

HUMAN RIGHTS, AMERICAN EXCEPTIONALISM, AND THE STORIES WE TELL

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In a fractured age, when cynicism is god, here is a possible heresy: we live by stories, we also live in them. One way or another we are living the stories planted in us early or along the way, or we are also living the stories we planted—knowingly or unknowingly—in ourselves. We live stories that either give our lives meaning or negate it with meaninglessness. If we change the stories we live by, quite possibly we change our lives.

—Ben Okri, *A Way of Being Free*¹

In many respects, the story of the Universal Declaration of Human Rights (UDHR),² since its promulgation by the United Nations, is one of remarkable growth of international recognition of the rights of all peoples. Nonetheless, the framework of universal human rights continues to be contested, and one need only glance at any newspaper to be reminded of the grim realities that still confront much of the world's population. The 60th anniversary of the UDHR gives us an opportunity to focus not only on the extent to which the rights it articulates have gained acceptance in international discourse, but to consider the options for extending and enforcing those rights. The theme of this symposium is "Advancing the Consensus." The notion of a consensus implies a common agreement, a shared narrative or story. The history of the post-World War II human rights movement can be told as one of ever-expanding agreement on certain basic or universally acknowledged values and

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¹ BEN OKRI, *A WAY OF BEING FREE* 46 (1997).

² Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

norms, embodied most visibly in the UDHR.³ However, it is also a story of great frustration, as we consider the many impediments to the implementation of these norms and are forced to acknowledge that life is exceedingly difficult for most of the world's people.⁴ The premise that we have a consensus to be advanced highlights what are often perceived as two major obstacles to the human rights movements of the twenty-first century. One of these is American exceptionalism, the United States' practice of unilaterally exempting itself from participation in international organizations and human rights treaties while simultaneously insisting that the rest of the world comply with international norms.⁵ Another is resistance in significant sectors of the world to the universalization of rights on the grounds that international institutions are being used to impose Western values unilaterally upon non-Western cultures.⁶ From the perspective of those struggling to "advance the consensus," both of these tendencies seem to undermine the progress made since 1948 in the field of international human rights. While often viewed as representing diametrically opposed sources of pressure on the human rights paradigm, they both may be products of the Eurocentric nature of contemporary international law. If this is true, it may be time to consider expanding and reframing the paradigm of human rights.

This Essay is a reflection on the narrative of American exceptionalism, focusing on its premise that the United States represents the highest stage in

³ See Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR. J. INT'L L. 903, 903 (2008).

⁴ For example, in 2008, the World Bank determined that 1.4 billion people live in extreme poverty, defined as an income of less than \$1.25 per day. Shaohua Chen & Martin Ravallion, *The Developing World is Poorer than We Thought, but No Less Successful in the Fight Against Poverty* 19 (World Bank Dev. Group, Policy Research Working Paper No. 4703, 2008). In addition, the United Nations Development Programme's 2007/2008 report noted that over 80% of the world's population live in countries where the income gap is widening. UNITED NATIONS DEVELOPMENT PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2007/2008, FIGHTING CLIMATE CHANGE: HUMAN SOLIDARITY IN A DIVIDED WORLD 25 (2007), available at http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf.

⁵ Many legal scholars have addressed the notion of American exceptionalism and have employed definitions both more and less inclusive than the one employed herein. For other approaches, see generally AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005); Steven G. Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006); Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the Dred Scott Case*, 82 CHI.-KENT L. REV. 393 (2007); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775 (2001).

⁶ See Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law?*, 18 EUR. J. INT'L L. 379, 389-91 (2007).

the evolution of Western civilization achieved to date and its related claim to be at the forefront of human progress. It is significant to the human rights discourse because, while used as a justification for the United States' self-exemption from the human rights regime, this foundational belief simultaneously reinforces the Western ideals and values underlying the contemporary international legal framework.⁷ In turn, the arguments used by U.S. leaders to undergird their exceptionalist positions lend credence to critics of contemporary human rights law who argue that human rights are being used as a "Trojan horse" to impose a Western worldview on non-Western societies.⁸ My thesis is that if we are to achieve a true consensus about contemporary human rights norms, we will have to take seriously the critique of their colonial roots, opening up the discourse to the stories of all peoples. Only then, I believe, will we be able to achieve an honest consensus capable of both effectively countering American exceptionalism and providing a means of embracing multiple understandings of the world within the framework of international human rights. This is, of course, a large subject and what follows are simply some preliminary thoughts to initiate the discussion.

I. THE COLONIAL PRESUMPTIONS OF AMERICAN EXCEPTIONALISM

In September 2008, law professor Steven Calabresi, a co-founder of the neoconservative Federalist Society, provided an apt summary of the exceptionalist perspective when he objected to the U.S. Supreme Court's consideration of "foreign law" by arguing:

Those of us concerned about citation of foreign law . . . believe in something called American exceptionalism, which holds that the United States is a beacon of liberty, democracy and equality of opportunity to the rest of the world. . . . The country that saved Europe from tyranny and destruction in the 20th century and that is now saving it again from the threat of terrorist extremism and Russian tyranny needs no lessons from the socialist constitutional courts of Europe on what liberty consists of.⁹

⁷ Calabresi, *supra* note 5, at 1337–38; Koh, *supra* note 5, at 1482–83.

⁸ See GUSTAVO ESTEVA & MADHU SURI PRAKASH, GRASSROOTS POST-MODERNISM: REMAKING THE SOIL OF CULTURES 117 (1998). For an excellent overview of the colonial premises of international law, see ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (1st ed. 2005).

⁹ Steven G. Calabresi, Letter to the Editor, N.Y. TIMES, Sept. 20, 2008, at A18; see Adam Liptak, *U.S. Court is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 17, 2008, at A1.

A similar sentiment was expressed by President George W. Bush in his introduction to the 2002 *National Security Strategy*, in which he described the United States as representing the “single sustainable model for national success” that had emerged in the twentieth century, and presented the United States’ plan to maintain and expand its “unparalleled military strength and great economic and political influence,” using it “to bring the hope of democracy, development, free markets, and free trade to every corner of the world.”¹⁰

This perspective is not limited to those who advocate unilateralism in U.S. foreign policy. In his speech acknowledging victory in the presidential election of 2008, Barack Obama first noted that “a new dawn of American leadership is at hand,” and then proclaimed:

[T]o all those who have wondered if America’s beacon still burns as bright—tonight we proved once more that the true strength of our nation comes not from the might of our arms or the scale of our wealth, but from the enduring power of our ideals: democracy, liberty, opportunity, and unyielding hope.¹¹

In this statement, President-elect Obama was invoking one of the most common images of American exceptionalism: the United States as the embodiment of freedom and democracy and, therefore, the light of hope for the rest of the planet. He also was echoing a theme first articulated in 1630 by Puritan minister John Winthrop, who predicted, “[W]e shall be as a City upon a Hill,”¹² a theme reiterated by President Ronald Reagan when he stated in his farewell address, “And how stands the city on this winter night? . . . [S]he’s still a beacon, still a magnet for all who must have freedom. . . .”¹³

¹⁰ George W. Bush, *Introduction to THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* (Sept. 2002); see also RICHARD A. FALK, *THE DECLINING WORLD ORDER: AMERICA’S IMPERIAL GEOPOLITICS 189–99* (2004).

¹¹ Barack H. Obama, President-elect, Election Night Acceptance Speech (Nov. 4, 2008) (transcript available at http://news.yahoo.com/s/ynews/ynews_p1135).

¹² John Winthrop, *A Modell of Christian Charity*, in *AMERICAN SERMONS* 28, 42 (1999).

