

# Symposium: Human Rights in the United States

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## THE COURSE OF TRUE HUMAN RIGHTS PROGRESS NEVER DID RUN SMOOTH

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“‘Bold new ideas and quick decisions were asked,’” a critic of U.S. foreign policy has written. Innovation, a forward lean, was asked and at times given. Yet innovation often yielded undesired results. “Action diplomacy, carried too far, entangled the United States in the fortunes of nations beyond the area of American interest or understanding,” the critic wrote. “It encouraged the illusion that an internal crisis in a remote land might affect the peace of the world. It led American diplomats to try things in foreign countries that the people of the country ought to have done for themselves.” Nor was paternalistic entanglement the worst consequence. In the words of this critic, action diplomacy “nourished the faith that American ‘know-how’ (odious word) could master anything; the ‘when in doubt, do something’ approach to an intractable world; the officious solicitude that degenerated into cynical manipulation and finally into bloody slaughter.” With tragedy came a new respect for those who had resisted innovation for its own sake; that is, the critic wrote, for those persons “‘who had learned from long, disillusioning experience that there were few or no new ideas, bold or otherwise, that would solidly produce the dramatic changes then sought.’”<sup>1</sup>

One well might expect to find these words in a critique of how the administration of President George W. Bush handled human rights and foreign affairs. After terrorists attacked New York and Washington on September 11, 2001, officials indeed demanded “forward-leaning” ideas for what they called a “new kind of war.”<sup>2</sup> Action stifled doubt. The United

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1. Authorship of this critique will be discussed *infra* note 6 and accompanying text.

2. See Memorandum re: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, from Alberto R. Gonzales to George W. Bush, President of the United States (Jan. 25, 2002) (“[T]he war against terrorism is a new kind of war.”), reprinted in THE TORTURE PAPERS 118, 119 (Karen J. Greenberg & Joshua L. Dratel eds., 2005); R. Jeffrey Smith & Dan Eggen, *Gonzales Helped Set the Course for Detainees*, WASH. POST, Jan. 5, 2005, at A1 (reporting that during preparation of post-September 11 legal memoranda, Gonzales, then White House Counsel and later Attorney General, “often repeated a phrase used by Defense Secretary Donald H. Rumsfeld to spur

States jumped to talk with peoples whose languages it could not understand. "The survival of liberty in our land increasingly depends on the success of liberty in other lands," Bush declared in his second inaugural address. "The best hope for peace in our world is the expansion of freedom in all the world."<sup>3</sup> Professing to pursue dual goals of fighting terrorism and spreading democracy, the United States chose sides in conflicts it could not comprehend and bolstered leaders who seemed more willing to toe Washington's line than to address needs within the territories they claimed to control. Emphasis on state security, meanwhile, invited encroachments on individual security. Encroachers included agents not only of the United States and other liberal democracies, but also of countries long criticized as human rights violators. Newly emboldened, the latter joined the former in arguing that antiterrorist exigencies allowed harsh measures.<sup>4</sup> Yet manipulation of legal constraints did not prevent the deaths of innocents: Even by conservative estimates, civilian casualties in Iraq now exceed 82,000 women, children, and men.<sup>5</sup>

This account would seem to link contemporary policy to the foregoing critique; in point of fact, however, the words first quoted do not criticize Bush. They were written decades ago by the historian Arthur M. Schlesinger, Jr.<sup>6</sup> His words aimed at another President, from another party and era: John F. Kennedy, whose tenure was marked not only by survival in the Cuban Missile Crisis but also by debacle at the Cuban Bay of Pigs, not only by assistance to the civil rights movement but also by surveillance of its leader, Rev. Martin Luther King, Jr.<sup>7</sup> Kennedy's attraction to novelty had,

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tougher anti-terrorism policies: 'Are we being forward-leaning enough?'). On the scope of the argument that a "new kind of war" required a "new paradigm" of law, see Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2089 & n.9, 2093-94 (2005) [hereinafter Amann, *Abu Ghraib*].

3. President George W. Bush, Second Inaugural Address (Jan. 20, 2005), available at <http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html>.

