

# A POWERLESS COMPANION: HUMAN RIGHTS IN THE AGE OF NEOLIBERALISM

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## I

### INTRODUCTION

It is increasingly common to claim that international human rights law is a neoliberal phenomenon. And certainly the common timing is right: the human rights revolution and the victory of market fundamentalism have been simultaneous. In an important new essay, Marxist international lawyer Susan Marks compares Naomi Klein's *The Shock Doctrine* with my own recent history of international human rights, which emphasizes the 1970s as the moment of breakthrough for their ascent. Both histories, Marks observes, ascribe the newfound visibility of human rights to their promise to transcend formerly attractive political options east and west that seemed inadequate or even dangerous.<sup>1</sup> "For her too," Marks acknowledges of Klein's treatment, "the human rights movement as we know it today took shape during the 1970s. And for her too, a defining characteristic of the new movement was its non-political creed."<sup>2</sup> But for Marks, Klein succeeds by unveiling the neoliberal circumstances of human rights that have permanently defined their trajectory:

[S]he considers that a rather important aspect of the context for the movement's emergence is one Moyn omits to mention: the rise in that period of the neo-liberal version of 'private' capitalism, with its now familiar policy prescription of privatisation, deregulation and state retreat from social provision. To its influential enthusiasts then and now, *that* is the last utopia. . . . From Klein's perspective, then, the history of human rights cannot be told in isolation from developments in the history of capitalism."<sup>3</sup>

(At this point Marks notes that Milton Friedman won the Nobel prize for economics in 1976, the year before Amnesty International was given the Nobel

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1. See Susan Marks, *Four Human Rights Myths* in HUMAN RIGHTS: OLD PROBLEMS, NEW POSSIBILITIES 217 (Kinley et al. eds., 2013). See also NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* 11 (2007); SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010); Samuel Moyn, *Substance, Scale, and Salience: The Recent Historiography of Human Rights*, 8 ANN. REV. OF L. & SOC. SCI. 123 (2012).

2. Marks, *supra* note 1, at 226.

3. Marks, *supra* note 1, at 226 and 226 n.44.

peace prize.)

Friedrich Hayek, the guru of neoliberalism, was as impressed a witness of the human rights revolution of the 1970s as anyone else. But it is interesting that, although occasionally an advocate of the constitutionalization of basic liberties like freedom of speech and press, he was in fact an acerbic critic of that revolution. In an interview, he described the spike in talk around human rights associated with Jimmy Carter's election to the American presidency as a strange fad, which (like all fashions) risked excess:

I'm not sure whether it's an invention of the present administration or whether it's of an older date, but I suppose if you told an eighteen year old that human rights is a new discovery he wouldn't believe it. He would have thought the United States for 200 years has been committed to human rights, which of course would be absurd. The United States discovered human rights two years ago or five years ago. Suddenly it's the main object and leads to a degree of interference with the policy of other countries which, even if I sympathized with the general aim, I don't think it's in the least justified. . . . But it's a dominating belief in the United States now.<sup>4</sup>

All the same, since that moment of modish popularity, the staying power of human rights has led to many more positive visions of the essential harmony—if not identity—of economic liberalism and international human rights. The Marxist left, indeed, is hardly the only source of claims concerning the synergetic relationship between the advancement of market freedoms and human rights.<sup>5</sup> If anything, it is much more common to promote neoliberalism as an agent of the advancement of human rights rather than to link them as malign accomplices.

Perhaps most notably, Ernst-Ulrich Petersmann argues that, although human rights law may exact some costs to efficiency, the general relationship between economic liberty and human rights is productive and strong, so much so that promoting the former and latter are not very different enterprises.<sup>6</sup> He writes:

[E]njoyment of human rights require[s] the use of dispersed information and economic resources that can be supplied most efficiently, and most democratically, through the division of labour among free citizens and through liberal trade promoting economic welfare, the freedom of choice and the free flow of scarce goods, services, and information across frontiers in response to supply and demand by citizens.

There is, accordingly, little daylight between economic liberalization and the promotion of international human rights. And though Petersmann's optimism

4. Interview by Robert Chitester with Friedrich A. Hayek, at UCLA (1978), available at [http://www.hayek.ufm.edu/index.php?title=Bob\\_Chitester\\_part\\_I&p=video1&b=930&e=1037](http://www.hayek.ufm.edu/index.php?title=Bob_Chitester_part_I&p=video1&b=930&e=1037).

5. Admittedly, others nearly always construe "human rights" as a set of abstract values rather than a set of concrete movements and legal regimes. See, e.g., JOHN C. W. TOUCHIE, HAYEK AND HUMAN RIGHTS: FOUNDATIONS FOR A MINIMALIST APPROACH TO LAW (2005).

6. Ernst-Ulrich Petersmann, *Time for a United Nations "Global Compact" for Integrating Human Rights in the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. OF INT'L L. 621, 621–22 (2002). See also Ernst-Ulrich Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, in HUMAN RIGHTS AND INTERNATIONAL TRADE (Thomas Cottier et al. eds., 2005).

7. Petersmann, *Time for a United Nations*, *supra* note 6, at 629.

about near identity has certainly drawn their fire, mainstream international human rights lawyers generally envision a large zone of compatibility between their norms and standard market arrangements; they merely insist that the values of international human rights need to be kept separate so as to provide critical purchase on “globalization” if and when it goes wrong.<sup>8</sup> In the mainstream vision, international human rights can offer a toolbox of legal and other standards to guide, tame, and “civilize” an era of transnational market liberalization that has generally improved the human condition.<sup>9</sup>

This article argues that it is far too soon—analytically in the one case and historically in the other—to sign on to either the Marxist or mainstream position about the relationship between human rights and neoliberalism. To the first position, much more analytical clarity is required to prove more than a simple case of conjuncture between the two phenomena that are sometimes too easily conflated. To the second, the record so far suggests that human rights seem fit to provide little, if any, help in remedying (let alone overturning) the development in the history of capitalism that its critics range under the heading “neoliberalism.” In largest part that is because, although the record of capitalism in our time is highly mixed when it comes to the achievement and violation of basic human rights, its most serious victim is equality (of resources and opportunities alike) both in national and global settings—a value that the Universal Declaration of Human Rights of 1948 and the international human rights movements following in its wake do not even set out to defend.<sup>10</sup> Since globalizing neoliberalism and international human rights emerged at the same moment and developed in parallel, there are undoubtedly connections to be found. But the interactions between human rights and neoliberalism are more subtle than Marxists so far claim. Indeed, the crucial connection is a missed connection: precisely because the human rights revolution has at its most ambitious dedicated itself to establishing a normative and actual floor for protection, it has failed to respond to—or even allowed for recognizing—neoliberalism’s obliteration of the ceiling on inequality.

“Neoliberalism,” especially in leftist discourse, often does massive work in diverse settings of argument, coming close through its overuse to functioning as a call for explanation rather than the real thing. And with its moral charge, it is sometimes deployed like holy water, sprinkled liberally for safety’s sake to ward off evil. Although its rise as an item of discourse and apotropaic talisman

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8. Philip Alston has famously alleged that Petersmann’s goal was “to hijack, or more appropriately to Hayek, international human rights.” See Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. OF INT’L L. 815, 816 (2002).

9. See, e.g., RHODA E. HOWARD-HASSMANN, CAN GLOBALIZATION PROMOTE HUMAN RIGHTS? (2010); DAVID KINLEY, CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY 1–3 (2009).

10. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

reflects understandable anger, it is also symptomatic of explanatory confusion.<sup>11</sup> Nonetheless, as David Singh Grewal and Jedediah Purdy indicate in their introduction to this issue, citing an inadequate shorthand for the complex of individualist thought, market solutions, and state retrenchment both domestically and internationally is better than omitting these topics altogether, as American legal scholarship has so far done to its detriment.<sup>12</sup>

But looking beyond America, the prominence of neoliberalism as a category in scholarship about human rights means that the exact nature of the linkage of the two requires as much attention as the omission of the former from thinking about the latter. “Human rights, as with power and money, became a means to an end of globalizing neoliberal democracy,” Stephen Hopgood remarks in his much noticed recent study, in a commonplace observation.<sup>13</sup> And yet, so far, Marxists such as Wendy Brown, Susan Marks, and others have offered indeterminate and unsubstantiated claims that do not suffice to plausibly elevate the chronological coincidence of human rights and neoliberalism into a factually plausible syndrome. For there is a long way from historical “coincidence” or companionship—which there certainly has been between neoliberalism and the human rights phenomenon—to actual causality and complicity. “We would do well to take the measure of whether and how the centrality of human rights discourse might render . . . other political possibilities more faint,” Brown has argued in a classic indictment at the center of the recent commentary.<sup>14</sup> Even this displacement theory, about which Brown explicitly invites further reflection rather than offering a strong conclusion, is weak compared to the much stronger accusation of complicity that Brown and others simultaneously offer.<sup>15</sup>

Though it seems likely that some displacement of other schemes of justice has indeed occurred thanks to the rise of human rights, I do not think a much stronger claim is likely to work.<sup>16</sup> To say that human rights were coincident with or part of the context of neoliberal victory is not only not to say more—it is also not to say much. In particular, it is not to say that neoliberalism has *required* human rights to make its way in the world—or vice versa. Picayune an agenda as it might seem to specify how weakly related the ascent of human rights

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11. See, e.g., Keally McBride, *Neoliberalism: Its Untimely Life and Timely Death*, paper presented at American Political Science Association annual conference, September 2013.

12. David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.*, no. 4, 2014 at 1.

13. STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* 95 (2013).

14. Wendy Brown, “*The Most We Can Hope For . . .*”: *Human Rights and the Politics of Fatalism*, 103 *S. ATLANTIC Q.* 451, 461–62 (2004).

15. See *id.* In the same essay, though tentative about displacement, Brown claims that human rights “legitimate” neoliberalism in the form of global free trade and engage in “an old ruse of liberal reformers, in pursuing agendas that have significant effects in excess of the explicit reform, while insist[ing] that all they are doing is a bit of good or holding back the dark.” *Id.* at 461.

16. The relationship between human rights and imperial agendas is a separate matter I do not take up here, but my own view is that the case for intermittent causal relation is much stronger, for there is no denying the role of moral claims in creating legitimacy for great powers (as well as other actors).

appears to the market fundamentalism of our time, I suggest that the finding of only a tenuous relationship between the two has substantial ramifications for judging human rights and their spectacular rise in the last few decades—and thus for assessing the mainstream position.

Excusing human rights from causally abetting the free market victory of the neoliberal age is, after all, no defense of their prominence today. It is certainly worth considering the possibility that human rights provide some sort of moral leverage against neoliberal developments. However, even if the value of the normative guidance that human rights provide is undoubted, the trouble is that it amounts to little more than a set of mostly rhetorical admonitions. Worse, by focusing on a minimum floor of human protection, human rights norms prove inadequate in facing the reality that neoliberalism has damaged equality locally and globally much more than it has basic human rights outcomes (which, in some cases, it may indeed have advanced). It is hardly less distressing, but, so far, much more justifiable to conclude that human rights have not made enough of a difference in the short timeframe and global space they share with their neoliberal *frère ennemi*. They have been condemned to watch but have been powerless to deter. Added to the fact that human rights at least as canonically established have nothing to say about the principal value of equality that neoliberalism threatens, it seems hard to conclude that they are a useful resource in response.

If my perspective in between Marxism and the mainstream is adequate, it also follows that there is not much critical or political value in opposing human rights out of understandable outrage at neoliberalism. Instead, the economic transformations of the current era force a heavy burden on those concerned to formulate or to find a more serious analytical account of economic transformations and to offer more robust political resistance than they have marshaled so far. And since human rights idioms, approaches, and movements are unlikely to offer either—and, indeed, do not strive to do so when it comes to inequality—they should stick to their minimalist tasks outside the socioeconomic domain, in part to avoid drawing fire for abetting the stronger companion of their historical epoch.

This article is structured to reach these conclusions by examining a range of Marxist positions on the relationship between neoliberalism and human rights, beginning with Karl Marx's own theory of rights, both because of its intrinsic importance of and its frequent application to current debates. After concluding that this theory offers only initial starting points for analyzing international human rights and the neoliberal era of capitalism alike, the article's next part turns to the late-twentieth-century history of the companionship of the two, tracking their contemporaneous inceptions to examine their harmony and dissonance. The final part of the article stresses that human rights offer a minimum of protection where the real significance of neoliberalism has been to obliterate the previous limitation of inequality. Although human rights idioms, regimes, and movements have valuably formulated one approach to that floor,

they have so far done little or nothing to build it, even as they have surged discursively across the same era as the ceiling on hierarchy has been simply blown away.

## II

### THE GARDEN OF EDEN OF THE RIGHTS OF MAN

It is worthwhile to begin by to establishing how much work would be required—certainly far beyond that done so far—to regard human rights as an apology for “neoliberal” capitalism, in part because of how much work Karl Marx’s own texts leave to be done. And this is so for two overlapping sets of reasons. For one thing, there were the different phases in Marx’s own account of rights, which provide an inadvertent reminder of how institutionally new international human rights today are. Second, there is massive distance between the globalizing capitalism to which he bore witness and our world. Even if his own work provides considerable resources for thinking about rights generally, it falls silent when it comes to the specificities of our problem, both because of the “neoliberal” form of our capitalism as well as the globalizing reformism of our rights movements.

Marx, of course, offers his most famous criticism of “human rights” in *On the Jewish Question*, where he takes the French Declaration of the Rights of Man and Citizen as an index of the failure of political emancipation compared to the “human emancipation” for which he calls.<sup>17</sup> Yet in this early text, Marx usefully makes central (even if he fails to effectively theorize) what may have been the central fact of the rights of man for most of their history: they have long been constituted within the state.<sup>18</sup> There is, of course, no doubt that the political language of natural rights had an elective affinity, or an even deeper relationship, with the birth and expansion of capitalist social relations, and Marx eventually understood that the reduction of rights to his original statist framework was misleading.<sup>19</sup> Yet it remains of great interest that, in taking the French Revolution’s Declaration of the Rights of Man and Citizen of 1789 as his early proof-text, Marx believed that a moral philosophy of natural rights in its most abstract formulations depends in history on the agency of the state (even nation-state) to be politically operationalized.<sup>20</sup> Marx did not take this

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17. See KARL MARX & FRIEDRICH ENGELS, *THE MARX-ENGELS READER* (Robert C. Tucker ed., 2d ed. 1978).

