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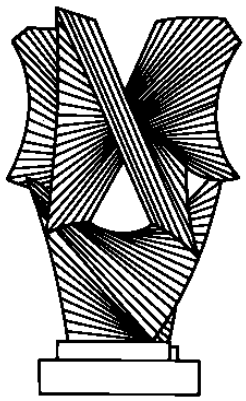

SOME SKEPTICAL COMMENTS ON BETH SIMMONS'S *MOBILIZING FOR HUMAN RIGHTS*

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Some Skeptical Comments on Beth Simmons's *Mobilizing for Human Rights*

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Abstract. These comments address some theoretical, empirical, and normative claims made by Beth Simmons in her book, *Mobilizing for Human Rights*. The empirical heart of the book is rigorous, but because of the shallowness of the data and the limits of the empirical methodology, the implications for human rights law are narrow and to a large extent ambiguous.

Beth Simmons makes three types of claims in her book: theoretical, empirical, and normative. While I admire the project and the methodological scrupulousness with which she carried it out, I found myself skeptical about all three types of claims. In this brief comment, I will explain why.

I. Theory

A. Why Do States Enter Human Rights Treaties?

Simmons proposes two theories—one explaining why states enter human rights treaties and another explaining why they comply with human rights treaties. Her first theory, which she calls a theory of "rationally expressive commitment," is that "governments are more likely to ratify rights treaties they believe in and with which they can comply at a reasonable cost than those they oppose or find threatening" (64).

Simmons argues that this theory predicts that liberal democracies will enter human rights treaties, while authoritarian states will not enter human rights treaties. The puzzle is then why not all liberal states enter human rights treaties, and why not all authoritarian states avoid entering human rights treaties. Her answer is that some liberal states do not enter human rights treaties because they face legislative hurdles, federalism, and judicial constraints—all of which raise the domestic costs of ratification. Meanwhile, authoritarian states enter human rights treaties because they expect benefits of some sort, make mistakes, or are governed by leaders who face an end-game and thus discount the long-term costs from entering such treaties.

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So much for the theory; is it plausible? The main problem with it is that it does not in fact explain why liberal democracies would enter a human rights treaty. A state will enter a treaty only if the perceived benefits exceed the costs. Simmons focuses on the cost side, plausibly arguing that a state that enters a treaty that does not require it to change its behavior does not face any cost. But she does not explain what such a state gains from entering a human rights treaty. And given that there are political costs from entering treaties, as she discusses (for example, the opportunity cost from going through ratification rather than engaging in other government action), her theory suggests that *no* liberal democracy should enter a treaty.

Another puzzling element of the theory is the role that the common law plays in it. Simmons says the common law states face higher ex post costs from ratifying treaties than non-common law (let's say, civil law) states do. One reason she gives is that in common law states, judicial independence exists. But not all common law systems feature judicial independence, and many civil law systems do feature judicial independence. It would thus be better to treat judicial independence as a separate variable. But in any event it is not clear which way judicial independence cuts. Independent judges may insist that states comply with a treaty against a government's wishes (thus raising ex post costs); but they might also refuse to enforce treaties (reducing ex post costs). Simmons needs to explain why independent judges would act the way she thinks they would act.

Simmons says that treaties are "more of a foreign substance" (p. 72) in a common law system than in a civil law system. I am not sure what she means by this statement but a few comments are in order. First, remember that U.S. federal courts have very limited common law powers; they mostly enforce statutes. Second, common law systems are filled with codes, and common law judges understand how codes work. Indeed, a treaty is no more foreign to a common law judge than a statute is. Third, there is no reason to believe that common law judges must undergo more "attitude adjustment" (72) than civil law judges. As I noted, common law judges are used to dealing with statutes and, for that matter, treaties. (The U.S. is a party to far more treaties than any other country.) Statutes that abolish common law precedents are common, and treaties are no more problematic than they are.

Simmons further argues that a common law court's interpretation of a treaty is less predictable than a civil law judge's is, again raising the cost of entering treaties for governments. I would say the opposite. It is easy to predict how common law judges act because one can look at the reasoning in previously decided cases, which explains why the judges interpreted treaties one way or the other. One cannot do this for civil law judges.

Finally, Simmons argues that in common law systems treaties are irreversible. However, a state that enters a treaty can easily reverse it just by enacting a statute. This is true in

common law systems, and mostly true in civil law systems. There is no reason to believe that a common law court would stop a state from exiting a treaty.

