

Remarks before the Commission on Unalienable Rights  
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Please accept my thanks for the invitation to speak with you and for your service on this important effort. Grappling with the meaning and implications of human rights is a task that no one generation can complete; comprehension, validation, and commitment require investment of renewing thought and action even though human rights are described as self-evident and eternal. In fact, the reasons why individual nations and even individual people subscribe to notions of human rights vary enormously—and range from idealism to realpolitik—as do their justifications and rationales, which sound in such competing registers as religion, social contract, nature, utility, and game theory.<sup>1</sup> As I will explain, respect for the dignity of each person offers a core basis for human rights in both substance and in attitudes of respect and civility even when we disagree. Your admirable effort to trace ideas about human rights to deep histories and understandings of eternal truths should underscore the importance of engagement with other nations and multinational convenings as we all face unprecedented challenges to human dignity.

Despite disagreements over the sources, origins, and nature of human rights, there is remarkable convergence, bridging diverse societies, nations, historical periods, and religious and

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<sup>1</sup> On reasons and motives for endorsement, see, e.g., Abdullah Ahmed An-Na-Im, *Human Rights in the Muslim World*, 3 *Harv. Hum. Rights. J.* 13 (1990) (noting legitimizing force of human rights endorsement); Burns Weston, *Human Rights*, 20 *New Encyclopedia Britannica* (15<sup>th</sup> ed. 1992) (examining competing ideas and emergence of human rights discourse in the seventeenth to nineteenth centuries).

philosophic traditions, around the existence of human rights. Such overlapping consensus<sup>2</sup> is illustrated by universal rejection of murder, slavery, torture, and other cruel, inhuman, or degrading treatments, as well as universal embrace of equal treatment under law. Professor Orlando Patterson traces the birth of freedom to human experiences with its opposite.<sup>3</sup> Violations of rights are often more readily understood than abstract statements about rights. The Universal Declaration of Human Rights, setting out a statement of fundamental human rights endorsed by nations around the world in 1948, reflected practical agreement despite diverging cultural traditions and rationales, as so well examined in your Chair's beautiful book, *A World Made New*.<sup>4</sup>

To see a right as universal is not to assert that it is universally implemented. Freedom of conscience and religious exercise, rights of privacy and family formation, freedom from

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<sup>2</sup> The convergence on human rights without requiring agreement on justifications, was well expressed by Jacques Maritain, who noted agreement behind the Universal Declaration of Human Rights. Jacques Maritain, Introduction, in *Human Rights: Comments and Interpretations* 9-10 (UNESCO ed., 1949). John Rawls introduced the notion of “overlapping consensus”: the concept that diverse individuals who subscribe to apparently divergent or conflicting “comprehensive doctrines” (such as differing religious traditions) may nonetheless endorse a core set of norms for different reasons. John Rawls, *The Idea of an Overlapping Consensus*. *Oxford Journal of Legal Studies*, 7 *Oxford J. Legal Stud.* 1 (1987). For a similar—indeed, converging—idea, see Cass R. Sunstein, *Commentary: Incompletely Theorized Agreements*, 108 *Harv. L. Rev.* 1733 (1995). Finding rationales distinctive to varied traditions suggests both the truth and the grounds for commitment to human rights across multiple cultures and societies. Seeing such a basis for the justification for human rights does not, however, mean a narrow or thin view of the scope and content of those rights. Joshua Cohen, *Minimalism about Human Rights: The Most We Can Hope For?* 12 *J. of Political Philosophy* 190 (2004).

<sup>3</sup> Orlando Patterson, *Freedom: Freedom in the Making of Western Culture*, Vol. I (1991); David Scott, *The Paradox of Freedom: An Interview with Orlando Patterson*, 17 *Small Axe* 96 (2013). And just as slavery helped people articulate freedom, mass murder helped people identify genocide as a gross violation of human rights.

<sup>4</sup> Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

governmental tyranny, and equality under the law are salient examples of human rights that remain universal but are often violated in practice.<sup>5</sup> The Holocaust during World War II gave rise to the vow of “Never Again,” yet the world has witnessed subsequent genocides.

Widespread condemnation of violations underscores the fundamental nature and sweeping acknowledgment of basic human rights and the duty of individuals and states alike to respect the rights of others.<sup>6</sup>

At their core, human rights are founded on the dignity of each person.<sup>7</sup> It is not by accident that the Universal Declaration of Human Rights begins with the statement that “all human beings are born free and equal in dignity and rights.” Equal dignity of each person underlies the command to respect every person’s conscience and worth. Aharon Barak, formerly president of the Israel Supreme Court, noted that in the lives of human beings, the concept of human dignity “is loaded with 2,500 years of history.”<sup>8</sup> Most national constitutions and

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<sup>5</sup> See Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* 13 (2011) (the key justice norms of international human rights prosecutions is that “the most basic violations of human rights—summary execution, torture, and disappearance—cannot be legitimate acts of state and thus must be seen as crimes committed by individuals” and therefore must be prosecuted).

