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The Relative Universality of Human Rights

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THE RELATIVE UNIVERSALITY OF HUMAN RIGHTS

Human rights as an international political project are closely tied to claims of universality. The foundational international legal instrument is the Universal Declaration of Human Rights. The 1993 World Human Rights Conference, in the first operative paragraph of the Vienna Declaration and Programme of Action, holds that "the universal nature of these rights and freedoms is beyond question." The universality of human rights is a central theme in diplomatic, popular, and academic discussions alike.

Attacks on the universality of human rights, however, are also widespread. Proponents of relativism regularly present their arguments not only with considerable political passion but some genuine theoretical force. Some versions of universalism are indeed both philosophically indefensible and politically pernicious.

Cultural relativism has probably been the most discussed issue in the theory of human rights. Certainly this is true in this journal. I have been an active participant in these debates for more a quarter century now, arguing (Donnelly 1982; 1984; 1989; 1990; 1994; 1997; 1999; 2003; Howard and Donnelly 1986) for a form of universalism that also allows substantial space for important (second order) claims of relativism. I continue to insist on what I have called the "relative universality" of human rights. Here, however, I give somewhat more emphasis to the relative, following the principle that the exposition of theoretical ideas always should consider the political environment in which arguments are advanced and the likely (ab)uses of those arguments.[1]

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[1] Although the contribution is indirect, this essay owes much to a long conversation with Daniel Bell and Joseph Chan in Japan in 1997. I thank them for the sort of deep and genuine engagement of fundamental differences that is unfortunately rare in academic life. I hope that they and similarly inclined readers will find much less that makes them uncomfortable here than in previous formulations of my ideas and perhaps even more to agree with than they might previously have thought possible.

In the 1980s and early 1990s, when vicious dictators regularly appealed to culture to justify their depredations, a heavy, perhaps even over-heavy, emphasis on universalism seemed not merely appropriate but essential. Today, however, human rights are backed by the world's preponderant political, economic, and cultural powers and challenges have become largely marginalized. Few states challenge international human rights today, either directly or indirectly by insisting that, for cultural, ideological, or developmental reasons, large portions of the Universal Declaration do not apply to them. An account that gives somewhat greater emphasis to the limits of universalism thus seems called for – especially now that American foreign policy regularly appeals to "universal" values in the pursuit of a global ideological war that flouts international legal norms.

This essay is structured around distinguishing several senses of the "universality" of human rights. Universalism and relativism are far more complex notions than is usually acknowledged, by either defenders or critics. I argue international human rights should be considered universal in at least three senses, which I call functional, international legal, and overlapping consensus universality. But two other commonly used senses, which I call anthropological and ontological universality, are empirically, philosophically, or politically indefensible. I also emphasize that universal human rights, properly understood, leave considerable space for national, regional, cultural, and other forms of diversity and relativity. In other words, defensible forms of universality are also significantly relative.

1. CONCEPTUAL AND SUBSTANTIVE UNIVERSALITY

Let us begin by distinguishing that I will call **conceptual universality**, which is implied by the very idea of human rights, from what I will call **substantive universality**, the universality of a particular conception or list of human rights.

Human rights, following the manifest literal sense of the term, are ordinarily understood to be the rights that one has simply as a human being. As such, they are equal rights, because we either

are or are not human beings, equally. Human rights are also inalienable rights, because being or not being a human being is usually seen as an inalterable fact of nature, not something that is either earned or can be lost. Human rights are thus "universal" rights in the sense that they are held "universally" by all human beings. Conceptual universality is in effect just another way of saying that human rights are, by definition, equal and inalienable.

Although analytically important, conceptual universality is of surprisingly little practical significance. It establishes only that if there are any such rights, they are held equally/universally by all. It does not show that there are any such rights. If conceptually universal rights do exist they may be so few in number or specified at such a high level of abstraction that they are of little practical significance. And conceptual universality says nothing about the central question in most contemporary discussions of universality, namely whether the rights recognized in the Universal Declaration of Human Rights and the International Human Rights Covenants are universal. This is a substantive, not a conceptual, question. It will be our focus here.

2. UNIVERSAL POSSESSION NOT UNIVERSAL ENFORCEMENT

Defensible claims of universality, whether conceptual or substantive, are about the rights that we have as human beings. Whether everyone, or even anyone, is in fact able to enjoy these rights is another matter. The sad fact remains that in far too many countries today most internationally recognized human rights are systematically unenforced. The state not only actively refuses to implement, but grossly and systematically violates, human rights.

We have created a system of national implementation of internationally recognized human rights. Norm creation has been effectively internationalized. Enforcement of authoritative international human rights norms, however, is left almost entirely to sovereign states. Except in the European regional regime, supranational supervisory bodies are largely restricted to monitoring how

states implement their international human rights obligations. Transnational human rights NGOs and other advocates engage in largely persuasive activity, aimed at changing the human rights practices of states. Foreign states as well, although they are free to raise human rights violations as an issue of concern, lack the authority to implement or enforce human rights within the sovereign jurisdiction of another state. The implementation and enforcement of universally held human rights depends on sovereign states – and thus is highly relative.

3. HISTORICAL OR ANTHROPOLOGICAL UNIVERSALITY[2]

Human rights are often held to be universal in the sense that all or most societies and cultures have practiced human rights throughout all or most of their history. For example, Adamantia Pollis and Peter Schwab argue that "all societies have human rights notions" (1980: xiv). Yogindra Khushalani goes so far as to claim that "the concept of human rights can be traced to the origin of the human race itself" (1983: 404). Such claims to **historical or anthropological universality**, as I have shown in some detail elsewhere, (2003: ch. 5, 7; 1990; 1980) are empirically false. Equal and inalienable rights that all people have simply because they are human, and which can be exercised against the society and polity of which one is a member, were recognized by no pre-modern society, Western or non-Western.

Values such as justice, fairness, and humanity need to be distinguished from practices that aim to realize those values. The literature on so-called non-western conceptions of human rights regularly confuses values such as limited government or respect for personal dignity with the practice of equal and inalienable individual rights to realize such values.

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[2] Most of this section is drawn directly from, and summarizes, (Donnelly 2003: ch. 5).