I understand that Simmons finds strong results for the common law, in line with other scholars who have used that variable in cross-country regressions. But if she cannot provide a persuasive theory for why the common law should matter for treaty ratification, then worries arise that the correlations are spurious.

B. Why Do States Comply with Human Rights Treaties?

The second part of Simmons's theory addresses why states comply with human rights treaties. She calls her theory "a domestic politics" theory of compliance: "treaties are causally meaningful to the extent that they empower individuals, groups, or parts of the state with different rights preferences that were not empowered to the same extent in the absence of the treaties" (125).

She identifies three mechanisms: (1) for most countries, the creation of a treaty is exogenous, so it sets the agenda, forcing a government to take a stand on a potentially embarrassing issue; (2) treaties create litigation opportunities for domestic groups; (3) treaty ratification encourages domestic groups to lobby for reform by revealing to them that some people in government support their commitments, and thus that their probability of prevailing in domestic politics is higher than they had previously thought.

I like the focus on domestic politics, but I wonder whether it really improves on more conventional "black box" theories that treat states' interests as essentially fixed and exogenous. With respect to the first mechanism, if a country helped create the treaty, then the treaty was already on the agenda before international negotiations. If the country is a passive recipient, the question is why a government finds it harder to say "no" to domestic groups when a treaty exists than when it does not exist. After all, except in the most repressive states, domestic groups can (and do) influence the agenda by proposing that the country adopt domestic human rights protections. They do not need to wait for a treaty, and indeed rarely do.

As for litigation, although Simmons cites various examples of the use of litigation to enforce treaties, and some academic work, I am skeptical. The problem here is that when states ratify treaties, they retain the option to decide whether or not to create judicially enforceable rights. In dualist states, the government usually must enact implementing legislation. In monist states, the government usually may enact legislation that bars domestic enforcement. Thus, the litigation mechanism is ultimately question-begging. If we want to understand why a state complies with a treaty, we cannot just cite the risk of litigation, because then we must ask why the state decides to comply with a treaty *by* creating judicially enforceable rights.

The mobilization mechanism also suffers from circularity. People who care about, say, stopping torture might be governed by leaders who share their view, who do not share their view, or who are divided. If the leaders oppose torture as well, then they will stop torture whether or not a treaty exists. If the leaders are divided about torture, then surely domestic anti-torture groups will know this, and they will not learn anything from the ratification of the Convention Against Torture. If the leaders approve of torture, but nonetheless ratify the Convention Against Torture, it is possible that the domestic anti-torture groups will falsely believe that in fact the leaders reject torture, and mobilize, possibly producing some positive effect. It is only in this last case that the mobilization theory makes any logical sense, but is it plausible? Don't domestic groups know about the torture (that is why they form in the first place) and won't they believe that the leaders have no intention of complying with the treaty?

II. Empirics

I will pass over the empirical tests of the ratification theory, and turn to the empirical tests of the compliance theory, which form the bulk of the book. Simmons argues that the results are consistent with her hypothesis that ratification of human rights treaties causes states to improve what I will loosely call "human rights outcomes." Of course, as she notes, there are a number of exceptions—notably for torture. But there are other reasons to question the results, as I will discuss.

A. What Is Compliance?

In older debates about human rights treaties, discussions centered around the question of compliance. Do states that enter human rights treaties comply with them? Skepticism was based on anecdotal evidence—a country like Hungary could enter the ICCPR in 1974 and not in any obvious way change its behavior. It remained a totalitarian dictatorship until communism collapsed in 1989. Simmons asks a different question: whether ratification of a human rights treaty has a causal effect on a state's human rights outcomes. The question is then whether human rights outcomes after ratification exceed human rights outcomes prior to ratification, all else equal.

To understand the difference between these approaches, imagine that two countries agree to settle a border dispute by drawing a line through the disputed territory. "Compliance" means that the states stop sending troops into the area on the other side of the line. "Causation" means that the states send fewer troops into the area on the other side of the line than they did before they entered the treaty. It should be clear that a treaty could be a failure even if it has causal effect. If troop movements decline only a little, and the dispute between the states over the border region is not resolved, the treaty may well be regarded as a failure despite its causal effect.

Let us consider a human rights treaty. If a country enters the CAT, and the number of people tortured goes down from 100,000 per year to 50,000 per year, there is (arguable) causation, but not compliance. This counts as success in Simmons's empirics, not as failure.

Which is the right perspective? It depends on what you care about. If the question is whether international law and human rights treaties in particular ever affect behavior, then all we care about is causation. If the question is whether states comply with human rights treaties, then we care about compliance.