<sup>6</sup> See Hugo Grotius, *The Jurisprudence of Holland* 293, 315 (Robert W. Lee, trans. and ed. 1926) (asserting as a feature of nature the injunction to “respect one another’s rights.”)

<sup>7</sup> Justice James Wilson, one of the framers of the U.S. Constitution, wrote in the first constitutional decision by the Supreme Court: “A State, useful and valuable as the contrivance is, is the inferior contrivance of man, and from his native dignity derives all of its acquired importance.” *Chisholm v. Georgia*, 2 U.S. (2 Dal.) 419, 453, 455 (1793) (opinion of Wilson, J.). The dignity embraced in human rights is not linked to rank within a social hierarchy but to the natural dignity of each human—a notion expressed well by early American patriot Thomas Paine. See Michael J. Meyer and W. A. Parent, Introduction, in *The Constitution of Rights: Human Dignity and American Values* 1, 4 (Michael J. Meyer and William A. Parent, eds., 1992).

<sup>8</sup> Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* 16 (2015).

international human rights treaties for the past fifty years emphasize human dignity.<sup>9</sup> American law professor and diplomatic figure Oscar Schachter explained that references to human dignity in human rights documents leave the definition or meaning of dignity to intuitive recognition of the intrinsic worth of each distinct human being. That worth explains the centrality of individual choice in beliefs and ways of life, the importance of participation in larger groups to the development of human personality and meaning, and the affront to human worth created by deprivations of sufficient means for subsistence and opportunities to work.<sup>10</sup>

Attention to the dignity of others is essential to both individual and national development. The significance of human dignity to the development within nations is documented in the empirical work of Nobel Prize-winning economist Amartya Sen. His work demonstrates that poor economic opportunities reflect lack of freedom, while human rights protections promote economic security.<sup>11</sup> Moreover, his work evidences how enforcement of civil and political rights reduces the risk of major social and economic disasters such as famine, as people free to complain can alert and press governments to respond to crises such as food shortages or contagious viruses.<sup>12</sup> Depriving individuals of equal rights to participate in political and economic life undermines their dignity and denies neighbors and societies of their contributions and talents. Attending to human dignity, therefore, diminishes the significance some might

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<sup>9</sup> See Mary Ann Glendon, *A World Made New* 175, 263 n.2 (2001). See also Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3<sup>rd</sup> ed. 2014) (dignity can be thought of “as the intellectual center of the entire culture of human rights”).

<sup>10</sup> Oscar Schachter, *Human Dignity as a Normative Concept*, 77 *Am. J. Int. L.* 848 (1993).

<sup>11</sup> Amartya Sen, *Human Rights and Capabilities*, 6 *J. Hum. Dev.* 151 (2005).

<sup>12</sup> Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (1981). See also Amartya Sen, *Development and Freedom* (1999); Amartya Sen, *The Idea of Justice* (2009).

attribute to distinctions between political and civil rights on the one hand, and social and economic rights on the other.<sup>13</sup>

It is individual dignity that defends rights against tyranny, and that grounds opportunities to learn and to participate in cultural, scientific, and civic worlds. Respect for individual dignity means resisting efforts to dehumanize any individual or group or to deny any individual their rights simply because of their race, gender, identities, or other circumstances.<sup>14</sup> Individual dignity undergirds the commitment to security within nations and within a global order, the ability to seek asylum from persecution, and the right to equal protection under the law.<sup>15</sup> The dignity of each individual lies behind the condemnation of such practices as rape as a weapon of

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<sup>13</sup> For analyses of the interdependence of political/civil and social/economic rights, see United Nations Development Programme, *Human Development Report 2002* (2002); Henry Shue, *Basic Rights: Subsistence, Affluence, and American Foreign Policy* (2d. ed. 1996); Karel Vasek, *For the Third Generation of Human Rights: The Rights of Solidarity*, International Institute of Human Rights, 1979; Daniel Whelan, *Indivisible Human Rights: A History* (2011); Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 *Notre Dame L. Rev.* 1153, 1168 (1998); James W. Nickel, *Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights*, 4 *Hum. R. Q.* 985 (2008); Flavia Piovesan, *Social, Economic, and Cultural Rights and Political and Civil Rights*, *Int'l J. Hum. Rts.* (Jan. 2004); David Petrasek, *The Indivisibility of Rights and the Affirmation of ESC Rights Presentation* (Oct. 2010), <http://humanrightshistory.umich.edu/files/2012/08/Petrasek.pdf>; Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 *Hum. Rts. Q.* 63 (2004); David Trubek, *Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs*, in *Human Rights in International Law: Legal and Policy Issues*, 207 (Theodore Meron, ed., 1984).