4. For background on the legal constraints in the wake of September 11, see generally Diane Marie Amann, *Punish or Surveil*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 873 (2007); Amann, *Abu Ghraib*, *supra* note 2; Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263 (2004).

5. See Iraq Body Count, Documented Civilian Deaths from Violence, <http://www.iraqbodycount.org/> (last visited Apr. 20, 2008) (stating that 82,856 to 90,390 civilians had suffered violent deaths since the spring 2003 coalition invasion of Iraq). Other estimates are much higher. Gilbert Burnham, Riyadh Lafta, Shannon Doocy & Les Roberts, *Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey*, 368 LANCET 1421, 1421, 1426-27 (Oct. 21, 2006), available at <http://www.the-lancet.com/webfiles/images/journals/lancet/s0140673606694919.pdf> (estimating nearly 655,000 Iraqi deaths as of July 2006 and citing other estimates above that of the Iraq Body Count).

6. ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 440-41 (Ballantine Books 1996) (1978). All quotations in the first paragraph of this essay appear on these pages of this book by Schlesinger. The internal quotations that begin and end this essay's first paragraph constitute Schlesinger's own quotations from JOHN PATON DAVIES, JR., FOREIGN AND OTHER AFFAIRS 198 (1st ed. 1964).

7. SCHLESINGER, *supra* note 6, at 286-352, 353-65, 443-48, 499-532 (discussing, respectively, civil rights, FBI surveillance of King and others suspected of communist sympathies, the Bay of Pigs, and the missile crisis).

as Schlesinger put it, “its most genial expression in the Peace Corps, its most corrupt in the mystique of counterinsurgency.”<sup>8</sup>

To sketch parallels between the Bush administration and another long past is by no means to claim that global challenges and state responses have remained the same for half a century. The United States’ struggle against terrorism differs in kind from its campaign against communism, just as World War II differed from the Cold War. So too the means of struggle. Technology enables lighter and more lethal weaponry, transported, like information itself, to an extent and at a speed once unimaginable. Technology’s reach thus makes less illusory the concern that problems in one land—violence, poverty, disease—soon might visit harm upon neighboring lands. Yet these differences ought not to drown out the cautionary tale that similarities tell. Foreign affairs parallels suggest that although new ideas deserve attention, they ought not to enjoy uncritical acceptance. An idea ought rather to withstand a test of tradition, administered with a humility that, as Schlesinger’s account underscores, is not always foremost in the American mind.

#### PATIENTLY PROMOTING HUMAN RIGHTS ABROAD

Resolutions to the question at hand—the United States’ proper role in promoting human rights around the world—may be reached in this spirit of tradition and humility. But some answers no doubt will frustrate some human rights activists. Consider, for example, the concept of “responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>9</sup> Horror at atrocity may spur the activist to call for action on that basis, as in fact has occurred in the context of crisis in Darfur.<sup>10</sup> Tradition and humility, conversely, may counsel against action on that basis alone, for at least three reasons. First of all, there is the matter of the law. Despite its noble aim and catchy acronym—R2P—responsibility to protect is not a component of any binding treaty and has not yet crystallized into a norm of customary international law. More than a few jurists remain uncertain about the legal force and precise contours both of responsibility to protect and of its older variant, humanitarian intervention.<sup>11</sup> Sec-

8. *Id.* at 440.

9. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (declaring that states collectively have this responsibility whenever an individual state fails to provide such protection to its own population).

10. See U.N. Human Rights Council, *Report of the High-Level Mission on the Situation of Human Rights in Darfur Pursuant to Human Rights Council Decision S-4/101*, Advance Unedited Version, 2, 6, 9–10, 12, 14, 19–20, 25, U.N. Doc. A/HRC/4/80 (Mar. 7, 2007), available at [http://media.washingtonpost.com/wp-srv/world/documents/darfur\\_hrc.pdf](http://media.washingtonpost.com/wp-srv/world/documents/darfur_hrc.pdf).

