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Justifying Justice: Strengthening Foundations for the Rights of Accused Persons

by

Kurt Fertig

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To the Graduate Faculty:

The members of the committee appointed to examine the dissertation of Kurt Fertig find it satisfactory and recommend that it be accepted.

_____

James Stoutenborough, Ph.D. Chair

_____

Wayne Gabardi, Ph.D. Committee Member

_____

Zac Gershberg, Ph.D. Graduate Faculty Representative

Dedicated to my remarkable parents, **Norman and Georgia Fertig**

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Table of Contents

List of Figures

List of Tables

Justifying Justice: Strengthening Foundations for the Rights of Accused Persons

Dissertation Abstract—Idaho State University (2019)

The Universal Declaration of Human Rights (UDHR) codifies certain universal rights for accused persons. This study outlines a theoretical justification for them which supplements the foundations currently offered by religion and philosophy. Since most perceived violations of human rights occur in the treatment of accused persons, it is imperative that we have a sufficiently broad foundation upon which to justify opposition to such things as torture, inhumane treatment of enemy combatants, or suspension of due process. In the past, the more tenuous foundations provided by religion and philosophy have lacked worldwide acceptance when standing alone. This study discusses the arguments for universal human rights in both religion and philosophy and explains why they benefit from a broader defense. I ground this defense in a foundation built upon the historical existence and widespread contemporary adoption of certain human rights across cultures, religions, and political systems. Specifically, I support a defense for the universality of these rights through a combination of the frequency of their appearance in historical law codes and their adoption into modern law codes (constitutions) across broad geographical, religious, and political spectra, using data from the Comparative Constitutions Project. This study will further validate the list of universal rights for accused persons found in the UDHR and will provide additional justification for their existence.

Key Words: Universal Human Rights, Universal Morality, Universal Declaration of Human Rights, Natural Law, Natural Rights, Comparative Constitutions

CHAPTER 1: Introduction

Importance:

"The united nations represents the idea of a universal morality, superior to the interest of individual nations . . . that men in every land hold the same high ideals and strive for the same goals of peace and justice . . ."

--Harry Truman (1950)

In January of 2017, shortly after Donald Trump assumed the Presidency, his nominee for Secretary of State, Rex Tillerson, was seated before the Senate Foreign Relations committee and was answering questions about world affairs. One exchange was particularly instructive in elucidating the importance of discovering common foundations for universal human rights. Senator Marco Rubio, of Florida, outlined what he felt were human rights abuses being perpetrated by the government of Saudi Arabia and asked Mr. Tillerson if he would label that country a human rights violator. Mr. Tillerson refused. He said that Saudi Arabia does not share the same values, when it comes to human rights, as the United States of America. Furthermore, he blamed that lack of common perception on longstanding cultural differences, and indicated that such a government could not be held to the same standards espoused by the United States, or by the rest of the world, for that matter. If Mr. Tillerson was correct in his response, and human rights cannot be universally applied, but are dependent upon culture, religion, or geography, then there is little moral argument to be made by the world community when such abuses are perpetrated. Furthermore, when human rights begin to erode in the United States, or elsewhere, amidst changing culture, values, or mores, what argument will be left to protect them?

The search for a universal morality, particularly as it relates to human rights, is difficult because justification for morality is frequently not amenable to empirical support and runs into falsifiable assertions. Still, there is a public voice which continues to proclaim its existence through laws, philosophy, religion, ritual, edicts, and constitutions around the world. Many people, in fact, *do* assert universal morality of some kind and, when President Harry Truman made the above statement at the event of the 5th anniversary of the formation of the United Nations, the world had only recently come together in an unprecedented effort to codify such a universal morality, in the form of universal human rights, and to avoid the sort of moral relativity of which Tillerson spoke. How well the authors of the Universal Declaration of Human Rights captured real universal human rights has been up for debate. However, if universal rights do exist, arguments for their continued existence must be based upon a reasonable foundation and, so far, such foundations are difficult to solidify, though there are some epistemologies through which attempt it.

The purpose of this dissertation is to find foundational support for those human rights which are afforded to accused persons in the Universal Declaration of Human Rights (UDHR). The UDHR serves as a launching pad for universal rights because it is the most comprehensive list of rights to have at least the pretense of worldwide agreement. After World War II, not only were several different nations pushing for a codified list of universal rights, but many world religions were, as well (Morsink 1999, 1-3). Representatives from the United States, China, Lebanon, Australia, Chile, France, the Soviet Union, the United Kingdom, and Canada played important roles in drafting the list of rights designed to prevent any possible return to the atrocities of the holocaust. Jews, Catholics, and Protestants joined in a common call for human rights after the war and the Jewish community even drew up its own draft of them (Morsink

1999, 2). This groundswell of support was both organic and reactive--a good indication of universality. Specific plans for the drafting of a universal declaration called for the inclusion of disparate political opinions through the appointment of commissioners from a broad geographical base (Morsink 1999, 4-5). This had the effect of representing a swath of the world's population--inserting values from various cultures and locations into the final draft. Thus, from its very inception, the committee that decided upon what would constitute universal human rights in the UDHR (although clearly not representing all countries and religions on earth) was at least from countries that represented most of the major world religions, many forms and types of government, and various levels of wealth and prosperity, which lent an air of universality to their final conclusions. The horrors of World War II, and the inhumanity which it exposed, gave an urgency to these representatives which allowed them to set aside prejudices and selfish ends in favor of working toward a common goal. Despite this widely accepted and carefully outlined effort, however, the human rights proposed in the UDHR could still benefit from further theoretical and foundational support, and a stronger defense against cogent arguments that are currently being made against their existence. Given world events, this support is needed now, more than ever.

Most of what are seen throughout the world today as human rights violations tend to center around the treatment of those who are accused of crimes and whether or not such persons are treated fairly. Consequently, the focus of this study is on rights that are afforded to accused persons, including those in the UDHR. Prison camps in North Korea, the flogging of accused thieves in Indonesia, the execution of apostates in Iran, and the perceived unfairness of white juries trying black suspects in the United States, are all contemporary examples of what could be considered human rights violations when dealing with those accused of crimes. But how can we

justify our opposition to these things? Upon what universal moral foundation can we argue against such treatment and, with a united voice, assert that the writers of the UDHR got it right when they prohibited such government condoned behavior? Without a broadly acceptable foundation, there is little to support current arguments for more humane treatment of accused persons around the globe.

This dissertation explores these questions by examining a particular canon of human rights for accused persons--beginning with those outlined in the Universal Declaration. It also includes some rights for accused persons that are not found therein but that, nevertheless, enjoy widespread acceptance. These extra rights have been included as part of the study because they, too, have made a good argument for universality--not from the purposeful intent of the Universal Declaration, but through their ubiquitous presence in worldwide constitutions. These rights, in fact, are so common today, in constitutions around the world, that they are naturally included in the data set this study will utilize from the Comparative Constitutions Project. A list of the sixteen specific rights of accused persons set forth in this project, for which will be sought evidence of both historical use and widespread contemporary adoption, is as follows:

Found in the Universal Declaration	Not Found in the Universal Declaration
1-Freedom from torture, cruel, degrading, or inhuman punishment: (Article 5)	8-Right to counsel
2-Right to equal protection under law, without discrimination: (Article 7)	9-Right to remain silent or protections from self-incrimination
3-Freedom from arbitrary arrest, detention, or exile: (Article 9)	10-Protections against being tried twice for the same crime

4-Right to an independent and impartial (fair) tribunal: (Article 10)

5-Right to a public trial: (Article 10)

6-Right to be presumed innocent until proven guilty: (Article 11)

7-Protection against ex post facto charges: (Article 11)

11-Right to a speedy trial

12-Right to calling witnesses and to examining witnesses

13-Right to a jury or judgement of one's peers

14-Right to appeal to a higher court for redress

15-Protections against arbitrary collection/handling of evidence

16-Due process allowances in criminal proceedings

It is worth noting that the modern iteration of the rights above have historical precedent. This precedent answers many questions but also begs two important ones. First, how long has the concept of universal human rights existed? Second, how long have our modern human rights been in the human consciousness? The second of these questions will be discussed in Chapter 3, with an in-depth look at historical and pre-modern law codes and a search for the existence of rights for accused persons that bear some resemblance to their modern counterparts. The first is much more difficult to empirically examine. It is possible that the concept of universal rights for human beings is older than recorded history and simply does not make itself manifest to us because of an absence of surviving records. It is also possible that such a concept has reached its present form gradually, and owes itself to a slow building of the ideas of one culture upon another. Either way, we can probably credit the Greeks with setting, or at least expanding, the foundations for human rights, much as they set, or expanded, the foundations for democracy. Wiltshire (1941) credits the Greeks with the concept of natural law and its precursor, in the

notion of justice, found in the early Homeric poems. This evolved into the concept of a universal law--rules which existed independent of man, or even the gods--and was given full form by such thinkers as Aristotle, who made the distinction between unsupported laws (those laws made by man) and those laws which were based upon the foundation of a higher law of nature (Wiltshire 1941, 12). Aristotle's thought was followed by the philosophy of the Stoics, which merged law with nature and articulated a universal morality with which all men were born. The concept was further elevated by Cicero into the idea that a "just law" was that which was in agreement with nature (23), something outside of man himself. Cicero, in turn, inspired the Roman concept of natural law which was explained in the Justinian Code as a higher and more permanent form of law, above those made by the state (20-21) and one which existed independent of them.

The concept of natural law survived the Greek city states and the Roman Empire and was appropriated into the Christianity of the Middle Ages because it comported so well with the concept of divine law. Thus the natural law inscribed on the pillars in Athens found new form in the divine law inscribed on the stones of the Ten Commandments (32-33). It was a Christian clergyman and philosopher, Thomas Aquinas, who first began to list rights that were in accordance with natural law and who began the process of giving names to those rights. Importantly, Aquinas used natural law to incorporate the Greek stoic traditions into the mainstream of medieval Christian thought (38-39).

Moyn (2010) traced the origins of natural rights (and the continuation of the much older concept of natural law) though the Enlightenment period and the English, German, and French philosophers who borrowed from Thomas Aquinas. Thomas Hobbes, who ascribed to one universal human right (that of self-preservation) from which all others derived (Moyn 2010, 22), assumed natural rights directly from natural law (p. 21). These laws and their attendant rights

were expanded and solidified by his successor in the English Enlightenment, John Locke, who enthroned the right to possession of private property and provided the foundation (along with the established principles of Magna Carta) of the rights that would be mentioned in the English Bill of Rights, the American Declaration of Independence, and the U.S. Bill of Rights. The concept of these natural rights reached other areas of Europe during the German Enlightenment and both Hegel and Kant were able to apply them to the reconciliation of freedom and community in relation to the rise of the nation state (29-30). From these philosophers grew the roots of the French and American Revolutions and the great explosion of natural rights which contributed to the list of rights specifically afforded to accused persons in the Universal Declaration, which form the basis of this study, and that inform the underlying question of how, if they are indeed universal, to defend them.

Those who find themselves forced to give a defense for the universal existence of the above-mentioned rights naturally fall back upon the arguments made by religion and philosophy from whence they came. These arguments are cogent and are discussed and explained through the body of this paper. This study also examines why, despite their history, these foundations lack universal appeal through a universally accepted argument and how each, in its turn, can prove itself a problematic source for universal agreement, if taken alone. In Chapters 3 and 4 of this project there is proposed an additional, more empirical foundation which supplements religion and philosophy in support of the continuation of universal rights for accused persons. It is a foundation built upon historical use and widespread contemporary adoption.

Additionally, Chapters 3 and 4 are structured in a manner to confront three main arguments that are made against the existence of universal human rights and that question their legitimacy. The first is a philosophical point, made by David Hume (1784), which argues that

we must focus our philosophical attentions on what *is*, not on what *ought* to be (Hume 1784). This is a difficult hurdle since so much of the argument for human rights is, indeed, based on an accepted human conception of what "ought to be." However if what "ought to be" is universal in its understanding and is not dependent on, say, culture or dominant religion, then we might get over that obstacle by assuming that universal acceptance more closely approximates what "is", in the human consciousness, than the capricious and more narrow assumption of what "ought to be." This is taken into account by comparing occurrence rates of rights for accused persons in various regions of the world (containing, as they do, differing cultures) and comparing occurrences in countries that operate under different predominant religions. If the data indicates that adoption of these rights occurs despite culture and religion, then an argument can be made that each of these rights is something that "is", according to a universal human conscience, and not simply what "ought to be" based on individual tradition or religious dogma.

The second argument that deserves attention is that of legal positivism. Stamos (2015) argues that universal human rights are nothing more than a construct of western society and a contrived myth, propagated originally by the English Levellers, through John Locke, and on to Thomas Jefferson, with no further universality outside of this origination (Stamos 2015, 151-175). If this is accurate, then one would expect to find these rights adopted disproportionately among cultures heavily influenced by Western civilization, and governments instituted by them--specifically in Western Europe and in the scope of Western colonization. If the opposite is true, however, and rights for accused persons are adopted independent of location and Western influence, then there is an argument to be made that Western civilization is only one iteration, of many, of the same universal understanding. This argument is addressed by comparing the rates

of adoption of human rights among the different regions of the world, which have been disproportionately impacted by Western civilization.

Finally, it is important to control for an argument made by Lukes (1994) which suggests that human rights may not be universal and, instead, may differ depending on the form of government, or political system, which oversees them, suggesting they should be less common under some forms of government than others. This final argument is controlled for by comparing adoption rates among countries which differ in their form and function of governance.

All sixteen of the rights for accused persons in this study are examined in light of these arguments. In each case their level of occurrence is examined in ancient and medieval law codes, as well as their existence in world declarations, across the globe, and their adoption into modern law codes in the form of contemporary constitutions. This allows a conclusion to be drawn about both historical use and widespread adoption across religions, cultures, regions, and governments. Analyses suggest that some rights for accused persons are very defensible under these assumptions and should enjoy worldwide agreement. Others, on the other hand, may not be so easily defended.

Chapter 4 introduces the data sets upon which this study draws, and the methods by which it was conducted to test for geographical and chronological universality. Finally, the hypotheses are explored through textual analysis of data collected through the *Comparative Constitutions Project* and other original texts. The universality of rights for accused persons is sought by comparing their existence in historical law codes with their adoption in modern ones. Their existence in both serves as an additional foundation for justifying human rights for accused persons worldwide, adding important support to the existing religious and philosophical arguments.

The importance of this study lies in the defense of human rights for those accused of crime--the rights that stand at that critical intersection between a human life and the criminal justice system. This is the most vulnerable place for human rights abuses, and the area in which they are most likely to erode. This is because all systems of justice must balance the safety of innocents against the rights of the accused. The scales in that balance may tip one way or another. However, when individual rights are sacrificed on the altar of security, they are difficult to regain. Arguments for safety and security are obvious and, during times of crisis, are both abundant and powerful. If there is no solid argument to counter the erosion of rights for accused persons at such critical junctures, the pendulum can swing too far in one direction with potentially disastrous consequences for human rights everywhere. This study is an attempt to have a rational counter balance to the arguments that will be made against universal rights for accused persons, across the world, in times of fear--as this is when such rights are most endangered. It will also lend support and clarification to any universal arguments on behalf of universal human rights, including the sort mentioned during the exchange between future Secretary of State Rex Tillerson, and Senator Marco Rubio. If the morality of human rights is relative, and is dependent upon culture, religion, and forms of government, as Mr. Tillerson suggested, then it is difficult to defend those rights found in the Universal Declaration of Human Rights. However, if the rights are universal, and exist in the collective human conscience across borders and cultures, then such a defense will follow naturally. It is important to find such support for universal human rights and to obviate such arguments in the future.

CHAPTER 2: Theory

For A Stronger Foundation--Theory and Methods

". . . One conception of justice is more reasonable than another, or justifiable with respect to it, if rational persons in the initial situation would choose its principles over those of the other. . ."
--John Rawls

In order to seek a universally acceptable foundation for human rights for accused persons, this study relies heavily upon the work of John Rawls (1993, 2009), one of the few modern philosophers who still asserts that some form of universal rights can be rationally discovered. In modern philosophy, arguments for natural rights are becoming more rare and strained. Yet Rawls' theory of justice sets forth the best argument for how such rights, if they exist, can be discovered. In his seminal work, *A Theory of Justice*, Rawls sets out to find an alternative to the philosophical traditions supporting human rights by first rejecting the modern utilitarian view--that the rights of the many must necessarily trump the rights of the few (Rawls 2009, 3-4). Justice, to Rawls, is nothing more than fairness to the individual (3) and he sees the communal living of mankind as being impossible if they are unable to share universal principles of justice that are agreed upon and supported by social institutions, not hedonistic calculus (5). How can such universal principles of justice be discovered? Rawls' answer is to encourage the reinvention of the social contract championed by such philosophers as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau (11) and, like them, see the acceptance of such universal rights as stemming from an original and universal agreement among individuals who seek to live in harmony with one another (11). However, he recognizes that such a contract must be made

from a "position of equality" (11), since all who sit at the table will have their own ulterior motives. He describes such a position as one in which "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like . . . the principles of justice are chosen behind a veil of ignorance" (12). According to Rawls, then, universal human rights exist in the human consciousness, but they can only be extracted for observation when people are ignorant of what they stand to lose or gain by admitting them. Behind such a veil of ignorance, the principles that would be agreed upon to satisfy justice in a society would simply be those that are both "widely accepted" and "reasonable" (13).

In a separate work, Rawls suggests that people among all nations, under certain conditions, would accept similar human rights, even when they come from separate cultural and historical backgrounds, and have different forms of government (Rawls 1993). This postulation lends itself to observation, and so this project looks at those rights which are currently in vogue and seeks an empirical foundation upon which they can be proven to be, as Rawls says, both "widely accepted" and "reasonable." Such an observation of various cultures and governments may provide arguments which lend support to the current foundations available to us through religion and philosophy. One might postulate that those rights which are both "reasonable" and "widely accepted", as Rawls describes them, would be the sort of human rights that should exist in historical and modern law codes independent of geography, religion, and form of government.

