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## Introduction

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## INTRODUCTION

JOEL K. GOLDSTEIN\*

This issue of the *Saint Louis University Law Journal* traces, in some sense, to two events that occurred a quarter century ago. On February 6, 1977, Richard J. Childress, professor and former dean, of Saint Louis University School of Law died at the age of fifty-five. Barely seventeen days earlier, President Jimmy Carter had pledged an “absolute” commitment to human rights in his inaugural address and called for “international policies which reflect our own most precious values.”<sup>1</sup> Later that spring, President Carter called for “a new American foreign policy—a policy based on constant decency in its values and on optimism in our historical vision.”<sup>2</sup>

October 3, 2001, Harold Hongju Koh delivered the annual Richard J. Childress Memorial Lecture at Saint Louis University School of Law on *A United States Human Rights Policy for the 21st Century*.<sup>3</sup> Professor Koh’s address shared President Carter’s premise that human rights should be an important part of American foreign policy, and it was appropriate that he said so in a lecture bearing Richard Childress’ name. The Richard J. Childress Memorial Lecture was established to honor the memory, and recall the contributions, of Richard Childress during the nearly three decades he served on the School of Law’s faculty and the seven years (1969-76) he served as its dean. Dean Childress was noted for, among other things, his commitment to excellence in legal education,<sup>4</sup> his involvement with the legal profession,<sup>5</sup> and

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1. Inaugural Address of President Jimmy Carter, BOOK I PUB. PAPERS 1 (Jan. 20, 1977), available at <http://www.jimmycarterlibrary.org/documents/speeches/index.phtml> (last modified Oct. 9, 2001).

2. University of Notre Dame: Address at Commencement Exercises at the University, BOOK I PUB. PAPERS 954 (May 22, 1977) (audio available at <http://www.presidency.ucsb.edu/site/media/carter/>). The intersecting paths between human rights on the one hand, and Dean Childress and Saint Louis University School of Law on the other, might be traced back further. The Universal Declaration of Human Rights was, of course, signed in 1948, the year before he joined our faculty.

3. See 46 ST. LOUIS U. L.J. 293 (2002).

4. John E. Dunsford, *Dick Childress as a Teacher*, 21 ST. LOUIS U. L.J. 1 (1977); Vincent C. Immel, *Dick Childress as Dean*, 21 ST. LOUIS U. L.J. 3 (1977).

5. See Hon. Joseph J. Simeone, *Richard J. Childress: His Impact on the Legal Community*, 21 ST. LOUIS U. L.J. 5, 7-8 (1977).

his passion for individual rights.<sup>6</sup> Dean Childress was fully involved in the struggle for fair treatment of all Americans.<sup>7</sup> Following his death, alumni and friends established the lectureship in his memory to bring eminent scholars to our halls to reflect upon, and foster discussion of, legal issues of concern. A distinguished roster of lecturers have so contributed during the ensuing twenty-five years.

Shortly after beginning as Dean of the School of Law in 1999, Dean Jeffrey Lewis suggested making the Childress Lecture the seminal event on the academic calendar, asking the Childress Lecturer to produce not simply a speech, but also a major scholarly article. That work, as well as the written comments, responses and related works of other leading scholars, would be presented in an annual issue of our *Law Journal*. Professor Jerold H. Israel, the Ed Rood Eminent Scholar at the University of Florida Frederic G. Levin College of Law, provided the maiden lecture/article under Dean Lewis' new vision. His work on *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*<sup>8</sup> provided the basis for a memorable event and issue, and inaugurated a series which will contribute to understanding with respect to important legal issues.

This issue is a most worthy successor. Professor Koh had chosen his topic months before the atrocity of September 11, 2001 transformed the world; those unique and tragic events reshaped the context of his lecture and added urgency and new dimensions to the issues under discussion. The *Saint Louis University Law Journal* is pleased to present in this volume the article upon which Professor Koh's lecture was based, and comments and responses by nine other experts invited to participate. Professor Koh has written, in a different context, that "just as human rights theory without practice is lifeless, human rights practice without theory is thoughtless."<sup>9</sup> Indeed, part of the strength of this issue is the extent to which it brings together the theory and practice of human rights, through the discussions and their authors.

