

CLOSING THE GAP ON MORAL RELATIVITY: COMPARING HUMAN RIGHTS REGIMES IN THE UNITED STATES AND THE RUSSIAN FEDERATION

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DOI:10.17589/2309-8678-2016-4-1-98-128

Contemporary authors often overstate the differences within the human rights regimes in the Russian Federation and the United States. This article is meant to provide insight into why the two systems, although taking markedly different developmental paths, have come to be far more similar than is often realized. The first question raised is, how did the two human rights systems develop historically? The next question is, how did the Universal Declaration of Human Rights and its subsequent split into two separate Covenants affect the rights within each system? The third question raised is, what modern advancements have taken place within each system? And finally, what failures within each system are also demonstrative of similarities within the two systems? Thus, the article begins by tracing historical developments within the two systems in order to elucidate regional variances that exist, and to explain how such variance materialized. Next, the article will provide concrete examples by comparing specific rights – such as the right to a public education, the right to social security, the right to participate in political life, and the right to privately own land – in order to provide some insight into why the author believes the differences in the two systems are often overstated by commentators. Finally, the article will explore some shortcomings that also share marked similarities within both systems. The article concludes that while the human rights regimes within Russia and the United States took markedly different paths during their development, and have relied on vastly different political and social situations during their evolution, they have ultimately reached a much greater level of maturity and protection under the law than is often given credit.

Keywords: human rights; Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; constitutional exceptionalism; federalism; comparative law; international law.

Recommended citation: Scott Armstrong, *Closing the Gap on Moral Relativity: Comparing Human Rights Regimes in the United States and the Russian Federation*, 4(1) RLJ (2016).

Table of Contents

- 1. Introduction**
- 2. Historical Developments**
- 3. Post-Split Developments**
 - 2.1. Russian Developments**
 - 2.2. United States Developments**
- 3. Comparison of Specific Rights**
 - 3.1. The Right to Public Education**
 - 3.2. The Right to Social Security**
 - 3.3. The Right to Participate in Political Life**
 - 3.4. Private Ownership of Land**
- 4. Failures within Each System**
 - 4.1. Torture**
 - 4.2. Incarceration**
- 5. Conclusion**

1. Introduction

Eleanor Roosevelt, who chaired the United Nations Human Rights Commission from 1946 to 1952 and was instrumental in negotiating the Universal Declaration of Human Rights, once stated:

Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. . . . Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.¹

To the author, what Eleanor Roosevelt was trying to convey was the message that essential to the legitimacy of human rights is the notion that these are truly universal values, inherent in the worth of all human beings. That all human beings are born free and equal in dignity and rights. And as such, human rights are not adequately protected unless they have meaning everywhere. Yet, while studying the laws pertaining to human rights across the globe, the author began to notice that such laws, at least from a cursory glance, did not seem to be uniformly established. In fact, the influence of domestic principles of constitutionalism, state identity and

¹ Eleanor Roosevelt, *In Our Hands* (Address delivered at the United Nations on the tenth anniversary of the Universal Declaration of Human Rights (1958)).

sovereignty, international organizations, and how international laws are incorporated into domestic law, all factors into the practice of human rights across the globe and create a fabric rich with seemingly differing and sometimes competing values. As such, human rights do not seem to be truly universal. By focusing my attention on specific rights such as the right to a free public education, the right to social security, the right to participate in the political process and the right to private ownership of land, the author began to notice that while these rights may not be universal, the regional variance that exists among many state actors seems to be often overstated. In order to fully explicate the international law of human rights would take a work far greater than the time and space the author has to devote to this article. Therefore, the modest purpose of this article will be to focus primarily on the seemingly contrasting rights within the United States and the Russian Federation in order to model one subset of the larger phenomenon of regional variance amongst human rights regimes.

This article will hopefully accomplish two goals. First, it will trace the history of the development of human rights generally, as well as within the two systems specifically. The purpose will be to elucidate the regional variances that exist, and to explain how such variance materialized. Second, the article will provide concrete examples in order to provide some insight into why the author believes the differences in the two systems are often overstated by commentators.

2. Historical Developments

No discussion of human rights in the United States would be complete without mentioning *Magna Carta*. When the American Founding Fathers searched for historical precedent in asserting their rights against King George III and the English Parliament, they found it here. The document was the result of the disastrous foreign policy of King John. After losing an important battle to King Phillip II at Bouvines, and with it, all hope of regaining the French lands he had inherited, he returned home defeated and cash-strapped. In order to refill his coffers, King John demanded scutage from his barons who had not taken part in the war with King Phillip II. The barons refused, and instead assembled at Runnymede on June 15, 1215, and demanded their rights be written down and recognized by the King. The rights and liberties set forth in the document grew over time into one of the foundational documents of democracy and ancient liberties.² However, at the time, neither of these were the goals of the barons. The Charter was in reality a feudal document meant only to protect the rights and property of the top echelon on feudal society. Furthermore, the rights being asserted against King John were not newly created

² For a concise summary on the significance of *Magna Carta* to the development of the American Declaration of Independence, see *Magna Carta and Its American Legacy*, U.S. National Archives & Records Administration, <http://www.archives.gov/exhibits/featured_documents/magna_carta/legacy.html> (accessed Mar. 11, 2016).

rights, dreamed up by the barons for the first time. Instead, the barons were simply putting to pen ancient rights and liberties that already existed.

It was largely the work of Sir Edward Coke in the early 17th century that made the document legally significant for people other than the barons who initially created it. Lord Coke's view of the law was particularly relevant to the American experience, for it was during this period that the charters for the colonies were written. Each colonial charter included the guarantee that those sailing for the New World and their heirs would have 'all the rights and immunities of free and natural subjects.'³ As the founding fathers developed legal codes for the colonies, many incorporated liberties guaranteed by *Magna Carta*, and later the 1689 English Bill of Rights, directly into their own statutes. Through Coke, whose four-volume *Institutes of the Laws of England* was widely read by American law students, young colonists such as John Adams, Thomas Jefferson, and James Madison learned of the spirit of the charter and the rights that it protected – or at least Coke's interpretation of them.

Thus, while the original *Magna Carta* may have simply been about barons and their taxation, much later the same principles came to be called no taxation without representation, and England lost its American colonies on the same basis. Over time, *Magna Carta* has been interpreted and reinterpreted into one of the most important documents to date in the field of human rights. Although it may be more accurate to state that what has transpired since the formation of the document is more worthy of note than the original document itself, either way, *Magna Carta* has grown to become what some consider the foundation of fundamental human rights and democracy.

At the same time that *Magna Carta* and the English Bill of Rights were lending their influence to the establishment of individual rights in the American colonies, the protection of individual rights in Continental Europe were being sculpted by the Peace of Westphalia.⁴ Westphalia is a region in Northern Germany that was the location of the Peace Treaty that ended the Thirty Years War in 1648. The Treaty is actually two documents-- the Treaty of Münster and the Treaty of Osnabrück – named after the two towns where the documents were negotiated and signed. Although the Peace was essentially a great property settlement for Europe, a sort of quieting of title across the continent, it is also recognized as the beginning of modern concepts of state sovereignty and international relations.⁵ For example, within the Treaty of Osnabrück

³ See, e.g., *Charter of Connecticut – 1662*, The Avalon Project, <http://avalon.law.yale.edu/17th_century/ct03.asp> (accessed Mar. 11, 2016) ('That all, and every the Subjects of Us, Our Heirs, or Successors, which shall go to inhabit within the said Colony, and every of their Children, which shall happen to be born there, or on the Seas in going thither, or returning from thence, shall have and enjoy all Liberties and Immunities of free Did natural Subjects within any the Dominions of US, Our Heirs or Successors, to all Intents, Constructions and Purposes whatsoever, as if the they and every of them were born within the realm of England . . .').

⁴ The turbulence of the times is reflected in two seminal works of political thought and jurisprudence: Thomas Hobbes' *Leviathan* (1651) and Hugo Grotius' *De iure belli ac pacis* (1625).

⁵ The Peace of Westphalia is relevant because international law has contributed so much to the development of the field of human rights.

the drafters agreed upon, 'exact and reciprocal Equality amongst all Electors, Princes, and States of both Religions.'⁶ While only concerning Protestants and Catholics, it is the first instance of protecting religious freedoms within an international agreement.

However, it is largely agreed upon that the origins of the modern human rights regimes lie in the Minority Treaties of the 20th century.⁷ Minority Treaties refer to the treaties, League of Nations Mandates, and unilateral declarations made by countries applying for membership in the League of Nations and United Nations. Most of the treaties entered into force as a result of the Paris Peace Conference. Stateless individuals such as Romani peoples, colonized individuals, and those displaced by the Treaty of Versailles at the close of World War I, all helped to draw attention to the increasing need for human rights protections for certain minority groups. Thus they were more collective group rights being protected, as opposed to individual rights *per se*. The Treaty of Versailles reorganized the boundaries of Europe and substantial minority populations were displaced or found themselves under the authority of unfamiliar sovereigns. Take for example the recreation of the State of Poland where millions of ethnic Germans were left residing within the territory. Also consider the creation of new states in the Balkans such as Yugoslavia and Hungary. Each consisted of large populations of people who did not share linguistic or ethnic identity with the majority population. All of this displacement was seen as a real threat to peace, and a potential cause for further war. As such, Minority Treaties were meant to protect collective group rights in order to avoid potential armed conflict. The duty to respect these rights was imposed on governments of defeated states as a condition precedent to the restoration of sovereign authority over their territories.⁸ Yet, the system was in no sense a universal mechanism to protect human rights. It was applicable only to states forced to accept minority rights as part of the terms of peace at the close of World War I.