In his hypothetical "original position", Rawls argues that men would choose equality in the assignment of basic human rights (Rawls 2009, 14) so everyone would enjoy the same rights. However, the difficulty lies in finding a way to place people in such an original position. Where, it might be asked, can people come to the table behind a veil of ignorance about their own

wealth, intelligence, status, and abilities such that they would honestly assess their situation and come to a reasonable conclusion about universal rights? It is likely a functional impossibility. However, when deciding on what should constitute justice among societies, Rawls points out that "[i]t is clear, then, that I want to say that one conception of justice is more reasonable than another, or justifiable with respect to it, if rational persons in the initial situation would choose its principles over those of the other . . ." (17). Although Rawls' hypothetical meeting of the collective minds cannot happen in such an organic and grassroots way, it can be synthetically approximated by looking at what principles men have actually chosen, over others, to represent their interests through time. If these beliefs are represented in ancient and modern law codes, in many varied and different situations, then their existence across cultures, religions, governments, geography, time and place, would render them nearly as universal as if the participants had been able to shed their biases and sit at the table under a veil of ignorance. These observable choices will give us a clue about what rights are both widely accepted and reasonable and thus are likely to exist in the universal human conscience.

It is important to understand, especially from an historical perspective, that those protected by ancient and modern law codes often represent a very narrow portion of society. Although we may look at what the Greeks chose to represent their interests, for example, they did not always include all groups as partakers of the same rights that were afforded the upper class males of their society. This can easily bias a sample of historical law codes (and even some modern ones) since the opinions of certain elements of society are not always represented in those rights that have been provided. This unconscious bias in the data exists because what has been considered universal across time and culture might be lacking universal attribution to all members of the society which grants it. For example, the privileged of society could easily

assert human rights that most benefited themselves. It can be argued that many harsh penalties for crimes, in, say, Rome or Hanoverian England, were based more on protecting one class of person against another than on providing universal rights for everyone. For the purposes of this study, however, I look at universal rights through the only lens that is available--those rights afforded to the echelons of society that were considered worthy of them at the time. I leave to future researchers the task of unpacking the universality of human rights as it pertains to gender, caste, socioeconomic condition, and a host of other inequities that must have existed across a spectrum of historical contexts. The important question when reading these texts is this, "When rights were afforded any group, what were these rights?" Thus, though the often-patriarchal societies of history may be biased toward one group or another, this study is merely observing each society's assessment of what human rights *should* be, even if they are not equally applied.

Traditions:

"The proof of the common law is by witnesses and jury . . . call my accuser before my face and I have done." --Sir Walter Raleigh (Quoted in Knight, 1996 and inspired by Magna Carta)

Human rights can be found in the form of both positive rights (a providing of certain commodities by the government) and negative rights (protections of people from unwanted intrusions by the government). The subject of this study (the rights of accused persons) falls squarely within the latter category, and seeking universal foundation for the former must be the subject of future study and is not considered here. Throughout history, in the presence of a developed political system, and the absence of pure vigilantism, there has always been some sort of process between the accusation of criminal activity and the administration of punishment. It is

within the mechanisms of these criminal proceedings that we find the values of a society in the form of these negative rights--particularly as they relate to the rights of accused persons.

The legal traditions in which we may find these values are various and have been given names. Roth (2014) discusses a full sixteen such traditions which have existed at some point around the world (Egyptian, Mesopotamian, Chinese, Hindu, Hebrew, Greek, Roman, Maritime, Japanese, Mohommedan, Celtic, German, Slavic, Ecclesiastical, Romanesque, and Anglican) (Roth 2014, 48). With the exception of some legal systems surviving in the Socialist tradition, the great majority of world nations today can be classified as belonging to three legal traditions--Civil Law traditions, Common Law traditions, and Islamic Law traditions (48). Each of these carries with it the influences exerted by the former geographical traditions listed, and the religious and cultural influences built up over the millennia of their history. Thus, what we see as the rights of accused persons around the world is possibly a reflection of geography, culture, and religious belief. This study seeks to define what else, if anything, might explain the common existence of human rights among these disparate peoples.

The reliance on an approach of looking at historical use and widespread adoption to examine this subject is both practical and theoretical, as other foundational arguments for human rights run into difficulty when using their premises to convince a worldwide audience. If someone were to put the full force of moral argument behind an assertion that certain rights for accused persons ought to be implemented everywhere, one would have only a narrow list of epistemologies through which to appeal--religion and philosophy chief among them. Each of these ways of viewing the origins and universality of human rights is extremely important in its own right. For example, without religion for the vast history of mankind, human rights and human decency might have had very little upon which to base their arguments. Furthermore,

without the long contemplation of historical philosophy, entire nations which have championed human rights would have lacked an ideological foundation upon which to build the governments which have spread those rights worldwide. However, as important as these epistemological foundations are, both of them would benefit from a supporting argument--one that would readily be recognized by nearly everyone, across cultures, religions, geography, and time. This is the argument of historical consensus and widespread acceptance.

Foundations--Religion

". . . Rights without morality cannot long endure, and . . . there will be no better global order without a global ethic." --Declaration toward a Global Ethic (Parliament of World Religions, 1993)

In looking at human rights foundations in religion, an emphasis is placed on the five major world religions (Christianity, Islam, Buddhism, Judaism, and Hinduism). Although there are innumerable offshoots and iterations of these main philosophies, each with its own unique perspective and contribution to human rights or, for the purposes of this study, those rights that are given to accused persons, this study focuses only on these five. This is because, according to a worldwide survey of world religions conducted by the PEW Research Center in 2012, these are by far the dominant traditions found in the world both today and through antiquity. According to the survey, a full 84% of people in the world today identify with some religion (31% Christian, 23% Mulsim, 15% Hindu, and 7% Buddhist). Various folk religions make up another 6% of the world population but these are many and varied and do not make up a cohesive philosophy that could be used in this study. Furthermore, very little physical record exists of the mores of such

folk religions, especially as they would influence legal traditions. Therefore, although they have existed for millennia in countries such as the African nations, and anecdotal evidence of their influence on the law can be found in the writings of anthropologists (see Roth, 2014, 21 and 28 for some examples), the existence of any written evidence of the law is lacking and, therefore, difficult to quantify here. Conversely, although Jews make up an even smaller part of the world religious population (.2% according to the PEW study), than folk religions, the religion itself is a very cohesive unit and its legal history is well recorded. Furthermore, the influence of Judaism on Christianity is so substantial, despite its number of adherents being comparatively small (it is the dominant religion of only one country), that, for the purposes of this project, it will be considered in conjunction with the history of Christianity instead of as a separate entity. The rest of the world population according to the PEW survey (about 16%) is affiliated with no religion at all (PEW Research Center--Religion and Public Life. 2012).

Although the major world religions have long provided a moral foundation for human rights, it was not until very recently, at the Parliament of World Religions in Chicago, in 1993, that a document was drawn up purporting to codify and unify the values of all world religions, concerning human rights, and to give them a universal voice. This claim, by the World Council of Religions, of universality of moral foundation, was not lightly made. Nor is it now without scholarly support through studies arguing that the world religions *do* possess agreement on fundamental human rights. In other words, not only did this group of leaders from different world religions agree that the human rights (including those for accused persons) in the Universal Declaration were their own, there is also evidence from the major traditions that they are correct in claiming some historical affinity for them.

In the Hindu tradition, for example, human rights are founded in a concept of reciprocal behavior from which good treatment of others can be derived. As we shall see from law codes which will be examined in the next chapter, similar rights for accused persons as those found in the Universal Declaration and the U.S. Bill of Rights, can be derived from the Hindu duties of human interaction. Many modern Hindu scholars have made the argument that universal human rights can be derived from basic Hindu teachings. Dwivedi (2009), Rathod (2014), and Traer (1991) each make contributions explaining how the human rights outlined in the Universal Declaration can be gleaned from Hindu teachings and can be supported by the fabric of Hindu culture and religion, thus making those rights, though not mentioned by name in Hindu texts, compatible with the Hindu faith.

Some scholars of Buddhism, too, make an argument that the rights found in the Universal Declaration are completely compatible with the main tenets of the faith. Despite the fact that, unlike other religions, Buddhism has no central religious text to examine, but instead a large body of collected scripture from across Asia, it is important to acknowledge that human rights can be derived from these wide ranging Buddhist teachings (much as they are in the Hindu tradition) even though they are not as overtly expressed as they might be in other religious texts. The teachings of Buddhism provide an ample foundation from which to identify such rights as will be evidenced by the Buddhist law codes that are discussed in Chapter 3. Additionally, such scholars as Keown (1998), Traer (1988) and Thero (2013), argue that human rights in the Universal Declaration are not only endemic to the tenets of Buddhism, but are an attempt by Western society to protect that which is already central to Buddhist teaching, and are thus a natural outgrowth of it.

Since the Western tradition of human rights includes the history of Judeo-Christianity, no discussion of human rights could be complete without a look at the Bible, the Torah (specifically encompassing the first five books of Moses), and the Talmud (commentary on the law and the prophets of the Old Testament). Many of the arguments for human rights in the U.S. Bill of Rights were made by appeals to the Judeo-Christian God and specific teachings in these texts. Scholars such as Cohn (1996) find human rights throughout the Jewish and the Christian sacred texts and argue that many specific human rights with which we are acquainted can be derived from the teachings of Jesus Christ, from the New Testament, and from the Law of Moses.

In Islam, Shari'a Law, found in the Koran, the Sunnah (the doings or example of the prophet Mohammed), and the Hadith (the sayings of the prophet Muhammad) is similar to the Judeo-Christian scripture in that human rights can be inferred from specific teachings and, again, are done so through arguments made by modern scholars. Burns (2014), and Ahmed (1994) observe that the rights found in the Universal Declaration can find their origins in Islam, and in the Koran, and explain their spread among Islamic nations both with and without the influence of the Western civilization.

Throughout history, religion has been both a catalyst for the formation of human rights and a defender of those rights, as well. Each of its modern forms can make an argument of supporting the human rights found in the Universal Declaration, including those afforded in the same document to accused persons. The main problem with using religion as the sole foundation for human rights and as the major argument for the existence, specifically, of the rights of accused persons, is that it tends to work in generalities, as noted above, and specific rights are rarely outlined clearly in the religious texts or scriptures. Instead, they must be inferred from the teachings through scholarly hermeneutics. This provides not only the obvious opportunity for

reinterpretation as a rebuttal against the arguments made by religion, but also a chance for the ultimate subversion of human rights based on misuse of religious dogma--something which has become familiar prose in the chapters of world history. Because of a lack of specificity, we have seen religion reinterpreted in such a way that it supports the violation of human rights, as opposed to protecting them. Political entities, especially, have reinterpreted the meaning of scriptural texts to subvert human rights among a population (Salih 2010) and certain religious traditions have actually been at odds with the pioneering of human rights (Traer 1991, 3-4). Although it can be argued that it is merely a corruption of religious texts that results in the justification of violating certain human rights, it must be acknowledged that the potential for such corruption is always there, and expecting a universal understanding of religious texts has never been realistic. It does not require a lengthy perusal of most scripture, for example, to discover at least some points of contention which, from a modern perspective, contain assertions that can only be interpreted as being at odds with modern understandings of human rights. This makes it difficult for religion, alone, to form the basis for universal human rights regardless of its positive intentions. It is important, therefore, to recognize the remarkable contribution religion has made to human rights without forcing it to be the only foundation upon which we build our arguments for them.

Thomas Aquinas, the Catholic theologian and medieval Christian apologist, recognized that religious scripture and teaching alone were not the most convincing argument for the existence of human rights and that a broader foundation, including Aristotelian ethics, would place the idea on more solid footing. For this extra support, he turned to philosophy and, more particularly, to the "great philosopher", Aristotle.

Foundations--Philosophy

"Men being, as has been said, by nature, all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent." --John Locke (Second Treatise on Government)

The traditional argument for human rights in philosophy (often called natural rights) is entwined with, and dependent upon, the concept of natural law. From the time of Aristotle and the Greek philosophers there has been a search for what constitutes natural law and natural rights. The concept of human rights has been expanded and contracted, across the long history of reasoned thought, and has come, at the present time, to a sort of impasse--an impasse which either favors a relative positivism or asserts natural rights with a tenuous argument. Do natural rights belong to the human family, and can those rights be found through reason? The answer to that question seems to depend entirely on which philosopher one asks.

Natural Law can be traced back to the Greek philosophers and some argue that it existed even before Aristotle (Burns 2011). Natural Law was clearly advanced by Aristotle in *Politics* (350 BC) and expanded into specific rights by the 13th century Catholic theologian, Thomas Aquinas (1274). Then the English and French Enlightenment philosophers Hobbes, Locke, and Rousseau touched upon the concept of a social contract--a binding agreement between a government and its people. Probably growing from the system of feudalism which had been present across much of Europe, this social contract described the relationship between a government and the governed as one in which protection from the former was exchanged for support from the latter. Hobbes (1651) argued that the singular human right requiring state protection, and the right from which all other rights derived, was that of self-preservation.

Hobbes believed that in order to have that right protected, citizens turned themselves over to a government of such leviathan proportions that it could protect the lives of everyone within its confines while being too large to ever be disassembled. Locke (1690), on the other hand, saw a much more comprehensive list of human rights to include life, liberty, and property. He also saw the protected citizens as a more important body than the government protectorate and argued that a government existed only to preserve the rights of its people and could be abolished and reformed if it ever became contrary to those ends. And while both Hobbes and Locke saw the social contract as a protection against the inherent tendency of mankind to devolve into a state of savagery, Rousseau (1762) saw it as a necessary evil to combat the rise of civilization, which broke up the paradisiacal state of man and threw him into conflict with his fellow man, in opposition to his nature, which was inherently good. In either case, the social contract was an important admission in philosophy that there existed, among peoples, certain universal human rights that deserved protection from the state or government. Universal rights in the form of a universal morality were further promoted by the German philosopher Immanuel Kant (1781) and a teleological trajectory toward a universal morality and an ultimate societal good was championed by his compatriot, George Friedrich Hegel (1807).

Despite the success that a philosophy of natural law, natural rights, and even universal morality, enjoyed during the English and German Enlightenments, it has been countered by what was then a contemporary, and now a more modern, utilitarian approach to understanding human rights. First seen in the Greek philosophers like Plato (380 BC) and given modern utterance by Jeremy Bentham (1789), John Stuart Mill (1859), and others, utilitarianism argues that human rights are highly dependent upon circumstances and are less universal in nature as much as they are culturally dependent tools of necessity. The argument for utilitarianism (that what is right is

nothing more than what is best for the majority, in a particular case) has been so powerful that it poses an existential threat to natural law, which struggles to find modern proponents with any sort of widely accepted argument for the existence of natural rights. Recent efforts have been made by Rawls (2009), Nussbaum (2011), and Amartya (2004) and a return to the natural law philosophy of Thomas Aquinas can be found in the works of Alasdair MacIntyre (1981) Robert George (2013), and John Finnis (2011). Habermas (1998), too, has argued that human rights exist as part of a universal morality while being inextricably connected to the positivist law which defines them and Dworkin (1999) argues that human rights are rooted in moral principles and are best understood in that light. Despite the arguments of these contemporary philosophers, they are some distance from converting the whole of modern philosophy back to supporting the existence of natural rights or of a universal morality of the sort that so clearly informed the French and American revolutions.

The trend in defending universal human rights has, instead, been grappling with astute arguments *against* a universal morality made by empirical philosophers as early as Hume (1784) and given popular voice by a resurgence of the ideas of Nietzsche (1886 and 1887). The result is a trend in philosophy which now appears to be moving away from proving a universal foundation, through reason, and seeks, in its place, a foundation through majority consensus. It is an argument for a positivist foundation in the absence of a universal morality. Furthermore, there is an assertion that any morally absolute statement (ie. all men deserve the right to liberty) is not a statement of a universally existing right at all, but a statement of preference (Stevenson 1944; Satris 1987). Unchecked, this natural evolution of emotivism becomes a moral relativism which argues that what is right or fair for one, is not necessarily so for another. The implications of such relativism upon universal human rights is obvious.

The best hope to support philosophical arguments for natural rights is to follow the ideas of Rawls to their logical conclusion, and to seek to find widespread support for certain universal rights by drawing out what is in the common human conscience. This common understanding must, as Rawls described, be "universally agreed upon." This agreement comes only when the gathering of minds is one in which "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like . . . the principles of justice are chosen behind a veil of ignorance" (Rawls 2009, 12). Thus the "veil of ignorance" is the surest way to come to an unbiased conclusion about what mankind perceives as universally moral, and so provide a foundation for the rights of accused persons which satisfies justice in a society where those human rights are both "widely accepted" and "reasonable" (13).

In light of Rawls' argument, the major impasse in philosophy can be considered one between universalism and contextualism. Will universal human rights appear when all cultures, societies, and peoples are open to reflect them? Or will those rights be widely divergent and dependent for their existence upon the historical and cultural context of each participating group? These questions can be answered and this impasse navigated by examining what human rights have been chosen throughout history *regardless* of cultural and historical contexts. On top of the foundation for universal human rights provided by religion, and in addition to the foundational arguments make by philosophy, an argument for human rights which includes historical and cultural contexts would be instructive. Though such an argument will owe many of its ideas to religion and many of its reasons to philosophy, it will, at least, find itself supplemented by an observable historical consensus.

CHAPTER 3: Rights in Ancient Law Codes and World Declarations

Rights of the Accused in Ancient Law Codes

" *. . . Hammurabi, the exalted prince . . . to bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers; so that the strong should not harm the weak . . . and [to bring] about the well-being of the oppressed . . .*"--Hammurabi, King of Babylon

Chapter 1 outlines two basic assumptions, which, if answered in the affirmative, would lead one to believe that not only can an argument be made that a certain human right is universal, but also that it sits upon a solid foundation with which to argue for its continued existence. The first of these assumptions is that a right for accused persons can be argued to be universal if (among other things) it exists across cultures in antiquity (historical use). The best way to determine if such rights existed in antiquity, and across cultures, is to look at the best records we have of the ancient intersection between culture and criminal justice. These exist today in translations of ancient and medieval law codes. It is important to note, at the outset, that a statement of right in a law code is by no means a guarantee of its enforcement at the time. Many law codes are an aspiration, more than a guarantee, and some might have enjoyed more success at actual enforcement on behalf of accused persons than others. Historically, certain laws have existed on the books that lack any threat of enforcement or are enforced disproportionately. Consequently, there is always the chance of misinterpreting a society's values by looking only at the law codes while ignoring the level of enforcement. Unfortunately, gathering enforcement statistics for most of the pre-modern law codes in this study would be an impossible task and we are left only with what is written in law. If a right is guaranteed by the law code, whether or not

it was carefully enforced in the society to which it belonged, it remains an important statement of the universal aspirations of that particular people.

