

# *Human Rights in the 21<sup>st</sup> Century: Take a Walk on the Dark Side*

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## *Abstract*

This article unpacks three normative claims on which the human rights project is based and exposes the dark side of the project. The author examines the larger context within which human rights has taken shape, and critiques the claim that human rights is part of modernity's narrative of progress; interrogates the assumption that human rights are universal, challenging its dehistoricised, neutral, and inclusive claims; and unpacks the atomised, insular liberal subject on which the human rights project is based and its correlating assumptions about the 'Other' who needs to be cabined or contained lest she destabilises or undermines this subject. The author makes some tentative proposals as to how we can engage with human rights once its dark side is exposed.

We have witnessed an extraordinary proliferation of human rights law in the course of the 20<sup>th</sup> Century and the beginning of this millennium. Contrary to popular belief, business is booming at the United Nations, with its entourage of resolutions, declarations and conventions that now deal with a broad range of abuses across the globe — including racial discrimination, women's rights to equality, the rights of children, and the rights of indigenous groups — all aided and abetted by non-governmental organisations, including faith-based groups, women's groups and other social justice initiatives. There is a sense that the international community is dealing with these 'problems' seriously and handling them with great speed and efficacy.

Yet, the outward sense of progress, of something being done, of a social justice project being pursued in the name of human rights, is emerging as a somewhat disingenuous and illusory endeavour. The record of human rights since their proclamation in the 18<sup>th</sup> Century has been less than stellar. Indeed, the legal interventions that have been pursued in the name of human rights are perhaps the most explicit examples we have to date of how the assumptions that more law equals more equality and freedom, and that human rights is an optimistic and hopeful pursuit, are quite mistaken. In fact, the proliferation of laws in the name of human rights serves at times to remind us how our good intentions, passions and progressive 'swords may have turned into boomerangs.'<sup>1</sup> The human rights

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1 Janet Halley & Wendy Brown (eds), *Left Legalism/Left Critique* (2002) at 4.

promise of progress, emancipation and universalism, has been exposed as myopic, exclusive and informed by a series of global panics especially a panic, over national security, sexual morality, and cultural survival in the contemporary period. What happened to the dissidence and rebellious spirit of human rights? How has a project that held out the promise of a grand spicy fete mutated into an insipid appetiser?

In this essay, I unpack three normative claims on which the human rights project is based and expose its dark side.<sup>2</sup> In the first section, I set out the larger context within which human rights has taken shape, especially the claim that human rights is part of modernity's narrative of progress — that is, human rights represents a step forward in the progress of human development and civilisational maturity. In the second part, I interrogate the assumption that human rights are universal, challenging its dehistoricised, neutral and inclusive claims. In the third part, I examine the atomised, insular liberal subject on which the human rights project is based and its correlating assumptions about the 'Other', who needs to be cabined or contained lest she destabilises or undermines this subject. In the final part of the article, I make some tentative proposals as to how we can engage with human rights once its dark side is exposed.

As a back drop to this article, I refer to Philip Noyce's 2002 feature film, *Rabbit-Proof Fence*. The film relates the story of three young Aboriginal girls — Molly, Daisy and Gracie — who escape from an internment camp at the Moon River Native Settlement where Auber Neville, the Chief Protector for the Aborigine Populace, detains them as wards of the state. The internment camp represents the panic on the part of the Australian state in the early 20<sup>th</sup> Century over the impending disaster resulting from the proliferation of an 'unwanted third race' — the 'half-caste' Aboriginal children. The fear results in the promulgation of special laws for the forcible removal of 'half-caste' children from their families, and internment in detention centres to keep them from 'contaminating' the rest of

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2 My focus on three normative claims is not exhaustive. There are a number of other concerns about the field that are not addressed in this article: see for example, David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (2004). Kennedy lists a host of other pragmatic worries regarding the field. Some of these include: a critique of the way in which human rights has come to occupy the space of emancipatory possibilities, and also effectively marginalise any other emancipatory projects; the narrow focus of human rights on the state, leaving the severe harms produced by non-state actors unaddressed; the generalising vocabulary of human rights which papers over political, ideological and cultural differences; promoting a 'one size fits all' politics; centring the relationship between the state and individual, equating the structure of the state, which enforces, grants, recognises, implements and remedies violations, with freedom; and the false sense of satisfaction that emerges when the building of a human rights movement comes to be equated with the human rights project. He states that signing up to the cause does not bring an end to the practice. Some scholars have argued that human rights are an inherently conservative discourse that enables the violence of development to continue legitimately, failing or lacking the ability to bring about redistributive consequences by challenging the dominant economic and political paradigm of development. Instead, human rights merely controls and orders resistance to that violence. See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and the Third World* (2003) at 28.

Australian society. In the celluloid representation of this fear, the children at the camp are to be bred into white Christian families until the 'native' is fully assimilated and all traces of 'colour' and racial markings erased. But 'half-casts' like Molly remained unassimilable — her skin colour too dark to dilute even if it was put through three generations of breeding. The girls undertake an epic journey of 2000 kilometres across the formidable deserts of Australia to find their way back home to Jigalong by following the rabbit-proof fence that stretches across the outback. Their tortuous journey is intercut with shots of an increasingly desperate, red-faced Neville seeking out ways of recapturing the girls, returning them to Moon River and containing the contaminant.

In real life, the process of reconciliation and healing for the 'Stolen Generation' has ostensibly been partly brought about by *Bringing Them Home*, a report produced by the Australian Human Rights and Equal Opportunity Commission. The report was based on the testimony of victims, documenting the events and human rights violations that resulted from the policy of 'breeding out' the 'half-caste' Aborigine.<sup>3</sup> It concluded that the policy of forcible removal, pursued from 1910 to 1970, constituted genocide and recommended the payment of reparations, the provision of services for the affected persons, and the enactment of new laws in the area of child welfare, family law and juvenile justice.

The process of recuperating the traumatised, alienated subjects of the past into the liberal democratic state through the discourse of human rights represents the metamorphosis of a racist state into one that is caring and compassionate.<sup>4</sup> Human rights become a site for reconciling moments of rupture and exclusion, and bringing the past into synch with the norms and values of liberalism, rather than bringing about a deeper interrogation of those norms and values. However, the release of *Rabbit-Proof Fence* in 2002 disrupts this attempt at tidy closure and a sense of moving on. Screened at a time when the war on terror, the overarching concern with the security of the nation-state and the sovereign subject was (and remains) dominant, celluloid serves to remind the spectator of the new exclusions being produced in the contemporary moment by the liberal democratic state and the beckoning need for a closer scrutiny of the central premises that constitute the human rights project.

I take inspiration from Julius Stone's sociological interpretation of international law to diagnose the dark side of human rights and engage with the

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3 Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997). The terms of reference directed the Commission to examine the effects of 'past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence.' It was also directed to look at the adequacy of services and procedures available to people affected by such separation; the principles for determining the compensation for those affected by these laws and policies; and whether existing laws, practices and policies dealing with the placement and care of Aboriginal and Torres Strait Islander children adhered to the principle of self-determination. See also, Anne Orford, 'Commissioning the Truth' paper presented at the International Conference on Transitional Justice, Bellagio, 2–7 March, 2005.

4 Orford, *ibid.*

assumptions and tensions that underscore the project.<sup>5</sup> My own location as a postcolonial feminist legal thinker prompts me to impact and subvert the terrain of human rights, while at the same time, as a practitioner, to reformulate, rather than abandon, rights as a tool to bring about transformation in the lives of those who are excluded from their ambit. I explore the possible ways in which both of these desires — though on their face antagonistic — can be reconciled so as to avoid the traps of mainstreaming that can sanitise the discourse, and at the same time ensure that a critique of the discourse does not become irrelevant.

### *1. Narrative of Progress*

The establishment of human rights in the mid 20<sup>th</sup> Century as part of a modern project of international institutions was a critical moment. It brought into being the possibility that states could no longer shelter behind the fig leaf of sovereignty for violations committed against individuals. State sovereignty could be cast aside and a state's acts subjected to human rights scrutiny. It was a new form of interventionism that emboldened the liberal internationalist and his or her belief in the virtue of law and principle of universality. Human rights marked a point of arrival — a step in the progress of human development.

