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Human Rights Aspirations, Professional Obligations: Practitioner Survey on the Ethics of Domestic Human Rights

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**HUMAN RIGHTS ASPIRATIONS, PROFESSIONAL OBLIGATIONS:
PRACTITIONER SURVEY ON THE ETHICS OF DOMESTIC HUMAN RIGHTS**

Beth Lyon*

ABSTRACT

This article examines the little-explored ethical dimensions of an important trend toward the use of international law in U.S. civil rights and social justice advocacy. Internationalized civil rights work, described here as “domestic human rights,” is a growing practice area that plays out in a unique ethical context that has received little academic attention. An important first step toward generalizing about the ethical issues arising in domestic human rights advocacy is to learn about the current state of practice, and to begin that project, the author carried out an advocate survey. The goal of the survey was to gain insight into the current ethical practice of the domestic human rights bar by analyzing self-reported accounts of the specific ethical duties and pitfalls arising for a practitioner employing a human rights strategy in the domestic context. In order to reach the relatively limited number of advocates in this practice area, surveys were distributed electronically, distributed on paper, and administered in-person.

The survey respondents brought to the study a broad variety of backgrounds and experience levels. Their responses revealed that some practitioners see the use of international law as just another tool in a large social change arsenal, posing, in the practitioners’ eyes, no new ethical challenges. Other practitioners argued that incorporating international law and fora into civil rights work does raise unique ethical questions, sharing their analysis and techniques for ensuring that their work is ethically sound. Many of the ethical dilemmas they described reflected the essential embeddedness of domestic human rights work in domestic-only practice, including client management and allocating limited resources to novel arguments. They also pointed out unique dilemmas, such as litigating in international contexts with no ethics codes, and arguing that domestic remedies have been exhausted while continuing to advocate effectively in the domestic context. The article grounds these debates in the ethics literature, drawing both on domestic lawyering and the less extensive literature on ethics in international law practice.

The survey respondents also analyzed the current ethical regime, critiquing it for its gaps and substantive failings, including class- and cultural-bias and parochialism. Other respondents defended the regulatory ambiguity of the current situation as providing the flexibility necessary for effective advocacy. The respondents also described the difficult struggle between skepticism of law as a solution for subordinated communities and appreciation

for the radical and transformative potential of international human rights law. The survey revealed a small, overtaxed group of advocates trying to balance parallel goals of advancing client cases, community causes, and the integration of international human rights standards with U.S. law. In the context of a domestic legal regime that is often at substantive odds with human rights law, as well as quite hostile to the notion of international legal authority, the ethics of this practice is complex and often wrenching. Most of the survey respondents are the first and last source of legal assistance for their client communities, and their calls for reform merit attention, just as their observations provide important insights into the development of domestic human rights in the United States.

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I. INTRODUCTION

This article examines the little-explored ethical dimensions of an important trend toward the use of international law in U.S. civil rights and social justice advocacy. Internationalized civil rights work, described here as “domestic human rights,” or DHR, is a growing practice area that plays out in a unique ethical context, but the ethics of U.S. domestic human rights advocacy has received little academic attention. One step in attempting to generalize the ethical issues arising in domestic human rights advocacy is to learn about the current state of practice, and to begin that project, I carried out an advocate survey. The goal of the survey was to gain insight into the current ethical practice of the domestic human rights bar by analyzing self-reported accounts of the specific ethical duties and pitfalls arising for a practitioner employing a human rights strategy in the domestic context. In order to reach the relatively limited number of advocates who practice domestic human rights in this country, surveys were distributed electronically, on paper, and administered in-person. I am very grateful to all of the survey respondents,¹ who provided their frank insights and advice for the benefit of their colleagues in this hardworking community.

* Professor of Law, founding Director, Farmworker Legal Aid Clinic, and founding Co-Director, Community Interpreter Internship Program, Villanova University School of Law. I am grateful to Risa Kaufman, Director of the Columbia Law School Human Rights Institute for organizing the Ethics in Domestic Human Rights conference and for her assistance with the survey upon which this article is based. I am very grateful to the practitioners who took the time to answer the survey and share their useful insights about ethically managing this rapidly evolving and complex practice area. While any errors are my own, I thank research assistants Ron Hochbaum and Danielle Granatt and the editors of the Notre Dame Journal of International, Comparative, and Human Rights Law for their excellent work. I am also very grateful to my family for its unswerving love and support.

¹ Cathy Albisa, National Economic and Social Rights Initiative; Sandra Babcock, Northwestern Law School; Jin Yung Bae, Center for Reproductive Rights; Cathleen Caron, Global Workers Justice Alliance; Ariel Dulitzky, University of Texas Law School (participated in the survey in his capacity as a Clinical Professor of Law and the Director of the Human Rights Clinic at the University of Texas, not as a member of the United Nations Working Group on Enforced or Involuntary Disappearances); Polly Halfkenny, Transport Workers Union Local 100, Theresa Harris, Human Rights USA; Robert Kushen, European Roma Rights Centre; Robin Levi, Justice Now; Johanna Miller, New York Civil Liberties Union; Tina Minkowitz, Center for the Human Rights of Users and Survivors of Psychiatry; Lynn Paltrow, National Advocates for Pregnant Women; Sarah Paoletti, University of Pennsylvania Law School; Melissa Rothstein, Just Detention International; James Silk, Yale Law School; Bret Thiele, Center on Housing Rights and Evictions, JoAnn Kamuf Ward, Columbia Law School Human Rights Institute; Seri Wilpone, Maryland Legal Aid. All of these respondents were willing to be acknowledged by name as participants, but some declined to be attributed for their quotations. An additional five respondents were willing for their contributions to be analyzed and quoted, but preferred to withhold their names and affiliations from the report.

The article begins with a profile of the survey respondents and then groups the responses into three themes: (1) the overlap and distinctions between the ethics issues confronted by domestic human rights lawyers and other lawyers, (2) the level of satisfaction with the current ethical regime, and (3) striking a balance between skepticism of law as a solution for subordinated communities and appreciation for the radical potential of international human rights law. The responses reveal that some practitioners see the use of international law as just another tool in a large social change arsenal, posing no new ethical challenges. Other practitioners argued that incorporating international law and fora into civil rights work does raise unique ethical questions, sharing their analysis and techniques for ensuring that their work is ethically sound. The article grounds these responses and debates in the ethics literature, drawing both on domestic lawyering and the less extensive literature on ethics in international law practice.

II. SURVEY APPROACH AND METHODOLOGY

The question of legal ethics in U.S. domestic human rights practice was virtually unexplored until the June 2010 conference at which this paper was presented, leaving the terrain bare of fundamental questions or hypotheses. I chose to use a survey about the current ethical practice of domestic human rights lawyers to develop the contours of the landscape. With no prior attention to the issue to form a basis, the goal of the survey was to identify issues and controversies, and to flesh out arguments and potential solutions to ethical dilemmas. In empirical research terms, this was a qualitative rather than a quantitative study. The goal of a quantitative research survey is to extrapolate from a sample group to make statistically significant statements about a group as a whole.² By contrast, “qualitative research methods were devised to study those aspects of being human for which experimental and statistical methods are ill suited—namely, lived world actions and meanings.”³ Qualitative research generates rather than tests hypotheses.⁴ I selected a survey as a useful qualitative research tool, allowing me to develop a “general sense”⁵ of the domestic human rights legal community’s situation, thus fueling the development of theories and opening avenues of inquiry in this under-researched area.⁶

² See, e.g., FLOYD J. FOWLER, JR., SURVEY RESEARCH METHODS 9 (1988) (“The purpose of the survey is to produce statistics—that is, quantitative or numerical descriptions of some aspects of the study population.”).

³ CONSTANCE T. FISCHER, QUALITATIVE RESEARCH METHODS FOR PSYCHOLOGISTS: INTRODUCTION THROUGH EMPIRICAL STUDIES xvi (2005).

⁴ FRED N. KERLINGER & HOWARD B. LEE, FOUNDATIONS OF BEHAVIORAL RESEARCH 588–93 (4th ed. 2000).

⁵ See FOWLER, JR., *supra* note 2, 19.

⁶ See CARL AUERBACH & LOUISE B. SILVERSTEIN, QUALITATIVE DATA: AN INTRODUCTION TO CODING AND ANALYSIS (QUALITATIVE STUDIES IN PSYCHOLOGY) (2003). Although it is a

Other aspects of this project militated in favor of qualitative research. Practitioner self-reports about their professional ethics are necessarily subjective and internal.⁷ As “a reflective, interpretive, descriptive, and usually reflexive effort to *describe and understand* actual instances of human actions and experience from the perspective of the participants who are living through a particular situation,”⁸ qualitative research is designed to deal with subjective self-reporting of the kind gathered in the instant project. In fact, the only portion of this survey that is quantitative is the description of the respondents’ practice areas, as discussed in Section III of the article. This information is reported in a quantitative fashion, but the goal is only to describe the respondents themselves, not to make generalizations about the practice areas of *all* domestic human rights lawyers.