In searching for those aspirations, we must acknowledge that a search for elements of modern human rights in pre-modern law codes is hampered by a few important difficulties. The first is that ancient law codes are scarce. When compared to the sheer volume of codes that must have existed throughout history, those left for our perusal represent only the tiniest fraction. Thus, we must try to gain insights from a sample that is already biased by its lack of size. However, finding human rights in ancient law codes, especially in any great numbers, is probably an indication that they were more common than we may know.

The second problem is that some of these scarce pre-modern law codes are known only from fragmentary documentation, leaving the likely chance that there are protections for accused persons in many ancient societies that are simply missing from the portion of their code that remains, thus making them appear, misleadingly, to have been absent. Again, finding them at all in these law codes is a strong indication that they were important in ancient societies and that they were probably more widespread than we can measure.

Third, we are hampered by having to rely on translations into English, which are subject to both error and accidental bias. This error can exist not only in the translation, but also in the interpretation of the words and ideas that have been translated. Human beings are wont to interpret the past through the lens of the present and this can cause distortion. For example, representation for an accused person by a third party, in the Gentoo Codes of India, might not mean exactly the same thing that being represented by counsel in our modern court system does. We can find false parallels when we see the past through the prism of our own experience.

Finally, there is the obvious assumption that even supporters of universal human rights, or universal morality, must face, and that is the fact that standards of decency and morality have evolved over time. This concern must be given serious consideration. Even if universal human rights exist in certain areas, it is less honest to say they are immutable throughout time as it is to state that societies in pre-modern times were on to something universal and were touching upon some sort of common understanding. Finding a clear expression which mirrors the specific rights that are present across law codes in modernity is difficult. It is more likely that such rights would be found as similar ideas rather than similar statements. For example, the Theodosian Code has provisions which protect an accused person in ancient Rome from certain deprivations, while in custody, that were considered cruel at the time, such as not allowing a prisoner out of shackles while awaiting trial to exercise and breathe clean air. This would comport with the sensibilities of the current justice system in the United States. However, the punishment that would follow a guilty verdict (crucifixion for murder, for example) would offend our modern sensibilities in an era when even the comparatively mild form of death penalty, lethal injection, is being questioned for its cruelty. In these cases we must remind ourselves that this study is not about equalizing cultures and norms across time, but is about looking for similarities in human aspirations, especially as it pertains to human rights for accused persons. The argument is that both the ancient Romans and the writers of the U.S. Constitution valued protecting the criminally accused from what would have been unusual and out of the ordinary punishments for their respective times and cultures. In summary, such errors in perception and the bias they might introduce cannot be corrected. They are a fixed part of the data available to us. However, since these law codes are all this study has with which to work, these potential biases can only be noted for their possible impact on any findings before proceeding to evaluate them.

Also prior to moving forward, an explanation of how the pre-modern law codes used in this chapter were selected is in order. As mentioned above, there exists such a paucity of documentation of what would constitute protections for accused persons among ancient cultures, that the sole criteria for selection of the codes used in this study was that they have a reasonably accurate translation into English and that some parts of the code survive in which criminal justice proceedings are mentioned (i.e. what happened to accused persons between the time of accusation and the administration of punishment). Using this criteria worldwide, as far back as ancient documents can be translated and up to any code preceding the explosion of human rights that came on the heels of the French and American revolutions, this study is able to include a total of sixteen pre-modern Law Codes, representing four regional centers of civilization for which recorded histories exist. The codes include four from ancient Mesopotamia, four from the Mediterranean (including the Greek city states and the Roman Empire), four from the Far East, and four from Northern Europe. Unfortunately, ancient law codes from lower Africa and from the pre-Columbian New World have simply not survived to any degree that makes them amenable to this study. Although some anecdotal and oral traditions for those areas persist, they are not in the form of a searchable law code and are subject to substantial revision over the millennia. Regardless of the listed shortcomings of this type of analysis, a surprising number of human rights for accused persons can be found in ancient law codes. Most of the rights for accused persons found in these codes can be identified through careful study of the texts. Others have been inferred or understood by modern experts on a particular code or society. Recall, this project is looking specifically for the sixteen specific rights of accused persons either found in the Universal Declaration of Human Rights, or those not found therein that enjoy widespread acceptance.

Because we are dealing with translations from other languages, and changing conceptions over time and across cultures, it is important to specify how each right is defined in this study and how it was identified within these codes. In some instances, the right was located and acknowledged to be similar to a corresponding modern right by a scholar of that particular code or culture. To these attributions I give deference and assume their veracity. For locating those found elsewhere, it was necessary to ascribe a particular definition to each right based on the modern meaning. No one in ancient Mesopotamia is going to have written the words "due process" for example. However, if there was a regular process, described in law, which had to be followed when assessing an accused person's innocence or guilt, it could be understood that something similar to our modern conception of due process was there. What follows below are the operational definitions for each right.

Freedom from Cruel and Unusual Punishment

Recall, we are not looking for protections against acts of punishment that would be defined as cruel and unusual today. This is an ever evolving standard and one for which the definition has changed radically. Even in the past 200 years, in the United States, the concept of what constitutes cruel punishment has become almost unrecognizable. Instead, this project is looking for laws and provisions, that require the humane treatment of prisoners and accused persons, as the cultures in question understood humane treatment to be, at the time.

Right to equal protection under law, without discrimination

Here this study seeks provisions, rules, or statutes which require that accused persons must have similar criminal processes and consequences regardless of sex, class and other distinctions. Although most ancient law codes differentiate between classes in administration of rights or criminal processes, there might be some which require a lower or less respected class to

be treated the same as a class which is perceived to be higher. This would be evidence of an aspiration for equal protection.

Freedom from arbitrary arrest, detention, or exile

Here the study looks specifically for provisions and rules which require special processes before someone can be taken into custody or forced to appear for trial. Often this is found in ancient law codes when oath or affirmation is required or some sort of collateral given by the accuser before the accused can be taken into custody, much as the 4th Amendment to the U.S. Constitution currently requires.

Right to an independent and impartial (fair) tribunal

To determine if this right exists in a pre-modern law code, we must watch for specific rules and requirements for the judiciary--provisions which require the judge, or trier of fact, to be fair, or impartial through his learning or temperament. It would also include the establishment of punishments in the case of judicial misconduct.

Right to a public trial

This would be any provision in an ancient law code which requires that the process of determining guilt or innocence occur in public, and not in private.

Right to be presumed innocent until proven guilty

For this right the study seeks provisions which show that a person cannot be deprived of property or liberty until some kind of determination of guilt occurs. It can also include rules such as an ordeal or place of refuge set up to allow a person time to prove his own innocence before a punishment is carried out.

Protection against ex post facto charges

To consider this right present in an ancient law code one would need to find a provision which specifies that there are protections against being charged for something that was not a crime at the time it was committed.

Right to counsel

The right to counsel exists in a law code if there is a person appointed or allowed to argue on behalf of the accused person.

Right to remain silent or protections from self-incrimination

This right would be present in an ancient law code if there was a specific rule or provision which allowed for people to not have to verbally answer to accusations or make statements in their own defense.

Protections against being tried twice for the same crime

Here the study requires a specific mention of a protection against someone being tried a second or subsequent time for any crime for which he had previously been found innocent.

Right to a speedy trial

This right could take many forms in ancient law codes but would be expected to include any provision which requires that the judicial process be carried out swiftly, or without delay, or any rules requiring parts of the process be completed within a certain time frame.

Right to calling witnesses and to examining witnesses

Here the study looks for evidence that testimony of witnesses is either required or allowed during the finding of guilt or innocence. If they are clearly a part of the proceedings, it is safe to assume that they are allowed or required.

Right to a jury or judgement of one's peers

The finding of this right would require an obvious option to have guilt or innocence expressed by a group of peers of the accused person in addition to, or in place of, the regular magistrate.

Right to appeal to a higher court for redress

This right would likely be present in any rule or procedure which allows an accused person who has been found guilty, or who is having difficulty having his case heard, to appeal his case to a higher court, body, or person.

Protections against arbitrary collection/handling of evidence

This right would be found in protections in ancient law codes which specify how evidence must be collected or handled in order to be valid in a criminal proceeding.

Due process allowances in criminal proceedings

Perhaps one of the more difficult rights to define, it can be assumed that due process is valued in a particular law code if there are clear directions about a certain process that must be followed during the trial or assessment of guilt or innocence. This might be in the form of an ordeal, a chance at sanctuary, or any number of other requirements as long as they appear to be both mandated and regularly applied.

The Middle East and Mesopotamia

The first block of ancient law codes examined comes from ancient Mesopotamia and the Middle East. This group contains some of the oldest law codes in existence and represents societies from the Mediterranean to the fertile crescent from 4,000 years ago to about 1,400 years ago--a vast sample of time which is woefully underrepresented in any surviving law. The Code

of Ur-Nammu is the oldest existing legal code of which we have record. Presumably issued by edict of a Sumerian king around 2000 BC, it give us a glimpse into a culture that included slavery and a developed monetary system. The purpose of the code, according to the prologue, was to "establish equity in the land." It came during a time of disparate city-states and beliefs in divine kingship. Therefore, we are left to guess at how the laws of surrounding empires and city-states might have looked. Instead, we have only this one glimpse from the period--a law code that proscribes the death penalty for murder and rape, and which introduces a system of monetary fines as restitution for other crimes. There is some evidence in the Code of Ur-Nammu of presumption of innocence in the form of ordeals--a primitive way to allow a suspect to "prove" innocence after being accused of a crime (precept 13). There is also a due process protection requiring that an accuser pay a fine if it is determined that his accusation is unfounded. In this way rampant accusations could be kept in check and trial could only proceed when certain protections for the accused were honored.

The Code of Hammurabi, perhaps the most famous of ancient law codes, was issued under the reign of the sixth king of the city-state of Babylon, several hundred years after the law Code of Ur-Nammu. Within its pages one can see a complicated civil system of contracts and obligations, the violation of which brought certain consequences enforced by the state. Like the code of Ur Nammu, the code of Hammurabi indicates a social system in which slaves existed as property and women were not necessarily equal under the law. It shows a culture in which water and irrigation were at a premium and for which something as trivial as the destruction of another person's dam was a capital offense. Like the code of Ur-Nammu, there was a system of monetary compensation with which to mete out justice and the enforcement of the death penalty for rape, murder, theft of slaves, and other actions that could be considered particularly harmful

to the victim. Similar to the code of Ur-Nammu, there were assumptions of innocence that could be sorted out through ordeals (precept 2). There were also due process protections in the form of injunctions against both false accusers up to an including the death penalty (precept 2), and even against witnesses who refused to testify (precept 12) and judges who were proven to have ruled wrongly (precept 5)--the latter also being reflective of efforts to maintain a fair tribunal. The right for the accused to call and expect the testimony of witnesses on his behalf (precept 12) is also present, as are several protections against arbitrary arrest or detention in the form of required oaths in front of a magistrate before anyone could be taken into custody or forced to defend themselves against criminal accusation (precepts 9, 23, 120, 126, 131).

The Law of Moses, also an ancient law, but almost one thousand years younger than the Code of Ur-Nammu, is estimated to have come into existence around 1200 BC. Unlike the earlier Sumerian codes, the Mosaic Law rested on a foundation of divine origin rather than the power of the state. Far more than just the 10 commandments, the Mosaic Law consisted of a wide range of laws and procedures for the administration of justice among the early Israelites who settled Canaan. Freedom from arbitrary arrest exists in the form of injunctions against false accusation (Exodus 23:1) and presumption of innocence and some form of due process can be inferred from the right of an accused person to seek asylum at the horns of the altar before vigilante justice could take effect (Exodus 21 and 1 Kings 1:49-51). The right of an accused persons to call witnesses to testify on his behalf, and laws requiring the numbers of witnesses required for successful accusation can be found in Deuteronomy 19:15-21. Efforts to provide a more speedy trial can be inferred from the changes to law courts made by Moses (Exodus 18).

The Koran, originating in the Saudi Arabian peninsula near 600 AD, was similarly less an injunction by the state as it was a pronouncement of law from deity. However, such law was

subject to interpretation by the government at the time, just as the Law of Moses was, and the Koran became a guiding tool in understanding the rights afforded to accused persons within the nations through which the religion of Islam spread. Islamic law, much like any of the other law codes examined in this project, arose in a world and a culture difficult for us to comprehend from our modern perspective. With our current sensitivities toward equality and equity, some of the actions pronounced under the Sumerian, Babylonian, Mosaic, and Islamic codes can appear cruel and foreign. The judicial system is Islam was originally administered by the prophet Mohammed and then later delegated with specific instructions to his successors. When searching specifically for the rights of accused persons, scholars such as Abdel-Haleem (2003) and Burns (2014) have pointed to parallels to the rights of accused persons found in our modern canon. Imam Nawawi, for example discussed a presumption of innocence inherent to the statements of Mohammed in the Hadith (Nawawi 1997), and rights to an impartial and fair tribunal can be inferred from the text of the Koran commanding that justice be enthroned (Surat Ash-Shura 42:15, Surat Al-Maeda 5:8, Surat An-Nisa 4:58). Alwani (1995) describes these fair tribunals as commanded by Mohammed at the expansion of the Islamic community, and argues that due process for accused persons was present in the onus of proof being on the claimant, while the defendant needed only swear an oath of innocence (Alwani 1995, 4-5). There were also protections against false slander and thus a presumption of innocence on behalf of those who had shown no reason for the judge to doubt their dishonesty (10). Alwani also described built in protections for the home against unreasonable search and seizure (14-15) and there are requirements for the testimony of witnesses in criminal issues (Surat An-Nisa 15, for example).

The Mediterranean

The second set of law codes examined in this project include those from the Mediterranean, specifically from the Greeks and the Roman Empire. These span a period of approximately one thousand years from Aristotle's writings in 330 BC to the Justinian Code in 529 AD. The Greek city-states were so diverse in their cultures and administration of government that the small sample of law codes which survives (this study looks only at the Athenian Constitution) is surely not fully representative of the Greek culture which had many and varied micro-cultures. In Athens, for example, women had nowhere near the rights or status that they were afforded in places like Sparta.

The Greek city-state of Athens existed in the first millennium BC and is the political seat from which much of Western civilization owes its rise. Not only did Athens produce several of the greatest political philosophers but also some of the greatest political institutions, many of which are still emulated around the world today. We catch a glimpse of the criminal justice system of Athens in the writings of Aristotle (330 BC) and we can glean some of the rights that were afforded to accused persons in ancient Greece through these writings (Sealy 1976; McDowell 1778). The entire trial system in Athens, as described by Aristotle, makes clear that the Athenians valued the concept of a presumption of innocence. The trial of Socrates, as an example (Stone 1989), is a detailed description of a prosecution's attempt to prove the guilt of a man who is otherwise presumed innocent. The right to an impartial jury is obvious in the requirements of jurors to be chosen by lot from among the people so that they could not be persuaded by bribes ahead of time. This requirement for an impartial tribunal included the rights of the accused to call witnesses on their behalf and to confront witnesses against them. It also allowed for an appeal from lower tribunals to the jury court. Subjects walked free during the

time of trial and there were provisions in place to protect against cruel punishments by allowing a decision between a punishment suggested by the prosecution at the time of conviction and one suggested by the defense (Stone 1989).

Around 450 BC, as the Roman Republic threw off the last of its early kings, the conflict between the ruling class and the plebeians led to the formation of a law code that guaranteed certain rights, during the phase of trial and punishment, to accused persons. The surviving portions of these rules, written on "Twelve Tables", indicate some progress was being made by lower classes seeking recognition and rights to insulate them against the upper echelons of society. Some of the reforms, as they related to the rights of accused persons, the subject of this study, showed similarities to those rights seen today, including protections against arbitrary arrest and detention (Table 1:1; Table 3:2) in which a defendant could not be seized for trial unless a witness corroborated the complaint of the plaintiff or until a certain period of time had passed. Additionally, there were provisions in the Twelve Tables (Table 1:7,8,9) which guaranteed a speedy trial for the accused--setting actual times of day by which an accused person had to be brought before the magistrate and times in the evening by which the trial had to be concluded. There was also some respect shown for due process in criminal proceedings indicated in the tables--namely that a certain investment of property (in the form of pack animals) had to be offered up during the making of a criminal allegation before it would be taken seriously (Table 2:1a). And time (30 days) was given to those accused of crimes requiring monetary compensation to make good on the fine before they could be seized and brought to trial (Table 3:1,2).

These twelve tables served the Republic for many years but constant changes and interpretations of the law influenced the writing of a much larger codex of rights and regulations

(heavily influenced by the Christianization of Rome) around 350 AD. In 429, Emperor Theodosius II set up a commission to codify the laws of the Roman Empire from the reign of Constantine until his own time (a period of over 100 years). Within ten years, under his direction, the laws of the Roman Empire were gathered and organized into 16 books that were ratified by the Senate and accepted by unanimous consent as the laws of the land. Known as the Theodosian Code, this extensive set of laws and edicts covered a disparate range of topics from marriage and family law to military organization and border enforcement. It was meant to be the grand summation of law that would rule the empire and inform its legal tradition from that time forward. It continued to assert inequality by class, as both slaves and women were given lower station in certain aspects of the law (women could not act as advocates on behalf of plaintiffs, for example) (Book IX, Title 1). However, the code had plain provisions in place for protecting the accused. In Book IX of that code, under Title I, were recorded the laws regarding the rights of an accused person being brought to trial and protections that were put in place for such a person between the time of accusation and the moment of conviction or acquittal.