<sup>14</sup> For a recent effort to explain human rights as universal, and not dependent on particular cultural understandings or misunderstandings, see Maria Elisa Castro-Peraza, Jesús Manuel García-Acosta, Naira Delgado, Ana María Perdomo-Hernández, Maria Inmaculada Sosa-Alvarez, Rosa Llabrés-Solé, and Nieves Doria Lorenzo-Rocha, *Gender Identity: The Human Right of Depathologization*, 16 *Inter. J. Environ. Research and Public Health* 978 (March 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6466167/>.

<sup>15</sup> See United Nations General Assembly, *Universal Declaration of Human Rights* (1948). See also Jack Donnelly, *International Human Rights* 23 (3<sup>rd</sup> ed. 2007) (“Human rights rest on an account of a life of dignity to which human beings are ‘by nature’ suited,” even though there is no widely accepted theory of human nature).

war, medical experimentation on unconsenting prisoners, and denial of equal legal rights to individuals with disabilities.

Rooted in religious views of divine creation, and also recognized by many with reference to human biology and culture rather than religious grounding, the notion of human dignity demands respect for the conscience and beliefs of others.<sup>16</sup> These are rights, not elements of grace or charity.<sup>17</sup> That means these rights inhere in each human being and cannot be revoked by a government, nor surrendered by an individual. Such ideas undergird the founding and ongoing commitments of the United States stated so well in the Declaration of Independence launching this nation. It did take time and struggle to ensure that these commitments include women, children, and previously enslaved individuals; the ideas extend to all human beings. “[A]ll men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”<sup>18</sup>

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<sup>16</sup> Patricia S. Churchland, Human Dignity from a Neurophilosophical Perspective, in Human Dignity and Bioethics: Essays Commissioned by the President’s Council on Bioethics (March 2008), [https://bioethicsarchive.georgetown.edu/pcbe/reports/human\\_dignity/chapter5.html](https://bioethicsarchive.georgetown.edu/pcbe/reports/human_dignity/chapter5.html); Immanuel Kant, Critique of Practical Reason (Mary Gregor ed. & trans. (1997)); Bertrand Russell, “A Free Man’s Worship,” in The Meaning of Life, in E.D. Klemke and Steven Cahn, eds. 56 (2008); Who Are You?: Reaffirming Human Dignity (Oct. 28, 2019) (Cardus Religious Freedom Institute synthesis of views from religious and nonreligious sources), [https://static1.squarespace.com/static/57052f155559869b68a4f0e6/t/5ddd8a7f8dca7851719d6140/1574800033977/Who-Are-You-Reaffirming-Human-Dignity-v2\\_CARDUS.pdf](https://static1.squarespace.com/static/57052f155559869b68a4f0e6/t/5ddd8a7f8dca7851719d6140/1574800033977/Who-Are-You-Reaffirming-Human-Dignity-v2_CARDUS.pdf)

<sup>17</sup> Louis Henkin, The Age of Rights 2 (1990). Natural *rights* are possessed by individuals who can claim them, and this is different from natural *law*, which conveys principles formulated without demands that individuals can make. Mathias Risse, On American Values, Unalienable Rights, and Human Rights, Ethics & International Affairs (forthcoming spring 2020).

<sup>18</sup> Declaration of Independence: A Transcription (July 4, 1776), found in America’s Founding Documents, National Archives. Founder John Dickinson said that fundamental rights and liberties were “not annexed to us by parchment and seals, they are created in us by the decrees of Providence, which establish the laws of our nature.” John Dickinson, Of the Right to Freedom: And of Traitors (1804), in A Library of American Literature, An Anthology in Eleven Volumes (Edmund C. Stedman and Ellen Mackay Hutchison, comp. 1891),

Thomas Jefferson, the Declaration's key drafter, later explained that the authority of the Declaration "rests then on the harmonizing sentiments of the day."<sup>19</sup> He acknowledged the grounding of those sentiments in both common sense and previous writings by such figures as Aristotle, Cicero, and Locke.<sup>20</sup> Jefferson's phrasing "turned a typical eighteenth-century document about political grievances into a lasting proclamation of human rights," historian of human rights Lynn Hunt observed.<sup>21</sup> The expression of universal, unalienable rights carried with it the conceptual power to challenge denials of rights, regardless of the polity or government in charge.<sup>22</sup>

Thus, this recognition of unalienable rights, distinctively articulated at the founding of what became our nation, was itself rooted in earlier sources and in turn echoed in statements made by other nations and associations of nations.<sup>23</sup> In the case of our nation, the assertion of

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(<https://www.bartleby.com/400/prose/425.html>); see also Gordon Wood, *Creation of the American Republic, 1776-1787*, 293-94 (1998) (quoting John Dickinson, 1766).