18. See *id.* at 23–24.

19. The classic argument is C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962).

20. Historians such as Richard Tuck have diagnosed a much deeper causal relationship than Marx himself perceived between the ascendancy of rights in early modern natural law theory and the perfection of modern state as the essential and long-term forum of their political meaning. See RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* (2001). I followed Tuck’s general argument somewhat slavishly in my own book in distinguishing international human rights. See Moyn, *supra* note 1, at ch.1.

alliance to be a contingent mistake; to him, it was rather a core feature of the rise of rights. Textually, to put it differently, Marx's critique of human rights is a critique of *political emancipation within the state*. If his critique is directed at the formal abstraction of rights, then it is abstraction within a (rather institutionally concrete and historically specific) forum of the political citizenship provided by the state.<sup>21</sup>

Marx's insistence on the limits of the state as an agent of emancipation, alongside his lack of interest in the state-making many have prized down through the era of twentieth-century decolonization, should thus not distract from the fact that *his own framing* of the significance of the rights of man in his most classical treatment fails to link them to the workings of global capital. Whether or not Marx's critique transposes easily to the abstractions of rights in moral philosophy, then, it definitely requires significant theoretical work—and ultimately, a changed account from that early essay—to apply it to modern-day international and global human rights politics. When they became a newly prestigious mobilizational and legal option, international human rights politics broke in fundamental ways with the statist framework within which Marx himself worked and the institutionalized rights politics that he observed in the French Revolution. If anything, the centrality of the state to bourgeois order indeed meant that the response of working men had to be itself globalizing, though certainly not in the mode of contemporary human rights activists.

None of this means that the entanglements of “human rights” and “modern capitalism” (including “neoliberalism”) do not exist, but it does mean that they are not obvious, even or especially for Marxists, who must build rather than assume an account of them. And as much as Marx's own theoretical evolution after *On the Jewish Question* provides better grounds for success in this venture, it also leaves severe obstacles. For one thing, it is also true, as recent research has shown, that Marx himself was by no means above invoking rights as a basis of progressive reform, in spite of his apparently totalistic rejection of them before.<sup>22</sup> Indeed, as Andrew Sartori emphasizes, the constitutive emancipatory promise of liberalism and its rights talk as Marx understood both as much authorized intermittent criticisms of capitalism (and empire) as obfuscated their obvious depredations.<sup>23</sup> But the real challenge is that Marx's ultimate critique of rights is general, going to the relation between the globalization of capital, property ownership, and social abstraction, rather than anything so narrow and

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21. That was why the response to a bourgeois regime of rights required the liquidation of the distinction between the state and civil society, and though perhaps not what Engels later called the “withering away” of the state.

22. See DAVID LEOPOLD, *THE YOUNG KARL MARX: GERMAN PHILOSOPHY, MODERN POLITICS, AND HUMAN FLOURISHING* 150–63 (2009); Justine Lacroix & Jean-Yves Pranchère, *Karl Marx fut-il vraiment un opposant aux droits de l'homme?: Émancipation individuelle et théorie des droits*, 62 *REVUE FRANÇAISE DE SCIENCE POLITIQUE* 433 (2012) (both demonstrating Marx's deployment of rights talk for the sake of emancipation).

23. ANDREW SARTORI, *LIBERALISM IN EMPIRE: AN ALTERNATIVE HISTORY* (2014). I am very grateful to Professor Sartori for assistance with this part of the article.

particular as an analysis of international human rights regimes and movements (which, if they existed in his time, did not interest him).

When he evolved beyond the juvenilia of *On the Jewish Question*, Marx altered his presentation of bourgeois rights to moderate the statist emphasis of his early account. But these theoretical shifts were really in the service of an account emphasizing how a (potentially) globalizing set of market relations required a set of social abstractions that might comfortably take formal individual rights as its legal form. Hence Marx's claim in *Capital* that the capitalist market is

a very Eden of the innate rights of man. . . . [There individuals] contract as free persons, who are equal before the law. Their contract is the final result in which their joint will finds a common legal expression. . . . [E]ither in accordance with the pre-established harmony of things, or under the auspices of an omniscient providence, they all work together to their mutual advantage, for the common weal, and in the common interest.<sup>24</sup>

Yet even in the evolved form of Marx's critique, there is a drastic set of differences between that *general* account—which might fit, for example, the modern globalization of markets and the globalization of property rights quite well—and some *specific* account needed to capture the particularity of international human rights regimes and movements in the last several decades.<sup>25</sup>

After all, neoliberal capitalism is a specific episode in the history of capitalism that Marx never knew. More important for my purposes here, today, human rights are often self-consciously presented (though not with great plausibility, as I ultimately argue) as a force that can or will moderate or even reverse the evils of the current form of global market relations. Stereotypically, and to some extent really, human rights legal orders and mobilizational politics have lost their associations to the defense of freedom of contract and private property—there are other bodies of law, and other movements, for that purpose. Rather, in human rights regimes from the United Nations processes to treaty mechanisms, and in human rights movements from Amnesty International to global antipoverty campaigns, the goal is to ameliorate the suffering of others or even insist upon the basis for justified, though minimal, redistribution. Whatever one wants to say about human rights as they exist today, in short, must depart radically from Marx's early work, and build

24. 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 280 (Ben Fowkes trans., 1976).

25. As Marx's own treatments imply, appeal to natural and human rights remained more common in his own era as cited rationales for the protection of free contract and private property. In fact neoliberals today refer much more rarely to the justificatory basis of natural or human rights than their nineteenth-century forebears did in defense of their economic liberalism, presumably because reformists and humanitarians have so successfully captured the language for their cause. Compare ROBERT GREEN MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE 1865–1910, ch.5 (1951) (entitled “Judicial Conservatism and the Rights of Man”), with Samuel Moyn, *Nationalism and Capitalism as Nineteenth-Century Rights Movements*, in OXFORD HANDBOOK OF HUMAN RIGHTS HISTORY (Devin O. Pendas ed., forthcoming) (both demonstrating the popularity of libertarian rights talk in the nineteenth century).



substantially on his later work. And though Marx could not have theorized either neoliberalism or human rights as they are now known, he might not have been surprised to learn that the chief objection to the latter is that they share the same historical era as the former without unsettling it.

### III

#### HUMAN RIGHTS AND NEOLIBERAL ECONOMICS: HARMONY AND DISSONANCE

Although the broad outlines of the emergence of neoliberalism have been and continue to be the subject of an accelerating and exciting literature, in the final analysis the origins are fairly straightforward. As the prospect of state-led growth and redistribution loomed in the middle of the twentieth century, Friedrich Hayek and his initially obscure compatriots, offering a complex revival of nineteenth-century economic liberalism, linked the emergence of the Western welfare state to the communist planned economy (even though, in fact, the leaders of welfare states were about to enter a bitter global struggle with their communist opposite numbers). Thirty years later, in the midst of the 1970s, the neoliberals suddenly and surprisingly found in the economic crisis of the welfarist project an opening for their views.<sup>26</sup> The rest of neoliberalism's history since that breakthrough moment is well-known: the evisceration of the regulatory state in the North Atlantic industrial zone together with an international program towards the global south (as well as, perhaps most spectacularly, formerly communist Eastern Europe) to facilitate capital movement to the detriment of opposing forces.<sup>27</sup> Strikingly, this barebones narrative has numerous parallelisms to the history of the emergence of human rights. After all, human rights also revive a version of classical liberalism in new form. Intellectually, international human rights were not new in the 1970s but enjoyed new practical circumstances in the middle of that decade that made them prestigious overnight. And during the 1970s (as well as today), the premier target of international human rights politics was (and continues to be) the postcolonial and developmentalist state. These coincidences seem to be (in the Marxist phrase) "no accident."