Protections against unreasonable seizures of persons and assurance of due process are specified (Title I:5) where the law directs that spoken accusation would no longer be enough to bring someone to trial for a crime and that accusation required the added burden of "inscription" (formal written accusation or oath). Presumption of innocence is implicit in Titles 1, 2, and 3 with language that indicates the accused must be protected from various inhumanities because there is yet the possibility, before conviction, that they are innocent. Due process protections can be assumed in the added requirements for bringing accusation on capital offenses. For example, under the provisions of Book IX, a person bringing charges on a capital offense, such as homicide, would have to take upon himself the possibility of receiving the same capital

punishment should it be determined that his accusations were false (Title 1). This had to be done prior to the accused being forced to defend himself. Additionally, no person could be bound in prison before appearing before a magistrate (Title 2, 3). The right to a speedy trial was also guaranteed as was the necessity of being tried in the jurisdiction where the crime occurred. Under Title 1, protections were put in place to protect the accused from "the inactivity of judges" by requiring that magistrates immediately bring the accused from custody and to trial so that they might not "suffer too cruelly." Furthermore, a time frame (of one month) was given during which the investigation of a crime had to be concluded and the imprisoned defendant given a right to be heard. There are also protections against what the Romans considered, at the time, to be cruel punishments. Book IX, Title 1, for example, appears to place limits on torture of convicted persons in order to gain confessions about accomplices. The idea of protecting accused persons from unnecessarily cruel treatment, can also be found in the Theodosian code in places where judges could be prosecuted for not speaking up if they saw inappropriate punishments being administered to those in custody and that torture could not be administered on a convicted person without declaration by oath (inscription). Title 1 indicates that judges would be punished and their office staff condemned if they did not speak up when they saw that torture was being conducted on an accused person before proper oath had been made. Additionally, Title 3 documents protections against cruelty being administered on accused persons by requiring such things as loose chains, during the detention process, prohibition against being kept in the dark, and requirements that each prisoner have access to sunlight and fresh air. All of this was done under the assumption that there was a desire to minimize the possibility of an innocent person having to suffer--a presumption of innocence.

Between 529 and 534 BCE, the Byzantine emperor Justinian sought again to unify the laws of the Roman Empire, which had become unwieldy, and commissioned several capable men to do so. Led by his legal adviser, Tribonian, the older constitutions and edicts found in the Gregorian Code, the Hermogenian Code, and the Theodosian Code were compiled and combined, along with more recent laws, into the Corpus Juris Civilis--or body of civil law--known as the Justinian Code. In his own words to the Roman senate Justinian stated that this unification of law was designed to promote the "common welfare, by collecting such laws as are certain and clear, and incorporating them into a single code" (Justinian Code, Introduction). Furthermore, it was an effort to "[collect] in a single body the Imperial Constitutions which were scattered through several volumes, and the most of which were either repetitions or conflicting, and free them from every defect" (Introduction). The laws and edicts found therein are as diverse and far reaching as the Roman Empire itself. But the purpose of this project is to focus on the laws and edicts that specifically dealt with the treatment of prisoners of the state—both before and after conviction, and specifically as they dictated when and where a prisoner could be confined and under what conditions. In the Justinian Code, Book IX is replete with laws put in place to protect prisoners from being imprisoned before there was some indication of their guilt--a presumption of innocence. Additionally, oaths had to be sworn before someone could be deprived of liberty and brought before the court. Most accused persons remained free during the time of their trial and were allowed periods of time to get their affairs in order before having to defend themselves. In Titles 3 and 4 there are indications of the appointment of counsel to represent the accused, and provisions for a speedy trial requiring that a trial proceed "at once" so that the accused might be discharged if found to be innocent. Furthermore, accusers and accomplices had to be produced as soon as possible. All of these requirements are an indication

of due process and rights to a speedy trial for accused persons. Protections against cruel and unusual punishment can be found in Title 4, where the physical wellbeing of the accused is given particular consideration. Prison conditions were required to be sanitary and healthy and, again, chains had to be loose and the prisoner was required to have access to sunlight and to clean air. Furthermore any negligence by the guards, or even the magistrates, which resulted in damage to the physical wellbeing of the accused, required stiff punishments against those persons (Title 3, 4). The requirements of judges to fairly judge and to protect against "unreasonable severity" show obvious respect for the right to a fair and impartial tribunal, as well, and witnesses were called and could be punished if they did not testify as required (Title 3, 4).

The Far East

As previously mentioned, Stamos (2015) postulates that human rights, as we know them today, are merely a function of Western civilization and its influence on other societies. Therefore, the codes below, which survive from the Far East, many before Western traditions were influential, are particularly instructive. The oldest law codes in this group that contain any information touching on the treatment and rights of accused persons are found in the Edicts of Ashoka (around 230 BC) and the Law Code of Manu (200 BC-300 AD).

The Edicts of Ashoka (English translation and discussion by Dhammika, 1993) are ancient edicts, found inscribed in stone in parts of India, which are attributed to a legendary king of the same name. The traditions surrounding the king's history--that he once ruled as a ruthless tyrant but converted to Buddhism and became a righteous reformer--are veiled in myth. However, the edicts survive and provide a glimpse into Buddhist thought and governance in India in the third century BC. It is difficult to understand the cultural minutiae that might have

governed those for whom these rights were enshrined, and it is highly likely that caste systems were present during Ashoka's reign as much as what existed for any of his contemporaries. However, we are looking for what his community held as an ideal, and a few of the edicts allow us some view of that. In regards to the treatment of accused persons in his country, Ashoka showed concern for the treatment of prisoners and bragged about having issued blanket pardons on 25 different occasions during his reign. He issued, among the rock edicts, proclamations that required fair treatment of prisoners, as well, making it known that they should be "unfettered" and that those who had families to support, or who were old, should be given the opportunity for early release (Edict 5). He sought due process in criminal justice proceedings, equal protection under the law, and a guarantee of fair criminal proceedings by declaring (through Pillar Edicts, Edict 4) "uniformity in law" and "uniformity in sentencing" throughout his kingdom. Through the same edict he guaranteed a right to appeal for those who had been sentenced to death, and granted a period of reprieve so that family members could gather evidence with which to make the appeal (Dhammika, 1993).

The Law Code of Manu, probably written between 200 BC and 300 AD, in India, was translated into English in 1794 and became a foundational document for Hindu law under the later colonial occupation. It is possibly a foundational text for some Buddhist law, as well (Olivelle 2004). Probably written over time, by several different authors (Olivelle 2004), it is a collection of writings over the centuries that captures some of the Hindu perceptions of law and human duty, including those that pertain to the rights of accused persons. Again, through our modern lens, we must recognize that the laws written in the code make mention of different societal castes and different treatment among them (Code of Manu 8.41 and 8.24) as well as disparate treatment of men and women within the legal system (8.62) and in terms of acting as

witnesses. However, there are recognizable rights for accused persons that are akin to those found in the other pre-modern codes we have examined. Examples of due process in criminal proceedings, for example, can be observed in the requirements of the king and other judges to follow certain standards of law in their judging (8.1). The impartiality of judges (tribunals) was attempted through the requirement that the only men who could be appointed to judge were those who were learned in both the law and legal process (8.9). There is also, in the code, ample evidence that witnesses were called (8.18, 8.45) and that those potential witnesses with a stake in the dispute, or with a close relationship to the parties of an action, were excluded from testifying for fairness' sake.

The Tang Code was written in China during the Tang dynasty (approximately 600 to 900 AD). A large portion of the penal code under which the judicial system operated, and which was borrowed by succeeding dynasties and other Asian empires, survives today. The Tang Code was remarkably specific in many areas of law, including areas dealing with the treatment of accused persons. Again, we must observe that the Tang dynasty was defined by class systems, which discriminated against certain groups of people who were considered commoners, and the nobility enjoyed disproportionately more rights. Although some of the women in higher social circles could occupy important government positions, those in the lower echelons of society could not. Nevertheless, a reading of the Tang Code offers some insight into what was considered proper rights for those who had been accused of crimes regardless of social class. Articles 351 and 475 of the Code indicate that it was important in Imperial China that accused persons be free from arbitrary arrest and detention. It was strictly forbidden (and brutally punished) for a person to make any accusation against another that might lead to his arrest if the accuser did not specify his real name attached to the accusation (Article 354). Anonymous accusations were not

allowed. This was true for both free persons and those currently imprisoned for other offenses who could be additionally punished if they brought false accusations against fellow prisoners. There is some indication of protections against ex post facto charges, as well (Article 354) since charges could not be brought on crimes that were committed *prior* to an "amnesty" or the cancelling of a particular law. One could not be held accountable for crimes which were not criminal at the time of accusation. There was also a right to appeal inherent in Article 359, in which there are references to the ability to progress from lower courts to higher ones with a strict requirement that grievances must begin at the lowers courts and not bypass them. Allowing witnesses in trial was made clear in the injunction of Article 357 against swearing false testimony and in the case of finding evidence against protected classes (elderly or infirm) in Article 474. The assurance of a fair tribunal was guaranteed through the threat of punishments for magistrates and other criminal justice personnel if they did not correctly and impartially carry out their duties or if they accepted bribes (Articles 353, 354, 355, 472). Although much of the Tang Code's discussion of the criminal justice system is brutal (requirements of physical beating for those who make false accusations and the death penalty (often by strangulation, for capital crimes), there were provisions in the code that make it clear that there was a value ascribed to humane treatment of prisoners between the time of accusation and the final carrying out of the sentence. For example, it was required that prisoners be given clothing and rations if they were incarcerated at such a distance that their families could not provide them (473). Additionally, prisoners who fell severely ill would be allowed visitation from family members to care for them and, if they were not removed from their restraints during the illness, the jailer could be punished. Since "judicial torture" (three attempts at getting a confession through beating) was a means of exacting a confession, those who were particularly young, elderly, or infirm were

spared this form of "truth finding" and could be interrogated instead through the use of witnesses.

The British translators of the Gentoo Laws (or laws of the Hindu Pundits in India at the time of the British occupation) asserted that their purpose for collecting a long history of written laws from the Hindu people was to make sure that the British laws incorporated in their country would conform to existing tradition and legal standards (A Code of Gentoo Laws 1777). As far as the translation (made in the late 18th century) is correct, the ancient Hindu laws contained several protections for the accused which we might recognize today (Gentoo Laws 1777). Fair tribunals were assured by insisting that the magistrate must be a person who is willing to hear both sides of the argument and to listen carefully to both the accuser and the accused while listening to the advice of an assistant of "knowledge and discernment" (Chapter 3, section 1). Section 3, of the same chapter, lists a number of reasons that an accused person cannot be immediately seized, or taken into custody. Such a person would be protected from arbitrary arrest that would disrupt any important responsibilities to his family, his work, his religious duties, or that would take him away from making his living and gaining sustenance. There are provisions in Chapter 3, section 2 which allow for the use of counsel (a vakeel) in one's defense. This counsel is allowed for virtually all criminal cases (with rare exceptions) and in all cases for those who are mentally deficient. Additionally, there is an expressed right to call witnesses in Chapter 3, section 7, where witnesses are not only called by the magistrate presiding over a matter but can also be summoned by the accuser and the accused to give testimony on their behalf.

Northern Europe

The final section of law codes examined in this study are some of those which survive from Northern Europe and which contain, as was required for inclusion in this study of the other codes, some information about the period of time in the criminal justice system between accusation and the carrying out of punishment. The first comes to us from the laws of Alfred the Great, a monarch in the late 7th century AD. In about 890, the West Saxon king took it upon himself to gather together the laws that had governed Anglo-Saxon society for the centuries that preceded him, stretching back to the time of the migration of the Anglo-Saxons to the British Isles. In doing so he made it clear that he had carefully chosen from among a large body of existing Anglo-Saxon laws, elevating and codifying some, while rejecting others. Alfred also made it clear, in the preface to his laws, that he had borrowed specifically from the laws and pronouncements of certain of his predecessors including the Kentish king, Ethelbert, the Saxon king, Ini, and the Merican king, Offa (Dooms of Alfred the Great, Introduction). By Alfred's time, Christianity was well entrenched in the British Isles and informed their laws to a great extent. Alfred's dooms (laws) included not only the Ten Commandments, but much of the Mosaic teachings about crime and punishment, as well. Interestingly, almost all of the penalties in the code fall under a list of monetary costs an accused person must pay to compensate for his crimes (either to the king, the victim, or the victim's family). This form of restitution, in and of itself, protected against any arbitrary arrest and detention. However, there is a portion of the laws (doom 42), probably written with some deference to the portions of the law of Moses which allowed an accused person to find sanctuary, which contains both the concept of presumption of innocence and due process. In this doom, where blood feud is discussed, the law allows for a person who has been wronged by another to attack and kill the accused. Doom 42 protects such

accused persons by allowing them a certain length of time in which they could plead their case to the king and kindred before the attack could commence. The accused was also allowed to claim sanctuary at a church where he could not be killed until his case could be heard.

The Laws of the Salian Franks (around 500 AD) were those laws which survive for one of the Germanic tribes in existence during the transition from the Roman Empire to medieval Europe. It is difficult to know how much of the laws of the Salian Franks were influenced by those of the Roman Empire and how much influence they received from the Germanic tribes from whence they came. Regardless, this collection of laws includes some aspects of the period of time between accusation and punishment and can thus be used for this study. A translation of the laws and discussion of them was written by Katherine Fischer Drew (1991). She notes that some of the other law codes which were contemporary with the Salian code took an existing judicial system and judicial procedure for granted (Drew 1991, 33), the result being that not much can be learned from them about the rights of accused persons in the process. The laws of the Salian Franks, on the other hand, had a great deal to say about both the judicial system and judicial procedure (33). A fair tribunal was offered in the form of chief judicial officers and their assistants who were chosen from local families of good repute, who were learned and experienced in the law, and who served without pay (33-36). Furthermore, the right to appeal to a higher court was allowed through immediate appeal from the local magistrate to the king, who would travel the kingdom to hear cases (33-36). Freedom from arbitrary arrest was accomplished in the form of required sworn oaths from the accuser and the accused, and witnesses were called to swear oaths on behalf of either party and could be called to testify in numbers dependent upon the seriousness of the case (33-36). Due process, in place of the blood feud, much as in the Dooms of Alfred, was insured through a system of monetary rewards, in

place of vengeance, which were brokered by the state and prevented someone from being immediately punished through vigilantism (36-37). A speedy trial was guaranteed through the requirement of certain time periods for the summons process before trial was commenced which was supported by threatened penalties for delay (36-37).

As the Laws of the Salian Franks represent a law code from Northern Europe at the beginning of the medieval period, Magna Carta (the Great Charter) is a law code that came about near the end of medieval Europe. In it, we see the first protections of rights for the accused that imitate language we are accustomed to hearing today. In 1215 AD, King John, the Angevin king of England at the turn of the 13th century, found himself compelled to sign a document which was not written by him but that, nevertheless, became law throughout his kingdom. When he failed at domestic policy, angered the citizenry with his taxes, mistreated land owners, lost great land holdings abroad, and found himself excommunicated by the church, John was facing an imminent popular revolt and the possible overthrow of his entire kingdom. To stave off such an overthrow, he agreed to sign away power from the monarchy and gave it to the English aristocracy.

In that transfer of power are certain rights for accused persons that the English landowners felt were necessary to preserve their status and protect them from the king. These protections included guarantees against cruel and unusual punishment (stanza 20), in which the Barons staved off fines that were so steep as to financially cripple those who were accused of violating the law. A right to a fair tribunal can be found in stanza 39, where right to a jury of one's peers is also present. The tribunal was fair only if the judge was a fellow-citizen. Provisions for allowing witnesses in one's own defense (stanza 38) and the right to a speedy trial by requiring that justice could not be delayed (stanza 40) were also present. Furthermore, a man

could not be deprived of his liberty through arbitrary arrest (stanza 39) nor could his status in society or his landholding be diminished until he was found guilty (presumption of innocence) (stanza 39). Stanza 39 is also widely thought to contain the roots of due process in English common law. Throughout the document is a further deference to due process wherein property and liberty could not be removed without the accused being afforded his due rights.

The final pre-modern law code from Northern Europe borrows heavily from Magna Carta. However, the English Bill of Rights came a full 450 year later, through a Parliament that came into existence as a direct result of the signing of the former document. In the passage of this law, due process was ensured in the first two provisions that called for the magistrate to be unable to execute or suspend laws without the consent of parliament. A right to a fair tribunal was called for through the ending of biased ecclesiastical courts. The freedom from cruel and unusual punishment was made clear in language almost identical to that which stands in the U.S. Bill of Rights. The right to a jury of one's peers was reaffirmed, while the right to appeal for redress up to the king, himself, was also made law. A presumption of innocence can be inferred from the injunction that any fines or levies against a person would become invalid until *after* he was found guilty.

Here follows, then, a summary of the rights of accused persons inferred in each of the law codes that have been examined, in each region of the world, along with attribution to any scholars who assisted in locating them:

-Mesopotamia and the Middle East:

-The Code of Ur-Nammu (2100 BC):

-Presumption of Innocence (Precept 13)

-Due Process (Precept 14)

-The Code of Hammurabi (1750 BC):

-Presumption of Innocence (Precept 2)

-Due process: (Precept 2, 12)

-Right to call witnesses (Precept 12)

-Freedom from arbitrary arrest, detention (9, 23, 120, 126, 131)

-The Law of Moses (1200 BC):

-Freedom from arbitrary arrest, detention (Exodus 23:1)

-Right to call witnesses (Deuteronomy 19:15-21)

-Right to a speedy trial (Exodus 18)

-Presumption of Innocence (Exodus 21)

-Due Process (1 Kings 1:49-51)(Exodus 21:12-13)

-The Koran (632 AD)

-Presumption of Innocence (Statement of Mohammed in the Hadith).