Rights – entitlements that ground claims with a special force – are one practice for realizing social and political values. Human rights – equal and inalienable entitlements held by all individuals that may be exercised against the state and society – are a distinctive way to seek to realize social values such as justice and human flourishing. There may be considerable historical/anthropological universality of basic values across time and culture.[3] There is no evidence, however, that any society, civilization, or culture had a widely endorsed vision of equal and inalienable individual human rights prior to the seventeenth century. Consider three, more or less arbitrarily chosen, examples.

"In almost all contemporary Arab literature on this subject [human rights], we find a listing of the basic rights established by modern conventions and declarations, and then a serious attempt to trace them back to Koranic texts." (Zakaria 1986: 228) This now extensive literature typically claims that "Islam has laid down some universal fundamental rights for humanity as a whole, which are to be observed and respects under all circumstances ... fundamental rights for every man by virtue of his status as a human being" (Mawdudi 1976: 10). When we consider the details, however, such claims prove to be almost entirely baseless.

For example, the scriptural passages that Khalid M. Ishaque (1974: 32-38) argues establish a "right to protection of life" are in fact divine injunctions not to kill and to consider life inviolable. The "right to justice" proves to be instead a duty of rulers to establish justice. The "right to freedom" is a duty not to enslave unjustly (not even a general duty not to enslave). "Economic rights" turn out to be duties to help to provide for the needy. And the purported "right to freedom

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[3] It is easy, though, to overstate such universality, which is typically at such a high level of generality that it allows practices that many adherents of this "shared" value would consider savage and inhuman. For example, virtually all societies agree that it is wrong to inflict violence on the innocent. Their conceptions of innocence, however, are not empty but are so varied that they provide much less support for "progressive" practices than is often imagined.

of expression" is actually an obligation to speak the truth -- that is, not even an obligation of others but an obligation of the alleged right-holder.

Turning to Africa, Dunstan Wai argues that "it is not often remembered that traditional African societies supported and practiced human rights. Traditional African attitudes, beliefs, institutions, and experiences sustained the 'view that certain rights should be upheld against alleged necessities of state'" (1980: 116). This confuses human rights with limited government.[4] Government can be limited on a variety of grounds, including divine commandment, legal rights, and extralegal checks such as a balance of power or the threat of popular revolt. The personal rights of pre-colonial Africans against their governments[5] were based not on humanity but on such criteria as age, sex, lineage, achievement, or community membership. Not all rights are human rights. Most in fact arise from a source other than common humanity.

It is also regularly argued that "the protection of human rights is an integral part" of the traditions of Asian societies (Anwar 1994: 2). "All the countries of the region would agree that 'human rights' as a concept existed in their tradition" (Coomaraswamy 1980: 224). Such arguments involve similar confusions.

"In a broad sense, the concept of human rights concerns the relationship between the individual and the state; it involves the status, claims, and duties of the former in the jurisdiction of the latter. As such, it is a subject as old as politics" (Tai 1985: 79). But not all political relationships are governed by, related to, or even consistent with, human rights. What the state owes those it rules is indeed a perennial question of politics. Human rights provide one answer. Divine right

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[4] Compare (Legesse 1980: 125-127) and (Busia 1994: 231) and, for non-African examples, (Said 1979: 65), (Mangalpus 1978), and (Pollis and Schwab 1980: xiv).

[5] (Fernyhough 1993: 55ff.) offers several examples of personal rights enjoyed in pre-colonial African societies. See also (Mutua 1995: 348-351).

monarchy, the dictatorship of the proletariat, the principle of utility, aristocracy, theocracy, democracy, and plutocracy offer other answers.

"Different civilizations or societies have different conceptions of human well-being. Hence, they have a different attitude toward human rights issues" (Lee 1985: 131). Even this is misleading. Other societies may have (similar or different) attitudes toward issues that we consider today to be matters of human rights. But unless they possess a concept of human rights they are unlikely to have any attitude toward human rights.

Many arguments of anthropological universality are inspired by an admirable desire to show cultural sensitivity and respect. In fact, however, they do no such thing. They actually misunderstand and misrepresent the foundations and functioning of the societies in question as a result of anachronistically imposing an alien analytical framework.

I am not claiming that Islam, Confucianism, or traditional African ideas cannot support internationally recognized human rights. Quite the contrary, I argue below that they logically can and in practice increasingly do support human rights. My point here is simply that Islamic, Confucian, and African societies did not in fact develop significant bodies of human rights ideas or practices prior to the twentieth century.

The next section offers an explanation for this fact. Before moving on, though, we should note that exactly the same thing can be said of the pre-modern West. Just as traditional Asian and African societies lacked ideas and practices of human rights, so did traditional Western societies.

The ancient Greeks notoriously distinguished between Hellenes and barbarians, practiced slavery, denied basic rights to foreigners and non-citizen Greeks, and severely restricted the rights of even free adult (male) citizens. The idea that all human beings had equal and inalienable basic rights was equally foreign to Athens and Sparta, Plato and Aristotle, and Homer, Hesiod, Aeschylus,

Sophocles, Euripides, Aristophanes, Herodotus, and Thucydides. Much the same is true of ancient Rome, both as a republic and as an empire. In medieval Europe, the spiritual egalitarianism and universality of Christianity expressed itself in hierarchical, inegalitarian politics. The idea of equal legal and political rights for all human beings, had it even been seriously contemplated, would have been seen as a moral abomination, a horrid transgression against God's order.

In the pre-modern world, both Western and non-Western alike, the duty of rulers to further the common good arose not from the rights (entitlements) of all human beings (or even all subjects) but from divine commandment, natural law, tradition, or contingent political arrangements. Although the people could legitimately expect to benefit from the obligations of their rulers, in neither theory nor practice did they have human rights that could be exercised against unjust rulers. The reigning ideas were natural law and natural right (in the sense of righteousness or rectitude) not natural or human rights (in the sense of equal and inalienable individual entitlements).

4. FUNCTIONAL UNIVERSALITY

Human rights ideas and practices are a product not of culture but of social structure. They arose not from any deep Western "cultural" roots but from the social, economic, and political transformations that we summarize in the idea of "modernity." And they have relevance wherever those transformations have occurred, irrespective of the pre-existing "culture" of the place.

