearances. How likely is it that this indicates a trade-off? We start by plotting average levels for each of the four rights indicators over time, and split by states that have ratified the ICCPR and states that have not (Figure 3.1).

While it is difficult to draw causal claims from this figure as the population of states is changing over time (as more states ratify, fewer states make up the “non-ratifiers” population), we are able to check the face-validity of a trade-off claim. First, it is worth noting that disappearances tend to be both rarely used and fairly stable over time in this sample. Second, disappearance scores trend slightly toward *fewer* rights violations, while the remainder of the civil liberties indicators (speech/civil rights, personal integrity rights) exhibit mixed or downward movement overtime (more violations). This is the exact opposite of what we would expect if there were a trade-off developing over time. Nor is there a clear difference in general patterns over time between ratifiers and non-ratifiers, apart from year-to-year noise. The trade-off hypothesis would imply diverging trends for ratifiers but parallel trends for non-ratifiers. However, both ratifiers and non-ratifiers exhibit diverging trends in disappearances and religious freedom. Likewise, trends for freedom of association and disappearances are nearly parallel in both (barring the positive post-2000 shock for the non-ratifier sample). Obviously, we cannot draw inferences about individual state behavior from this time series. Nevertheless, Figure 3.1 does suggest that a sizable trade-off between rights and repression is implausible.

⁴¹ Lupu, “Best Evidence,” 2013.

⁴² The CIRI data is described and can be accessed at: www.humanrightsdata.com/

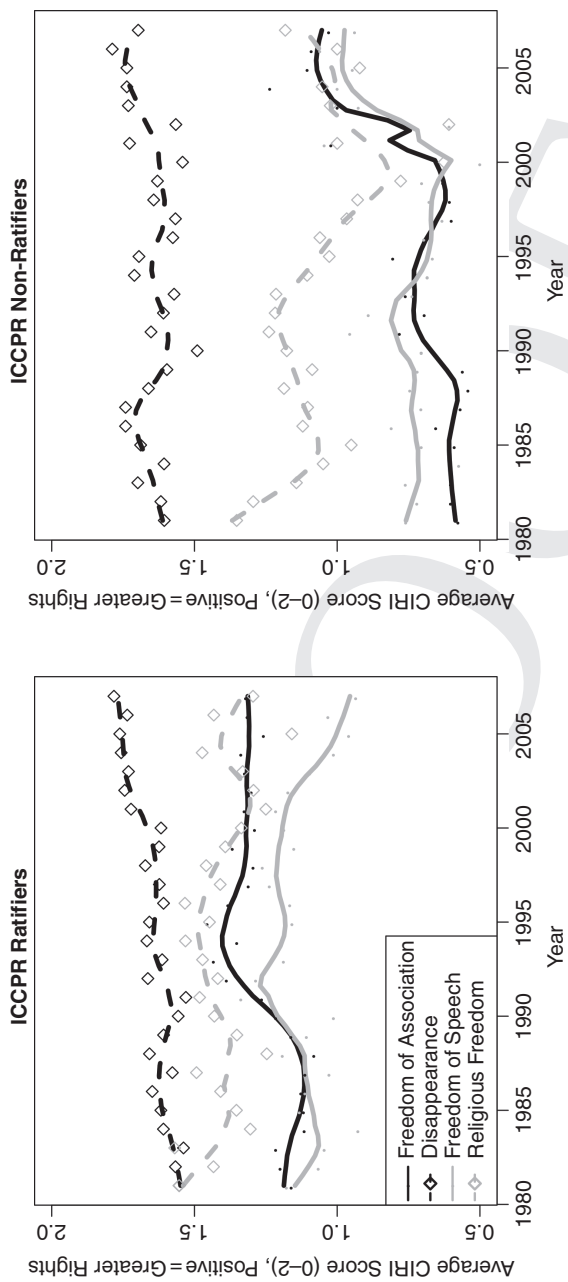


Figure 3.1: Mean CIRI Human Rights Scores over time (1981-2007)

Lines denote smooth LOESS regressions fit to each time series.