In addition to best meeting the goals of the study, a qualitative approach was indicated because of the presently limited prospects for more quantitative research with domestic human rights lawyers, a small and difficult-to-isolate group. First, owing to the United States’ delayed and substantively closed subscription to international treaties, and the barriers to their justiciability in U.S. law, opportunities for domestic human rights were historically limited. With the ratification of three core U.N. human rights treaties in the early 1990s and subsequent attention to the attendant treaty reporting procedures, the volume of activity around domestic human rights has only recently begun to expand. Domestic human rights lawyers are also difficult to identify for targeted research. Domestic human rights is by definition a hybrid domestic-international practice area, which means that the domestic human rights “bar,” is not readily isolated for targeted survey requests that are guaranteed to reach DHR lawyers and DHR lawyers alone. In

common feature of other academic fields, survey research only occasionally forms the basis of legal scholarship, and when it does it is generally presented as qualitative rather than quantitative information. *See, e.g.,* Richard Delgado, *Minority Law Professors’ Lives: The Bell-Delgado Study*, 24 HARV. C.R.-C.L. L. REV. 349, 354 n. 19 (1989) (“Although the survey results are reported in numerical and tabular form, the survey is primarily qualitative in nature, not quantitative.”); Jenée Desmond-Harris, “*Public Interest Drift*” Revisited: *Tracing the Sources of Social Change Commitment among Black Harvard Law Students*, 4 HASTINGS RACE & POVERTY L.J. 335, 343 (2006–2007) (surveying African American Harvard law students and alumni to test theories of public interest commitment loss, and noting “[b]ecause of the relatively informal nature of this study, the small sample size, and the potential for bias, I present these results as speculative indicators of trends among black HLS students.”); John Arter Jackson, *Managing and Resolving Legal Issues in Technology: A Report from the Albany Law School Science and Technology Law Center Project*, 9 ALB. L.J. SCI. & TECH. 317, 325 (1998–1999) (reporting findings from questionnaire distributed to participants at a conference and “borne out in later, more formal surveys”); Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623, 624–25 n. 5 (2004) (“I make no claims...as to the scientific reliability of the results, but report them as at least anecdotal evidence of the experience and attitudes of some copyright and trademark attorneys.”).

⁷ *See* KERLINGER & LEE, *supra* note 4, at 592 (describing “Qualitative Evaluation Research” as “deal[ing] with stories and case studies”).

⁸ *Id.* (emphasis added).

contrast with other specialized bars, there is no membership association for domestic human rights practitioners, let alone a specialization or licensing mechanism. National lawyers' organizations like the American Bar Association and the Association of American Law Schools have no sections or committees dedicated to domestic human rights. Moreover, because appearances before the United Nations human rights treaty bodies are open to civil society and not limited to licensed attorneys,⁹ not all domestic human rights advocates are lawyers, which is the group this survey sought to reach in order to elicit issues in legal ethics. Given the difficulties in directly reaching this limited population at the present juncture, an initial qualitative survey to identify issues is the most appropriate first step.

The target population for the survey was practicing domestic human rights lawyers. Although the survey was qualitative, it conformed to some quantitative methodology best practices for ensuring validity. I wrote a statement of objectives and a draft survey instrument,¹⁰ both of which were reviewed by and discussed with Risa Kaufman of the Columbia University Human Rights Institute. After the questions had been translated into the Survey Monkey¹¹ format, two law student research assistants and I took the survey to work out any kinks in the question wording, format and order before circulation.¹² A word version of the survey appears at Appendix I.

The Survey Monkey link was then circulated to two listservs. Columbia University's Bringing Human Rights Home Network (BHRH) reports a membership of 390 and a goal of "encourag[ing] U.S. compliance

⁹ See, e.g., Office of the United Nations High Commissioner for Human Rights, Human Rights Committee—Working Methods: Overview of the working methods of the Human Rights Committee § VIII (“[T]he Committee [which monitors state party compliance with the UN Covenant on Civil and Political Rights] invites non-governmental organizations and national human rights institutions to provide reports containing country-specific information on States parties whose reports are before them.”), available at <http://www2.ohchr.org/english/bodies/hrc/workingmethods.htm#a8>; Office of the United Nations High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination - Working Methods § B (“[N]on-governmental organizations” may communicate and meet directly with the CERD Committee and its members), available at <http://www2.ohchr.org/english/bodies/cerd/workingmethods.htm>; United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture Rules of Procedure, CAT/C/3/Rev.4 Rule 76 (August 9, 2002) (“The Committee may decide, if it deems it appropriate, to obtain from the representatives of the State party concerned, governmental and non-governmental organizations, as well as individuals, additional information or answers to questions relating to the information under examination.”), available at <http://tb.ohchr.org/default.aspx?Symbol=CAT/C/3/Rev.4>; United Nations High Commissioner for Human Rights, ExCom Observers (noting that non-governmental organizations participate in the annual sessions of the UNHCR Executive Committee), <http://www.unhcr.org/pages/49c3646c8c.html> (last visited Apr. 15, 2011).

¹⁰ See FOWLER, JR., *supra* note 2, at 99–100 (discussing the need for a statement of objectives and focused discussion about the draft survey instrument).

¹¹ Survey Monkey is a free online survey software and questionnaire tool, available at <http://www.surveymonkey.com/> (last visited Apr. 15, 2011).

¹² This step is called “pretesting.” See KERLINGER & LEE, *supra* note 4, at 606

with international human rights law, including through the U.N. and Inter-American Human Rights systems and the development of strategies to use human rights law in U.S. courts and domestic policy-making and debate.”¹³ As of September 2010, the BHRH listserv had 350 subscribed members.¹⁴ It is not clear how many members of the Network or the listserv are lawyers, nor how many have active experience with domestic human rights advocacy, but in my view, this listserv was the most accurate tool currently available to reach the survey’s target audience.

In addition to posting the link to the BHRH listserv on three occasions over a five-month period,¹⁵ I also posted the survey to a smaller listserv for international human rights law clinicians, run by Cornell Law School. This listserv had 131 subscribers as of October 2010, all “[a]cademics, including fellows, in the U.S. and other countries, who teach international human rights clinics or are interested in the practical applications of international human rights.”¹⁶ This listserv likely overlaps significantly with the BHRH listserv. Finally, a paper version of the survey was distributed at the above-referenced Continuing Legal Education training on Ethics and Domestic Human Rights Lawyering held at Skadden, Arps in June 2010,¹⁷ which drew roughly 125 attendees.¹⁸ This conference presented the BHRH listserv over-inclusion problem in reverse; here one could be sure that virtually all the attendees were lawyers, because the program was a CLE at a large law firm, but based on my interactions with the attendees, many of them were domestic lawyers who were interested in either the subject or gaining the ethics credit, but were not themselves practicing domestic human rights advocacy.

The survey included three questions seeking respondents’ consent to the use of their information. Respondents could agree for their responses to be quoted by name, for their identity as respondents to be included, or to simply have their responses anonymously incorporated into any published report of the survey. The survey instrument also provided respondents the opportunity to write their own terms of consent, and several respondents did so. One

¹³ See Columbia Human Rights Law School, Bringing Human Rights Home Lawyers’ Network, http://www.law.columbia.edu/center_program/human_rights/HRinUS/BHRH_Law_Net (last visited Apr. 14, 2011).

¹⁴ See E-mail from Risa Kaufman, Exec. Dir., Columbia University Law School Human Rights Institute, and Lecturer-in-Law, Columbia University Law School, to author (Sept. 22, 2010, 08:19 EST) (on file with author) [hereinafter Kaufman E-mail].

¹⁵ February, April, and June 2010.

¹⁶ See E-mail from Sital Kalantry, Assoc. Clinical Professor of Law, Cornell Law School, to author (Oct. 5, 2010 10:32 EST) (on file with author) [hereinafter Kalantry E-mail].

¹⁷ Four organizations sponsored the conference, which was held at Skadden, Arps’ New York office: the Columbia Law School Human Rights Institute, the Center for Constitutional Rights, the Center for Reproductive Rights, and the National Economic and Social Rights Initiative. Columbia Law School, Ethics and Domestic Human Rights Lawyering CLE Conference, http://www.law.columbia.edu/center_program/human_rights/HRinUS/CLEs/2010CLE (last visited Apr. 15, 2011).