Professor Koh's prescription of a human rights strategy for this century is a vision of a most uncommon man. He is, to be sure, one of the leading lights in the legal academy. He joined the faculty of the Yale Law School in 1985 and has held the Gerard C. and Bernice Latrobe Smith Professorship of International Law since 1993. His scholarship includes several books and more than eighty law review articles. Most of his scholarly contributions, with

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6. Monsignor John A. Shocklee, *Richard J. Childress: His Commitment to Human Rights*, 21 ST. LOUIS U. L.J. 10 (1977).

7. See Simeone, *supra* note 5, at 7-8.

8. Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303 (2001).

9. HAROLD HONGJU KOH & RONALD C. SLYE, *Deliberative Democracy and Human Rights: An Introduction*, in DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 3 (Harold Hongju Koh & Ronald C. Slye eds., 1999).

some important exceptions, might be grouped in three general categories. First, he has written extensively regarding the appropriate constitutional balance in decision-making regarding foreign and military matters. His book, *The National Security Constitution: Sharing Power After the Iran-Contra Affair*, published in 1990, presented a powerful argument that our constitutional regime, in its design and general practice, requires power sharing among the three branches of government in foreign and defense matters rather than automatic and blind deference to the executive.<sup>10</sup> The American Political Science Association honored his scholarship by awarding him its 1991 Richard E. Neustadt Award. Second, Professor Koh has written extensively regarding international and transnational law generally, focusing on the jurisprudential and empirical questions of why nations obey international law and how public and private actors interact to fashion and apply international and transnational law.<sup>11</sup> Finally, Professor Koh has written frequently regarding a variety of subjects dealing with human rights, particularly in an international context.<sup>12</sup> The latter subject may seem ostensibly the immediate topic of Professor Koh's article, yet even a cursory reading makes clear that Professor Koh draws upon all three strains of his scholarly work to craft his blueprint for an American human rights approach in these troubled times.

Professor Koh's interest in human rights is not simply an intellectual exercise. He is the child of Korean immigrants who sought refuge in the United States in 1961 after the fall of the democratically-elected Korean government in which his father, Kwang Lim Koh, served. Professor Koh's family experience made him sensitive to the oppressive conditions in which much of the world's population lives, disposed him to seeing freedom and democracy as much of the cure, and left him with an appreciation of the unique role and responsibility of America in bringing justice to the world. When he began his academic career, he wrote of the potential of transnational public law litigation to address and remedy international human rights abuses in much the same way as domestic public litigation had addressed race and gender

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10. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990). See also Harold Hongju Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122 (1991); Harold Hongju Koh, *War and Responsibility in the Dole-Gingrich Congress*, 50 U. MIAMI L. REV. 1 (1995).

11. See, e.g., HENRY J. STEINER ET AL., *TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT* (4th ed. 1994); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

12. See, e.g., Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Harold Hongju Koh, *Democracy and Human Rights in the United States Foreign Policy?: Lessons From the Haitian Crisis*, 48 SMU L. REV. 189 (1994); Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994).

discrimination. Nearly three decades after America offered protection to his family, Professor Koh responded to student requests by establishing an international human rights clinic at Yale Law School to conduct transnational public law litigation. He and his students assumed a substantial litigation docket, impressive in its scope and ambition—litigating against former officials for abusing their people. They filed amicus briefs in the Supreme Court, and ultimately committed nearly 30,000 hours during the early 1990s to represent Haitian refugees in limbo behind barbed wire in Guantanamo Bay between the persecution, which awaited them at Port-au-Prince, and the promise of Ellis Island.<sup>13</sup> The Haitian litigation put Professor Koh and his students adverse to the United States Justice Department, under the administrations of President George H. W. Bush and President William Jefferson Clinton. Their cases went to the Supreme Court five times. One can only imagine the burden on Professor Koh's time, resources and disposition these events must have caused, superimposed as this activity was on his normal professorial schedule.

Having begun the decade litigating against the Clinton Administration, Professor Koh concluded the last century in its service, as Assistant Secretary of State for Democracy, Human Rights and Labor from 1998 to 2001. In that capacity, Professor Koh daily monitored human rights in all the world's time zones. He made 150 trips to fifty-five countries, often the world's trouble zones. He worked to mobilize responses to human rights abuses in Kosova, East Timor, Sierra Leone and elsewhere. On his watch, the United States signed the child soldiers protocol and ratified the child labor convention. The human rights reports, which his office issued, were lauded for their integrity by groups who monitor them.

