The Mote in Thy Brother’s Eye: A Review of Human Rights as Politics and Idolatry

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BOOK REVIEW

The Mote in Thy Brother's Eye:
A Review of Human Rights as Politics and Idolatry

MICHAEL IGNAZIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY (Princeton University Press, 2001)

By
William M. Carter, Jr.*

I.
INTRODUCTION

Michael Ignatieff’s provocatively titled collection of essays, Human Rights As Politics and Idolatry [hereinafter Human Rights], is a careful examination of the theoretical underpinnings and contradictions in the area of human rights. At bottom, both of his primary essays, Human Rights As Politics and Human Rights As Idolatry, make a claim that is perhaps contrary to the instincts of human rights thinkers and activists: namely, that international human rights can best be philosophically justified and effectively applied to the extent that they strive for minimalism. Human rights activists generally argue for the opposite conclusion: that international human rights be construed as broadly as possible, both in terms of the substantive rights protected and to whom those rights should apply. Ignatieff argues that a minimalist conception of human rights is necessary for human rights to have maximum moral force and acceptance, and

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1. The entirety of this venerable quote is:
Judge not, that ye be not judged. For with what judgment ye judge, ye shall be judged: and with what measure ye mete, it shall be measured to you again. And why beholdest thou the mote that is in thy brother’s eye, but considerest not the beam that is in thine own eye? Or how wilt thou say to thy brother, Let me pull out the mote out of thine eye; and, behold, a beam is in thine own eye? Thou hypocrite, first cast out the beam out of thine own eye; and then shalt thou see clearly to cast out the mote out of thy brother’s eye.
Matt. 7:1-5 (King James).


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he adduces persuasive geopolitical evidence in support of his conclusions. Taken together, these essays advance a minimalist conception of human rights limited to those rights necessary to protect human "agency"; that is, those rights strictly necessary to protect a person's ability to make choices with dignity. In doing so, Ignatieff seeks to defend human rights from criticisms of Western cultural imperialism and lack of moral grounding, while demonstrating that human rights activists need not retreat into cultural relativism to make such a defense. Readers should understand that Ignatieff, despite taking human rights activists to task for certain inconsistencies, is attempting to support human rights by providing a consistent and principled theoretical basis for them. In short, Ignatieff's critique is best seen as a good-faith challenge intended to strengthen the international human rights movement, even if the reader does not agree with his ultimate conclusions.

The book is fascinating, not only because of the well-reasoned content of its main essays, but also for its structure. It is essentially an extended Socratic dialogue. Ignatieff's positions are critiqued, first in the introduction by Amy Gutmann, then in responses by four eminent scholars. Ignatieff then considers the views of the commentators in his rebuttal and candidly addresses the flaws or gaps they point out. In all, Ignatieff's primary essays, the responses, and his rebuttal make an important contribution to our thinking about human rights. The book is doubly laudatory for achieving this with only occasional forays into the philosophically opaque, and therefore should hold substantial appeal for human rights activists who are not philosophers, academics, or lawyers.

This review addresses an area touched, but not squarely confronted, by many of the essays in Human Rights. It will argue that international human rights should be treated as more than a series of laudatory goals or a "discourse" (in Ignatieff's words) among societies about values. Rather, the body of agreements and principles that we characterize as "human rights" is properly understood as law. Recognizing the essentially "legal" nature of the human rights principles articulated in various multinational agreements in the second half of the twentieth century helps mollify some of the criticisms Ignatieff raises. In short, disagreement about the philosophical underpinnings of human rights becomes less important when those rights are treated more as law than as moral philosophy. And if the victims of human rights abuses should be the focus of the inquiry (as all the commentators in the book agree should be the case), then it is perhaps fair to ask if those victims should care whether the law on which they rely to stop abuses is grounded in Western or Eastern thought, religious doctrine, or secular humanism, as long as it is effective.

In recognition of the true scope of the questions raised by such an approach, this review will address at length only one aspect of the view that human

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3. Professor Gutmann, the editor of the book, is Provost and Professor of Politics at Princeton University. The commentators are K. Anthony Appiah, Professor of Afro-American Studies and Philosophy at Harvard University; David A. Hollinger, Professor of History at the University of California at Berkeley; Thomas W. Laqueur, Professor of History at the University of California at Berkeley; and Diane F. Orentlicher, Professor of Law at American University.
rights are "law." Specifically, this article contends that there is a better chance of achieving maximalist goals, despite Ignatieff's thoughtful counsel to the contrary, where states actually treat human rights as law by giving international human rights domestic enforceability. Incorporating human rights law into domestic legal systems may, in many countries, require major reordering of those legal systems, a goal not readily achievable. In the United States, however, Constitutional and statutory mechanisms already exist which, properly understood, require domestic courts to enforce international human rights law. If there were currently a supranational body with the ability to regularly enforce human rights law,\textsuperscript{4} then much of Ignatieff's explanation for a minimalist view of human rights would be undercut. We would not necessarily need a coherent moral foundation that tries to achieve maximum adherence among nations—states would obey human rights law because a superior authority could force them to do so.\textsuperscript{5} In the absence of such a superior authority, however, consistent treatment of international human rights law as "law" domestically (that is to say, having domestic enforceability in suits brought by individuals) comes a close second. By truly applying international standards internally, rather than seeking only to export them, Western nations can impart a more substantial degree of cross-cultural legitimacy to international human rights law.\textsuperscript{6}