As they say, hindsight is 20/20, and as history has now taught us, the threat to peace was in fact all too real. Germany aggressively sought to protect the rights of its *Volksdeutsche*⁹ peoples. Nearly a third of all litigation before the World Court between 1920 and 1939 involved some aspect of the protection of minority rights in Europe, with Germany suing Poland nearly a dozen times.¹⁰ The minority issue was ultimately the foremost ground cited by the Nazi party for its invasion of Poland,

⁶ *Peace Treaties of Westphalia (October 14/24, 1648)*, GHDI, <http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=3778> (accessed Mar. 11, 2016).

⁷ James C. Hathaway, *The Rights of Refugees under International Law* 81–91 (Cambridge University Press 2005).

⁸ *Id.* at 81.

⁹ '*Volksdeutsche*' is a term meaning 'ethnic German' that arose in the early 20th century and was used by the Nazi party to describe ethnic Germans living outside of the Third Reich, although many had been in other areas for centuries.

¹⁰ The World Court was known as the Permanent Court of International Justice at this time, and its records are available at <<http://www.icj-cij.org/pcij/index.php?p1=9>> (accessed Mar. 11, 2016).

which sparked World War II. As then-US Secretary of State Cordell Hill, recalled, '[f]rom the moment when Hitler's invasion of Poland revealed the bankruptcy of all existing methods to preserve peace, it became evident . . . that we must begin almost immediately to plan the creation of a new system.'¹¹ In order that history not repeat itself once again, the victorious Allied powers in 1945 signed the Charter of the United Nations. Within the Preamble of the Charter, it states that one main purpose of the United Nations would be 'to reaffirm faith in fundamental human rights . . .'¹² Furthermore, Art. 55(c) called for 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'¹³ When the atrocities committed by Nazi Germany became apparent after the war, the consensus within the world community was that the UN Charter did not sufficiently define the rights to which it referred. In order to better protect these 'fundamental human rights' there needed to be a clear iteration of which rights were being protected. Shortly thereafter, the United Nations faced the task of pronouncing what exactly those human rights norms were. A panel of intellectuals and human rights advocates, led by Eleanor Roosevelt, along with the input of national delegations, worked together on the project, which culminated in the 1948 Universal Declaration of Human Rights.¹⁴

The UDHR was designed to elaborate the commitment, inaugurated in the UN Charter, to promote human rights as indispensable to international as well as domestic peace and security. Article 1 proclaims straightaway: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'¹⁵ The corpus of the UDHR was the enunciation of those freedoms necessary for individuals to operate within a polity. Such human rights as freedom from slavery¹⁶ and torture,¹⁷ equality before the law,¹⁸ freedom of movement,¹⁹ freedom of thought, conscience and religion,²⁰ and right to participation in the political process,²¹ are laid out and ring with authority and certainty. In addition

¹¹ Cordell Hull, 2 *The Memoirs of Cordell Hull 1625* (Macmillan 1948).

¹² U.N. Charter, Preamble.

¹³ *Id.* Art. 55(c).

¹⁴ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., pt. 1, Resolutions, at 71, U.N. Doc. A/810 (Dec 10, 1948) [hereinafter UDHR].

¹⁵ *Id.* Art. 1.

¹⁶ *Id.* Art. 4.

¹⁷ *Id.* Art. 5.

¹⁸ *Id.* Art. 7.

¹⁹ *Id.* Art. 13.

²⁰ *Id.* Art. 18.

²¹ *Id.* Art. 21.

to these 'first-generation'²² civil and political rights, the UDHR also prescribes some 'second-generation'²³ economic and social rights.²⁴ These include the right to work,²⁵ to rest and leisure,²⁶ to education,²⁷ and to participation in cultural life.²⁸

Although the UDHR was adopted without dissent, the inclusion of both 'first-generation' rights and 'second-generation' rights created division right off the bat. Not every country operates under the same governmental structure, and not every government protects the same types of rights. For instance, the Soviets were concerned about Art. 17's enshrinement of the right to own property, and the United States was concerned about the First Amendment implications of Art. 12's requirement that attacks of individual honor and reputation be barred. It is not hard to recognize that the major division was between the United States and Soviet Russia, because this was a post-World War II document, and the US and Russia were the two major players on the international playing field at the time. Furthermore, their status within the United Nations, especially their being two of the permanent members on the United Nations Security Council, gave substantial weight to each of their respective positions regarding the UDHR.²⁹

²² 'First Generation' human rights are negative rights concerned primarily with liberty and participation in political life, and were pioneered by the United States Bill of Rights and earlier in France by the Declaration of the Rights of Man and of the Citizen in the 18th century, although some of these rights and the right to due process date back to the *Magna Carta* of 1215 and the Rights of Englishmen, which were expressed in the English Bill of Rights in 1689. They were later enshrined in international law by the UDHR, the 1966 International Covenant on Civil and Political Rights, and in Europe by the 1953 European Convention on Human Rights.

²³ 'Second-generation' human rights are positive rights and weren't recognized until after World War II. They are fundamentally economic, social and cultural in nature. They were also enshrined in the UDHR, and later in the 1966 International Covenant on Economic, Social, and Cultural Rights.

²⁴ Debate over positive *versus* negative rights began in the 19th century. The idea of 'generations' seems to have been the work of Karel Vasak, a continental European scholar of Czech origin who wound up in France. He envisioned three generations of rights derived from the French trinity of liberty (first), equality (second) and fraternity (third – *i.e.* collective rights). Liberty, it seems to me, is the only component of the French formulation that can be empirically tested. Some tend to appeal more towards John Locke's trilogy because it is more concrete. One can observe whether a fellow citizen: is alive or dead (life); is on the street or in jail (liberty); and possessed or dispossessed of 'stuff' (property). Likewise, the government can tangibly respect or deprive these rights subject to due process of law.

²⁵ UDHR, Art. 23(1).

²⁶ *Id.* Art. 24.

²⁷ *Id.* Art. 26(1).

²⁸ *Id.* Art. 27(1).

²⁹ By holding a spot as a permanent member of the Security Council, both countries hold 'veto power' over any UN action taken. There are five permanent members on the Security Council: the United States, Russia, China, France, and the United Kingdom. Today there are also 10 non-permanent members elected for two-year terms by the General Assembly. In 1948, however, there were only six non-permanent member states: Argentina, Belgium, Canada, Colombia, Syrian Arab Republic, and Ukrainian Soviet Socialist Republic.

The reason the UDHR could be adopted by consensus, despite the deep rift over certain provisions, was that it was not a legally binding instrument, but was instead merely an aspirational assertion of what rights *ought to be* protected. The UDHR is a United Nations General Assembly Resolution, and thus only amounts to what some term 'soft law'.³⁰ In fact, within the preamble itself the UDHR states that it is merely 'a common standard of achievement,' something to be 'strive[d]' for by national governments through 'progressive measures'.³¹ The United States went as far as to issue a statement after the UDHR's adoption, which noted: 'It is not a treaty; it is not an international agreement. It does not purport to be a statement of law or legal obligation.'³² Yet even though it was not legally binding, both countries were concerned because 'soft law' has a tendency, over time, to harden into international legal obligations by becoming customary international law.³³

The United States was concerned they needed to hold out to prevent customary international law from forming and trumping its own domestic laws on point. This is because within the United States Constitution, Art. VI, often referred to as the 'Supremacy Clause,' places treaties on the exact same playing field as constitutional and federal law. The exact language reads: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land . . .'³⁴

Other articles of the UDHR which comprised 'second-generation' economic, social and cultural rights, such as Art. 22's 'right to social security' and Art. 25's 'right to a standard of living adequate for the health and well-being . . . including food, clothing, housing and medical care,' were seen as departures from the typical human rights recognized within the United States and similarly positioned countries. As such, the United States avoided these economic, social and cultural rights at all costs.

The Soviet's faced similar concerns that a number of the listed civil and political rights would develop into customary international law and directly conflict with their own form of totalitarian governmental rule, which largely denied its citizens these civil

³⁰ The term 'soft law' refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat 'weaker' than the binding force of traditional law, often contrasted with soft law by being referred to as 'hard law.'

³¹ UDHR, Preamble.

³² 19 Dep't State Bull. 751 (1948).