¹⁸ See Kaufman E-mail, *supra* note 14.

survey respondent requested and was accommodated with a live interview rather than providing written answers. In the months after the survey was administered, multiple communications took place with each respondent to clarify answers and confirm consent. As discussed further in Section IV, a relatively high percentage of respondents began but discontinued the survey. If they provided no responses at all, the records of their entry into the system were destroyed to preserve confidentiality. If they provided some responses but did not answer the consent questions, they were contacted; either their consent was confirmed, or their records, too, were destroyed.

After discarding the non-consent or discontinued surveys, twenty-three substantive responses were available for discussion in this paper. A “substantive response” refers to responses dealing with the ethics questions on the survey, as opposed to responses that simply described the respondent and his/her practice area. Eleven respondents began to take the survey online and got as far as providing detailed information about their practice areas, but declined to answer any of the questions about ethics. Most of these respondents terminated the survey upon reaching the first substantive question: “Do you believe that domestic human rights work presents you with any unique ethical choices?” This question was placed at the beginning of the survey because it captured the essence of the project.

It is not possible, of course, to definitively interpret this relatively high number of terminations by people who were interested enough to answer detailed demographic questions and who do have domestic human rights experience. In addition to the small community, the uncertain percentage of list members who are not lawyers and the uncertain percentage of conference goers who actually practice DHR, the chronically over-taxed condition and “survey fatigue” of lawyers and human rights advocates could also account for the sample size and some of the drop-off. For example, in the summer of 2010, a short survey circulated to the BHRH listserv requesting information about the BHRH Network (of which listserv members are all presumably a part), garnered only thirty-five responses.¹⁹

It is also possible that the non-respondents do not see anything ethically unique about domestic human rights work as compared with other areas of lawyering, and that ignoring or terminating the survey was their way of disengaging from a project with which they have a fundamental, substantive quarrel. However, it is interesting to consider the additional (or overlapping) possibility that at least some of the terminations simply reflected the novelty of this question, and a lack of a common framework for identifying ethical concerns unique to this practice area. Taken together with the substantive responses discussed in the next section, many of which did quarrel with the premise of the uniqueness of domestic human rights ethics, these non-responses form a challenge to the project to develop a framework and disseminate this analysis to the bar.

¹⁹ *See id.*

III. PROFILE OF RESPONDENTS

The respondents differed broadly in practice and experience. All but one of the twenty-three substantive responses²⁰ came from U.S.-licensed attorneys. The one respondent who is not U.S.-barred belongs to a foreign bar association. Most of the respondents work in non-profit, non-governmental agencies, including law school clinical programs. Their work encompasses a wide range of issues, including the justiciability of economic, social, and cultural rights and the rights of detainees, immigrants, labor unions, and mental health patients. A few of the respondents work in private practice, and the group's experience level ranges from two years out of law school to thirty-one years of practice.

To examine the domestic human rights expertise of the respondents, the survey asked them to classify their current work in terms of the way they incorporate international law into their advocacy work. Twenty-two of the respondents answered this question, dividing their work into the following categories:²¹

1. U.S. Domestic-Only

Domestic-only work involves representing U.S. clients and issues in domestic fora, using only domestic law without any comparative or foreign law analyses.

2. U.S. Domestic Human Rights "Importing"

This is a subset of domestic human rights, in which advocates use comparative or international law in U.S. domestic fora. Domestic human rights importing includes, for example, citing comparative and international authority in domestic litigation, legislative treaty ratification advocacy, and hosting or interacting with international missions to the United States.

²⁰ As discussed above, "substantive responses" refers to responses dealing with the ethics questions on the survey, as opposed to responses that simply described the respondent and his/her practice area.

²¹ These advocacy categories are described in more detail at Beth Lyon, *Changing Tactics: Globalization and the U.S. Immigrant Worker Rights Movement*, 13 UCLA J. INT'L. L. & FOREIGN AFF. 161, 170-73 (2008). As discussed in the text below, the instant project is intended to parse out and highlight U.S. domestic human rights advocacy from amongst the diverse practice types of the survey respondents. By contrast, the categories originally developed for the UCLA article were created to apply universal categories to a pre-defined practice subset (the rights of immigrants in the United States). Therefore, the categories utilized in the two papers vary slightly.

3. Domestic Human Rights “Broadcasting”

Broadcasting involves presenting U.S. clients and issues in inter-governmental fora. Submitting reports to U.N. treaty bodies or other monitoring bodies such as the Universal Periodic Review process and filing petitions with the (IACHR) are both examples of domestic human rights broadcasting.

4. International-Only

This work involves representing non-U.S. clients and issues in foreign or inter-governmental fora.

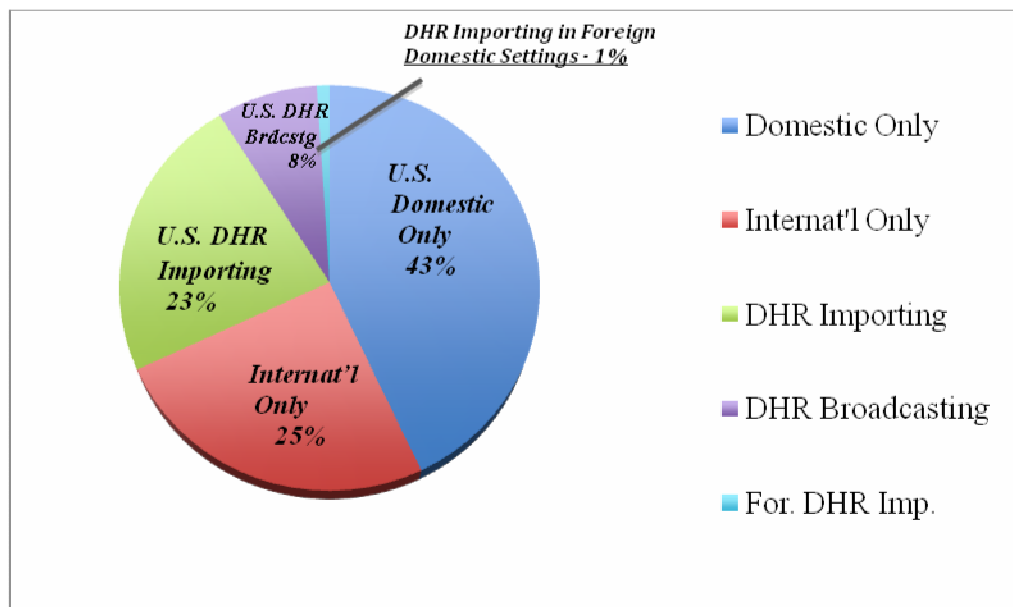
5. “Other”

I provided this response option because I had deliberately kept the categories simple and wanted respondents to be able to identify more specialized practice types. One respondent, a U.S.-based advocate, did report a significant percentage of his time in domestic human rights importing in foreign settings. Because this project is aimed at U.S. advocates working on domestic issues, I decided not to include foreign domestic advocacy with U.S. domestic human rights “importing;” instead, it was listed as a separate category. Nor did these categories perfectly capture the work of one respondent who advocates on behalf of pre-departure migrant workers who have not yet left their countries of origin and post-return who have now left their countries of employment. That respondent divided her work across the four previous categories.

Virtually all the respondents’ practices ranged over more than one of these categories. Figure 1 depicts the spread of reported majority practice areas. Only five respondents reported that 100% of their work falls into only one category: two spend 100% of their time on domestic-only advocacy, one devotes 100% of her time to domestic human rights work, and two to international-only advocacy. Nine respondents reported that a majority of their practices are dedicated to domestic-only work, and five devote most of their work to international-only advocacy. Of these, only the two who devote 100% of their time to domestic-only and the two focused 100% on international-only work reported handling no work at all in domestic human rights advocacy. Another eight spend more of their time on domestic human rights advocacy than on other work. Figure 1 also categorizes the twenty-two advocates’ work in the aggregate, showing that 43% of their efforts are devoted to domestic-only advocacy, 25% to international-only, 23% to U.S. domestic human rights “importing,” 8% to U.S. domestic human rights “broadcasting,” and 1% to domestic human rights “importing” in foreign domestic settings.

Although this survey was intended to raise ethical considerations, not to provide a statistically significant (generalizable) set of demographic data, these numbers do demonstrate that the human rights work of many of these particular respondents is embedded in other practices.²² For instant purposes, these practice breakdowns indicate that the respondents' ethical insights arise from significant experience with domestic human rights advocacy. They also indicate that the respondents possess broad experience in quite varied U.S. domestic and international fora.