As the eight hundred pound gorilla on the world stage, the United States can enhance the understanding of human rights as law through leadership by example and by a recognition that it cannot, in fact, do whatever it wishes in the human rights arena. Aside from defending a nation that presents itself as one of the leading proponents of human rights worldwide against charges of hypocrisy and cultural imperialism, a mature domestic jurisprudence of international human rights as law would contribute to the growing "international judicial dia-

\textsuperscript{4} This review recognizes that there are currently ad hoc tribunals that enforce international criminal or humanitarian law, such as the International Criminal Tribunals for Rwanda and the Former Yugoslavia. Moreover, the permanent International Criminal Court has similar jurisdiction; it entered into force on 1 July, 2002, having received the necessary 60 ratifications (despite efforts by the United States to undermine the ICC, see, e.g., Ignatieff, \textit{Human Rights as Politics, in HUMAN RIGHTS, supra note 2, at 13.}). These bodies, particularly the ICC, are of tremendous importance. Outside of military conflicts, however, there is currently no supranational body that has the ability to effectively enforce international human rights law. While certain regional bodies, such as the Inter-American and European Courts of Human Rights, do have some ability to grant "fair compensation" to victims of human rights violations, they must largely rely on states to agree to adhere to their rulings.

\textsuperscript{5} Even the existence of such a supranational body, however, would not completely eliminate the need for the type of analysis Ignatieff ably performs. The mere threat of a bigger stick would not necessarily lead to more internalization of human rights law in countries, which should (as Ignatieff recognizes) be the eventual goal. Nor would such a supranational body fully defend against the charges of Western cultural imperialism, should such a body only seek to enforce nominally "Western" values.

\textsuperscript{6} This is a point Ignatieff recognizes at several points in his essays. See Ignatieff, \textit{Human Rights as Politics, in HUMAN RIGHTS, supra note 2, at 36 ("it is inconsistent to impose international human rights restraints on other states unless we accept the jurisdiction of these instruments on our own"); Ignatieff, \textit{Human Rights as Idolatry, in HUMAN RIGHTS, supra note 2, at 92 ("[U]niversality [of human rights] properly means consistency: the West is obliged to practice what it preaches. This puts the West, no less than the rest of the world, on permanent trial.")}
logue” on the contours and interpretation of that body of law. This is not to say that U.S. courts must necessarily find that, for example, the death penalty violates international human rights law. Rather, the United States must show that it takes human rights law seriously by applying international human rights law in making that determination. In the context of the issues raised by Ignatieff’s book, the process is equally as important as the outcome. This review will show, pointing specifically to a recent decision of a federal district court in New York, that international human rights law is indeed federal “law” that may be domestically enforced.

II. HUMAN RIGHTS AS DISCOURSE AMONG NATIONS

Ignatieff’s first essay, Human Rights as Politics, provides a good summary of the “juridical, advocacy, and enforcement revolutions” in human rights in the latter half of the twentieth century. After reviewing this evidence of moral progress, he takes human rights activists to task for treating human rights as “trumps”: that is, the tendency to treat human rights language as bringing political disputes to closure. Rather, he argues, human rights are properly seen as politics—a starting point for deliberation about morally acceptable practices. Treating human rights as politics, rather than a set of “moral trump cards,” he argues, helps the human rights community defend against charges of Western cultural imperialism and provides defensible and defined limits to humanitarian intervention. Such a conception of human rights also gives human rights activists the ability to effectively “take sides” against certain practices, because explicitly treating human rights as politics eliminates the need to make difficult-to-defend claims about moral neutrality.

Because international human rights norms cannot effectively be imposed from the outside, human rights doctrine must seek moral grounds for agreement among cultures. Ignatieff therefore argues that human rights language should be limited to making demands necessary to protect human “agency”—the ability of individuals to make choices for themselves with dignity. A politics of human rights focused on protecting human agency is crucial to the success of the human rights movement, Ignatieff believes, because cultures of various orientations are most likely to find common ground in the proposition that international human rights law protects “the right of people to construe dignity as they wish, not the content they give to it.”

8. See Ignatieff, Human Rights as Politics, in HUMAN RIGHTS, supra note 2, at 37. See also Buell v. Mitchell, 274 F.3d 337, 370-76 (6th Cir. 2001) (dismissing challenge to death penalty based on treaties and customary international law).
10. Ignatieff, Dignity and Agency, in HUMAN RIGHTS, supra note 2, at 165. Thomas Laqueur’s commentary argues for expanding the “politics” of human rights beyond “rights” language, to include support for the social and cultural conditions that can lead to an expansion of the “moral
III.
THE MORAL UNDERPINNINGS OF HUMAN RIGHTS DOCTRINE AND "RIGHTS MINIMALISM"

Although Ignatieff’s first essay is perhaps the most controversial, in that it challenges the fundamental belief of most human rights advocates that human rights are in fact “trumps,” the second essay is ultimately more powerful. In Human Rights as Idolatry, Ignatieff more directly addresses the moral underpinnings (or lack thereof) of international human rights doctrine. Ignatieff believes that the human rights community has elevated human rights to the level of idolatry, contending that “[h]uman rights has become the major article of faith of a secular culture that fears it believes in nothing else.” He argues that this secular worship at the altar of human rights presents cultural and spiritual challenges to its effectiveness.