¹³ Calabresi, *supra* note 5, at 1336 (quoting President Ronald Reagan, Farewell Address to the Nation, 2 PUB. PAPERS 1718, 1722 (Jan. 11, 1989)). Alaska Governor and Republican vice presidential nominee Sarah Palin also alluded to this vision in the vice presidential debate of October 2008:

[E]ven more important is that world view that I share with John McCain. That world view that says that America is a nation of exceptionalism. And we are to be that shining city on a hill, as President Reagan so beautifully said, that we are a beacon of hope and that we are unapologetic here. We are not perfect as a nation. But together, we represent a perfect ideal. And that is

This framing is significant because it reflects a core aspect of American identity—the deeply ingrained belief that the United States represents the highest stage of progressive development in the history of humanity.¹⁴ As anthropologist Eric Wolf notes:

Many of us . . . grew up believing that [the] West has a genealogy, according to which ancient Greece begat Rome, Rome begat Christian Europe, Christian Europe begat the Renaissance, the Renaissance the Enlightenment, the Enlightenment political democracy and the industrial revolution. Industry, crossed with democracy, in turn yielded the United States, embodying the rights to life, liberty, and the pursuit of happiness.¹⁵

This view of history incorporates some of the most fundamental presumptions of Western civilization—that there is a fundamental dichotomy between people and nature;¹⁶ that the benchmark of human civilization is the domination of nature, particularly through science and technology;¹⁷ that all of human history can be understood in terms of a universal, linear path of progress toward increased civilization;¹⁸ and that what has been termed Western civilization represents the highest stage of evolution in human history to date.¹⁹ It is also a view that focuses on difference and the “ranking” that can be assigned to

democracy and tolerance and freedom and equal rights. Those things that we stand for that can be put to good use as a force for good in this world.

Sarah Palin, Governor, Alaska, The Biden-Palin Vice Presidential Debate at Washington University in St. Louis (Oct. 2, 2008), available at <http://www.debates.org/pages/trans2008b.html>.

¹⁴ See ERIC R. WOLF, EUROPE AND THE PEOPLE WITHOUT HISTORY 5–6, 12–13 (1982).

¹⁵ *Id.* at 5.

¹⁶ See J.M. ROBERTS, HISTORY OF THE WORLD 24–29 (1993); RICHARD WASWO, THE FOUNDING LEGEND OF WESTERN CIVILIZATION: FROM VIRGIL TO VIETNAM 4–6 (1997).

¹⁷ See Bosire Maragia, *The Indigenous Sustainability Paradox and the Quest for Sustainability in Post-Colonial Societies: Is Indigenous Knowledge All that Is Needed?*, 18 GEO. INT’L ENVTL. L. REV. 197, 217–18 (2006); PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 51–53 (1992).

¹⁸ As the philosopher Ludwig Wittgenstein observed, “Our civilization is characterized by the word ‘progress.’ Progress is its form rather than making progress being one of its features.” FITZPATRICK, *supra* note 17, at 92 (quoting LUDWIG WITTGENSTEIN, CULTURE AND VALUE 7e (G.H. Von Wright & Heikki Nyman eds., Peter Winch trans., Univ. of Chicago Press 1980) (1977)). For an example of history told from this perspective, see ROBERTS, *supra* note 16, at 3.

¹⁹ See ROBERTS, *supra* note 16, at 555. Roberts asserts:

By 1900 European civilization had shown itself to be the most successful which had ever existed. Men might not always agree on what was most important about it but no one could deny that it had produced wealth on an unprecedented scale and that it dominated the rest of the globe by power and influence as no previous civilization had ever done. Europeans (or their descendants) ran the world.

Id.

individuals and peoples as a result of that difference on the universal scale of Western development or, as often put, “human progress.”²⁰

Describing what he terms “the founding legend of Western civilization,”²¹ historian Richard Waswo summarizes the relationship between this understanding of civilization and the international law that developed in the European world:

When we Europeans felt we were barbarians, the Trojan legend told us we weren't; now that we know that we were barbarians but aren't any longer, we can drop the legend from our history, and use it henceforth to determine the history of the barbarians we've so lately discovered. The use of the legend . . . to determine the fate of the indigenous populations in the new world is clearly visible in the formation of a special branch of law. This would eventually become international law, and was created expressly to deal with the accelerating conflicts among the major powers of Europe, due in large part to their competing claims over territory and trading privileges in the new world, and with the vexed question of the respective “rights” of the colonizers and the colonized.²²

As discussed briefly below, it is this belief in the superiority of Western civilization and its universal applicability, considered so obvious as to be “common sense” in the American worldview, which undergirds both our current structures of international law and the United States' claims to be upholding “universal” human values while exempting itself from internationally accepted norms.

Winthrop's “city upon a hill” is repeatedly referenced by American leaders not simply because it provides a powerful image, but because it captures the Puritans' belief that their journey to the New World was a “reenactment of the Exodus narrative revolv[ing] around a powerful theology of chosenness.”²³ Central to their worldview was their faith in a divinely ordained “plan” for the world and the notion that God had a particular “covenant” with humanity,

²⁰ See FITZPATRICK, *supra* note 17, at 62–63 (describing the shift in intellectual activity from “drawing things together” to discriminating between them, and noting the role this plays in establishing both identity and order (quoting MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* 54 (1973))).

²¹ WASWO, *supra* note 16, at iii.

²² *Id.* at 136.

²³ ANDERS STEPHANSON, *MANIFEST DESTINY: AMERICAN EXPANSION AND THE EMPIRE OF RIGHT* 6 (1995).

which they were fulfilling.²⁴ While the earliest English settlers claimed that the indigenous peoples of the Americas would benefit by receiving both Christianity and civilization, including “a well governed commonwealth” and education in the “mechanical occupations, arts, and liberal sciences,”²⁵ the settlers’ ideology focused on their opportunity to establish a New Israel, or New Canaan, through which the world was to be regenerated and “God and humankind . . . reconciled at last.”²⁶ Thus, the Puritans saw themselves to be creating a new model of civilization for the European world, while also bringing the purported benefits of Western civilization to indigenous peoples.²⁷

This “mission” was also invoked when, a century later, British colonists in North America decided to declare their independence in the name of the “unalienable Rights” of “Life, Liberty, and the pursuit of Happiness.”²⁸ The leaders of the American rebellion were declaring the existence of an unprecedented entity, a settler colonial state that intended to be recognized as the first member of the hitherto exclusively European community of “civilized” nations by virtue of representing a more evolved phase of Western civilization. To justify this expansion of the prevailing Eurocentric paradigm, and what to all appearances was a radical divergence from the law of nations as it was then framed, American leaders called upon a “higher” natural law, which recognized freedom, equality, and democracy as inherent rights.²⁹

There were, of course, many economic motivations behind the move to independence,³⁰ but the political theory of the emerging American republic focused on the notion that the English system, which theoretically prevented

²⁴ See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 164–65 (1990).

²⁵ *Id.* at 172 (quoting George Peckham, an early English promoter of American colonization).

²⁶ STEPHANSON, *supra* note 23, at 7.

²⁷ See NEAL SALISBURY, *MANITOU AND PROVIDENCE: INDIANS, EUROPEANS, AND THE MAKING OF NEW ENGLAND, 1500–1643*, at 178 (1982). On the ideological transition made by the settlers from viewing American Indians as objects of salvation to threats to civilization, see Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 430–31 (2006).

²⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²⁹ See WILLIAMS, *supra* note 24, at 242–43; Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 886–90 (1978).

³⁰ Of particular concern were the Royal Proclamation of 1763, *reprinted in* WILCOMB E. WASHBURN, *THE AMERICAN INDIAN AND THE UNITED STATES* 2135–39 (1979), which prohibited settlement west of the Allegheny and Appalachian Mountains without explicit permission from London, and the Stamp Act of 1765, which was passed to fund implementation of the Royal Proclamation, *see The Declarations of the Stamp Act Congress* (1765), *reprinted in* PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS 1764–1766, at 62–63 (Edmund S. Morgan ed., 1959); EDMUND S. MORGAN & HELEN M. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION* 53–70 (1953); WILLIAMS, *supra* note 24, at 228.

despotism by dividing governmental powers between the King, the House of Lords, and the House of Commons, had broken down.³¹ Furthermore, the colonies were not represented in Parliament and thus were entirely dependent on the King.³² Confronted with these failures of the English system but wishing to claim its ideals, the founders of the new republic looked to the early roots of their democracy, emphasizing that the Saxons had “introduced into England an elective kingship, an annual assembly of tribal chiefs, the witenagemot—the true forerunner of Parliament—trial by jury, and the common law.”³³ As characterized by Thomas Jefferson and others, the advances of Saxons had been undermined by the Norman Conquest and its introduction of feudalism, then restored by the Magna Carta and, finally, despite numerous popular struggles, lost again to more recent forms of governmental corruption and oppression.³⁴ The newly formed United States was to revive the purer form of democratic governance attributed to the settlers’ Saxon ancestors.³⁵

From the beginning, this “mission” affected the United States’ relationship to international law. In laying the foundation for their war of independence, the American settlers were making the radical claim that they, rather than the British Crown, possessed the legal right to colonize North America as they deemed appropriate.³⁶ In three centuries of European expansion, the legal framing of colonialism had been considerably secularized, with sovereignty coming to be vested in the various European crowns rather than the pope, but in no case had the colonists themselves made the case that they independently possessed the right to possession and dominion over “infidel” lands.³⁷ On its

³¹ See MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY* 62–63 (1970).