<sup>19</sup>See Thomas Jefferson, Letter to Henry Lee (May 8, 1825), available in Founders Online, National Archives.

<sup>20</sup>*Id.*

<sup>21</sup> Lynn Hunt, *Inventing Human Rights: A History* 15 (2007). Similarly, Louis Henkin observed that Thomas Jefferson built on work by John Locke and "took 'natural rights' and made them secular, rational, universal, individualistic, democratic, and radical." Louis Henkin, *The Idea of Rights and the United States Constitution in the Age of Rights* 85 (1990). And Eric Foner explained that the American tradition transformed freedom from a specific idea for a specific world to a universal idea—carrying a challenge to the enslavement of human beings. Eric Foner, *The Meaning of Freedom in the Age of Emancipation*, 81 *J. Am. Hist.* 435, 440 (1994).

<sup>22</sup> Eric Foner, *supra*, at 443, 452.

<sup>23</sup> Louis Henkin, *The Age of Rights* 1-5 (1990) (finding human rights formulations after World War II drew on natural law and natural rights, social contract theories, and ideas of universal rights implied on each person's humanity); Louis Henkin, *The Rights of Man Today* 301 (1988 reprint of 1978 ed.) (rights of man are not divinely ordained but result from God's creation of humans with reason and judgment and from social contract among people).

unalienable rights helped justify the demand for recognition as an independent and sovereign nation. The hope, said Jefferson, was to “appeal to the tribunal of the world” and “to place before mankind the common sense of the subject; ...[in] terms so plain and firm, as to command their assent.”<sup>24</sup> Perhaps, paradoxically but truly, recognition of the universal condition of human beings warranted national independence, allowing a people to secure a new government able to take its place in the community of nations.<sup>25</sup> The Declaration of Independence appealed to people outside the colonies; it reflected and in turn strengthened ideas of natural rights informed by universal reason, natural law, and international law.<sup>26</sup>

What are the earlier sources for the concepts of natural rights and individual human dignity to which the Declaration of Independence appealed? Natural rights, as explained nearly

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<sup>24</sup> Louis Henkin, *The Age of Rights*, supra (quoting Jefferson). Recognition of human rights can be traced to non-Western sources predating the seventeenth century. Cyrus the Great, in the Persian empire of more than two thousand years ago, recognized certain rights; the tenth-century Islamic philosopher Al-Farabi envisioned a moral society of individuals all endowed with rights and living with love and charity among their neighbors. Paul Gordon Lauren, *The Evolution of Human Rights: Visions Seen* 11-13 (1998).

<sup>25</sup> “We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by the Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that *as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which independent States may of right do.*” Id. (italics supplied). For discussions of the relationships between independence and connections and of relational modes of analysis, see Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990); Martha Minow and Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 *Hypatia* 4 (1996). The separation of individuals from one another—and the separateness of nations from one another—at a minimum requires engagement with the other to define and protect boundaries. See Anthony P. Cohen, *The Symbolic Construction of Community* (1985).

<sup>26</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* 84 (2011).



five hundred years ago by Dutch scholar Hugo Grotius, applied to people in all traditions, all nations, all religions, and all legal traditions.<sup>27</sup> Perhaps especially enduring is Grotius's recognition that humans by our nature are both social and self-preserving, so we engage in reasonable pursuit of our own interests while also abstaining from what belongs to others.<sup>28</sup> Understanding each person as social and at the same time self-preserving establishes the reason for devising modes of coexistence, tolerance, and civility. These values received focus after the Reformation produced schisms, distrust, and then lengthy wars in Europe. In the context of such violence, political thinkers including Thomas Hobbes, John Locke, and Roger Williams formulated conceptions of free speech and religious freedom now understood as essential to human rights.<sup>29</sup>

These concepts do not reflect fundamental harmony among humans but instead respond to eternal risks of conflict and disagreements. The self-interest of human beings and the omnipresent risk of conflicts among groups make respect for the rules of order essential. These rules rest on reason and humility, and do not require subjective regard or love for other humans.<sup>30</sup> Rules of social order, to be enduring, depend on recognizing the dignity and worth of

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<sup>27</sup> Lynn Hunt, *Inventing Human Rights: A History* 117 (2007) (discussing Grotius, born in 1583 and died in 1645).