Fig. 1. Aggregated Practice Areas



IV. SPECIAL ETHICAL CONSIDERATIONS IN DOMESTIC HUMAN RIGHTS ADVOCACY?

There was a nearly even split in the responses to the question: "Do you believe that domestic human rights work presents you with any unique ethical

²² See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 982 (2008) (explaining that domestic human rights advocacy uses human rights norms and starts at various points in public interest law, entering through "multiple points of entry," going beyond the federal courts and into other venues to influence human rights agendas). Although beyond the scope of this paper, the demographics of international human rights dissemination in the United States are likely in transition as this country becomes more involved in international and regional human rights treaty regimes, and are worth exploring in the future. See *id.* at 988–89 (discussing the tactics employed by American lawyers seeking to influence human rights in light of the status of the United States as signatory to international treaties).

choices?”²³ The respondents who found domestic human rights work to have special ethical dimensions concentrated their examples on questions of client management, resource management, tensions created by the requirement of exhaustion of domestic remedies, and the demands of the human rights regime itself as a free-standing ethical mandate. These respondents are keenly aware of the weakness of international human rights law enforceability in the U.S. context, and of the potential dangers to both client and cause of what one respondent called the “top-down approach,”²⁴ namely arguing international and comparative standards to potentially hostile domestic decision-makers. The respondents who maintained that domestic human rights advocacy does not present unique ethical issues argued that the “tensions found in that practice area are generic to cause lawyering.”

A. Client Management

Many of the survey respondents discussed the challenges of managing clients in the domestic human rights context. Domestic human rights lawyers, like their domestic-only counterparts, have both law reform and jurisprudential-institutional goals that they must manage in addition to the client’s best interest. Communicating with clients about their international legal options is an important issue in this practice area. Domestic human rights lawyers also pointed to special considerations involved when working with foreign clients. In addition, some of the survey respondents noted that they do not represent individuals but rather organizations or simply causes.

1. *Client v. Cause*

Domestic human rights lawyering necessarily involves high, life-and-liberty stakes for clients and partners, be they individuals or organizations. For example, one respondent noted that many of her clients are presently incarcerated, and “the risks of retaliation can be life-threatening.”²⁵ Domestic human rights advocacy often involves “cause lawyers” whose motivation for their work is tied up less in personal financial gain than in broader societal goals. As a result, domestic human rights lawyers must strike a balance, fulfilling their ethical obligation to their clients while advancing societal goals for which they have made considerable personal sacrifices.

In this way, domestic human rights lawyers are much like other public interest lawyers. Domestic-only and international-only advocates who work

²³ Nine respondents answered that they do perceive unique ethical choices in domestic human rights work, and eight responded that they do not. An additional four gave equivocal answers or responded that they are not sure.

²⁴ Electronic survey of Jin Yung Bae, Attorney, Center for Reproductive Rights (2000) (on file author).

²⁵ Electronic survey of Melissa Rothstein, Program Director, Just Detention International (2010) (on file with author).

for individual clients are also often working toward law reform, such as, for example, a change in law, process or institutional arrangements that benefits a vulnerable group or ends an oppressive government practice. The law reform vision of domestic human rights lawyers likely mirrors that of both their domestic-only and their international-only counterparts. At this level, I agree with the survey respondent who stated, “[t]here are always ethical issues but I don’t feel they are substantially different from those . . . in any sort of public interest advocacy.”²⁶

However, cause lawyers do not only work at the level of individual case and law reform. One survey response raised the question of the *jurisprudential-institutional* goals of a domestic human rights lawyer. For the purposes of this paper, a jurisprudential-institutional goal is a goal that advances the underlying cause by altering the internal arrangements of law or law-focused institutions. An advocate’s jurisprudential-institutional agenda stands parallel with his law reform goals. For example, a domestic-only lawyer might pursue a litigation strategy that encourages an administrative agency to place weight on the more favorable decisions of a particular circuit court of appeals. An international-only lawyer might urge regional human rights courts to give deference to the decisions of their counterparts in other regions. Similarly, domestic human rights advocates are pursuing a “broader agenda[:] incorporating a human rights framework.”²⁷

Legitimizing international law as a source of authority in the United States may at first seem similar to the examples just cited regarding circuit court precedent or region-to-region jurisprudence, but there are important differences. First, U.S. domestic human rights lawyers arguing international law in the U.S. context face more extreme hostility and skepticism than they would when arguing non-binding domestic sources in the domestic context.²⁸ Second, the status of international law and international institutions in U.S. jurisprudence is a more unsettled question than other areas of domestic jurisprudential advocacy, simply because there are so many U.S. arenas in which international and comparative law have not been argued. The U.S. Supreme Court has famously debated the role of international law authority in the context of recent civil rights cases,²⁹ but outside the federal appellate

²⁶ Electronic survey of Sandra Babcock, Clinical Professor, Northwestern University (2010) (on file with author).

²⁷ Electronic survey of Anonymous Practitioner (2010) (on file with author).

²⁸ See Cummings, *supra* note 22, at 983 (discussing the controversy surrounding the use of international law in American federal courts).

²⁹ See *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding the Eighth and Fourteenth Amendments bar a juvenile from receiving the death penalty and noting the “stark reality” that the United States is the only country in the world that imposes the juvenile death penalty as sentence) see also *Graham v. Florida*, 130 S. Ct. 2011, 2030, 2033 (2011) (sentencing a juvenile to life imprisonment without parole for a non-homicidal offense constitutes cruel and unusual punishment, discussing that the Court has looked abroad in making independent legal conclusions). Notably, at least some scholars argue that the Supreme Court’s use of international law and comparative law as a persuasive authority in many fields apart from human rights is a longstanding and unremarkable fact. See Daniel A. Farber, *The Supreme*

context, very few U.S. tribunals have grappled with international authority.³⁰ Moreover, even in the federal context, where the topic has been more frequently addressed, reliance on foreign and international law is highly controversial in a way that other choice-of-law and jurisprudential questions are not. For example, after a spate of Supreme Court decisions that cited international and comparative law as persuasive authority, several bills were introduced in the house outlawing the practice of judicial citation to foreign and international law.³¹ A 2004 bill would have amended U.S. policy as follows: “In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law.”³²

Whether it is domestic-only or motivated by internationalism, the promotion of a jurisprudential-institutional goal may or may not be in a client’s best interest. However, given its unsettled and politicized nature, the jurisprudential aspiration of human rights incorporation is potentially chaotic to a client’s individual interests.

2. *Weak Individual Legal Options*

The survey responses highlighted another and related potential distinction between domestic human rights and domestic-only advocacy: the weakness of human rights as an individual client strategy. In the words of one respondent, “the overall lack of efficacy of advocacy based on international human rights law and the antipathy of many judges and others in the U.S. make it important, and difficult, to weigh it against other strategies.”³³ Because

Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History, 95 CAL. L. REV. 1335, 1353–55 (2007); David J. Seipp, *Our Law, Their Law, History and the Citation of Foreign Law*, 86 B. U. L. REV. 1417, 1429 (2006).

³⁰ See Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 294–95 (2005) (noting that the lower courts invoke international law inconsistently, especially during wartime); see also Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT’L L. 675, 677 (2003) (discussing confusion among both the bar and the bench surrounding the level of deference given to decisions of international tribunals and the subsequent limited understanding regarding the role of international law in domestic courts, a formulation that invites lower courts to misunderstand and misuse such decisions).

³¹ See H.R. Res. 468, 108th Cong. (2003); Constitutional Preservation Resolution, H.R. Res. 446, 108th Cong. (2003); The Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004) [hereinafter *Constitution Restoration Act*]; see also Seipp, *supra* note 29, at 1420–24 (describing the attempts at legislating away international and comparative authority, and also describing death threats against Supreme Court Justices Ginsberg and O’Connor in the wake of their participation in a decision relying on international law).

³² H.R. 3799, 108th Cong. (2004).

³³ Electronic survey of Jim Silk, Clinical Professor of Law, Allard K. Lowenstein International Human Rights Clinic (2010) (on file with author).

they are relying on international law, domestic human rights lawyers are routinely relying on hortatory standards. Human rights broadcasting offers literally no binding solutions to the victims of human rights violations in the United States, because of this country's conservative international human rights law diplomacy. Through a combination of its ratification and domestic jurisprudence, the United States acknowledges *no* international human rights tribunal's pronouncements as binding upon it.³⁴ The result is that successfully litigating individual U.S. claims in the few supranational fora that are empowered to hear them, for example the IACHR, the NAFTA labor and environmental side agreements, and the International Labour Organization Committee on Freedom of Association, is more akin to calling a press conference than winning a case. In terms of human rights importing, international human rights law sources are rarely considered binding by U.S. tribunals.³⁵

It is important to acknowledge that domestic-only public interest lawyers are no strangers to presenting desperate clients and communities with near-hopeless legal options. Any difference here may be at the level of volume and frequency. *Every* international law option that domestic human rights lawyers offer their clients comes with the non-enforceability footnote. Another potential difference is that weak legal options are more likely to equate to procedural victories in the domestic-only context. Although ethical counsel struggles with the appropriateness of filing weak motions, colorable claims can shift the timing of a matter in ways that are critical to individual clients. A colorable asylum claim, for example, can extend an immigrant family's unity by years. A non-frivolous appeal can extend a death-row client's life by a decade. Very rarely, however, does an international law intervention offer the client a shift in the flow of her case. U.S. tribunals have notably refused to delay cases despite the requests of such international bodies as the

³⁴ See Russell G. Murphy & Eric J. Carlson, "Like Snow [Falling] on a Branch...:" *International Law Influences on Death Penalty Decisions and Debates in the United States*, 38 DENV. J. INT'L L. & POL'Y 115,128 (2009) (surveying the history of United States positions regarding international tribunals, including refusal from jurisdiction of the International Criminal Court and withdrawing from one of the most important human rights tribunals, the International Court of Justice).