³² The undemocratic nature of this relationship and the colonists’ resulting grievances are reflected in the provisions of the Declaration of Independence, which reads as a bill of indictment against George III. While issues of taxation, trade, immigration, and access to American Indian lands were clearly motivating the signers, it is interesting to note how the bulk of their complaints are phrased in terms of the King’s refusal to comply with established processes of governance. See *THE DECLARATION OF INDEPENDENCE* paras. 3–30 (U.S. 1776).

³³ PETERSON, *supra* note 31, at 57.

³⁴ See WILLIAMS, *supra* note 24, at 267.

³⁵ See *id.* (summarizing arguments made by Jefferson in a 1774 pamphlet entitled *A Summary View of the Rights of British America*). The colonists also relied on indigenous models, but these were rarely acknowledged. See generally DONALD A. GRINDE, JR., *THE IROQUOIS AND THE FOUNDING OF THE AMERICAN NATION* (1977); DONALD A. GRINDE, JR. & BRUCE E. JOHANSEN, *EXEMPLAR OF LIBERTY: NATIVE AMERICA AND THE EVOLUTION OF DEMOCRACY* (1991); BRUCE E. JOHANSEN, *FORGOTTEN FOUNDERS: BENJAMIN FRANKLIN, THE IROQUOIS, AND THE RATIONALE FOR THE AMERICAN REVOLUTION* (1982).

³⁶ See Grey, *supra* note 29, at 880–90.

³⁷ See *id.* at 891. See generally WILLIAMS, *supra* note 24.

face, the American leaders were taking a position that violated international law as it was recognized by the “civilized” world, for under that law, colonies certainly had no right to rebel. As legal scholar Thomas Grey bluntly concludes, “[t]he case for independence could not be made in legal terms.”³⁸

To justify their actions, the Angloamerican rebels’ Declaration of Independence accused the King of having “plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people,” bringing in mercenaries “to compleat the works of death, desolation, and tyranny, already begun with circumstances of Cruelty & Perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.”³⁹ As this passage indicates, they were invoking the law of nations to lay the foundation for their claim to independence. However, in asserting a legal right to rebel under these conditions, the colonial leaders certainly were not prepared to recognize a similar right of American Indians to self-determination.⁴⁰ Thus, one of the points of contention raised by the Declaration was the colonists’ claim that the King’s actions were leaving them unprotected against “the merciless Indian Savages whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.”⁴¹

The international law being invoked explicitly privileged the rights of colonizing powers over indigenous peoples.⁴² In essence, the “founding fathers” were asserting their superior rights *as* colonizers, claiming to better represent the civilization being brought to the New World and denouncing Britain for treating them as colonial subjects rather than actors. American leaders invoked a law that recognized freedom and equality as inherent rights, but because the United States was created very literally by appropriating the land and labor of others, they needed to rationalize the disparities between the rights they claimed for themselves and those granted to their colonial subjects. To do this, they emphasized the construct of civilization upon which Western

³⁸ Grey, *supra* note 29, at 890.

³⁹ THE DECLARATION OF INDEPENDENCE paras. 26–27 (U.S. 1776).

⁴⁰ The political ideology of both the American and French Revolutions emphasized a right to self-determination. See B.C. NIRMAL, *THE RIGHT TO SELF-DETERMINATION IN INTERNATIONAL LAW: EVOLUTION, UN LAW AND PRACTICE, NEW DIMENSIONS* 27–28 (1999). However, the right of *colonized* peoples to self-determination only began to be recognized in the aftermath of World War I, and then only in extremely limited form and with respect to the colonies of defeated powers. See *id.* at 29, 31–36; ANGHIE, *supra* note 8, at 115–95; HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 27–49 (1990).

⁴¹ THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).

⁴² See ANGHIE, *supra* note 8, at 13–31; WILLIAMS, *supra* note 24, at 59–225.

law relied,⁴³ depicting the indigenous peoples inhabiting the lands claimed by European and Euroamerican colonizers as “heathen” and, increasingly, “savage.”⁴⁴ Not being civilized—i.e., not having conquered nature—these Others had made no “progress” in the Western scheme of development and therefore had no prior history worth acknowledging.⁴⁵ Once colonized peoples were defined as less than fully human, it was a short leap to justifying the appropriation of their “unsettled” lands for “productive” use and either eliminating the inhabitants or using them, much as domesticated animals, simply for their labor power.⁴⁶

This paradigm also provided the underlying rationale for the construct of an American “manifest destiny” to expand across the continent and to acquire overseas territories. Between 1803 and 1853, as a result of the Louisiana Purchase, the acquisition of Florida, the annexation of about half of Mexico, and the occupation of the Oregon territory, the United States extended its territorial claims to encompass all of what is now known as its lower forty-eight states.⁴⁷ In 1867, it also claimed Alaska by virtue of its “purchase” from Russia.⁴⁸ There was, of course, continued resistance from indigenous peoples in these territories, but in 1890, following the Wounded Knee massacre, the United States declared the “internal frontier” to be closed.⁴⁹

Summarizing this expansionist ideology, attorney and author John O’Sullivan coined the phrase “manifest destiny,” opining in 1845 that America’s claim “is by the right of our manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the

⁴³ See VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 80–82 (Fulcrum Publishing 2d ed. 1994) (1973); FITZPATRICK, *supra* note 17, at 41–42, 72, 92–95; WASWO, *supra* note 16, at 6.

⁴⁴ See FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 43, 76–78 (W.W. Norton 1976) (1975) (describing the transition in the early 1600s from an emphasis on indigenous peoples as “wild,” but still people, to “savages” akin to beasts). For background, see generally RONALD SANDERS, *LOST TRIBES AND PROMISED LANDS: THE ORIGINS OF AMERICAN RACISM* (1978). In the U.S. context, see generally WILLIAMS, *supra* note 24; CHARLES M. SEGAL & DAVID C. STINEBACK, *PURITANS, INDIANS, AND MANIFEST DESTINY* (1977).

⁴⁵ See generally WOLF, *supra* note 14.

⁴⁶ See, e.g., WILLIAMS, *supra* note 24, at 171, 227–86.

⁴⁷ For further discussion of this history, see Natsu Taylor Saito, *Colonial Presumptions: The War on Terror and the Roots of American Exceptionalism*, 1 *GEO. J. MOD. CRIT. RACE PERSP.* 67 (2008).

⁴⁸ FREDERICK MERK, *MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY: A REINTERPRETATION* 229 (Harvard Univ. Press 1995) (1963).

⁴⁹ See HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES: 1492–PRESENT* 290 (rev. and updated ed. 1995). On the massacre at Wounded Knee, see RALPH K. ANDRIST, *THE LONG DEATH: THE LAST DAYS OF THE PLAINS INDIAN* 350–52 (1964); DEE BROWN, *BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST* 401–02 (1970).

development of the great experiment of liberty and federative self government entrusted to us. It is a right such as that of the tree to the space of air and earth suitable for the full expansion of its principle and destiny of growth”⁵⁰

The term “manifest destiny” quickly assumed widespread popularity in mainstream discourse, for it evoked the earliest English settlers’ vision of a New Canaan and captured the essence of the United States’ claim to the legitimacy not only of its independent existence, but also its constant expansion.⁵¹ The expropriation of native lands and the concomitant decimation of indigenous peoples within the claimed territory of the United States provided the material base for the extension of U.S. hegemony over other peoples, and the rationale used to accomplish this consolidation “at home” has been extended subsequently to justify the global reach of U.S. power.⁵² This rendering of the American “creation story,” with its framing of origins and purpose, has remained remarkably consistent over time, rationalizing the superimposition of the U.S. model onto international economic, political, and legal systems as well as individual states across the planet while simultaneously being used by American leaders to exempt themselves from participation in many of the institutions it has founded or exerted considerable influence over.