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26. See ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION* (2012).

27. On intellectual foundations, aside from BURGIN, *supra* note 26, see SERGE AUDIER, *NÉOLIBÉRALISMES: UNE ARCHÉOLOGIE INTELLECTUELLE* (2012). To date the general histories of neoliberalism are surprisingly intellectual, and nothing comparably synthetic exists on enacted policies of the 1970s and since. But for early pictures and building blocks, see DAVID HARVEY, *THE ROAD FROM MONT PÉLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE* (Diethelm Plehwe & Philip Mirowski, eds., 2009); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005); see also JOHANNA BOCKMAN, *MARKETS IN THE NAME OF SOCIALISM: THE LEFT-WING ORIGINS OF NEOLIBERALISM* (2011); COLIN LEYS, *MARKET-DRIVEN POLITICS: NEOLIBERAL DEMOCRACY AND THE PUBLIC INTEREST* (2003); JAMIE PECK, *CONSTRUCTIONS OF NEOLIBERAL REASON* (2013). For the response to recent capitalist setbacks, with heavy emphasis on the economics profession (rather than structural forces), see PHILIP MIROWSKI, *NEVER LET A SERIOUS CRISIS GO TO WASTE: HOW NEOLIBERALISM SURVIVED THE FINANCIAL MELTDOWN* (2013).

The most plausible explanation for these facts is that human rights and neoliberalism shared both a predecessor and a target: a developmentalist statism that, while certainly present in the welfarist west and north, found its most famous expressions in Eastern Europe and the global south. Put differently, the paired breakthroughs of human rights and neoliberalism shared common institutional foes and especially negative conditions as those foes lost prestige. A national welfarist commitment found across the North Atlantic, normally defended in collectivist terms, was on the wane just as human rights and neoliberalism began enjoying success, and the same was even more true of the developmentalist vocation of the postcolonial nation-state to prioritize rapid growth, often by pursuing economic autarky. Without their departure, it seems hard to imagine that either international human rights or neoliberal frameworks and policies would have begun their rapid ascent in the mid-1970s, which gave them a kindred trajectory against a shared prior background.

Furthermore, neoliberalism and human rights share key ideological building blocks. Most obviously, they share a commitment to the prime significance of the individual, whose freedoms matter more than collectivist endeavors, even when those are justified on the grounds that they will generally advance the well-being of individuals. More controversially, their shared antipathy towards, or at least suspicion of, the state, and especially the nation-state, also seems plain, since both reject its moral credentials (even as both rely on its agency for enacting policy reform).

Though clearly neoliberalism and human rights share several negative conditions and ideological building blocks, the question is whether these common traits obscure much more than they reveal about the causal interdependence of the two phenomena—or, more accurately, lack thereof. After all, the general affinities of human rights with market fundamentalism only go so far. To state the obvious, for human rights' many partisans, they are a discourse of hope and reform and have typically been directed at the totalitarian and authoritarian state. That state persists in many places today, in response to which human rights advocates continue to engage in their informational politics without any conscious commitment to a particular scheme of economic relations (or perhaps more accurately, with a conscious though frequently separate commitment to unspecified visions of social justice). The ongoing critique of the atrocity, despotism, and misrule of the state in which the human rights movement overwhelmingly engages hardly amounts to a grim recipe for rollback of the national welfare state and could not possibly entail that rollback on its own.

And so, very quickly in the assessment of how human rights have tracked the emergence of a neoliberal age, one is pushed onto the ground of troubling chronological simultaneity, negative conditions, and vague descriptive affinity. All of these perhaps authorize suspicions of weak complicity, but hardly of more dastardly synergy, between neoliberalism and human rights. And in spite of these parallelisms between the two phenomena, it is an altogether different

matter whether the moment of success in the 1970s that each enjoyed depended on the success of the other. There are, in fact, many reasons to doubt that this is the case.

With their scalar novelty as global principles informing a transnational political movement, human rights were resurrected under very specific circumstances from their entombment in obscure United Nations documents and procedures (including the Universal Declaration of Human Rights of 1948 itself and the international supervision some envisaged on its basis). There were three great causal factors that led to their dissemination outside the United Nations: (1) the loss of faith in Cold War paradigms of personal engagement (and notably the loss of faith in socialism) in favor of a new and putatively “antipolitical” sort of movement; (2) the rise of human rights as a language of state legitimacy in the international system, surprisingly sponsored first and foremost by American Presidents along with some West European leaders; and (3) the achievement of decolonization, which, from Western capitals, often seemed to cry out for a new form of rights-based international supervision that suddenly seemed relevant.<sup>28</sup>

For one episode that suggests that the coincidence of the parallel breakthrough of neoliberalism with the emergence of international human rights politics may explain little, consider the example of the southern cone of the Americas after 1973. Notoriously, General Augusto Pinochet, after his fall 1973 coup, adopted Milton Friedman as an adviser, and the neoliberal Mont Pèlerin Society held meetings in Chile. Indeed, Naomi Klein takes this example as the starting point in her history of neoliberal “shock.”<sup>29</sup> In a very brief section of her book, the most popular history of neoliberalism ever written, Klein takes up how human rights imposed “blindness” on the relationship between capitalism and terror.<sup>30</sup> Instead, she rightly says, Amnesty International took a neutral attitude toward structural matters (like the class struggle and ongoing counterrevolution Marxists saw) in order to focus on an informational politics that merely singled out incontestable state abuses.<sup>31</sup> Marks agrees that “where the effects of neo-liberal reconstruction began to bite, activists confined their criticism to the denunciation of abuses, leaving unchallenged the conditions in which those abuses had become possible.”<sup>32</sup>

But although it is true (indeed, centrally important) that the coalescence of a new sort of transnational-rights movement in response to Latin American misdeeds confined itself to state crimes, it is important to be clear about what is

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28. See Moyn, *supra* note 1. For even more factors, see also Jan Eckel, *The Rebirth of Politics from the Spirit of Morality: Explaining the Human Rights Revolution of the 1970s*, in *THE BREAKTHROUGH: HUMAN RIGHTS IN THE 1970S* 226 (Jan Eckel & Samuel Moyn eds., 2013). On the American case, see BARBARA J. KEYS, *RECLAIMING AMERICAN VIRTUE: THE HUMAN RIGHTS REVOLUTION OF THE 1970S* 75–152 (2014).

29. KLEIN, *supra* note 1, at 7.

30. *Id.* at 118–21.

31. *Id.* at 118–19.