Natural or human rights ideas first developed in the modern West. Early inklings are clear in Britain by the 1640s. (Tuck 1979) A full-fledged natural rights theory is evident in John Locke's *Second Treatise of Government*, published in 1689 in support of the so-called Glorious Revolution. The American and French Revolutions for the first time used such ideas as the basis for constructing new political orders. But it is the social-structural modernity of these ideas and practices, not their cultural "Westernness," that deserves emphasis.

Nothing in classical or medieval culture made the West specially suited to the development of human rights ideas. In fact, even early modern Europe, when viewed without the benefit of hindsight, seemed a particularly unconducive cultural milieu for human rights ideas. No widely endorsed reading of Christian scriptures before the mid-seventeenth century supported the idea of a broad set of equal and inalienable individual rights held by all human beings – or even all Christians. And the second half of the sixteenth century and the first half of the seventeenth century was an era of violent, often brutal, internecine and international religious warfare.

Although Western culture did become increasingly supportive of the idea and practice of equal natural rights, Western culture did not cause Westerners to develop ideas and practices of human rights. At the risk of gross oversimplification I want to suggest that capitalist markets and absolutist states were the causal forces behind both the rise of human rights ideas and practices and the modernization of Western economies, societies, polities, and cultures, two processes of social change that strongly reinforced one another.

Ever more powerful (capitalist) markets and (sovereign, bureaucratic) states disrupted, destroyed, or radically transformed "traditional" communities and their systems of mutual support and obligation. Rapidly expanding numbers of (relatively) separate families and individuals were thus left to face a growing range of increasingly unbuffered economic and political threats to their interests and dignity. Such new "standard threats" (Shue 1980: 29-34) to human dignity provoked a variety of remedial responses.

The absolutist state offered the solution of a society organized around a monarchist hierarchy justified by a state religion. But the newly emergent bourgeoisie, the other principal beneficiary of early modern markets and states, envisioned a society in which the claims of property

balanced those of birth. By the late seventeenth century, such claims increasingly were formulated in terms of natural rights.[6]

The Reformation contemporaneously disrupted the unity of Christendom, often quite violently. By the middle of the seventeenth century, states, more out of exhaustion than conviction, began to stop fighting over religion. (The Westphalia settlement of 1648 is conventionally presented as the start of "modern" international relations.) Although full religious equality was far off – just as bourgeois calls for "equal" treatment initially fell far short of full civil and political equality even for themselves – religious toleration (for selected Christians sects) gradually became the European norm,[7] and an important foundation for broader ideas of human rights. If individual choice was permitted on the vital issue of salvation, why not on issues of lesser magnitude as well?

Add to this the growing possibilities for physical and social mobility and we have the crucible out of which human rights ideas and practices were formed. Privileged ruling groups faced a growing barrage of demands from an ever widening range of dispossessed groups, first for relief from particular injustices and disabilities, eventually for full inclusion on the basis of equality. Such demands took many forms, including appeals to scripture, church, morality, tradition, justice, natural law, order, social utility, and national strength. Claims of equal and inalienable natural/human rights, however, increasingly came to be preferred.

This threat-response dynamic occurred first in modern Europe. Modern markets and states, however, have spread to all corners of the globe, bringing with them roughly the same threats to

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[6] This and the following two paragraphs are taken from (Donnelly 2003: §4.2).

[7] The special place of markets and states is only contingently Western; the economic and political transformations first experienced in the West have spread, in very similar forms, throughout the globe. The religious dimension, however, is more essentially Western – although I would argue that the rise of Protestantism itself was greatly facilitated by the economic and political transformations that I am emphasizing here. On the link between Protestantism and the modern state system, see (Philpott 2001: Part II).

human dignity. This has created a **functional universality** for human rights. Human rights represent the most effective response yet devised by human ingenuity to a wide range of standard threats to human dignity that have become nearly universal across the globe.

It was no coincidence that the idea and practice of human rights developed first in early modern Europe. This locus, however, was more an accident or effect than a cause. Westerners had no special pre-existing cultural proclivity to human rights. Rather, they had the (good or bad) fortune to experience first modern markets and states. New forms of suffering and injustice called forth new remedies. Equal and inalienable individual human rights became an increasingly important and effective response. And nothing better has yet been devised.

State socialism and developmental dictatorship, the leading alternatives of the Cold War era, proved themselves dismal failures. Human rights today remain the only proven effective mechanism for assuring human dignity in societies dominated by markets and states. Although historically contingent and relative, this functional universality fully merits the label universal – for us, today.

Notice, though, that this functional universality assumes a world where markets and states have created individuals and communities in need of human rights.[8] Elsewhere, such rights would be superfluous or even perverse. For example, some indigenous communities may not have undergone the social transformations that would make human rights appropriate practices to protect the vital interests and values of people in such societies.

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[8] I have focused on the disruptive consequences of capitalist markets, which have in most of the world destroyed or radically transformed traditional communities and their systems of social support (which often provided a functional equivalent for many human rights). Human rights, however, have no less relevance to modern command economies. In market and command economies alike, they mandate state intervention to assure universal access to basic goods, services, and opportunities. The difference is that in market economies the standard threats to human dignity are more equally divided between states and (capitalist) markets whereas in command economies "market" and state are more nearly fused. In both cases, though, the economy must be controlled by the state and the state must be controlled by its citizens, both through and for the purpose of realizing human rights. And clearly nothing said here addresses the relative merits of market and command economies in providing growth, development, or support for human rights.

It is conceivable that people will devise alternative mechanisms that they find equally or more effective for protecting themselves, their families, and their communities and for realizing their deepest values and aspirations. I am unaware, however, of any actual examples. Such claims usually have been advanced by repressive elites and their supporters. As the past twenty years clearly indicate, though, they have almost always been rejected by the people when given the opportunity. Alternative practices have demonstrated themselves to be failures that can be sustained only by immense repression, as in contemporary North Korea, Cuba, and China.