This belief in the transformative and progressive potential of human rights is contingent on an assumption that we have, as a civilised world, moved forward, and that the coming together of nation-states in the recognition of universal human rights is a critical part of the liberal project that seeks to advance individual rights and human desires. It is a narrative that is driven by a persistent belief that history has a purpose and direction coupled with an assumption that the world has emerged from a backward, more uncivilised era. Indeed, it reflects the metamorphosis of civilisation from the primitive, into a modern and evolved form, and this progress has emanated from the heart of Europe.<sup>6</sup> It has mostly been achieved except in some of the outposts of the empire. This new emboldened project has received a major impetus in the post-Cold War era in the form of liberal internationalism, which no longer faces any ideological resistance. A veneration of these ideals and hubris born of the profound belief in this justice-seeking project have come to characterise the practice in the field. There is a real earnestness on the part of well-intentioned activists, practitioners, judges and even politicians that they are pursuing a progressive, even righteous, goal.

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5 See for example Julius Stone, *Social Dimensions of Law and Justice* (1966). Stone describes law as an instrument of social control for achieving justice. He rejected a purely analytical approach to legal positivism and focused on the ways judges arrived at considerations of legal policy and principle, as well as the legal authorities that influenced their decisions. His work was deeply influenced by his own social context, in particular his Jewish identity, the treatment of Jews in Nazi Germany and his Zionist inclinations. See Leonie Star, *Julius Stone: An Intellectual Life* (1992).

6 Wendy Brown, *Politics Out of History* (2001) at 10. While human rights emerged partly as a response to the 'barbarism within Europe' during World War II, the focus here is on the implications of this project when conceived in universal terms for those who remained under, or were emerging from colonial subjugation.

Those who do not necessarily regard human rights as such a neat and tidy project — as a project that is progressive let alone transformative — have challenged this narrative of progress. The view that the international recognition of human rights marks an end to an ignorant past and enables the realisation of freedom and equality is challenged as empirically and theoretically flawed: in purely factual terms more human rights violations have been committed in the 20th Century, which was ostensibly the most human rights focused century, than at any other point in human history.<sup>7</sup> As the late Jacques Derrida stated, ‘[n]o degree of progress allows one to ignore that never before in absolute figures, have so many men, women and children been subjugated, starved or exterminated on earth.’<sup>8</sup> And it continues.

There is a dark side to human rights work, which has been exposed by, amongst others, postcolonial scholars, feminists and new scholars in international law.<sup>9</sup> These scholars have examined the costs of this work, revealing some of the resulting, often unanticipated damage done. What has emerged is how it is possible to read the virtuous script of human rights against the grain, to read another narrative into the story line that was, perhaps, never intended by those who inspired the project or to accord a meaning to it that counters or subverts any progressive reading it might have had. Original intent is invariably not knowable. But even if it was, and however well-intentioned it may have been, it does not necessarily continue to inform the constitutive basis of the human rights project — as progressive, emancipatory and liberating. As put by Kennedy, ‘virtue does not always move in the direction of the virtuous’.<sup>10</sup>

Perhaps partly because of these limitations, as well as the powerful hold that sovereignty continues to have on some nation-states, there is another more reactionary critique of human rights that has emerged. In its crude form, this critique views human rights as a corrosive tool that has eroded the legitimacy conferred or exercised through sovereignty, and threatened national and social cohesion. According to this view the era of historical progress and coherence has ceased, and we have entered the age of uncertainty and instability. Today the global flows of human beings across borders, immorality of sex, ‘bogus’ refugees, single parent families, absence of faith, homosexuality and welfare mothers has in part

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7 Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000) at 2.

8 Jacques Derrida, *Spectres of Marx: the State of the Debt, the Work of Mourning, and the New International* (Peggy Kamuf Trans, 1994) at 85 quoted in Douzinas, *ibid*.

9 See for example Anthony Anghie, Bhupinder Chimni, Karin Mickelson & Obiora Okafor (eds), *The Third World and International Order: Law, Politics and Globalization* (2004); Nathaniel Berman, ‘Wake of Empire’ (1999) 14 *American University International Law Review* 1515; Kennedy, above n2 at 3–36; Doris Buss & Ambreena Manji, *International Law: Modern Feminist Approaches* (2005); Vasuki Nesiah, ‘The Ground Beneath Her Feet: Third World Feminisms’ (2003) 4 *Journal of International Women’s Studies* 30; Dianne Otto, ‘Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference’ (1996) 5 *Social & Legal Studies* 337; Anne Orford, *Reading Humanitarian Intervention, Human Rights and the Use of Force in International Law* (2003).

10 Kennedy, above n2 at xix-xx.

brought about the demise of history and an end to progress. This position argues that legitimacy, security and social cohesion reside in the glories of the past and its certainties, which must be retrieved and the encroachments of human rights law on sovereignty arrested. We are indeed witnessing such 'Golden Era' narratives blossom across the world, most explicitly articulated in the rise of and ever increasing legitimacy of the agendas of the religious and conservative right, examples including the Hindu Nationalists in India, the Christian evangelicals in the United States, the British National Party, Austrian Freedom Party, and the far-right Danish People's Party.

In contrast to this deep opposition to the human rights project, a more sophisticated, nuanced position is emerging, which seeks to engage with human rights discourse to pursue a very reactionary and conservative agenda. For example, in his letter to women released on the eve of the Beijing Women's Conference, in 1995, Pope John Paul II addressed the world's women, thanking them and apologising to them if the Catholic Church had contributed to their historical oppression.<sup>11</sup> The Pope recognised that women had and continue to experience historical disadvantage, and called for:

real equality in every area: equal pay for equal work, protection of working mothers, fairness in career advancements, equality of spouses with regard to family rights and the recognition of everything that is part of the rights and duties of citizens in a democratic state.<sup>12</sup>

In a similar vein the Vatican has opposed violence against women, while at the same time distinguished its position from feminists by casting itself as a preserver of the family. The Pope's statements have found popular support amongst women around the world, especially poor women in the global south. Similarly, Christian evangelicals have launched a global crusade against trafficking, more specifically sex trafficking, especially in the so-called 'Third World' as a critical arena of human rights concern.<sup>13</sup> The focus on 'Third World' women resonates with the 'charitable' instincts of evangelicals and 'do good' notions of saving the 'wretched of the earth'. Although this instinct is not to be derided, it is the deeper political agenda of the evangelicals that are cause for alarm. These include their views on sexual integrity and the role of women in the family.<sup>14</sup>

These responses exemplify how human rights are a contested terrain and not one that can simply be read in linear terms. I want to expand on this idea that

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11 John Paul II, *Letter to Women* (29 June 1995): <[http://www.vatican.va/holy\\_father/john\\_paul\\_ii/letters/documents/hf\\_jp-ii\\_let\\_29061995\\_women\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_29061995_women_en.html)> (13 June 2006). For a critical analysis of the strategies of the Vatican at the Beijing Women's conference see Doris Buss, 'Robes, Relics, and Rights: The Vatican and the Beijing Conference on Women' (1998) 3 *Social and Legal Studies International Law Journal* 339.

12 John Paul II, *ibid.*

13 Nina Shapiro, 'The New Abolitionists' *The Seattle Weekly* (24 August, 2004); Lisa Katayama, 'Sex Trafficking: Zero Tolerance' *Mother Jones* (21 May 2005).

14 For an insightful work on role of the Christian Right in the international legal arena and women's rights see Doris Buss & Didi Herman, *Globalizing Family Values: The Christian Right in International Politics* (2003).

human rights is an arena where different visions of the world are fought out and how this struggle is obscured in linear accounts of human rights. It is only through what Salman Rushdie has described as the ‘chutnification of history’ that the layered and complex narrative of human rights is revealed. This includes, for example, an excavation of how the discourse is permeated by imperial ambition, assertions about moral and civilisational superiority, as well as religious evangelicalism.<sup>15</sup> In the contemporary period, there is an explicit example of this complex narrative in the context of the bombing of Afghanistan in October 2001. The attacks took place amidst a cacophony of claims by western leaders that this was a ‘crusade’ against the ‘evil doers’, that ‘Western civilisation was superior to Islam’ and part of the war on terror, which according to one United States general was a ‘Christian battle against Satan’.<sup>16</sup> These claims were wrapped in a strong, bold argument in favour of self-defence, including the right to pre-emptive strikes. Subsequently, as Vasuki Nesiiah argues, there has been a subtle mutation of the discourse on the part of those countries which participated in the Afghanistan offensive, from self-defence to human rights, providing the tool for legitimizing the operation that had initially seemed so suspect.<sup>17</sup> The muscle flexing and macho talk, the language of evil, darkness and crusades that permeated the initial representation of the military conquest, came to be superseded by the gentler tones of women’s rights, peace, religious freedom and democracy that ultimately provided legitimacy for the intervention.<sup>18</sup> In November 2001, after the bombing campaign was launched on Afghanistan, Laura Bush stated:

Only the terrorists and the Taliban threaten to pull out women’s fingernails for wearing nail polish. The plight of women and children in Afghanistan is a matter of deliberate human cruelty, carried out by those who seek to intimidate and control .... Because of our recent military gains in much of Afghanistan, women

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15 Anne Orford, ‘Feminism, Imperialism and the Mission of International Law’ (2002) 71 *Nordic Journal of International Law* 275 (on how feminist engagements with international law are reproducing some of the colonial underpinnings that characterise this field). See also Anghie et al, above n9.