³⁵ See Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 U. PA. J INT'L L. 169, 206-08 (2007) (explaining that U.S. courts seemingly prefer to use international law as a proxy for comparative practice rather than a body of binding standards). It is important to note that U.S. courts actively engage in human rights law through the application of statutes that create direct jurisdiction to apply international norms, for example, the Alien Tort Claims Act (ATCA). See *Alien's Action for Tort*, 28 U.S.C. § 1350 (2010). The ATCA is a jurisdictional statute that permits foreign nationals to sue in tort in a United States court for a "tort...committed in violation of the law of nations." *Id.* However, the scope of this statute has been limited through recent jurisprudence limiting the definition of "the law of nations." See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-34 (2004); see also, Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in the Courts of the United States*, 57 VAND. L. REV. 2241 (2004).

International Court of Justice (ICJ)³⁶ and the IACHR.³⁷ A rare but important counter-example is that of the survey respondent who was able to delay imposition of the death penalty based on letters from the Organization of American States' IACHR.³⁸ This example should inspire domestic counsel to make these arguments, but such successes are, at least at this juncture, rare, and lawyers utilizing international human rights in a domestic context must routinely confront the special, problematic status of international law options in the U.S. domestic system when counseling clients on their options.

3. *Client-Centeredness*

Several respondents noted that, although by and large their clients support the advocate's cause, conflicts between client and cause can and do arise.³⁹ For example, one respondent noted the ethical problems that arise for advocates representing groups when an individual client's goals diverge from the preferences of the other group members. Perhaps unsurprisingly, the responses from all sides of the question of whether domestic human rights work presents unique ethical choices reflected a commitment to client-centeredness. One respondent flatly stated, "[w]e will not use international law in a situation where it may hurt the client's case or antagonize a negotiating party."⁴⁰ Another noted, "the client's interest always trumps the greater cause. [N]ot a close question."⁴¹ In fact, two respondents reported that when working in settings where no formal code obtains, their ethical framework is based on the principle of client decision-making.⁴²

³⁶ For an example of a case that put the United States directly at odds with the International Court of Justice, *see, e.g.*, *Breard v. Greene*, 523 U.S. 371, 374–76 (1998).

³⁷ *See* *Roach v. Aiken*, 781 F.2d 379, 380–81 (4th Cir. 1986) (concluding that, with respect to the imposition of the death sentence, the issue's consideration by the Inter-American Commission on Human Rights was an insufficient reason to either stay or stop the execution).

³⁸ In one Texas death penalty case, the Inter-American Commission on Human Rights sent a letter to the U.S. Department of State requesting a delay in setting the execution date while the matter was pending with the Commission. After learning about the Commission's intervention, the prosecutor and judge agreed to defer setting an execution date. Eight years later the date has not been set. *See* E-mail from Sandra Babcock, Clinical Professor of Law and Clinical Director, Center for International Human Rights, to Danielle Granatt (Apr. 12, 2011, 07:54 EDT) (on file with author). *See also* Brief of Morton Abramowitz et al. as Amici Curae Supporting Respondent at 13–14, 22–23, *Roper v. Simmons*, 543 U.S. 551 (2005) (discussing the Commission's opposition to the juvenile death penalty and disruption caused by letter campaigns).

³⁹ *See* Electronic survey of Anonymous Practitioner (2010) (on file with author).

⁴⁰ Electronic survey of Robin Levi, Human Rights Director, Justice Now (2010) (on file with author).

⁴¹ Survey response of Sandra Babcock, Clinical Professor, Northwestern University, (2010) (on file with author).

⁴² *See* Survey responses of Cathleen Caron, Executive Director, Global Workers Justice Alliance (2010) (on file with the author) (reporting "general client-centered approach" when not bound by particular ethics code); Sarah Paoletti, Clinical Supervisor and Lecturer,

Of course, as any experienced lawyer knows, the devil of client-centeredness is in the details, but an examination of exactly how the cause-versus-client balance is struck by the domestic human rights bar is beyond the scope of this article. What is clear here is that the reported tenet of the domestic human rights bar is to sacrifice cause to client interests, even when not required by binding ethical codes. One advocate explained that she maintains a participation mechanism to ensure protection of the interests of the victims of the policies her organization seeks to reform: “we regularly include former prisoners in our work to maintain some accountability.”⁴³

a. “Transparency and Participation:”⁴⁴ Communicating with Clients about Internationalist Strategies

Effective client counseling is a critical and delicate function for every ethical lawyer, but it carries a special urgency in the public interest and pro-bono setting, because the vast majority of poor and subordinated clients have little recourse to second opinions. Many survey respondents felt that the key to balancing client versus cause lies in client communication. One respondent stated, “It must be made clear to any ‘client’ that [strategic] litigation may involve desired outcomes of changed jurisprudence rather than only a specific remedy for a specific individual or group.”⁴⁵ Another reiterated the importance of close and careful client counseling about the “uncertain results” of using international human rights advocacy to achieve their goals.⁴⁶ One respondent stated that the tension between individual client and group client goals “argues for very explicit conversations about decision-making processes upfront.”⁴⁷ Another advocate stated, “I generally work with clients that support the cause of the litigation, but still make it clear that there may be a distinction between what is good for the cause and what is good for the client.”⁴⁸

b. Like-Minded Clients

The importance of working with clients who “support the cause of the litigation” came up in survey responses additional to the one quoted above. One respondent stated, “[o]ur clients generally come to us because they believe

University of Pennsylvania Law School (2010) (on file with author) (“Client-decision making [is] the core factor” of ethical rules used in international advocacy.”).

⁴³ Rothstein, *supra* note 25.

⁴⁴ Electronic survey of Cathy Albisa, Executive Director, National Economic and Social Rights Initiative (2010) (on file with author).

⁴⁵ Electronic survey of Bret Thiele, Senior Expert for Litigation, Centre on Housing Rights and Evictions (2010) (on file with author).

⁴⁶ Electronic survey of Tina Minkowitz, Center for Human Rights of Users and Survivors of Psychiatry (2010) (on file with author).

⁴⁷ Electronic survey of Sarah Paoletti, Clinical Supervisor and Lecturer, University of Pennsylvania Law School (2010) (on file with author).

⁴⁸ Thiele, *supra* note 45.

in the cause and want to advance it”⁴⁹ In the context of working with community partners, another respondent noted that, though issues still come up, “we try to address [conflicts] at the front end by undertaking sufficient due diligence before we enter into a partnership and try to ensure that we are sufficiently aligned.”⁵⁰ The contours of the relationship between social change lawyers and like-minded clients is the subject of a rich literature,⁵¹ as the issues tackled by this lawyering community result in the push and pull between service to the ongoing needs of marginalized communities and the pursuit of long-term goals.

c. Special Considerations When Working with Inaccessible Clients

Serving inaccessible clients creates clear ethical tensions for advocates.⁵² The costs of communication go up even as effectiveness goes down, implicating the Model Rule 1.4 mandate to “keep a client reasonably informed about the status of a matter,”⁵³ and to “promptly comply with reasonable requests for information.”⁵⁴ One respondent described the problem of geographically remote clients: “sometimes there’s an impulse to compromise the extent of communication with the client about the status of litigation and various strategic choices to be made, but it is very important, in fact even more important in cases involving people abroad, to communicate fully because the distance and silence could frustrate them and make them feel vulnerable.”⁵⁵

⁴⁹ Electronic survey of Anonymous Practitioner (2010) (on file with author).

⁵⁰ Albisa, *supra* note 44.

⁵¹ See Raymond H. Brescia, *Line in the Sand: Progressive Lawyering, “Mastering Communities,” and a Battle for Affordable Housing in New York City*, 73 ALB. L. REV. 715, 727 (2010) (discussing the debate common in progressive lawyering circles on how to best serve the needs of clients while serving long-term tactics like law reform, impact litigation, and community organizing); see also GERALD P. LÓPEZ, REBELLIOUS LAWYERING; ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE 70–71 (1992) (urging public interest lawyers to ground their work in the lives of the communities of their subordinated clients while pursuing collective solutions to community problems); Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is there a Role for “Facilitative” Lawyering?*, 1 CLINICAL L. REV. 639, 639–40 (1995) (contrasting the client-centered and “collaborative” approaches and proposing “facilitative” lawyering as a middle approach to working with activist clients); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 755 (1988) (providing a thorough case study on change-oriented lawyering and “client empowerment” against the backdrop of South African apartheid and analyzing different avenues through which the public interest lawyer effectuates social change).