11. See generally Karen Engle, “*Calling in the Troops*”: *The Uneasy Relationship Among Women’s Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. J. 189 (2007); Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT’L L.J. 703 (2006); Nigel S. Rodley & Başak Çali, *Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law*, 7 HUM. RTS.

ond, there is the matter of what underlies that uncertainty: Recognition that states sometimes have labeled as “humanitarian” interventions actually undertaken for non-altruistic reasons, and that in any event interventions which managed initially to curtail violence often have failed at longer-term tasks like rehabilitating ex-combatants and forestalling new fighting at intervention’s end. Third, there is the matter of institution-building. Resort to new ideas as a response to malfunction in old mechanisms is understandable but not necessarily optimal. A better endeavor might be reinforcement of extant means for securing the rule of law, coupled with resistance to adding new layers of legal theory unless the endeavor proves the old mechanism truly unworkable. In the case of atrocity, first resort thus should be to means such as the U.N. Security Council, the Geneva Conventions on the laws of armed conflict, treaties against torture and genocide, and international criminal justice.<sup>12</sup> In the long term prevention must be pursued, not by uncritical embrace of bold new ideas that promise to effect bold new change, but rather by patient support for persons who work from within to construct a civil society that settles disputes fairly and without use of force.

This is a less bold initiative, of course. It is likely to inch along on an uneven path, and may show no results for a generation or more. Yet if the global goal is to nurture human rights in ways meaningful within humanity’s myriad cultures—as it should be—an approach that proceeds with humility and with attention to tradition seems likely to establish a truer course for U.S. action abroad.

#### RECLAIMING AMERICA’S HUMAN RIGHTS TRADITION

On the home front the United States can and should take dramatic action. The need is there, and not just in one southern city still in a shambles years after Hurricane Katrina.<sup>13</sup> Throughout urban America homicide is becoming a sad but familiar fact of life.<sup>14</sup> In some violent neighborhoods, as many as one of every three children suffers from post-traumatic stress disorder.

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L. REV. 275 (2007); Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99 (2007).

12. See U.N. Charter arts. 39–51 (setting forth the Security Council’s collective security role); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

13. See generally LAUREL E. FLETCHER, PHUONG PHAM, ERIC STOVER & PATRICK VINCK, *REBUILDING AFTER KATRINA: A POPULATION-BASED STUDY OF LABOR AND HUMAN RIGHTS IN NEW ORLEANS* (2006), available at <http://www.law.berkeley.edu/news/2006/Katrina%20Report-June7.pdf>.

14. See, e.g., Bob Herbert, Op-Ed., *A Bloodbath in Newark, and Beyond*, N.Y. TIMES, Aug. 11, 2007, at A15; Solomon Moore, *Killings Surge in Oakland, and Officials Are Unable to Explain Why*, N.Y. TIMES,

der, nearly double the rate experienced by American service members returning from Iraq.<sup>15</sup> Governmental preference for the punitive response ends up searing many young men with the brand of “criminal,” a label that often strips them of any role in the political process and any hope of gainful employment.<sup>16</sup> Capital punishment—a domestic practice that is a lightning rod for international criticism—absorbs immense portions of the public fisc and judicial time yet has little measurable deterrent effect.<sup>17</sup> Measures aimed at prevention of crime and other social ills have fallen by the wayside. Education seems in a perpetual crisis;<sup>18</sup> the crisis in health is ever-growing.<sup>19</sup> Jobs paying a living wage and once-taken-for-granted benefits are hard to come by.<sup>20</sup> Little wonder the income gap separating America’s haves and have-nots is on par with that of the year just before Roaring Twenties boom ended in economic bust.<sup>21</sup> And race, or national origin, not infrequently figures as a predictor of disadvantage.<sup>22</sup> This state-

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June 22, 2007, at A13; Kate Zernike, *Violent Crime in Cities Shows Sharp Surge, Reversing Trend*, N.Y. TIMES, Mar. 9, 2007, at A14.

15. Jill Tucker, *Hidden Victims of Violence*, S.F. CHRON., Aug. 26, 2007, at A1 (referring to “recent research and the country’s top child trauma experts”).