<sup>28</sup> Jon Miller, "Hugo Grotius," *The Stanford Encyclopedia of Philosophy* (Edward N Zalta, ed., Spring 2014), <https://plato.stanford.edu/archives/spr2014/entries/grotius/> (quoting translation of *The Rights of War II* 20.44); Hugo Grotius, *The Rights of War and Peace*, Books I-III, (Richard Tuck, ed., 2005) (translation of Hugo Grotius, *De iure belli ac pacis*).

<sup>29</sup> See Teresa Bejan, *Mere Civility: Disagreement and the Limits of Tolerance* (2017).

<sup>30</sup> *Id.*, at 81 ("While we are stuck in the same boat with people we hate, we had better learn to make the most of it. There is no reason, however, to think that this will make us respect or like each other more. It is usually the opposite.") (describing view of Roger Williams). See also Susan McWilliams, *Civility: When Mere is More: Review of Teresa Bejan, Mere Civility: Disagreement and the Limits of Toleration*, *LA Review of Books* (Jan. 20, 2017), <https://lareviewofbooks.org/article/civility-when-mere-is-more/>; Anthony Mills, "All Must Be

other humans—and expecting reciprocal recognition even among people who disagree. Effectuated within relationships across a given society and across multiple societies, human rights depend upon and generate sufficient toleration of difference to enable coexistence among individuals, groups, and nations.

The toleration of difference entailed by human rights in turn requires civility—courtesy in personal exchanges—even when others exercise their liberties differently than one would oneself.<sup>31</sup> Civility requires discipline and engagement; it requires resisting name-calling; it demands knowledge of the fragility of peace and toleration. Toleration only comes into play when there is disagreement.<sup>32</sup> Putting up with views and practices with which we disagree is necessary to respecting them and treating them with dignity. Practicing regard for even those communities of belief and practice that we dislike can also provide some check against absolute authority structures that could suppress alternatives with grave risks of totalitarian power.<sup>33</sup> Maintaining civility over time both reflects and depends upon respect for human rights and mutual recognition of human dignity.

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Tolerated”: Teresa Bejan’s *Mere Civility, Part I*, *Law and Liberty* (Aug. 28, 2018), <https://www.lawliberty.org/2018/08/27/all-must-be-tolerated-teresa-bejans-mere-civility-part-1/>.

<sup>31</sup> Disagreements even arise over the meaning and demands of civility amid disagreement. See Bejan, *supra*, at 14; Mills, *supra*.

<sup>32</sup> Joshua Halberstam, “The Paradox of Tolerance,” 14 *Philosophical Forum* 190 (1982-83) (tolerance cannot even arise as a question unless the two people or groups disagree with one another, and traditional orthodoxies require commitments that are deliberately intolerant, i.e., by rejecting the possibility that their tenets could be wrong); Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, 28 *Osgoode Hall L.J.* 409 (1990).

<sup>33</sup> See Paul G. Chevigny, *More Speech: Dialogue, Rights and Modern Liberty* (1988) (arguing for justifications for free speech and due process on the basis of the philosophic, psychological, and political needs for dialogue). Respect for communities despite disagreement reaches limits, though, where those communities systematically violate the human rights of individuals.

The relative peace found in the United States despite enormous religious heterogeneity shows the values of tolerance as a cultural, legal, and moral practice. Tolerance has been key to America, past and present, when even large and powerful groups experience some aspects of feeling marginal. In his book *Religious Outsiders and the Making of America*, R. Laurence Moore explores how groups ranging from Latter-Day Saints and Jews to Catholics and mainline Protestants narrate their experiences as outsiders in America.<sup>34</sup> The profound embrace of human rights ideals in the United States may reflect such experiences as lessons in empathy as well as in universal norms of respect.

Toleration and respect remain important not just for relationships between individuals but also in individuals' attitudes and behaviors toward groups to which they do not belong. After visiting America, Alexis de Tocqueville was not the first or the last to note how intermediate organizations diffuse the potential tyranny of a centralized government and offer buffers between the individual and the state.<sup>35</sup> De Tocqueville also warned against the tyranny of the majority. The framers of the United States Constitution resisted intolerance enforced through mandated conformity even in the form of state governments.<sup>36</sup>

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<sup>34</sup> R. Laurence Moore, *Religious Outsiders and the Making of America* (1987).

<sup>35</sup> Alexis de Tocqueville, *Democracy in America* (volumes 1 and 2) were published in 1835 and 1840. See Alexis de Tocqueville, *Democracy in America* (rev'd ed, Henry Reeve, trans. 1899).