The “spiritual” crisis described in the essay is that human rights activists have intentionally divorced human rights claims from any particular religious or spiritual grounding, in recognition of the fact that different cultures have varying views of the moral underpinnings of rights. The Western human rights community rightly surmised that an explicitly Jeffersonian view that all people were endowed by their (Christian, Protestant) Creator with the rights articulated in the Universal Declaration of Human Rights was unlikely to find agreement among nations outside of the Western tradition. In an attempt to achieve universality, the early human rights communities engaged in a deliberate silence about the metaphysical underpinnings of human rights. This pragmatic silence has made it easier for a global human rights community to emerge. Yet this separation raises a fundamental inconsistency because international human rights doctrine claims, for example, that “[a]ll human beings are born free and equal in dignity and rights,” but never articulates why. In other words, human rights doctrine—divorced from religious or spiritual underpinnings—never answers the question, “What gives human beings the right to have rights?” Secular humanist human rights doctrine instead makes the claim that human beings are special by virtue of being human and it is this elevation of mankind to the level of the sacred that can be seen as “idolatrous” by the religious. This analysis presents a challenge that the human rights community would do well to take seriously, given that the vast majority of the world does claim some spiritual or religious allegiance.

imagination” to include distant rights abuses—"the capacity to somehow feel the exigency of wrongs suffered by strangers at a distance.” Thomas Laqueur, The Moral Imagination and Human Rights, in HUMAN RIGHTS, supra note 2, at 134.

11. Ignatieff, Human Rights as Idolatry, in HUMAN RIGHTS, supra note 2, at 53.

12. Id. at 77, citing Article I of the Universal Declaration of Human Rights.

13. Diane Orentlicher’s commentary argues that the human rights community needs to engage religion, rather than seek to divorce claims of the legitimacy of human rights doctrine from religious thought. Diane F. Orentlicher, Relativism and Religion, in HUMAN RIGHTS, supra note 2, 141-58. She believes that international human rights norms require internalization and acceptance by countries and cultures, and that human rights must therefore at least be consistent with these countries’ and cultures’ religious foundations. In her words, “human rights cannot truly go global unless it goes deeply local.” Id. at 157. Orentlicher also argues that willingness to seriously engage religious
Ignatieff believes one response to this challenge can be found in the theme raised in the first essay: that human rights should be limited to protecting human “agency” or negative liberty (i.e., the capacity of each individual to achieve rational intentions without hindrance, in Ignatieff’s words). This minimalist conception of human rights is intended to address the challenge to universality of substantive human rights norms. Ignatieff argues that it is only possible to achieve a shared view of human rights where that view is “compatible with diverging attitudes concerning what constitutes a good life.”

The second human rights crisis Ignatieff confronts is “cultural”; namely, that the lack of a coherent moral grounding for international human rights doctrine leaves it open to serious challenge both within and outside the West. Ignatieff identifies political Islam and East Asia as the primary sources of the external cultural crisis. As for political Islam, Ignatieff argues that certain substantive human rights values embodied in the Universal Declaration of Human Rights, such as the right to freely choose one’s spouse, are incompatible with certain strains of political Islam, because they imply a sovereign individual whose interests rise above the will of Allah as expressed in Koranic values regarding familial relationships. Similarly, the oft-noted “Asian values” model presents a serious challenge to the claimed universality of human rights doctrine, because it argues that the focus of human rights (i.e., Western ideals) on individualism subverts the ordered and functioning communitarian systems and values necessary to enable enjoyment of these individual rights.

The internal Western challenge Ignatieff addresses is the tendency of human rights advocates to “trade away” too much in attempting to answer the other challenges. Ignatieff argues that Western defenders of human rights risk undermining their cause when they retreat into extreme cultural relativism by conceding that “international human rights” is really solely synonymous with “Western values.” He contends that Western human rights advocates should recognize and argue that (1) the early history of international human rights included many cultural traditions besides the West; (2) the Universal Declaration of

15. Orentlicher also addresses the cultural and spiritual crises that present serious challenges to human rights doctrine’s claims to universality. She argues that even the fundamental, minimalist norms that Ignatieff advocates—the prohibition against torture, for example—may not achieve universality without significant transformation within certain societies, which requires that human rights have “broad and deep” legitimacy. Orentlicher accordingly argues that a sustainable theory of human rights requires two elements beyond Ignatieff’s analysis: (1) procedural inclusiveness, where different cultures and perspectives truly have a seat at the table in constructing international human rights norms; and (2) transnational collaboration, whereby human rights activists from different nations collaborate in the enforcement of human rights norms. Orentlicher, Relativism and Religion, in HUMAN RIGHTS, supra note 2, at 151-54.
Human Rights grew out of Western shame and an attempt to restrain the barbarism committed in the West during World War II, rather than out of a sense of "Western triumphalism"; and (3) it is precisely the most arguably "Western" aspect of human rights doctrine—the focus on individualism—that makes it appealing to oppressed people around the world and that it therefore needs no apology. Ignatieff argues that rather than address these challenges by seeking to achieve universality of consent to human rights norms among all cultures and nations (which inevitably results in toothless standards), Western defenders of human rights should seek to justify their claims in terms of universality of the interests of the powerless which, at base, involves the demand that state power be exercised over them only in ways that respect their autonomy as individual moral agents. Ignatieff returns to the point that "human rights as agency" does not necessarily entail adopting substantive Western standards or ways of life. Instead, it simply requires creating conditions under which the powerless "are free to avail themselves of such [substantive] rights as they want."  