--Right to an impartial (fair) tribunal (Surat An-Nahl 16:90, Surat Ash-Shura 42:15, Surat Al-Maeda 5:8, Surat An-Nisa 4:58). (Alwani 1995)

--Due process (Alwani 1995)

--Right to call witnesses (The Sunnah)

--Abdel-Haleem (2003)

--Burns (2014)

--Freedom from unreasonable search and seizure (Alwani 1995)

--The Mediterranean:

-The Athenian Constitution (330 BC)

-Presumption of Innocence

-Right to an impartial jury

-Right to an impartial (fair) tribunal

-Right to call witnesses

-Right to appeal

-Freedom from arbitrary arrest, detention

-Freedom from cruel, unusual punishment

--Aristotle (Unknown)

--Sealy (1976)

--McDowell (1778)

-The Twelve Tables (450 BC)

-Freedom from arbitrary arrest, detention (Table 1:1)

-Right to a speedy trial (Table 3:1)

-Due Process (Table 2:1a, 3:1,2)

-The Theodosian Code (438 AD)

-Freedom from arbitrary arrest, detention (Title I)

-Due Process (Title I)

-Right to a speedy trial (Title I)

-Freedom from cruel, unusual punishment (Title III)

-Presumption of Innocence (Title III)

--Pharr (1952)

-The Justinian Code (529 AD)

--Presumption of Innocence (Corpus Juris Book IX)

-Freedom from arbitrary arrest, detention (Corpus Juris Book IX)

-Right to a speedy trial (Title 3, 4)

-Freedom from cruel, unusual punishment (Title 4)

-Right to an impartial (fair) tribunal (Title 4)

-Right to call witnesses (Title 3, 4)

-Right to counsel (Title 3, 4)

-Due Process (Title 3, 4)

--The Far East:

-The Edicts of Ashoka (230 BC)

-Freedom from cruel, unusual punishment (Justice Edicts--Rock Edict 5)

-Right to an impartial (fair) tribunal (Justice Edicts--Pillar Edict 4)

-Due Process (Justice Edicts--Pillar Edict 4)

-Right to appeal (Justice Edicts--Pillar Edict 4)

-Equal protection (Justice Edicts--Pillar Edict 4)

-The Law Code of Manu (200 BC-300 AD)

-Right to an impartial (fair) tribunal (8.9)

-Right to call witnesses (8.18, 8.45)

-Due Process (8.1)

--Jaiswal (2013)

-The Tang Code (600-900 AD)

-Freedom from arbitrary arrest, detention (Article 351, 475)

-Protection against ex post facto charges (Article 354)

-Right to an impartial (fair) tribunal (Article 354)

-Right to appeal (Article 359)

-Right to call witnesses (Article 357, 474)

-Freedom from cruel, unusual punishment (Article 473, 474, 476)

-Freedom for Self Incrimination (Article 473, 474)

-The Gentoo Laws (1785)

-Freedom from arbitrary arrest, detention (Chapter 3, Sect. 1, Sec. 3)

-Right to an impartial (fair) tribunal (Chapter 3, Sec. 1)

-Right to counsel (Chapter 3, Sec 2)

-Right to call witnesses (Chapter 3, Sec. 7)

Northern Europe:

-The Dooms of Alfred the Great (890)

-Presumption of Innocence (Doom 42)

-Freedom from arbitrary arrest/detention (Monetary Punishments)

-Due Process (Doom 42)

-Laws of the Salian Franks (500)

-Freedom from arbitrary arrest, detention (p. 34)

-Right to an impartial (fair) tribunal (p. 33)

-Due Process (p. 36)

-Right to call witnesses (p. 36)

-Right to a speedy Trial (p. 36)

-Right to appeal (p. 33, 37)

--Drew (1991)

-Magna Carta (1215)

-Freedom from cruel and unusual punishment (stanza 20)

-Right to an impartial (fair) tribunal (stanza 34)

-Right to call witnesses (stanza 38)

-Right to a jury (stanza 39)

-Freedom from arbitrary arrest, detention (stanza 39)

-Right to a speedy trial (stanza 40)

-Due process (stanza 39)

-English Bill of Rights (1689)

-Freedom from cruel, unusual punishment

-Presumption of Innocence

--Right to a jury

--Right to an impartial (fair) tribunal

--Due process

--Right to appeal

As the above information indicates, it is possible that many of the rights of accused persons that are present in the Universal Declaration, and which are prevalent in today's world constitutions, are neither new nor novel. Despite arguments which attribute universal human rights to Western civilization alone, and to the expansion of the British empire specifically, many

of these rights can, indeed, be recognized in pre-modern law codes not only along the trajectory of Western tradition, but in codes that also represent the Middle East, the Far East, and the Mediterranean.

Of the sixteen human rights for accused persons that we consider contemporary, both in and out of the Universal Declaration, a similar right to a full fourteen of them appear in ancient law codes--ten of those occurring in more than one tradition. The following figures are a representation of the distribution of the 16 identified rights for accused persons for which similarities have been found in pre-modern law codes:

Figure 3-1: Ancient Law Codes (1)

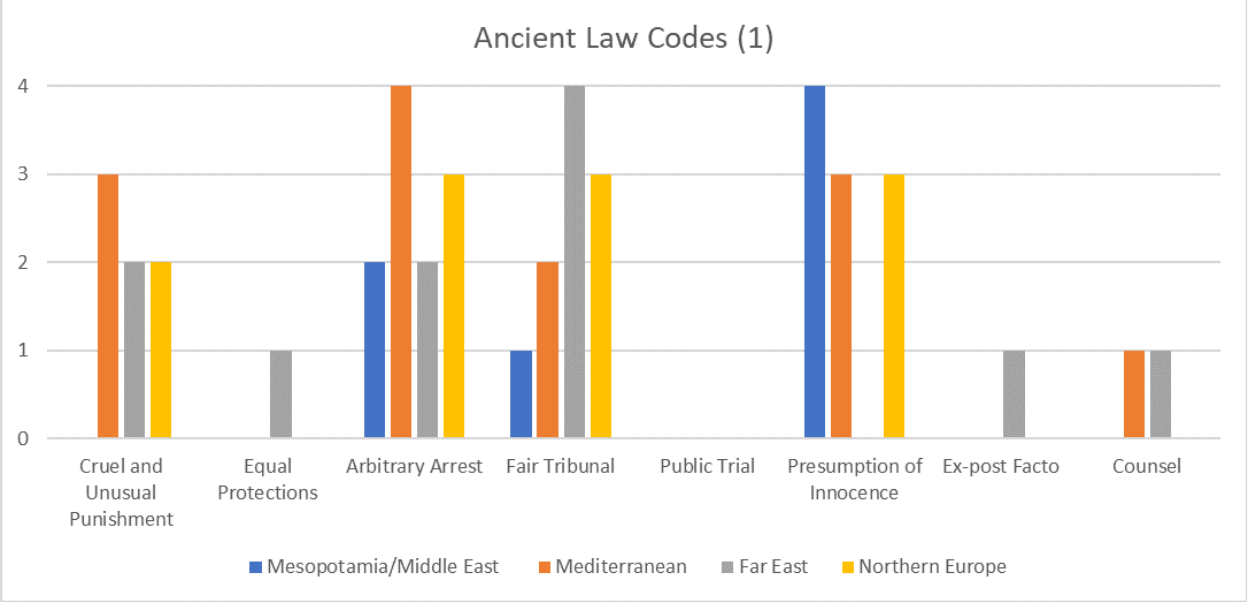
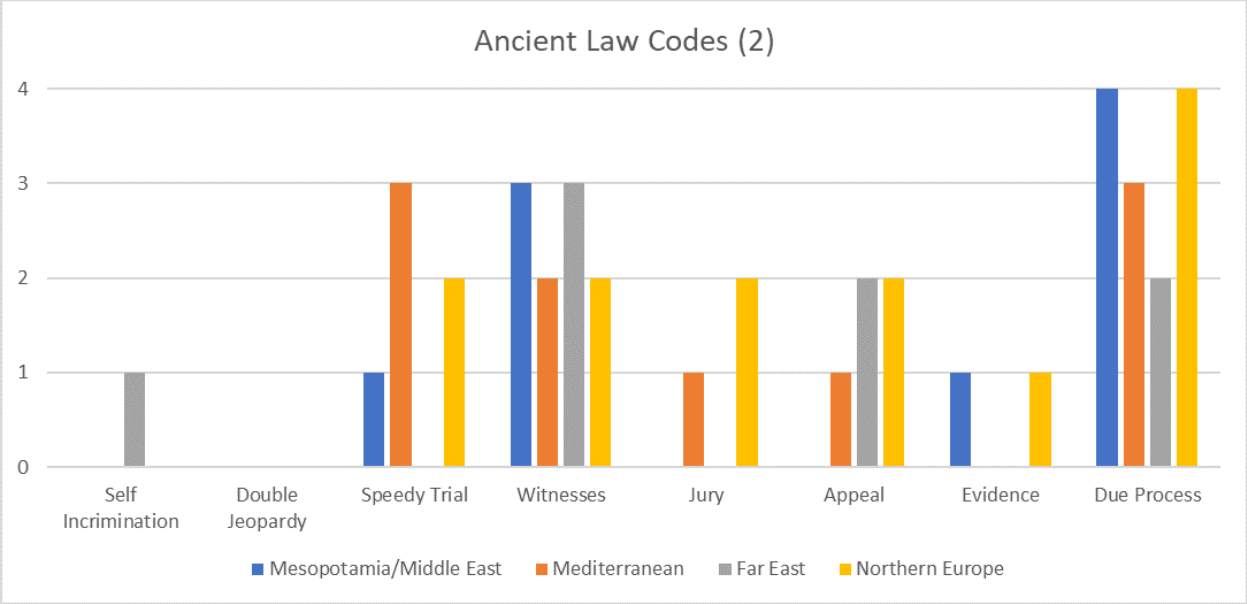


Figure 3-2: Ancient Law Codes (2)



Rights of the Accused in World Declarations:

" . . . *Fundamental human rights stem from the attitudes of human beings, which justifies their international protection and on the other hand that the reality and respect of people's rights should necessarily guarantee human rights* . . ."--African Charter on Human and People's Rights (1986--Preamble)

If the existence of certain rights in ancient law codes can serve to measure an historical consensus, then the existence of those same rights, in the various worldwide declarations of human rights, is a good indication of their widespread acceptance across cultural, religious, and geographical space in the more recent past and present. If such rights have been adopted into the various declarations on human rights that exist, we can assume that there is something about the people, their religion, and their geographical area that allows for the acceptance of these rights,

and their adoption into their modern laws, regardless of their origin--thus supporting the second assumption for universality--widespread contemporary adoption.

Universal declarations of rights can be thought to begin with the French and American revolutions in the late 18th century, when actual lists of negative rights (protections from government) were codified. Other geographical areas followed suit, beginning with the countries in Central and South America, and continuing with Europe and the Islamic nations. By the end of the 20th century, universal declarations of human rights had been signed and adopted by the African and Asian nations, as well, providing some indication of universality in places further removed from the Western tradition. Because this explosion in codified rights occurred in the short space of two centuries, and because modern language was so easily borrowed in an increasingly connected world, these rights could be identified in the worldwide universal declarations without difficulty. The similarities are striking. A list of the world declarations on human rights, and the occurrence of the sixteen outlined rights of accused persons within them, are as follows:

-**The French Declaration of the Rights of Man** (1789)

-Right to equal protection under the law (Article 1, Article 6)

-Freedom from arbitrary arrest, detention (Article 7)

-Due Process (Article 7)

-Protection against ex post facto charges (Article 8)

-Freedom from cruel, unusual punishment (Article 8, 9)

-Presumption of Innocence (Article 9)

-**The Bill of Rights of the U.S. Constitution** (1789)

-Freedom from arbitrary arrest, detention (Amendment 4)

-Freedom from arbitrary collection of evidence (Amendment 4)

-Freedom from self-incrimination (Amendment 5)

-Protections from double jeopardy (Amendment 5)

-Due process (Amendment 5)

-Right to a public trial (Amendment 6)

-Right to counsel (Amendment 6)

-Right to a speedy trial (Amendment 6)

-Right to call witnesses (Amendment 6)

Right to a jury (Amendment 6)

-Freedom from cruel, unusual punishment (Amendment 8)

-**The American Declaration of the Rights and Duties of Man** (April 1948)

-Right to equal protection under law (Article 2)

-Freedom from arbitrary collection of evidence (Article 9, 10)

-Right to an impartial (fair) tribunal (Article 18, 26)

-Freedom from arbitrary arrest, detention (Article 25)

-Right to a speedy trial (Article 25)

-Due Process (Article 25)

-Freedom from cruel, unusual punishment (Article 25, 26)

-Presumption of Innocence (Article 26)

-**The Universal Declaration of Human Rights** (December 1948)

-Freedom from cruel, unusual punishment (Article 5)

-Right to equal protection under law (Article 7)

-Freedom from arbitrary arrest, detention (Article 9)

-Right to an impartial (fair) tribunal (Article 10)

-Right to a public trial (Article 10)

-Due Process (Articles 8-10)

-Presumption of Innocence (Article 11)

-Protection against ex post facto charges (Article 11)

-**The European Convention on Human Rights** (1953)

-Right to appeal (Article 2)

-Freedom from cruel, unusual punishment (Article 3)

-Freedom from arbitrary arrest, detention (Article 5)

-Right to a speedy trial (Article 5)

-Right to an impartial (fair) tribunal (Article 6)

-Right to a public trial (Article 6)

-Presumption of Innocence (Article 6)

-Right to counsel (Article 6)

-Right to call witnesses (Article 6)

-Due process (Article 5,6)

-Protection against ex post facto charges (Article 7)

-Right to equal protection under law (Article 14)

-**Universal Islamic Declaration of Human Rights** (1981)

-Freedom from arbitrary arrest, detention (Article 2)

-Right to equal protection under law (Article 3)

-Right to an impartial (fair) tribunal (Article 4)

-Right to appeal (Article 4)

-Presumption of Innocence (Article 5)

-Due Process (Article 5)

-Protection against ex post facto charges (Article 5)

-Freedom from cruel, unusual punishment (Article 7)

-Freedom from self-incrimination (Article 7)

-**The African Charter of Human and People's Rights** (1986)

-Right to equal protection under law (Article 2)

-Freedom from cruel, unusual punishment (Article 5)

-Freedom from arbitrary arrest, detention (Article 6)

-Presumption of Innocence (Article 7)

-Right to counsel (Article 7)

-Right to a speedy trial (Article 7)

-Due Process (Article 7)

-Right to appeal (Article 7)

-Right to an impartial (fair) tribunal (Article 7)

-Protection against ex post facto charges (Article 7)

-**The Asian Charter of Human Rights** (1998)

-Adopts all rights found in the Universal Declaration (3.1)

-Freedom from cruel, unusual punishment (3.7)

-Right to impartial (fair) tribunal (3.7)

-Right to counsel (3.7)

-Due process (3.7)

-Presumption of Innocence (3.7)

-Right to appeal (3.7)

The presence of the sixteen rights for accused persons, as found in the various world declarations on human rights, are depicted in the figures below. All sixteen rights are represented and nine of them occur in over half of the world declarations.

Figure 3-3: World Declarations (1)

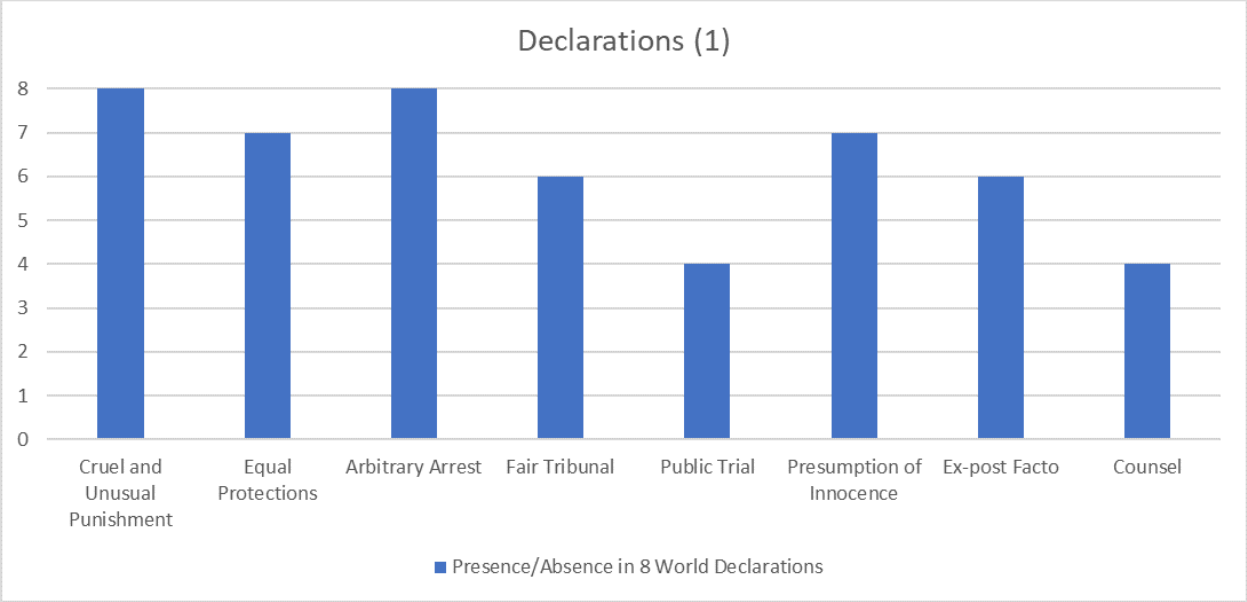
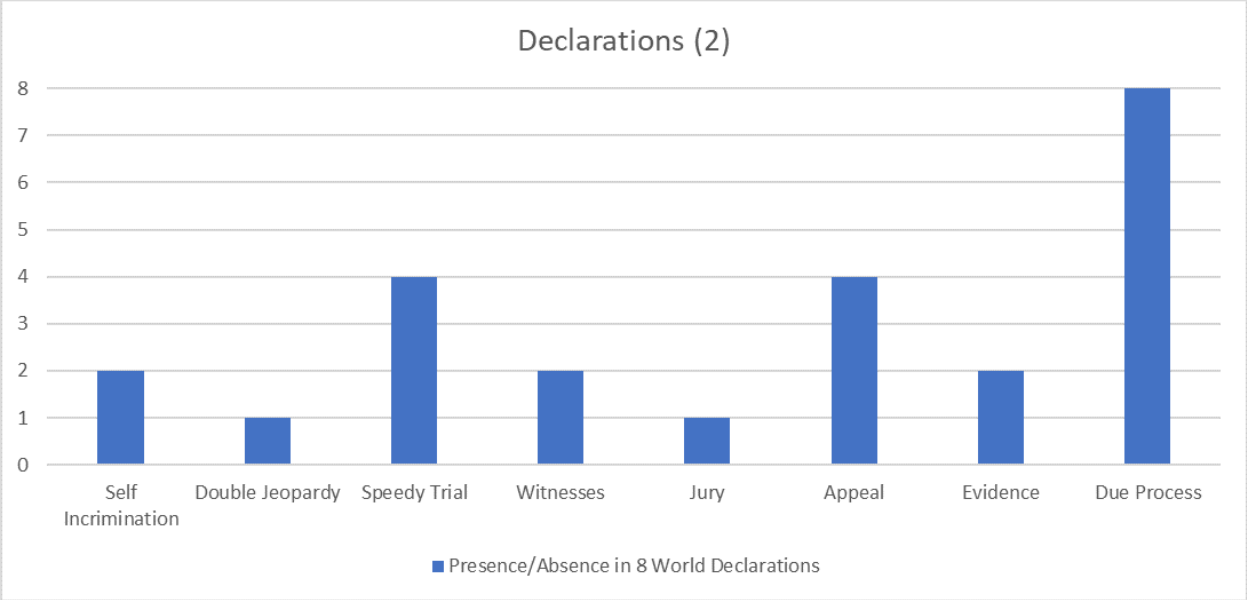


Figure 3-4: World Declarations (2)



So far it appears that some rights for accused persons can not only be argued to have historical use, across time, but also to be widely adopted in modernity, as well. It is important now to turn to the task of eliminating other explanatory variables for widespread adoption. It is entirely possible, for example, that certain rights give the appearance of being universally adopted because they widely exist, even though they only exist under particular circumstances (ie. in countries most influenced by the Western tradition or in countries that operate under a particular form of government). As you may recall, this study tests for universality through widespread adoption in modern law codes while holding certain elements constant which might serve as better explanations of worldwide acceptance. Therefore the study accounts for the impact on widespread adoption in worldwide constitutions that might be exerted by geographical region, dominant religion, and form of government. Recall that Hume, Stamos, and Lukes have postulated that these are possible causal factors. If nations tend to adopt certain human rights for

accused persons into their ruling legal documents (their constitutions) regardless of region, dominant religion, and form of government, then it is reasonable to believe there is a good argument for a universal human understanding that transcends traditional barriers and which expresses itself in worldwide constitutions, regardless of their country of origin. An excursion into this testing can be accomplished by dividing constitutions in the Comparative Constitutions Project into specific groups which share certain common traits. This is commenced in the next chapter.