³³ There are two key elements in the formation of customary international law. They are expressed in Art. 38 of the International Court of Justice Statute (59 Stat. 1055, 33 U.N.T.S. 993), which states custom is 'evidence of a general practice accepted as law.' To show a rule of customary international law exists one must prove: 1) that the rule has been followed as a 'general practice,' and 2) that it has been 'accepted as law.' There is thus an objective, and a subjective element to the inquiry.

³⁴ U.S. Const. Art. VI. Furthermore, the concept termed the 'Charming Betsy Principle' makes acts of Congress subject to conformity with international law.

and political rights. There are some deep-rooted philosophical underpinnings that both laid the foundation as well as supplement the division. Within Russia, especially during the Soviet period, many did and do adhere to Marxist ideology. In Marxism, Communism is seen as the ultimate stage of social development. As such, substantive law codes within Russia were meant to have an aspect of social engineering involved. This can still be seen in many of the law codes currently in effect in Russia today. This is not so in the United States, where Lockean theory largely prevails. These adherents would find capitalism as the ultimate stage of social development due to the labor theory of property, a theory of natural law that holds property originates by the exertion of labor upon natural resources. In the market-driven, individualistic West, how one fared economically, socially or culturally was your own problem, between you and the market. As Cold War ideology goes, any attempts to require the government to protect economic rights were considered communist and suspect. In the Soviet Bloc, the state was expected to provide the basics for economic survival, and any attempts to say otherwise were seen as capitalist and suspect.

In essence, the United States backed Western-inspired civil and political rights, which are typically considered first-generation human rights, while the Soviet Union and its allies backed the socioeconomic and cultural rights typically considered second-generation human rights. This requires some further explanation. In the constitutional culture of the United States, the prevailing attitude was, and still is, that the purpose of the right is to insulate and protect people from abusive governmental power. The American Constitution was designed specifically to limit the national government to enumerated areas of authority. The Constitution was drafted as an arm's-length agreement amongst the 13 newly independent states. While they were aware of the need for some national cooperation, especially in commerce and defense, they had just finished fighting a long and costly war against a distant king and parliament. Furthermore, each state already enjoyed a functioning, representative government. The idea of a national government was concerning to those different interests – such as large and small states or manufacturing and agrarian states – which feared their opponents would take control of the new national government and implement their own economic or political policies. According to Western legal theory, 'it is the individual who is the beneficiary of human rights which are to be asserted *against* the government.'³⁵ Thus, the only right that makes sense is one that places restrictions on government action taken against individuals, otherwise termed 'negative rights.'

In contrast, second-generation rights are, in essence, requirements that the government *provide* certain benefits and services to the public (such as education, work, social security, or culture), and are otherwise termed 'positive rights.' It is the United States position that such positive rights may be provided as necessary, but

³⁵ Doriane Lambelet, *The Contradiction between Soviet and American Human Rights Doctrine: Reconciliation through Perestroika and Pragmatism*, 7 B.U. Int'l L.J. 61, 66 (1989), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1744&context=faculty_scholarship> (accessed Mar. 11, 2016).

they are not legally required to do so (at least not by the Federal Constitution, of which the article will touch on more later). Russians saw such positive rights as the proper role of governmental administration.³⁶ The Soviet state was considered as the source of human rights. Therefore, the Soviet legal system regarded law as an arm of politics and courts as agencies of the government.³⁷

American disinclination to positive rights can also be attributed in part to the ideological campaign against the Soviet Union during the Cold War. The Soviets gave a high place to the collective over the individual. Individual rights of expression, or political diversity, were not important in the collective state. This meant priority for positive liberty, which they believed empowered the state to take sweeping action to provide for the well being and 'self-realization' of its citizens, sometimes at the expense of individual civil and political rights, such as the right to political participation.³⁸ Everyone was to be set on the unitary goal of furthering the Soviet cause. Many in the West, however, viewed the Soviet position skeptically as a veiled attempt to return to the excesses of authoritarianism that the United Nations system of governance was designed to prevent.³⁹

The political roadblock culminated in the follow up the UDHR with two separate treaties – the International Covenant on Civil and Political Rights⁴⁰ and the International Covenant on Economic, Social, and Cultural Rights⁴¹ – each of which was adopted in 1966 and entered into force in 1976. In the end, the United States chose not to ratify the ICESCR, and still has not ratified the treaty to present day. Also of particular interest is the fact that the United States' reservations to the ICCPR made the international human rights exactly congruous to already existing domestic constitutional protections. To the extent that any international rights would have exceeded the domestic protections already afforded, they were repudiated. Furthermore, the United States has not signed onto the First Optional Protocol to the ICCPR, which grants individuals the right to bring claims before the Human Rights Committee, as opposed to the state bringing the claim on their behalf. And although Russia ratified both the ICESCR and the ICCPR, these documents were neither well known to people living under Communist rule nor taken seriously by

³⁶ See generally David A. Shiman, *Economic and Social Justice: A Human Rights Perspective* (Human Rights Resource Center 1999), available at <<http://www1.umn.edu/humanrts/edumat/pdf/TB1.pdf>> (accessed Mar. 11, 2016).

³⁷ Richard Pipes, *Russia under the Bolshevik Regime 402–03* (Vintage Books 1995).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR].

⁴¹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95–19, 999 U.N.T.S. 3, 6 I.L.M. 360 (1967) [hereinafter ICESCR].

the Communist authorities.⁴² While the United States still to date has decided not to sign onto the First Optional Protocol to the ICCPR, Russia did later choose to sign the Optional Protocol. Russia did so on October 1, 1991, and with it, made the following Declaration:

The Union of Soviet Socialist Republics, pursuant to article 1 of the Optional Protocol, recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Union of Soviet Socialist Republics, in respect of situations or events occurring after the date on which the Protocol entered into force for the USSR. The Soviet Union also proceeds from the understanding that the Committee shall not consider any communications unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the individual in question has exhausted all available domestic remedies.⁴³

Only two months after signing the Optional Protocol, the Soviet Union dissolved into 15 post-Soviet states.⁴⁴ The Russian Federation has been recognized internationally as the successor state of the Soviet Union. Therefore, according to international law, Russia remains bound by any and all treaties entered into by the former Soviet Union and thus the Optional Protocol still applies.⁴⁵

The 1977 USSR Constitution reflects that the entire country was designed around the idea of a social state surrounding a totalitarian country governed by the Communist party as the central rulers. It stated: 'The Soviet state and all its bodies function on the basis of socialist law, ensure the maintenance of law and order, and safeguard the interests of society and the rights and freedoms of citizens.'⁴⁶ In short, the Russian paradigm 'enjoy[s] no independent existence outside the network of law-relationships (*pravootnosheniia*) established by positive legislation (*zakonodatel'stvo*).'⁴⁷ And although many parts of the Soviet Constitution sounded as though it promoted

⁴² Daniel C. Thomas, *Human Rights Ideas, the Demise of Communism, and the End of the Cold War*, 7 J. Cold War Stud. 110, 117 (2005), available at <http://papers.ssrn.com/abstract_id=1333625> (accessed Mar. 12, 2016).

⁴³ A list of signatories and their reservations and / or declarations are available at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en> (accessed Mar. 12, 2016).

⁴⁴ The post-Soviet states include Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Russia.

⁴⁵ See Vienna Convention on Succession of States in Respect to Treaties, Aug. 23, 1978, Arts. 15(b), 34(b), 1946 U.N.T.S. 3; see also Vienna Convention on Succession of States in Respect of State Property, Archives and Debt, Apr. 8, 1983, 22 I.L.M. 306 (1983).

⁴⁶ USSR Constitution Art. 4.

⁴⁷ Ronald Childress, *False Cognates and Legal Discourse*, 2(1) Journal of Eurasian Law (JEL) 3 (2009).

civil and political rights, such provisions did not have direct effect, and there was no legislation in place to enforce them.⁴⁸ In other words, constitutional rights of Russian citizens require ‘concretization’ before they can be adjudicated.⁴⁹ Take for instance Art. 59 of the RF Constitution. It claims that alternative service in place of military service is a right whether based on grounds of conscience, religious faith, or ‘other reasons established by federal law.’⁵⁰ Yet, since no specific statute has been adopted, Art. 59 is completely inoperative in the Russian Federation. This is odd to an American’s sensibilities, which would think about constitutional rights and protections as having direct effect simply by their being within the text of the Constitution itself.

3. Post-Split Developments

In 1787, Noah Webster poignantly articulated the need for citizens to take part in the political process when he penned the following:

In the formation of . . . government, it is not only the *right*, but the indispensable *duty* of every citizen to examine the principles of it, to compare them with the principles of other governments, with a constant eye to our particular situation and circumstances, and thus endeavor to foresee the future operations of our own system, and its effects upon human happiness.⁵¹

Mr. Webster was suggesting that people should not simply educate themselves with the form of government that their own state practices, but to familiarize oneself with competing systems of government as well, so as to ultimately determine the best possible form of government. As a founding father of the United States, Mr. Webster was primarily concerned with American Constitutionalism and the structure of the newly established United States federal government. However, the same idea of comparative study should not be lost on other areas of state practice as well. Today, it is not governmental structure that is booming with innovation any longer, it is instead areas such as environmental protection, globalization of trade and commerce, the development of international laws and regulations, the establishment of intergovernmental organization, human rights and various other areas subject to rapid development and growth. Accordingly, the remainder of this article will

⁴⁸ For more information on the different legal paradigms at play, see *id.*

⁴⁹ This is true even today, even though Art. 18 of the RF Constitution declares that such rights operate directly.