To directly test the trade-off hypothesis, we replicate the analysis of Lupu (2013a) using the same set of control variables.⁴³ As described above, we estimate both the total effect of ICCPR ratification on disappearances and the effect controlling for each of the three other rights variables using sequential g-estimation. We fit a linear regression model on the estimate of the total direct effect of ICCPR ratification on the expected effect and compare it to the controlled direct effect.⁴⁴ To properly account for all of the uncertainty in our estimation, we compute standard errors and confidence intervals using a cluster bootstrap clustering on country.

Figure 3.2 plots the estimated average treatment effect of ICCPR ratification for a given country year on the expected CIRI disappearances scale. As negative values correspond to more disappearances (higher values denote greater respect for rights), this estimate implies that states that ratify the ICCPR do tend to be more likely to engage in disappearances, on average. Does this support strategic substitution? No. *When we estimated the controlled direct effects holding constant each of the other three rights mediators, the resulting point estimates are essentially identical to the average treatment effect.* Fixing the mediating rights variables has no appreciable change in the estimated effect of ratification on disappearances. Were the strategic substitution hypothesis true, the controlled direct effect would attenuate toward zero, since we would have blocked one of the crucial pathways through which the effect was supposed to be transmitted. In fact, there are no statistically significant differences between effects when the rights improvement mediating mechanism is “on” or “off.”⁴⁵ While we do not have a clear explanation for the existence of the ICCPR correlation with disappearances in this case, we cannot

⁴³ Following Lupu (2013a), we include as pre-treatment controls measures of judicial independence, democracy, regime durability, incidence of civil and interstate war, log GDP per capita, log population, number of INGOs operating in the country, and outcomes lagged by one period, in addition to year fixed effects. Overall, our dataset contains 190 total countries and 2157–2160 total country-year observations. The total sample sizes differ slightly across each of the moderators as we have slightly different amounts of missingness in each CIRI variable.

⁴⁴ This is the only place where we diverge from the original model specification (which used an ordinal probit model). Sequential g-estimation requires us to assume linearity for the outcome in order to efficiently estimate the conditional expectation of the outcome. This is somewhat implausible given that the CIRI scale is bounded between 0–2 and is more properly ordinal. However, our results when using OLS to estimate the total effects are very similar to those from an ordered logistic model, suggesting that making the linearity assumption does not yield misleading implications

⁴⁵ We directly test for whether there is a difference by computing the difference between the total and controlled effects for each bootstrapped sample. In all three cases, we fail to reject the null hypothesis that this difference is distinguishable from zero at $\alpha = .05$. While the largest difference does appear for religious freedom, the magnitude is still negligible and statistically indistinguishable from noise.

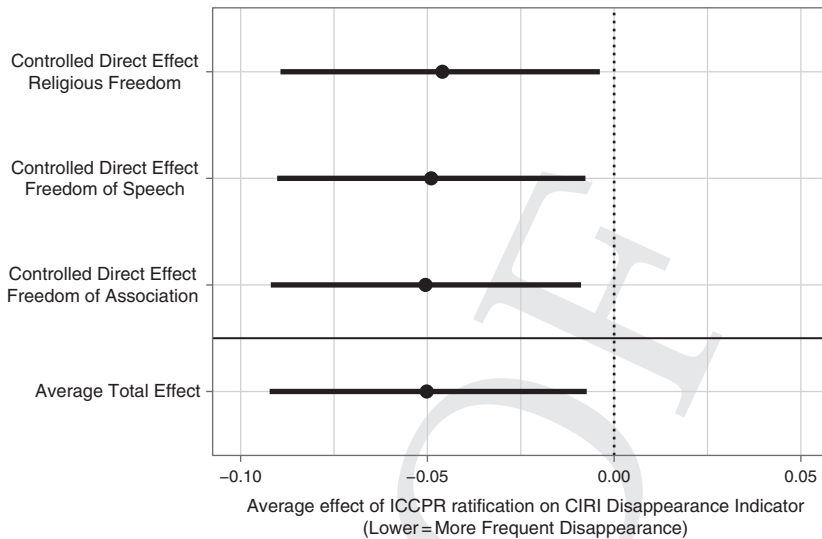


Figure 3.2: Total and Controlled Direct Effects of ICCPR ratification on CIRI disappearance rating

Lines denote 95 percent cluster bootstrapped confidence intervals.

attribute it to strategic substitution across other forms of repression. Perhaps there is some lurking variable driving the correlation or a different mediating mechanism. But we can conclude in this case that there is no evidence that states on average compensate for increases in civil and political rights by increasing repression via disappearances.