Nonetheless, we must leave theoretical space for, and give serious attention to, arguments that another state, society, or culture has developed plausible and effective alternative mechanisms for protecting or realizing human dignity. We must also recognize, even emphasize, that human rights, even though functionally universal, do not provide effective responses to all threats to individual and group dignity. Human rights set a minimum standard of political legitimacy rather than provide a comprehensive account of social justice. Particularly ominous is the possibility of new threats that cannot adequately remedied by the mechanism of human rights. Some of the more frightening scenarios about private economic power in globalized markets suggest that human rights are becoming obsolescent.

The functional universality of human rights depends on human rights providing attractive remedies for some of the most pressing systemic threats to human dignity. In the contemporary world, human rights do precisely that for a growing number of people of all cultures in all regions. The functional universality of internationally recognized human rights certainly is historically contingent. For us today, however, universality rather than relativity most deserves emphasis. Whatever our other problems, we all face the threats of modern markets and states. And whatever our other religious, moral, legal, and political resources, we all need equal and inalienable universal human rights to protect us from those threats.

5. INTERNATIONAL LEGAL UNIVERSALITY

If this argument is even close to correct, we ought to find widespread active endorsement of internationally recognized human rights. In fact we see precisely that in international human rights law, giving rise to what I will call **international legal universality**.

Virtually all states accept the authority of the Universal Declaration of Human Rights.[9] For the purposes of international relations, human rights today means, roughly, the rights in the Universal Declaration. And those rights have been elaborated in a series of widely ratified treaties. As of January 26, 2006, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights had 152 and 156 parties respectively. The International Convention on the Elimination of All Forms of Racial Discrimination had 170 parties. The Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child had, respectively, 180, 141, and 192[10] parties. These six core treaties have an average 165 parties, which represents a truly impressive 85% ratification rate.

This international legal universality began, and still operates in significant measure, at an elite interstate level. In recent decades, however, it has penetrated much more deeply. Movements for social justice and of political opposition have increasingly adopted the language of human rights. Growing numbers of new international issues, ranging from migration, to global trade and finance, to access to pharmaceuticals are being framed as issues of human rights. (Brysk 2005) The language of human rights has become so dominant that even scholars and activists sympathetic to the cause

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[9] Although initially a resolution of the UN General Assembly, and thus not technically binding, most analysts today agree that over the ensuing decades it has acquired the status of customary international law. See (Meron 1989: ch. 2) and (Simma and Alston 1992). (Watson 1999) forcefully presents the minority view.

[10] Only Somalia and the United States are not parties to the Convention on the Rights of the Child.

of human rights have increasingly turned their attention to practical shortcomings and conceptual limitations of the human rights movement. (e.g., Glendon 1991; Ignatieff 2001; Kennedy 2004) There is perhaps no greater evidence of acceptance than when your principal critics are your "friends" rather than your "enemies."

International legal universality, like functional universality, is contingent and relative. It depends on the decision of states, international organizations, transnational actors, and various national groups to treat the Universal Declaration and the Covenants as authoritative. Today, though, they do precisely that.

States that systematically violate internationally recognized human rights do not lose their legitimacy in international law. Except in cases of genocide, sovereignty still ultimately trumps human rights. But the international legal universality of human rights has spilled over into a growing sense that the political legitimacy of a government rests in significant measure on the extent to which it respects and protects internationally recognized human rights. Robert Mugabe's Zimbabwe presents a striking example. Even China has adopted the language (although not the practice) of internationally recognized human rights, seemingly as an inescapable precondition to its full recognition as a great power.

International legal universality, like functional universality, involves people, states, and other political actors deciding for themselves that human rights are essential to protecting their visions of a life of dignity. In the future they may no longer accept or give as much weight to human rights. Today, however, they clearly have chosen, and continue to choose, human rights over competing conceptions of national and international political legitimacy. And increasingly not only states but civil society actors and movements of political opposition are waging their struggles for social justice under the banner of human rights.

6. OVERLAPPING CONSENSUS UNIVERSALITY

International legal universality is replicated at the level of moral or political theory in an incomplete but significant form. John Rawls distinguishes "comprehensive religious, philosophical, or moral doctrines," such as Islam, Kantianism, Confucianism, and Marxism, from "political conceptions of justice." (1996: xliii-xlv, 11-15, 174-176; 1999: 31-32, 172-173) Political conceptions of justice address only the political structure of society, defined (as far as possible) independent of any particular comprehensive doctrine. Adherents of different comprehensive doctrines thus may be able to reach an "overlapping consensus" on a political conception of justice. (1996: 133-172, 385-396)[11]

Such a consensus is overlapping; partial rather than complete. It is political rather than moral or religious. Rawls developed the notion to understand how "there can be a stable and just society whose free and equal citizens are deeply divided by conflicting and even incommensurable religious, philosophical, and moral doctrines." (1996: 133) The idea, however, has an obvious extension to a culturally and politically diverse international society. I will argue that there is an emerging and deepening international overlapping consensus on the Universal Declaration.[12]

Human rights can be grounded in a variety of moral theories. For example, they can be seen as encoded in the natural law, called for by divine commandment, political means to further human good or utility, or institutions to produce virtuous citizens. The increasing political prominence of human rights over the past few decades has led more and more adherents of a growing range of

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[11] This and the following two paragraphs are drawn from (Donnelly 2003: §3.2).

[12] Rawls' own extension in The Law of Peoples (1999) involves both a wider political conception of justice and a narrower list of internationally recognized human rights. The account offered here, in other words, is Rawlsian in inspiration, but not that of John Rawls.

comprehensive doctrines in all regions of the world to endorse human rights – (but only) as a political conception of justice.

Such an overlapping consensus on human rights operates in the Western world no less than in the broader international community. Thomists and utilitarians, for example, agree about little at the level of comprehensive doctrines. Thomists do not even consider utilitarianism a moral theory, seeing it as based on a confusion of the good and the right. Nonetheless, many contemporary Thomists and utilitarians endorse human rights as a political conception of justice.