⁵² See Michael J. Maloney & Allison Taylor Blizzard, *Ethical Issues in the Context of International Litigation: “Where Angels Fear to Tread,”* 36 S. TEX. L. REV. 933, 956–65 (1995).

⁵³ MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(3) (1983).

⁵⁴ *Id.* at R. 1.4(a)(4).

⁵⁵ Electronic survey of Jin Yung Bae (2010) (on file with the author).

d. Special Considerations when Working with Foreign Clients

Several respondents also gave insights into their strategies in managing cases involving foreign nationals. One respondent noted that “[y]ou have to think about the cultural differences and how those affect your client’s understanding of your ethical duties.”⁵⁶ Specifically, another respondent looks at the legal practice rules in the client’s country of origin to get a better idea of the client’s expectations of the attorney-client relationship in order to prevent misunderstandings.⁵⁷

The academic ethics literature underscores the need for attention to this issue. Professor Mary Daly argues that in other countries, non-lawyers carry out many of the functions that a lawyer would perform in the United States.⁵⁸ In the context of working with foreign clients abroad, international law scholar Robert Lutz has suggested “the long hours, high costs, and high recoveries in U.S. litigation” are potential surprises for foreign clients working with U.S. lawyers.⁵⁹ Professors Maloney and Blizzard write about the difficult situation of communicating unacceptable “low ball” offers to clients who are likely to accept them because of their cultural backgrounds.⁶⁰ Clients coming from countries with more limited roles for attorneys could experience confusion about the proper scope of a U.S.-barred lawyer’s role in his matter. Professor Lutz also notes that language barriers can become an ethical issue, describing a California state bar opinion when he states that the duty of competence includes a duty to offer “adequate communication,” including utilizing a “skilled” interpreter and, if necessary, translator.⁶¹

Other respondents noted that they are constantly vigilant to the potential collateral immigration consequences of their actions in domestic human rights cases, and to advising clients about those risks.⁶² One respondent noted that she has to give different advice to documented versus undocumented people when counseling groups on civil disobedience.⁶³ Another respondent pointed out the special importance of international human rights law to foreign nationals: “U.S. protections (constitutional and otherwise) are always unclear for these clients and there is a question of whether international law MUST be raised.”⁶⁴

⁵⁶ *Id.*

⁵⁷ Electronic survey of Anonymous Practitioner (2010) (on file with author).

⁵⁸ See Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 *FORDHAM INT’L L.J.* 1239, 1270–71 (1998).

⁵⁹ See Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 *FORDHAM INT’L L.J.* 53, 66–67 (1992).

⁶⁰ See Maloney & Blizzard, *supra* note 52, at 958–59.

⁶¹ Lutz, *supra* note 59, at 84 (quoting the California State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1984-77 (1984) (interpreting Rule 6-101 of California Rules of Professional Conduct, predecessor of current Rule 3-110)).

⁶² Paoletti, *supra* note 47.

⁶³ Electronic survey of Anonymous Practitioner (2010) (on file with author).

⁶⁴ *Id.* (emphasis in original).

B. Empowerment versus Exhaustion of Domestic Remedies

One respondent highlighted the ethical challenges arising from the requirement of exhaustion of domestic remedies. Exhaustion, which requires petitioners in international tribunals to first exhaust the litigation avenues available domestically, is a hurdle to jurisdiction in international human rights litigation. Failure to exhaust remedies is a powerful basis for contesting jurisdiction and has resulted in the dismissal of more than one human rights case lodged against the United States by its citizens.⁶⁵ The respondent who raised this question noted that making strong arguments on exhaustion at the regional or international level can have consequences for domestic work, undermining efforts at community empowerment regarding the scope and utility of domestic law.⁶⁶

C. Limited Resources

An additional dilemma relates back to the earlier point about the aspirational nature of human rights law: limited resources. One respondent stated that a unique challenge in domestic human rights advocacy lies in “[d]eciding when organizationally it makes sense to file an action based on international law when you know it has almost no chance of winning.”⁶⁷ As the circle of advocates willing and able to assist with international advocacy in domestic U.S. cases grows, many of them housed in law schools, domestic lawyers who are willing to incorporate international law arguments or file with international fora have more support than they may know. (Inevitably, as international advocacy does become a more mainstream option in public interest cases, the tipping point will be reached where there are insufficient international human rights lawyers to meet the demand for assistance by U.S.-based clients and causes). However, many advocates are simply too overwhelmed to add another argument, particularly one that means co-counseling with an unfamiliar group. For example, one respondent recalled an

⁶⁵ For example, in 1999 the ACLU of San Diego and the California Rural Legal Assistance Foundation asked the Inter-American Commission on Human Rights to find that an initiative known as “Operation Gatekeeper,” whereby the United States sought to redirect migrants eastward out of border cities and into the more hostile terrain of the Tecate Mountains and the Imperial Desert, resulting in a sharp increase of deaths, was a violation of Article I of the American Declaration of the Rights and Duties of Man. The Commission declared the claim inadmissible on the basis that remedies within the domestic legal system were not exhausted. See Victor Nicholas Sanchez, et. al. v. United States, Pet. 65/99, Inter-Am. Comm’n. H. R., Report No. 104/05 (2005), *available at* <http://www.iachr.org/annualrep/2005eng/USA.65.99eng.htm>.

⁶⁶ Paoletti, *supra* note 47.

⁶⁷ Electronic survey of Polly Halfkenny (2010) (on file with author).

unsuccessful attempt to “persuade local counsel in a crim[inal] def[ense] case to include (much less discuss) an international human rights claim.”⁶⁸

D. Human Rights as an Ethical Mandate

Several survey respondents stated that their resolution of ethical choices is shaped by the very fact that they work in human rights. Because international human rights law is associated with particular values, these advocates find ethical guidance in the substantive doctrine of their practice area. For example, one respondent argued, “the ethical issues remain the same in all social justice work, but any claim to support human rights principles and values should shape how you resolve those issues.”⁶⁹ Many scholars point to the dignity of the individual as the foundational principle of international human rights,⁷⁰ tying in to the fierce client-centeredness the respondents expressed. One respondent noted that in settings where her state ethics code does not apply, her ethical standards, in addition to focusing on client-centeredness, are “loosely derived from human rights principles.”⁷¹

E. Special Ethical Considerations in Domestic Human Rights Broadcasting

One major area of domestic human rights advocacy is indisputably unique from domestic-only work: advocacy on behalf of U.S. clients and causes that takes place in international fora. Here again, there are dilemmas shared by domestic-only public interest and domestic human rights lawyers,

⁶⁸ Electronic survey of Lynn Paltrow J.D., Executive Director, National Advocates for Pregnant Women (2010) (on file with author).

⁶⁹ Albisa, *supra* note 44.

⁷⁰ The notion of human dignity as a foundational principle of human rights is a common scholarly theme. See Daniel Kanstrom, *On “Waterboarding”: Legal Interpretation and the Continuing Struggle for Human Rights*, 32 B.C. INT’L & COMP. L. REV. 203, 215 (2009) (declaring one of the most important achievements of human rights law is the “crystallization of legal norms” to protect the individual’s basic dignity). See also Tarek F. Maassarani et al., *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT’L L. J. 135, 140 (2007) (explaining that the human rights framework arose from the ashes of World War II to ensure the protection of human dignity); Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT’L L.J. 237, 238 n.3 (defining international human rights as referring to the body of international law that aims at protecting the human dignity of individuals); Patricia E. Standaert, *Other International Abuses: the Friendly Settlement of Human Rights Abuses in America*, 9 DUKE J. COMP. & INT’L L. 519, 520 (1999) (noting that the goal of the international community was to create an “unwavering respect” for human life and dignity through international human rights treaties, intervention, and prosecution).

⁷¹ Electronic survey of Cathleen Caron, Executive Director, Global Workers Justice Alliance (2010) (on file with author).

and at least one that is unique to domestic human rights lawyers: working in international fora that offer no binding ethical rules whatsoever.