⁵⁰ RF Constitution Art. 59.

⁵¹ Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* 6 (Prichard & Hall 1787), reprinted in *The Constitution of the United States: And Selected Writings of the Founding Fathers* 669 (Barnes & Noble Inc. 2012).

utilize Mr. Webster's theory and provide a comparative study of the present state of human rights within these two systems. The following discussion will highlight the advancements made in each system following the splitting of the UDHR into the ICCPR and the ICESCR.

2.1. Russian Developments

Since the collapse of the Soviet Union in 1991, Russia has undergone a profound transformation in its political and constitutional systems, which have in turn affected its treatment of human rights. On September 21, 1993, President Boris Yeltsin declared the Supreme Soviet dissolved and issued Decree No. 1400 'On Progressive Constitutional Reform in the Russian Federation,'⁵² which suspended the operation of most of the former 1978 Constitution. The ultimate result was the adoption of a new Constitution in 1993 that rejects the former communist dictatorship and calls for passage to a democratic government.⁵³ Article 1 begins by declaring that the Russian Federation is now a 'democratic federal rule-of-law state.'⁵⁴ Americans admired Yeltsin's efforts so much that they passed the Freedom Support Act to help underwrite his program of reforms.

The new Constitution went much further in recognizing human rights than did any of its predecessors. Article 2 provides that '[i]ndividuals and their rights and freedoms shall be of supreme value.'⁵⁵ And although the Constitution still makes it the 'duty of the state'⁵⁶ to protect such rights, it makes clear its departure from the Soviet model by proclaiming that '[f]undamental human rights and freedoms are inalienable and belong to everyone from birth.'⁵⁷ Another development that came along with the passage of the new Constitution was the introduction of the concept of separation of powers. Of particular importance to enforcing human rights in Russia is the guarantee of the independence of the judiciary and power of judicial review.⁵⁸ Furthermore, Art. 15(1) establishes the principle of constitutionalism by

⁵² «О поэтапной конституционной реформе в Российской Федерации» [*'O poeapnoi konstitutsionnoi reforme v Rossiiskoi Federatsii'*] (Collection of Acts of the President and Government of the Russian Federation, No. 39, item 3597).

⁵³ See Victoria Schwartz, *The Influences of the West on the 1993 Russian Constitution*, 32 *Hastings Int'l & Comp. L. Rev.* 101 (2009), available at <http://papers.ssrn.com/abstract_id=2117246> (accessed Mar. 12, 2016) (discussing the influences of Western constitutional ideology on the new Russian Constitution).

⁵⁴ RF Constitution Art. 1.

⁵⁵ *Id.* Art. 2.

⁵⁶ *Id.*

⁵⁷ *Id.* Art. 17(2).

⁵⁸ *Id.* Art. 10: 'State power in the Russian Federation shall be exercised on the basis of separation of the legislative, executive and judicial branches. Organs of legislative, executive and judicial power shall be independent.' This concept, while not specifically stated in the U.S. Constitution, is inherent in its structure, separating the first three articles in accordance with the three branches of government.

providing that '[t]he Constitution of the Russian Federation shall have supreme legal force and *direct effect*.'⁵⁹ The rules governing international law are also very important to the Russian Federation, which is apparent through Art. 10 of the RSFSR Declaration of Sovereignty of June 12, 1990, which declared: 'All citizens and persons without citizenship living on the territory of the RSFSR are guaranteed the rights and freedoms envisioned in the RSFSR Constitution, the USSR Constitution, *and the generally recognized norms of international law*.'⁶⁰ The same concept was applied in Art. 17(1) of the 1993 Constitution, which states: 'The rights and freedoms of the individual and citizen shall be recognized and guaranteed in the Russian Federation *in conformity with the generally recognized principles and norms of international law*.'⁶¹ Not to mention, international law instruments take precedence over national legislation according to Art. 15(4) of the RF Constitution.⁶²

Chapter 2 of the Constitution, which deals with the 'Rights and Freedoms of the Individual and Citizen,' contains an extensive list of rights. Not only does it include the familiar social and cultural rights, but it also contains many civil and political rights, such as free opinion and speech, freedom of assembly, freedom of association and political plurality. Russia has thus combined ideals from its socialist past by including economic, social, and cultural rights, based on the ICESCR with the more traditionally Western concepts of civil and political rights stemming from the ICCPR.⁶³ The catalog of civil, political, economic, social, and cultural rights are all based off of international human rights standards.

The next major step for Russia in the field of human rights came on February 28, 1996, when Russia signed the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter ECHR]. Russia is now a member of the Council of Europe and thus under the ECHR, it is subject to the jurisdiction of the European Court of Human Rights [hereinafter Eur. Ct. H.R.], an international tribunal with real bite.⁶⁴ By acceding to the ECHR, Russia not only agreed to abide by the ECHR's provisions, but also made itself subject to the case law of the Eur. Ct. H.R. In essence, they adopted a well-developed existing body of human rights law overnight. The ECHR begins with an enumeration of rights that blends both first and second-generation

⁵⁹ RF Constitution Art. 15(1) (emphasis added).

⁶⁰ Emphasis added.

⁶¹ RF Constitution Art. 17(1) (emphasis added).

⁶² *Id.* Art. 15(1).

⁶³ It would be unwise not to mention, however, that in post-Soviet Russia, the Communist Party became one of the strongest and most stable political parties, while the parties of the non-communist reformers have foundered. The absence of democratic organizations to counter the Communist Party continues to be a serious destabilizing force in the Russian political environment that may hamper the progress of human rights developments within Russia.

⁶⁴ The council is made up of over 40 countries, and has rendered over 400 judgments against states.

rights. And furthermore, since these events the Russian parliament has been actively incorporating human rights principles into its domestic legislation.⁶⁵ In order to further ensure the protection of the newly established human rights concepts, Russia developed a special agency that deals exclusively with human rights violations – the Office of the Commissioner for Human Rights and Its Plenipotentiary (Ombudsman). There have also been efforts to develop a regional human rights enforcement system within the Commonwealth of Independent States [hereinafter CIS].⁶⁶

One major area that has seen real change in Russia due to its membership in the Council of Europe deals with the death penalty. Although Russia has had an off-and-on relationship with the death penalty for some time, most recently, the all-time low (excluding when it was abolished) came when only four executions were carried out in 1993.⁶⁷ The primary reason that Russia has backed away and become more tentative of the death penalty has been its wish to become and remain a member of the Council of Europe. In order to join in 1996 Russia had to agree to an immediate moratorium on implementation of the death penalty and its elimination within three years.⁶⁸ The moratorium held the death penalty at bay until 1999, when the Constitutional Court declared in Ruling No. 3-P of February 2, 1999,⁶⁹ that it would not be allowed at all. However, in 2001 the Duma passed a new Criminal Procedure Code that clears up ambiguities surrounding when the death penalty may be applicable, and thus it may move toward imposing the death penalty once again. Even so, by virtue of the new Criminal Code, which came into force on January 1, 1997, the death penalty is prescribed for five offences, whereas in the 1970^s there were 22. There is also provision for the substitution of a sentence of life imprisonment. And lastly, minors, women and persons over 60 years of age may not be sentenced to death.⁷⁰ Russia's spot on the Council of Europe is already tentative, and some commentators

⁶⁵ Including the new 2002 Civil Procedure Code, 2001 Criminal Procedure Code, 2001 Land Code, 2001 Law on Court Expertise, 2001 Labor Code, 2002 Bar (*advokatura*) Law & Code of Ethics and the 2004 Housing Code. Important because one of the lessons of Russia's Communist past is that constitutional and legislative guarantees of human rights are meaningless without some enforcement mechanism, which generally comes from a statute (*zakonodatel'stvo*) that can be adjudicated.

⁶⁶ Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, May 26, 1995, reprinted in 17 Hum. Rts. L.J. 159 (1996). However, many member states of the CIS are dictatorships that engage in widespread violations of human rights.

⁶⁷ William Burnham et al., *Law and Legal System of the Russian Federation* 651 (3rd ed., Juris Pub. Inc. 2004).

⁶⁸ *Id.* at 652.

⁶⁹ In the case concerning the review of the constitutionality of certain provisions of Arts. 41 and 42(3) of the RSFSR Criminal Procedure Code (Collection of Legislation of the Russian Federation, 1999, No. 6, item 867). The Court held that it would not be allowed 'regardless of the composition of the tribunal that tries the case – whether a court with a jury, a court of three professional judges or a court with one professional judge and two lay assessors'.