Crowding Out: Human Rights Versus Development

For the second test, we examine Posner's assertion that states' commitments to improve human rights directly crowd out efforts at promoting economic growth and development.⁴⁶ This argument takes a very similar form to the repression substitution. The effect of international human rights obligations on poor economic outcomes are mediated, in Posner's view, by the costly distraction of trying to comply with international human rights agreements. Lacking a good proxy for "effort" or "resources allocated," we understand this argument to suggest a head-to-head competition between rights realization and developmental outcomes.

⁴⁶ Posner, *The Twilight of Human Rights Law*; Posner, "Human Welfare, Not Human Rights."

Without improvements in rights, there is little reason to believe that Posner's rights-development trade-off would be very constraining.

Posner's argument grows out of a frustration with the proliferation of international human rights law. Treaty proliferation is a matter of historical record, and so is the fact that a growing number of states have ratified more and more human rights agreements over time.⁴⁷ The more human rights treaties a state ratifies, the more resources it is likely to devote to implementing its obligations (or so the argument goes). But to the extent that this is true, Posner claims there is a trade-off between rights and developmental outcomes, and the latter, he argues, are more clearly associated with human well-being generally.

Is this trade-off plausible? Interestingly, there has been no such trade-off for the international community as a whole. A quick look at official aid allocations suggests that if anything, the relationship is in the *opposite* direction to that Posner posits (Figure 3.3). According to the OECD database of official development aid, economic development assistance vastly outstrips human rights development assistance, and the growth over time in development assistance strongly counters Posner's claim that human rights efforts have crowded out development efforts.⁴⁸

What about a budget constraint at the state level? The evidence above undercuts Posner's claim of a *hard* constraint, since state budgets for development have apparently been significantly augmented by the international community. But suppose the trade-off is real. We would then expect states that make more human rights commitments to underinvest in development. Posner suggests many measures of development that might conceivably reflect the human welfare concerns he has in mind. The first is GDP/capita: "Higher per capita GDP means that more goods and services are being consumed; because people want goods and services, an increase in consumption of goods and services would seem to indicate an increase in welfare."⁴⁹ The second is the United Nations Development Program's "Human Development Index" (HDI), which Posner mentions as a broader measure of factors that contribute to human well-being.⁵⁰

⁴⁷ Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, chapters 2 and 3.

⁴⁸ Richard A. Nielsen (2013). "Rewarding Human Rights? Selective Aid Sanctions Against Repressive States." *International Studies Quarterly* 57(4): 791–803.

⁴⁹ Posner, "Human Welfare, Not Human Rights," 1783.

⁵⁰ *Ibid.*, 1789. The United Nations Development Program describes the HDI as "a summary measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and have a decent standard of living." See <http://hdr.undp.org/en/content/human-development-index-hdi>.