CHAPTER 4: Rights in Modern Law Codes (Comparative Constitutions)

Rights of the Accused in Comparative Constitutions

"Nobody may be compelled to testify against himself, nor be arrested except by virtue of a written warrant issued by a competent authority. The defense by trial of persons and rights may not be violated. The domicile may not be violated, as well as the written correspondence and private papers; and a law shall determine in which cases and for what reasons their search and occupation shall be allowed." --Argentinian Constitution (Section 18)

We now turn to a search for support for universality based upon universal adoption in modern law codes or contemporary constitutions. Here the study continues to examine both the group of seven rights found in the Universal Declaration as well as those nine which are not found therein but that are, nevertheless, widespread. The bulk of the data utilized in this chapter was compiled by the Comparative Constitutions Project. It was necessary to also utilize data from the PEW Research center and the Central Intelligence Agency for comparison and grouping purposes. My reason for combining these data sets is to see if societies around the world are apt to adopt the sixteen rights for accused persons that are the focus of this study, in spite of the region of the world in which they exist, the dominant religion in which they believe, and the form of government under which they operate. The added data allows those distinctions to be made. There are surely other assumptions which might be tested to look for patterns (or lack thereof) but I believe these few are a good starting point and I choose them over others because of the arguments made by the aforementioned scholars that the existence of universal human rights is better explained by these variables than by a universal human conscience. The

assumption is that if worldwide peoples are apt to adopt these rights irrespective of other offered explanations and arguments, then there is something about these rights which is, indeed, universal, and there is an effective argument to be made that those who violate them would be forced to consider.

A quick note about the origin of these data sets is necessary here: The Comparative Constitutions Project (CCP) is an exhaustive information collection project begun in 2005 to allow for extensive comparative studies of the world's constitutions. The resultant data set is immense (and still growing), including over 15,000 observations for every world constitution--each multiplied through its various iterations over the years of its existence. For the purposes of this study, the data set has been abridged to include only the most recent iteration of the 195 existing world constitutions and will only include data gathered in the area of human rights--specifically those rights which become important in the administration of justice. Furthermore, the CCP data set has been condensed to include only those human rights which match the 16 rights of accused persons that exist within and without the Universal Declaration as described in Chapter 1. The rights searched in this study have been filed under the following variable names in the CCP data set:

--Right in the Universal Declaration

-Freedom from torture, cruel, degrading, or inhuman punishment: Article 5 (cruel)

-Right to equal protection under law, without discrimination: Article 7 (equal)

-Freedom from arbitrary arrest, detention, or exile: Article 9 (habcorp)

-Right to an independent and impartial (fair) tribunal: Article 10 (fairtri)

-Right to a public trial: Article 10 (pubtri)

-Right to be presumed innocent until proven guilty: Article 11 (presinoc)

-Protection against ex post facto charges: Article 11 (expost)

--Rights not in the Universal Declaration

-Right to counsel (couns)

-Right to remain silent or protections from self-incrimination (miranda)

-Protections against coule jeopardyor being tried twice for the same crime (doubjep)

-Right to a speedy trial (speedtri)

-Right to witnesses and to examining witnesses and evidence (examwit)

-Right to a jury or judgement of one's peers (jury)

-Right to appeal to a higher court for redress (rghtapp)

-Protections against arbitrary collection/handling of evidence (evidence)

-Due process allowances in criminal proceedings (dueproc)

Finally, I have combined the CCP data with data which outlines the region of the world in which each constitution is located, the dominant religion of each participating country, and the mode of government under which each country operates. The combined data set is important in addressing the particular concerns which have surfaced about the existence of universal human rights and will help to explain the existence of rights for accused persons in worldwide constitutions in light of those arguments. Comparisons can be made through simple cross tabulation of each right with the various existing constitutions when organized by geographical region, dominant religion, and form of government or political system. The data is first examined for the seven rights granted to accused persons that are present in the Universal Declaration of Human Rights (1948).

RIGHTS FOUND IN THE UNIVERSAL DECLARATION:

Freedom from Cruel and Unusual Punishment:

The prohibition against cruel and unusual punishment appears early in the UDHR and enjoys robust representation in law codes around the world from antiquity. The words in contemporary law codes are modern but the concept, as described earlier, is older. However in the CCP data, the modern phraseology is what is looked for, and this is sufficient in light of the wholesale borrowing of language that has occurred among countries in the realm of human rights. Recalling the information from Chapter 3, this right, or something similar, appears in almost half of all ancient law codes currently available and in all four regions of the world from which they originated. It also makes a strong showing in world declarations of human rights across the cultural spectrum (appearing in all of them), and we can now see that a provision for protections against cruel and unusual punishment is explicitly affirmed, by similar language, in a high percentage of world constitutions where the data is available.

Table 4.1.1: Cruelty Universality	Occurrence	Percentage
Ancient Law Codes	7/16 (3/4 regions)	44%
World Declarations	8/8	100%
Contemporary Constitutions	121/146	83%

A strong argument can be made that this protection for accused persons is both widely accepted and universally agreed upon. Furthermore, its adoption into world constitutions does not appear to be dependent solely on the level of influence it received from Western civilization as those geographical regions most out of its reach still adopt this right at very high rates into the language of their respective constitutions.

Table 4.1.2: Cruelty/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	12/19	63%
Region 2 (Eastern Europe)	21/21	100%
Region 3 (Latin America and the Caribbean)	22/26	85%
Region 4 (The Middle East and North Africa)	9/12	75%
Region 5 (Sub-Saharan Africa)	34/37	92%
Region 6 (South Asia)	5/5	100%
Region 7 (East Asia)	8/15	53%
Region 8 (Oceana)	9/10	90%

This right also, according to the CCP and PEW Research data, seems to be adopted into constitutions at high rates regardless of a country's dominant religion, indicating that its existence is not dependent upon a particular religious dogma nor created solely from its teachings. It is more universal than this, and begs a different explanation for its widespread existence.

Table 4.1.3: Cruelty/Religion	Occurrence	Percentage
Majority Christian	74/88	84%
Majority Muslim	26/32	81%
Majority Hindu	2/2	100%
Majority Buddhist	6/11	55%

Finally, a prohibition against cruel and unusual punishment does not seem to be solely dependent on the form of government under which a constitution is formed, either. Even theocracies and one-party systems seem to adopt the provision against cruel and unusual punishment at at least a 50% rate, which is remarkable since constitutions in these countries often reflect the will of one person or party and not that of the people at large.

Table 4.1.4: Cruelty/Govt.	Occurrence	Percentage
Presidential Republic	60/71	85%
Parliamentary Republic	33/37	89%
Absolute Monarchy	2/3	67%
Constitutional Monarchy	19/25	76%
Theocracy or One Party System	3/6	50%

In summary, the prohibition against cruel and unusual punishment appears to enjoy widespread existence through time, across cultural boundaries, and widespread adoption in modernity across broad regional, religious, and government differences, despite arguments to the contrary. A strong argument can be made that protections for accused persons from cruel and unnecessary treatment, between accusation and conviction, is likely to exist in the universal human conscience and would probably be universally adopted in John Rawls' hypothetical discussion of justice, made behind a veil of ignorance.

Equal Protection under the Law

The requirement for equal protection under the law, without discrimination, is a key component in the UDHR and enjoys robust representation in modern law codes and world declarations but is only marginally represented in ancient law codes appearing in only 6% of the sample. This is likely due to the fact that many ancient cultures and codes operated in areas in

which slavery was prominent, class distinctions were the norm, and equality between the sexes was not recognized. This right likely has more modern origins.

Table 4.2.1: Equal Protection Universality	Occurrence	Percentage
Ancient Law Codes	1/16 (1/4 Regions)	6%
World Declarations	7/8	88%
Contemporary Constitutions	145/146	99%

Although it is a recent development, equal protection without discrimination is widely accepted and adopted into modern law codes. Furthermore, its adoption into world constitutions does not appear to be dependent solely on the level of influence it received from Western Civilization. Instead it has been adopted into modern constitutions at a remarkably high rate regardless of region.

Table 4.2.2: Equal Protection/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	19/19	100%
Region 2 (Eastern Europe)	21/21	100%
Region 3 (Latin America and the Caribbean)	25/26	96%
Region 4 (The Middle East and North Africa)	12/12	100%
Region 5 (Sub-Saharan Africa)	37/37	100%
Region 6 (South Asia)	5/5	100%
Region 7 (East Asia)	15/15	100%
Region 8 (Oceana)	10/10	100%

Equal protection also, according to the CCP data, seems to be adopted into constitutions at high rates regardless of a country's dominant religion, enjoying nearly 100% adoption across the board in all world religions. This is a remarkable acceptance rate that indicates that, although new historically, this right is fully embedded in the modern human conscience.

Table 4.2.3: Equal Protection/Religion	Occurrence	Percentage
Majority Christian	87/88	99%
Majority Muslim	32/32	100%
Majority Hindu	2/2	100%
Majority Buddhist	11/11	100%

Finally, equal protection does not seem to be solely dependent upon the form of government under which a constitution is formed. Constitutions under all forms of government have adopted this right at high percentages and there appears to be no meaningful distinction between them.

Table 4.2.4: Equal Protection/Govt.	Occurrence	Percentage
Presidential Republic	71/71	100%
Parliamentary Republic	37/37	100%
Absolute Monarchy	3/3	100%
Constitutional Monarchy	24/25	96%
Theocracy or One Party System	6/6	100%

Protection from Arbitrary Arrest

Protections against arbitrary arrest and imprisonment, present in the UDHR, enjoy a representation in ancient law codes that is both widespread and robust. This right is also found in high percentages in both modern law codes and world declarations, indicating that it has been present, in some form or another, through much of the world's history and is widely adopted today. It appears that protecting alleged criminals from being physically detained without some sort of oath or affidavit on behalf of the accuser, is frequently valued, both historically and in contemporary law codes.

Table 4.3.1: Arbitrary Arrest Universality	Occurrence	Percentage
Ancient Law Codes	11/16 (4/4 regions)	69%
World Declarations	8/8	100%
Contemporary Constitutions	118/146	81%

The adoption of freedoms from arbitrary arrest and detention is not dependent on the region of the world in which these modern constitutions are written. Therefore, its adoption into world constitutions does not appear to be dependent solely on influence from Western Civilization. It has been adopted into modern constitutions at a high rate regardless of geographical region.

Table 4.3.2: Arbitrary Arrest/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	18/19	95%
Region 2 (Eastern Europe)	19/21	90%
Region 3 (Latin America and the Caribbean)	21/26	81%
Region 4 (The Middle East and North Africa)	9/12	75%
Region 5 (Sub-Saharan Africa)	26/37	70%
Region 6 (South Asia)	5/5	100%
Region 7 (East Asia)	12/15	80%
Region 8 (Oceana)	7/10	70%

Furthermore, when looking at adoption by dominant religion of a country, protections from arbitrary arrest and detention again enjoy widespread adoption rates that are high for every major religion group (at least above 50%). This indicates that the universal conscience is a better explanation of this right than religious background.

Table 4.3.3: Arbitrary Arrest/Religion	Occurrence	Percentage
Majority Christian	75/88	85%
Majority Muslim	23/32	72%
Majority Hindu	1/2	50%
Majority Buddhist	9/11	82%

Finally, protections from arbitrary arrest do not seem to be solely dependent on the form of government which adopts them--again enjoying widespread and robust representation among countries with all the major forms of government. This right in the Universal Declaration thus enjoys important support for universality.

Table 4.3.4: Arbitrary Arrest/Govt.	Occurrence	Percentage
Presidential Republic	59/71	83%
Parliamentary Republic	30/37	81%
Absolute Monarchy	2/3	67%
Constitutional Monarchy	18/25	72%
Theocracy or One Party System	5/6	83%

Right to an Impartial or Fair Tribunal

The fourth right mentioned in the Universal Declaration of human rights is that afforded to accused persons which offers some sort of guarantee that the judicial body, which is the trier of fact, will be fair and impartial. Again, this right is supported very well through widespread and frequent appearances in ancient law codes and through strong (more than 50%) representation in world declarations and modern law codes.

Table 4.4.1: Impartial Tribunal Universality	Occurrence	Percentage
Ancient Law Codes	10/16 (4/4 regions)	63%
World Declarations	6/8	75%
Contemporary Constitutions	81/146	55%

By region there is some weaker representation in certain areas. Western Europe (with the US and Canada), as well as the Middle East and East Asia have lower representations although the right is still present in about a third of the modern law codes in these regions. The other five regions have a much higher representation of this right.

Table 4.4.2: Impartial Tribunal/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	6/19	32%
Region 2 (Eastern Europe)	15/21	71%
Region 3 (Latin America and the Caribbean)	15/26	58%
Region 4 (The Middle East and North Africa)	4/12	33%
Region 5 (Sub-Saharan Africa)	24/37	65%
Region 6 (South Asia)	4/5	80%
Region 7 (East Asia)	4/15	27%
Region 8 (Oceana)	8/10	80%

The distribution of adoption of the right to a fair tribunal shows that it is present in all modern law codes belonging to the 4 major religions. However, it is least frequent among the modern law codes in majority Buddhist countries and is also under 50% in majority Muslim countries, indicating that there might be some cultural influence.

Table 4.4.3: Impartial Tribunal/Religion	Occurrence	Percentage
Majority Christian	52/88	59%
Majority Muslim	14/32	44%
Majority Hindu	2/2	100%
Majority Buddhist	4/11	36%

By form of government, the right to a fair and impartial tribunal has some outliers, as well, finding less widespread adoption in countries led by monarchies or one party systems. There is some evidence that this right might be influenced by form of government.

Table 4.4.4: Impartial Tribunal/Govt.	Occurrence	Percentage
Presidential Republic	42/71	59%
Parliamentary Republic	24/37	65%
Absolute Monarchy	1/3	33%
Constitutional Monarchy	12/25	48%
Theocracy or One Party System	1/6	17%

Right to a Public Trial

The right to a public trial, found in the Universal Declaration of Human Rights, has a fairly wide distribution among modern law codes and sits at the 50% threshold for world declarations. However, it is absent in ancient law codes, indicating that it might be of more modern origin.

Table 4.5.1: Public Trial Universality	Occurrence	Percentage
Ancient Law Codes	0/16 0/4 regions	0%
World Declarations	4/8	50%
Contemporary Constitutions	104/146	71%

As far as distribution by region is concerned, however, it appears that the adoption of a right to a public trial is not determined by the originating region of the adopted constitution. Instead, it enjoys majority distribution among the eight regions of the world delineated by the Comparative Constitutions Project.

Table 4.5.2: Public Trial/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	12/19	63%
Region 2 (Eastern Europe)	19/21	90%
Region 3 (Latin America and the Caribbean)	17/26	65%
Region 4 (The Middle East and North Africa)	12/12	100%
Region 5 (Sub-Saharan Africa)	22/37	59%
Region 6 (South Asia)	3/5	60%
Region 7 (East Asia)	10/15	67%
Region 8 (Oceana)	8/10	80%

When examined in light of dominant religion, the right to a public trial is found to exist in at least 50% of all modern law codes from all four major religions. Thus, neither region, nor religion appear to be a factor in its modern adoption rates.

Table 4.5.3: Public Trial/Religion	Occurrence	Percentage
Majority Christian	64/88	73%
Majority Muslim	21/32	66%
Majority Hindu	1/2	50%
Majority Buddhist	7/11	64%

Finally, when its adoption distribution is compared against the various forms of government, there is similarly no apparent correlation to government type. Its adoption rate is both high and stable across all the forms of government we have to compare.

Table 4.5.4: Public Trial/Govt.	Occurrence	Percentage
Presidential Republic	44/71	62%
Parliamentary Republic	29/37	78%
Absolute Monarchy	3/3	100%
Constitutional Monarchy	19/25	76%
Theocracy or One Party System	5/6	83%

Presumption of Innocence

The right to a presumption of innocence, present in the Universal Declaration, enjoys support through historical use, in ancient law codes, and through modern rates of adoption into contemporary ones. There is an argument to be made that this right exists in the universal conscience of mankind.

Table 4.6.1: Innocence Universality	Occurrence	Percentage
Ancient Law Codes	10/16 (3/4 regions)	63%
World Declarations	7/8	88%
Contemporary Constitutions	113/146	77%

By region, the presumption of innocence is widespread and common. The one outlier being Region 1. Although this may come as a surprise, it is important to point out that this region, although it contains the U.S., the U.K., and Canada, is composed mostly of countries which fall under the Civil Law tradition, and only a few which operate under the Common Law tradition. It is also possible that this region shows a lower instance of this right not because it is not valued, but because it is inferred so readily that there is little need for it to be stated.