IV. A PATH TO ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW BY DOMESTIC COURTS

Human Rights is an important book because it identifies and confronts serious challenges to the legitimacy of international human rights doctrine. While recognizing the value of Ignatieff's analysis, this review proposes another conception of human rights that addresses some of the challenges raised in the book without necessarily adopting the minimalist conception Ignatieff proposes. That conception requires Western nations who are proponents of international human rights worldwide to seriously treat human rights law as "law" domestically. Although such an effort by Western nations would not resolve all the challenges Ignatieff identifies, it would help address the external cultural crisis, while lessening the need for complex metaphysical justifications for this body of law.
Increasingly, United States courts are being presented with claims based, at least partially, on international human rights law. There are four primary situations in which litigants present such claims: (1) litigation brought in U.S. courts by a citizen of another country for abuse that occurred in a foreign country; (2) litigation brought by a foreign national against the United States for violations of international human rights law; (3) suits brought by U.S. citizens against foreign governments or entities; and (4) cases where a U.S. citizen sues the United States for violations of international law, based on actions occurring within the United States. Only cases within the second and fourth categories truly address the issues raised in Human Rights. Suits in U.S. courts against

K. Anthony Appiah, *Grounding Human Rights, in Human Rights, supra note 2, at 106. Appiah questions the value of what he calls "high doctrine" (i.e., fully theorized agreement on the moral basis for international human rights law) as opposed to a pragmatic, deliberate silence. He believes that human rights treaties can perhaps best be defended by arguing simply that they operate to offer people protections against oppression that most oppressed people desire. Id. at 108. This review takes a somewhat similar approach in arguing that a demonstrated consistent application of international human rights law as "law" within Western nations is important even in the absence of a fully consistent explanation of its metaphysical underpinnings.

18. This review focuses primarily on the judiciary's treatment of human rights law for the simple reason that one of the central attributes of what we consider "law" in the United States is the rule of law; that substantive rights may be privately enforced in the courts by individuals, without regard to the whims of the Executive Branch. To the extent that human rights law is only domestically enforceable in the United States when the Executive Branch says so, it is not "law" in the traditional sense of the word. The proper role of Congress in construing and applying human rights law is significantly more complicated and is examined (briefly) below.


20. See, e.g., Haitian Centers Council, Inc. v. McNary, 969 F.2d 1350 (2d Cir. 1992), wherein the plaintiffs challenged interception and return of Haitian refugees on several grounds, one of which was that the action was a violation of the United States' duties under the Convention Relating to the Status of Refugees ("Refugee Convention"). Note, however, that the court construed the relevant statutory provisions (as informed by international law) to hold that the Refugee Convention itself provided enforceable rights. See id. at 1367 ("[P]laintiffs' arguments regarding the self-executing nature of Article 33.1 of the Refugee Convention are largely academic, since §243(h)(1) [of the INA] provides coextensive protection."). Further, the Supreme Court subsequently reversed the Second Circuit's holding in McNary. See Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993). See also Jama v. INS, 22 F. Supp. 2d 353 (D.N.J. 1998) (rejecting asylum seekers' claim under the Alien Tort Claims Act that their treatment in INS detention violated the law of nations as embodied in various international human rights agreements). But see Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd on other grounds, 654 F.2d 1382 (10th Cir. 1981), wherein the district court granted a writ of habeas corpus to a "Marilio" Cuban who claimed that his continued indefinite detention violated customary international law norms against arbitrary detention. The Tenth Circuit, however, in affirming the judgment, did not hold that these norms of customary international law themselves provided a basis for relief. As in McNary, the court construed the relevant statutory provisions (as informed by international law) to require the petitioner's release. 654 F.2d at 1389-90.

foreign governments or entities, whether by a U.S. citizen or a foreign national, do not impose any great costs on the United States beyond the resources expended in entertaining such suits in federal court. Such suits, while they are laudable in providing a forum for resolution of serious human rights claims, and although they do contribute to the growing international judicial dialogue on human rights, do not rebut any of the criticisms Ignatieff analyzes concerning Western cultural imperialism, "American exceptionalism," or hypocrisy.\textsuperscript{2}

Cases where the plaintiff seeks to hold the United States' domestic feet to the international human rights fire, on the other hand, have one of the essential attributes of "law," if by law we mean a consistently binding set of obligations that may be enforced by individuals. Such cases are rarely successful in domestic courts, and therefore feed the perception of human rights as mere platitudes that may be disregarded at will.