⁷⁰ Bill Bowring, *Russia's Accession to the Council of Europe and Human Rights: Four Years On*, 4 Eur. H.R. L. Rev. 362, 369 (2000).

have made note that a ‘move back toward imposing the death penalty may be the “last straw” as far as the Council of Europe is concerned, with all the international prestige and negative public opinion issues that this would raise.’⁷¹ Currently, however, Russia has adhered to the unofficial moratorium announced by President Yeltsin on August 2, 1996, thanks to the practice of referring all death sentences to the President’s Commission on Clemency who have commuted each sentence to life in prison and Russia’s desire to remain part of the Council of Europe.⁷²

The Russian Supreme Court has cited the ECHR in a number of cases, and has ordered all courts subordinate to it to apply such precedents where applicable. The Eur. Ct. H.R. has become overwhelmed with cases from Russia. President Putin even remarked in November of 2001:

We do not consider the European Human Rights Court as a competitor of our own judicial system. On the contrary, this is the most important element of European values in the modern world and in Russia if we take into account its integration into the world community.⁷³

Still, as of February 2009, 28 percent of pending cases before the Eur. Ct. H.R. were directed against the Russian Federation, amounting to 27,900 cases. And of those found admissible, the vast majority go against Russia. Also, findings of several organizations are far from complimentary. The UN Committee on Economic, Social and Cultural Rights noted that ‘the process of transition to a democratic country with a market-based economy is being undermined by the development of corruption, organized crime, tax evasion and bureaucratic inefficiency and has resulted in inadequate funding for social welfare expenditure and payment of wages in the State sector.’⁷⁴ The Committee on the Elimination of Racial Discrimination noted increasing incidents of acts of racial discrimination on ethnic grounds and inter-ethnic tensions

⁷¹ Burnham et al., *supra* n. 67, at 659 (noting that sensitivity about Russian membership in the Council is clear from the Council’s vote in April 2000 to suspend Russia’s voting rights on the Council because of human rights violations in Chechnya).

⁷² There is a clear difference in the treatment of the death penalty in the United States, because as a matter of state law, there is a myriad of viewpoints taken, whereas in Russia, it is the central government that has the last word.

⁷³ Quoted in William Burnham et al., *Law and Legal System of the Russian Federation* 329 (6th ed., Juris Pub. Inc. 2015) (citing Peter Krug, *Internalizing European Court of Human Rights Interpretations: Russia’s Courts of General Jurisdiction and New Directions in Civil Defamation Law*, 32 *Brook. J. Int’l L.* 1, 7 (2006), available at <<http://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1255&context=bjil>> (accessed Mar. 12, 2016)).

⁷⁴ *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, U.N. ESCOR, ¶ 13, U.N. Doc. E/C.12/1/Add.13 (1997), at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2F1%2FAdd.13&Lang=en> (accessed Mar. 12, 2016).

and conflicts in various parts of the Russian Federation.⁷⁵ The UN Special Reporter on Torture has mentioned that detention conditions are characterized by overcrowding and unsatisfactory sanitation and medical care.⁷⁶

The United States is responsible for another important piece of the puzzle in the development of human rights in Russia. During the 1990^s, the United States intervened directly to export Western ideas and institutions into Russian society. With Russia's newly established commitment to democracy and the rule of law, observers in the United States saw it as their duty to provide what help that could in shaping this transition in Russia. In the early 1990^s, several Russian non-governmental organizations were formed with the purpose of seeking international assistance in Russia's transition. One such organization was ROSCON, whose acronym stood for 'Russian Society for Social Conservation' and whose goal was a broad, societal change in behavior through social marketing. ROSCON negotiated an agreement with Washington-based Academy for Educational Development [hereinafter AED] jointly to seek an award of funding from the United States Agency for International Development [hereinafter AID]. The ROSCON / AED team received millions of dollars from AID to educate Russians about free market economics. Many realized that the shift from Russia's command economy to that of a free-market would not only require large-scale effort from above by the government, but also cooperation and understanding from below as well. Another, purely American-based NGO that worked within Russia during this time was the Rule of Law Consortium [hereinafter ROLC], whose goal was to strengthen Russia's core legal institutions, and was a heavy influence in reviving jury trials in Russia. AID awarded ROLC US\$22 million dollars to help support the rule of law in Russia.⁷⁷

Many skeptics have argued that the change was too drastic to take hold in Russia. The author has spoken with Dr. Ronald M. Childress, a former member of the ROSCON

⁷⁵ *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination Russian Federation*, U.N. CERD, 52nd Sess., UN Doc. CERD/C/304/Add.43 (1998), at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2F304%2FAdd.43&Lang=en> (accessed Mar. 12, 2016).

⁷⁶ *Report of the Special Rapporteur, Mr. Nigel S. Rodley, Submitted Pursuant to Commission on Human Rights Resolution 1997/38*, U.N. ESCOR, Commission on Human Rights, 54th Sess., Agenda Item 8(a): Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 164, UN Doc. E/CN.4.1998/38 (1998), at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/145/96/PDF/G9714596.pdf?OpenElement>> (accessed Mar. 12, 2016).

⁷⁷ The ROLC define Rule of Law as follows, pulling directly from the 1993 Vancouver Summit: 'Rule of Law means that all components of society, including the public bureaucracy, operate under the same legal constraints and with the same legal rights, thus enabling peaceful and predictable political and economic participation. Strengthening the rule of law requires that the legal system exist not only on paper, but also in practice. Written laws must also be implemented, enforced, understood, accepted, and used. Therefore, strengthening the rule of law requires the development of independent, efficient, and highly professional judicial and legal institutions capable of supporting democratic, market-oriented societies and protecting human rights. It also requires an increased awareness on the part of the population of the benefits to them of a law-based society, and a publicization and popularization of the new systems being created.'

team, who is now an Adjunct Professor at the University of South Carolina School of Law. Dr. Childress emphasized that many of these NGO's, in particular ROSCON, were ultimately failures in their attempts to weave Western institutions into Russia's fabric. However, not even Dr. Childress and his ROSCON comrades can deny that the collective efforts of countless individuals and NGO's bringing Western ideals into Russia had some tangible effect on Russia in areas such as privatization, market-liberalization, monetarism, rule of law, democracy, and most importantly for this paper, human rights.

2.2. United States Developments

Unlike the Russian Constitution that provides for limitations within its text,⁷⁸ the United States Constitution sets out individual rights in absolute terms. Take for instance the First Amendment's flat prohibition: 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . .' But no one maintains this means exactly what it says. Limitations come from judicial decisions and include such things as subversive speech and words that lead to breach of the peace.⁷⁹ Thus the brevity of the US Constitution should not be cited as proof of vast differences between the two systems. Also unlike Russia, Americans have traditionally known their rights and have stood upon them. From *Marbury v. Madison*⁸⁰ to present day, Americans know that no arbitrary action of the government in violation of their rights can escape judicial review. However, Russians are today much more aware of their own rights. Copies of the 1993 RF Constitution are sold in mass quantities. As mentioned, it contains 47 articles declaring 'Rights and Liberties' of persons and citizens.

One large development in the United States actually predates the UDHR, but has had lasting effects on the landscape of individual rights within the United States nonetheless. After the stock market crash of 1929 wiped out many American's savings, and bank failures further exacerbated the problem, Franklin D. Roosevelt began to combat the rampant poverty with his New Deal government programs. The Acts were meant to address many dangers of modern American life, including old age, poverty and unemployment. By signing the Social Security Act on August 14, 1935, President Roosevelt became the first president to advocate for federal government assistance for the elderly.

The United States has also become a member to a regional human rights regime – the Inter-American Human Rights System, otherwise known as the Organization of American States. While generally not held in as high regard in terms of enforcement as with its European counterpart, the Inter-American System provides for regional oversight and acts as a regional 'watch-dog' nonetheless, and has strengthened the United States commitment to both positive and negative human rights. The Inter-

⁷⁸ RF Constitution Art. 55(3).

⁷⁹ Like shouting 'Fire!' in a crowded theatre.

⁸⁰ 5 U.S. (1 Cranch) 137.

American System also contains the Inter-American Court on Human Rights. Another argument that is often made about why the situation in the two countries is so different is that of American 'constitutional exceptionalism'.⁸¹ In essence, comparing the United States Constitution with other nation's constitutions and pointing out the lack of socioeconomic rights within the text is often used as proof of the lack of positive human rights protection within the United States.⁸² Yet this argument is fundamentally flawed. Unlike Russia, who has drafted and redrafted its Constitution numerous times, the United States' Constitution is the oldest surviving national constitutional document in the world. The constitutions of the United States and the Russian Federation were written half a world and more than 200 years apart under immensely different political situations and traditions that shaped the drafters' choices. Furthermore, confining the study of constitutionalism in the United States simply to the text of the Federal Constitution ignores the reality of constitutionalism in the United States. Over the past two centuries, Americans have participated in extensive and ongoing constitution making at the state level, in the course of which they have evaluated and updated the choices reflected in the United States Constitution numerous times. Also, similar to Russia's Constitution, state constitutions tend to be rather long and elaborate, and include more detailed provisions. Furthermore, similar to Russia's Constitution, state constitutions are often amended and oftentimes even replaced outright.⁸³ For instance, just between 1971 and 1973, South Carolina passed 200 amendments to its own state constitution. And most importantly, like Russia's Constitution, state constitutions contain positive rights, such as a right to free education, labor rights, social welfare rights, and even so called 'third-generation' environmental rights.