Table 4.6.2: Innocence/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	7/19	37%
Region 2 (Eastern Europe)	20/21	95%
Region 3 (Latin America and the Caribbean)	20/26	77%
Region 4 (The Middle East and North Africa)	11/12	92%
Region 5 (Sub-Saharan Africa)	35/37	95%
Region 6 (South Asia)	4/5	80%
Region 7 (East Asia)	7/15	47%
Region 8 (Oceana)	8/10	80%

There is one outlier, as well, when its adoption is compared against the major religion of the adopting country (Buddhist nations at 45%) but that is close enough to the 50% threshold that it is difficult to say that Buddhist nations value it significantly less than the other major religions. Religious affiliation is probably not a causal factor for the adoption of this right.

Table 4.6.3: Innocence/Religion	Occurrence	Percentage
Majority Christian	68/88	77%
Majority Muslim	26/32	81%
Majority Hindu	2/2	100%
Majority Buddhist	5/11	45%

The adoption of presumption of innocence does not appear to be influenced by form of government. It does not have any adoption rates below 50% among all forms. It appears, therefore, that form of government is not a causal factor in determining adoption rates for presumption of innocence, either.

Table 4.6.4: Innocence/Government	Occurrence	Percentage
Presidential Republic	60/71	85%
Parliamentary Republic	29/37	78%
Absolute Monarchy	3/3	100%
Constitutional Monarchy	15/25	60%
Theocracy or One Party System	3/6	50%

Protections against Ex-Post Facto Charges

The last right for accused persons guaranteed in the Universal Declaration is that of protection against ex-post facto charges, or being charged with something that was not a crime at the time it was committed. Heavily present in modern constitutions and in world declarations, this right is scarce to non-existent in the ancient law codes examined in this study. It is possible that this right is a product of more modern views of the criminal justice system and specifically driven by modern judicial processes.

Table 4.7.1: Ex-Post Facto Universality	Occurrence	Percentage
Ancient Law Codes	1/16 (1/4 regions)	6%
World Declarations	6/8	75%
Contemporary Constitutions	122/146	84%

Adoption rates into modern constitutions are high in all regions of the world outlined in the CCP and there are no major outliers or indications that one region favors the adoption of this right at significantly higher or lower rates than the others. In modern times, at least, culture does not play a role in the acceptance of this right and its codification into modern law codes.

Table 4.7.2: Ex-Post Facto/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	14/19	74%
Region 2 (Eastern Europe)	17/21	81%
Region 3 (Latin America and the Caribbean)	24/26	92%
Region 4 (The Middle East and North Africa)	11/12	92%
Region 5 (Sub-Saharan Africa)	33/37	89%
Region 6 (South Asia)	4/5	80%
Region 7 (East Asia)	9/15	60%
Region 8 (Oceana)	9/10	90%

When examined in light of religion, we see the same pattern we saw with presumption of innocence . . . a slightly below 50% adoption rate among majority Buddhist nations, but higher adoption rates among the other religions. It is not enough of an aberration to conclude that religion is the reason for adopting, or failing to adopt, this right.

Table 4.7.3: Ex-Post Facto/Religion	Occurrence	Percentage
Majority Christian	75/88	85%
Majority Muslim	29/32	91%
Majority Hindu	2/2	100%
Majority Buddhist	5/11	45%

Form of government does not appear to be a deciding factor on adoption, either. It appears to enjoy majority adoption rates across all political systems available in the CIA data on forms of government.

Table 4.7.4: Ex-Post Facto/Govt.	Occurrence	Percentage
Presidential Republic	61/71	86%
Parliamentary Republic	34/37	92%
Absolute Monarchy	3/3	100%
Constitutional Monarchy	17/25	68%
Theocracy or One Party System	4/6	67%

Right to Counsel

The right to counsel in criminal proceedings is the first of nine rights examined in this study which are *not* found in the Universal Declaration of Human Rights. The right to counsel has strong representation in modern law codes, 50% representation in world declarations, but a low representation in ancient law codes, suggesting the possibility of a more modern origin.

Table 4.8.1: Counsel Universality	Occurrence	Percentage
Ancient Law Codes	2/16 (2/4 regions)	13%
World Declarations	4/8	50%
Contemporary Constitutions	110/146	75%

In adoption by region, there is little to suggest that the region of the world in which a constitution is written creates any major impact on the adoption of a right to counsel. The one outlier is barely below 50% and is, again, the region of the world in which such a right might be so established, anyway, that it is not mentioned by name.

Table 4.8.2: Counsel/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	9/19	47%
Region 2 (Eastern Europe)	19/21	90%
Region 3 (Latin America and the Caribbean)	24/26	92%
Region 4 (The Middle East and North Africa)	7/12	58%
Region 5 (Sub-Saharan Africa)	27/37	73%
Region 6 (South Asia)	4/5	80%
Region 7 (East Asia)	10/15	67%
Region 8 (Oceana)	9/10	90%

When compared against the dominant religion of the adopting country, the adoption of a right to counsel in criminal proceedings is not dependent upon predominant religion, either. Instead, it is fairly common among all countries regardless of the major faith.

Table 4.8.3: Counsel/Religion	Occurrence	Percentage
Majority Christian	68/88	77%
Majority Muslim	21/32	66%
Majority Hindu	2/2	100%
Majority Buddhist	7/11	64%

Nor does its adoption rate appear to be dependent upon the form of government overseeing it. When compared against all five forms of government, a right to counsel is fairly evenly distributed among them. It is highly unlikely that form of government is a determining factor.

Table 4.8.4: Counsel/Govt.	Occurrence	Percentage
Presidential Republic	54/71	76%
Parliamentary Republic	29/37	78%
Absolute Monarchy	2/3	67%
Constitutional Monarchy	17/25	68%
Theocracy or One Party System	4/6	67%

Protection against Self-Incrimination

The protection against self-incrimination, while prominent in the US constitution and Bill of Rights, is difficult to justify through an argument of historical use and widespread adoption. This right is virtually absent among the ancient law codes examined in this study, is poorly represented in world declarations, as well, and expresses a much smaller distribution among modern law codes than any of the rights examined up to this point.

Table 4.9.1: Self-Incrimination Universality	Occurrence	Percentage
Ancient Law Codes	1/16 (1/4 regions)	6%
World Declarations	2/8	25%
Contemporary Constitutions	76/146	52%

It is also worth noting that there are also some fairly prominent outliers when adoption rates are compared by geographical region. Regions one, four, five, and seven have low adoption rates while regions two, three, six, and eight, have high adoption rates. Once again, the major outliers are Western Europe, the Middle East, and East Asia. There is a good argument to be made that protections against self-incrimination might be culturally based.

Table 4.9.2: Self-Incrimination/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	5/19	26%
Region 2 (Eastern Europe)	14/21	67%
Region 3 (Latin America and the Caribbean)	22/26	85%
Region 4 (The Middle East and North Africa)	3/12	25%
Region 5 (Sub-Saharan Africa)	15/37	41%
Region 6 (South Asia)	3/5	60%
Region 7 (East Asia)	5/15	33%
Region 8 (Oceana)	8/10	80%

When we look to see if predominant religion explains some of the outliers, we see that the Buddhist and Muslim religions both do, indeed, appear to have some correlation to lower adoption levels of a right against self-incrimination. It is entirely possible that this right does owe its existence, at least in part, as Hume might argue, to local assertions of morality.

Table 4.9.3: Self-Incrimination/Religion	Occurrence	Percentage
Majority Christian	54/88	61%
Majority Muslim	8/32	25%
Majority Hindu	2/2	100%
Majority Buddhist	3/11	27%

Finally, Lukes' argument appears to have some support through the influence on adoption rates by form of government. Both Monarchies and One-Party Systems adopt the right of protections against self-incrimination at noticeably lower rates. This is a right which could be a product of certain cultures and traditions, borrowed disproportionately by those areas which have been variously influenced by them, and dependent on form of government.

Table 4.9.4: Self-Incrimination/Govt.	Occurrence	Percentage
Presidential Republic	36/71	51%
Parliamentary Republic	23/37	62%
Absolute Monarchy	1/3	33%
Constitutional Monarchy	12/25	48%
Theocracy or One Party System	1/6	17%

Protection against Double Jeopardy

The protection against double jeopardy (also modern language which simply means a protection against being tried again for a crime for which one has been found innocent) is similarly difficult to justify when using the arguments of universal existence in ancient law codes and universal adoption in modern ones. It is weakly represented in both--being non-existent in the ancient law codes examined in this study, almost non-existent (only found in one) among the world declarations, and achieving barely over 50% adoption rates in modern law codes. The data gives the impression that this right might also be of more modern origin and limited to the influence of one particular judicial tradition.

Table 4.10.1: Double Jeopardy Universality	Occurrence	Percentage
Ancient Law Codes	0/16 (0/4 regions)	0%
World Declarations	1/8	13%
Contemporary Constitutions	79/146	54%

Furthermore, geographical region seems to be a significant predictor of adoption rates of protections against double jeopardy--the Middle East being particularly low in adoption rates when compared to other regions. It is likely that this right, and its adoption into modern law codes, is culturally influenced.

Table 4.10.2: Double Jeopardy/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	6/19	32%
Region 2 (Eastern Europe)	14/21	67%
Region 3 (Latin America and the Caribbean)	18/26	69%
Region 4 (The Middle East and North Africa)	2/12	17%
Region 5 (Sub-Saharan Africa)	19/37	51%
Region 6 (South Asia)	3/5	60%
Region 7 (East Asia)	7/15	47%
Region 8 (Oceana)	9/10	90%

The above regional correlation is at least partially explained by examining the adoption rates by predominant religion. When compared against other world religions, Muslim and Buddhist nations have significantly lower rates of adoption. It is reasonable to assume that the predominant religion of a country has some influence on whether or not this right is adopted into the country's constitution.

Table 4.10.3: Double Jeopardy/Religion	Occurrence	Percentage
Majority Christian	55/88	63%
Majority Muslim	10/32	31%
Majority Hindu	2/2	100%
Majority Buddhist	3/11	27%

Finally, there is some correlation to form of government, as well, as protections against being tried twice for the same crime are particularly low among absolute monarchies and one party systems. Lukes (1994) may have a good argument to explain the existence, or lack of existence, of this human right based on form of government.

Table 4.10.4: Double Jeopardy/Govt.	Occurrence	Percentage
Presidential Republic	37/71	52%
Parliamentary Republic	25/37	68%
Absolute Monarchy	1/3	33%
Constitutional Monarchy	12/25	48%
Theocracy or One Party System	1/6	17%

Right to a Speedy Trial

The right to a speedy trial fairs somewhat better, appearing in a fairly significant number of ancient law codes and in roughly 50% of modern law codes and world declarations. This is a right which seems consistent over time but only moderately popular in modernity.

Table 4.11.1: Speedy Trial Universality	Occurrence	Percentage
Ancient Law Codes	6/16 (3/4 regions)	38%
World Declarations	4/8	50%
Contemporary Constitutions	72/146	49%

This moderate popularity does have some correlation to the region of the world in which the adoption does or does not occur. Regions two, four, and seven, for example, have adoption rates well below 50%, while others (especially Region eight) enjoy much more robust adoption rates. The adoption rate for the right to a speedy trial appears to have some cultural influence.

Table 4.11.2: Speedy Trial/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	11/19	58%
Region 2 (Eastern Europe)	7/21	33%
Region 3 (Latin America and the Caribbean)	15/26	58%
Region 4 (The Middle East and North Africa)	4/12	33%
Region 5 (Sub-Saharan Africa)	19/37	51%
Region 6 (South Asia)	3/5	60%
Region 7 (East Asia)	4/15	27%
Region 8 (Oceana)	8/10	80%

The right to a speedy trial also appears to have correlation to the dominant religion of a particular country. Again, majority Muslim and majority Buddhist countries are the outliers with the lower adoption rates. These religions are, unsurprisingly, more highly represented in regions 4 and 7.

Table 4.11.3: Speedy Trial/Religion	Occurrence	Percentage
Majority Christian	52/88	59%
Majority Muslim	7/32	22%
Majority Hindu	1/2	50%
Majority Buddhist	3/11	27%

There is one major outlier in mode of governance. Those countries that run as a theocracy, or one party system, do not adopt the right to a speedy trial into their modern constitutions at all. Across other forms of government, the adoption rate is much higher.

Table 4.11.4: Speedy Trial/Govt.	Occurrence	Percentage
Presidential Republic	32/71	45%
Parliamentary Republic	20/37	54%
Absolute Monarchy	2/3	67%
Constitutional Monarchy	16/25	64%
Theocracy or One Party System	0/6	0%

Right to Call or Confront Witnesses

The right to call or confront witnesses is unique in this study in that it enjoys more widespread use in the ancient law codes examined than in the modern ones. Present in a high percentage of ancient law codes, it has anemic representation among modern law codes and world declarations.

Table 4.12.1: Witnesses Universality	Occurrence	Percentage
Ancient Law Codes	10/16 (4/4 regions)	63%
World Declarations	2/8	25%
Contemporary Constitutions	48/146	33%

To what extent it is represented among modern law codes, the right to call and examine witnesses has disproportionate adoption rates, as well. Among most regions it is very low. There are two exceptions in region 3 (Latin American and the Caribbean) and region 8 (Oceana). It is unclear why these particular areas would adopt the right at such higher rates.

Table 4.12.2: Witnesses/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	4/19	21%
Region 2 (Eastern Europe)	2/21	10%
Region 3 (Latin America and the Caribbean)	14/26	54%
Region 4 (The Middle East and North Africa)	0/12	0%
Region 5 (Sub-Saharan Africa)	13/37	35%
Region 6 (South Asia)	1/5	20%
Region 7 (East Asia)	4/15	27%
Region 8 (Oceana)	8/10	80%

There is some religious disparity, as well, in the distribution of this right. There is an extremely low representation among those countries with the predominant religion of Islam and low representations among Buddhist and Christian nations, as well. Hindu nations, on the other hand, adopt it more readily into their constitutions.

Table 4.12.3: Witnesses/Religion	Occurrence	Percentage
Majority Christian	34/88	39%
Majority Muslim	3/32	9%
Majority Hindu	1/2	50%
Majority Buddhist	3/11	27%

When the right to call/confront witnesses is compared to the present forms of government, there are low adoption rates throughout. The rate of adoption is zero among theocratic and one-party systems. However, as with region and religion, there is uniformity in the low levels of adoption.

Table 4.12.4: Witnesses/Govt.	Occurrence	Percentage
Presidential Republic	22/71	31%
Parliamentary Republic	11/37	30%
Absolute Monarchy	1/3	33%
Constitutional Monarchy	11/25	44%
Theocracy or One Party System	0/6	0%

Right to Trial by Jury

The right to be tried by a jury of one's peers shows both a lack of universality through time (among ancient law codes) and a lack of universal adoption in modernity. This appears to be a right which was not popular in the past and continues to be unpopular today.

Table 4.13.1: Jury Universality	Occurrence	Percentage
Ancient Law Codes	3/16 (2/4 regions)	19%
World Declarations	1/8	13%
Contemporary Constitutions	25/146	17%

It is scarce in all regions of the world with the notable exception of Western Europe (including the United States and Canada). This demonstrates that the right to trial by jury is very arguably a product, as Stamos (2015) would say, of Western Civilization and its trajectory. Among ancient law codes, all three of the mentions of jury trials are those which existed along the trajectory of western civilization (the Athenian Constitution, Magna Carta, and the English Bill of Rights). There is little support to show that a trial by jury is a fundamental right universally embedded in the human conscience.

Table 4.13.2: Jury/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	8/19	42%
Region 2 (Eastern Europe)	3/21	14%
Region 3 (Latin America and the Caribbean)	4/26	15%
Region 4 (The Middle East and North Africa)	1/12	8%
Region 5 (Sub-Saharan Africa)	4/37	11%
Region 6 (South Asia)	1/5	20%
Region 7 (East Asia)	1/15	7%
Region 8 (Oceana)	2/10	20%

Comparing by predominant religion shows little except the fact that right to trial by jury is uncommon in countries under all major religions. Again, this right is universally unpopular both in antiquity and in modernity.

Table 4.13.3: Jury/Religion	Occurrence	Percentage
Majority Christian	16/88	18%
Majority Muslim	3/32	9%
Majority Hindu	0/2	0%
Majority Buddhist	1/11	9%

When the right to trial by jury is compared against the various forms of government, they all adopt this right at very low to nonexistent levels, again showing the right's lack of popularity in modern law codes. There is a surprising exception for theocracies and one-party systems which adopt the right to trial by jury at 50%. It is unclear why this is so.

Table 4.13.4: Jury/Govt.	Occurrence	Percentage
Presidential Republic	11/71	15%
Parliamentary Republic	4/37	11%
Absolute Monarchy	0/3	0%
Constitutional Monarchy	6/25	24%
Theocracy or One Party System	3/6	50%

Right to Appeal

The right for an accused person to appeal to a higher court or power for redress does not enjoy widespread existence in ancient law codes nor high rates of adoption in modern law codes. It exists, however, in half of all the world declarations, giving some indication that it enjoyed a brief period of popularity.

Table 4.14.1: Appeal Universality	Occurrence	Percentage
Ancient Law Codes	5/16 (3/4 regions)	31%
World Declarations	4/8	50%
Contemporary Constitutions	51/146	35%

When trying to determine if adoption rates of a right to appeal, among modern law codes, are explained by region, there is one major outlier in region 2 (Eastern Europe) which adopts this right in 76% of its modern law codes while no other region adopts at a rate higher than 40%.

Table 4.14.2: Appeal/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	5/19	26%
Region 2 (Eastern Europe)	16/21	76%
Region 3 (Latin America and the Caribbean)	8/26	31%
Region 4 (The Middle East and North Africa)	1/12	8%
Region 5 (Sub-Saharan Africa)	13/37	35%
Region 6 (South Asia)	2/5	40%
Region 7 (East Asia)	2/15	13%
Region 8 (Oceana)	3/10	30%

The right to an appeal is low among countries regardless of predominant religion, as well. It is poorly distributed in all of them, showing a lack of popularity among all religions, but is at least consistent in that lack of popularity, as no religion adopts it at near the 50% threshold.