Interestingly, Simmons's results are probably more dramatic for political scientists than for lawyers. For political scientists, where realism has long been a dominant perspective, it is surprising when states comply with treaties. So in political science, Simmons's results are dramatic. But for lawyers, the opposite is true, well represented by Louis Henkin's famous claim that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[2] Simmons's results, which show modest causal effects but not compliance, hardly seem consistent with this view; indeed, they seem to falsify it.

I will say more about this distinction when I talk about the normative implications of Simmons's work.

1. What is the dependent variable? What do the coefficients tell us?

Simmons uses a range of dependent variables that measure different human rights outcomes. Unfortunately, many of these variables do not have intuitive meaning, so it is difficult to interpret the results.

Take religious freedom. The dependent variable is a dummy variable: 0 (restrictive) or 1 (free). We are told that government practices that count as restrictive include "prohibitions on proselytizing, prohibitions on clergies' political participation; ... harassment and/or intimidation for religious beliefs and practices" (p. 386). This definition is so general as to be meaningless. In virtually every country, restrictions exist on religious behavior; whether they rise to the level of "harassment" is often in the eye of the beholder.

A graph on p. 173 shows that religious freedom has actually stayed about the same during the period of study, 1981-2005. It has hovered around 0.7, which means that about 70 percent of countries receive a "1" during this period, while treaty ratifications have increased from less than 50 percent to more than 80 percent. There is no clear correlation between treaty ratification and religious freedom.

[2] Louis Henkin, How Nations Behave 47 (2d ed. 1979).

Nonetheless, Simmons finds that at a statistically significant level countries with an ICCPR commitment have more religious freedom. The coefficient is .08, which means that when a country ratifies the ICCPR, the probability that religious freedom will increase from 0 to 1 is eight percent. How should we understand this coefficient? Does religious freedom increase significantly or trivially when a state ratifies the ICCPR?

There are two problems with answering this question. The first is that religious freedom is a continuous function, which cannot be captured fully in a dichotomous variable. It is possible that the states that move from 0 to 1 when they ratify the treaty are states that barely fall short of receiving a 1 before they ratify the treaty and barely deserve a 1 after they ratify the treaty. Thus, their improvement is marginal. The second is that we have no intuitive sense of what it means for 8 percent of states to improve their behavior. Is this amount large enough to justify the costs of entering the treaty in the first place? I will return to this question in Part III.

2. Selection effects.

Simmons examines all human rights treaties, which collectively contain dozens or maybe even hundreds of provisions, yet she tests only a handful. How did she select them?

This question is important because if the provisions Simmons tests do not fairly represent all of the provisions in all of her treaties, her results will be biased. Suppose, for example, that Simmons tests only those provisions most likely to influence states' behavior. Then her coefficients—the representation of the causal effect of the provisions that she tests—will exaggerate the actual effect of the human rights treaties considered as a whole.

Ideally, Simmons would select her provisions randomly. That might be too much to ask, since many provisions would be difficult to test. But if she did not select them randomly, how did she select them? One concern is that she was drawn to provisions that require agencies produce human rights outcomes that are easily measurable so as to facilitate empirical analysis, which requires measurable outcomes. An example is the death penalty: the number of people formally executed by the state is public information in nearly all countries. The problem with this approach is that countries may well be less likely to comply with provisions that do not require easily measurable outcomes—precisely because observers cannot easily tell whether the state has complied with the treaty term. Indeed, there is an even worse possibility: that states that enter human rights treaties improve their behavior along measurable dimensions while worsening their behavior along unmeasurable dimensions, so that overall human rights outcomes stay the same or even decline. The state that abolishes the death penalty in conformity with the second optional protocol of the ICCPR might permit local police to take up the slack by engaging in extrajudicial killings, which are extremely hard to measure because

police can disguise them as accidents or unsolvable crimes committed by unknown private individuals.

At the conference, Simmons said that she addressed this problem by choosing "hard" provisions, citing the Convention Against Torture. But it is not clear what she means by hard provisions. The point is that the only way to address this problem is to test treaty provisions that require states to produce unmeasurable human rights outcomes, but of course if the outcomes are unmeasurable, then an empirical test cannot be performed.

3. Reverse causation.

Regression analysis must always address the question of reverse causation. Simmons shows certain correlations—between treaty ratification and human rights outcomes—but correlation does not mean causation. The correlations are consistent with Simmons's hypothesis—that ratification causes improvement in human rights outcomes—but also with the opposite—that states that improve their human rights performance will enter human rights treaties. Indeed, the reverse hypothesis is consistent with Simmons's theory of ratification, which holds that states are more likely to ratify treaties when the cost of compliance is low.