16 The former Italian Prime Minister Silvio Berlusconi is reported to have ‘praised Western civilisation ... as superior to that of the Islamic world and urged Europe to reconstitute itself on the basis of its Christian roots’: Steven Erlanger, ‘Italy’s Premier Calls West Superior to Islamic World’ *New York Times* (27 Sept, 2001) at A8. And Dick Cheney in his remarks on *Meet the Press* stated, ‘I think the world increasingly will understand that what we have here are a group of barbarians ... So it’s an attack not just upon the United States but upon, you know, civilised society ... We also have to work, though, sort of the dark side, if you will ... That’s the world these folks operate in, and so it’s going to be vital for us to use any means at our disposal, basically to achieve our objective. And I think we have to recognise we are the strongest, most powerful nation on Earth’. *Meet The Press* (NBC television broadcast, 16 Sept 2001). See also ‘US is Battling Satan Says Army General’ *BBC News* (UK edition) (17 Oct 2003): <<http://news.bbc.co.uk/1/hi/world/americas/3199212.stm>> (13 June, 2006) where US General Boykin remarked that the war on terror was a war against Satan; See also Sydney Blumenthal, ‘The Religious Warrior of Abu Ghraib’ *The Guardian* (20 May 2004).

17 See Vasuki Nesiiah, ‘From Berlin to Bonn to Baghdad: A Space for Infinite Justice’ (2004) 17 *Harvard Human Rights J* 75. Nesiiah demonstrates how humanitarian intervention has not only constrained violence and militarism, it has also buttressed and complemented it.

18 *Id* at 95.

are no longer imprisoned in their homes. They can listen to music and teach their daughters without fear of punishment.<sup>19</sup>

These words applied the gentle soothing balm of human rights over the preemptive attacks and ‘crusade’ against the ‘evil ones’.<sup>20</sup> The sense of triumphalism, of human rights bringing the Afghan people into the modern age was summed up in the utterly banal yet poignant remark of one US State department spokesman that the Afghans had voted ‘for the first time in five thousand years’.<sup>21</sup> Afghanistan today, much like Africa in an earlier period, was consigned to the ‘waiting room of history’, in a state of ‘nothingness’ until this redemptive moment, when the combined spirit of liberal internationalism, human rights and democracy brought salvation.<sup>22</sup>

Thereafter, it was but one small step towards Iraq. Once again the initial narrative of conquest and occupation is gradually being overwritten by claims of ‘freedom on the march’, where human rights are being equated with democratisation and freedom projects, and the pursuit of ‘infinite justice’. Images of shock and awe were replaced by congregations of Iraqi men and women, struggling in the constituent assembly to bring some form of governance to Iraq and draft a constitution.<sup>23</sup> The language of human rights and democracy have been somewhat muted, if not actually countered, by the daily civilian atrocities committed by the occupying forces and the insurgency, the failure of the newly formed government of national unity to restore law and order, the continuous questioning over the legality of the war, as well as the prison humiliations and abuses at Abu Ghraib and the massacre of Iraqi civilians by US marines in Haditha.<sup>24</sup> Perhaps the jury is still out on this one — it is too early to say whether Iraq can be successfully rescripted as a noble endeavour by the altruistic West, in

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19 *CNN Saturday Morning News: Laura Bush Delivers Radio Address* (CNN television broadcast 17 Nov, 2001). See also Ratna Kapur, ‘Un-Veiling Women’s Rights in the “War on Terrorism”’ (2002) 9 *Duke Journal of Gender Law & Policy* 211.

20 The reference to ‘crusade’ is from the remarks made by George Bush shortly after the September 11<sup>th</sup> attacks, when he stated, ‘This crusade, this war on terrorism is gonna take a while. And the American people must be patient. I’m gonna be patient’ Manuel Perez-Riugs, ‘Bush Vows to Rid the World of Evil Doers’: <<http://archives.cnn.com/2001/US/09/16/gen.bush.terrorism/>> (13 June 2006).

21 US State Department (18 October, 2004) ‘The Afghan Vote’: <<http://www.globalsecurity.org/military/library/news/2004/10/www41019.htm>> (31 March 2005).

22 Dipesh Chakraborty used the phrase the ‘waiting room of history’ to describe the ways in which the non-West is doomed never to be quite modern, for modernity has already been authentically produced in Europe. It is a concept that has defined and shackled the non-West in a discriminatory universalism. See Dipesh Chakraborty, *Provincialising Europe: Postcolonial Thought and Historical Difference* (2000). Also recall Hegel’s statements that Africa has no history: ‘at this point we leave Africa not to mention it again. For it is no historical part of the world: it has no movement or development to exhibit’: George Hegel, *The Philosophy of History* (trans by J Sibree, 1956) at 99.

23 Nesiah, above n17.

24 Ellen Knickmeyer, ‘In Haditha: Memories of a Massacre’ *The Washington Post* (27 May, 2006) at A01; Daniel Henninger, ‘The Indictment of US Troops was Inevitable’ *Wall Street Journal* (2 June 2006) at A18.

particular the United States, to bring democracy and freedom to the Middle East. Yet for some in the United States, this claim appears self-evident. The success of the mission is already evident in the securing of US military bases bordering two 'terrorist states' — Syria and Iran — and the adoption of a democratic constitution by Iraq for the first time in its five thousand year old history.<sup>25</sup> Once again, five thousand years seems to represent the quicksand of history. And universal human rights are cast as impervious to history.

These critiques as well as the reactionary possibilities of human rights, constitute some of the theoretical and practical tensions that characterise human rights law and disrupt the idea that human rights is one long and steady march towards progress.

## 2. *Discriminatory Universality*

In this section, I unpack the normative assumptions that inform the notion of universality to which human rights claims are tethered. The human rights project is based on the assumption that all humans are entitled to enjoy human rights without regard to distinction. It is a claim that regards human rights as being based on notions of objectivity, neutrality and inclusion.

Yet when we examine the Enlightenment project, the precursor to the human rights movement, it exposes a history of how claims to universality and inclusion have co-existed with exclusion and subordination. Recall the moment when Europe was in the midst of a struggle for liberty, equality and freedom, Europe's 'Others' continued to be subjugated under the weight of colonialism and slavery.<sup>26</sup> Even within Europe, gender and racial apartheid established a hierarchy of what and who constituted the liberal subject — the white, Christian, propertied male. While there is an assumption that certain political practices are indeed universal, such as liberty, equality and freedom, these ideals seem to stumble and falter at the moment of their encounter with the unfamiliar, the 'Other' or difference. These values meet with some of the same difficulties today in their encounters with difference and unfamiliarity. Universality is always accompanied by what Denise da Silva evocatively describes as 'the other side of universality'.<sup>27</sup>

While there is some concern over the universalist claims of human rights in light of the harms and exclusions that have characterised its liberal antecedents, there remains a deep commitment to the project and faith in its universal application.<sup>28</sup> The exclusions of the past are regarded as moments of profound inconsistency in what liberalism stands for and how it has operated, for example, in relation to women and other socially disadvantaged groups. As some feminist scholars have argued, it is, in fact, a failure of liberal thinkers to follow their own thought through to its progressive end.<sup>29</sup> For example, subordination by sex was

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25 See David Horowitz, *Unholy Alliance Against America: Radical Islam and the American Left* (2004).

26 Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (2005).