The primary criticism of treating international human rights as enforceable law in the United States rests on the allegedly countermajoritarian nature of international human rights law, or what Ignatieff calls "American exceptionalism."\textsuperscript{23} U.S. courts have been extremely hesitant to give domestic effect to international human rights law, despite the fact that the Constitution makes international law part of the "supreme law of the land."\textsuperscript{24} As a recent federal

\textsuperscript{22} For example, the Second Circuit's decision in Filartiga, supra note 19, where the court applied customary international law to determine that the torture of a Paraguayan national by another Paraguayan national was cognizable in U.S. courts in a suit under the Alien Tort Claims Act, was an important step forward in the recognition of international human rights law as "law" that can be enforced in United States courts. Research reveals no comparable decision upholding a claim seeking to apply international human rights law to actions perpetrated by the United States against U.S. nationals. But see, e.g., Buell, supra note 8, where the court at least considered a challenge based on international law to the death penalty.

\textsuperscript{23} Ignatieff, Human Rights as Politics, in Human Rights, supra note 2, at 12-14.

\textsuperscript{24} See U.S. CONST. art. VI, §1, cl. 2; The Paquete Habana, 175 U.S. 677, 700 (1900). The U.S. is therefore nominally a "monist" system. The monist/dualist dichotomy can be briefly summarized as follows. Certain constitutional regimes, including the United States, explicitly make international law part of the "law of the land" and are therefore called "monist" systems. The "dualist" conception recognizes that international law exists, but treats it as proceeding on a completely separate plane from the domestic legal system, absent legislation specifically incorporating international law. See Anne Bayefsky and Joan Fitzpatrick, International Human Rights Law in United States Courts: A Comparative Perspective, 14 Mich. J. Int’’l L. 1, 4-5 (1992). Although the United States is theoretically a monist system, court decisions make clear that the U.S. is a dualist system in practice. "Thus, the United States may breach an international obligation and become responsible internationally—as it did when Congress enacted the Byrd Amendment which ... required the President to violate United Nations sanctions against [Zimbabwe]—and yet not be answerable for such a breach in domestic courts." Lillich, infra note 37, at 369-70 (citing Diggs v. Shultz, 470 F.2d 461, 465-67 (D.C. Cir. 1972, cert. denied, 411 U.S. 931 (1973))). The Supreme Court has indicated that it intends federal courts to follow an approach that is monist in theory but dualist in practice, at least as regards anything other than a signed, ratified, self-executing treaty (or one for which Congress has enacted implementing legislation). See United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992) (recognizing that the U.S.-Mexico extradition treaty "has the force of law," but holding that it could not be directly enforced by the judiciary because it is not self-executing). One response to this argument is that the fact that something is not enforceable by the judiciary does not mean that it is not "law"; it just deals with who may enforce that law. See, e.g., Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that the disparate impact regulations to Title VI of the Civil Rights Act of 1964 do not themselves create a private cause of action, but noting the validity of those regulations and that they could be enforced by the Executive Branch). The most obvious rejoinder to this response is that rights construed in such a manner are virtually useless. Regulatory agencies could
district court decision illustrates, however, individual domestic enforcement of international human rights law is in no way contrary to the United States' constitutional regime. In *Standt v. New York*, the plaintiff, a German citizen, was arrested in the United States. He was not informed of his right, under the Vienna Convention on Consular Relations (VCCR), to contact the German Consulate nor was he permitted to do so despite his repeated requests. *Standt* sued, alleging, *inter alia*, a Section 1983 claim for violation of his right under the VCCR to contact his consulate upon arrest in a foreign country. The court denied defendants' motions for summary judgment on the Section 1983/VCCR claim, holding that plaintiff could pursue an affirmative claim under Section 1983 for violation of the rights secured by the VCCR.

Given the generally dim view U.S. courts take of direct, individual enforcement of international treaties, the results in *Standt* seem surprising. The court, however, did not treat the proposition that plaintiff could enforce this treaty via Section 1983 as particularly controversial. Rather, the court treated the VCCR as it would any other federal “law” that a plaintiff seeks to enforce via Section 1983. In resolving the question of the VCCR’s enforceability, the court also looked to relevant international law, akin to principles of statutory interpretation, in interpreting the treaty. Moreover, the *Standt* court considered the VCCR’s legislative history (or travaux preparatoires) and relevant precedent of other countries in resolving the question. All of these steps—examining the treaty as it would other federal “law”; applying principles of statutory interpretation; looking at the treaty’s legislative history; and examining the persuasive precedent of other courts that have considered the question—contribute to the recognition of international law as “law.” For purposes of this review, the reasoning in *Standt* is at least as important as its result.

The court began by recognizing that the inquiry into whether the plaintiff has standing to enforce a treaty essentially asks the same question as whether the treaty is self-executing: both inquiries seek to determine whether the treaty creates an individually enforceable right. Turning to this inquiry, the *Standt* court first looked at international legal principles of treaty interpretation. The court noted, looking to the Vienna Convention on the Law of Treaties, that the inquiry must begin with the plain language of the treaty. Where the language of the treaty is unclear or contradictory, resort may be had to the legislative history and relevant precedent of other courts that have considered the question—contribute to the recognition of international law as “law.” For purposes of this review, the reasoning in *Standt* is at least as important as its result.
tive history as an aid in determining the treaty's intent. Both the plain language and the legislative history, the court concluded, established that the VCCR does confer enforceable rights on the individual.\textsuperscript{32} The court further found that the practices of other countries supported its interpretation of the VCCR as conferring individually enforceable rights.\textsuperscript{33} Having concluded that the VCCR conferred individual rights, the \textit{Standt} court then held that such rights were enforceable via Section 1983 under the test articulated by the Supreme Court in \textit{Blessing v. Freestone}.\textsuperscript{34}

The decision in \textit{Standt} should not be overstated as a broad mandate that international human rights law is domestically enforceable in U.S. courts in every circumstance. \textit{Standt} dealt with a particular treaty of limited application and concluded that it could be enforced via Section 1983 because its examination of the treaty indicated that it created a federal "right." It remains to be seen whether \textit{Standt}'s reasoning can be extended to other human rights treaties,\textsuperscript{35} and resolution of that question must await further cases relying on treaties that may or may not create enforceable federal "rights" under a \textit{Blessing} analysis. It must also be noted that \textit{Standt} dealt with a signed and ratified treaty.\textsuperscript{36}

\textsuperscript{32} \textit{Id.} at 424-27.