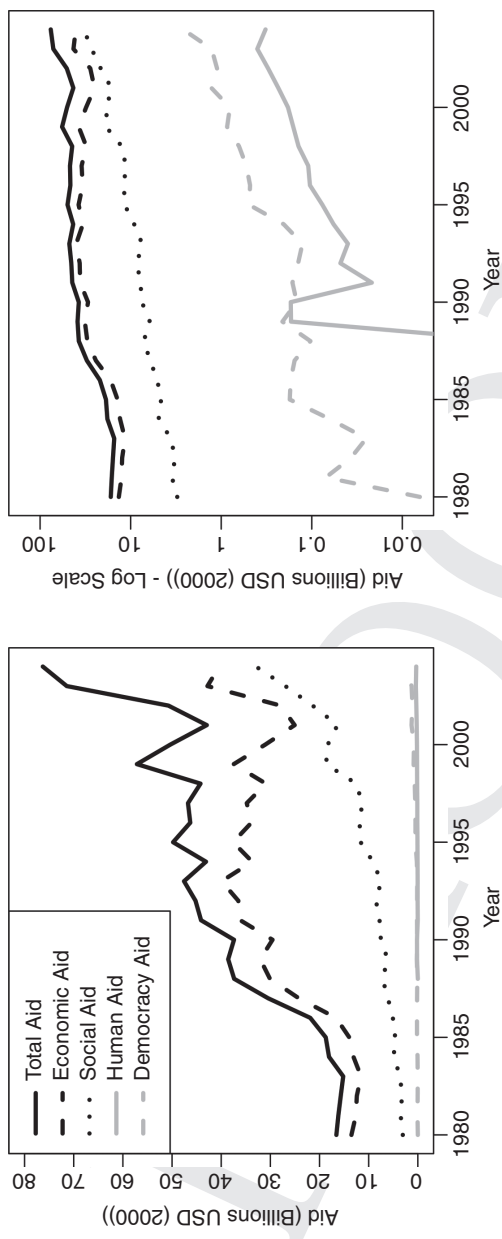


Figure 3.3: Aid Flows by Sector From 17 OECD Donors. Source: OECD (2008), as presented in Nielsen (2013).

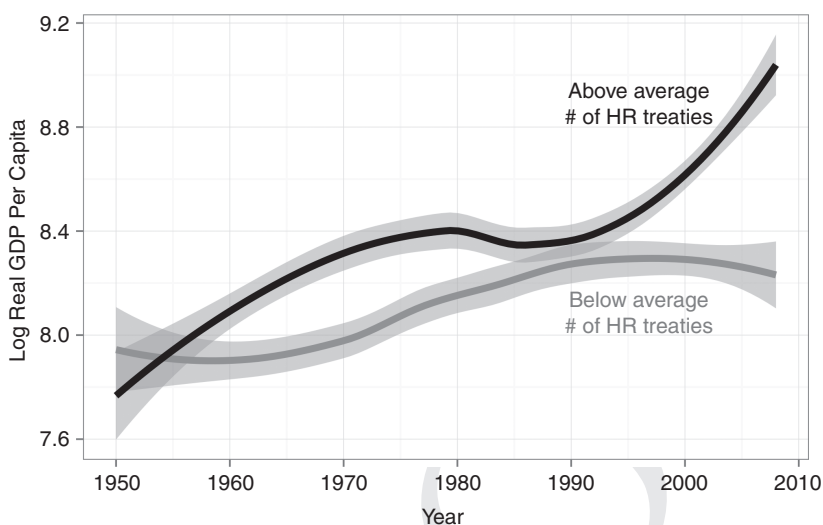


Figure 3.4: Patterns in per Capita GDP among high-commitment and low-commitment states, 1950–2007

Lines are LOESS smoothers for the conditional expectation of GDP per capita in a given year. Gray shading denotes the 95% confidence interval around the line.

Do more human rights obligations lead to underinvestment in economic development? A simple visualization does not support a trade-off. Using a count of ratification of the major human rights treaties⁵¹ on the one hand and the log of GDP per capita⁵² on the other, it is fairly clear that states that have ratified more treaties than average performed better economically than those who ratify fewer human rights treaties, contrary to the trade-off hypothesis (Figure 3.4). Posner's hypothesis sees little support here, as the average rate of change in per capita GDP tends to be generally parallel between the two groups. Since 2000, it even appears that the states with more human rights commitments grow at a more rapid rate. To test this hypothesis more explicitly, we regress countries' percent

⁵¹ To measure levels of human rights commitment, we draw from Lupu's (2013b) dataset cataloguing the years in which states ratified universal UN human rights treaties. We generate a count for each state of how many of the 24 human rights treaties they ratified in a given year.