16. See Solomon Moore, *Justice Dept. Numbers Show Prison Trends*, N.Y. TIMES, Dec. 6, 2007, at A26 (reporting on government data showing that “[a]bout one in every 31 adults in the United States was in prison, in jail or on supervised release at the end of last year,” and adding that these “data reflect deep racial disparities in the nation’s correctional systems, with a record 905,600 African-American inmates in prisons and state and local jails”).

17. In California, the state with America’s largest death row, “maintaining the . . . death penalty system costs taxpayers more than \$114 million a year . . . not counting the millions more in court costs needed to prosecute capital cases and hold post-conviction hearings in state and federal courts.” Rone Tempest, *Death Row Often Means a Long Life*, L.A. TIMES, Mar. 6, 2005, at B1. On average it has cost “more than a quarter of a billion dollars for each life taken at state hands.” *Id.*

18. See, e.g., Sam Dillon, *Schools Scramble for Teachers Because of Spreading Turnover*, N.Y. TIMES, Aug. 27, 2007, at A1; Elissa Gootman, *Few Minorities Get Best High School Diplomas*, N.Y. TIMES, Nov. 30, 2005, at B5; Juana M. Gyek, *Officials Meet to Discuss Crisis in Education*, THE SUN (Yuma, Ariz.), Jan. 15, 2008; Eddy Ramirez, *Room to Improve*, U.S. NEWS & WORLD REP., Nov. 12, 2007, at 45.

19. See, e.g., Editorial, *Bleak Findings on Health Insurance*, N.Y. TIMES, Aug. 29, 2007, at A22 (hereinafter Editorial, *Bleak Findings*) (citing Census Bureau statistics showing 47 million uninsured people in 2006, up from 44.8 million in 2005); Erik Eckholm, *In Turnabout, Infant Deaths Climb in South*, N.Y. TIMES, Apr. 22, 2007, § 1, at 1 (reporting rises in infant mortality in Mississippi, as well other Southern states, which have raised questions among doctors about a possible link to “the growing epidemics of obesity, diabetes and hypertension among potential mothers”).

20. See, e.g., STEVEN C. PITTS, UC BERKELEY CTR. FOR LABOR RESEARCH AND EDUCATION, *JOB QUALITY AND BLACK WORKERS: AN EXAMINATION OF THE SAN FRANCISCO BAY AREA, LOS ANGELES, CHICAGO, AND NEW YORK 5–7* (2007), available at [http://laborcenter.berkeley.edu/blackworkers/blackworkers\\_07.pdf](http://laborcenter.berkeley.edu/blackworkers/blackworkers_07.pdf); Editorial, *Bleak Findings*, *supra* note 19 (attributing the jump in persons without health insurance, by 2.2 million from 2005 to 2006, largely to shrinking job benefits).

21. David Cay Johnston, *Income Gap Is Widening, Data Shows*, N.Y. TIMES, Mar. 29, 2007, at C1 (reporting that “[t]he top 10 percent [of Americans] . . . reached a level of income share not seen since before the Depression” and “collected 48.5 percent of all reported income in 2005”).

22. E.g., PITTS, *supra* note 20, at 5–7 (showing blacks to be disproportionately unemployed or employed in low-wage, no-benefits jobs); Dana Canedy, *Troubling Label for Hispanics: ‘Girls Most Likely to Drop Out’*, N.Y. TIMES, Mar. 25, 2001, § 1, at 1 (citing census data showing that Hispanic children leave school without diplomas at a rate two or more times greater than the rates for black or white children); Erik Eckholm, *Plight Deepens For Black Men, Studies Warn*, N.Y. TIMES, Mar. 20, 2006, at A1 (reporting on statistics which “show that the huge pool of poorly educated black men are becoming ever more disconnected from the mainstream society, and to a far greater degree than comparable white or

ment by Professor Jonathan Simon puts the problem succinctly: "The odds of an African American man going to prison today are higher than the odds he will go to college, get married, or go into the military."<sup>23</sup> In short, on too many fronts the United States is failing to assure human security.<sup>24</sup> The United States is failing, that is, in its duty to protect the liberty, safety, and well-being of its own people.