32. Marks, *supra* note 1, at 9.

and is not being said. No one asserts that this early instance of a now-familiar sort of informational activism was a cause of either the coups themselves or the disarmament of other sorts of criticism against the misdeeds of Pinochet's government or other new authoritarian regimes.<sup>33</sup> Klein, unlike Marks, registers clearly why, if contributory blame falls on human rights optics, it is really only with regard to the regime's external critics—for, at that point in history, its internal opponents had no choice but to narrow their focus and ignore the political economy of state terror. Klein writes, "Every facet of the human rights movement was functioning under highly restricted circumstances . . . Inside the affected countries . . . they didn't talk about the political or economic agendas behind the disappearances because to do so was to risk being disappeared themselves."<sup>34</sup> Klein could have added that the coalescence of a transnational human rights movement, for all the price that movement paid in muting structural critique, functioned in coalitional ways quite differently from a more divisive revolutionary politics. But it remains true that the international left was alive and well, and part of the success of human rights in the 1970s was due to the left's own failure either to escape savage repression in a range of countries or to successfully bring together a coalition to denounce dictatorial misdeeds with equal success as human rights movements. It is true that Klein concludes that "the human rights movement also helped the Chicago School ideology to escape from its first bloody laboratory virtually unscathed."<sup>35</sup> Yet the blame it deserves in this regard seems rather negligible compared to a host of other forces—including failures and mistakes on the left at what remained a very open moment in history. Further, as Klein acknowledges, the human rights "movement unquestionably played a decisive role in forcing an end to the junta's worst abuses."<sup>36</sup>

As for the rest of Klein's book, which proceeds through the present, nowhere else does it mention human rights movements (except to rely serially on their information in order to frame her critique). And in any case, much more interesting than a debatable causal linkage between neoliberalism and human rights in the 1970s is the two movements' ongoing companionship as they both entered adolescence in the 1980s and achieved close to full capture of their respective realms of governance, both on national and international scenes, in the 1990s. Even as the transnational left remained alive and well in the 1970s across the world, in the 1980s and 1990s (and indeed, through today) human rights frameworks came and continue to come close to occupying the

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33. One would need a much more intricate story to make the latter case, of the sort attempted (to my knowledge) only in the case of Uruguayan exiles after the coup in their own country in the summer of 1973, and the substitutional story about their peregrinations towards human rights as opposed to inherited leftism took long into the later decades. See VANIA MARKARIAN, *LEFT IN TRANSFORMATION: URUGUAYAN EXILES AND THE LATIN AMERICAN HUMAN RIGHTS NETWORKS, 1967–1984* 67–106 (2005).

34. Klein, *supra* note 1, at 149.

35. *Id.*

36. *Id.* at 147.

imagination of reformist-minded individuals and groups the world over—and thus deserve much larger causal association with a range of phenomena. (If there has been “social resilience” in the face of various neoliberal successes worth emphasizing, the left has not fared as well, in practice and perhaps in theory too.<sup>37</sup>)

And yet it remains a completely open research question how exactly to frame the relationship of the human rights explosion with neoliberal victory, in Latin America and especially beyond. Was it the same everywhere and all along? I do not think so, for the allegation that human rights silenced structural and “political” criticisms of what amounted to a neoliberal era became much more valid and convincing only as time went on. But there is still the work to accomplish to say even that much. As Mary Nolan cautiously and insightfully puts it, “There is no single relationship between human rights and market fundamentalism across countries and types of rights.”<sup>38</sup> The same observation applies across time. The history of the initially distant companionship remains to be written.

To me, it already seems clear that a better way to frame the relationship between neoliberalism and human rights, at least based on current research, is in terms of parallel trajectories, with the tragic consequence that (as some of Marks’s own brilliant work implies) structural insight into the root causes of social suffering went missing at the time that it was badly needed.<sup>39</sup> Yet this result occurred only in small part because human rights became a more coalitionally successful prism for interpreting and addressing injustice than other imaginable frameworks. It is possible (as I have argued in *The Last Utopia*) for the prestige and prominence of international human rights to be symptomatic of a loss of structural accounts of social relations without their being causally responsible or morally culpable for it.<sup>40</sup> If such modes of thought have been lacking due to the “superficiality” of the informational focus of human rights politics, it is not as if those politics are alone or even primarily to blame. The failure of a convincing structuralism and the programmatic aphasia that resulted is the work of many forces, and it is implausible to believe that either has gone missing thanks primarily to human rights hegemony.

If all of the above holds—and one assumes that historical coincidence is not necessarily a causal relationship—then the analysis becomes much less one about blame (or excusal) and much more about the failure of structural modes

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37. See SOCIAL RESILIENCE IN THE NEOLIBERAL ERA (Peter A. Hall & Michèle Lamont eds., 2013).

38. Mary Nolan, *Human Rights and Market Fundamentalism in the Long 1970s*, in TOWARDS A NEW MORAL WORLD ORDER: MENSCHENRECHTSPOLITIK UND VÖLKERRECHT SEIT 1945 172, 174 (Norbert Frei & Annette Weinke eds., 2013). The essay is a promissory note for a major research project that is intended to spell out the relationship in careful detail. See also Mary Nolan, *Gender and Utopian Visions in a Post-utopian Era: Americanism, Human Rights, Market Fundamentalism*, 44 CENT. EUR. HIST. 13 (2011).

39. See Susan Marks, *Human Rights and Root Causes*, 74 MOD. L. REV. 57 (2011).

40. See Moyn, *supra* note 1.

of thinking and more activist political strategies to retain widespread appeal. Human rights look more like a symptom of a much broader syndrome, and the point of criticizing them changes accordingly. It becomes about convincing their adherents that, although serviceable for some tasks (like singling out state abuses), human rights fail at others, and need to be supplemented by both new frameworks of analysis and new modes of intra- and transnational activism.

#### IV

##### THE FAILURE OF HUMAN RIGHTS IN THE SOCIOECONOMIC DOMAIN

In his classic *A Brief History of Neoliberalism*, Marxist David Harvey is surprisingly generous to the birth of human rights, though he is well positioned to see early on that it coincided with the trajectory of his own object of study. He notes:

The universalism of rights has been and can be used with progressive aims in minds. The tradition that is most spectacularly represented by Amnesty International, Médecins sans frontières, and others cannot be dismissed as a mere adjunct of neoliberal thinking. The whole history of humanism (both of the Western—classically liberal—and various non-Western versions) is too complicated for that.<sup>41</sup>

And in spite of various criticisms of human rights that are easily made—their limitation to first-generation liberties, their cooptation by imperial projects, their nondemocratic credentials even when intervention abroad takes nonmilitary form, or their elitist distance from grassroots politics—Harvey concludes it is a mistake to dismiss them. Instead of “eschew[ing] all appeal to universals as fatally flawed” and “abandon[ing] all mention of rights as an untenable imposition of abstract, market-based ethics as a mask for the restoration of class power,” in the end it would be “unfortunate to abandon the field of rights to neoliberal hegemony. There is a battle to be fought, not only over which universals and what rights should be invoked in particular situations but also over how universal principles and conceptions of rights should be constructed.”<sup>42</sup>

However, that hypothetical apology for some version of universalism or even some version of human rights should not lead to complacency. It cannot substitute for an inquiry into how much of a difference that the actual, so-far-enacted forms of universalistic human rights law and policy have made—notably with respect to the economic arrangements that neoliberalism has transformed.<sup>43</sup> In this regard, a harsh and unforgiving verdict on international human rights politics seems necessary in order to stave off sentimental hopes and to promote intellectual commitments and practical mobilization that will do better. If the human rights movement is the weak and subordinate doppelgänger of its neoliberal brother—with whom it is joined in a mysterious

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41. Harvey, *supra* note 27, at 178.

42. *Id.* at 178–79.

43. See Samuel Moyn, *Do Human Rights Treaties Make Enough of a Difference?*, in *CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW* (Conor Gearty & Costas Douzinas eds., 2012).

common destiny but merely dragged along without providing direction—then some other sort of opposition is necessary in both the short and long run.