This, however, is a rather recent phenomenon. Aquinas had no conception of natural rights. (Donnelly 1980) Bentham famously described natural rights as "simple nonsense" and imprescriptible natural rights as "nonsense upon stilts." (Bentham 2002) Until the mid-twentieth century, virtually all utilitarians were hostile to natural or human rights and human rights were almost completely foreign to Thomist moral and political thought. In the past half century, however, prominent Thomists (e.g., Maritain 1943; Finnis 1980) have enthusiastically endorsed human rights. Utilitarian defenses of human rights – especially as second order rules justified by the principle of utility; that is, as something like a political conception of justice – have also become common. And in ordinary day to day politics, most utilitarians and Thomists not only accept human rights but often do so with considerable enthusiasm.

What is true of these two theories is more generally true as well. Virtually all Western religious and philosophical doctrines through most of their history have either rejected or ignored human rights. Today, however, most (although not all) adherents of most (but not all) Western comprehensive doctrines endorse human rights. There is no logical reason why a similar transformation could not happen elsewhere. If the medieval Christian world of crusades, serfdom,

and hereditary aristocracy could become today's world of liberal and social democratic welfare states, it is hard to imagine a place where a similar transformation is inconceivable.

Consider the traditional Hindu caste system, which not only stressed categorical, qualitative moral differences between different descent-based groups (castes) but even denied moral significance to the category human being. Gandhi, however, showed it is possible to reinterpret even such a seemingly inegalitarian comprehensive doctrine in fundamentally egalitarian terms that support human rights. And in practice India has been, both at home and abroad, one of the leading Third World supporters of internationally recognized human rights.

Or consider the talk, popular in the 1990s, of the incompatibility between "Asian values" and internationally recognized human rights.[13] In Asian countries such as Japan and South Korea, however, both governments and ordinary people have embraced human rights without in any way compromising their "Asianness". Asian values – like Western values, African values, or just about any other set of values – can be, and have been, interpreted in ways that are incompatible with human rights. But they also can be, and have been, interpreted to support human rights. And political developments in a growing number of Asian countries suggest that ordinary people and governments alike are increasingly coming to see human rights as a political expression, in contemporary circumstances, of their deepest ethical, cultural, and political values and aspirations.

No particular culture or comprehensive doctrine is "by nature," or in any given or fixed way, either compatible or incompatible with human rights. Cultures are immensely malleable, as are the political expressions of comprehensive doctrines. It is an empirical, not a theoretical, question whether (any, some, or most) members of a culture or exponents of a comprehensive doctrine

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[13] (Langlois 2001) offers perhaps the best overview, from the perspective of a sympathetic critic of such arguments. (Jacobsen and Bruun 2000) and (Bauer and Bell 1999) are good collections of essays. For my own views, see (Donnelly 2003: ch. 7) or (Donnelly 1999).

support human rights as a political conception of justice. And this question must be investigated by examining practices today, not by reference to ancient texts or practices. When we do that, we find that most leading comprehensive doctrines, and virtually all deeply egalitarian doctrines, in all regions of the world, increasingly participate in a deepening overlapping consensus that merits being called universal in an extended but real sense of that term.

All major civilizations have for long periods treated a significant portion of the human race as "outsiders" not entitled to guarantees that could be taken for granted by "insiders." Few regions of the globe, for example, have never practiced and widely justified human bondage. For most of their histories, all literate civilizations have assigned social roles, rights, and duties primarily on the basis of inegalitarian ascriptive characteristics such as birth, age, or gender.

Today, however, the moral equality of all human beings is not merely accepted but strongly endorsed by all leading comprehensive doctrines in all regions of the world. This convergence, both within and between civilizations, provides the foundation for a convergence on the rights of the Universal Declaration. In principle, a great variety of social practices other than human rights might provide the basis for realizing foundational egalitarian values. In practice human rights are rapidly becoming the preferred option. I will call this **overlapping consensus universality**.

Islam and Confucianism present striking contemporary examples. Although many Islamic fundamentalists (like many Christian and Jewish fundamentalists) rail against internationally recognized human rights, the much more salient fact about the Muslim world seems to me to be the way in which not only liberal and progressive but even many very conservative Muslims have adopted the language of human rights, arguing that Islamic social teachings support the practice of internationally recognized human rights.[14] Similarly, although Confucianism was a principal source

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of Asian values critics of human rights in the 1990s, interesting work is being done today to develop Confucian conceptions of human rights.[15]

Here we circle back to the insight underlying (misformulated) arguments of anthropological universality. Although traditional (Western and non-Western) cultures did not in fact endorse human rights, there is nothing in African, Asian, American, or European cultures, or most of the comprehensive doctrines that they contain, that prevents them from doing so now. We might even see empirically false arguments about traditional conceptions of human rights as misguided but understandable reflections of ongoing processes of contemporary endorsement.

Cultures, religions, and philosophies are resources that people deploy to give meaning to their lives. Shared bodies of cultural resources are used by different social actors in different ways to achieve very different purposes. Culture is not a fixed essence, or even a univocal strand of historical traditions, but a repertoire of contested symbols, practices, and meanings over (and with) which members of a society constantly struggle.[16] Culture is not destiny – or to the extent that it is, that is only because victorious elements in a particular culture have used its various resources to make for themselves, and their society, a particular destiny.

7. VOLUNTARY OR COERCED CONSENSUS?

Both overlapping consensus and international legal universality rest on the idea of a broad transnational consensus. Is this consensus more voluntary or coerced? This question is crucial to determining the depth of the penetration of international human rights norms.

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[15] See, for example, (Chan 1999), (Bell 2000), (Bell and Hahm 2003). For broader discussions of the complex engagement of China with (originally Western) notions of rights, see (Svensson 2003) and (Angle 2002).

[16] For applications of this understanding of culture to debates over human rights, see (Preis 1996) and (Nathan 2001).

The importance of the example and advocacy of the United States and its allies should not be underestimated. Example, however, has been more powerful than advocacy, let alone coercion. Human rights dominate political discussions less because of the support of materially dominant powers than because they respond to some of the most important social and political aspirations of individuals, families, and groups in most countries of the world. Some governments may feel compelled to endorse internationally recognized human rights. The assent of most societies and individuals, however, is largely voluntary.[17] The consensus on the Universal Declaration reflects its cross-cultural substantive attractions. People, when given a chance, usually (in the contemporary world) choose human rights, irrespective of region, religion, or culture.