27 Denise da Silva, 'Toward a Critique of the Socio-Logos of Justice: The Analytics of Raciality and the Production of Universality' (2001) 7 *Social Identities* 421.

deemed to be natural and the subject of sex ignored by liberal political philosophers and their theories of justice. It is only through feminism's role in unmasking inequalities in familial arrangements that the promise of liberalism for women is being brought about, and the liberal internationalist endeavour to promote women's human rights globally strengthened.<sup>30</sup> It is the result of manipulation that can be corrected through the gradual process of inclusion of these previously excluded groups. Independence from colonial rule fought and won through the invocation of civil and political rights is used as another example to substantiate this position.

Yet this search to restore liberalism to its pristine elegance and original features is an elusive one, for its history belies the possibility of any such origins. International law coupled with its humanitarian zeal was structured by the colonial encounter and its distinction between the civilised and uncivilised.<sup>31</sup> The search for a standard to both explain and justify the exclusion of non-European subjects from international law in the 19<sup>th</sup> Century was based on the prevailing, and uninterrogated assumption that European states were civilised. In order to gain entry into the community of international law and family of civilised nations, outside communities had to strive to resemble the European.<sup>32</sup>

Revisiting the colonial encounter is critical in order to understand the limitations and possibilities of human rights in the contemporary period. It is essential for human rights advocates to embrace this history. Assertions about the universality of human rights simply deny the reality of those whom it claims to represent and speak for, disclaiming their histories and imposing another's through a hegemonising move. Thus, the liberal tradition from which human rights have emerged not only incorporates arguments about freedom and equal worth but — and this is the core of my argument — it also incorporates arguments about civilisation, cultural backwardness, racial and religious superiority. Further human rights remain structured by this history. This dark side is intrinsic to human rights, rather than something that is merely broken and can be glued back together.

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28 Kathleen Mahoney & Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (1993); Rebecca Cook, 'Women's International Human Rights Law: The Way Forward' in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (1994). In contrast, Anne-Marie Slaughter argues that a distinction should in fact be made between liberal and non-liberal states, with international law applying only to liberal states: Anne-Marie Slaughter, 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine' (1992) 92 *Columbia Law Review* 1907.

29 Martha Nussbaum, *Sex and Social Justice* (1999). See also Martha Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (2005).

30 Id Nussbaum (1999) at 65.

31 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (2002), chapter 2; Anthony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law' (1990) 40 *Harvard International Law Journal* 1; Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

32 Koskenniemi, id at 135.

### 3. *Troubling Subjects*

The liberal subject lies at the heart of the human rights endeavour. This subject is free, unencumbered, self-sufficient and rational, existing prior to history and social context. However, given the arguments already presented about the situatedness of human rights and its liberal underpinnings, it is evident that the sovereign, autonomous subject is unable to survive without the existence of an 'Other'. A host of subjects continue to be denied inclusion into the project, or entitled access only to the extent that they resemble the familiar subject of human rights discourse.

There are at least three different ways in which the 'Other' has been addressed in relation to rights discourse. The first is through the assumption that the difference can be erased and the 'Other' tamed and assimilated through some form of cultural or racial strip. The second is to treat the difference as natural and inevitable. And finally, there is the response that justifies incarceration, internment or even annihilation of the 'Other' because of the threat it poses. These are not rigid and absolute categorisations, but frequently overlap and leak into one another. And all of these responses are present in the contemporary moment.<sup>33</sup>

Assimilation is integral to the liberal tradition. It is accompanied by cultural erasure and plays out on a host of sites. In the context of the colonial encounter in India, assimilation took the form of learning how to imitate the colonial power. The 'universal' principles of liberty, equality and freedom were contingent on the

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33 This analysis parallels some of the arguments presented in a large body of recent scholarship on citizenship and nationality. See generally Linda Bosniak, 'Citizenship Denationalized' (2000) 7 *Indiana Journal of Global Legal Studies* 447. Bosniak examines how citizenship has been denationalised across a range of discourses and how and why such a process is taking place. One stream of this literature argues in favour of a global or world citizenship, given that there is evidence that citizenship is no longer (and should no longer be) bounded by the nation-state as well as the emergence of a universal human rights regime. Some scholars argue that the conferment of rights and benefits on human beings, regardless of their citizenship status, constitutes part of our moral obligation. See for example Martha Nussbaum, 'Patriotism and Cosmopolitanism' in Martha Nussbaum, *For Love of Country: Debating the Limits of Patriotism* (1996) arguing in favour of a notion of 'citizens of the world, challenging the arbitrariness of patriotism and how it can be dangerous, by producing nationalist chauvinism that can lead to an immoral disregard of other people and other cultures'; Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 *Ethics* 250, (examining the aspirational goal of universal citizenship, which assumes that citizenship is a progressive concept which has included more and more people over the course of time — blacks and women, for example.) See also Mike Featherstone, 'Cosmopolis: An Introduction' (2002) 19 *Theory, Culture & Society* 1; Berta Esperanza Hernandez-Truyol & Matthew Hawk, 'Travelling the Boundaries of Statelessness: Global Passports and Citizenship' (2005) 52 *Cleveland St Law Rev* 97 (Hawk proposes a model of formal global citizenship, one that flows from the concept of dual or multiple nationalities, that exists in tandem with national citizenship, and based on the idea of the universality of human rights); Andrew Linklater, 'Cosmopolitan Citizen' (1998) 2 *Citizenship Studies* 23 at 41. Yet it is not at all self-evident that appeals to international human rights law bound to conceptions of a 'global' or 'world' citizen would inevitably rescue an unlawful non-citizen and accord him/her a recognition that transcends the monopoly power of nation-states to determine who counts and who does not. And as argued in this article, universalist claims of human rights have been unmasked as operating along the same axis of inclusion and exclusion that have that has characterised their liberal antecedents.

native's ability to conform or be trained into civilisation. While he was never entitled to full citizenship, citizen-like behaviour nevertheless was encouraged and became part of the lexicon of the 'politically aware Indian.'<sup>34</sup> The native was entitled to certain rights and benefits to the extent that he could reinvent himself as an Englishman. Yet that standard remained an elusive one, often unattainable, for no matter how hard the native struggled to mimic the 'master' at the cost of her own subjectivity, she remained at most, 'almost white, but not quite.'<sup>35</sup>

In the contemporary period, this response is found in the proliferation of new citizenship and nationality laws being enacted throughout Europe and elsewhere. These laws reflect a simultaneous fear of the 'Other', while also providing an opportunity to enable these 'Others' to be part of the universal project of rights and acquire legitimacy through the process of assimilation and their permanent translation into a familiar medium.

One recent explicit example of this response can be found in the Danish family reunification law.<sup>36</sup> According to the *Aliens Act* 2002 (Denmark), the government has sought to restrict the number of resident permits awarded for the purpose of family reunification ostensibly to reduce the number of unemployed aliens.<sup>37</sup> Under the *Aliens Act*, the legal right of family reunification has been withdrawn and replaced with a provision regulating the right to a residence permit in Denmark for the purpose of family reunification with a person living in Denmark. It is based on extremely strict age and connection requirements.<sup>38</sup> The marriage or registered partnership should be recognisable under Danish law and entered into voluntarily. There is also a requirement that the parties be over the age of 24,<sup>39</sup> even if one of the parties is a Danish citizen and that their aggregate ties with Denmark be stronger than their aggregate ties with another country, a condition that is lifted in situations where the person residing in Denmark has held Danish citizenship for at least 28 years.<sup>40</sup> The aggregate requirements used to evaluate attachment and loyalty to the nation, include the presence of family members already living in

34 Sudhir Chandra, 'Subjects' Citizenship Dream: Notes on the Nineteenth Century' in Rajeev Bhargava & Helmut Reifeld (eds), *Civil Society, Public Sphere and Citizenship: Dialogue and Perceptions* (2005) 106, 107. See also Mrinalini Sinha, *Colonial Masculinity: The 'Manly' Englishman and the 'Effeminate Bengali' in the Late Nineteenth Century* (1995); and Gauri Viswanathan, *Masks of Conquest: Literary Studies and British Rule in India* (1989).

35 Homi Bhabha, *The Location of Culture* (1994) at 15; see also Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation* (1992).

36 *Aliens Act* 2002 (Denmark).

37 Danish Immigration Service, *Statistical Overview* (2004) at 13–16.

38 Details of the requirements are set out on the website of the Danish Immigration Service: <<http://www.udlst.dk/english/Family+Reunification/Default.htm>> (13 June, 2006).