Recently, empirical political scientists have adopted the goal of verifying whether human rights law makes any difference—that is to say, whether it leads to any positive outcomes. In my view, the language of human rights has worked well in robbing legitimacy from certain extreme regime forms, although it is highly controversial whether human rights law actually played a causal role in the political transformation in the former Soviet bloc, Latin American autocracies, and elsewhere. And, in any event, any study of the uses of human rights law needs to incorporate attention to its misuses. Skeptical of the human rights mobilization across borders, leading empirical analyst Beth Simmons has argued plausibly that, where the political and material circumstances of modern citizenship already exist, human rights law allows an additional tool of domestic mobilization, beyond even that made available by constitutional law, at least when it comes to norms like freedom of speech and integrity of the human body.<sup>44</sup> Harvey's optimism about the emancipatory possibilities of rights-claiming is most plausible in these cases. However, empirical political scientists so far provide no case so far for the productive uses of human rights norms regarding economic and social entitlements. It is indeed remarkable that Simmons, Kathryn Sikkink, and others who hope to redeem human rights from cynicism about their negligible effects have so far focused exclusively on some rights to the detriment of others—especially rights purporting to afford protections in the socioeconomic domain.

A brief, and therefore necessarily superficial, survey of the shortcomings of human rights norms and movements with the structural transformations of the era of market fundamentalism in mind must start with a basic and rarely made point: In their legalized forms, human rights do not purport to provide an egalitarian agenda. It is perfectly possible to imagine a fully achieved local and global regime of human rights protection that simultaneously features the worst hierarchy of wealth and other primary goods known to history. Indeed, in some ways, grasping the paradoxical relationship of human rights and so-called neoliberalism amounts to seeing how thorough a disjuncture there is between an agenda of economic and social rights protection and a more ambitious egalitarian agenda.<sup>45</sup> When it comes to the sorts of goals envisioned by the International Covenant for Economic, Social, and Cultural Rights, it is not how much they promise but how little that needs to receive more emphasis, since the covenant strives for a minimum floor of protection in domains like housing,

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44. See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 151–71 (2011).

45. For a less oppositional view that nonetheless recognizes the different vocations of (canonically established) economic rights and theories of overall social justice, see Jeremy Waldron, *Socioeconomic Rights and Theories of Justice* (New York University School of Law Public Law and Research Paper Series Working Paper No. 10-79, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1699898](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699898).

health, and food, rather than a fuller bodied egalitarianism.

It is popular, and understandable, to focus on those episodes (Pinochet's Chile, for example) where neoliberal policies have gone along with state repression—which Klein's indictment of the shock doctrine dramatizes (or sensationalizes). But, in certain ways, it seems much more disturbing to observe that neoliberal victories are perfectly compatible with full respect for not just civil and political liberties, but also for economic and social rights. If one extrapolates the most extreme possible illustration of this point, it is perfectly possible to imagine an alternate reality in which one man personally owns everything, but with all the provisions of the Universal Declaration of Human Rights nonetheless honored (through his subsistence spending). Even the much-ridiculed promise in the Universal Declaration's Article 27 of paid vacations is completely harmonious with a world controlled by a galloping hierarchy of means.<sup>46</sup> Society has indeed headed towards a scenario in the last thirty years where a formerly egalitarian impulse has sometimes successfully been displaced, as inequality has spiked, by an agenda in which a set of protections alleviates the most abject destitution. Generalizing drastically, it is fair to say that the present era of world history is one in which a floor has been partially built to save the wretched of the earth from the worst suffering, even as the ceiling for hierarchical wealth concentration has been obliterated.<sup>47</sup>

The conceptual point, in other words, is that an economic and social rights agenda is different—and much more minimalist—than an egalitarian agenda. It is perfectly possible for one to succeed as the other fails. The historical point is that the ends of the first agenda have often been prioritized—and sometimes achieved—across an era during which the ends of the second agenda have been forsaken. But two crucial qualifications are necessary to understand the historically juxtaposed trajectories of the two agendas. For one thing, for all the progress made in saving humanity from the most extreme sorts of immiseration, much remains to be done even to provide a floor of basic protection. No one wants to trivialize social and economic rights protection, even in the name of a plausible indictment of aphasia concerning broader patterns of wealth and income distribution and rising inequality. Second, even successes in the socioeconomic domain have hardly been due to the application of a normative framework of human rights, the birth of a formal regime of human rights law, or the mobilizational activism of any human rights movement. In fact, the lion's share of poverty reduction in the last few decades (indeed, given the population numbers involved, in world history by far) is due to a single factor: the policies of the Chinese state.<sup>48</sup> And although a wide range of factors account for the

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46. See Universal Declaration of Human Rights, *supra* note 10.

47. See generally THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014).

48. According to one source, China brought more than 600 million people out of poverty across the era of neoliberalism (1980–2010), accounting for three-quarters of all poverty reduction worldwide. See *Towards the End of Poverty*, THE ECONOMIST, June 1, 2013, available at <http://www.economist.com/news/leaders/21578665-nearly-1-billion-people-have-been-taken-out>



remainder of poverty reduction—food and water access, health improvement, and so on—it does not seem as if human rights protection or promotion as frameworks or projects rank high among them, if they figure on the list at all.

Now consider this deflationary perspective about the value of economic and social rights agendas (set off from the protection of those rights achieved through other frameworks or thanks to other means) by starting with domestic or national protection and then turning to more transnational and global protection. There is no doubt that, after the first phase of human rights history in the 1970s and 1980s, during which a global dialogue concerning economic and social rights was largely absent, such discourse has surged. But, sadly, this rhetorical and framing (or, more generously, standard-setting) work has caused no shifts in real-world outcomes independently. This is most graphically clear when it comes to the highly prestigious model of judicial enforcement of socioeconomic rights, especially when national judiciaries interpret constitutional norms in the spirit of international human rights law (including by relying on its notion of a minimum core of protection).

For many years, South Africa was credited as the laboratory where these developments were pioneered, especially after the landmark *Grootboom* case.<sup>49</sup> In particular, for several years, some leading American academics praised the “democracy-forcing” manner in which South African courts both advanced socioeconomic rights and respected democratic legitimacy when it came to policy choices.<sup>50</sup> On this interpretation, courts could invalidate policies that failed to respect a designated minimum core of socioeconomic rights protection while refusing to craft enforcement remedies of their own, thereby prompting democratic branches of government to do so.<sup>51</sup> But, especially on this minimalist and noninterventionist model, the final results have been disappointing: it turns out that the South African judiciary, instead of encouraging legislative or political action, forced the democratic branches into a nonresponse. Unfortunately, it is plausible to conclude that judicial enforcement has failed to make a great deal of difference, both in South Africa and beyond.<sup>52</sup> In particular, as David Landau has shown, enforcement of economic rights by courts tend to favor the well-off (such as pensioners defending entitlements against state rollback under budgetary pressure) rather than the weakest and

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extreme-poverty-20-years-world-should-aim.

49. See *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC) (S. Af.) (vindicating social and economic rights of applicants and encouraging government policy to implement them).

50. See CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 221–38 (2001); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* chs. 6–8 (2009).

51. See Sunstein, *supra* note 50. It is a story that likely seemed especially appealing to Americans because of their own country’s failure to constitutionalize social rights at the zenith of liberal judicial power and persistent worries since of the political power of the charge that judges might “legislate from the bench.”