<sup>36</sup> See Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* 55-56 (1<sup>st</sup> ed. 1955); see also Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *Colum. L. Rev.* 1 (1988) (discussing values of federalism).

Tolerance of a subcommunity does not entail permission to export to the rest of the society values that contradict the broader society's own commitments.<sup>37</sup> A subgroup may need distinct space to follow its own rules about, for example, marriage, childrearing, alcohol consumption, or diet, but this freedom does not grant a subgroup the right to enforce its beliefs on society more broadly.<sup>38</sup> Individuals within the group still are entitled to protection from group practices that violate their fundamental human rights. Respecting the dignity of each individual means that membership in a particular group must not deny access to human rights and may require avenues of exit for members of a group who otherwise would be unable to claim violation of a human right.<sup>39</sup>

Much of what I have been describing comes from American experiences and American law. We can be justly proud of the distinctive American contributions to these ideas, contributions such as the Declaration of Independence, and the human rights conceptions of Thomas Paine, Thomas Jefferson, and Roger Williams. Treating the human right to hold property as a guarantee regardless of one's birth order, and ensuring voting rights regardless of one's lack of property, were significant American contributions. The American experience is not only supportive of but also a significant influence on global understandings of human rights. The United States has vitally stood up for individuals at risk of murder, torture, or arbitrary detention simply because of their religion, political views, gender, or sexuality. But pride in American

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<sup>37</sup> Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 *J. Family Law* 741 (1987-8).

<sup>38</sup> See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>39</sup> Tolerance does not require giving the subgroup room to adopt a caste system or to implement disrespect for other members of the larger society. See *Bob Jones University v. United States*, 461 U.S. 574 (1983) (rejecting the university's claim to tax-exempt and tax-deductible status).

ideas should lead to humility and respect for the other sources of human rights. Not only did American thinkers rely upon other sources; their ideas called for toleration and respect for other people, other traditions, and other nations. These ideas, attitudes, and engagement culminate in the articulation of unalienable rights in the Declaration and in America's ongoing commitments.<sup>40</sup>

The United States has extensive experiences addressing conflicts that can arise when a population subscribes to multiple cultures and religions—and when tensions appear between multiple human rights. Here and in many other countries, people encounter potential conflicts between religious liberty and gender equality, between family autonomy and protection of children's opportunities, and between freedoms of expression and association and security against violence or subordination.<sup>41</sup> Governance principles including federalism and the distinctions between public and private realms can afford avenues for coexistence between groups that disagree and provide opportunities for exit to individuals who disagree with their

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<sup>40</sup> See Frank Michelman, Reflection, 82 Tex. L. Rev. 1737 (2003); Amartya Sen, Human Rights and the Limits of Law, 27 Cardozo L. Rev. 2913, 2926 (2005) (citing Adam Smith, Lectures on Jurisprudence).

<sup>41</sup> For a thoughtful discussion of religious freedoms versus women's rights, see Kristina Arriaga de Bucholz, Intersection of Religious Freedom and Women's Rights, Council on Foreign Affairs (April 13, 2017), <https://www.cfr.org/conference-calls/intersection-religious-freedom-and-womens-rights>. Valuable discussions of family autonomy and children's rights include Soo Jee Lee, Note: A Child's Voice vs. A Parent's Control, 17 Colum. L. Rev. (2017); Zalman Rothschild, Free Exercise's Outer Boundary: The Case of Hasidic Education, 119 Colum. L. Rev. Forum (2020); and Colleen Sheppard, Children's Rights to Equality: Protection versus Paternalism, 1 Annals Health L. 197 (1992). On how to address violent extremism while preserving human rights, see Center for Strategic and International Studies, Turning Point: A New Comprehensive Strategy for Countering Violent Extremism (Nov. 14, 2016), <https://www.csis.org/features/turning-point>.

own group.<sup>42</sup> The principle of subsidiarity—keeping decision-making closest to where it will have primary effects—offers a tool for addressing some tensions between rights.<sup>43</sup>

Other nations have developed proportionality review to address potential tensions among legally enforceable rights.<sup>44</sup> Under this kind of analysis, which also resembles examination of reasonableness, “the graver the impact of the decision upon the individual affected by it, the more substantial the justification that will be required.”<sup>45</sup> International human rights institutions

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<sup>42</sup> See Martha Minow, *Principles or Compromises: Accommodating Gender Equality and Religious Freedom in Multicultural Societies*, in *Gender, Religion, and Family Law: Theorizing Conflicts between Women’s Rights and Cultural Traditions* 23 (Lisa Fishbayn Joffe and Sylvia Neil, eds., 2013) (considering “federalism, with decentralized authorities empowered to make parallel and conflicting decisions, and privatization, according power to private actors to arrange their own affairs away from public view and differently than a public process would do... Each permits alternatives to all-or-nothing solutions to moral and legal conflicts; each structures avenues for coexistence of diverging groups while retaining processes for collective restrictions of extreme practices.”). At times, seeming conflicts can be resolved by finding a convergence among diverging values. *Id.*, at 15-19 (authorizing employee selection of a health care beneficiary as convergence between a governmental commitment to health benefits for same-sex partners and a religious employer’s commitment to health care access but opposition to same-sex partnerships). On other occasions, social movements and political resolutions address conflicting conceptions of human rights. See Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 *Boston College L. Rev.* 781 (2007).