Thus, to give a few examples, in 1823, the United States announced what has come to be known as the Monroe Doctrine in Latin America, a policy described by Hans Morgenthau as a form of “localized imperialism,” under which the United States essentially precluded any further European colonization in Latin America.⁵³ Through the Roosevelt Corollary, announced in 1904, it further claimed for itself the right to intervene in Latin America.⁵⁴

⁵⁰ MERK, *supra* note 48, at 31–32 (quoting John O’Sullivan, Editorial, *The True Title*, N.Y. MORNING NEWS, Dec. 27, 1845).

⁵¹ O’Sullivan had previously used the phrase in criticizing what he termed interference in U.S. expansion into Texas and Mexico, but it became popularized after he published the *New York Morning News* article quoted above, in which he was referring to U.S. plans to acquire Oregon. *See id.* at 24–32. The week after publication of O’Sullivan’s piece, Massachusetts Representative Robert C. Winthrop referred to the phrase in Congress, and it was soon widely referenced in popular discourse. REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* 220 (1981).

⁵² *See* Saito, *supra* note 47, at 99–109.

⁵³ *See* DANIEL C. GILMAN, *JAMES MONROE* 161–62 (1883) (quoting James Monroe, Seventh Annual Message to Congress, Dec. 2, 1823). On Morgenthau’s characterization, see Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1694 n.31 (2000) (citing HANS J. MORGENTHAU & KENNETH W. THOMPSON, *POLITICS AMONG NATIONS* 70 (6th ed. 1985)).

⁵⁴ *See* Louis A. Pérez, Jr. & Deborah M. Weissman, *Public Power and Private Purpose: Odious Debt and the Political Economy of Hegemony*, 32 N.C. J. INT’L L. & COM. REG. 699, 709 (2007).

Following World War I, the Wilson administration went to extraordinary lengths to shape the terms of the Treaty of Versailles and establish the League of Nations, but the Senate's failure to ratify that treaty precluded American participation in the League or the Permanent Court of International Justice.⁵⁵

As World War II drew to a close, the United States played a key role in establishing the United Nations and in ensuring that it was structured in a manner that would preserve American influence.⁵⁶ In 1950, a highly influential report to the National Security Council commonly known as NSC-68 stated that the United States' goal was to "foster a world environment in which the American system can survive and flourish. It therefore rejects the concept of isolation and affirms the necessity of our positive participation in the world community."⁵⁷ The report continued, noting that it was this purpose that "gave rise to our vigorous sponsorship of the United Nations."⁵⁸ Since that time, however, the United States has developed a reputation, even among its allies, for acting unilaterally and often hypocritically with respect to international law—a reality it was forced to confront rather abruptly in 2001 when it lost its seat on the U.N. Human Rights Commission for the first time since 1947.⁵⁹

Even as American leaders continue to emphasize the importance of bringing democracy and the rule of law to all peoples, since the formation of the United Nations, they have exempted the United States quite regularly from the international legal regimes they played an instrumental role in creating.⁶⁰

⁵⁵ See PAGE SMITH, *AMERICA ENTERS THE WORLD: A PEOPLE'S HISTORY OF THE PROGRESSIVE ERA AND WORLD WAR I* 720–38 (1985); FRANCIS ANTHONY BOYLE, *FOUNDATIONS OF WORLD ORDER: THE LEGALIST APPROACH TO INTERNATIONAL RELATIONS (1898–1922)* 138–39 (1999).

⁵⁶ See generally STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS* (2003). On the United States' continued disproportionate influence over U.N. affairs, see PHYLLIS BENNIS, *CALLING THE SHOTS: HOW WASHINGTON DOMINATES TODAY'S UN* (1996).

⁵⁷ National Security Council, NSC-68: A Report to the National Security Council by the Executive Secretary on United States Objectives and Programs for National Security § VI.A (Apr. 14, 1950), *reprinted in* U.S. DEP'T OF STATE, *FOREIGN RELATIONS OF THE UNITED STATES: 1950 NATIONAL SECURITY AFFAIRS, FOREIGN AND ECONOMIC POLICY* 234–93 (1974).

⁵⁸ *Id.* at 253.

⁵⁹ See Connie de la Vega, *Human Rights and Trade: Inconsistent Application of Treaty Law in the United States*, 9 UCLA J. INT'L L. & FOREIGN AFF. 1, 4, 36 (2004) (noting that in 2001, U.S. observer status at the Council of Europe was disputed because the U.S. continues to use the death penalty, and that the U.S. was excluded from the Inter-American Commission of the Organization of American States in 2003 because of a variety of human rights concerns).

⁶⁰ Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 309–13 (2007); Justice Richard J. Goldstone, *The Consequences of the United States Abdicating Its Moral and Political Leadership of the Free World*, 24 ARIZ. J. INT'L & COMP. L. 587, 593–99 (2007); Louis

Thus, for example, U.S. officials have repudiated the International Criminal Court;⁶¹ announced a new doctrine of “preemptive” war, which to all appearances violates the U.N. Charter;⁶² and maintained that the Geneva Conventions are “obsolete” and can be considered optional.⁶³ They have “disappeared” and arbitrarily detained U.S. citizens, permanent residents, and foreign nationals alike in violation of their obligations under both treaties and customary international law⁶⁴ and subjected prisoners to practices condemned internationally and domestically as torture.⁶⁵ In light of the dominant role played by the United States in establishing the financial, political, and military structures through which global power is now exercised and international law defined, the question becomes why it would put such effort into creating a legal regime only to reject it in so many respects.

Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341–45 (1995); van der Vyver, *supra* note 5, at 776–77, 789–95.

⁶¹ Douglas E. Edlin, *The Anxiety of Sovereignty: Britain, the United States and the International Criminal Court*, 29 B.C. INT’L & COMP. L. REV. 1, 5 (2006); Johan D. van der Vyver, Book Review, 18 EMORY INT’L L. REV. 133, 142 (2004) (reviewing BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* (2003)); John R. Worth, *Globalization and the Myth of Absolute National Sovereignty: Reconsidering the “Un-Signing” of the Rome Statute and the Legacy of Senator Bricker*, 79 IND. L.J. 245, 245–47 (2004).

⁶² See MARY ELLEN O’CONNELL, AM. SOC’Y OF INT’L L., TASK FORCE ON TERRORISM, *THE MYTH OF PREEMPTIVE SELF-DEFENSE* 3 (Aug. 2002), <http://www.asil.org/taskforce/oconnell.pdf>.

⁶³ *Id.* In 2002, White House Counsel and future Attorney General Alberto Gonzales sent a memorandum to President George W. Bush, which argued that the “new paradigm” of law occasioned by the war on terrorism “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.” Memorandum from Alberto R. Gonzales, White House Counsel, to George W. Bush, President, U.S., 2 (Jan. 25, 2002), available at http://www.washingtonpost.com/wp-srv/politics/documents/cheney/gonzales_addington_memo_jan252001.pdf; see Aya Gruber, *Who’s Afraid of Geneva Law?*, 39 ARIZ. ST. L.J. 1017, 1022–23 (2007).

⁶⁴ Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 384, 414 (2007); NATSU TAYLOR SAITO, *FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE* 153–69 (2007). See generally DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003).

⁶⁵ On the practices engaged in by the United States at the Abu Ghraib prison in Iraq, see generally SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2004). On the treatment of prisoners at Guantánamo Bay, see generally MICHAEL RATNER & ELLEN RAY, *GUANTÁNAMO: WHAT THE WORLD SHOULD KNOW* (2004). For a summary of the United States’ 2006 report to the supervisory body of the Convention Against Torture (CAT) and that body’s findings that the indefinite detentions of persons at Guantánamo and those extrajudicially rendered to third countries constitute a violation of the CAT, see Note, *Contemporary Practice of the United States Relating to International Law* 100 AM. J. INT’L L. 690, 703–05 (2006). On the findings of the Organization of American States’ Inter-American Commission, see generally Brian D. Tittmore, *Guantanamo Bay and the Precautionary Measures of the Inter-American Commission on Human Rights: A Case for International Oversight in the Struggle Against Terrorism*, 6 HUM. RTS. L. REV. 378 (2006).