52. See Paul O’Connell, *The Death of Socio-Economic Rights*, 74 *MOD. L. REV.* 532 (2011).

most vulnerable.<sup>53</sup> Of course, the failure of judicial enforcement of socioeconomic rights does not mean that other attempts to protect socioeconomic rights have necessarily failed. But, so far, there is no powerful evidence confirming the value that a human rights framework brings to the reformulation of citizenship in a welfarist direction thanks to other forces (for example, partisan mobilization, which Simmons has credited for improvement when it comes to political and civil rights).<sup>54</sup>

Meanwhile, in international law, there is currently a burgeoning debate about how international human rights norms do or might tame or counteract globalization, especially in its recent neoliberal mode. This debate has exploded in two concurrent arenas: international trade law and policy on the one hand and corporate social responsibility on the other. But the most generous thing to say is that it is too early for much more than the declaration of normative applicability of human rights principles in either domain.

Petersmann and many others have argued that, by and large, the relationship between globalization and human rights is essentially one of mutual reinforcement or even common identity, especially when rights of property and free enterprise are made the key to the enjoyment of other human goods since property rights and free enterprise allow the funding for these other goods to materialize.<sup>55</sup> The more that free trade is allowed to maximize wealth for all, the better the outcomes will be across all dimensions of concern that human rights aim to cover. The response of mainstream human rights scholars to this claim is to insist on the separability and priority of the norms of which they are the stewards, guarding them against being falsely represented as simple side effects or fringe benefits of some other project, like economic growth.<sup>56</sup> Although optimists in the mainstream continue to hold out hope for “linkage” in the trade arena and the rise of rights principles within corporate social responsibility, it is hard to conclude that the grounds for hope are justified on the basis of the record so far.<sup>57</sup>

In perhaps the most developed version of this mainstream account, David Kinley has argued that if globalization is tweaked in the name of external international human rights standards that it sometimes regrettably fails to respect, it can indeed provide the benefits that its more naïve enthusiasts

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53. See David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 401 (2011).

54. See Simmons, *supra* note 44.

55. See Petersmann, *supra* note 6.

56. See Alston, *supra* note 8.

57. Petersmann has made much clearer in response to the polemics of a decade ago that he does not regard “linkage” of human rights and trade liberalization to be solely on the latter’s terms, thus making his proximity to mainstream optimists about the possibility of finding a zone of overlap between capitalism and human rights (and vice versa) clearer than before. See Ernst-Ulrich Petersmann, *The Promise of Linking Human Rights and Trade*, in *LINKING GLOBAL TRADE AND HUMAN RIGHTS: NEW POLICY SPACE IN HARD ECONOMIC TIMES* (Daniel Drache & Lesley A. Jacobs eds., 2014).

celebrate as automatic.<sup>58</sup> His position is that, if the equally regrettable extremes of uncritical partisanship and skeptical demonization of globalizing markets are avoided, the large amount of overlap between market forces and human rights can be discovered and “crossovers and complementarities” between the two maximized.<sup>59</sup> For Kinley and others writing in this vein, neoliberal market fundamentalists are bad apples who inappropriately extend their otherwise healthy respect for the ability of free trade and multinational corporations to raise humanity out of indigence, and transform this respect into the mistaken beliefs that there are no defects to globalizing capital and that all human goods are advanced by it. Conversely, critics of “neoliberalism” refuse to see that globalization has progressive features and believe that it is purely evil.<sup>60</sup> With a prophylaxis against the extremes, the task of ethical globalization is where hope for the future lies.

Yet just as in the case of social rights prospectively enforced by judicial authority, it is unsurprising that in both international trade law and corporate social responsibility, human rights have proved distressingly ineffective, and this seems unlikely to change.<sup>61</sup> To be sure, human rights have made discursive inroads, albeit surprisingly recently, in the trade debate. As late as 2006, when World Trade Organization (WTO) Director-General Pascal Lamy offered a call in Santiago to move beyond the Washington Consensus, human rights did not figure into the discussion.<sup>62</sup> But, then again, the raft of criticism of the Washington Consensus before that date rarely appealed to human rights.<sup>63</sup> (It more frequently insisted that trade arrangements pay developmental benefits for the worst off rather than that they respect human rights.) With surprising speed, however, the intersection of international trade and human rights has taken on something of the character of an obligatory topic in WTO circles, and it seems plausible (though, as noted above, no one has undertaken to prove it empirically) that, in the areas of labor regulation and pharmaceutical patents, human rights have had some salutary effects in framing claims and even in promoting better outcomes.

But it is another matter to hypothesize much of a general reorientation of trade law by international human rights norms, law, or politics. Even mainstream analysts acknowledge that human rights norms have made little rhetorical headway in trade debates, and although the WTO’s dispute resolution mechanism has teeth, it is not a plausible agent for the general advancement of human rights outcomes.<sup>64</sup> Andrew Lang’s brilliant essay on

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58. See Kinley, *supra* note 9.

59. *Id.* at 32.

60. See Howard-Hassman, *supra* note 9.

61. See ECONOMIC GLOBALISATION AND HUMAN RIGHTS (Wolfgang Benedek et al. eds., 2011) (providing survey of the human rights prospects in diverse areas of economic law).

62. See Pascal Lamy, Director-General, World Trade Organization, Humanising Globalisation (Santiago, Chile, Jan. 30, 2006), available at [http://www.wto.org/english/news\\_e/sppl\\_e/sppl16\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl16_e.htm).

63. See *id.*

64. According to Kinley, “I have lost count of the number of trade specialists (lawyers,

neoliberal trade law sympathetically considers what would work, compared to recent history, in which human rights have provided little beyond discursive sensitization.<sup>65</sup> Lang convincingly worries that it is only a reform of the collective purposes of the trade regime itself that would provide better normative guidance (and, one might add, more robust politicization both in theory and practice).<sup>66</sup> A focus on the effect of trade on human rights law from the outside, as it were, has the function

of occluding the question of collective purpose in the conduct of international economic governance. Where critical voices should be generating a debate about the fundamental purposes of global trade governance, instead they have given rise to a discussion of the relative priority to be accorded to the trade project vis-à-vis other projects of international order. What should be a debate about re-opening space for discussing the collective purposes of global trade governance, instead has to a large extent become a debate about the appropriate allocation of authority between the global trade regime and other centres of regulatory and political authority [like human rights law]. . . . [A]ttempts to integrate consideration of 'social' values and objectives into the trade regime are unlikely to bear much fruit unless they are accompanied by a much more fundamental challenge to prevailing understandings of the nature and purpose of the trade regime.<sup>67</sup>

Lang himself casts this possible move as a return to the “embedded” liberalism of the immediate post-World War II years, and he thinks human rights are potentially part of the normative vocabulary that would provide this return or renewal.<sup>68</sup> Whether or not he is persuasive on either count, it seems hard to doubt his conclusion that the superficiality of the effects of human rights politics on trade outcomes so far demands some other approach.

Similar observations apply to corporate social responsibility, which has a history that is even shorter with regard to the incorporation of human rights norms, but which is subject to a parallel analysis as that of international trade law. Indeed, the rise of human rights in the governance of corporations (especially among multinational corporations) is not only more recent but has come about in explicitly nonlegal, “moral” form. Famously, after the death of the U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, John Ruggie stepped in as special representative to offer “pragmatic” and nonlegal Guiding Principles on Business and Human Rights, approved by the Human Rights Council in 2011.<sup>69</sup> Charitably, it is far too early for optimism about the

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economists, national and international bureaucrats, and academics) who roll their eyes whenever mention is made of human rights and trade.” KINLEY, *supra* note 9, at 91. On dispute resolution, see JAMES HARRISON, *THE HUMAN RIGHTS IMPACT OF THE WORLD TRADE ORGANISATION* (2006).