Few "ordinary" citizens in any country have a particularly sophisticated sense of human rights. They respond instead to the general idea that they and their fellow citizens are entitled to equal treatment and certain basic goods, services, protections, and opportunities. My argument is that the Universal Declaration presents a pretty good first approximation of the list that they would come up with, largely irrespective of culture, after considerable reflection. More accurately, there is little in the Universal Declaration that they would not put there, although we might readily imagine a global constitutional convention coming up with a somewhat larger list. I thus conclude that we see something very close to a voluntary overlapping consensus on the Universal Declaration, which is mirrored in the strong international legal consensus.

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[17] The burden of proof, it seems to me, lies on those who hold otherwise. States may be particularly vulnerable to external pressure and thus unusually tempted to purely formal endorsements of international norms advocated by leading powers. (Even that seems to me not obviously correct. I read hypocrisy more as evidence of the substantive attractions of hypocritically endorsed norms.) I can see little evidence, however, that societies and individuals feel similarly compelled. And if they are attracted, that matters decisively, however perverse or misguided we may find that attraction.

8. ONTOLOGICAL UNIVERSALITY

Overlapping consensus implies that human rights can, and in the contemporary world do, have multiple, diverse "foundations." A single transhistorical moral foundation for human rights would provide a very different kind of universality. Such **ontological universality**, as I will call it, cannot be logically precluded. I will argue, though, that it is profoundly implausible.

A single moral code may indeed be objectively correct and valid at all times in all places. Many moral theories, both secular and religious, claim that. At least three problems with such arguments, however, are practically – although not logically – fatal.

First, no matter how strenuously adherents of a particular philosophy or religion insist that (their) values are objectively valid, they cannot marshal arguments that adherents of other religions or philosophies find persuasive. Whatever the source of this failure to agree, it leaves us politically in pretty much the same position as if there were no objective values at all. We are thrown back on arguments of functional, international legal, and overlapping consensus (understood now, perhaps, as imperfect reflections of a deeper ontological universality).

Second, virtually all comprehensive doctrines have for at least large parts of their history ignored or actively denied human rights. Although it is conceivable that an objectively correct doctrine simply has been incorrectly interpreted by its exponents, this seems improbable. Thus even if some comprehensive doctrine is indeed objectively correct, it is unlikely that human rights in general, and the particular list in the Universal Declaration, are ontologically universal.

Third, the ontological universality of human rights implies that almost all moral and religious theories through most of their history have been objectively false or immoral. This may indeed be correct. But before we embrace such a radical idea, I think we need much stronger arguments than are currently available to support ontological universality.

Overlapping consensus does not make human rights groundless. Quite the contrary, it gives them multiple grounds. Whatever its analytical and philosophical virtues, this is of great practical utility. Those who want to make ontological claims for their comprehensive doctrines can do so, and thus be faithful to their own views, without needing to convince or compel others to accept this particular, or even any, foundation. Treating human rights as a Rawlsian political conception of justice may allow us to address a wide range of issues of political justice and right while circumventing inconclusive and divisive disputes over moral foundations.

9. UNIVERSAL RIGHTS – NOT IDENTICAL PRACTICES

Elsewhere I have developed a three-tiered scheme for thinking about universality. (1984; 2003: §6.4) I have argued that human rights are (relatively) universal at the level of the concept, the broad formulations characteristic of the Universal Declaration such as the claims in Articles 3 and 22 that everyone has "the right to life, liberty and security of person" and "the right to social security." Particular rights concepts, however, have multiple defensible conceptions, introducing a significant element of legitimate variation/relativity. Any particular conception then will have many defensible implementations. At this level – for example, the design of electoral districts to implement the right "to take part in the government of his country, directly or through freely chosen representatives" (Universal Declaration Article 21) – extensive relativity is possible.

Functional and overlapping consensus universality lie primarily at the level of concepts. International human rights treaties do often embody particular conceptions, and sometimes even particular forms of implementation,[18] but they too permit a wide range of particular practices.

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[18] For example, Article 14 of the Convention against Torture specifies that "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."

Substantial second order variation, by country, region, culture, or other grouping, is completely consistent with the (relative) universality of human rights.

Striking legitimate variations exist even within regions. For example, conceptions and implementations of many economic and social rights differ substantially between the United States and most other Western countries. Even within Europe, substantial variations exist. For example, Robert Goodin and his colleagues (Goodin et al. 1999) demonstrate important systematic differences between the welfare states of Germany and the Netherlands.

Not all variations, of course, are justifiable. Concepts set a range of plausible variations among conceptions, which in turn restrict the range of practices that can plausibly be considered implementations of a particular concept and conception. But even some deviations from authoritative international human rights norms may be, all things considered, (not il)legitimate.

Five criteria can help us to grapple with claims in support of such deviations.[19]

1) Important differences in the character of the threats being faced are likely to justify variations, perhaps even at the level of concepts. Although providing perhaps the strongest theoretical justification for even fairly substantial deviations from international human rights norms, such arguments rarely are empirically defensible in the contemporary world. (Indigenous peoples may be the exception that proves the rule.)

2) Participants in the overlapping consensus deserve a sympathetic hearing when justifying limited deviations from international norms. Disagreements over "details" should be approached differently than systematic deviations or external attacks. The depth of participation in the

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[19] Although here I remain explicitly agnostic on the "we" making such judgments, I am implicitly speaking from the perspective of an engaged participant in international society. I think, though, that this not particularly problematic for the argument that follows.

overlapping consensus (and international legal consensus) also often provides insight into the intentions of those advocating deviations from international norms.

3) Arguments claiming that a particular conception or implementation is, for cultural or historical reasons, deeply imbedded within or of unusually great significance to some significant group in society deserve, on their face, sympathetic consideration. Even if we do not positively value diversity, the autonomous choices of a free people should never be lightly dismissed, especially when they reflect well-established practices based on deeply held beliefs.

4) The resulting set of human rights must be generally consistent with the structure and overarching values of the Universal Declaration.