⁵² Time series data on GDP is drawn from Version 6.0 of the Expanded Trade and GDP Data dataset. Kristian S. Gleditsch, "Expanded Trade and GDP Data," *Journal of Conflict Resolution* 46: 712–24 (2002).

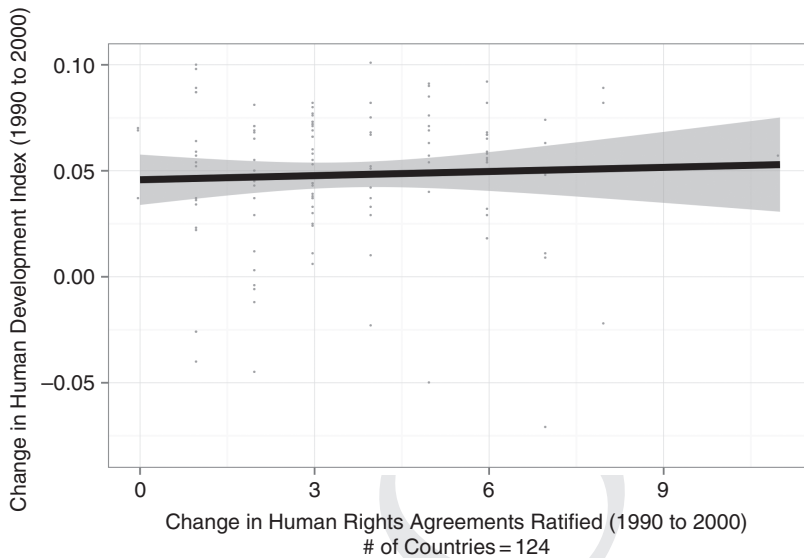


Figure 3.5: No evidence of an association between changes in HR commitments and changes in HDI

change in GDP per capita on the number of human rights treaties that they sign, again using the same controls as we did above for Lupu (2013a). We find that for each additional treaty ratified, the expected change in growth rates is statistically indistinguishable from zero (95% confidence interval [0.11%–0.27%]).

We also find no evidence that the countries that expand their human rights commitments see weaker growth in terms of a more generalized index of development – the UN Human Development Index. While the HDI is not collected annually, nor does it cover every single state (particularly for earlier iterations of the survey), we do have two time points – 1990 and 2000 – that allow for some within-country comparisons. Figure 3.5 plots the change in HDI for each country for which data is available from the year 1990 to 2000 against the change in the number of human rights treaties that state signed between 1990 and 2000. We do not see the negative association that Posner’s argument would imply. In fact, the slope of a simple regression fit to the bivariate relationship is statistically indistinguishable from zero. For conventional measures such as GDP per capita and more broad-based indices of development such as HDI, we find no evidence that states taking on greater human rights obligations are falling behind on development.

In short, there is practically no support for the claim that human rights obligations have interfered with the crucial project of economic development and attention to human welfare. Note what we are *not* arguing here. We agree that “[t]he notion that a government could legitimately put resources into economic growth, health care, or security rather than eliminating torture is highly controversial.”⁵³ But it is fairly clear that the international legal system does not force, or even incentivize, such a controversial choice.

The Rights/Social Justice Trade-off: Individual Rights Versus Social Equity

Finally, we explore the contention that human rights have contributed to impoverished social justice. Unfortunately, the critics do not provide very clear guidance on exactly what constitutes social justice, or even whether this is a universal concept or culturally specific. David Miller defines social justice as “how the good and bad things in life should be distributed among the members of human society.”⁵⁴ Europeans seem to have in mind some combination of attention to poverty prevention, equitable access to education, healthcare and labor market access, non-discrimination, and even intergenerational justice.⁵⁵ It is challenging to show that global social justice is improving or is at risk, because the concept only properly applies if we assume a society-wide consensus about the range of goods, services, and opportunities that members of a given society value (individual tastes notwithstanding).⁵⁶ Since that is not possible in the space of this short chapter, we have decided to test the concept of social justice as poverty prevention and equitable income distribution. We fully understand that this is too “flat” a conception,⁵⁷ and use it here only as *prima facie* empirical evidence of the claims advanced above.

