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THE MOST DANGEROUS BRANCH?:  
HUMAN RIGHTS AND THE GLOBAL IMPACT  
OF THE  
SUPREME COURT OF THE UNITED STATES

by

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Proposal Draft

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- a) Describe briefly what has been done by previous investigators in the field which is closely relevant to your proposal. The purpose of this section is to explain to the reader just how your work will add to or improve the existing literature. Normally, one should cite several specific studies, but not a large number.**

*Brief Review of the Literature*

While a vast literature exists on the role of the US Supreme Court's domestic impact with respect to social change and civil/human rights issues in the United States,<sup>1</sup> there are few studies that discuss the global impact of the Court. Research in this area requires a grounded understanding of the dynamics of globalization, law, and the judiciary. Most of the work written about the judiciary at the global scale centers on transjudicial communications<sup>2</sup>—communications between the courts of different nation-states— and usually ignore the US Supreme Court.<sup>3</sup> However, the literature that does analyze the US Supreme Court and judicial globalization generally provides at least one of the following two types of information:

- (1) The global location/positioning of the US Supreme Court in an international context. Whether international forces shape court decisions, describe the world in which the US Supreme Court makes decisions, and whether other countries listen to their decision.
- (2) The international impact. Whether the US Supreme Court has any influence outside of the United States. And if so, what does it impact (courts, attorneys, media, social movements) and how?

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<sup>1</sup> See Michael Klarman, *From Jim Crow to Civil Right—The Supreme Court and the Struggle For Racial Equality*. Oxford Press (2004); David A. Schultz (ed). *Leveraging the Law—Using the Court to Achieve Social Change*. Peter Lang Publishing (1998); Gerald N. Rosenberg. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press. (1991).

<sup>2</sup> Anne Marie Slaughter coined the term “transjudicial communication.” She writes that “courts are talking to one another all over the world.” See “A Typology of Transjudicial Communication.” 29 U. Rich. L. Rev. 99.

<sup>3</sup> See Carl Baudenbacher. “Foreward: Globalization of the Judiciary” 38 Texas International Law Journal p. 397; Buergenthal, Thomas, “International Tribunals and National Courts: The Internationalization of Domestic Adjudication”, in *Recht Zwischen Umbruch und Bewahrung* 687 (1995). Sir David Williams. “Courts and Globalization” 11 Ind. J. Global Legal Studies p. 57.

L'Heureux-Dubé examines specifically the global impact of the Rehnquist Court.<sup>4</sup>

First, however, she recounts a history of judicial influence when the United States was seen as one of the most influential sources of foreign authority on human rights. She describes this as a phase of reception, where some courts are seen as givers and others as receivers. During this reception phase, the US Supreme Court—particularly the Warren<sup>5</sup> and Burger<sup>6</sup> Courts (1953-86)—had a large impact on the social justice decisions of foreign national courts. The Warren and Burger Courts acted as production sites in a transjudicial communication circuit.

L'Heureux-Dubé states that the process of judicial decision making has shifted from reception to dialogue. She writes that

Judges no longer simply receive the cases of other jurisdictions. Rather, cross-pollinating and dialogue between jurisdiction is increasingly occurring...Judges around the world look to each other for persuasive authority, rather than some judges being 'givers' of law while others are 'receivers.' Reception is turning to dialogue.<sup>7</sup>

L'Heureux-Dubé argues that this shift partially explains why the impact of the Rehnquist Court has declined relative to the earlier Warren and Burger Courts. She conducted an informal statistical analysis of Canadian Supreme Court decisions and found that the Canadian court cited the Warren Court almost twice as much as the Rehnquist Court, and

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<sup>4</sup> The Supreme Court is known by the Chief Justice of the Court that presides over it. The current Supreme Court Chief Justice is William Rehnquist. The Rehnquist Court began in 1986, when Rehnquist was elevated to the Chief Justice position.

<sup>5</sup> The Warren Court, named after Chief Justice Earl Warren, was known for its liberal record and progressive social change rulings like the 1954 school racial desegregation case *Brown v. Board of Education*. The Warren Court existed from 1953 to 1969.