It should, therefore, come as no surprise that Professor Koh's Childress article is a work of rare caliber. Its richness comes not only from his ability to integrate in it lessons from the strands of his scholarship, but also from the quite different perspectives in which he has experienced issues of human rights—refugee, scholar, lawyer and public official. Moreover, it is the work of an extraordinary human being who brings together a powerful mind, an abiding sense of justice, unmitigated energy and the joy of an optimistic spirit.

Professor Koh argues that the United States should conduct a human rights policy based upon four over-arching principles which he outlines in detail: telling the truth, consistency toward the past, consistency toward the present and consistency toward the future. The principles must be applied not in isolation but rather as part of a coherent and comprehensive human rights strategy that embraces the globalization of freedom, democracy and human rights not simply as valuable ends in themselves but also as means to solving global problems that in different ways threaten all of the earth's inhabitants.

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13. See Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, *supra* note 12.

Professor Koh's experience at the State Department tempered somewhat his optimism since he learned that, for a variety of reasons, making foreign policy is "a lot harder than it looks."<sup>14</sup> But, consistent with his disposition, Professor Koh does not offer this lesson to discourage big thinkers or to encourage complacency among academics and others regarding the slow pace of official change (although some might infer this lesson). Rather, Professor Koh offers future public servants two suggestions—remember your agenda and state your principles—to enable them to accelerate change in the context of principled deliberation.

The creative principles Professor Koh suggests will foster discussion and, in some circles, controversy. For instance, he suggests that the United States tell the truth not only about the human rights violations of others, but also about those committed by its friends and itself. He believes in accountability for past violations but cautions that retribution sometimes must be mitigated by a society's need for its people to make up and move on. The United States can improve the human rights conduct of others by a combination of carrots and sticks, a mixture of strategies involving public and private communications and governmental and nongovernmental actors. Rather than simply responding to abuses after they occur, Professor Koh would refocus American human rights strategy to help obliterate the sources of the problem by doses of preventive cure—establishing mechanisms to provide early and timely warnings to an atrocity response network, using "diplomacy backed by force, followed if necessary, by force backed by diplomacy[.]" and promoting democracy in its multiple dimensions as a means to protect human rights and as a worthy end of itself.<sup>15</sup>

To Professor Koh, the events of September 11 offer a test of the principles he offers. He acknowledges that diplomacy, force, counterintelligence, law enforcement and economic sanctions are among the appropriate strategies needed to combat those responsible. Yet ultimately the "globalization of democracy" must be a primary antidote to the "globalization of terror."<sup>16</sup> America must demonstrate moral leadership by observing international and national law in fashioning its response, by remaining true to American ideals to defend American security.

This cryptic summary cannot begin fairly to outline the rich and nuanced argument Professor Koh presents. Reading his article is its own reward, one those concerned about human rights should hurry to claim. His article begins, rather than ends, the discussion this issue provides. The *Law Journal* has solicited essays from an imposing group of nine human rights specialists.

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14. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 297 (2002).

15. *Id.* at 324.

16. *Id.* at 332.

They explore the descriptions and prescriptions Professor Koh provides, offering in some instances additional or alternative suggestions.

The responses resist easy categorization, but some comment may furnish a helpful guide. The essays by Professor Mark Weston Janis and Professor David Sloss locate Professor Koh's analysis within human rights discourse. Professor Janis associates Professor Koh's thought with the American tradition of universalism or naturalism which accents the reality of international law and the common elements of humanity.<sup>17</sup> In so doing, Professor Janis draws some parallels between Professor Koh's thought and that of James Brown Scott, an international law scholar during the early twentieth century.<sup>18</sup> Professor Sloss locates Professor Koh along a rather different spectrum. According to him, Professor Koh's prescription based on his four principles "attempts to craft a middle way between moralistic idealism and amoral realpolitik"—the polar extremes between which American foreign policy swings.<sup>19</sup> Professor Sloss finds himself largely sympathetic to Professor Koh's "hard-nosed idealism" but suggests problems in some specific instances in which Professor Koh's principles are applied.