We measure income inequality using the common Gini coefficient measure. With respect to within-country inequality, we find little evidence that countries that sign many human rights agreements have systematically greater inequality (higher Gini coefficients). The relationship is generally flat, if not somewhat negative, as countries that have signed

⁵³ Posner, “Human Welfare, Not Human Rights,” 1794.

⁵⁴ David Miller, *Principles of Social Justice* (Harvard University Press, 1999), 1.

⁵⁵ See, for example, the content of the “Social Justice Index,” which purports to measure the concept for states in the European Union; available at www.social-inclusion-monitor.eu/social-justice-index/.

⁵⁶ Miller, *Principles of Social Justice*, 8.

⁵⁷ A point made by many, including Cass R. Sunstein, *Free Markets and Social Justice* (Oxford University Press, 1999), 5.

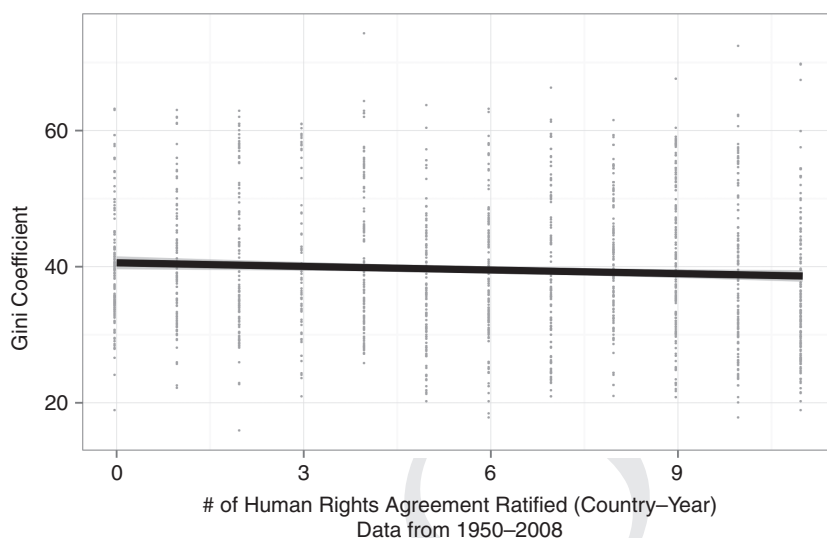


Figure 3.6: No meaningful relationship between measures of income inequality and number of human rights agreements ratified.

many human rights treaties have (admittedly, negligibly) more *equal* income distributions. Figure 3.6 plots the bivariate relationship between Gini coefficients of countries from 1950 to 2008 against the number of human rights agreements that they have signed.⁵⁸ Indeed, the slope of the bivariate regression line is marginally negative, but the pattern is overall incredibly noisy. To adjust both for time-trends and other relevant covariates, we fit a regression of the Gini coefficient on the number of human rights agreements signed, along with controls and year fixed effects. We actually estimate a slight negative and statistically significant relationship between the two. All else being equal, a country that ratifies an additional human rights agreement can be expected to have a Gini coefficient that is *lower* – signifying greater income equality – about 0.75 points (95% CI: [-1.47, -0.03]). This relationship is contrary to the claim that human rights have crowded out equality. However, the magnitude of the effect is so small that we should be cautious in inferring

⁵⁸ We use data on income inequality from the World Bank’s “All the Ginis” Dataset (version: Autumn 2014), which aggregates multiple Gini coefficient measures from household surveys. Notably, there is sizable missingness in this time series as it relies only on available surveys. However, this dataset gives the widest coverage possible with respect to direct measures of income inequality without relying on estimates, imputation, or guesses.

anything from this result. Nevertheless, it does show, at a minimum, that there is no clear evidence that countries that allocate effort to ratifying human rights agreements have systematically disregarded social justice. If there is a trade-off in terms of countries' use of human rights instruments and actual distributional outcomes, it is essentially impossible to find evidence of it in the data.