\textsuperscript{33} \textit{Id.} at 426 (noting practice in, for example, Canada, Argentina, and Mexico).

\textsuperscript{34} 520 U.S. 329 (1997). \textit{Blessing} requires a multi-part inquiry in determining whether federal law creates a "right" enforceable under §1983. First, the plaintiff must establish the violation of a federal right by demonstrating that (1) Congress intended that the provision in question benefit the plaintiff; (2) the right asserted is not so vague and amorphous that its enforcement would strain judicial competence; and (3) the statute unambiguously imposes a binding obligation. Once plaintiff has met this test, the defendant may rebut plaintiff's \textit{prima facie} case by demonstrating that Congress specifically intended to foreclose a §1983 remedy by providing a comprehensive mechanism for protecting the federal right, such as a comprehensive administrative enforcement scheme. \textit{Id.} at 340-41. A defendant cannot easily carry his burden of rebutting the presumption of enforceability under §1983 once the plaintiff has met its \textit{prima facie} case. Congress is presumed to legislate against the background of §1983 and therefore contemplate private enforcement when it creates federal rights, unless there is substantial legislative evidence to the contrary. \textit{Id.} at 346.

\textsuperscript{35} Whether the VCCR can properly be characterized as a "human rights" treaty, in the same sense as, for example, the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), raises interesting questions. Courts may be more willing to hold that treaties such as the VCCR are domestically enforceable because (1) they are necessary for the protection and effective functioning of U.S. citizens abroad and (2) by definition, they will be limited in application because such a claim could only be brought in the United States by a foreign national, not as a matter of course by U.S. citizens alleging, for example, racial discrimination. On the other hand, domestically enforcing a convention such as the VCCR may rebut one of the claims raised by Ignatieff's book, namely, that human rights should be limited to protecting those "negative rights" necessary to protect "agency." After all, the right to consular assistance under the VCCR is clearly a right "to" something, not just a freedom "from" something. \textit{Cf.} Amy Gutmann, \textit{Introduction, in} HUMAN RIGHTS, supra note 2, at ix (arguing that many human rights are more than "negative" freedoms necessary to protect "agency": "[t]he right to subsistence is as necessary for human agency as a right against torture."). On the other hand, the only affirmative obligation a country has under the VCCR is to "notify" a foreign national of his right to consular assistance.

\textsuperscript{36} \textit{See Standt,} 153 F. Supp. 2d at 427 ("The VCCR, as a ratified treaty, is, of course, the supreme law of the land") (emphasis added). The United States has signed and ratified certain relatively non-controversial human rights treaties, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Prevention and Punishment of the Crime of Genocide. The U.S. has also signed and ratified CERD and the International Covenant on Civil and Political Rights (ICCPR), but with several key reservations, understandings and declarations (RUDs). The debate over whether unratified treaties or treaties the
Moreover, the \textit{Standt} court did not directly address the debate over whether non-self-executing treaties are directly enforceable in a private cause of action, nor did it address whether customary international law,\textsuperscript{37} not codified in a treaty, is domestically enforceable. The \textit{Standt} court, in fact, may have made a fairly serious analytical error by not clearly indicating whether it was finding that (1) the treaty was self-executing because it created individually enforceable rights, and therefore directly enforceable in a private lawsuit in the absence of implementing legislation or (2) the treaty was enforceable via Section 1983 regardless of whether it was self-executing, as long as it created rights resting with the individual, rather than (or in addition to) State parties. By conflating the two issues, it is unclear whether the court meant to hold that \textit{only} self-executing treaties are enforceable via Section 1983. If that is the holding to be drawn from \textit{Standt}, the decision is inconsistent with the Supreme Court’s decision in \textit{Blessing}.

The distinction is between rights and remedies. Where a court finds that a treaty is self-executing, the result should be the same as where a court finds that a federal statute or regulation gives rise to an implied private cause of action under a \textit{Cort v. Ash}\textsuperscript{38} analysis: the individual may enforce it \textit{directly} without relying on other legislation. In contrast, where federal legislation (or a treaty, in this case) is determined to provide a federal “right” under a \textit{Blessing} analysis,

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\textsuperscript{37} Arguably, customary international law provides an independent source of enforceable human rights law beyond that codified in treaties. See, e.g., Carlos Vazquez, \textit{Treaty-Based Rights and Remedies of Individuals}, 92 COLUM. L. REV. 1082 (1992); Bayefsky & Fitzpatrick, \textit{supra} note 24), and need not be repeated here, except to say that even a declaration of “non-self-execution” by the Executive Branch does not necessarily render the treaty non-enforceable by the judiciary via §1983, since “non-self-executing” is a fairly narrow technical doctrine meaning that the treaty does not create a “freestanding” private cause of action. For example, in the RUDs to the ICCPR, the United States stated that “the Covenant will not create a private cause of action in U.S. courts.” See Sloss, \textit{infra} note 39, at 166 (discussing the U.S.’s reservations to the ICCPR). As this review explains, however, this does not necessarily mean that the ICCPR is not enforceable via §1983; it only means that the treaty, standing alone, does not create a basis for individuals to sue under it directly.