Several commentators elaborate on one or more of Professor Koh's principles. Professor Ruti Teitel points out that two of Professor Koh's principles, truth and accountability, are "principles of transitional justice" which she defines as "legal responses to past wrongs, taken *ex post* to redress violations of human rights."<sup>20</sup> She asks the empirical question whether these principles will foster better human rights policy and argues that, at least, they foster "an expanded global humanitarian regime."<sup>21</sup> Professor Teitel suggests a number of further areas of inquiry, which Professor Koh's discussion of new forms of transnational accountability implicates.

Michael Posner focuses on two of Professor Koh's principles, telling the truth and consistency toward the present. He shares Professor Koh's belief that America's credibility in pursuing human rights abroad will be enhanced if it owns up to, and addresses, its domestic rights shortcomings.<sup>22</sup> Private groups must scrutinize and supplement the official reports our government produces. If, as Professor Koh suggests, inside-outside engagement is to help achieve consistency towards the present, Mr. Posner argues that global companies will

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17. Mark Weston Janis, *International Law as Fundamental Justice: James Brown Scott, Harold Hongju Koh, and the American Universalist Tradition of International Law*, 46 ST. LOUIS U. L.J. 345 (2002).

18. *Id.*

19. David Sloss, *Hard-Nosed Idealism and U.S. Human Rights Policy*, 46 ST. LOUIS U. L.J. 431 (2002).

20. Reiti Teitel, *The Future of Human Rights Discourse*, 46 ST. LOUIS U. L.J. 449 (2002).

21. *Id.*

22. Michael H. Posner, *Response to Harold Koh's Childress Lecture – A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 414-16 (2002).

need to go further to put corporate responsibility into practice.<sup>23</sup> Mr. Posner suggests that workplace conditions will only improve to appropriate standards if independent monitors and institutions work to achieve greater accountability and transparency.<sup>24</sup>

Some other participants, while identifying with the general thrust of Professor Koh's article, join Professor Sloss in questioning some particulars. Professor Juan E. Mendez argues "the aftermath of September 11 creates the serious risk of undermining all the gains made by the American public and U.S. institutions in installing human rights as central to this country's foreign policy."<sup>25</sup> Professor Mendez believes Professor Koh's prescription warrants general discussion, that his principles are sound and have "a serious chance" of success.<sup>26</sup> To be sure, he questions Professor Koh in a few particulars; he believes true reconciliation can only occur following accountability and therefore he would emphasize the latter as necessary for the former.<sup>27</sup> Moreover, he believes Professor Koh to be overly optimistic in his belief that business leaders will advance human rights.<sup>28</sup>

Aryeh Neier questions Professor Koh's conclusions in several respects. The Bosnian experience causes him to question Professor Koh's emphasis on early warning systems. There, he argues, the deficiency was not with the dissemination of information regarding the atrocities but in the lack of international leadership.<sup>29</sup> Similarly, diplomacy will not suffice unless backed by credible force, often in the form of presidential leadership committed to stop grave human rights abuses.<sup>30</sup> He also challenges Professor Koh's conclusion that economic sanctions alone will not persuade a country like China to improve its human rights record and Professor Koh's reliance on sustained engagement emphasizing global communal values from various sources.<sup>31</sup> Mr. Neier contends that economic sanctions have not really been tried and that multilateral jawboning has not succeeded.<sup>32</sup>

Professor Phillip R. Trimble argues that human rights is one, but only one, value which must shape American foreign policy. Its claims must be balanced against other imperatives, such as security and international trade and

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23. *Id.* at 417.

24. *Id.* at 418.

25. Juan E. Méndez, *Human Rights Policy in the Age of Terrorism*, 46 ST. LOUIS U. L.J. 377, 378 (2002).

26. *Id.* at 390.

27. *Id.* at 391.

28. *Id.* at 391-92.

29. Aryeh Neier, *Presidential Leadership: An Essential Ingredient*, 46 ST. LOUIS U. L.J. 405, 405-06 (2002).

30. *Id.* at 406.

31. *Id.* at 407-08.