Since 2001, American leaders have often cited the exigencies of a newly identified threat of global terrorism to explain away their deviations from international law, invoking the familiar argument that extant rules are inadequate to preserve the United States and, more generally, Western civilization from the ravages of barbarism.⁶⁶ However, such recent displays of disregard for international law are quite consistent with U.S. practice through much of the twentieth century, when terrorism was not considered a major threat.⁶⁷ If, as many have observed, the United States' "do as I say, not as I do" approach to international law is a significant stumbling block to advancing the human rights consensus, the underlying premises of American exceptionalism, not just contemporary U.S. practices, will have to be addressed. The position now being asserted is not fundamentally different from that claimed by the founders when they utilized the colonial law of their era to justify their occupation of North America and simultaneously asserted a prerogative to deviate from its strictures for the greater good of bringing Western civilization to a more advanced stage.

The fundamental premise of American exceptionalism—that it is acceptable and sometimes necessary to violate international law for a "greater good" best determined by American leaders—cannot be successfully countered by the argument that the United States is violating international law.⁶⁸ That fact has already been accounted for, explicitly or implicitly. Challenges to the exceptionalist stance can only succeed if they engage the underlying worldview, which posits Western civilization as the highest stage of a process of unilinear and inevitable human development, and the American state as its most advanced iteration.⁶⁹ Otherwise, one is reduced to accepting the underlying premise and arguing that the "greater good" at issue is not sufficiently "good" to justify this or that particular deviation from the rule of law.

Further, this exceptionalist rationale cannot be countered simply by advocating for U.S. compliance with international law because it is a legal

⁶⁶ For example, President Bush informed Congress that the war on terror "is civilization's fight." Presidential Address to a Joint Session of Congress, Sept. 23, 2001, in GEORGE W. BUSH, WE WILL PREVAIL: PRESIDENT GEORGE W. BUSH ON WAR, TERRORISM, AND FREEDOM 11, 14–15 (2003). On the "uncivilized" nature of the enemy, see Jeanne M. Woods & James M. Donovan, "Anticipatory Self-Defense" and Other Stories, 14 KAN. J.L. & PUB. POL'Y 487, 494–95 (2005).

⁶⁷ For an overview of these practices, see generally Saito, *supra* note 47, at 105–09.

⁶⁸ Rosemary Foot, *Exceptionalism Again: The Bush Administration, the "Global War on Terror" and Human Rights*, 26 LAW & HIST. REV. 707, 708 (2008).

⁶⁹ See *supra* notes 14–20 and accompanying text.

system that still embodies many of the presumptions of the European societies from which it emerged. Such presumptions include the belief in one universal path of human progress, generally measured by the degree to which societies have incorporated scientific and technological “advances,” and a belief in the “values” embodied in Western understandings of the constructs of freedom, democracy and individual rights.⁷⁰ As legal scholar David Kennedy summarizes:

International law has seen itself as the voice of civilization, of the center, of the modern, of the future, and of universal humanism and progress against, or in dialog with, the voices of the non-Christian world, the primitive, underdeveloped, non-Western, outlaw world of those who do not yet see things from a high place.⁷¹

For those of us steeped in this concept of civilization and the understanding of human nature from which it derives, questioning these fundamental beliefs is very difficult. More to the point, it is difficult for us to envision an international legal system which is not rooted in this worldview. However, the movements which have resisted universal applicability of individuated human rights can give us some insight into directions which could be taken by the world order of coming generations.

II. THE DECOLONIZATION OF HUMAN RIGHTS LAW

If we hope to see the emergence of a truly “universal” human rights paradigm applicable to and accepted by all peoples, we may have to be willing to step back from the presumption that a one-size-fits-all Truth can be rationally discerned and structured into the law. Given the extent to which contemporary structures of international law are so deeply rooted in the core narrative of Western civilization, and its history so intertwined with that of European colonialism, meaningful reconsideration of the framework of international human rights law—a project sometimes referred to as its decolonization—would appear to be necessary.⁷² This is a project far beyond

⁷⁰ See generally ANGHIE, *supra* note 8; FITZPATRICK, *supra* note 17.

⁷¹ David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT’L L. & POL. 335, 359 (2000).

⁷² On the decolonization of international law, see, for example, James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013 (2007); Sundhya Pahuja, *The Postcoloniality of International Law*, 46 HARV. INT’L L.J. 459 (2005); Darren C. Zook, *Decolonizing Law: Identity Politics, Human Rights, and the United Nations*, 19 HARV. HUM. RTS. J. 95, 122 (2006).

the scope of this Essay, but a brief consideration of its potential may render it a bit less overwhelming.

Some observations by law professor B. S. Chimni on the work of international lawyers and scholars in India during their first “post-colonial” decades provide one useful starting point. According to Chimni, Indian scholars “indicted colonial international law for legitimizing the subjugation and oppression of Asian peoples . . . [and] emphasized that Asian states were not strangers to the idea of international law” nor culturally incapable of full participation in the international legal system, and developed a strategy of global coalition-building to bring about change within, and expansion of, that system.⁷³ The benefits of this approach, he observes, included the recording of contributions made by those deemed Other to the evolution of law, the realism it brought to attempts to change legal structures, and the emphasis it placed on the inclusion of the world’s vast majority of Third World peoples into contemporary law.⁷⁴ As we entered an era of formal decolonization in the 1960s and 70s, these were similarly important to the incorporation of newly decolonized peoples into the international legal system.

Chimni notes, however, that three basic weaknesses undermined this approach. One was that “the end of colonialism was equated with the end of international relations based on exploitation and violence,” with a resulting failure “to see that the structures that had spawned colonialism remained in place.”⁷⁵ A second was that the adoption of positivist methodology prevented international legal scholars from addressing “the world beyond rules,” precluding analyses of how institutions function within historical and political contexts.⁷⁶ Finally, Chimni observes “that the first generation of international law scholarship represented the post colonial State as standing above conflicts and classes and the role of the intellectuals was viewed as supporting this State in its nation building tasks.”⁷⁷ This, he concludes, resulted in a blindness to the violence of the state, an initial neglect of human rights law, an acceptance of law-making as the prerogative of government bureaucrats, and, most importantly, the exclusion of “consideration of the impact of the international legal structures on the lives of ordinary men and women” and, therefore, of

⁷³ B. S. Chimni, *Teaching, Research and Promotion of International Law in India: Past, Present and Future*, 5 SING. J. INT’L & COMP. L. 368, 369–70 (2001).

⁷⁴ *Id.* at 370.

⁷⁵ *Id.*

⁷⁶ *Id.* at 371.

⁷⁷ *Id.* at 372.

their resistance to the policies and practices of these structures.⁷⁸ Put most simply, the attempt to adopt legal structures that were divorced from the people's stories proved inadequate to meet their real needs.

Extrapolating from this case study, we can see the critical importance of beginning from the premise that *all* peoples—not simply the states that purport to represent them—are the rightful subjects of international law. In turn, this requires recognition of a deep and rich human history in which societies of all different types have developed systems governing their relations with others, and acknowledgement that historical context and political effects cannot be detached from legal norms or institutions and that blindly adopting either the methodological approach or the structures of the currently hegemonic model will predictably reproduce the relationships upon which it was founded and which it went to such pains to maintain. If we take the *all peoples* premise of the UDHR and other human rights treaties seriously, we must likewise take it in historical context, understanding that it refers not simply to the aggregate of individual atomized “units” within the global world order, but to *peoples*, each with their own multilayered identities, cultures, histories, and world views.⁷⁹

With this very simple conceptual shift, the claim to universality, so central not only to the ideology of Western civilization but also to the contemporary international legal system, begins to crumble. Author Gustavo Esteva and Professor Madhu Suri Prakash observe, “[O]ur grassroots experiences continue to teach us that we do not live in a universe, but in a pluriverse; that the universality in the human condition claimed by human rights propagators exists only in their minority worldview.”⁸⁰ Given the multiplicity of perspectives readily evident to anyone willing to see them, the assertion of a universal Truth (or, more fundamentally, that there is one universal Truth), requires a concomitant deprecation of the alternatives. In many ways, this observation summarizes the dilemma of “universalizing” human rights.