That last sentence may startle given the earlier argument against uncritical adoption of R2P, the doctrine of responsibility to protect. The two positions are not at odds, however. To declare that states have a collective responsibility to act against certain forms of violence is to invoke a new and soft norm, legally unenforceable without resort to older, treaty-based regimes whose own founding charters do not recite that norm. In contrast, to say that the United States must protect the liberty and security of persons within its jurisdiction is to reclaim well-grounded domestic law and tradition. For although the statement that "[e]veryone has the right to life, liberty and security of person" is made most precisely in an international instrument,<sup>25</sup> the concept has roots in the common law tradition and lies at the keystone of the U.S. Constitution.<sup>26</sup> The concept thus may be found in provisions like the Suspension Clause, which limits the state's power to detain persons without judicial review.<sup>27</sup> It animates in particular the substantive guarantees of the Constitution's Due Process Clauses, as discussed in myriad judgments of the U.S. Supreme Court.<sup>28</sup> The bond between con-

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Hispanic men," so that "[e]specially in the country's inner cities . . . finishing high school is the exception, legal work is scarcer than ever and prison is almost routine, with incarceration rates climbing for blacks even as urban crime rates have declined"); Michael A. Fletcher, *Middle-Class Dream Eludes African American Families*, WASH. POST, Nov. 13, 2007, at A1 (reporting on a study showing that "[n]early half of African Americans born to middle-income parents in the late 1960s plunged into poverty or near-poverty as adults").

23. JONATHAN SIMON, GOVERNING THROUGH CRIME 141 (2007).

24. The comprehensive approach to human needs set forth in this essay has much in common with "human security" as that concept is taking shape within the United Nations and some nation-states. See generally COMM'N ON HUMAN SECURITY, HUMAN SECURITY NOW (2003), available at <http://humansecurity-chs.org/finalreport/English/FinalReport.pdf> (final report of an independent commission supported by Kofi Annan, then the Secretary-General of the United Nations). Full exploration of this relationship is warranted, but is unfortunately beyond the scope of this essay.

25. Universal Declaration of Human Rights, art. 3, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

26. See, e.g., Diane Marie Amann, "Raise the Flag and Let It Talk": On the Use of External Norms in Constitutional Decision Making, 2 INT'L J. CONST. L. 597, 606-07 (2004) (describing historical and theoretical connections between domestic constitutional law and international human rights norms); Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 811-39 (2000) (tracing international impact of U.S. constitutional norms respecting criminal process).

27. U.S. CONST. art. I, § 9, cl. 2. Cf. *Rasul v. Bush*, 542 U.S. 466, 473-74 (2004) (describing habeas corpus as "a writ antecedent to statute . . . throwing its root deep into the genius of our common law," a body of law that predates the U.S. Constitution of 1789) (internal quotation marks omitted) (quoting *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945)).

28. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 673 & n.41 (1977) (citing William Blackstone's *Commentaries* and Article 39 of the Magna Carta as sources for the Fifth and Fourteenth Amendments' due process guarantee of liberty, which encompasses the freedom from "unjustified intrusions on per-

stitutional rights and human rights is manifest in writings like this one by Justice John Paul Stevens:

[T]he Court has made it perfectly clear that a burden on the individual interest in equal respect and equal treatment may constitute an arbitrary deprivation of liberty without any inquiry into the procedures that accompanied the deprivation. One of the elements of liberty is the right to be respected as a human being.<sup>29</sup>

Among the most important contemporary affirmations of this tradition is the 1941 speech in which U.S. President Franklin D. Roosevelt laid the groundwork for eventual entry into World War II by reminding the country what was at stake.<sup>30</sup> It was a fight, he explained, for “the simple, basic things that must never be lost sight of in the turmoil and unbelievable complexity of our modern world.”<sup>31</sup> Those “basic things” comprised a host of social, economic, civil, and political concerns, which Roosevelt distilled into “four essential human freedoms”: first, “freedom of speech and expression”; second, “freedom of every person to worship God in his own way”; third, “freedom from want,” that is, “economic understandings which will secure to every nation a healthy peacetime life for its inhabitants”; and fourth, “freedom from fear,” to be achieved at the international level by arms reduction and “the cooperation of free countries, working together in a friendly, civilized society.”<sup>32</sup>