To address reverse causation, Simmons uses three instrumental variables: common law system, regional ratification, and ratification hurdles (p. 172).[3] An instrumental variable is a variable that is correlated with the independent variable but not directly with the dependent variable. For example, Simmons argues that common law is a good instrumental variable because, as her first set of regressions established, states with common law systems are less likely to enter treaties, while there is no reason to believe that states with common law systems would be more (or less) likely to comply with treaties. Simmons makes similar arguments for regional ratification and ratification hurdles.

But using these variables as instrumental variables is questionable. The reason that Simmons gives for assuming that governments of common law countries are reluctant to enter treaties is that they fear that their own courts will interpret them too strictly or in the wrong way. But that means that the common law system will have a direct causal impact on human rights outcomes, which violates the assumptions of instrumental variable analysis.

Simmons argues that regional ratification is a good instrumental variable because it is correlated with treaty ratification, while there is no reason to assume that a state is more likely to improve its human rights outcomes as a result of the human rights performance of its neighbors. However, Simmons believes that neighbors pressure each other to enter human rights treaties; if neighbors influence the ratification decision, why wouldn't they also influence

[3] She also uses other statistical techniques such as lagged variables.

the decision to improve human rights outcomes? Again, the theoretical basis for assuming that regional ratification is correlated with the independent variable turns out to provide reason for believing that regional ratification is correlated with the dependent variable as well.

Simmons's third instrumental variable—ratification hurdles—is more plausible. It is plausible that ratification hurdles are correlated with treaty ratification because states that face high hurdles will have trouble ratifying treaties, while there is no obvious reason to believe that a state that can ratify treaties only with difficulty because of its constitutional system would also find it easy or difficult to improve its human rights outcomes. But there are reasons to worry. For example, suppose that the ratification process for countries does not differ much from the general legislative process and hence the difficulty of enacting ordinary statutes. For example, the U.S. government faces high hurdles in both making treaties and enacting statutes, while the UK government faces low hurdles in both cases. If this is so, then one would predict that states that face hurdles in entering human rights treaties would also face hurdles in improving human rights outcomes through legislation, which would violate the assumptions necessary for instrumental variable analysis.

4. Omitted variables.

Consider an intuitive explanation for Simmons's results. Dozens of states over the last forty years have undergone transitions from authoritarianism to liberal democracy. The transitions themselves had many causes: the influence of liberal neighbors in Europe for Spain, Portugal, and Greece in the 1970s; the collapse of the Soviet Union in the 1990s, which freed satellites in Eastern Europe to pursue western policies; the delegitimation of authoritarian rule in Latin America; and so on. As the countries adopted liberal constitutional forms and policies, they ratified human rights treaties. Formally, Simmons's two variables—treaty ratification and human rights outcomes—were jointly caused by an omitted variable, reflecting some historical or cultural process that cannot be directly observed.

Ironically, this theory recalls Simmons's own expressive theory of ratification: states liberalize for other reasons and then express their new commitment by entering human rights treaties. But on this alternative account, the treaties have no causal effect. They are not necessary to mobilize groups because the groups are already mobilized—they are the ones who caused the state to enter the treaties in the first place.

B. Arbitrary Division of the Population.

Suppose I am trying to test whether a pill makes people smarter. I test everyone who takes the pill, and I don't get a statistically significant result. Then I divide the population into 10 groups, and find that one group is positive. I then look for what is unique about the group—say they have green eyes. And I claim that I should be able to market my pill to people with green

eyes. The FDA would not permit me to do so. The problem is that a small segment of a large population will exhibit a correlation between the dependent variable and some other variable or variables at a statistically significant level as a result of pure chance. That is why the tester must identify the variables of interest in advance, on the basis of an accepted theory.

In testing the effect of human rights treaties on states' behavior, a natural starting point is the theory—common enough among lawyers—that treaties would improve the behavior of *all* states. Simmons's results are consistent with this hypothesis for a few treaty provisions, but overall they are weak. It is when Simmons subdivides the population of states that her results become stronger. It turns out that human rights improvements can be seen not so much in all states, but in transitional states, or middle-income states, or states with the rule of law, or states with state religions. The question then is whether these results are spurious—in the same sense as the green-eye results in my pill example—or valid.