The legitimacy of the paradigm of Western civilization rests on its claims to be bringing the twin virtues of material well-being (“development”) and the protection of human dignity (“universal rights”) to all of humanity.⁸¹ Resistance to the imposition of Western “values” is portrayed as an attempt to revert to a pre-Enlightenment “stage” of civilization, in which societies are

⁷⁸ *Id.*

⁷⁹ See ESTEVA & PRAKASH, *supra* note 8, at 11–14.

⁸⁰ *Id.* at 125.

⁸¹ See ANGHIE, *supra* note 8, at 204, 254–58.

ruled by dictators of one sort or another, unconstrained by the need to respect individual rights.⁸² In order for Western civilization to represent the apex of human history, rather than simply one of many possible forms of social organization, it had to define itself in opposition to the Other, for without that Other it could not validate its claims to supremacy.⁸³ Although the rights of peoples to maintain their culture and identity have been recognized over the past few decades,⁸⁴ the movement to expand the catalogue of universally agreed-upon rights also has gained momentum, leading to debates about the legality and acceptability of particular social practices or legal sanctions.⁸⁵ The emphasis of the current human rights paradigm, like that of development, on raising all peoples to a “higher” level of civilization, rather than on erasing the distinction between the “civilized” and the “uncivilized”—or the “developed” and the “un(der)developed”⁸⁶—is part of what allows it to be challenged as simply another attempt by the Western powers to remake all other cultures in their own image.⁸⁷

One expects that there are truly universal values common to all peoples, but finding them by exploring the multiverse of actual worldviews and their attendant values and imposing them by decree are two very different things. If international law is to be decolonized from the perspective of those who have been colonized rather than that of their colonizers, human rights law, too, will have to be broadened to recognize the diversity of human perspectives. In attempting to expand the human rights framework in a manner open to alternative understandings of human freedom and representative forms of governance, a good starting point might be the recognition that in many cultures people are seen as having responsibilities rather than rights—responsibilities to each other, to coming generations, and to the earth itself.

⁸² Antony Anghie observes that “[t]he vocabulary of international human rights law, democracy and the rule of law—and, indeed, market oriented economies—have now become the markers of a ‘civil state.’” *Id.* at 296.

⁸³ *See id.* at 52–65; FITZPATRICK, *supra* note 17, at 38; WASWO, *supra* note 16, at 6.

⁸⁴ *See, e.g.*, International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, S. TREATY DOC. NO. E, 95-2 (1978), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3; United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/61/L.67 (Sept. 13, 2007).

⁸⁵ *See, e.g.*, Abdullahi A. An-Na’im, *Islam and Human Rights: Beyond the Universality Debate*, 94 AM. SOC’Y INT’L L. PROC. 95 (2000); Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN’S L.J. 89 (1996); Johan D. van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43 (1998).

⁸⁶ On the terminological shift from civilization to development, see ANGHIE, *supra* note 8, at 196–211. *See generally* Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT’L L.J. 2 (2004).

⁸⁷ *See* ESTEVA & PRAKASH, *supra* note 8, at 117, 204–11.

From such perspectives, justice may be perceived as the antithesis of what we in the West associate with law. Thus, for example, Esteva and Prakash report that within the “pluriverse” of the many Indian peoples of the Mexican province of Oaxaca, indigenous traditions of justice have prevailed, even as they have adapted to five centuries of invasions.⁸⁸ They quote one indigenous Oaxacan who observed that “Westerners . . . represent justice with a blindfolded woman. We want her with her eyes well open, to fully appreciate what is happening. Instead of neutrality or impartiality, we want compassion. The person committing a crime needs to be understood, rather than submitted to a trial.”⁸⁹ Similarly, a municipal president in Oaxaca lamented, “I can no longer do what is fair. Every time I try to bring justice to our community, applying our traditional practices to amend wrongdoings, a human rights activist comes to stop me.”⁹⁰ As these stories illustrate, legal systems may have to reconsider the premise that an abstracted, rational, and universally applicable rule of law best embodies justice.

It is, by definition, impossible to summarize a pluriverse of understandings of what truly constitutes justice and how “rights” are conceived by different peoples. It may, however, be useful to consider just a few perspectives on the construct of “freedom,” often proffered as a universal value. The relevant question here is not whether all peoples wish to be free, but how and by whom the meaning of freedom is determined. A year after the United States invaded Afghanistan, Sonali Kolhatkar, vice president of the Afghan Women’s Mission, contrasted George W. Bush’s self-congratulatory statements about having freed Afghan mothers and daughters from the veil with the harsh realities of their daily lives: “What good is an uncovered face if it is starving to death?”⁹¹ Noting that their most significant problems were starvation, lack of shelter and health care, civil disorder, and so-called ethnic cleansing, Kolhatkar emphasized that what women in Afghanistan needed was not to be freed from the burqa, but “for the U.S. to stop imposing freedom through bombs, stop backing human rights violators and warlords, and stop hindering the security forces from expanding to the rest of the country.”⁹²

⁸⁸ *Id.* at 111.

⁸⁹ *Id.* (quoting Marcos Sandoval of the Triqui people of Oaxaca).

⁹⁰ *Id.* (quoting Rómulo, municipal president in Huayapam, Oaxaca, in a conversation with the authors).

⁹¹ Sonali Kolhatkar, *Afghan Women: Enduring American “Freedom,”* ZMAG., Dec. 2002, at 7, 7.

⁹² *Id.* On the scope of and damage caused by U.S. bombing in Afghanistan, see John Quigley, *The Afghanistan War and Self-Defense*, 37 VAL. U. L. REV. 541, 550–53 (2002). Senate hearings revealed that in 2006, “we saw a resurgent Taliban, growing violence—including an alarming rise in the types of suicide bombings and IED attacks so common in Iraq—and a ballooning opium trade.” Press Release, Senator Robert

Under these circumstances, one must ask what “freedom” means and, again, who gets to decide. For many Iraqis the consequences of “Operation Iraqi Freedom,” as the United States’ 2003 invasion and subsequent occupation was called, have been grim. A study by Iraqi physicians working with epidemiologists at Johns Hopkins University, published by the British medical journal *Lancet* in October 2006, estimated that 655,000 more people had died in Iraq since the invasion than would have died had the invasion not occurred,⁹³ and many sources reported that the civilian death toll had likely exceeded one million by early 2008.⁹⁴ According to Human Rights Watch and other organizations, U.S. forces in Iraq failed to curb massive looting of governmental facilities in the aftermath of the invasion, did not guard military arsenals, and disbanded security forces, creating a climate in which thefts, carjackings, kidnappings, and sexual assaults could be committed with impunity.⁹⁵ A common complaint was that neither Iraqi civilians nor U.S. soldiers were clearly informed of the rules of engagement, with the result that civilians have been disappeared, detained, and killed, and many homes have been demolished by tank and artillery fire.⁹⁶

Some Iraqis, like Fatima al-Naddaf, a spokesperson for a women’s advocacy organization in Baghdad, consider themselves anything but liberated: “Before, Iraq was under sanctions, but at least it was a free country, not occupied.”⁹⁷ According to al-Naddaf, the mass detention of Iraqi men has jeopardized not only their safety but that of women and children, and the incarceration of women has been underreported as well.⁹⁸ Similarly, 63-year-

P. Casey, Jr., Casey on Afghanistan Hearing (Mar. 8, 2007), <http://casey.senate.gov/newsroom/press/release/?id=75f7a67b-229d-4814-ab5a-1b32cc768529>.

⁹³ Gilbert Burnham et al., *Mortality After the 2003 Invasion of Iraq: A Cross-sectional Cluster Sample Survey*, 368 LANCET 1421, 1426 (2006). Of these deaths, 601,000 were attributable to violence. *Id.*

⁹⁴ See, e.g., Tina Susman, *Civilian Deaths May Top 1 Million, Poll Data Indicate*, L.A. TIMES, Sept. 14, 2007, at A6; *Civilian Death Toll in Iraq May Have Surpassed 1 Million*, DAILY STAR (Lebanon), Mar. 25, 2008, http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=90190. Other sources put the total closer to 100,000. See, e.g., Iraq Body Count, <http://www.iraqbodycount.org/> (last visited June 18, 2009).