<sup>6</sup> The Burger Court, named after Chief Justice Warren Burger, signaled a turning point in the Court's history. The Burger Court moved away from the Warren Court's liberal approach and emphasized a conservative viewpoint. The Court's transition from liberalism to conservatism under Burger was gradual because liberal justices still dominated the Court. The Burger Court existed from 1969 to 1986.

<sup>7</sup> Claire L'Heureux-Dubé "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" 34 *Tulsa L. J.* 15, p. 17.

the Burger Court almost three times as much.<sup>8</sup> She writes that a similar trend is discernable when one reviews the judgments from other countries.<sup>9</sup>

Lester writes that the US Supreme Court has an important role in the overseas diffusion of American human rights jurisprudence. Lester highlights four cases where the US Supreme Court, either through its decisions or in the informal advice of its judges (while on foreign diplomatic visits), has had an international impact. He uses these examples in crafting an argument that the Court should become more engaged in transjudicial communications; and not just “export” its decisions, but also begin to consider overseas interpretations when deciding its own cases. He argues that this cross-pollination will not only strengthen American human rights, but also the rights of the rest of humanity.<sup>10</sup>

Of particular importance to this dissertation project, he describes briefly some of the various processes through which the Court has an international impact. First, like L’Heureux-Dubé and Slaughter, he explains and illustrates transjudicial communications where foreign courts frequently refer to US Supreme Court decisions in constitutional cases.<sup>11</sup> Secondly, he offers some insight into the processes by which US Supreme Court decisions have a foreign impact. He writes that both foreign courts and the lawyers that argue before them have built upon US Supreme Court innovations to expand human rights, but in ways that are not currently recognized by the Court.<sup>12</sup> These individuals and institutions use US precedents in human rights arguments for situations that either the

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<sup>8</sup> *Id.* at 29.

<sup>9</sup> *Id.*

<sup>10</sup> Anthony Lester, “The Overseas Trade in the American Bill of Rights.” 88 Colum. L. Rev. 537, p.561.

<sup>11</sup> *Id.* at p. 537.

<sup>12</sup> *Id.* at pp. 543-44.

Court never envisioned, or to navigate a legal framework significantly different from the US Constitution.

Levit departs somewhat from L'Heureux-Dubé and Lester's description that the Court is isolationist and is not (and has not been) a consumer of foreign and international law. Levit argues that "[w]hile the Court has not been as hospitable to international law and 'constitutional cross-fertilization as its counterparts throughout the world, the Court has not operated in an isolated, legal cocoon, oblivious to all transnational law."<sup>13</sup> She illuminates the fact that when the US was a young nation, the Court frequently borrowed from foreign law (usually English law) to fill legal gaps.<sup>14</sup> Next, Levit provides a number of cases from the Court's recent history to show that the Court has looked to foreign law as persuasive in its decision making process.<sup>15</sup>

Lastly, while L'Heureux-Dubé and Lester have empirical components to their work, Mary Dudziak's article is the only empirical piece in the literature that focuses on a particular Court case and traces the process of its international impact. Dudziak's excellent study situates the 1954 landmark racial desegregation case, *Brown v. Board of Education* within an international Cold War context.

She argues that *Brown* set forth a positive image of American race relations in the international press.<sup>16</sup> This positive image was helpful in maintaining foreign relations and improving the nation's chances of meeting its Cold War objectives. The persistence of American institutionalized racism damaged these relations because—according to the

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<sup>13</sup> Janet Koven Levit, "Going Public With Transnational Law: The 2002-03 Supreme Court Term" 39 *Tulsa L. Rev.* 155, p. 156 (citations omitted).

<sup>14</sup> *Id.* at p. 157.

<sup>15</sup> *Id.* at footnote 9.

<sup>16</sup> Mary L. Dudziak, "*Brown* as a Cold War Case." *The Journal of American History.* (June 2004).

Justice Department in Court briefs—it raised doubts among friendly nations regarding the intensity of America’s devotion to democracy.<sup>17</sup> Dudziak’s work demonstrates that a US Supreme Court can have an international impact that is non-legal.