<sup>43</sup> See Paolo G. Carozzo, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 *Am. J. Inter’l L.* 39 (2003).

<sup>44</sup> Vicki Jackson and Mark Tushnet, eds., *Proportionality: New Frontiers, New Challenges* (2017); Kai Moller, *The Global Model of Constitutional Rights* (2012); Juan Cianciardo, *The Principle of Proportionality: The Challenges of Human Rights*, 3 *J. Civ. L. Stud.* (2010), <https://digitalcommons.law.lsu.edu/jcls/vol3/iss1/1>; Matthias Klatt and Moritz Meister, *Proportionality—a benefit to human rights? Remarks on the I·CON controversy*, 10 *I·CON* 687 (2012).

<sup>45</sup> Katharine Young, *Proportionality, Reasonableness, and Economic and Social Rights* *Proportionality: New Frontiers, New Challenges* (Vicki C. Jackson & Mark Tushnet, eds., Cambridge University Press, 2017). Germany, the nation with the most developed doctrine of proportionality, also has a thoroughgoing and unyielding commitment to the dignity of each human being. Ariel Bendor and Michael Sachs, *The Constitutional Status of Human Dignity in Germany and Israel*, 44 *Israel Law Review* 25 (2011); Edward J. Eberle, *Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview*, 33 *Liverpool Law Rev.* 201 (2012).

permit a “margin of appreciation” allowing individual states a measure of latitude—often using proportionality analysis—to accommodate diverse and localized conceptions of human rights in the interpretation of treaty obligations.<sup>46</sup> Hence, to recognize and implement human rights is not to treat them as unyielding in the face of competing human rights or obligations.<sup>47</sup> Rights, including human rights, are not absolute. Judicial implementation of rights acknowledges limitations required by a rational relationship with a legitimate aim, while upholding the values of dignity, freedom, and equality that undergird such rights. Such guides for implementation and enforcement of human rights pioneered by nations—including our own—strengthen local commitments to rights with rationality.

Devising practical applications of human rights—resolving potential conflicts among rights, and ensuring that human rights have real force in people’s lives—is the work of international institutions and agreements and the work of the rule of law within nation-states. Any nation devoted to human rights needs to commit to the work of such institutions and agreements in order to make human rights more than words on paper. This understanding guided the founders of the United States, who abided by the ancient legal maxim *pacta sunt servanda* (treaties are to be honored), just as it has informed their heirs in politics and leadership. The

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<sup>46</sup> See Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012).

<sup>47</sup> Rules governing speech in schools and other public places and rules governing elections may restrict individual rights in order to ensure sufficient order and equal treatment for speech to be heard, elections to be fair, and education to be effective. Martha Minow, *Education and Democracy*, Harv. L. Rev. Blog (Oct. 17, 2017) <https://blog.harvardlawreview.org/education-and-democracy/>. (Education and democracy “both enhance human freedom but require rules and structure to work. Both need ground rules. Neither can work amid untrammelled violence, disrespect, and lying. Formal rules and informal norms can guide people to assess claims and bolster intolerance of intolerance.”)

role of the United States as a leading architect and endorser of international human rights after World War II contributed to the long peace dubbed “Pax Americana.”<sup>48</sup> That long peace reflects a world order among nations agreeing to work together in ongoing collaborations that require and replenish trust and mutual security.

No one nation can ensure human rights, not even for its own people.<sup>49</sup> Current challenges—from human trafficking for sexual slavery to cyberwar<sup>50</sup>—require renewed collaborations across nations if human rights are to be more than ideals on parchment. Independence and connection thus infuse the network of nations making human rights real. Note the striking similarity to the independence and connection between individual people, propelled by regard for human dignity. The existence of this very Commission expresses commendable interest in issues that are critical to the lives of people unlike all of us-- issues that require testimony and insights from people around the world.

Engagement across differences expresses respect for the dignity of each human being; unalienable human rights attach to children, the elderly, people with disabilities, people of all

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<sup>48</sup> See Charles L. Mee, *The Marshall Plan: The Launching of the Pax Americana* (1984).