\textsuperscript{38} 422 U.S. 66 (1975). Under \textit{Cort}, a federal statute not explicitly containing a private cause of action may be found to contain one implicitly where: (1) plaintiff is a member of the class Congress intended to benefit; (2) there are indications of legislative intent to create a remedy for violation of the statute; (3) it is consistent with the purpose of the legislation to imply a remedy; and (4) where the remedy is not one traditionally relegated to state law. \textit{Id.} at 78.
Section 1983 provides the cause of action, regardless of whether the statute (or treaty) gives rise to an implied private cause of action (or whether the treaty is self-executing). In other words, the self-executing/implied private cause of action analysis is applied to determine whether the treaty or federal statute itself creates a mechanism for a private party to assert the violation in court. Under a Blessing inquiry, whether the treaty is self-executing (i.e., whether it creates a cause of action) is irrelevant, because Section 1983 itself provides the cause of action once it is shown that plaintiff is asserting a federal "right"—in the case of treaties, Section 1983 is the "implementing legislation" once the Blessing test is met.39 The better view of Standt therefore is that it looked to whether the VCCR conferred individual rights not to determine whether it was truly self-executing, but to determine whether it was "intended to benefit the plaintiff" under Blessing and therefore enforceable via Section 1983.40

But neither should the result and reasoning in Standt be understated. Standt is one of the few cases to take domestic application of international law seriously,41 and the only case thus far to hold, as had been urged by many scholars for years,42 that an international human rights treaty is enforceable via Section 1983. Moreover, the reasoning in Standt is equally applicable to other human rights treaties (ratified or unratified, self-executing or non-self-executing) and, indeed, to customary international law, even if the result on the facts of those cases is different. The reasoning in Standt can and should be extended to other claims brought under international human rights treaties or customary interna-

39. See, e.g., South Camden Citizens in Action v. New Jersey Dep't of Environmental Protection, 145 F. Supp. 2d 505, 520-24 (D.N.J. 2001) (explaining the differences between the two inquiries and holding that the Supreme Court's rejection of a "freestanding" implied private cause of action under Title VI's disparate impact regulations in Sandoval, supra note 24, did not preclude a claim to enforce those regulations via §1983). South Camden was reversed on appeal by the Third Circuit, but not on grounds that affect the analysis here. See 274 F.3d 771 (3d Cir. 2001). The two inquiries—"self-executing/implied cause of action" and "federal right" under §1983—do overlap in one respect: both ask whether the provision in question is intended to benefit the plaintiff. Yet they are not identical. See South Camden, 145 F. Supp. 2d at 520-21. There is substantial authority for concluding that the question of whether a treaty is self-executing is analytically the same as whether it creates an implied private cause of action. See David Sloss, The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties, 24 YALE J. INT'L L. 129, 151 n.119 (1999) (citing cases treating the analysis as the same). As Sandoval, Blessing and South Camden demonstrate, the fact that a federal statute (or regulation or an international treaty) does not create a "freestanding" implied private cause of action does not preclude an action to enforce it via Section 1983, where the statute or treaty creates a federal "right" under a Blessing analysis.

40. Standt's result is also limited because the court did not actually hold that the plaintiff's claim was ultimately successful; rather, it denied the defendants' motions for summary judgment on the Section 1983/VCCR claim. Further, the decision in Standt is, after all, only that of a single federal district court, though the opinion subsequently has been cited in a concurring opinion in New Mexico v. Martinez-Rodriguez, 33 P.3d 267, 282-83 (N.M. 2001) (Minzner, J., concurring) (citing Standt in disagreeing with the majority's conclusion that the VCCR does not create individually enforceable rights).

41. See generally Lillich, supra note 37 (discussing major cases invoking international human rights law in U.S. courts).

42. Scholars have advocated an approach similar to Standt's as a means of working around the self-executing treaty doctrine. See, e.g., Vazquez, supra note 36, at 1143-57; Sloss, supra note 39, at 152.
tional law. Nor is such extension merely a theoretical exercise intended to bolster the abstract legitimacy of international human rights law. Quite apart from the question of whether human rights can trump contrary aspects of U.S. domestic law (e.g., whether international law can be used to challenge the U.S. death penalty) is the use of international human rights law to fill very real gaps in the United States' protection of human rights under the Constitution or federal statutes.\footnote{43. One scholar characterizes this as the use of international human rights law to redress "non-frivolous, non-redundant claims." Sloss, \textit{supra} note 39, at 171-72. Sloss provides one hypothetical example of where international human rights law could operate to address a non-frivolous, non-redundant claim. He hypothesizes the Amish relying on the ICCPR's provisions on religious freedom to challenge application of a state statute to them, even though such application would not violate the Supreme Court's Free Exercise Clause jurisprudence. \textit{Id.} at 130-31. A second example of this "gap-filling" use of international human rights law is in the area of race discrimination. The Supreme Court, beginning with \textit{Washington v. Davis}, 426 U.S. 229 (1976), has grown increasingly fixated on the theory that claims of racial discrimination are cognizable under the Equal Protection Clause or federal statutes that are silent on the issue only where the plaintiff can prove intentional racial discrimination. Yet CERD does not require proof of intentional discrimination. \textit{See} CERD, \textit{supra} note 35, Art. 1(1) ("In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life") (emphasis added).}