Dudziak also illustrates the global position of the Court. Not only does the Court have a global impact on international press and (indirectly) diplomatic relations, but the global has an impact on the Court. She looks to justice’s letters, speeches and personal files to learn that many of the justices who decided *Brown* were concerned about the global impact of American race discrimination.<sup>18</sup>

### *Contribution to the Literature*

Most of the literature on the Court and globalization, with the exception of the Dudziak piece, has been written by lawyers who are not systematically engaging in social science research. Many of the scholars use poor data collection and/or analytical tools. Also, many of these legal scholars approach these issues normatively, usually in an attempt to criticize the Court for not engaging in transjudicial dialogues. This dissertation is not interested in these normative arguments.

L’Heureux-Dubé admits that her statistical analysis is not scientific and requires more in-depth research.<sup>19</sup> First, since she does not spell out her methodology, it is unclear to the social scientists what indicators L’Heureux-Dubé used in determining whether a decision implicated social justice issues. This project addresses that issue by identifying court cases that implicate human rights issues. For the purposes of this

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<sup>17</sup> *Id.* at p. 34.

<sup>18</sup> *Id.* at pp. 37-38.

<sup>19</sup> L’Heureux-Dubé *supra* note 7 at p. 29.

dissertation, human rights will include the civil, political, economic, social, and cultural rights guaranteed by

- (1) the US Constitution in the Bill of Rights and the individual rights protected by the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments and,
- (2) the “International Bill of Rights”<sup>20</sup>

Next, the concept of impact must be theorized better.<sup>21</sup> Counting the number of citations to the Rehnquist Court and comparing those to the citations of the Warren Court may not validly capture the true impact of the Rehnquist Court. This is not an easy problem to solve. In an attempt to address this problem, my project not only counts the number of times a foreign court cites the US Supreme Court, but subjectively classifies citations and codes the cases for how the foreign court used the Court’s decision.

Lastly, we need a better understanding of the process by which national court judges choose US Supreme Court cases. One could hypothesize that the Rehnquist court hasn’t lost impact but that because the decisions are relatively new and not established principles (unlike the Warren and Burger Court decisions), foreign judges are less likely to use these decisions. To address this problem, my dissertation project will attempt to interview judges, law clerks, and lawyers who address foreign courts and tribunals in order to try to understand how the Court’s decisions get before these institutions. In addition to interviews, I will examine judges/justices speeches, writings, and

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<sup>20</sup> While there is no official International Bill of Rights, the term usually refers to the collective reading of the United Nations Declaration of Human Rights (UDHR), the International Covenant of Civil and Political Rights (ICCPR), and the International Covenant of Economic, Social, and Cultural Rights (ICESCR).

<sup>21</sup> For a detailed discussion of measuring US Supreme Court impact, at least with respect to domestic issues see Stephen Wasby. “Impact and Compliance: What Do We Mean?” in Wasby, *The Impact of the United States Supreme Court*, pp. 27-56.

presentations to learn more about the process of judicial decision-making in an international context.

Lester's work does not purport to be social science research. His project takes four anecdotal cases that illustrate the overseas impact of the Court. This is problematic because in social science this is similar to choosing cases on the dependent variable. This also does not allow for variance or for understanding occurrences when Court decisions may not have an international impact.

Levit also doesn't make social scientific claims, though her argument that the Court is not isolationist could use more evidence. According to her, the Court is not isolationist because it made roughly ten references to international law (foreign decisions or laws) over the past fifty years.<sup>22</sup> One is left asking, how does Levit define isolationist? In addition, Levit is not focused on human right/social change issues. Her sole concern is to identify cases that make some reference to international law, but don't necessarily impact civil/human rights.

While sharing some similar goals as my research project, Dudziak's work, while remarkable, has a different agenda. Her work focuses on one case (Brown) and its link to a specific international event (the Cold War). My work is trying to answer a larger empirical question about whether the Court generally has an international impact, and to theorize in more abstract ways the processes by which the Court impacts the global.