39 The reasoning behind this provision was based on the idea that young people, especially those of Muslim origin, were being forced into marrying spouses chosen by their parents in their countries of origin and the spouses were subsequently using the marriage to enter into Denmark under its policy of family reunification. For an excellent critical analysis of similar policies in other Northern European countries, see Sherene Razack, 'Imperiled Muslim Women, Dangerous Muslim Men, and Civilised Europeans: Legal and Social Responses to Forced Marriages' (2004) 12 *Feminist Legal Studies* 129.

40 *Aliens Act* 2002 as amended by *Law 1204* of 27 December 2003.

Denmark, the completion of one or both partners' education in Denmark, proficiency in Danish and employment in Denmark. Evidence of either or both parties making extended visits to another country, and having children or other family members in another country, are also factors to be taken into consideration.

The impact of the aggregate ties requirement was illustrated in the case of Tien Dang, a 26 year old Vietnamese whose application to bring his wife to Denmark was rejected. The fact that he was a permanent resident and gainfully employed in Denmark, had his own home there, spoke Danish fluently and had other family members in the country (including his children and parents) were considered insufficient to counter the finding that his attachments with Vietnam were greater than his attachments to Denmark, presumably because he continued to visit his wife there. He remained an impostor, unable to reinvent himself as a true and loyal Dane. While the Council of Europe Human Rights Commissioner has concluded that Denmark's rules governing family reunification are in breach of the Convention,<sup>41</sup> the *Aliens Act* reflects how the project of assimilation is being aggressively pursued through the proliferation of new nationality and citizenship laws in Europe.<sup>42</sup> Following on the Commissioner's report, Tien Dang has filed a suit challenging the Danish family reunification law as contravening the European Human Rights Convention, which guarantees all individuals the right to a family life.<sup>43</sup> While Tien Dang's suit can be regarded as a challenge to the liberal project of assimilation, it continues to be framed within the logic of who counts and who does not, of wherethe line should be drawn. It does not challenge the unstated culturally normative standard being introduced through national immigration criteria to scrutinise those who are trying to enter through *legal routes*, as Dang appeared to fully comply with this standard and was still denied his right to family life. It is a standard that seeks to protect a mono-racial, uniform Danish identity that tolerates the presence of 'Others', but only as long as they sever the sinews of difference.<sup>44</sup> The line between belongingness and non-belongingness is being increasingly drawn in an insular, culturally intolerant direction, where only certain recognisable identities can cross into the legal zones.

The second response of naturalising or essentialising the difference has a rich genealogy. The Australian government's policy against half-caste Aborigines was based on assumptions about their natural inferiority. In the context of the colonial

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41 See Council of Europe Office of the Commissioner of Human Rights, 'Report by Alvaro Gil-Robles, Commissioner for Human Rights on his visit to Denmark 13–16 April 2004' CommDH (2004)12, (July 2004): <[http://www.humanrights.dk/upload/application/f98a9487/commdh\\_2004\\_12\\_e-1.pdf](http://www.humanrights.dk/upload/application/f98a9487/commdh_2004_12_e-1.pdf)> (18 May 2006).

42 For an evaluation of the impact of these new laws, see the reports of the European Commission Against Racism and Intolerance available (ECRI) at <[http://www.coe.int/T/E/human\\_rights/Ecri/](http://www.coe.int/T/E/human_rights/Ecri/)> (18 May, 2006).

43 *The Copenhagen Post* (19 July 2004): <<http://www.cphpost.dk/get/80174.htm>>.

44 See for example Daniel Pipes & Lars Hedegaard, 'Something Rotten in Denmark?' *New York Post* (27 August, 2002) (setting out the argument that Muslim immigrants have demonstrated little desire to integrate into their adopted country, are responsible for an upsurge in crime, including the rape of Danish women, and warning that current immigrant flows could result 'in every third inhabitant of Denmark in 40 years [being a] Muslim').

encounter the ‘Other’ was treated as lacking the capacity to reason, incapable of decision-making, culturally and morally inferior. The difference justified not only the denial of a host of legal rights and benefits to the native, but also of sovereignty.<sup>45</sup> It was this ‘rule of colonial difference’ that essentialised the difference between the coloniser and the colonised, and served to justify the imperial presence even when espousing a commitment to universal ideas and institutions.<sup>46</sup>

Women have historically been, and in many instances continue to be, regarded as inferior, weaker and in need of protection by a paternalistic state or male guardian. In the colonial relationship, gender essentialism was also conflated with cultural or civilisational backwardness, where the treatment of women was used in part as a justification for colonial intervention and the civilising mission.<sup>47</sup> Katherine Mayo’s work exemplifies this conflation. An American feminist and journalist, Mayo wrote a book in 1927 entitled *Mother India* — a powerful invective against the Hindu, in particular the Hindu male. Throughout the text, she provides lurid details about how the country was irredeemably and hopelessly ‘poor, sick and dying’<sup>48</sup> because of its depraved and corrupt practices, sexual recklessness and backward treatment by Hindu men of their women and young girls. Women are represented as helpless victims, lacking subjectivity and utterly victimised by a ruthless and barbaric culture. The text served as both an exoneration as well as justification for the continuation of British Imperial rule.<sup>49</sup> The assumptions about difference not only reinforced gender and cultural stereotypes, but also the denial of a host of legal rights and benefits to the native, including sovereignty and self-rule.<sup>50</sup> It served to subordinate the native, deny his/her rights to sovereignty and at times to any recognition of humanity.

In the contemporary moment, gender essentialism remains present in the anti-trafficking initiatives that have been adopted or enacted at the international and domestic levels at an extraordinary rate over the past three years. In the name of

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45 Anthony Anghie (1990), above n31 illustrates how the doctrine of sovereignty was a construct of the colonial encounter, and the legal tools developed to deny the sovereignty of nation-states in which the European colonial powers intervened.

46 Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (1993).

47 Rajeswari Sunder Rajan, *The Scandal of the State: Women, Law and Citizenship in Postcolonial India* (2003) (arguing that the British Imperial project was partly justified as a measure to improve the condition of Indian women and at the same time to ensure that the interventions left indigenous patriarchy untouched) at 3.

48 Katherine Mayo, *Mother India* (1927) at 32.

49 The impact of the publication of *Mother India* should not be underestimated. It provoked a highly nationalist response that dismissed Mayo as a foreigner, and her views as a western feminist inapplicable to the subcontinent: See for example, CS Ranga Iyer, *Father India: A Reply to Mother India* (1928); Dhan Gopal Mukherji, *A Son of Mother India Answers* (1928); Lala Lajpat Rai, *Unhappy India* (1985 reprint). The text represented a ‘tipping point’ in the historical transformation of the subcontinent: see Mrinalini Sinha, *Spectres of Mother India: The Global Restructuring of Empire* (2006). It also tethered gender essentialism to the cultural identity of the nation that continues to challenge feminist interventions in the postcolonial context.

50 See Anghie (1990), above note 31.

protecting women's rights, these initiatives are invariably based on assumptions, especially about women from the developing world, as being victims, infantile and incapable of decision-making. These assumptions have invited highly protectionist legislation and at times even justified protective detention and intervention strategies that further reinforce gender and cultural stereotypes.

A recent example is the case related by the former National Rapporteur on Trafficking in Nepal. In July of 2003, a bus full of Nepali women who were headed to New Delhi to catch flights out to the United Arab Emirates was intercepted on the Indo-Nepal border by a Nepali anti-trafficking non government organisation (NGO) with the help of the border police.<sup>51</sup> The NGO contended that the women were predominantly minors and were being trafficked for 'prostitution'. The women, on the other hand, argued that they chose to migrate abroad because in Nepal there were no jobs. The collapse of the tourism industry, the main source of employment for Nepali men and women, as a result of the Maoist insurgency and the more monarchical coup, left them with few options. These young women sought migration to the Middle East as a way out of a difficult situation. Their flight to some form of work and a better life was intercepted by an NGO well armed with international anti-trafficking laws and donor funding. Profiled as potential victims of trafficking and intercepted on suspicion in a pre-emptive operation, the busload of women were 'rescued' and taken to the shelter of the NGO. Upon inquiry it was discovered that only one of the intercepted women was a minor of 17 years. The rest of the women were consenting migrants, who had labour contracts and air tickets, and were fully aware of the nature of their prospective employment in the Middle East. Although the NGO subsequently acknowledged that this interception was a mistake, the women suffered economic losses, related to being unable to catch the flights that they had fully paid up, as well as a loss of job opportunity for which none were compensated.<sup>52</sup>

Thus, imperialist responses and victimised representations of women in the 'Third World' are also being aided by similar feminist positions found in the postcolonial world.<sup>53</sup> The perception that women are victims and objects in need of rescue continues to inform contemporary feminist politics both 'here' and 'there'.