32. *Id.* at 406.



investment.<sup>33</sup> Human rights reporting makes a contribution but sometimes may conflict with diplomatic or strategic considerations.<sup>34</sup> The spread of human rights is clearly desirable but empirically may prove more difficult than Professor Koh suggests because those who profess commitment to human rights do not espouse, by word or deed, a uniform set of principles.<sup>35</sup> Like Professors Koh, Teitel and Jinks, discussed below, Professor Trimble devotes some attention to the events of September 11 and its implications not only for America's human rights agenda but for its foreign policy, too.<sup>36</sup>

Finally, two participants, Professor Derek P. Jinks and Professor Catherine Powell use Professor Koh's article as a springboard to offer observations on some related human rights subjects. Professor Jinks points out that United States human rights policy exhibits a fundamental contradiction. On the one hand, the United States has played a crucial role in developing and enforcing human rights law; on the other hand, it has often resisted applying international human rights standards to itself.<sup>37</sup> Whether one views this as a "double standard" or less pejoratively as a "structural tension", it reflects the influence of competing liberal values which might be managed by developing principles of accommodation between international and domestic law.<sup>38</sup> Professor Jinks points out that while the globalizations of freedom and democracy generally reinforce one another, they are in tension to the extent that the creation of a universal set of rights norms as reflecting the global concept of freedom may limit the autonomy of national democratic institutions to define their own policies regarding rights in ways that deviate from those international norms.<sup>39</sup> Professor Jinks devotes much of his essay to examining the United States' response to September 11 as a case study of the way in which principles of accommodation might work. He points out that some recent domestic legislation violates basic human rights principles regarding, for instance, "arbitrary detention."<sup>40</sup> Yet international norms allow exceptions in certain emergencies subject to various procedural requirements. Such principles of accommodation allow nations to retain their legitimate rights of democratic self-determination consistent with international human rights law. Professor Jinks suggests, however, that the United States has failed to properly access

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33. Phillip R. Trimble, *Human Rights and Foreign Policy*, 46 ST. LOUIS U. L.J. 465 (2002).

34. *Id.* at 466-67.

35. *Id.* at 467.

36. *Id.* at 470.

37. Derek P. Jinks, *The Legalization of World Politics and the Future of U.S. Human Rights Policy*, 46 ST. LOUIS U. L.J. 357, 358 (2002).

38. *Id.*

39. *Id.* at 359.

40. *Id.* at 368-69.

this principle of accommodation by refusing so far to defend its expansion of governmental power vis-à-vis international human rights law.<sup>41</sup>

Professor Catherine Powell characterizes the current American human rights approach as isolationist and unilateralist.<sup>42</sup> She enumerates instances in which the United States has isolated itself from international consensus on human rights issues or acted unilaterally.<sup>43</sup> She suggests that America's unwillingness to embrace international rules and institutions inhibits its impact in advancing human rights abroad.<sup>44</sup> She calls for the promotion of "constructive forms of globalization whose foundation and sustainability are bolstered by international institutions and rule of law."<sup>45</sup>

Professor Koh's seminal article, and the responses it generated, provide a rich collection which will no doubt advance understanding of human rights issues and foster further discussion of them. Yet I suspect Professor Koh would not be satisfied if his article and the responses serve only to educate readers regarding the human rights agenda of this new century. He wants also to inspire us to act.

For this issue reminds us that throughout the globe oppressive regimes torment people by denying them basic human rights, that this behavior offends fundamental American commitments to human dignity, democracy and rule of law, and that Americans, and American lawyers, can act to help right the wrongs.

At the end of the discussion following his Childress lecture, Professor Koh recited, spontaneously and extemporaneously, from Robert F. Kennedy's eloquent address at the University of Cape Town in 1966 in which he attacked Apartheid.

It is from numberless diverse acts of courage and belief that human history is shaped. Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring those ripples build a current which can sweep down the mightiest walls of oppression and resistance.<sup>46</sup>

Harold Hongju Koh has surely generated more than his share of those ripples. His work and his words beckon us, and our country, to follow his example.

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41. *Id.* at 374-75.

42. Catherine Powell, *United States Human Rights Policy in the 21st Century in an Age of Multilateralism*, 46 ST. LOUIS U. L.J. 421, 422 (2002).

43. *Id.* at 422-24.

44. *Id.* at 427-28.

45. *Id.* at 429.

46. RFK: COLLECTED SPEECHES 243-44 (Edwin O. Guthman & C. Richard Allen eds., 1993).