⁹⁵ Joe Stork & Fred Abrahams, *Sidelined: Human Rights in Postwar Iraq*, in HUMAN RIGHTS WATCH, WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT 93, 96 (2004), available at <http://www.hrw.org/legacy/wr2k4/download/6.pdf>.

⁹⁶ See *id.* See generally ALI A. ALLAWI, THE OCCUPATION OF IRAQ: WINNING THE WAR, LOSING THE PEACE (2007).

⁹⁷ Brian Conley & Isam Rashid, *Iraq: No Day Is a Woman’s Day*, INTER PRESS SERVICE, Mar. 13, 2006, <http://www.ipsnews.net/news.asp?idnews=32476>.

⁹⁸ *Id.*

old Asmaa Ali observes, “[N]ow I feel Iraq has become like a big prison.”⁹⁹ Such stories illustrate not simply that the U.S. version of freedom being brought to Iraq represents occupation and imprisonment for many Iraqis, but that true self-determination cannot be achieved simply by the imposition, welcomed or not, of independent statehood, but must encompass the ability of all peoples to determine the meaning of freedom for themselves.

Decolonizing international law will likely require us to question both the state-centered framework of contemporary legal institutions and the presumption that rights are possessed solely by individuals. According to Robert Vachon, among many indigenous traditional cultures, “it is difficult to understand that rights or entitlements could be homocentrically defined by a human being. That they, furthermore, could be defined by a sovereign state . . . is almost ridiculous.”¹⁰⁰ Thus, from some perspectives, freedom is not a collection of individual rights to be guaranteed by law, but the ability to act in accordance with one’s responsibilities to future generations and the earth itself. “Progress”—at least when defined as movement up a hierarchy of civilization—may be inversely correlated with the ability to be truly self-determining and, therefore, with freedom.¹⁰¹ Articulating alternate visions of human rights and freedoms in any comprehensive or universalizing way, and disentangling them from the many layers of presumptions about history and progress that undergird the master narrative through which contemporary international law defines itself, is an enormous task. More significantly, it

⁹⁹ *Id.* The United States’ claim to be protecting civilization was similarly undermined when U.S. troops allowed the Iraq Museum to be looted of approximately 15,000 historical artifacts, widely viewed as “some of the greatest treasures from ancient Mesopotamia, the birthplace of civilization.” Kirsten E. Petersen, Note, *Cultural Apocalypse Now: The Loss of the Iraq Museum and a New Proposal for the Wartime Protection of Museums*, 16 MINN. J. INT’L L. 163, 164 (2007). On the United States’ failure to intervene, see Juliana V. Campagna, *War or Peace: It Is Time for the United States to Ratify the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts*, 17 FLA. J. INT’L L. 271, 274–82 (2005).

¹⁰⁰ ESTEVA & PRAKASH, *supra* note 8, at 110 (quoting Robert Vachon, *L’étude du Pluralisme Juridique: Une Approche Diatopique et Dialogale*, 29 J. LEG. PLURALISM & UNOFFICIAL L. 163, 165 (1990)).

¹⁰¹ As native Hawaiian scholar Haunani-Kay Trask says, “[b]urdened by a linear, progressive conception of history and by an assumption that Euro-American culture flourishes at the upper end of that progression, Westerners have told the history of Hawai‘i as an inevitable if occasionally bittersweet triumph of Western ways over ‘primitive’ Hawaiian ways.” HAUNANI-KAY TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII* 115 (Univ. of Hawaii Press 1999) (1993). For a classically Eurocentric analysis positing this trajectory in terms of economic development, see generally W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (2d ed. 1971). Marxist analyses have been criticized as similarly constraining. See, e.g., Frank Black Elk, *Observations on Marxism and Lakota Tradition, in MARXISM AND NATIVE AMERICANS* 137, 141 (Ward Churchill ed., 1983) (“[I]t seems Marxists are hung up on exactly the same ideas of ‘progress’ and ‘development’ that are the guiding motives of those they seek to overthrow.”).

cannot be done from “above,” for people must be free to tell their own stories on their own terms—a process diametrically opposed to having those stories rendered into quaint, anthropologically “discovered” pieces of a story which collapses all histories into the narrative of Western civilization.¹⁰²

Breaking out of the unidimensional and highly constricted understanding of rights and freedoms as they have been defined by the purveyors of Western civilization will require nuanced discussions that distinguish between the renunciation of the vision of a grand Eurocentric march through history and the notion that one state of affairs cannot be characterized as more desirable than another. Literary critic Terry Eagleton warns:

It is a mistake to believe that all grand narratives are progressive. . . . But to argue against History as progressive is not, of course, to claim that there is never any progress at all . . . anyone who did would be making quite as meta-narrational a claim as someone who thought that history has been steadily on the up since the sack of Rome. But this is different from believing that, say, there is a universal pattern to history characterized by an inexorable growth of productive forces.¹⁰³

Similarly, with respect to the protection of human rights, we will have to distinguish arguments against the imposition of one universal set of “rights” from the advocacy of simplistic cultural or moral relativism. As Esteva and Prakash emphasize,

[t]hose who have the courage to depart from the Grand March of Human Rights have countless other cultural paths open to them. These cultural alternatives do not entail alliances with the Pinochets, the Pol Pots, the oppressors of Tibet, the Burmese military dictatorship, the propagators of Hindu dowry deaths or Islamic fundamentalism.¹⁰⁴

Pluralism, which acknowledges the significance of deeply held values within particular perspectives or cultures, is in many respects diametrically opposed to relativism, which imposes—universally—a lack of collective values, replacing them with a universe of atomistic individual beliefs.¹⁰⁵

¹⁰² On the positive potential of “storytelling” in legal settings, see generally DERRICK BELL, *AND WE ARE NOT SAVED* (1987); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989).

¹⁰³ TERRY EAGLETON, *THE ILLUSIONS OF POSTMODERNISM* 55 (1996).

¹⁰⁴ ESTEVA & PRAKASH, *supra* note 8, at 126.

¹⁰⁵ *See id.* at 130.

One can acknowledge the importance of the rule of law, including the rights it purports to guarantee, to the extent one acknowledges the realities of contemporary state power, without conceding that the extant balance of political or economic power, or the hegemonic history it would impose upon us, comprises *all* of our reality.¹⁰⁶ One need not limit freedom to a right, or set of rights, guaranteed by a system of law “emanat[ing] from the legislative organ of the state, which has the monopoly of legitimate violence to enforce it.”¹⁰⁷ Instead, freedom can be defined to reflect the understandings of the peoples in the many traditions that have been appropriated by, and often assimilated into, the structures imposed through colonial domination. Speaking with respect to the deconstruction of development theory, Gilbert Rist says,

[T]o dwell so much on the Western specificity of the ‘development’ belief would have been rather futile if one were then to claim that one’s own conclusions were universal. Respect for cultural diversity, then, prohibits generalizations. There are numerous ways of living a ‘good life’, and it is up to each society to invent its own. But this in no way justifies the injustices of the present day, when some continue to ‘develop’ while others have to make do with a ‘happy poverty’—on the false grounds that this corresponds to their particular culture.¹⁰⁸

Similarly, with respect to international law, it seems clear that we must be receptive to the vast pluriverse of alternative worldviews without falling into a simplistic relativism which precludes addressing very concrete injustices.

III. CONSIDERING ALTERNATIVE PATHS

If we want to truly advance the consensus about international human rights in a manner that takes into account the stories, or realities, of all peoples, how would we begin this process? In an analysis that can be usefully adapted to this discussion, Rist proposes three “paths” with the potential to address problems resulting from the presumption that human history is inevitably the

¹⁰⁶ According to Esteva and Prakash, “Gandhi’s politics of liberation epitomized this kind of struggle: appealing to the highest moral ideals of the colonizers, while not renouncing his own culture’s moral ideals, defining human well-being or ‘the good life.’” *Id.* at 135.

¹⁰⁷ *Id.* at 131.