Finally, there is the response of incarceration, internment or elimination, where the 'Other' is cast as completely outside of western liberal democracy, defined as a threat to the nation-state — as backward, uncivilised and dangerous. These

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51 The NGO was funded by USAID which requires groups to denounce prostitution in order to receive funding. See *United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act*, 22 USC § 7631(f) (2003) and the *Trafficking Victims Protection Reauthorization Act*, 22 USC § 7110(g) (2) (2003). It is also aligned to the feminist position that conflates trafficking with prostitution and hence has used the garb of trafficking to advocate for the abolition of prostitution. See for example the Coalition Against the Trafficking of Women: <[www.catwinternational.org](http://www.catwinternational.org)>.

52 See Centre for Feminist Legal Research, *Report of the International Seminar on Cross Border Movements and Human Rights* (9–10 January, 2004) at 22.

53 Kapur, above n26 at 120–125.

subjects are legitimately denied human rights protections, as they are cast in opposition to such values and protections. In the civilising mission of Empire, the lack of conformity to the project could result in death and even annihilation.<sup>54</sup> In the contemporary period there are countless examples of difference being cast as a threat, contaminant or evil to be contained and purged should it prove too threatening. This somewhat bloated subject includes the Islamic, regarded as a threat to the mythical Caucasian, Christian West;<sup>55</sup> the homosexual, who is destroying civilisation, family and faith as we know it, the sex worker, with her contaminating agenda,<sup>56</sup> and the migrant subject,<sup>57</sup> intent on disrupting the social cohesion of distinctive western states. *All* of these responses to the ‘Other’ are not confined to tyrannical dictatorships or oppressive fundamentalisms. They are located in the heartland of the ‘homeland’ — in the epicentre of the liberal democratic state. A spectacular array of legal tools are being crafted in the form of anti-terrorism and anti-migration laws to deal with these new ‘Others’. These initiatives are intended to re-establish the moral, cultural and national certainties of the past as well as the security of the sovereign nation-state and sovereign subject. The threat per se justifies the creation of new categories — such as ‘unlawful non-citizens’ and the explicit policy of incarceration of asylum seekers in Australia; or the detention of the newly created ‘enemy combatants’ by the United States in Guantanamo Bay. Through these gestures, the ‘Other’ is being transformed into a manipulative, dangerous and contaminating force that can justify a ‘shoot-to-kill’ policy to protect the state and its citizens, even if it involves collateral damage in the form of Jean Charles de Menezes.<sup>58</sup> Somewhat ironically, Phillip Ruddock, the Australian Attorney-General, has justified such a hard-line security approach as a UN right, citing the governments obligations under Article 3 of the UN Declaration on Human Rights — to protect human life.<sup>59</sup>

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54 See Anghie (2005), above n31 at 13–31 discussing how the denial of sovereignty was rationalised and justified in the work of Francisco de Vitoria. In the context of the Spanish treatment of the Indians, the Indian was regarded as an object against which the powers of sovereignty could be exercised, including the power to wage war. The Indian who failed to comply with universal standards and resisted Spanish intervention, could be subjected to brutal sanctions, including war.

55 See a vitriolic attack on Muslim inferiority reflected in the barbaric treatment of their women, and describing Muslims as invading hoards who transform the beautiful Italian cities into ‘filthy kasababs’: Orianna Fallaci, *The Rage and the Pride* (2002) at 36, . For a discussion of this text and others presenting a similar characterization of Muslims and the reception of these texts, see Sherene Razack, *Geopolitics, Culture Clash and Gender after September 11* (2005) 32 *Social Justice*. Feminists have also tended to conflate the Muslim men with fundamentalism and backward or uncivilised treatment of women, and laud ventures in Iraq and Afghanistan as liberatory endeavours against a force that is so alien and outside of the principles of western liberal democracy. See Phyllis Chesler & Donna Hughes, ‘Feminism in the 21<sup>st</sup> Century’, *The Washington Post* (22 February 2002) at B7.

56 For a discussion of how the anti-trafficking agenda has been conflated with an anti-sex work agenda by the religious right as well as feminists, see Shapiro, above n13.

57 See Samuel Huntington, *The Challenge to America’s National Identity* (2004) which argues that America should remain a Christian, Anglo-Saxon country, in favour of ‘white nativism’ and against the mixing of races and cultures, that can only lead to national degeneration.

In all these instances we are declaring new non-humans, or lesser humans, as well as super-humans. These hierarchies and rankings are produced in and through the discourse of rights, which produces the human and social subject.

In this article, I have deliberately conducted an internal scrutiny of the human rights project as envisaged and pursued by liberal democratic states. The commitment to human rights is not necessarily a commitment to a social justice project that is unequivocally liberatory or emancipatory. The 'dark side' also constitutes this project. Sometimes, the dark side is obscured, as western, liberal democratic states project themselves as well-ordered, law abiding, and demonstrably tolerant, and human rights are cast as something that is needed out there — in the less developed, non-democratic, illiberal world. When George Bush walks into a mosque immediately after the September 11<sup>th</sup> attacks to ensure that there is no backlash in the form of violence inflicted on Muslims within the homeland, or when Tony Blair boldly asserts that the Muslim community will be embraced and diversity defended after the recent London bombings, the self-controlled, democratic, liberal values are presented as stable, coherent and in tact. These performances are articulated as examples of how 'civilised' free states behave. Yet this particular narrative obscures how these very same states are able to export the dark side of the liberal project. Countries such as the United States, with its muscular military arsenal and monetary strength, are able to export the dark side, push it out of the ranch, sending it in the contemporary moment to places like Guantanamo, Iraq or Abu Ghraib.

In countries that have less military hardware and economic might, the cost of exporting the dark side is formidable, and so it remains present and visible for the world to see. One instance might be the Gujarat riots that occurred in the western state of India in the Spring of 2002, resulting in the death of hundreds of Muslims, and the perpetration of extreme sexual violence against Muslim women as an act of retaliation by the mobs of the Hindu Right after an attack on a train carrying Hindu pilgrims.<sup>60</sup> The riots played out in a postcolonial democratic context that advocates human rights, and espouses a commitment to the values of tolerance, freedom of religion and secularism. While it is easy to cast these riots as features

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58 Jean Charles de Menezes, a Brazilian electrician living in London, was shot and killed on 22 July 2005 at the Stockwell tube station on the London Underground by Metropolitan Police officers. The Police issued an apology for the killing, stating they had mistaken him for a suspect of the previous day's failed bombings in London and acknowledged he was in no way connected. It was the first time the British public were made aware of a policy that gave police the authority to 'shoot to kill' a potential suicide bomber. The British public's reaction to the shooting was mixed. There were those who supported the need for police to make split-second decisions and described the De Menezes shooting as a case of 'collateral damage', while others condemned the killings as an example of police brutality: see <[http://news.bbc.co.uk/1/hi/talking\\_point/4711189.stm](http://news.bbc.co.uk/1/hi/talking_point/4711189.stm)> (18 May 2006).

59 David Nason & Patrick Walters, 'Hardline Security a UN Right' *The Australian* (26 July 2005). In justifying his stance, Ruddock stated, 'I don't want to be the Attorney-General who can be the subject of accusations from grieving relatives that it was in my power to do more to protect their loved ones'. For a defence of the 'shoot-to-kill' policy on similar grounds in Britain, see 'Police Defend Shooting Strategy' *BBC News* (8 March 2006): <<http://news.bbc.co.uk/1/hi/england/london/4784688.stm>> (25 August 2006).

of the chaotic, disordered and at times un-civilised non-West, what remains obscured is how such a violent response towards Muslims has been made possible and structured by the Hindu Right's active, and at times brilliant, ideological engagement with the liberal values of tolerance, freedom of religion and secularism.<sup>61</sup> The ability of some powerful democratic nations to export the 'dark side' deflects attention from the ways in which the possibilities for disorder and instability are produced in and through the discourse of rights, which sets out the terms for inclusion and exclusion.