Further, the limitations in an action to enforce international human rights law via Section 1983 may actually be a benefit in addressing one of the challenges Ignatieff addresses—the "countermajoritarian" issue or "internal" Western critique. A claim brought directly under international law arguably raises the same concerns as judicially-created implied private causes of action under federal statutes; namely, that the judicial branch will create free-standing, unlimited rights to sue that cannot be checked by the people's elected representatives. An action to enforce international human rights law via Section 1983 minimizes such concerns because it has an external check in the popular will. If "the people" disagree with such a legal remedy, they can convince Congress to amend Section 1983 to explicitly foreclose it.\footnote{44. Moreover, §1983 is more limited internally than a freestanding, implied private cause of action to directly enforce international human rights law. Section 1983 requires state action, and thus would not provide redress for human rights violations by truly private individuals or entities. \textit{See}, e.g., Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) (holding that there must be substantial "entwinement" with the state for a private entity to act "under color of state law" for purposes of §1983). Litigation under §1983 may also raise defenses of absolute, municipal and qualified immunity. Additionally, §1983 itself does not apply to rights violations by the federal government; although a \textit{Bivens} action may provide a similar cause of action against the federal government, the Supreme Court has been far more restrictive in applying \textit{Bivens} than it has been with regard to §1983. \textit{See} Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001). Using §1983 to litigate human rights violations in the United States does not therefore raise the specter of "rights run amok."}

Truly treating international human rights law as "law" within the United States, by engaging in the type of analysis illustrated by the \textit{Standt} decision, surely will not address all of the issues Ignatieff identifies in \textit{Human Rights}.\footnote{45. Even if more courts adopted a \textit{Standt} approach, such action would not squarely address claims of Western cultural imperialism (i.e., focusing solely on political rights), if \textit{Standt} is limited to treaties that the United States has ratified, given that the U.S. has not ratified major treaties that...}
Yet it can go a long way toward that goal, without necessitating the minimalist justification for human rights that Ignatieff proposes. Allowing individual enforcement of international human rights law in the United States demonstrates that the U.S. indeed "practices what it preaches," something Ignatieff recognizes is crucial to the success and legitimacy of the human rights movement. Consider: what authoritarian regime, charged by the United States that its conduct is outside the boundaries of human rights norms, will take such charges seriously where the United States consistently refuses to permit domestic enforcement of the human rights norms embodied in signed and ratified treaties? Yet that is precisely the situation that exists today.

The consistent refusal of the U.S. judiciary to enforce human rights law at home unquestionably weakens Western claims that human rights doctrine is "law" abroad, leaving it open to charges of Western cultural imperialism and hypocrisy. And it surely gives no comfort to those who need it most—the oppressed at home and abroad—to advocate, as a practical matter, a system of "law" that only operates when it cannot be enforced domestically. Moreover, enforcing international human rights law domestically via Section 1983 also addresses the internal Western critique that international human rights law is an infringement of popular sovereignty. Because of the internal and external limits on Section 1983 actions, Western opponents of treating human rights law as "real rights" domestically cannot coherently rely on this argument.

V.
CONCLUSION

It is precisely because no single prescription for the advancement of human rights is sufficient that the critiques presented by Ignatieff and the commentators in Human Rights should be required reading for Western human rights advocates. Western defenders of human rights must squarely address the challenges to the idea of human rights as trumps and the cultural and spiritual crises highlighted in Human Rights that undermine international human rights' claim to universality. In addition to addressing the concerns raised in this excellent book in answering human rights challenges abroad, however, Western defenders of human rights should also engage in an equally strong effort to convince Western nations in general and the United States in particular to treat international human rights law as "law" domestically. Otherwise we must be prepared to explain why what we promote as "law" abroad is merely "a good idea" at home.  

focus on "communitarian" rights, such as the International Covenant on Economic, Social and Cultural Rights.

46. There is no doubt that this effort is already underway. The International Human Rights Law Group has started a program specifically targeted at enforcement of international human rights law in the United States. See http://www.hrlawgroup.org. The Meiklejohn Civil Liberties Institute also has a similar program. See http://www.sfsu.edu/~mclicfc/hunrightsrep.html. The efforts of NGOs such as Human Rights Watch and Amnesty International to draw attention to human rights abuses in the United States are also of crucial importance. These efforts provide a resource upon which domestic civil rights practitioners can and should draw in their cases (which many have begun to do, either directly or through amicus briefs of human rights organizations, as is attested to by the
cases cited in this review where human rights claims were raised in U.S. courts). These developments are directed at forming a policy of strategic litigation by practitioners in the field to build a jurisprudential framework for incorporating international human rights standards into domestic law.