The speech espoused a broad view of the relation of a state to its people, both in its joinder of social and economic rights to civil and political rights and in its implication that it is the state that bears responsibility for the overall well-being of its people. The view both captured and furthered an ethos then present in the United States, as evidenced by the Statement of Essential Human Rights compiled in the mid-1940s under the auspices of the American Law Institute.<sup>33</sup> Accompanying nearly every right—each of which fits within Roosevelt’s Four Freedoms—was a declaration that “[t]he state has a duty to protect this freedom.”<sup>34</sup> The experts who drafted the

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sonal security”); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 114–15 (1873) (Bradley, J., dissenting) (citing the same sources as supporting the fundamental rights to “personal security” and “personal liberty”).

29. John Paul Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277, 284 (1986).

30. Franklin Delano Roosevelt, The Annual Message to the Congress, in 1940 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 663, 670 (1941).

31. *Id.* at 671–72.

32. *Id.* at 672.

33. *Statement of Essential Human Rights*, 50 DICK. L. REV. 7–19 (1945).

34. *Id.* at 7–17. The exact words appear as the second paragraph of Articles 1, 2, 4, 5, and 6, which guarantee freedom of religion, opinion, assembly, and association, as well as freedom from unreasonable interference with privacy or property. Explicit statements of state duty likewise appear in Articles 3, 7, 8, and 11 through 16, which guarantee freedom of speech, the right to fair trial, freedom from arbitrary detention, and the rights to education, to work amid reasonable conditions, to adequate food and housing, to social security, and to participation in government. Duty is implicit in the limitation that Article 10 places on state deprivations of property.

document scarcely saw those declarations as boilerplate, as their commentaries on two rights illustrate. Of the state's duty respecting the right to a domestic aspect of the freedom from fear—that is, the “[f]reedom from unreasonable interference with his person, home, reputation, privacy, activities, and property”—the experts wrote:

This Article imposes a duty upon the state to take measures to prevent the use of force and falsehoods by individuals or groups of individuals which would interfere with the safety, honor, and welfare of others. It sanctions and requires the state to organize such police force and to impose such criminal or civil liability or both, against the offenders, as may be necessary to give to the people within the borders of the state a reasonable degree of security against the aggressions and frauds of others.<sup>35</sup>

As for the right to social security—an aspect of Roosevelt's freedom from want—the experts wrote:

The duties imposed upon the state by this Article are to see that resources of society are organized:

- (1) to raise standards of health
- (2) to prevent sickness and accident
- (3) to provide medical care wherever needed, including maternity cases
- (4) to provide for the financial support of persons deprived of earnings who lack means of livelihood, including the involuntarily unemployed and their dependents, the aged, widows and orphans.<sup>36</sup>

Even as they invited private as well as public initiatives to satisfy these goals, the experts underscored that the duty to make certain that “the essential right stated in the Article is reasonably secured” remained with the state.<sup>37</sup>

It must be borne in mind that this Statement did not assert the justiciability of every enumerated right, any more than Roosevelt's articulation of Four Freedoms posited the courtroom as the sole forum for redress. These pronouncements of state duty resemble the directive principles found in national constitutions adopted in the mid-twentieth century<sup>38</sup> far more

35. *Id.* at 10–11.

36. *Id.* at 17.