Social scientists need to conduct more studies in order to assess the true impact of the US Supreme Court's human rights decisions on transjudicial communications. The

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<sup>22</sup> See Levit, *supra* note 13 at footnote 8 and accompanying text.

current literature suffers from a lack of social science rigor. This dissertation attempts to fill that gap. One thing is clear. More research needs to be conducted.

- b) Expound briefly the theoretical ideas being used, and the abstract nature of the process being studied. Indicate the relations between this specific study and broader issues in sociology. Mention specific hypotheses to be examined, or questions to be answered by the research.**

*Specific Hypotheses/Questions*

This dissertation project asks a number of specific research questions—but also attempts to address more general queries. Specifically, this project wants to test Lester and L’Heureux-Dubé’s argument that the Court has an overseas/international impact. I also want to test L’Heureux-Dubé’s argument that we are experiencing a declining global impact of the Rehnquist Court as compared to the earlier Warren and Burger Courts.

My work hopes to contribute to the literature by empirically (1) answering whether the Court has a global impact, (2) identifying the process(es) by which the Court impacts globally, and (3) explaining the productivity/innovation that results from the globalization of the Court’s law. If the Court produces an impact, then my project would engage in the process of thick description in order to outline the processes by which the Court produces an international impact.

The following is a summary of the hypotheses/questions this dissertation hopes to test/explore:

Hypothesis Testing Questions

- Does the US Supreme Court’s human rights decisions have an international impact?
- Are we witnessing a declining impact of the Rehnquist Court with respect to the earlier Warren and Burger Courts?

Exploratory Theory Building Questions

- How does the Court impact the global?
- What are some of the explanations for the globalization of the Court?
- What are the global processes that interact with the Court to
  - (1) not only diffuse the Court's decision, but also
  - (2) produce an international impact?
- What is the productivity of these processes at the local level? What happens to US Court decisions when they reach foreign soil?

*Abstract Nature of the Study*

While I have outlined the specific goals of this project, I am also hope to study the US Supreme Court in order to illuminate the more abstract processes of judicial globalization, and inform a sociology of the globalization of law. The results of this dissertation will lead to a fuller understanding of the transnational legal process, and shed more light on the globalization of law.

Harold Koh defines the transnational legal process as “the theory and practice of how public and private actors—nation-states, international organization, multinational enterprises, non-governmental organizations, and private individuals internalize rules of transnational law.”<sup>23</sup> First, Koh states that the transnational legal process is nontraditional in that it breaks down the dichotomies between domestic & international law, and public & private law.<sup>24</sup> Secondly, he is careful to note that the actors in the process are not limited to (nor are primarily) nation-states.<sup>25</sup> Next, he claims that the process mutates, and moves through the domestic & international and the public &

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<sup>23</sup> Harold Hongju Koh, “Transnational Legal Process.” 75 Neb. L. Rev. 181, 183.

<sup>24</sup> *Id.* at 184.

<sup>25</sup> *Id.*

private.<sup>26</sup> Finally, he says that the process is normative, in that when new rules emerge, they are interpreted, internalized and enforced.<sup>27</sup>

Koh's definition is useful to sociology not only because it outlines transnational law's process (how the interaction among transnational actors shapes law), but it highlights the process's normativity as well (how law shapes and guides those interactions). In theorizing law's production, he emphasizes norm-internalization. Norm-internalization is the complex process of institutional interaction where nations incorporate international law concepts into their domestic law, policies, and practice.<sup>28</sup>

Koh outlines the norm-internalization process as a cycle of interaction-interpretation-internalization.<sup>29</sup> This process consists of states interacting with domestic and transactional actors and producing interpretations of world norms. These norms can then be internalized by the state into its domestic laws and policies.

The theory of transnational legal processes is abstract. This dissertation can lead to a further elaboration of this theory, because through observation I will be able to analyze and report the specific mechanisms that constitute Koh's norm-internalization process.

### *The Study of Judicial Globalization and Sociology*

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Harold Hongju Koh, "Opening remarks: Transnational legal process illuminated." in *Transnational Legal Processes: Globalisation and Power Disparities*. Edited by Michael Likosky. p. 327.