<sup>49</sup> See Joseph S. Nye, Jr., *The Future of American Power: Dominance and Decline in Perspective*, *Foreign Affairs* (Nov./Dec. 2010), <https://www.foreignaffairs.com/articles/2010-11-01/future-american-power> (the problem of American power in the twenty-first century, then, is not one of decline but what to do in light of the realization that even the largest country cannot achieve the outcomes it wants without the help of others).

<sup>50</sup> See U.N. Women, *Sex trafficking is a grave violation of human rights and a form of violence against women and children* (Jan. 25, 2011), <http://www.endvawnow.org/en/articles/538-sex-trafficking-is-a-grave-violation-of-human-rights-and-a-form-of-violence-against-women-and-children.html>; Joel Oseiga, *Could Cyberwar Lead to Gross Human Rights Violations?* *Medium* (Dec. 15, 2017), <https://medium.com/@joeloseiga/could-cyber-warfare-lead-to-gross-human-rights-violations-2151b04ba619>.



identities, and people committed to diverse religious and ethnic communities, political parties, and regions. Each generation needs to practice the respect, humility, and discipline required by regard for the human dignity of others. Seeking to understand others, or at a minimum, to accord them respect, forms the practice of human rights. Centuries of human experiences inform theories about human rights: they are rooted in deep traditions and reflect many ideas about the nature of human beings and humans' capacities for reason. But the need to examine and articulate the meanings of human rights requires work in each generation.

The strength or weakness of generation's own commitments will determine the strength or weakness of human rights in practice. New contexts create new challenges. With the emergence of artificial intelligence, how will respect for each individual and protections against new forms of discrimination or oppression be assured? Protecting fundamental human rights in this new age will require new procedures to ensure transparency, accountability, and protection of individuals. Autonomous weapon systems, "designer" gene editing, and other new technologies introduce unprecedented questions about the scope and reach of human rights.<sup>51</sup> Computer "bots" escalate incivility; an authoritarian government on one side of the globe may jeopardize a child's life on the other side of the world by punishing those who report a contagious virus.<sup>52</sup> Reliance on nation states as primary vehicles for human rights faces

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<sup>51</sup> Kenneth Anderson and Matthew Waxman, *Debating Autonomous Weapon Systems, Their Ethics, and Their Regulation Under International Law*, in Roger Brownsword, Eloise Scotfield, and Karen Yeung, eds., *The Oxford Handbook of Law, Regulation, and Technology* (2017).

<sup>52</sup> Repetition of hateful online messages often comes from a limited number of accounts; automated techniques may amplify the problem but may also be useful in detecting it. Suman Kalyan Maity, Aishik Chakraborty, Pawan Goyal, and Animesh Mukherjee, *Opinion Conflicts: An Effective Route to Detect Incivility in Twitter*. *Proc. ACM Hum.-Comput. Interact.* 2, CSCW, Article 117 (Jan. 2018), <https://doi.org/10.1145/3274386>. Suppression of a whistle-blower may be at work in reports of the coronavirus. See Nectar Gan and Natalie Thomas, *Chen Qiushi spoke*

challenges with the growing significance of transborder social networks, terrorist organizations, and multi-national corporations. Respect for the dignity of each human provides a lodestar, but there is work to do if human rights will be meaningful in this brave new world.

I have suggested the need for modesty in claims of sources for human rights because those sources diverge yet they overlap. Multiple sources across time and from different traditions reject terrible violations of human dignity, whatever the theory about justifications and meanings. The centrality of respect for the dignity of each and every person animates human rights and connects civil/political and economic/social rights. Recognizing human dignity means acknowledging how human nature includes capacities for reason, self-interest, sociality, conflict, and connection. Failures to realize human rights in practice are frequent and common. Humility and civility are necessary attitudes and foundations. Clashes among people and even among human rights are inevitable, but national and international institutions devise and implement workable approaches to navigate those clashes. No one nation alone can achieve all it takes to realize human rights; nations, like individual people, are independent but also dependent on others to learn and to achieve their ends. It is right to trace human rights to deep histories and understandings of eternal truths about human beings, but doing so should not still the urgency of renewed engagement and commitment. Unprecedented challenges are upon us. So then is the injunction to participate in the work to improve the practices and institutions invented to realize and effectuate human rights.

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out about the Wuhan virus. Now his family and friends fear he's been silenced, CNN (Feb. 9, 2020), <https://www.cnn.com/2020/02/09/asia/wuhan-citizen-journalist-intl-hnk/index.html>.

Thank you for your devotion to unalienable rights and for this chance to meet together.