37. *Id.*

38. Examples are the Irish and Indian constitutions that took effect in 1937 and 1950, respectively, the latter having borrowed the concept from the former. IR. CONST., 1937, art. 45; INDIA CONST. arts. 36–51. See also GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 76–79 (1966) (discussing the interrelation of these two postcolonial constitutions); Maureen B. Callahan, *Cultural Relativism and the Interpretation of Constitutional Texts*, 30 WILLAMETTE L. REV. 609, 613 n.24 (1994) (same). Despite the constitutional declaration of nonjusticiability, India's Supreme Court has developed an interpretive approach by which to give some judicial effect to the state's directive-princi-



than they do the favoring of judicial remedies found in subsequent international human rights instruments.<sup>39</sup> The assumption that many violations of rights would be challenged in political rather than judicial arenas may have aided the embrace of the Statement, first by the American Law Institute and soon after by a principal drafter of the 1948 Universal Declaration of Human Rights.<sup>40</sup>

The debate respecting the extent of state responsibility, sometimes labeled the question of negative versus positive liberties, is beyond the scope of this inquiry. Details of implementation are of secondary concern; first, reaffirmation of America's human rights tradition will have to stir in policymakers a sense of obligation to act. In reclaiming that tradition the United States must address at once the most acute problems. The United States thus must come to grips with the reality of violence in the lives of many Americans, particularly in certain neighborhoods. Then it must work to reduce such violence through fair and effective enforcement of criminal laws, through attention to rehabilitation as well as punishment, and through preventive measures. It must fortify the educational system and work in particular to stanch early departures from school, given the link between dropout rates and relegation to low-paying, no-benefits jobs. It must tackle the crisis in health and health care, produced in part by a failure of market forces to assure Americans' mental and physical well-being. It must trace the causes and desirability of income inequalities. Finally, whenever domestic harms are shown to relate to attributes like race, ancestry, country of birth, or similar factor, it must work to eliminate such iniquitous causes of inequality.

#### A FINAL WORD ON THE MATTER OF HUMILITY

Genuine progress toward these domestic objectives surely would trench the United States' global role as a promoter of human rights. In

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ples duties. See *Tellis v. Bombay Mun. Corp.*, A.I.R. 1986 S.C. 180 (articulating a right of poor persons to a livelihood, such that the state could not arbitrarily prohibit them from living on urban streets).

39. See International Covenant on Civil and Political Rights art. 2.3(b), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (pledging that each state party will not only assure claimants a hearing before "competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State," but also will work "to develop the possibilities of judicial remedy" for violations of enumerated rights); Comm. on Econ., Soc. & Cultural Rights [CESCR], *General Comment 3: The Nature of States Parties Obligations (Art. 2, par. 1)*, ¶ 5, U.N. Doc. E/1991/23 (Dec. 14, 1990) (approving of the ICCPR provision just discussed, and thus encouraging judicial remedies for claims brought under the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, notwithstanding that the latter treaty is silent on the point).

40. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 57 (2001) (writing that as U.N. diplomat John Humphrey worked to prepare what would prove an important draft of the UDHR he "was particularly impressed by" the Statement of Essential Human Rights, which was produced on the basis of a study sponsored by the American Law Institute).

securing for its own people security at home and in the streets, better health care and education, and freer political, cultural, and spiritual exercise, the United States would establish a model for human rights protection worthy of international emulation. That, in turn, would give rise to a new question: Who should draw attention to this fact?

Americans, understandably, would be tempted to trumpet their achievements. It is to be hoped, however, that proclamation of this renewed status as a leader in human rights would come from others, and not from the United States. That is because it is not just the United States' behavior that drew criticism during this administration and, as the Kennedy example indicates, during others.<sup>41</sup> The repeated assertion that the United States stands alone, as the world's uniquely important actor, likewise fell hard upon international ears. Implicit in the inaugural address already quoted and many other public pronouncements of President Bush,<sup>42</sup> the American exceptionalist claim is made by top-level U.S. officials from both parties. Its most concise phrasing—"America is really, truly the indispensable nation"—is the brainchild of diplomat Madeleine K. Albright,<sup>43</sup> and often was repeated by William Jefferson Clinton, the President for whom she served.<sup>44</sup>

Bruitings of American exceptionalism too often ignore this simple fact: Every nation is exceptional. The distinguishing trait or traits that compose singularity are, after all, integral to national identity. It is true that on the global level the idiosyncrasies of one or more states may garner special notice, for the simple reason that those states possess enough power to insist on accommodation of their demands. But the realist interplay of politics should not have the effect of erasing that which makes less powerful states exceptional. In all nations that champion human rights—core pillars of which are human dignity and cultural diversity<sup>45</sup>—respect for the singular-

41. 1 See *supra* text accompanying notes 6–8.