5) Tolerance for deviations should decrease as the level of coercion increases.

Consider two brief examples, dealing with the freedoms of religion and speech.

Article 18 of the Universal Declaration reads, in its entirety, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Most schools of Islamic law and scholarship, however, deny Muslims the right to change their religion. Is prohibition of apostasy by Muslims compatible with the universality of Article 18? Reasonable people may reasonably disagree, but I am inclined to answer "Probably."

We are dealing here with a variation at the level of conceptions – the limits of the range of application of the principle of freedom of religion – in a context where the overarching concept is strongly endorsed. Most Islamic countries and communities respect the right of adherents of other religions to practice their beliefs (within the ordinary constraints of public order). Given that there

is a deeply rooted basis in the underlying comprehensive doctrine, supported by a long tradition of practice, in principle we ought to approach arguments against apostasy with an certain tolerance.

We must also, though, ask whether we are dealing with a relatively isolated deviation from international norms by participants in the overlapping consensus. Where the answer is no, as is the case in many contemporary Islamic states, we should be much more skeptical of extending toleration in practice. But even in that case, we would do well to focus our criticism and efforts to promote change elsewhere – that is, to work to improve broader human rights practices to help to create a situation where we would be "willing to live with" at least some forms of prohibition of apostasy.

This then brings us to the means used in combating apostasy. Persuasion certainly lies within a state's margin of appreciation. Freedom of religion does not require religious neutrality – separation of church and state, as Americans typically put it – but only that people be free to choose and practice their religion. And there is no guarantee that that choice be without costs. The state thus would be justified in denying certain benefits to apostates, so long as those benefits are not guaranteed by human rights (protection against discrimination on the basis of religion is one of the foundational elements of international human rights norms). It may even be permissible to impose modest disabilities on apostates, again so long as they do not violate the human rights of apostates, who remain human beings entitled to all of their human rights. In particular, the state is under no obligation to protect apostates against <u>social</u> sanctions from their families and communities that do not infringe human rights.

Executing apostates, however, certainly exceeds the bounds of permissible variation. Violently imposing a particular conception of freedom of religion, let alone one that that is explicitly prohibited by international human rights law, inappropriately denies basic personal autonomy. Even

if justified within a particular comprehensive doctrine, it so excessively infringes on the existing international legal and overlapping consensus that it is not entitled to international toleration – although we should stress that the same constraints on the use of force apply to external actors that apply to the state in dealing with dissenters, constraints that acquire even greater force when considerations of sovereignty and international order are added to the calculation.

Let us turn now to a slightly different kind of problem in a very different place. Article 4(a) of the racial discrimination convention requires parties not just to prohibit racial violence and incitement to such violence but also to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred." Article 20(2) of the International Covenant on Civil and Political Rights similarly requires that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Such requirements have been rejected in the United States, where free speech includes even "hate speech," so long as it does not involve incitement to violence.

Here we must balance two competing human rights rather than a conflict between human rights and another value. Because any resolution will require restricting the range of at least one of these rights, any approach that plausibly protects the conceptual integrity of both rights must be described as controversial but defensible. That would seem to include American practice with respect to hate speech.

In the United States, incitement to violence is legally prohibited, thus protecting and giving substantial legal backing to the general prohibition against violence that is the central subject of Article 4(a). We thus have only a narrow deviation from international norms, with respect to one part of a second order conception, in a context of general support for not only the overarching concept but also the convention as a whole. Furthermore, the deviation is on behalf of a strong

implementation of another vitally important human rights. And it is deeply rooted in legal history and constitutional theory.

Targets of hate speech may indeed be harmed. They remain, however, protected against violence and not subject to any state imposition of a particular substantive vision. Conversely, prohibiting speech because of its content harms those whose speech is restricted and in effect involves state imposition of a particular viewpoint. Reasonable people may reasonably disagree about which harm is greatest. Toleration of the American refusal to prohibit hate speech thus seems demanded, even from those who sincerely, and no less reasonably, believe that prohibiting hate speech is a much better course of action.

Unusually difficult theoretical and practical problems are posed by a comprehensive doctrine that generally supports internationally recognized human rights -- as I think both Islam and American liberal democracy do – but is incompatible with some particular element. Adherents face the difficult choice of changing or abandoning long and deeply held views or rejecting some important part of the international legal consensus on human rights. Outsiders face the problem of determining how far to extend tolerance to fellow participants in the overlapping consensus on human rights. Such a decision is especially difficult when not only international norms but their own comprehensive doctrines reject the practice in question.

In such disputes, at least one side is likely to find itself dissatisfied by any outcome. But if the debate is approached, on <u>both</u> sides, with mutual respect, and a focus on a shared framework of overarching values, not just the particular matter of disagreement, then each side may also emerge with a certain kind of satisfaction. <u>How</u> arguments of universalism <u>and</u> arguments of relativism are advanced may sometimes be as important as the substance of those arguments.

I do not want to claim very much for my discussion of these two examples. My arguments are hardly conclusive, perhaps not even correct. I think, though, that they clearly show that the (relative) universality of internationally recognized human rights does not require, or even encourage, global homogenization or the sacrifice of (many) valued local practices. Certainly nothing in my argument implies let alone justifies cultural imperialism. Quite the contrary, (relatively) universal human rights protect people from imposed conceptions of the good life, whether those visions are imposed by local or foreign actors.

Human rights seek to allow human beings, individually and in groups that give meaning and value to their lives, to pursue their own vision of the good life. Such choices deserve our respect so long as they are consistent with comparable rights for others and reflect a plausible vision of human flourishing to which we can imagine a free people freely assenting. In fact, understanding human rights as a political conception of justice supported by an overlapping consensus requires us to allow human beings, individually and collectively, considerable space to shape (relatively) universal rights to their particular purposes – so long as they operate largely within the constraints at the level of the concept established by functional, international legal, and overlapping consensus universality.

10. UNIVERSALISM WITHOUT IMPERIALISM

My account so far has emphasized the "good" sides of universalism, understood in limited, relative terms. The political dangers of arguments of anthropological universality are modest, so long as one accepts functional and international legal universality. And in arguing against ontological universality, I ignored the dangers of imperialist intolerance that may lurk behind such claims when they move into politics. In this final section I want to consider briefly some of the (quite substantial) dangers posed by excessive or "false" universalism – especially when a powerful actor (mis)takes its own interests for universal interests or values.