<sup>29</sup> See H. Koh "How is International Human Rights Law Enforced?". 74 *Ind. J.L.* 1397 (1999); H. Koh "Why Do Nations Obey International Law?" 106 *Yale L. J.* 2599 (1997).

This proposal has criticized the current literature for its lack of empirical evidence and social scientific soundness. More rigorous social scientific research should be conducted, and sociology is an excellent discipline to fulfill this task.

Sociology can help legal scholars understand the links between institutions (i.e. courts), domestic and international human rights laws, and globalization. We can unpack and criticize the ideas of legal scholars and give more rigorous explanations to understand the hidden and often masked reasons behind the globalization of human rights laws. As sociology has already done a lot of work theorizing global processes, the sociologist can move the legal scholar beyond asking the simple question of whether the US Court's decisions are diffusing to other nations—but can start to ask about the productivity of the Court's decisions when they enter new countries (and new domestic localities).

In addition, questions and claims of justices are less possible if power is masked through invisible hands.<sup>30</sup> The goal of sociology is to track power that operates below the surface. In her call for a sociology of globalization, Susan Silbey writes,

Let me be explicit. I am not suggesting that we pursue social theory because of a scholastic desire for knowledge for knowledge's sake...I suggest we pursue sociology more seriously because without that theoretically informed analysis of the social organization of power and law, without analysis that begins with the elemental dimensions of social interaction, critical questions of justice cannot be answered. In my view, sociological inquiry is the minimal prerequisite for engaged action on behalf of justice."<sup>31</sup>

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<sup>30</sup> Susan Silbey. "‘Let them eat cake’: Globalization, postmodern colonialism, and the possibilities of justice." in *The Legal Geographies Reader*. (ed. By Nicholas Blonley et. al.) (2001). p. 274.

<sup>31</sup> *Id.*

Understanding the operationalization and mechanisms of global judicial processes is surely important for all who have an interest in promoting human rights and social justice on domestic and international fronts. Therefore, this project is inherently linked to broader issues of public sociology.

**c) Indicate the type of data to be used and their availability.**

The focus of this dissertation is to determine the impact of the US Supreme Court on human rights from 1953 to the present. This roughly fifty year period is particularly important to the field of human rights. Earl Warren became the Chief Justice of the Supreme Court in 1953, and it was at this time when many scholars believe that “the U.S. Supreme Court engaged in a redefinition, expansion and modernization of Bill of Rights interpretation.”<sup>32</sup> While this dissertation utilizes multiple methodologies, for simplicity I will discuss data under two basic categories: content analysis and interviews. Section (e) provides a more detailed discussion of method.

*Content Analysis*

This project’s content analyses will monitor (1) foreign court decisions, (2) foreign news media, and (3) foreign judges’ speeches and personal files.

*Foreign Decisions*

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<sup>32</sup> L’Heureux-Dubé, supra note 7, p. 20. While some may argue that this period of rights expansion ended when the Burger Court ceased in 1986, I include the current Rehnquist Court in this project for a variety of reasons. First, it is a modern court that has decided a number of pressing human rights issues. Second, the Rehnquist Court exists in a moment of intense global processes. Therefore, tracking this court is invaluable for answering the questions this dissertation poses—especially when the illustration of transnational legal processes.

I will read foreign court decisions in order to ascertain how and/or if they use US Supreme Court cases in their human rights cases. Currently my project is looking at only national high courts and international tribunals with searchable electronic decisions. I propose to analyze the decisions of every court with a searchable database. Following is a list of those courts and tribunals that are available:

- International Tribunals
  - European Court of Human Rights
  - Inter-American Court of Human Rights
  - United Nations Human Rights Committee
  - African Commission on Human and People's Rights<sup>33</sup>
  