42. See, e.g., President Bush, *supra* note 3; *Excerpts From President's Speech: "We Will Prevail" in War on Terrorism*, N.Y. TIMES, Nov. 9, 2001, at B6 (quoting Bush's declarations that "[w]e wage a war to save civilization itself . . . [a]nd we will prevail").

43. Elaine Sciolino, *Madeleine Albright's Audition*, N.Y. TIMES, Sept. 22, 1996, § 6, at 63 (quoting Albright, then U.S. Permanent Representative to the United Nations).

44. See, e.g., *Transcript of President Clinton's Second Inaugural Address to the Nation*, N.Y. TIMES, Jan. 21, 1997, at A14 (quoting Clinton as saying that "America stands alone as the world's indispensable nation."); Alison Mitchell, *Albright to Head State Dept.; Republican in Top Defense Job*, N.Y. TIMES, Dec. 6, 1996, at A1 (quoting Clinton as saying that his second term national security team, including Albright, will help ensure that "America remains the indispensable nation, the world's greatest force for peace"). Other Presidents have echoed the claim. See Emmanuelle Jouannet, *French and American Perspectives on International Law: Legal Cultures and International Law*, 58 ME. L. REV. 292, 321 n.118 (2006).

45. See U.N. Charter art. 1 (aspiring to "the principle of equal rights and self-determination of peoples," and to "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"); *id.* at art. 2 (describing as founding principles of the United Nations "the sovereign equality of all" member states and the shunning of "the threat or use of force against the territorial integrity or political independence of any state"). See also ICCPR, *supra* note 39, preamble (stating that "the equal and inalienable rights of all members of the human family . . . derive from the inherent dignity of the human person"); *id.* at art. 27 ("In those

ity of each nation is essential. The United States thus should put aside the off-putting rhetoric of exceptionalism, and opt instead to let an exemplary record on human rights convey the country's uniqueness.

### CONCLUSION

Crisscrosses of intention and action prompt a would-be bridegroom in "A Midsummer Night's Dream" to reassure his intended thusly: "The course of true love never did run smooth."<sup>46</sup> In the wooded world to which they and other couples repair—a place where Puckish potions play upon Athenian authority, with tragicomic results—the wisdom of his words is revealed. For at the end of their ordeal all seem happier, their setbacks perhaps having set them on a truer course. It is a theme to keep in mind while pondering the United States' proper role in promoting human rights around the world. Though American rhetoric has tended to favor the bold stroke and the quick result, history shows human rights unlikely to advance by such an approach. Measures taken abroad, in reliance on an "American 'know-how'"<sup>47</sup> ignorant of cultural complexities, have failed; indeed, in some cases such measures have increased constraints on liberty. Recognition that the course of human rights seldom has run smooth counsels care when acting to promote such rights. In the specific case of the United States, a two-pronged strategy holds promise for a break from the tragic policies of its recent past. The first prong would apply overseas. The United States should work to bolster existing international human rights enforcement mechanisms, resorting to innovation only if mechanisms in place fail despite genuine efforts at reinforcement; furthermore, it should help to strengthen means for enforcement within each nation-state. The second prong would apply at home. The United States must redouble its commitment to the liberty and security of each person, paying particular attention to street violence and steep rates of imprisonment, to inequalities in income and among racial and other groups, and to inadequacies in health care, education, and employment. Improvement of these persistent domestic problems would do much to set the United States upon a truer course of global action in service of human rights.

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States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.").

46. WILLIAM SHAKESPEARE, *A MIDSUMMER NIGHT'S DREAM*, act. I, sc. 1.

47. See, e.g., SCHLESINGER, *supra* note 6, at 441.