1. *Integrating Multiple Sources of Ethics Authority*

Several respondents reported that they draw on multiple sources to arrive at their ethics decisions. One respondent provided an example from her practice representing U.S. residents in the Liberian Truth and Reconciliation Commission, work in which she uses her state ethics code as a basis, supplementing it with the Commission's rules. Another advocate consults the state bar rules, model rules, rules of the country in which the work takes place, and general principles of ethics.⁷² Similarly, many domestic-only public interest advocates have experience with integrating more than one ethical code, when they find themselves in fora that supply specialized, supplementary ethical regimes, for example, the U.S. Department of Justice Executive Office for Immigration Review rules of conduct for the immigration bar.⁷³

2. *Absence of Binding Ethical Rules*

In addition to its multi-fora character, much of the international work involved in domestic human rights broadcasting is also ethically unique, because many international human rights bodies, including the ICJ, the IACt.HR and the European Court of Human Rights, (ECt.HR) provide no formal ethical guidance to the advocates who practice before them.⁷⁴ The American Bar Association (ABA) recently provided guidance to U.S. human rights lawyers representing U.S. clients and causes in such fora, but this guidance is complex and largely untested. In 2002, the ABA amended Comment 7 to Model Rule 8.5 to state that lawyers engaged in "transnational practice" "with a matter pending before a tribunal" will be bound by "the rules of the jurisdiction in which the tribunal sits" "unless the rules of the tribunal provide otherwise" or "unless international law, treaties or other agreements

⁷² Electronic survey of Anonymous Practitioner (2010) (on file with author).

⁷³ See OFFICE OF THE CHIEF IMMIGRATION JUDGE, COURT PRACTICE MANUAL, DISCIPLINE OF PRACTITIONERS, available at <http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%2010.pdf> (last visited Apr. 14, 2011).

⁷⁴ See CODES OF CONDUCT FOR INTERNATIONAL TRIBUNALS AND ARBITRATION, available at http://www.personal.psu.edu/faculty/l/s/lst3/presentations%20for%20webpage/ASIL_Terry_Codes_International_Tribunals.pdf (last revised May 11, 2009) (last visited Apr. 14, 2011) (listing "Tribunals That Have Not Yet Adopted Explicit Codes of Conduct"). See also Melissa E. Crow, *From Dyad to Triad: Reconceptualizing the Lawyer-Client Relationship for Litigation in Regional Human Rights Commissions*, 26 MICH. J. INT'L. L. 1097 *passim* (2005) (noting the lack of ethical guidance in regional human rights fora and recommending reform of the standing requirements in the African and Inter-American human rights systems to prevent victim disempowerment vis-à-vis lawyers and NGOs).

between competent regulatory authorities in the affected jurisdictions provide otherwise.”⁷⁵

The choice of law principle mirrors the domestic inter-state portion of Rule 8.5, but threatens to create havoc in the case of domestic human rights broadcasting work, because this work is quite distinct from U.S. inter-state practice. For example, an Oregon state lawyer practicing in Florida will have a common language and legal context for interpreting his or her obligations under Florida ethics rules. Contrarily, it seems that an Oregon lawyer representing an organization before the IACt.HR will have to conform to Costa Rican ethical rules, as Costa Rica is the “jurisdiction in which the tribunal sits,” which is likely to be a much more difficult task, both legally and linguistically. Note too that, for U.S. domestic human rights lawyers litigating in transnational fora that *do* have their own ethical codes, it appears from the wording of the Model Rule that the rules of the jurisdiction can only be supplanted if the transnational forum rules explicitly “provide otherwise.”⁷⁶ Close examination of the new 8.5 commentary is beyond the scope of this paper, but the implication of the “provide otherwise” language is that American lawyers may be required to conform to irrelevant and unfamiliar rules when practicing in an international forum, if the international forum has not explicitly ruled out their use.

The one survey respondent who is a foreign attorney, rather than a U.S.-licensed attorney, does not have to refer to Rule 8.5 for ethical guidance. This respondent stated that he relies on “common sense and a combination of several code of conduct or ethical rules, *e.g.*, those developed by the ICRC, different bar associations, different journalist organizations, etc.”⁷⁷ to make ethical determinations in his transnational litigation.

V. ADEQUACY OF THE EXISTING HUMAN RIGHTS REGIME

The survey asked respondents whether the existing human rights regime meets their needs. Of the sixteen domestic human rights advocates who answered this question, ten answered that their needs are *not* met, while five replied that the existing regime *does* meet their needs.⁷⁸ In addition to the sheer lack of international ethics regulation discussed above, numerous

⁷⁵ See MODEL RULES OF PROF'L CONDUCT R 8.5 cmt.7 (2002).

⁷⁶ See *id.*

⁷⁷ Electronic survey of Anonymous Practitioner (2010) (on file with author). Additionally, although international-only work is not the focus of this article, it is interesting to note that one respondent stated that working with foreign nationals abroad means that “the clients who do not know U.S. rules would expect you to abide by their legal ethical obligations, not the United States.” Caron, *supra* note 71.

⁷⁸ Ten respondents who reported that they do domestic human rights advocacy answered “no” and five answered “yes.” One advocate felt unsure; she acknowledged that there is a lack of ethics regulation for international lawyers, but also opined that such regulations would of necessity be “too general to be of much practical use.” Electronic survey of Sandra Babcock, Clinical Professor, Northwestern University (2010) (on file with author).

substantive shortcomings in the existing ethics regime arose in the survey responses. The advocates who feel satisfied with the current situation acknowledge, but feel comfortable with, the existing gaps and ambiguities.

The respondents pointed to many failings in the existing ethical regime. A detailed exploration of these concerns, most of which are the subject of a substantial literature in the domestic-only context, is beyond the scope of this article. Each of these issues does, however, provide an opportunity for further exploration of how a particular dilemma manifests itself in the domestic human rights context, and whether regulatory reform is appropriate:

1. Impact Litigation and Systems Advocacy

Several respondents pointed out the difficulty of ethical lawyering for movements. One respondent felt that “we could benefit from a more nuanced and complete set of ethics that address advocacy beyond the individual, building on the conflict of interest rules.”⁷⁹ Another asserted that the current regime does little to resolve “the tension between the client’s best interest and the “best interest” of the cause.”⁸⁰ Another respondent noted, “[m]y needs are not addressed well . . . as a systems advocate rather than a lawyer with attorney-client relationships.”⁸¹

2. Risk to Third Parties

One respondent (as well as several of the training presenters and participants) noted his dissatisfaction with the existing ethics regime because it fails to adequately address risk to third parties.⁸²

3. Objectivity/Candor to the Tribunal

“[A] certain commitment to ‘objectivity’ means you document and advocate in a way that is not in solidarity with impacted communities. This objectivity also serves to objectify people and can be a threat to their dignity and humanity as well.”⁸³

⁷⁹ Paoletti, *supra* note 47. For an analysis of the shortcomings of the ethical rules vis-à-vis representing groups, see Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups*, 78 VA. L. REV. 1103, 1111–22 (1992) (arguing that the Rules limit intermediation, undercut the protection of individuals in a group representation situation, and minimize the power of class members as against the lawyer for the class).

⁸⁰ Electronic survey of Anonymous Practitioner (2010) (on file with author).

⁸¹ Minkowitz, *supra* note 46.

⁸² Electronic survey of Anonymous Practitioner (2010) (on file with author).

⁸³ Albisa, *supra* note 44. Timothy Terrell discusses this tension in terms of conflicting values: “If lawyer-members [of transovereign entities like human rights NGOs] internalize the values of the transovereign, then these values become a separate, significant source of

4. Class Bias

“Most of legal ethics seem to be about representation of elites and rich people and is too often not related in meaningful ways to the reality of legal representation.”⁸⁴

5. Parochialism

“In this global age, being bound by the rules in one U.S. state when one is practicing globally simply does not make sense. A broad guideline of principles should be applicable for practice outside of the United States.”⁸⁵

6. Privilege

One domestic human rights lawyer raised the question of privilege, noting that the current rules discouraging the presence of non-lawyers in “strategy discussions and intakes” conflict with her work in solidarity with advocacy that utilizes both legal and non-legal strategies.⁸⁶

Interestingly, two respondents who reported doing no work in domestic human rights advocacy both argued that the existing regime does not meet their needs either.⁸⁷ One of these respondents, whose practice is entirely domestic-only, noted that she is often faced with “tensions in impact litigation and cause advocacy that aren’t addressed in our existing ethics regime.”⁸⁸ The other respondent is a U.S.-licensed attorney whose practice is entirely international-only because he focuses on the situation of the Roma in Europe. This advocate raised the question of regulatory gap: neither the ECt.HR nor the U.N. treaty bodies provide practitioners with ethics codes.⁸⁹

The advocates who answered that yes, the existing regime does meet their needs, feel that the ambiguity gives them more flexibility: “There may not be clear rules that govern every situation, but I would rather extrapolate from existing rules than create a new regime or code that attempts to answer every

authority in their lives.” See Timothy Terrell & Bernard L. McNamee, *Transovereignty: Separating Human Rights from Traditional Sovereignty and the Implications for the Ethics of International Law Practice*, 17 *FORDHAM INT’L L. J.* 459, 483 (1994).