The author will use the right to education as an example. While a social right constitutionally protected in Russia, the United States Supreme Court has declared education, 'is not among the rights afforded explicit protection under our Federal Constitution'.⁸⁴ The same is true for other socioeconomic rights, such as the right to health care, to a limited workday, to social security benefits, and to a healthy

⁸¹ See, e.g., Helen Hershkoff, *Horizontality and the 'Spooky' Doctrines of American Law*, 59 Buff. L. Rev. 455 (2011), available at <http://buffalolaw.org/past_issues/59_2/Hershkoff.pdf> (accessed Mar. 12, 2016); Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 Mich. L. Rev. 391 (2008), available at <http://papers.ssrn.com/abstract_id=1287701> (accessed Mar. 12, 2016).

⁸² See Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* (University of Chicago Public Law & Legal Theory Working Paper No. 36, January 2003), <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1384&context=public_law_and_legal_theory> (accessed Mar. 12, 2016).

⁸³ Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. Chi. L. Rev. 1641, 1672 (2014), available at <http://papers.ssrn.com/abstract_id=2416300> (accessed Mar. 12, 2016) (stating that 'Louisiana has had 11 constitutions, Georgia has had 9, Virginia and South Carolina have each had 7, and Florida and Alabama have each had 6. Combined, the states have produced a total of 149 documents to date.').

⁸⁴ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

environment.⁸⁵ Thus, when looking only at the Federal Constitution, it appears that the United States and Russia differ greatly as to treatment of positive rights. But when one considers that Americans have enshrined many explicit positive rights in their state constitutions, the two systems do not seem so vastly different after all.⁸⁶

There are also a large number of universal human rights instruments dedicated to specific issues that both countries adhere to. For instance, both nations adhere to the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Furthermore, certain customary human rights norms, such as the prohibition against genocide, slavery and torture, have become *jus cogens*⁸⁷ obligations that may not be derogated by treaty by any nation. Moving forward, the following chapter will provide specific comparisons of the treatment of several rights within the two systems so as to present meaningful and justifiable examples of the broad ideas discussed earlier in the paper.

3. Comparison of Specific Rights

As the previous discussion has hopefully explained, the traditional argument posits that Russians enjoy better treatment when it comes to second-generation positive rights, while Americans enjoy better treatment in terms of first-generation negative rights. However, this is merely terminology used to describe certain types of human rights, and may not have as much meaning in practice. Thus, the following section will use specific examples of positive and negative rights, and juxtapose their treatment within the two systems, to elucidate the similarities between both states' practices. Much has already been written regarding some of the 'sexier' rights such as the right to life, liberty and freedom of religion. Therefore, this article will use corollary rights, equally as important, but lesser discussed, to explain its position. The following discussion will use two positive rights: the right to receive a free public education (Sec. 3.1) and the right to receive social security (Sec. 3.2), as well as two negative rights: the right to participate in political life (Sec. 3.3) and the right to own private property (Sec. 3.4).

⁸⁵ See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1133 & nn. 2–5 (1999).

⁸⁶ See David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* 13, 17 (UBC Press 2012) (stating as of 2012, 30 state constitutions included one or more provisions requiring the government to care for the poor or the disabled; 11 required the state to set minimum wages or a maximum workday; 16 protected the right to unionize; nine required the government to regulate workplace safety; and 14 protected the right to a clean and healthy natural environment; as these examples illustrate, Americans do not shy away from imposing positive constitutional duties on government).

⁸⁷ *A jus cogens* norm is an international rule deemed so important that states are not allowed to opt-out of them. Some examples are genocide, committing war crimes, and waging aggressive wars.

3.1. The Right to Public Education

The right to a free public education is obviously a positive right, since it requires that the government provide some benefit to its citizens. And in accordance with the standard positive *versus* negative right tradition, it is explicitly enumerated within Russia's Constitution, and left out of the US Constitution. Article 43 of the 1993 RF Constitution provides that '[e]veryone shall have the right to education' and that '[p]re-school, elementary, secondary and vocational education in state or municipal educational institutions . . . shall be guaranteed to be accessible to all citizens free of charge.⁸⁸ This right is not provided for in the US Constitution, and some mistakenly state that the right therefore does not exist in the US system as a constitutionally protected right. Furthermore, some even use the fact that the United States has not signed on to the United Nations Convention on the Rights of the Child⁸⁹ as evidence to bolster the argument that this positive right doesn't exist in the United States. But those commentators are wrong. It is well known that the right to free public education does exist in the United States. This is where federalism and the Tenth Amendment come into play. The reason the United States cannot sign on to the Convention, is because child's rights are an area relegated to state law, and thus by the Federal Government signing the treaty, it would be stealing power from the states.⁹⁰ The United States federalist structure is such that the federal government possesses only those powers delegated to it by the Constitution. All remaining powers are reserved for the states or the people.⁹¹ And it is within state law that the right to a free public education is protected.⁹²

It is worth noting that while Russia is also considered a federation, and thus also contains elements of federalism; the two systems do not work identically. In the United States, both the Federal Government, as well as the state governments, are

⁸⁸ RF Constitution Arts. 43(1)–(2).

⁸⁹ The 1989 United Nations Convention on the Rights of the Child is now ratified by every nation except Somalia (which does not have a recognized government capable of ratifying a treaty) and the United States. In terms of human rights treaties, it is the most widely ratified human rights treaty in history, and a true step towards universal human rights standards. Interestingly, the ICCPR (Art. 24(1)) provides that '[e]very child shall have . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.' And the ICESCR (Art. 10(3)) states that '[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.' Yet it was not until the United Nations Convention of the Rights of the Child that an international instrument comprehensively covered children's civil, political, economic, social and cultural rights.

⁹⁰ One might then ask why the United States doesn't simply take reservation to the articles that interfere with state rights. The answer is that it goes to the heart of the treaty, and thus reservations are not allowed according to the Vienna Convention on the Law of Treaties.

⁹¹ U.S. Const. amend. X: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

⁹² It is often noted that the right to a free public education is as close to a constitutional guarantee of a positive right in the United States as you can get.

considered sovereign in their own right. James Madison established this approach to sovereignty. According to his opinion,

[t]he Constitution of the USA created a government in the strict sense of the word in the same way as state governments were initiated by their respective constitutions. Both federal and state governments have legislative, executive and judicial branches of power. Both federal and state constitutions state the limits of authorities of the organs of power. In some cases, the jurisdictions of the federal government and state government coincide, while in others they exclude each other, which constitutes one of the distinctive features of the existing system.⁹³

In contrast, the current state of Russian federalism provides for very little power to the republics, and most of the power still resides in the Central Government. Thus, if the Russian republics are truly sovereign at all, their sovereignty is severely limited. It is therefore from the Central Government itself that Russia provides for the right to a free public education, while it is reserved for the states in the US.

Getting back to the development of the right to a free public education in the United States, it was not until the turn of the century that states began making free public education widely available. Yet today every state provides for the right. Take a number of South Carolina Supreme Court cases for example. The South Carolina Supreme Court held that because the South Carolina Constitution requires the General Assembly to provide public schools for all children, then the state is constitutionally required to provide at least 'a minimally adequate education' to its resident children.⁹⁴ A more recent South Carolina case, similarly taking place in Abbeville County, stated that providing children with a free public education was 'the most important function of state and local governments.'⁹⁵ Similar laws are present in every state of the Union. And as proof that the Federal Government backs these state initiatives, it provides funding to every state for assistance. Therefore, while the right to education may be a positive right, the terminology does not prevent the right from being realized within both Russia and the United States. The difference simply lies in how the government provides for the right.

3.2. The Right to Social Security

In the United States, the stock market crash in 1929 spurred the greatest economic depression the country had ever known. Rampant unemployment and poverty spread

⁹³ James Madison, *Letter to N.P. Trist (February 15, 1830)*, in *The Complete Madison: His Basic Writings 195* (Saul K. Padover, ed.) (Harper & Brothers 1953).

⁹⁴ *Abbeville County School Dist. v. State*, 335 S.C. 58, 58 (1999).