- Foreign National High Courts
  - Africa
    - Supreme Court of Nigeria
    - Constitutional Court of South Africa
  - Asia
    - Court of Final Appeal in Hong Kong
    - Supreme Court of India
    - Judicial Authority of the State of Israel
    - Constitutional Court of the Republic of Korea
  - Australia
    - High Court of Australia
  - Europe
    - House of Lords (Law Lord-United Kingdom)
    - British Privy Council
    - Constitutional Court of Bosnia and Herzegovina
    - Constitutional Court of Slovenia
  - North America
    - Supreme Court of Canada
    - Supreme Court of Mexico
  - South America
    - Federal Supreme Court of Brasil

### *News Media*

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<sup>33</sup> While the African Commission is not a judicial body like the other international tribunals in this group, this dissertation uses decisions from this body because the African Court on Human and People's Rights is not yet fully functional. The protocol that established the African Court recently came into force on January 25, 2004. The African Court is currently in the process of selecting its judges. See Human Rights in Africa (Jan 2004) <<http://www.pais.org/hottopics/2004/Jan/index.stm>>.

In addition to reading foreign decisions, I plan on conducting a content analysis of international news and magazine media coverage of the US Supreme Court. These sources include newspapers, magazines, journals, newsletters, radio and television transcripts, and wires. Since this project is covering a large geographic area, I will utilize electronic search engines in order to find coverage of the Court. The electronic service Westlaw, maintains regional databases that include a wide variety of widely consumed news sources. The following are the databases available on the Westlaw service.

- Africa News.
- Latin America, West Indies and Caribbean News
- North America, excluding the US
- Europe and the Commonwealth of Independent States (CIS)
- Middle East News
- Asia News

#### *Speeches, Personal Files, & Letters*

Lastly, I will attempt to view transcripts of judges' speeches, personal files, and letters to learn whether they speak on the Court's impact on their respective courts. This is by far the most difficult information to locate and will probably be used to provide context for the other data collected. National high court websites sometimes provide speeches, lectures, and biographies of their members. There is no particular source or systematic method to locate this information.

#### *Problems*

Some sampling problems exist with respect to the foreign decisions data. Because this project only examines electronically searchable decisions, the sample is

biased with respect to national high courts that do not publish their decisions electronically. Therefore this project may exclude some foreign courts that do not have the resources that more affluent courts have.

The only way to rectify this problem would be to analyze the printed paper decisions of foreign courts found in their respective court reporters. This presents its own problems. First, finding citations would be extremely difficult since most courts do not index their decisions according to what court's they cite. Secondly, the sampling bias still remains because there are some national high courts that do not have the resources to publish their decisions even in a printed paper format. My current sample makes a good theoretical sample, because it has a good diversity of courts with respect to culture, language, and geography. In addition, because the decisions are electronically searchable, there is lower risk of missing references to the US Supreme Court. Also, this project has not sampled foreign court decisions that are not written (or have not been published) in either English, French, Spanish, or Portuguese.

There are also some problems with using electronic media to search news media. The problem with using the electronic databases is that they have a high variance of coverage with respect to time. For example, the Africa News database contains the newspapers the East African and the Zambian Standard. Yet coverage for The East African might begin in 1998, while coverage for the Standard might not start until 2001.

### *Interviews*

Finally, this project hopes to interview individuals that are a part of the transnational legal process and who can comment on its functioning. These individuals

include judges, law clerks, and lawyers that are working (or have worked) on, with, or before a national high court/international tribunal. Each of these individuals is able to comment on various aspects of judicial decision-making.

There maybe some difficulty in obtaining interviews with judges. They are likely to be part of an elite class, and may be difficult to access depending on the country in which they reside. For example, I have an opportunity to interview members of the High Court of Tanzania as part of a law school research project. Interviewing a Law Lord of British Parliament may be somewhat more difficult, but not impossible.

Access to lawyers that have prepared arguments for foreign courts and international tribunals is more open—especially for those that work for non-government organizations. This project plans to interview lawyers that work for NGOs like Human Rights Watch in order to gain their insight on the use of US Supreme Court precedent in constructing arguments.

**d) Describe the analytical organization and the specific techniques to be employed. For any unorthodox or dubious aspects, indicate briefly what your operating assumptions are.**

This study is both a historical and contemporary analysis of foreign use of US Supreme Court decisions. This project is comprised of a content analyses and interviews.