Simmons argues that she did not subdivide the states arbitrarily but on the basis of her theory. I have already expressed some doubts about her theory of compliance, but the broader problem is that her theory of compliance does not really predict that transitional (or middle-income, or rule-of-law states, etc.) will be more influenced by human rights treaty ratification than other types of states. Her main explanations for compliance—agenda-setting, litigation, and mobilization—do not identify factors that one would expect to vary according to whether a state is transitional or not. For example, mobilization is just as likely to occur in a democratic state as in a transitional state, and indeed even in an authoritarian state unless it is totalitarian and no civil society is tolerated.

III. Normative Implications

Many political scientists restrict themselves to descriptive theory and empirical testing. Simmons is unusual for her normative commitments (or at least for expressing her normative commitments) as well. Even while she acknowledges forthrightly the limits of human rights treaties and the empirical limitations of her study, she celebrates the human rights treaties, and argues that her empirical results indicate that human rights treaties should be "respected" (376).

But if we take Simmons to have shown that ratification of human rights treaties causes states to improve their human rights performance (however minimally), what exactly follows from that? One possibility—which Simmons seems to have in mind—is that states do not enter or comply with human rights treaties as much as they might because they falsely believe that other states never comply with human rights treaties. By correcting this error, Simmons gives the first group of states reason to enter and comply with human rights treaties. But it seems doubtful that states think this way.

Indeed, it is easy to predict an opposite reaction. Perhaps many states believe falsely that states that enter human rights treaty greatly improve their human rights performance. Simmons's results tell them that their belief is false. Thus, the first group of states might conclude that they should not enter and comply with human rights treaties if other states do not take them very seriously.

Another problem with Simmons's normative argument relates back to my comment about the magnitudes of the coefficients in her regressions. If the question is whether "we" or states or other entities should invest in encouraging other states to enter and comply with human rights treaties, Simmons's empirical results provides an ambiguous answer. We all have limited resources, and if the result of all this effort is that it becomes a few percentage points more likely that a state will improve human rights outcomes, we should ask whether our resources might be better used in some other way. And if states do not improve their overall human rights outcomes, but merely switch from less measurable to more measurable outcomes, then our resources are being wasted.

Many countries, for example, China, argue that they cannot comply with the negative rights in the ICCPR and other treaties because their main agenda is to reduce poverty and maintain order. Although some academics, like Amartya Sen,[4] reject the view that human rights and development are incompatible, China's view is at least plausible and may well be right. Many authoritarian countries followed a successful path to development, and then liberalized only after they had achieved an acceptable standard of living for their people.

Why might development and compliance with human rights be incompatible? One possible reason is that development often requires wrenching changes in existing customs and rights. Property rights that evolved in a quasi-feudal or traditional agricultural society block development of a commercial economy, which requires the transformation of property into alienable, measurable, recorded plots of land. A democratic system may find it difficult or impossible to convert the economic system; an authoritarian system may not. A country that scrupulously obeys human rights prohibitions on taking property without compensation, moving populations, arbitrary detention, and the like, may find it difficult to achieve a modern stage of development.

Human rights treaties pose problems even for countries that do not have authoritarian systems but a reasonably responsive democratic governments. All countries must make tradeoffs; for poor countries, these tradeoffs can be particularly wrenching. Consider a simple example in which a poor country faces two major problems: local police who engage in torture and an inadequate system of schools. The country has limited resources, and could end torture

[4] Amartya Sen, Development as Freedom (2000).

only by depriving the schools of any money. Is that a proper use of resources? Arguably, not. Yet the human rights treaties, as normally interpreted, would obligate the country to end torture, while requiring it only to take reasonable steps toward funding schools. A country that complied with those rules might be much worse off, especially in the long run, than a country that disregarded them.

One might argue that human rights treaties do not block this tradeoff. After all, the ICESCR directs states to improve education. A state might seek to excuse its poor performance under the CAT by claiming that it is improving under the ICESCR. Most human rights lawyers would reject this type of argument because if it were accepted, human rights treaties would have no critical force at all. Outside the most obvious kleptocracies, governments can and do plead that they are doing the best under difficult conditions, and if they were to devote more resources to a problem like torture singled out by human rights campaigners, they would make no progress or even backslide on many other problems that are just as significant. If these arguments are correct, then Simmons's empirical results are hardly grounds for optimism. They show that governments of poor countries shift around their resources to please the west, but not in a way that necessarily improves the well-being of their populations.[5]

Readers with comments may address them to:

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[5] For further thoughts in this vein, see Eric A. Posner, Human Welfare, Not Human Rights, 108 Colum. L. Rev. 1758 (2008).

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