4 Conclusion

Many claims have been made about how international human rights law works – and how it sometimes fails to do so. Most scholars have commented on the effectiveness of the regime as a whole, or have concentrated on the ability of human rights law to achieve its stated objectives. But in recent years, a few commentators have claimed, or at least implied, that Human Rights (with a capital H and a capital R, as Stephen Hopgood would have it) as a set of rules, a philosophy, or a strategy of claim-staking has had *negative* consequences. Sometimes, these consequences have not been fully anticipated, as the strategic substitution or the budget constraint arguments tend to suggest. In the case of liberalism's focus on negative rights over social justice, the consequences may be construed as a deliberate choice that suits specific coalitions in powerful countries, such as the United States.


We have specified three dynamics that some authors have alleged connect international human rights law with negative consequences. *Strategic substitution* is a common critique of law enforcement: enforcing the law in some situations incentivizes actors to violate other norms or standards in order to achieve their objective. Banning torture is said to lead to less visible forms of “enhanced interrogation”: protecting civil rights that are observable is said to encourage repressive governments to simply cause their opponents to “disappear.” In this view, the demand for repression is basically constant. Law, some have claimed, merely changes its format.

Others claim that Human Rights have caused harm by *distracting* humankind from other purposes and values. Stalled development and global economic disparities leave so many people around the world in misery that it is natural to try to find a cause for, or at least a contributing factor to, these realities. For some, Human Rights as a system of commitments is at least in part to blame. The crowding-out hypothesis blames rights law for diverting resources away from the crucial project of economic development. “Human Welfare, *not* Human Rights” is a posture that prioritizes the former rather than the latter. But why not both? Because, some have claimed, budgets are limited, and when push

comes to shove, people must eat, though they need not enjoy basic freedom from political and even physical repression. The consequence? Allegedly, Human Rights have sapped efforts to tackle the bigger, broader problem of global poverty.

Relatedly, it is claimed that Human Rights have pushed matters of social justice into the background. In clinging to their negative liberties, liberals have lost touch with richer notions of rights such as equity, security, and justice. Over-legalization has become an end in itself; Human Rights has metastasized to inhabit the whole of humanitarianism. Indeed, Human Rights has become part of The Problem in the world today.

This chapter is a humble empirical effort to ask, *really?* Empirical push-back against such sweeping claims is important because they imply clear policy advice: drop the emphasis on Human Rights, and take up other crucial issues such as democratic transition, poverty alleviation, and “humanitarianism” writ large. Our findings suggest this drastic reorientation is unnecessarily destructive. It is also based on faulty empirics and sometimes little more than emotive gestures that belie our own sense of inadequacy in solving serious global problems.

We are aware that the basic empirics we offer in this chapter do not fully respond to the sweeping indictments found in some of the literature. But our discussion is designed simply to ask readers to stop and think for a moment about the direction much of the critique of Human Rights has taken. Unanticipated consequences have been described as *causal* outcomes on the basis of inappropriate empirical models. Crucial positions have been staked on little more than supposition. Skepticism has been fueled on the basis of thought experiments and possibilities. We want to at least encourage readers to stop and ask, *what is the causal evidence that international human rights law has contributed to any of these undesirable outcomes?* For a decade or more, the presumption that law matters for human rights has been the special evidentiary burden of those who hypothesize positive effects. We insist that  assign the international human rights regime negative consequences also have a burden to demonstrate causality.

Ours is not just a position based on empirical social science versus history, critical legal theory, philosophy, or any other academic discipline. All of these perspectives have a legitimate role in questioning the rules of governance humankind have fashioned. But when it comes to expounding on the consequences of choices we have made, it is essential to realize the danger of damaging a fragile system without empirical justification. As Stephen Hopgood has diagnosed, there *are* very powerful alternatives to Human Rights: for example, extreme forms of

religious authority and hard-shelled state sovereignty that we have recently rediscovered to be disastrous. Look at the evidence. Think again. Advocate wisely.

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