*Content Analysis*

This project will utilize both a qualitative hermeneutic approach and a quantitative approach. I will attempt a hermeneutical analysis of news media, foreign judges' speeches, and decisions. The quantitative analysis will be performed only on the foreign court/international tribunal decisions.

### *Qualitative Analysis*

There are no specific techniques that I plan to follow in the analysis of news media, foreign judges' speeches, and foreign decisions. I plan to utilize a more general hermeneutical analysis. Babbie writes that "hermeneutics refers to interpreting social life by mentally taking on the circumstances, views, and feelings of participants."<sup>34</sup> My goal is to look for outlines among the voluminous details of the data in order to ascertain the impact of the US Supreme Court. This entails developing conceptual models to describe the essential characteristics of social phenomena.

This qualitative analysis will search to find patterns in the use of US Supreme Court decisions. This project seeks to understand the reception and reaction to the Court's decisions by judiciaries and society-at-large.

The news media are good sources for gauging local reaction. This section of the analysis is interested in understanding, what human rights decisions are used by foreign courts? What Court decisions are reported by the news media? What are government, elite, and social responses to these Court decisions? News reports are also a good method for snowballing into particular societies and finding additional sources to consult or interview.

Judges' speeches and personal letters are also excellent sources for understanding the patterns and processes of the use of foreign laws. Some of the questions this analysis can help answer include: What are judges' philosophies on the use of foreign law when

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<sup>34</sup> Babbie, E.R. (1992). 6<sup>th</sup> edition. *The Practice of Social Research*, Belmont, Ca: Wadsworth Publishing Co. p. 343.

deciding domestic human rights issues? How do judges view globalization and the judiciary?

### *Quantitative Analysis*

As mentioned earlier, in addition to taking a qualitative approach to the foreign court rulings, I will also perform a quantitative analysis on these decisions. First, I will enumerate the population of decisions by country (i.e. count the number of cases that will be searched for each country). Second, I will search each country's decisions for citations to the United States Supreme Court. A number of terms will be used to conduct this search, including:

- US
- USA
- United States Supreme Court
- Supreme Court of the United States
- Supreme Court

Since I have a strong reading knowledge of French and Spanish, and a good understanding of written Portuguese, I will also translate these terms when appropriate. All of the court decisions that this project has sampled are published in one of these four languages.

The next step is to select those foreign court decisions that engage human rights issues. For the purposes of this dissertation, human rights will include the civil, political, economic, social, and cultural rights guaranteed and illustrated by

- (1) the US Constitution in the Bill of Rights and the individual rights protected by the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments and,
- (2) the “International Bill of Rights”

This will not be difficult for those cases decided before international tribunals like the European Court on Human Rights, the Inter-American Court of Human Rights, and the African Commission on Human and People's Rights—because they only review human rights issues. More subjective decision-making will occur when reviewing foreign national court decisions. This particular process is linked to the next step of the quantitative analysis.

The next step is to count and record court decisions as cases on a tally sheet. The tally sheet will have code categories and their attributes. The categories and their corresponding attribute values are as follows:

- What human right(s) is/are at issue?
  - (1) right to life
  - (2) right to be free from slavery
  - (3) right to be free from cruel, inhuman, or degrading treatment
  - (4) right to recognition as a person
  - (5) right to equality, freedom from discrimination
  - (6) right to effective remedy before national tribunal
  - (7) no arbitrary arrest, detention or exile
  - (8) presumption of innocence in criminal charges
  - (9) right to privacy, no arbitrary interference with home, or correspondence
  - (10) freedom of movement and residence
  - (11) right to seek asylum
  - (12) right to nationality
  - (13) right to marry and to have a family
  - (14) right to own property
  - (15) freedom of thought, conscience, and religion.
  - (16) freedom of opinion or expression
  - (17) freedom of peaceful assembly and association
  - (18) right to social security
  - (19) right to work
  - (20) right to education
  - (21) right to participate in cultural life
  - (22) other
  
- From what Court does the Supreme Court decision arise?