65. See ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER* (2011).

66. *Id.* at 190–220.

67. *Id.* at 10–11. However, Lang, I believe, goes too far in saying that a human rights strategy is “inadvertently complicit in the basic neoliberal move of occluding” collective purpose—unless it could be shown that human rights seriously obstruct it, as opposed to distract from or simply fail to reach it.

68. *Id.* at 313–54.

69. John Gerard Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc.

meaningful chastening of corporations simply because of the existence of these principles, especially given the step away from legality (and sometimes rights themselves) that Ruggie controversially took in order to make consent toward them possible.

As a general matter, mainstream proponents of human rights mechanisms in the socioeconomic domain place faith in what one might call an “infiltrative” model of politics, in which what is introduced as apparently harmless subterfuge will end up creating conditions for a powerful threat. But Ruggie’s principles seem even less likely to change behavior than other generally empty Trojan horses that the human rights movement has built across its short history. Of course, this hardly implies that the new principles are worthless—let alone so accommodating as to provide collusive shelter to global corporate power. Time alone will tell if they transcend their current uselessness, but it is not a good bet.

In an era when human rights chiefly have a rhetorical value in international trade and corporate responsibility alike, the main effect they do risk is a compensatory one, even as the chief practical challengers of neoliberalism, from the Seattle protests against the WTO of 1999 to Occupy Wall Street fifteen years later, generally skirt the normative claims, legal regimes, and mobilizational strategies of human rights in favor of other rubrics and styles. As Lang puts it,

it is important not to overstate the extent to which human rights have been adopted more broadly as the language of the global justice movement. For every NGO that adopts a rights perspective or uses rights language, there are many more which do not, and still more who do so only partially or tangentially.<sup>70</sup>

Alas, this does not mean that anyone is, as of yet, in possession of a plausible framework of opposition to market fundamentalism, either intellectually or practically. But this hardly makes human rights necessary or inevitable as a means of reorienting economic affairs, especially given their failures to change the world so far.

#### IV

#### CONCLUSION: FORMS OF CRITICISM OF HUMAN RIGHTS

Whatever the obscure prehistories of international human rights and global neoliberalism were up until the 1970s, when both began to ascend in prominence, each of these phenomena enjoyed only minor successes until the era surrounding the end of the Cold War, which provided each an extraordinary space of opportunity. The World Conference on Human Rights, which took place in Vienna in 1993, provided a moment of imaginative relaunching of

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A/HRC/17/31 (Mar. 21, 2011). See also John Gerard Ruggie, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* (2013).

70. Lang, *supra* note 65, at 100 (rigorously cataloguing the rise of human rights in trade debates after the catalytic period of 1997–2000, particularly around the TRIPS agreement). Cf. Tomer Broude, *From Seattle to Occupy: The Shifting Focus of Global Protest*, in *LINKING GLOBAL TRADE AND HUMAN RIGHTS* 91 (2014).

human rights corresponding to the founding of the WTO in 1995. The trouble is that so far—and in contrast to their signal role in targeting and stigmatizing totalitarian and authoritarian states—human rights have remained chiefly rhetorical in their inroads into the socioeconomic domain, whereas neoliberalism has transformed the globe profoundly. More challengingly, even when it comes to the ends of human rights protection, neoliberalism has sometimes done a better job than actual human rights movements: even as neoliberalism has had disastrous effects on wealth distribution both within states and across the globe, it has provided more poverty reduction, especially in its Chinese form, than any other agent. (This is not to say that neoliberalism unerringly works for the benefit of all humanity, as some of its proponents claim).

In part for this reason, marginal skeptics about the role of human rights in the global economy reply to mainstream optimists that the tweaks they entertain to the international economic order are not enough. According to skeptics, the mainstream is too uncritical of globalization itself to be trusted with the task of separating the wheat from the chaff. The mainstream puts a high premium on successfully avoiding naïve celebration of market fundamentalism, but puts an only slightly modified version of that same set of commitments in its place. For Paul O’Connell, there is no way to save globalization from neoliberalism without the drastic transformation of politics and economics that he calls “subaltern globalization.”<sup>71</sup> Susan Marks, for her part, focuses on the way in which human rights law, even when it purports to seek root causes of human rights violations, is not currently organized to permit the sort of structural critique eventually needed to target neoliberalism—or perhaps capitalism in any of its possible variants.<sup>72</sup> A new approach to politics and law would require a systemic evaluation of the causes of and alternatives to “planned misery.”<sup>73</sup> In their current forms at least, international human rights generally provide a distraction from both the necessary diagnosis and the necessary remedy.<sup>74</sup>

Although it is hard to gainsay the sobering conclusions of such critics, I have been concerned in this article with a cautionary point. For it is equally hard to conclude that blaming human rights regimes and movements of “complicity” with neoliberalism is itself productive. As I have indicated, I do not think human rights do or should provide the final normative standards against which economic arrangements should be judged wanting: they are too minimalistic to do so, especially in the socioeconomic domain, where an egalitarian theory of

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71. Paul O’Connell, *On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights*, 7 HUMAN RIGHTS LAW REVIEW 487, 493–95 (2007). See also Rhoda E. Howard-Hassmann, *Reply*, 9 HUMAN RIGHTS LAW REVIEW 127 (2009); Paul O’Connell, *Not Seeing the Forest for the Trees*, 9 HUMAN RIGHTS LAW REVIEW 135 (2009).

72. See Marks, *supra* note 39.

73. *Id.*

74. See Marks, *supra* note 1.

social justice provides a more defensible (and much higher) bar to meet.<sup>75</sup> But the minimalist standards of judgment for gross failure that human rights norms offer hardly themselves pose an obstruction (let alone the main one) to maximalist alternatives. The ethical standards of human rights are not necessarily “part of the problem” in the quest to develop either a higher standard for judgment or the political basis for a movement to meet it. The same, *mutatis mutandis*, is true of human rights regimes and movements. But this defense of human rights in an age of galloping inequality is obviously faint praise.<sup>76</sup>

It also follows that criticizing either the norms or the movements for distraction and insufficiency is important but minimal in itself. In an era in which human rights norms and movements are frequently overloaded with expectation, the best conclusion is that a Band-Aid is not an adequate response to a charnelhouse (even if Band-Aids have their uses). Analytically and politically, the mere act of criticizing human rights does little to provide useful alternatives to human rights frameworks, regimes, and movements that might succeed in areas where human rights have failed—in part because human rights are (so far) not designed to succeed in those areas. To bring the limited aims and often glancing successes of human rights movements into focus is simply to demand another politics to supplement goals that are inadequate in the first place and strategies that rarely work, especially in the socioeconomic domain. A threatening enemy, rather than a powerless companion, is what market fundamentalism demands.

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75. For this reason, it seems mistaken to me for O’Connell to treat human rights norms as the main normative standards against which to judge neoliberal globalization wanting, and to motivate the call for a subaltern globalization. After all, there is a wide range of ends international human rights are simply not trying to achieve, equality perhaps first among them.

76. Cf. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002). When Kennedy revisited his classic essay ten years later, his verdict was different—and in my opinion more correct: “Perhaps the [human rights] movement bit off more than it could chew.” David Kennedy, *The International Human Rights Movement: Still Part of the Problem?*, in EXAMINING CRITICAL PERSPECTIVES ON HUMAN RIGHTS 21 (Rob Dickinson et al. eds., 2012).

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