⁹⁵ *Abbeville County School Dist. v. State*, 410 S.C. 619, 623 (2014).

throughout the country. Franklin D. Roosevelt, who was at the time Governor of New York, decided a change was needed. As Governor, FDR created the Temporary Emergency Relief Administration, the first state agency in the country to provide public relief for the unemployed, 'not as a matter of charity,' he said, 'but as a matter of social duty.'⁹⁶ Once taking office after being elected as President in 1932, FDR implemented his famed New Deal reforms, such as the Social Security Act. Opponents to the Social Security Act sounded alarms about the New Deal being too socialist. In a Senate Finance Committee hearing, one Senator asked Secretary of Labor Frances Perkins, 'Isn't this socialism?' when she answered that it was not, the Senator continued, 'Isn't this a teeny-weeny bit of socialism?'⁹⁷ The American Liberty League went so far as to compare FDR to Karl Marx and Vladimir Lenin.⁹⁸ Whether or not the New Deal opponents were right or wrong, it is an important development in the United States, because the Social Security Act provided, for the first time, positive rights to American citizens enshrined at the federal level. The opponent's were defeated through some keen political maneuvering on Roosevelt's part. Utilizing the Judicial Procedures Reform Bill of 1937, Roosevelt appointed six new Supreme Court Justices, and 44 judges to lower federal courts, instantly tipping the political balance in his favor. Two United States Supreme Court rulings also affirmed the constitutionality of the Social Security Act.⁹⁹ Although the original act was discriminatory towards minorities and women, the Act has gradually moved towards universal coverage.

In Russia, the social security system has always been the responsibility of the state, and has been administered by the Ministry of Labour and Social Protection (*Ministerstvo truda i sotsialnoi zashchity*). Peter the Great made a decree in 1691 about prohibiting poverty.¹⁰⁰ The system has since grown and been formalized, set in statute, and amended to reflect the needs of the times. However, being a social state, Russia has placed social security on a high pedestal for a long time, and continues to do so today. During the transition period between Soviet Russia and the Russian Federation, social protections were at risk due to instability during the change. However, in 1999 the Federal Law 'About the State Public Assistance' which together with the Federal Laws 'About a Subsistence Minimum in the Russian Federation' (1997) and 'About a Consumer Basket in General Across the Russian Federation' (1999) made sure that

⁹⁶ Franklin D. Roosevelt, *Call for Federal Responsibility*, <<http://www.columbia.edu/~gjlw10/fdr.newdeal.html>> (accessed Mar. 12, 2016).

⁹⁷ Nancy J. Altman, *President Barack Obama Could Learn from Franklin D. Roosevelt*, L.A. Times (Aug. 14, 2009), <<http://articles.latimes.com/2009/aug/14/opinion/oe-altman14>> (accessed Mar. 12, 2016).

⁹⁸ Albert Fried, *FDR and His Enemies* 120–23 (Palgrave Macmillan 1999).

⁹⁹ See *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); see also *Helvering v. Davis*, 301 U.S. 619 (1937).

¹⁰⁰ Elizaveta N. Valieva & Jury V. Matveev, *Social Security in Russia: Institution-Historical and Financial Aspects*, 7(2) *Review of European Studies* 16 (2015), available at <http://papers.ssrn.com/abstract_id=2677583> (accessed Mar. 12, 2016). doi:10.5539/res.v7n2p15

public assistance was adopted into the new Russia.¹⁰¹ Thus, in terms of social security rights, the two systems have developed into similar positions as well.

3.3. The Right to Participate in Political Life

While the United States has developed protections for many formerly absentee positive rights, Russia has also made great strides in recognizing negative rights as well. One concrete example is the right to participate in political life. During the Soviet era, the right to participate was largely illusory. Although the 1936 Soviet Constitution guaranteed direct universal suffrage through the secret ballot, in practice there was really only ever one candidate. Furthermore, the right to assemble and freedom of association were strictly limited. For instance, in the 1930^s and 1940^s, outright political repression was practiced by the Soviet secret police. An extensive network of civilian informants – either volunteers or those forcibly recruited – were used to collect information for the government and report cases of suspected dissent.¹⁰²

However, because Russia is now subject to the ECHR and gives direct effect to international law, *Bowman v. the United Kingdom*¹⁰³ has had a large impact on the right to participate in political life in Russia. In *Bowman*, the Eur. Ct. H.R. held that free elections and freedom of speech, especially freedom of political discussion, form the basis of any democratic system, both rights are interrelated and strengthen one another. In stark contrast to the Soviet model, the 1993 Constitution proclaims in Art. 3 that people are ‘the sole source of power in the Russian Federation’ and that they may exercise their power directly and through representative government.¹⁰⁴ Further, it states: ‘Referenda and free elections shall be the supreme direct manifestation of the power of the people.’¹⁰⁵ The Constitution also guarantees such political rights as majority rule, free opinion and speech, freedom of assembly, freedom of association and political plurality. Within the United States, the right to political participation has had to hurdle a few mountains in terms of equality and access for minorities and women, but has traditionally been a system that values representative democracy. So in terms of negative political rights, the systems are growing closer as well.

3.4. Private Ownership of Land

To properly understand the development of the right to private ownership of property, one must first understand the historical developments in the two systems that led to their contemporary approaches. Therefore, the article will provide a brief

¹⁰¹ Valieva & Matveev, *supra* n. 100, at 19.

¹⁰² See John O. Koehler, *Stasi: The Untold Story of the East German Secret Police* 143 (Westview Press 1999).

¹⁰³ *Bowman v. United Kingdom*, no. 24839/94 (Eur. Ct. H.R. Feb. 19, 1998).

¹⁰⁴ RF Constitution Arts. 3(1)–(2).

¹⁰⁵ *Id.* Art. 3(3).

comparison of the developments as to property rights first for normative Western tradition, and then its Russian counterpart. Perhaps the earliest debate over private property rights was one that took place in Classical Athens between Plato, and his Athenian compatriot, Aristotle. In Plato's writings he tended to extol a utopian vision of the past where all property was held in common, and thus no struggle over property took place. The collective ownership was deemed necessary to promote common pursuit of the common interest, and avoid social divisiveness.¹⁰⁶ Socialist thinkers later adopted Plato's moral view. In response to Plato, Aristotle argued on purely practical grounds that private ownership of property would promote efficiency and basically market incentives. Aristotle also spoke about how private land ownership helps one become a free man, and thus suitable for citizenship.¹⁰⁷ Aristotle's view on property ownership came to prevail in Western thinkers. Skipping ahead to mid-17th century England, we find Thomas Hobbes presenting a powerful case for the role of the state in protecting property rights. Essentially, Hobbes built upon Plato's argument, and placed the state before the individual. As such, private property ownership was not a birthright, but something guaranteed by the state. It is easy to see why Hobbes has often been used as a pretext for introducing authoritarian government. Towards the end of the same century, John Locke began promoting the opposite position. Tacking on to Aristotle's view, Locke essentially placed property in such regard as to be a birthright, and so property ownership predates sovereignty. Locke mainly argued the moral reasoning for property ownership, but in 1776, Scottish economist Adam Smith published *The Wealth of Nations*, in which he put forth the practical functions of property ownership.

A total merger of power and ownership marked the Soviet order. The Land Decree of the Communist Party, written by Vladimir Lenin and adopted on October 26, 1917, barred private ownership for decades to come. The 1918 Constitution made it clear: 'For the purpose of attaining the socialization of land, *all private property in land is abolished*, and the entire land is declared to be national property.'¹⁰⁸ As Soviet legal theory developed through the 1920^s and 1930^s, land law developed as a separate branch of law¹⁰⁹ characterized by the following principles: 1) all land is owned by the state; 2) land cannot be the subject of a sale or transaction; and 3) the state grants the limited right to use land to individuals and legal entities. The land could only be held in return for lifelong service, and so Soviet land rules closely tracked that of feudal England, except for the fact that in Western feudalism there was a strong

¹⁰⁶ Plato, Republic 462 (Robin Waterfield, trans.) (Oxford University Press 1993) (c. 370 BCE).

¹⁰⁷ Aristotle, The Politics 1263 (Stephen Everson, ed.) (Cambridge University Press 1988) (c. 330 BCE).

¹⁰⁸ RSFSR Constitution (1918) Art. 3(a) (emphasis added).

¹⁰⁹ Unlike the system of law in place in the United States in which areas of law tend to affect one another (i.e. agency law affecting contract law), the Russia concept of *otrasl* states that each branch of law sits alone, and has no effect of other areas of law.

sense of mutual rights flowing between the lord and vassal, whereas Russian rulers followed the Mongol example of insisting on absolute obedience from below, with no accompanying sense of reciprocity.¹¹⁰ Western feudalism went through a process of gradual strengthening of the rights of the vassals, and an eventual end to feudalism, whereas Russia went through a period of retrogression, where the power of the Tsar was gradually strengthened. The process of removing all sense of property rights in Russia was completed by the 16th century.