Four British citizens, born and bred in the United Kingdom, have been identified as the persons who conducted the suicide bombings in the heart of London on 7 July 2005. The interminable claims that the terrorists are 'evildoers', jealous of 'our way of life and values', 'hate our freedoms' forcefully asserted ever since the attacks on September 11<sup>th</sup>, as well as immediately prior to the revelation of the London bombers' British identities, becomes sophistry in light of this fact.<sup>62</sup> It is a moment when the liberal democratic state has to seriously address its role in producing these human bombs.

#### 4. *Take a Walk on the 'Dark Side': Tentative Proposals*

This article is not arguing in favour of an outright rejection of human rights nor serving as an apology for a realist position on human rights. We 'cannot not want' human rights. Rights are radical tools for those who have never had them. Human rights seems a preferable, though a flawed ideal, to no rights at all. It is a very useful vocabulary. Yet, it is also important to confront the 'dark side' of this

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60 The Hindu Right has its basis in revivalist and nationalist movements of the 19<sup>th</sup> Century, which sought to revitalise Hindu culture as a strategy for resisting colonialism. As it developed through the 20<sup>th</sup> Century, it began to take on its distinctively right-wing, anti-minority stance, particularly in the 1920's with the publication of Vinayak Damodar Savarkar's *Who is A Hindu?* (1928) and the founding of the Rashtriya Swayamsevak Singh (RSS) (Association of Nationalist Volunteers), which is the main ideological component of the Hindu Right. See Gyanendra Pandey, *The Construction of Communalism in Colonial North India* (1990) at 210. Sarvarkar developed the idea of *Hindutva*, a communal discourse, which seeks to constitute Hindu subjects to understand their fractured society along the lines of religious identity. As Basu and others have stated: '[a]t the heart of *Hindutva* lies the myth of a continuous thousand-year old struggle of Hindus against Muslims as the structuring principle of Indian History. Both communities are assumed to have been homogenous blocks—of Hindu patriots, heroically resisting invariably tyrannical, 'foreign' Muslim rulers': Tapan Basu, Pradip Datta, Sumit Sarkar, Tanika Sarcar & Sambuddha Sen, *Khaki Shorts, Saffron Flags: A Critique of the Hindu Right* (1993) at 2; Chetan Bhatt, *Hindu Nationalism: Origins, Ideologies and Modern Myths* (2001) arguing that, while the *Hindutva* movement has been of relatively recent origin, the Hindu nationalist political and ideological processes have been in formation since the 19<sup>th</sup> Century and continue to impact on contemporary politics. See also David Luden (ed), *Contesting the Nation: Religion, Community and the Politics of Democracy in India* (1996); Christophe Jaffrelot (ed), *The Sangh Parivar* (2005).

61 For a discussion on how liberal rights discourse has been used by the Hindu Right to pursue a reactionary agenda, see Ratna Kapur, 'Normalizing Violence: Transitional Justice and the Gujarat Riots' (2006) 15 *Columbia Journal of Gender and Law* (forthcoming); see also Smita Narula, 'Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India' (2003) 16 *Harvard Human Rights Journal* 41.

project. There is a need to address the complicity of human rights in making the world less stable, less peaceful, more divisive, more polluted and more violent. Who is accountable when human rights interventions actually harm more than they help? The dark side enables everyone to use the vocabulary of human rights, while at the same time advance agendas that may not be emancipatory ones at the end of the day. To use the words of Costas Douzinas, human rights are being reduced to a body without a soul, without a political vision or moral purpose.<sup>63</sup>

Despite all that is known about the inadequacies of human rights, there continues to be an appeal to them as so much political hope has been invested in the project. It is an approach that has been characterised as a ‘Yes I know. But ...’ politics. The critique is suspended, out of concern that it will create anxiety, fear and even nihilism.<sup>64</sup> Yet after the most atrocious century and nothing encouraging to inspire us at the beginning of this one, it is also difficult to formulate a persuasive argument for returning to the ideals of classical liberalism — progress, universality and free will.<sup>65</sup> The equation of critique with pessimism, and progress with optimism, is quite mistaken. To question human rights is not to side with the inhuman, the anti-human and evil. What is required at this moment is neither an arrogant triumphalism nor hopeless despair, but rather, thoughtful reflection. What happens when the faith in human rights is eroded? Where does that leave us? It is much better to confront these difficult questions than to cling to old tattered frameworks or a project that now exists in its broken form.

The diagnostic reflections set out in this article draw attention to challenges that are not easy to confront for the human rights practitioner or scholar. I nevertheless propose some tentative, though by no means comprehensive thoughts about how we might move in a more creative and constructive direction. Firstly, we need to move beyond debates between the universal character of human rights and their historical particularity. The human rights project will remain circular and non-productive if we linger in the debate about transcendence and immanence. Indeed, a vast literature already exists in many non-western metaphysical and philosophical traditions, which reconcile the particular with the universal, the self with the transcendent.<sup>66</sup> More important as a starting point is to recognise that human rights are a site of power and resort to the vocabulary of human rights is indeed very powerful. It is this power in the hands of those who use it that must be understood — not its ability nor lack of ability to transform peoples lives, nor its potential to bring about change. Because it is powerful, it matters who brandishes

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62 See for example Tony Blair’s address to the nation on the eve of the Iraq War, 20 March 2003 stating, ‘But this new world faces a new threat: of disorder and chaos born either of brutal states like Iraq, armed with weapons of mass destruction; or of extreme terrorist groups. Both hate our way of life, our freedom, our democracy’: <<http://www.number10.gov.uk/output/Page3322.asp>> (13 June 2006). In Blair’s speech delivered after the July 7<sup>th</sup> bombings he categorically stated that ‘[w]hat we are confronting here is an evil ideology’: <<http://news.bbc.co.uk/1/hi/uk/4689363.stm>> (13 June 2006).

63 Douzinas, above, n7 at 4.

64 Brown, above, n6 at 15.

65 Douzinas, above, n7 at 344.

this sword. Human rights advocates need to realise that they also wield power once they participate in the terrain, and can be implicated in perpetuating its dark side.

Secondly, there needs to be a reorientation in human rights scholarship and education. Human rights advocates, including feminist scholars, have failed to adequately centre and interrogate the colonial trappings and 'First World' hegemonic underpinnings of this project, and frequently ignore or exclude the non-west from the conversation. Analysing human rights from a postcolonial perspective provides an enriched perspective of how the terrain has operated and the politics of inclusion and exclusion that it has sustained and even justified. The examples in this article are largely drawn from postcolonial India, where law and the liberal project on which it is based have had a troubled reception from their very introduction during the colonial encounter. Law was a mechanism of power that was used to serve the regulatory interests of the colonial state and constructed the subjectivity of both the ruling power and the native subject.<sup>67</sup> Rights have not been received unequivocally as a liberating and emancipating project. Nor has 'inclusion' been regarded as the antidote to subordination. The double consciousness that emerges from this understanding can accept the value of human rights without celebrating the colonial processes that justified imperialist intervention, and can also continue to justify similar interventions in the postcolonial world.

It is not only useful, but critical, for human rights scholars and advocates to consciously draw on the experience of the postcolonial world. This is obligatory in order to revise both our thinking and understanding of human rights that has been so dominated by Western pontification about the project, tied down to liberal utopian visions, or claims that human rights are something needed only 'over there', in the developing, less civilised world. 'To draw on the experiences' of the postcolonial world does not mean extracting experiences of perpetual

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66 K Venkata Raman, *Nagarjuna's Philosophy* (1966) discussing the ideas of the 3<sup>rd</sup> Century philosopher who contested the notion of an absolute position or truth, and argued in favour of the awareness of the possibility of different formulations of one and the same truth from different standpoints. It was an argument directed against the exclusive allegiance to any one formulation as absolute: see Jonardan Ganeri & Heeraman Tiwari (eds), *The Character of Logic in India: Bimal Krishna Matilal* (1998) discussing the works of a leading exponent of Indian philosophy and epistemology from a critical and analytical perspective. Matilal's central query was whether reality was actually knowable and therefore expressible in language. He also exposed the false assumption that Indian philosophy was either exotic or rooted in religion: Nityananda Giri Swami (ed), *Cenkottai Sri Avudai Akkal* (2002) presenting the views of the 15<sup>th</sup> Century female philosopher, who rendered the arguments about the self and transcendence into verse and examines metaphysics in and through the gender discriminatory practices of a community, revealing their contradictions and complexities.