¹⁰⁸ GILBERT RIST, *THE HISTORY OF DEVELOPMENT: FROM WESTERN ORIGINS TO GLOBAL FAITH* 241 (2d ed. 2002).

story of development and growth.¹⁰⁹ The first involves acknowledging contemporary realities without necessarily accepting the ideological justifications—or stories—most commonly accompanying them, i.e., “manag[ing] without illusions a system that is known to be perverse.”¹¹⁰ If we were to approach the extant system of international human rights law by acknowledging its inherent, historically rooted inequities and “manage” them with an eye to realizing its stated goals of international peace and security, including a genuine right to self-determination, perhaps we would be able to open up space in which the purposes and effects of this body of law and policy could be more honestly addressed and decisions about the allocation of the international resources imbued with a higher degree of transparency and accountability.¹¹¹

A second path, described by Rist as “a wager on the positive aspects of exclusion,”¹¹² involves reinforcing alternatives developed by “social movements in the South which have stopped expecting everything to come from the good will of those in power, and no longer believe either in aid or in international co-operation.”¹¹³ This might involve removing the constraints that prevent communities and grassroots organizations from developing their own systems of self-reliance and reviving their own systems of value.¹¹⁴ It might also mean rolling back the efforts of states and of international institutions to uniformly regulate all aspects of human behavior and social interaction,¹¹⁵ again providing space for rediscovering and re-establishing legal processes whose effectiveness would be measured by the degree to which they result in “justice” as understood by the community at issue. Again, this does not require a retreat into relativism or localized majority rule; each community would still function in relationship to state and international structures and a balance would have to be worked out as to the role of these larger institutions. However, that could be done, as it were, from the bottom up, with the well-being of all affected peoples being the measure, thus reversing the current trend of ever-increasing micro-management of social relations determined by an abstracted power and enforced by its monopoly on armed force.

¹⁰⁹ *Id.* at 242.

¹¹⁰ *Id.* at 248; *see id.* at 242.

¹¹¹ *See id.* at 248.

¹¹² *Id.* at 248.

¹¹³ *Id.* at 243.

¹¹⁴ *See id.* at 243–44.

¹¹⁵ *See id.* at 243–48.

Additionally, legal theory must be addressed, something Rist characterizes as developing “strategies of transgression” designed to “extricate thought from the circle of belief.”¹¹⁶ This involves stepping back from our beliefs, challenging the ideas considered self-evident in ordinary discourse, and constructing non-hegemonic explanatory models which recognize a wide range of historic and cultural realities.¹¹⁷ Attempts to unleash the liberatory potential of alternative systems of world order need not necessarily mean the wholesale destruction of current mechanisms for international consultation and cooperation, but these institutions and procedures must certainly be opened to the wide range of perspectives and histories embodied in the stories of the peoples of the world.

Lumbee legal scholar Robert Williams provides one example of the positive effects of opening an international body, the Working Group on Indigenous Peoples, to the pluriverse of human stories.¹¹⁸ Williams explains that the Working Group set aside the usual “screening function[s]” employed in such venues—usually questions of what is to be considered valid evidence and who has standing to present it—to allow for broader participation.¹¹⁹ After summarizing just a few of the stories he heard over the course of a decade,¹²⁰ Williams concludes that even within the limits of U.N. procedures and the statist structures of contemporary international law, this process had a visible impact on the legal institutions through which colonialism continues to function:

Such stories told by indigenous peoples . . . have raised consciousness in international human rights forums about the continuing genocidal threat of the European doctrine of discovery. . . . And through the power of their stories, indigenous peoples have begun to transform legal thought and doctrine about the rights that matter to them under international law.¹²¹

Without the opportunity to incorporate these narratives, it is unlikely that the U.N. General Assembly’s Declaration on the Rights of Indigenous Peoples¹²²

¹¹⁶ *Id.* at 248; *see id.* at 245–48.

¹¹⁷ *Id.* at 247.

¹¹⁸ Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 DUKE L.J. 660 (1990).

¹¹⁹ *Id.* at 678–81.

¹²⁰ *Id.* at 680–81.

¹²¹ *Id.* at 682.

¹²² U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 7, 2007).

would have been passed in September 2007, after a quarter-century of resistance from the major settler colonial states, most notably the United States, Canada, Australia, and New Zealand.¹²³

Despite its many limitations, the Declaration does recognize the rights of indigenous peoples to: determine their own identities;¹²⁴ maintain and preserve their own histories, cultures, religions, and systems of health and education;¹²⁵ determine their own political status and, in limited fashion, exercise political autonomy;¹²⁶ be protected upon their own lands and in controlling their natural resources;¹²⁷ have their treaties recognized and enforced;¹²⁸ and have such redress as is possible for lands and resources taken from them without their free and informed consent.¹²⁹ If this much can be accomplished within a legal system that, quite literally, was created out of, and for the purpose of, exploiting indigenous peoples, the possibilities for a truly different world order that does not presume the sanctity of Western civilization are surely worth considering.

In laying the groundwork for a re-envisioned and reconstructed system of human rights law capable of protecting the well-being of all peoples, our “strategies of transgression” must, of course, take into account the ideological and material realities of our time. Given the extraordinary military, economic, and political power currently wielded by the United States, it is unlikely that substantive change can occur on a global scale without addressing the U.S. approach to international law and institutions and, in turn, confronting American exceptionalism. International law as currently recognized evolved quite recently from a system that was self-consciously designed to accommodate relations between and among the “civilized” states of Europe and later extended to encompass states subsequently recognized by the original members of this “community” as sufficiently assimilated into this system.¹³⁰

While contemporary geopolitical realities must be acknowledged, of course, it is also becoming evident that the political, economic, and military

¹²³ For background information, see International Work Group for Indigenous Affairs, Declaration on the Rights of Indigenous Peoples, <http://www.iwgia.org/sw248.asp> (last visited June 18, 2009).

¹²⁴ U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 122, art. 8(2)(a)

¹²⁵ *Id.* arts. 13(1), 15(1), 21(1).

¹²⁶ *Id.* arts. 3–4.

¹²⁷ *Id.* art. 8(2)(b).

¹²⁸ *Id.* art. 37(1).

¹²⁹ *Id.* art. 10.

¹³⁰ See ANGHIE, *supra* note 8, at 144–46, 199–207.

structures created by these states has brought us a world order which is neither just nor sustainable.¹³¹ Simply insisting that the United States play by the rules of this international order will not resolve the most fundamental problems that have been generated by that order.¹³² As we are gradually forced to confront the reality that civilization may be rapidly rendering the planet uninhabitable,¹³³ we might do well to rethink the fundamental premises of the deeply embedded notions of manifest destiny and human progress and to begin reconstructing our understanding of human rights by drawing on the depth of understanding and experience found in the “pluriverse” of human societies. In turn, this will require reconceptualizing the stories of civilization and of American exceptionalism so deeply embedded in Western worldviews, and incorporating the narratives of those who have been historically excluded, not simply because of their intrinsic value but because they will allow us to see the inadequacies of contemporary international legal norms and structures. To paraphrase Ben Okri, perhaps if we change the stories on which our legal order is built, we will be able to expand that order to reflect the rights—and responsibilities—of all peoples.¹³⁴

¹³¹ For alarming summaries of statistical indicators, see *Extinction Rate Across the Globe Reaches Historical Proportions*, SCI. DAILY, Jan. 10, 2002, <http://www.sciencedaily.com/releases/2002/01/020109074801.htm> (noting an estimate that half of all living bird and mammal species will be extinct within the next two or three centuries); UNDP, *supra* note 4, at 257–60 tbl.9; UNDP, HUMAN DEVELOPMENT REPORT 2006: BEYOND SCARCITY: POWER, POVERTY AND THE GLOBAL WATER CRISIS 2 (2006), available at <http://hdr.undp.org/en/media/HDR06-complete.pdf>; WORLD BANK, 05 WORLD DEVELOPMENT INDICATORS (2005), available at <http://devdata.worldbank.org/wdi2005/Cover.htm>.

¹³² See, e.g., AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 5, at 2.

¹³³ Much has been written about this devastation, although generally from a perspective that assumes it is a problem for “civilization” to solve. See, e.g., Donald A. Brown, *Thinking Globally and Acting Locally: The Emergence of Global Environmental Problems and the Critical Need to Develop Sustainable Development Programs at State and Local Levels in the United States*, 5 DICK. J. ENVTL. L. & POL’Y 175, 178–96 (1996); AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (1992).

¹³⁴ See OKRI, *supra* note 1, at 46.