During *perestroika*,¹¹¹ widely publicized news regarding ecological damage and diminished productivity of agriculture led to a call for land reform. Timid reforms took place throughout *perestroika* and continued after Russian national independence. Amendments initially were strictly confined to the agricultural sector, but as the industry privatized, the privatization of land gradually extended as well. Private land ownership received final recognition in the present Constitution of the Russian Federation, adopted in December of 1993. Article 35 of the 1993 Constitution states: 'The right of private property shall be protected by law . . . Everyone shall have the right to have property, possess, use and dispose of it . . .'¹¹² And Article 36 goes on to provide that '[c]itizens and their associations shall have the right to possess land as private property.'¹¹³ The process was meant to transform the Russian people into a people of shareholders. Lands and business ownership were privatized and distributed to the people. The political agenda included visions of a birth of the Russian middle-class of property owners, who in turn would become the basis for a functioning Russian democracy and market-economy.¹¹⁴ Because constitutional law requires statutory implementation before it is truly considered in effect, the Government issued a new Russian Federation Land Code in 2001.¹¹⁵ The Land Code protects ownership (*sobstvennost'*) of land by private ownership.¹¹⁶

As for the United States, the system of land ownership developed in a somewhat unique atmosphere, although drawing on the ideas set forth by Aristotle, John

¹¹⁰ Stefan Hedlund, *Property without Rights: Dimensions of Russian Privatisation*, 53(2) *Europe-Asia Studies* 221 (2001). doi:10.1080/09668130020032271

¹¹¹ *Perestroika's* literal meaning is 'restructuring' – referring to the political movement calling for reformation within the Communist Party of the Soviet Union during the 1980'. It is largely associated with Soviet leader Mikhail Gorbachev and his *glasnost* policy reform. Political rifts forming over the policies implemented during this period are often cited as the foremost reasons for the dissolution of the Soviet Union.

¹¹² RF Constitution Arts. 35(1)–(2).

¹¹³ *Id.* Art. 36(1).

¹¹⁴ Hedlund, *supra* n. 110, at 215.

¹¹⁵ «Земельный кодекс Российской Федерации» от 25 октября 2001 г. № 136-ФЗ [*Zemelnyi kodeks Rossiiskoi Federatsii' ot 25 oktyabrya 2001 g. No. 136-FZ* ['Land Code of the Russian Federation' No. 136-FZ of October 25, 2001]].

¹¹⁶ Land Code, Art. 8(4).

Locke and Adam Smith. America was seen as 'new land,' seemingly infinite in size. From the very beginning, land ownership by colonizers was established. In fact, in order to ensure the colonies would grow, inducements of personal land ownership were made to settlers to convince them to travel to the New World and set up roots. This was a unique concept, that average people could acquire land in return for settling it. The first tracts of land were sizeable land grants made by the English, Dutch, French and Spanish crowns to individuals who would further subdivide their property in return for services, such as settling and working the land. Once the colonies won independence, the system of land granting was simply shifted to the new state governments. And although a few hurdles had to be made regarding race and gender inequality here as well, land ownership, use and dispossession were all relatively established and seen as a legally protected right from the beginning.

Thus, one can see that while the two systems took markedly different paths in achieving the present state of private land ownership, both ultimately reached the same outcome. Whether they developed completely independent from one another, or whether Western ideals were later superimposed onto the Russian system is not necessarily important. What is important is that in both systems private ownership of land is a present reality, and is protected by law.

4. Failures within Each System

Putting aside the great strides both systems have made, there have also been some serious shortcomings in both systems. For instance, in 2013 the Eur. Ct. H.R. found a violation of the ECHR in 93 percent of judgments involving Russia.¹¹⁷ As for the United States, on May 15, 2015, the United Nations Human Rights Council adopted a scathing report consisting of 348 recommendations that address a myriad of human rights violations within the United States. The report came out as part of the Universal Periodic Review, which examines the human rights record of all UN Member States.¹¹⁸ Both the Eur. Ct. H.R.'s reports on Russia, and the UN reports on the United States, reflect that both systems need to reverse policies that are inconsistent with international human rights principles. The article will now use torture (Sec. 4.1), and incarceration (Sec. 4.2) – which affect such rights as the right to life, liberty, and freedom of movement – as concrete examples to show similar failures within each system. Torture and incarceration were chosen because they are some of the most cited abuses within both Russia and the United States.

¹¹⁷ *Russia 2014 Human Rights Report* 19, U.S. Department of State, <<http://www.state.gov/documents/organization/236782.pdf>> (accessed Mar. 12, 2016).

¹¹⁸ Jamil Dakwar, *UN Issues Scathing Assessment of US Human Rights Record*, American Civil Liberties Union (May 15, 2015), <<https://www.aclu.org/blog/speak-freely/un-issues-scathing-assessment-us-human-rights-record>> (accessed Mar. 12, 2016).

4.1. Torture

The United States Department of State reported in 2013 that although the Russian Constitution prohibits such practices, there were numerous credible reports that law enforcement personnel engaged in torture, abuse, and violence to coerce confessions from suspects. Furthermore, authorities generally did not hold officials accountable for such actions. If law enforcement officials were prosecuted, they were typically charged with simple assault or exceeding authority.¹¹⁹ In 2012, the Eur. Ct. H.R. found Russia to have violated the ban on torture and inhuman or degrading treatment in 55 of 134 cases heard by the Court.¹²⁰ Reports from human rights groups and former police officers indicated that police most often used electric shocks, suffocation, and stretching or applying pressure to joints and ligaments, as those methods are less prone to leave visible marks.¹²¹ And although such abuses were detailed by the United States Department of State, the United States itself has recently been criticized for its own use of torture practice. Amnesty International reports that in the years since 9/11, the US Government has repeatedly violated both international and domestic prohibitions on torture and other cruel, inhuman or degrading treatment in the name of fighting terrorism.¹²² For instance, the Justice Department's Office of Legal Counsel produced a series of 'torture memos,' which mutilated the law so as to restrict the definition of cruel, inhuman or degrading treatment and to make certain torture practices seem legal under US law;¹²³ US interrogations of suspects in the war on terror have included such cruel and inhuman techniques as prolonged isolation, sleep deprivation, intimidation by the use of a dog, sexual and other humiliation, stripping, hooding, the use of loud music, white noise, exposure to extreme temperatures, and waterboarding.¹²⁴ And worse still, when the US began gaining notoriety for such treatment, they began to send detainees for interrogation to countries known to use torture.¹²⁵ These actions taken both in the United States and Russia have had a corrosive effect on respect for human rights around the world.

4.2. Incarceration

It should also be mentioned that while the United States is the developed country with the highest percentage of its citizens behind bars, Russia is a very close second.

¹¹⁹ *Russia 2013 Human Rights Report 4*, U.S. Department of State, <<http://www.state.gov/documents/organization/220536.pdf>> (accessed Mar. 12, 2016).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Torture and Other Ill-Treatment*, Amnesty International, <<http://www.amnestyusa.org/our-work/issues/torture>> (accessed Mar. 12, 2016).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

The United States has 702 prisoners per 100,000 people and Russia has 628 per 100,000.¹²⁶ By comparison, England has 139, Canada has 116, Italy has 100 and Germany has 91.¹²⁷ Conditions in Russian prisons and detention centers varied but were sometimes harsh and life threatening. They are marked by limited access to health care, food shortages, abuse by guards and inmates, inadequate sanitation, and overcrowding.¹²⁸ Human Rights Watch has noted that conditions in United States' prisons are not much better.

Prisoners and detainees in many local, state and federal facilities, including those run by private contractors, confront conditions that are abusive, degrading and dangerous. . . . Such failures violate the human rights of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person, and to be free from cruel, inhuman or degrading treatment or punishment.¹²⁹

Thus the gap is not only narrowing in terms of the rights provided by both systems, but on the opposite end of the spectrum, the gap is also narrowed when one takes into account the failures within each system.

5. Conclusion

In conclusion, the post-Soviet developments in regard to human rights generally, but especially with civil and political rights, has begun to develop into a model more familiar with Western thinkers. While it may not be perfected, true strides can be seen developing through implementing legislation, and a shifting of the paradigm on thought within the country generally. On the other hand, one can see that the United States, through its state legislatures and federal programs, has begun to enshrine the social, economic and cultural rights traditionally thought to be lacking in American society. Furthermore, at least within these two states, there are some serious shortcomings in terms of contemporary international human rights standards that need addressing as well. Thus, hopefully this article will serve as a small model on which the reader will take away some insight into the ever decreasing gap in varying regional human rights regimes. And on a larger scale, it seems as though forces are working globally to bring human rights regimes closer to universal norms. New international consensus on human rights, together with more effective human rights

¹²⁶ Burnham et al., *supra* n. 67, at 642.

¹²⁷ *Id.*

¹²⁸ *Russia 2013 Human Rights Report*, *supra* n. 119, at 6.

¹²⁹ Quoted in Roy A. Graham, *Our Prisons*, Roy Alexander Graham Blog (Aug. 12, 2015), <<http://royalexandergraham.blogspot.ru/2015/08/our-prisons.html>> (accessed Mar. 12, 2016).

institutions, more domestic protections, and global pressure, are all lending towards the establishment of the universal rights that Eleanor Roosevelt envisioned in 1958.

Acknowledgements

The author would like to thank Dr. Ronald M. Childress, Adjunct Professor of Law at the University of South Carolina School of Law for his guidance while writing this article.

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