67 For an excellent discussion of the complex ways in which law was used to advance the interests of the colonial state and construct the subjectivity of the native subject, see Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (1998) discussing the emergence of colonial criminal law as an ideological and cultural enterprise in the course of the establishment of British colonial rule in India. See also Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India' (2005) 23 *Law and History Review* 631; Indrani Chatterjee, *Gender, Slavery and Law in Colonial India* (2002); and Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (2003).

victimisation of 'Third World' women, or representations of the global south as always already existing in situations of helplessness and despair, interminable natural disasters, civil conflict or religious strife, or invoking the 'Other' as a cultural artefact. 'To draw on the experiences' requires understanding and learning from the postcolonial engagement with rights that are informed by the legacies of the colonial encounter. It is, after all, in the postcolonial world where the dark side has been most obviously played out. It is an experience that provides insights into how the marshy zones of exclusion were and continue to be produced. They were not simply imposed through brute force, but in and through rights discourse, including the right to equality, free speech or secularism, which are all-important rights that 'real' liberals and human rights advocates would endorse. These rights continue to be susceptible to ideologies and visions that are indeed quite distinct from feminist and progressive ones.

Finally, a major shift in the location of the project, who is telling the story and how the story is told, can provide a different and critical trajectory from which to view human rights. I illustrate the urgency of re-reading human rights from alternative locations, the excluded zones or from the perspective of excluded subjects through the example of three contemporary issues. The first concerns the current moment of economic globalisation and neo-liberal governmentality. While the G8 talks of increased aid to Africa it completely ignores the emergence of new market actors in that continent and the relevance of economic globalisation and trade. While entrenching the 'native' in a victim subject position through a focus on poverty alleviation can be regarded as laudable, it is also non-threatening and sustains the imperial messianic myth. The language of rights and humanitarianism once again obscures a counter narrative, based on sustaining unequal trade and market relations, and the fear of competition from cheaper labour markets. It reproduces a colonial anxiety. In the mid-18<sup>th</sup> Century this was played out explicitly when the East India Company subordinated a flourishing international trade in handicrafts and textiles by Indian merchants by cutting off the thumbs of 200 highly skilled, local textile weavers. It ruined the indigenous industry and served the interests of British mercantile community. Concerns about the neo-liberal project aside, the demand for free trade from poorer nations and the assertion of their identity as market actors is producing a similar consternation, which cannot be met with responses of charity. What challenges are posed to human rights — to its dark side as well as its relevance — when we read the narrative from the perspective of these new market actors? To what extent are new emancipatory spaces being provided by globalisation rather than human rights? To what extent are human rights being aligned with neo-liberalism and inclusion into the market? <sup>68</sup>

A second, related issue concerns the arrival of the non-West onto the shores of the 'West'. While this presence takes many forms — on the catwalk, through celluloid and spicy cuisine — it is the specter of cross-border movements that are causing jitters. Today, these movements are being addressed implicitly through more stringent immigration, anti-trafficking and anti-terror laws. They are also being addressed through ludicrous schemes such as the one devised by European

countries to organise joint charter flights, dubbed ‘Migrant Air’, to pick up and deport illegal migrants back to their home countries at less cost and greater speed.<sup>69</sup> Such initiatives will not curtail cross-border movements. The transnational migrant will continue to move clandestinely if legal routes are not available, as demand and the free flow of labour are necessary corollaries to the free flow of capital. These cross-border movements are in fact producing a paradox where the security of the transnational migrant is perhaps less threatened by people smugglers and traffickers, than by the current international system of human rights protection offered to people who move as migrants, refugees, or asylum-seekers. How can the story of human rights be told from the perspective of transnational migrants? What then are the obligations states have towards the economic migrant in the context of economic globalisation? That is not to say that cross-border movements are simply taking place because of economic need and the search for a better life. As one young second generation immigrant woman recounted, an Englishman once asked her grandfather, who emigrated from India to England, ‘Why are you here?’ Her grandfather responded, ‘We are the creditors’.<sup>70</sup> The seeds sown in the colonial past are being harvested in the global present.

Finally, religion is another example of a contemporary issue that needs to be addressed from a different perch. God is out of the closet and on the loose everywhere. The assumed opposition between religion and human rights that is presented as hallowed truth is neither helpful nor indeed accurate. It seems impossible for human rights to retain its secular credentials in a world where religion has seeped into the public domain, into conversations about security, HIV/AIDs, the family, homosexuality, gender equality and the ‘war on terror’. The liberal democratic states of the West are increasingly revealing themselves to be deeply faith-based. The French State has invoked the rights to secularism, liberty and equality to justify a ban against the wearing of headscarves by Muslim girls studying in French state run schools. Yet such interventions are exposed as exclusive and majoritarian, where acceptance is based on the performance of a cultural disrobing, forcing a choice on the part of the liberal (Christian) democratic state between the right to education and the right to expression and freedom of religion, while the girls themselves want both.<sup>71</sup>

Can human rights be articulated in ways that do not perpetuate these polarisations and false dichotomies? The answer to this question lies in learning from contexts that have engaged with these tensions. Freedom of religion and

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68 See Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* (2005) in which it is argued that neo-liberalism is becoming dominant as governmentality, and may emerge as the dominant ideology, where privatisation schemes and a flourishing market economy become the measure of democracy. This formation is global though constructed through local manoeuvres such as ‘corporatised media, schools and prisons’: id at 56. It is also a formation that is established partly through the production of a neo-liberal citizenry, where individuals are entrepreneurial actors across all dimension of their lives.

69 Alan Travis, ‘“Migrant Air” to Speed Deportations’ *The Guardian* (6 July 2005); see also ‘Cinq pays européens mettent en place des vols groupés pour expulser les sans-papiers’ *Le Monde* (6 July 2005).

70 Suketu Mehta, ‘A Passage from India’ *International Herald Tribune* (13 July 2005).

gender equality has operated with commitments to secularism in postcolonial, democratic countries such as India. It is a country where vast multitudes of deities co-exist with vast multitudes of people. You bump into them (gods and people) on the street, trip over them on the sidewalk, they sit with you in taxis and attend street parades where they are the constant cause of traffic jams.<sup>72</sup> No matter where you go, there they are! Women in religious minority communities are constantly renegotiating the boundaries and contesting the meaning of equality, understandings of secularism and the right to religious freedom, attempting to delink their meanings from their majoritarian moorings or capture by Hindu nationalists. These engagements attest to the importance of challenging the unhelpful dichotomies between religion and rights, the complex and contradictory nature of the human rights terrain, and why the meanings of rights need to be constantly monitored, revisited and interrogated.

My critique of human rights is intended to be productive and to articulate a different cosmology within which to understand the place of human rights in our contemporary world. The story of human rights cannot be told primarily through the dichotomies of good versus evil, heroes versus villains, winners and losers. Indeed, human rights can be an inhospitable terrain, much like the desertscape of the outback that Molly and her sisters struggled to cross, following a bisected fence that at times led them straight back into the arms of the 'Great White Saviour'. Molly herself makes it back home to Jigalong only to be forcibly removed once again, and then to escape again. In a similar vein, the battle to recapture the progressive and transformative terrain of human rights cannot be simply 'won', but the centring of excluded subjects, excluded zones and excluded histories can bring the project back to a space of greater optimism and lesser despair. Ultimately, it is an effort to put some life back into a project in desperate need of resuscitation and to give this body a soul.

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71 Jeremy Gunn, 'Religious Freedom and Laïcité: A Comparison of the United States and France' (2004) *Brigham Young University Law Review* 419 exposing the neutrality myth that ostensibly underscores the principle of Laïcité. See also *The Headmaster and the Headscarves* (2005) a BBC documentary directed and filmed by Elizabeth Jones, that exposes the tensions produced by the ban, through interviews with Muslim school girls at a specific state school, who were forced to choose between their right to education and the right to religious identity, and their headmaster, who supervises the cultural strip to ensure compliance with the law, while also exposing the majoritarian position underscoring the ban.

72 Salman Rushdie, *Imaginary Homelands: Essays and Criticism, 1981–1991* (1991).