⁸⁴ Paltrow, *supra* note 68.

⁸⁵ Caron, *supra* note 71.

⁸⁶ Electronic survey of Anonymous Practitioner (2010) (on file with author).

⁸⁷ Electronic survey of Robert Kushen, Managing Director, European Roma Rights Center (2010) (on file with author); and of Anonymous Practitioner (2010) (on file with author).

⁸⁸ Electronic survey of Anonymous Practitioner (2010) (on file with author).

⁸⁹ Kushen, *supra* note 87.

forum and client, as more specificity may actually limit the efficacy of the advocates.”⁹⁰

VI. LAW AS A LIMITED SOCIAL CHANGE TOOL VERSUS THE RADICALISM OF INTERNATIONAL HUMAN RIGHTS CONTENT

One of the survey questions asked whether advocates try to stay skeptical of offering legal solutions to communities whose aspirations appropriately go beyond the oppressive legal structure. The responses revealed a virtually universal and sharp awareness of the limitations of law as a solution to subordination. However, even as they condemned what Professor Timothy Terrell calls “the cult of lawyering,”⁹¹ the respondents also expressed sincere admiration for the radicalism of international human rights law.

The respondents struggle with the tension created by the mismatch between the hierarchies implicit in law, the weak international human rights law institutions and the progressive nature of the substantive international law norms. One advocate observed that the goal of “reaffirming international norms and structures” exists in tension with “dismantl[ing] legal oppression.”⁹² Another respondent feels that human rights lawyers are “always” in a position to smother the community’s aspirations with mere legal solutions, and noted the “perpetual” concern with staying skeptical about her own role in the community’s struggle.⁹³ One migrant worker rights advocate reported that she has “lost sleep” over the quandary of handling individual guest worker cases and thereby “helping to patch together a thoroughly broken system that will continue to result in the exploitation of workers.”⁹⁴ Clearly, these domestic human rights advocates are deeply conflicted about their role as actors in a fundamentally flawed legal order.

At the same time, the vast majority of the survey responses reflected positive feelings about international human rights norms. One of the respondents, for example, centers her work on the promotion of economic, social and cultural rights, an area of international law offering substantive protections far beyond what is currently available to poor and subordinated people in the United States.⁹⁵ Another respondent argued: “international human rights is an eruption of social justice radicalism into law.”⁹⁶ Another asserted that human rights are “inherently radical” because they offer “structural and significant change.”⁹⁷ Finally, another respondent argued that a public interest lawyer’s natural skepticism about law as a useful tool for

⁹⁰ Electronic survey of Anonymous Practitioner (2010) (on file with author).

⁹¹ Terrell, *supra* note 83, at 485–87.

⁹² Minkowitz, *supra* note 46.

⁹³ Paltrow, *supra* note 68.

⁹⁴ Caron, *supra* note 71.

⁹⁵ Albisa, *supra* note 44.

⁹⁶ Minkowitz, *supra* note 46.

⁹⁷ Albisa, *supra* note 44.

subordinated communities may be misplaced in this context because “human rights is not necessarily a legal solution. It is a change of mindset.”⁹⁸ These comments reflect a sense that the content of the laws involved in domestic human rights work somewhat offset or deflect the limitations of law as a mechanism for social change.

One respondent seeks to resolve the dilemma in his dealings with clients and client communities: “I try to stress that law is a social construct, and cause lawyering is a means by which to construct law/jurisprudence from the perspective of marginalized communities.”⁹⁹ For example, one respondent stated, “we also affirm [the international human rights] vision and standards, but don’t place undue [weight] on the formal processes.”¹⁰⁰ In this way, clients and partner organizations are asked to collaborate in promotion, rather than enforcement, of international human rights law standards.

VII. CONCLUSION

The goal of this article was to surface specific practitioner concerns to set some baselines for the project of advocating for ethics standards that are relevant to the needs of the domestic human rights bar. The twenty-three lawyers whose insights formed the focus of this article brought to the project a wide variety of practice backgrounds and levels of involvement with domestic human rights. Many of the ethical dilemmas they described reflected the essential embeddedness of domestic human rights work in domestic-only practice, including client management, and allocating limited resources to novel arguments. They also pointed out unique dilemmas, such as litigating in international contexts with no ethics codes, and the necessity of simultaneously arguing that domestic remedies have been exhausted while continuing to advocate effectively in the domestic context. The respondents advised careful client selection, culturally sensitive and frank client communication, and client-centeredness as important tools in resolving these dilemmas.

The survey respondents also analyzed the current ethical regime, critiquing it for its gaps and also for its substantive failings, including class and cultural bias and parochialism. Other respondents defended the regulatory ambiguity of the current situation as providing the flexibility necessary for effective lawyering. The respondents also described this bar’s difficult struggle between skepticism of law as a solution for subordinated communities and appreciation for the radical and transformative potential of international human rights law. The survey revealed a small, overtaxed group of advocates trying to balance parallel goals of advancing client cases, community causes, and the integration of international human rights standards into U.S. law. In the context of a domestic legal regime that is often at substantive odds with human rights law, as well as quite hostile to the notion of international legal

⁹⁸ Levi, *supra* note 40.

⁹⁹ Thiele, *supra* note 45.

¹⁰⁰ Albisa, *supra* note 44.

authority, the ethics of this practice is complex and often wrenching. Most of the survey respondents are the first and last source of legal assistance for their client communities, and they, their clients, and their causes deserve to work under an ethics regime that considers their needs.

APPENDIX I: PAPER VERSION OF THE SURVEY

Ethics in Domestic Human Rights Advocacy

About this Survey

Beth Lyon of Villanova Law School and Risa Kaufman of Columbia Law School collaborated on this survey. The goal of the survey is to explore what specific ethical obligations, duties and pitfalls arise for a practitioner employing a human rights strategy in the domestic context.

The results of the survey will be written up for potential publication in the Columbia Law School Journal of Human Rights. At the end of the survey you will be asked to provide your level of consent for use of the information—from attribution and quoting by name to simply incorporating your answers into generalizations about the responses we received. Without your consent to use them, your answers will be kept strictly confidential.

We know you are busy or may not be as interested in one issue as you are in another, so please do not feel you have to provide a detailed answer (or any answer at all) for every question.

You and Your Practice

Name, Title, Affiliation, Years of Practice

Email address

Are you licensed to practice by a U.S. state or territory?

Are you licensed to practice by a country other than the United States?

Please indicate the percentages of your practice/advocacy work falling into the following categories. If these categories don't match your work well, please use the "other" box to describe your work!

_____ U.S. Domestic-Only (domestic clients/issues, domestic fora, domestic law that involves no comparative or foreign law analysis)

_____ International-Only (non-U.S. clients/issues, inter-governmental fora, foreign or international law)

_____ Domestic Human Rights "Importing" (using foreign or international law analyses on behalf of U.S. clients/issues in domestic fora, including legislative advocacy; hosting or interacting international missions to the U.S.; representing clients who are abroad in domestic courts)

_____ Domestic Human Rights “Exporting” (presenting U.S. clients/issues in inter-governmental fora)

_____ Other

If your answer to question 2 included "Other," please explain.

If you indicated that your work includes "International-Only" advocacy (non-U.S. clients/issues, inter-governmental fora, foreign or international law), please explain what ethical rules or code you use in that specific aspect of your work and what issues typically arise in this area of your practice.

Ethics in your Practice

Do you believe that domestic human rights work presents you with any unique ethical choices?

What choices do you make when representing the utility of the international human rights framework to a U.S.-based community or client? Have you ever struggled with what you must disclose to a U.S.-based client about the broader goals of the cause generally and possible conflicts of interest between the good of the cause and the good of the client? How did you deal with that?

What is the impact of offering legal solutions to a radicalized and aspirational community? Might human rights lawyers smother the community's aspirations with a solution that reaffirms the oppressive structure? Do you feel you need to stay skeptical of your approach and if so how do you accomplish that?

If your domestic human rights work involves foreign nationals (whether they are located in the U.S. or abroad), how, if at all, does their citizenship affect the ethical choices in your practice?

If your domestic human rights work involves representing U.S. nationals who are abroad, how, if at all, does their location affect the ethical choices in your practice?

Do you feel that the existing ethics regime(s) meet your needs?

___ Yes

___ No

Please explain.

Consent

May we use your name and quote your answers? [If there appear to be any typos or grammar questions we will contact you to confirm the quote.]

- Yes
- No
- Other (please specify)

May we publish the fact that you responded to this survey (for example, in a footnote listing the individuals with affiliations who responded).

- Yes
- No

May we incorporate your answers into our overall survey results.

- Yes
- No
- Other

Other (please specify)