The legacy of imperialism does demand that Westerners in particular show special caution and sensitivity when advancing arguments of universalism in the face of clashing cultural values. Westerners must also remember the political, economic, and cultural power that lies behind even their best intentioned activities. Anything that even hints of imposing Western values is likely to be met with understandable suspicion.

Care and caution, however, must not be confused with inaction. Our values, and international human rights norms, may demand that we act on them even in the absence of agreement by others – at least when that action does not involve force. Even strongly sanctioned traditions may deserve neither our respect nor our toleration if they are particularly objectionable. Consider, for example, the deeply rooted tradition of anti-Semitism in the West or "untouchables" and bonded labor in India. Even if such traditional practices were not rejected by the governments in question, they would not deserve our respect. When rights-abusive practices raise issues of great moral significance, age and deep cultural roots are no defense.

Consider private and state violence against homosexuals. International human rights law does not prohibit discrimination on the basis of sexual orientation. But everyone is entitled to security of the person. If the state refuses to protect some people against private violence, on the grounds that they are immoral, it violates their basic human rights – which are held no less by the immoral than the moral.[20] And the idea that the state should be permitted to imprison or even execute people solely on the basis of private voluntary acts between consenting adults, however much that behavior or "lifestyle" offends community conceptions of morality, is inconsistent with any plausible conception of personal autonomy and individual human rights.

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[20] For clarity, let me explicitly note that I am not endorsing these judgments but simply arguing that even if they are accepted they do not justify violating human rights.

The preceding paragraphs are not meant to minimize the dangers of cultural and political arrogance, especially when a powerful actor mistakes its own interests for universal values. American foreign policy in particular has (not unreasonably) been accused of often confusing American interests with universal values. Many Americans do seem to believe that what's good for the U.S. is good for the world – and if not, then "that's their problem." The current American administration is more than willing to chide others, at home and abroad, who don't "get it." And the dangers of such arrogant and abusive "universalism" are especially striking in international relations, where normative disputes that cannot be resolved by rational persuasion or appeal to agreed upon international norms tend to be settled by political, economic, and cultural power – of which United States today has more than anyone else.

Faced with such undoubtedly perverse "unilateral universalism," even many well meaning critics have been seduced by misguided arguments for the essential relativity of human rights. This, however, in effect accepts the American self-presentation by equating human rights with American foreign policy. The proper remedy to such "false" universalism is defensible, relative universalism. Functional, overlapping consensus, and especially international legal universality, in addition to their analytical and substantive virtues, can be valuable resources not only for resisting many of the excesses of American foreign policy but for attempts to redirect it into more humane channels.

Indirect support for such an argument is provided by the preference of the Bush administration for the language of democracy and freedom rather than human rights. For example, in the introductions to the 2002 and 2006 national security statements, "freedom" is used 25 times, "democracy" seven times, and "human rights" just once (and not at all in 2006).[21] Part of the reason would seem to be that human rights does have a clear, relatively precise, and well-settled meaning in

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[21] http://www.whitehouse.gov/nsc/nssall.html, http://www.whitehouse.gov/nsc/nss/2006/print/intro.html

contemporary international relations. "Democracy" is both much narrower (Donnelly 2003: §11.3) and much more imprecisely defined, especially internationally. And "freedom" is a remarkably malleable idea – "rich" or "empty," depending on your perspective – as even a cursory review of the roster of the "free world" in the 1970s indicates.[22]

Although consensus is no guarantee of truth, international legal and overlapping consensus universality can provide important protection against the arrogant "universalism" of the powerful. Without authoritative international standards, to what can the United States (or any other power) be held accountable? If international legal universality has no force – and if arguments of ontological universality remain unpersuasive outside a relatively narrow community – why shouldn't the United States act on its own (often peculiar) understandings of human rights?

The contemporary virtues of (relative) universality are especially great because the ideological hegemony of human rights in the post-Cold War world is largely independent of American power. (We might even suggest that American power is in some significant measure an effect of the ideological hegemony of human rights.) Human rights can readily be turned against the arrogance of American, or any other, power. As Abu Ghraib indicates, the ideological hegemony of human rights may even mobilize internal political forces that lead to changes in policy in the midst of a war. And the international focus on Guantanamo – which on its face is odd, given the relatively small number of victims of the war on terror who have suffered in this bit of American-occupied Cuba – underscores the power of widely endorsed international norms to change the terms of debate and transform the meaning of actions.

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[22] The preference for "democracy" is more generally American. The denigration of the language of human rights and the exuberant embrace of the language of freedom, however, is particularly characteristic of the Bush Administration. Compare (Mertus 2003). By comparison, the prefaces of the Clinton national security statements of 1996, 1997, and 1999, taken together, use "democracy" 21 times, "human rights" six times, and "freedom" five. (http://www.fas.org/spp/military/docops/national/1996stra.htm, http://www.fas.org/man/docs/strategy97.htm, http://www.dtic.mil/doctrine/jel/other_pubs/nssr99.pdf)

International legal universality is one of the great achievements of the international human rights movement, both for itself and for the ways it has facilitated the deepening overlapping consensus on internationally recognized human rights. Even the United States participates – fitfully and incompletely – in these consensuses. Not just the Clinton administration but both Bush administrations as well have regularly raised human rights concerns in numerous bilateral relationships – usually, with a central element of genuine concern. (The real problem with American foreign policy is less where it does raise human rights concerns than where it doesn't, or where it allows them to be subordinated to other concerns.) And all of this matters, directly to ten of thousands, and indirectly to many hundreds of millions, whose lives have been made better by internationally recognized human rights.

Universal human rights are hardly a panacea for the world's problems. They do, however, fully deserve the prominence they have received in recent years. For the foreseeable future, universal human rights are likely to remain a vital resource in national, international, and transnational struggles for social justice and human dignity. And the relative universality of those rights is a powerful resource that can be used to help to build more just and humane national and international societies.

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