- (1) Warren Court
  - (2) Burger Court
  - (3) Rehnquist Court
- What type of opinion/decision is citing the US Supreme Court?
    - (1) majority opinion
    - (2) concurring opinion
    - (3) dissenting opinion
    - (4) plurality
    - (5) other
  
  - How does the foreign court use the US Supreme Court decision?
    - (1) Persuasive Authority (following the US Supreme Court)
    - (2) Negative Authority (disagreeing with the US Supreme Court)
    - (3) other
  
  - Does the court/tribunal use decisions in addition to the US Supreme Court?
    - (1) US Supreme Court is used as sole authority.
    - (2) US Supreme Court is used as sole foreign authority in addition to the native court's domestic rulings
    - (3) US Supreme Court is used as one of many foreign authorities.
  
  - What other countries' (foreign) authorities are being used by this court?  
<<List country/countries or international tribunal(s)>>
  
  - Does the court reach a conclusion consistent with the US Supreme Court's decision?
    - (1) Yes
    - (2) No
    - (3) Provide more information, especially in the case of 'No'

Once this data is collected, I will conduct tests of significance to determine whether US Supreme Court has had an impact on foreign courts. Frequency distributions will be used to ascertain in how and when foreign courts and international tribunals utilize US Supreme Court decisions. I will also run variance tests to determine which of the Supreme Court eras (Warren, Burger, Rehnquist) has had the largest impact internationally with respect to human rights.

### *Interview*

The dissertation hopes to use the interview process to mine the views of the participants who have a role in the creation of judicial decisions. Judges, law clerks, and lawyer practitioners have memories and observations from previous experiences that can help in the process of explaining how US Court decisions are used.

The interviews will consist of open-ended questions where I will probe subjects for responses. There will not be a set questionnaire instrument to administer to subjects, because many of the subjects' roles (who may share equivalent positions) are vastly different, depending on the organization or legal system they work in. For example, a law clerk in one court might have completely different responsibilities and roles than a clerk for another court. The same holds true for lawyers of different NGOs.

While there isn't a set questionnaire for the interviews, the following questions will act as a guide for the interview process. These questions can be asked to judges, lawyers and law clerks alike.

- Where were you educated?
- What is your familiarity/training with American law? Foreign/international law?
- Can you discuss the use of foreign decisions in your profession?
- How do you define foreign/international law?
- How often do you encounter foreign/international law in your work? American law?
- Are you likely to use foreign/international decisions? Why or Why not? How do you use these decisions (for what purpose)?
- Are judges receptive to arguments including foreign/international case law? Explain your answer.
- Do you cite foreign/international case law before courts?
- Do you cite to US Supreme Court opinions in foreign courts? Why?
- Do you use US opinions in other ways other than just merely citing them? How?
- Can you give examples of how you have used US Supreme Court citations in your arguments?

### *Methodological Problems*

The hermeneutic approach is problematic. Babbie notes that hermeneutic conclusions are more subject to debate due to their subjective nature.<sup>35</sup> Yet he adds that hermeneutics is more than the mere opinion of the social scientist, but an attempt to make logical order out of the chaotic diversity of experience.<sup>36</sup> I argue that there is no other technique available for detecting the possible latent content in news media, and foreign judges' decisions and speeches. This study attempts to decipher meanings contained within communications—to examine the presence and use of the Court's decisions. The determination of latent content requires judgments on the part of the researcher.

Other problems with this project arise from the more quantitative portion of this project. Coding and assigning attributes to categories is difficult, due to the highly subjective nature of this topic. There is a degree of subjectivity in evaluating what human right(s) are at issue in a case. Sometimes human rights concepts that exist in one legal system, does not have an exact equivalent in another. For example, some would argue that no right to privacy exists in the US Constitution—yet a right to privacy does exist in the European Charter on Human Rights (the instrument interpreted by the European Court of Human Rights). The Court however, has discussed a penumbra of privacy in conjunction with a number of the amendments found in the Bill of Rights.

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<sup>35</sup> *Id.* at 340.

<sup>36</sup> *Id.*