Table 4.14.3: Appeal/Religion	Occurrence	Percentage
Majority Christian	34/88	39%
Majority Muslim	7/32	22%
Majority Hindu	0/2	0%
Majority Buddhist	2/11	18%

The adoption of a right to appeal is low, across the board, regardless of form of government, as well. The highest adoption rate is only 49%, among those countries ruled by a parliamentary republic, and most rates are well below that. Again, it is consistent in its unpopularity.

Table 4.14.4: Appeal/Govt.	Occurrence	Percentage
Presidential Republic	26/71	37%
Parliamentary Republic	18/37	49%
Absolute Monarchy	1/3	33%
Constitutional Monarchy	4/25	16%
Theocracy or One Party System	1/6	17%

Rules of Evidence

Having rules of evidence (i.e. search and seizure requirements) is fairly common among modern law codes but it is rare in both ancient law codes and world declarations. This indicates that such rights are probably the result of a much more modern concern.

Table 4.15.1: Evidence Universality	Occurrence	Percentage
Ancient Law Codes	2/16 (2/4 regions)	13%
World Declarations	2/8	25%
Contemporary Constitutions	93/146	64%

Among the regions that adopt rules of evidence to protect accused persons, there is only one major outlier (region 6) in South Asia which is well below the threshold. All the other regions adopt this right at well above that percentage. This right may be culturally based.

Table 4:15.2: Evidence/Region	Occurrence	Percentage
Region 1 (Western Europe, United States, Canada)	11/19	58%
Region 2 (Eastern Europe)	15/21	71%
Region 3 (Latin America and the Caribbean)	19/26	73%
Region 4 (The Middle East and North Africa)	9/12	75%
Region 5 (Sub-Saharan Africa)	22/37	59%
Region 6 (South Asia)	1/5	20%
Region 7 (East Asia)	9/15	60%
Region 8 (Oceana)	6/10	60%

Comparison by predominant religion seems to corroborate the above outlier with the Majority Hindu nations being reluctant to adopt this right. It seems that those nations under a predominantly Hindu religion and in those regions surrounding India, adopt this rate at disproportionately lower rates, giving some indication that religion may play a role in its adoption into modern law codes.

Table 4.15.3: Evidence/Religion	Occurrence	Percentage
Majority Christian	59/88	67%
Majority Muslim	19/32	59%
Majority Hindu	0/2	0%
Majority Buddhist	6/11	55%

There is little to indicate, however, that form of government plays any role in the adoption rates of the right to be protected against the arbitrary collection and use of evidence. Instead, the adoption rates for this right appear to be completely independent of the sort of government the particular constitution falls under and all forms of government adopt this right into constitutions above the 50% threshold.

Table 4.15.4: Evidence/Govt.	Occurrence	Percentage
Presidential Republic	46/71	65%
Parliamentary Republic	19/37	51%
Absolute Monarchy	2/3	67%
Constitutional Monarchy	17/25	68%
Theocracy or One Party System	5/6	83%

Due Process

The right to due process is admittedly a very difficult one to quantify. In ancient law codes, the right can be found by noting that there were certain processes which were put into place for accused persons that had to, by law, be followed before they could be convicted and punished. Following this definition, due process is quite common in ancient law codes and also in world declarations. The problem is that the Comparative Constitution data requires the guarantee to be made by name before it will count in the data set. Having the right stated by name is not very common (only 19% of modern law codes do so) but nearly 100% of modern law codes have some sort of criminal process (and thus due process) that must be followed in criminal proceedings. There is a difference, then, between how often it is mentioned and how often it actually occurs. By actual occurrence, due process is one of the most defensible rights of the 16 that have been studied, occurring in very high percentages of ancient law codes, 100% of world declarations, and over 90% of modern law codes.

Table 4.16.1: Due Process Universality	Occurrence	Percentage
Ancient Law Codes	13/16 (4/4 regions)	81%
World Declarations	8/8	100%
Contemporary Constitutions	28/146	Mentioned -19% Occurs >90%

Since the occurrence cannot be quantified within the CCP data, its rate of adoption cannot be searched for correlation by region, religion, or form of government although it undoubtedly enjoys widespread acceptance through all three variables.

In summary, it appears that certain rights enjoy a much stronger argument for universality than others when those arguments are based on historical use in ancient law codes and widespread adoption in modern ones. These differences, and possible explanations for them, will be explored in the next chapter. Also in the next chapter comparison will be made in regards to the defensibility of rights outlined in the Universal Declaration versus those which arose out of the U.S. Bill of Rights, alone, to see how well the writers of the UDHR captured those rights which are more universal across both time and space. Those rights, in either category, which are most defensible, are the rights which can be argued to most likely arise out of a pure discussion of human rights behind John Rawls' veil of ignorance. Examination will also be made regarding which other rights might, under the arguments of Hume, Lukes, and Stamos, be more explainable as a product of culture, religion, or form of government, than as a natural outgrowth of the universal human conscience. Finally, there will be discussion about what it is that those rights which are least defensible have in common with one another.

CHAPTER 5: Discussion and Conclusions

This project began with the intent of examining important evidence regarding the universality of human rights--a subject over which there has been important debate in recent decades. As outlined, the theoretical justifications for the universality of these rights has usually rested in philosophy and religion. However, those foundations have opened these rights to a substantial critique about whether they are truly universal, especially provided the inconsistencies in the way both religion and philosophy have addressed these ideals over the millennia. Yet, we know that these rights have been deemed important by international bodies, and have even been declared universal by them. This project explicitly sought to lend greater defense to these declarations (particularly the Universal Declaration of Human Rights) and to provide an expanded argument to prevent human rights abuses against accused persons. It has sought to do so while still acknowledging three primary critiques of universal human rights. Through an examination of historical texts, from various regions of the world and throughout the written history of humankind, and through a study of modern constitutions, this project directly tests the validity of these critiques. Upon completion of these examinations, the evidence suggests that these critiques may be overstated, and that there may, in fact, be a universal understanding of what many human rights are, particularly with regard to the rights for accused persons.

I approached this defense through the lens of the philosophy of John Rawls, who argues that universal concepts of justice do exist and would be mutually adopted if the world's peoples were able to shed their biases and come to the table behind a veil of ignorance regarding what we each (as individuals and nations) stand to lose or gain by extending certain rights to others. I

found that the best way to mimic such a hypothetical meeting of the minds was not to try to strip humanity of bias (perhaps an impossible task) but to simply look at enough history and law that the universal rights which have been favored over the years would float to the surface and make themselves visible. I have done this by examining the evidence for universal rights through a combination of what has been valued in the past with what is currently widely accepted. Finally, in order to control for important arguments against universal human rights, I have compared this universal adoption against the three variables of culture, religion, and form of government.

There is an underlying assumption, that appears common to the much of the world, that we ought to treat those accused of crimes with equity and fairness, regardless of the accusation against them and regardless of the country in which accused persons find themselves. However, we see, time and again, that the unethical treatment of prisoners in certain places and by means which are completely antithetical to those worldwide assumptions, is common. How, as a world community, do we make a moral argument against such behavior, especially if rights are not universal, and are simply the chaotic byproducts of culture, religion, and government? We must use an argument that is independent of these. To argue for universal rights from a religious epistemology, although effective to some degree, works only for those who profess to respect the same faith. To use philosophy as our argument, we must accept the fact that the major arguments for universal rights in this discipline have stagnated, and are moving away from universal human rights, in the form of natural rights and natural law, toward a much less individualized utilitarianism.

It is the assumption of this author, along with (it can be assumed) a large percentage of humanity, that there are, indeed, universal human rights--rights which are both discoverable and defensible. The difficulty lies in attempting to find and defend them. To reiterate the general

assumptions from Chapter 1: A universally palatable canon of human rights can be found by noting their commonality through time (as evidenced through a search of ancient and medieval law codes) and can be supported by their contemporary adoption across geographical, cultural, and religious boundaries. If these measures for universality are met, there is likely a more solid foundation upon which to argue that a particular human right for accused persons is universal, ought to be accepted as such, and, most importantly, can be argued for, with moral weight and clarity, when such a right is disregarded. In other words, if a human right has been used historically, across both time and region, and now enjoys widespread acceptance as well, we would be justified to apply international pressure against the violation of human rights by pointing out that such violations are contrary to the universal human conscience.

I approached this undertaking fully aware of how the bias of my own beliefs might influence my approach and findings. Because of long-held convictions, and many years of personally interacting with accused persons in the U.S. criminal justice system, I believe in universal human rights and am a supporter of those rights of accused persons that are found in the Universal Declaration. Furthermore, I fully expected, at the commencement of this study, to find them existing elsewhere, to some degree, across the texts and data sets I have since examined. This expectation, in and of itself, has the potential to bias my findings. It is also fair to state, from the outset, that I am concerned about an erosion of human rights for accused persons and have been, for several years, contemplating a suitable defense for them. If there is no suitable defense, I fear that they might slowly be abraded. In addition to the philosophical and religious arguments that have been made in defense of human rights, I feel it is important to continue to add any rational evidence to the body of knowledge that supports keeping these

rights in place. The alternative, I believe, is a moral relativism that could allow for an insidious creep of unchecked, and unconscionable, treatment of accused persons.

Recall that when a sample of countries and cultures convened amidst the rubble of human rights left in the wake of World War II, they were seeking to codify a list of rights to protect against such unimaginable actions in the future. The title of their final document suggests that they meant to find those rights which were universal and which existed in the universal mind and conscience of man. In doing so, they borrowed heavily from the rights in the United States' Constitution and the U.S. Bill of Rights. However, in the area of the rights of accused persons, they did not borrow completely. In fact, several rights common to western civilization were left out. A critical question, in light of what was discovered by this study, is how well the framers of the Universal Declaration chose those rights that can be supported as universal. Did they choose the rights that were most likely to show an historical use through time and those which would exhibit widespread acceptance through adoption into modern law codes? Did they leave any out that ought to have been included? The chart on page 117 gives some indication of their success in this regard, taking into account findings within ancient law codes and the data from the Comparative Constitutions Project. As a reminder, each of the 16 rights for accused persons are represented below, both those included in the Universal Declaration and those which were not included. The chart indicates what was discovered about each one in turn.

Found in the Universal Declaration	Not Found in the Universal Declaration
1-Freedom from torture, cruel, degrading, or inhuman punishment: (Article 5)	8-Right to counsel
2-Right to equal protection under law, without discrimination: (Article 7)	9-Right to remain silent or protections from self-incrimination

3-Freedom from arbitrary arrest, detention, or exile: (Article 9)

4-Right to an independent and impartial (fair) tribunal: (Article 10)

5-Right to a public trial: (Article 10)

6-Right to be presumed innocent until proven guilty: (Article 11)

7-Protection against ex post facto charges: (Article 11)

10-Protections against being tried twice for the same crime

11-Right to a speedy trial

12-Right to calling witnesses and to examining witnesses

13-Right to a jury or judgement of one's peers

14-Right to appeal to a higher court for redress

15-Protections against arbitrary collection/handling of evidence

16-Due process allowances in criminal proceedings

Table 5.1.1: Rights Comparison

Right ( )=In UDHR ( )=Not in UDHR	Present in Several Ancient Law Codes (30%+)	Present in Majority of World Declarations (50%+)	Present in Majority of Modern Law Codes (50%+)	No Correlation to Geographical Region (<30% of average)	No Correlation to Predominant Religion (<30% of average)	No Correlation to Form of Government (<30% of average)
Cruel / Unusual Punishment	+	+	+	+	+	+
Equal Protection	-	+	+	+	+	+
Arbitrary Arrest	+	+	+	+	+	+
Fair Tribunal	+	+	+	+	-	+
Public Trial	-	+	+	+	+	+
Presumption of Innocence	+	+	+	-	+	+
Ex-Post Facto	-	+	+	+	-	+
Right to Counsel	-	+	+	+	+	+
Self-Incrimination	-	-	+	-	-	+
Double Jeopardy	-	-	+	-	-	+
Speedy Trial	+	+	-	+	+	-
Witnesses	+	-	-	-	+	+
Jury	-	-	-	+	+	+
Appeal	-	+	-	-	+	+
Evidence	-	-	+	-	-	+
Due Process	+	+	+	+	+	+

The first column of the chart indicates whether or not a particular right was found in more than 30% of ancient law codes. As was mentioned in Chapter 3, the law codes available for perusal are both rare and, in many cases, incomplete. Finding a specific right for accused persons among them at all is a good indication that those rights were probably more frequent than we can measure. Thus, if a right is present in at least 30% or more of the law codes, and also in at least half of the regions studied, it is likely that it was popular in law codes in antiquity. The second column indicates whether or not the particular right was found in a majority (50% or more) of world declarations. These declarations, although written over a short span of two hundred years, represent a wide diversity of lands, cultures, countries, and religious traditions. It is reasonable to suggest that finding a right in over half of them is a significant finding. The third column indicates whether each right was found in a majority (50% or more) of modern law codes, showing widespread adoption of the concept into contemporary world constitutions--again, a significant finding. The last three columns show whether a right had significant deviation from the mean among the adoption percentages when the variables of culture (by geographical region), religion, and form of government were held constant. A "+" in this column indicates that the existence of those rights is not readily explained by contemporary culture, religion, or government--thus bolstering its claim as a universal human right.

This study suggests that all of the rights examined have at least some claim to universality. Most were found in ancient law codes and all have been adopted to some extent among modern ones, as well. However, the distribution and the strength of representation is not equal. Some of the sixteen rights examined in this study are more defensible than others. If we look at those rights that are easiest to defend through their existence in ancient law codes, their existence in world declarations, and their adoption into modern law codes across culture,

religion, and form of government, then the following five rights are the easiest to defend and enjoy the most robust argument for universality:

-Freedom from torture, cruel, degrading, or inhuman punishment

-Freedom from arbitrary arrest, detention, or exile

-Right to an independent and impartial (fair) tribunal

-Right to be presumed innocent until proven guilty

-Due process allowances in criminal proceedings

All of these rights enjoyed a strong presence in ancient law codes both by volume and across geographical regions. Each is also well represented in the universal declarations of human rights that represent peoples, cultures, and customs across the world. Additionally, each of these rights appear to have been adopted with alacrity into modern law codes regardless of culture, religion, or form of government. Interestingly, four of these five are among the seven rights for accused persons found in the Universal Declaration. The founders of that document, (representing, as they did, various cultures, religions, and forms of government) appear to have chosen well.

The following two rights also enjoy a strong presence in ancient law codes. They were also adopted into modern constitutions across culture, religion, and form of government with no seeming dependence on those variables. However, while they do exist in modern law codes and world declarations, they are only minimally represented in them. Thus, these rights enjoy a good argument for universality through historical use and even distribution, but there is a somewhat weaker argument for universality through adoption into modern law codes:

-Right to a speedy trial

-Right to call witnesses and to confront witnesses

Conversely, the following four rights have a strong presence in modern law codes but are rare or non-existent in ancient ones. These rights are well represented in world declarations, and have also enjoyed widespread adoption into modern law codes since their inception. Furthermore, they, too, have not been adequately explained by an appeal to culture, religion, or mode of government since they were adopted seemingly independent of these variables. They enjoy a strong argument for universality in the form of widespread adoption but lack or have a weaker argument for universality through existence over time in ancient law codes. These are rights that are possibly more modern in origin:

-Right to counsel

- Right to Equal Protection under law, without discrimination

-Protection against ex post facto charges

-Right to a Public Trial

Two of the rights studied were scarce in both ancient law codes and modern law codes. Nevertheless, where found, they appeared to be distributed evenly in regards to region (culture), dominant religion, and mode of government. In other words, although they are scarce in time and place, and unpopular throughout history, they are evenly distributed enough to make the argument that they are not greatly influenced by culture, religion, and government and beg some other explanation for their existence:

-Right to a jury or judgement of one's peers

-Right to appeal to a higher court for redress

The last three rights are the most difficult to defend. These were not found in any significant number in ancient law codes and were also quite scarce among modern law codes and world declarations. Furthermore, there was significant indication that geographical region,

dominant religion, and even form of government, might have played a role in whether these rights were adopted into modern law codes. It is possible, then, that these rights have the potential to be more culturally based. Interestingly, these are the rights for accused persons which some might argue have the greatest potential to let a guilty person escape punishment. In other words, these are the rights that might allow someone to be set free based on a technicality:

-Protections against double jeopardy or being tried twice for the same crime

-Right to remain silent or protections from self-incrimination

-Protections against arbitrary collection/handling of evidence

It is interesting to note that each of these individual rights, when grouped according to how well their universality can be defended (most defensible, moderately defensible, and least defensible), share common traits with the other rights in that group. Those rights that are most defensible tend to be the rights which deal with broad concepts of fairness--usually fairness that is expected prior to an accused person going into trial (a fair tribunal, a capable magistrate, no arbitrary arrest, an initial consideration of innocence, an expectation of due process, etc.) Those rights that enjoy moderate support for universality, tend to be those which deal with the process of trial and the steps that lead to the actual finding of guilt or innocence (a speedy trial, a public trial, right to call witnesses, a right to counsel, a right to a jury, the right to appeal, etc). Those that have the least support for universality, while also part of the trial process and the finding of guilt or innocence, share in common the fact that they are the rights which deal with protections that can lead to guilty persons being set free on a technicality. They are the rights most likely to be misused on behalf of the accused and at the expense of justice.

The argument for universality for these last three rights is further weakened by a possible explanation of existence and adoption due to regional and cultural influence. It is not a stretch,

for example, to argue that these last three protections (those against double jeopardy, self-incrimination, and arbitrary collection/use of evidence) have been derived from one particular judicial tradition as the data in this study has hinted. In fact, strong arguments can be made that these are, as Stamos (2015) posited, a product of Western civilization and English Common Law. Knight (1996) for example, explains that much of what is understood about the protection against self-incrimination can be attributed to values in the Book of Martyrs that were a result of Catholic oppression of English Protestants (Knight 1996, 57-58) and through reforms after such trials as the one for John Lilburn in the 17th century (90-93) and after the inquisition trial of John Lambert (95)--all in the tradition of English Common Law. Knight also suggests that protections against arbitrary collection of evidence owe their existence, at least in part, to corrupt services of warrants for evidence collection that were carried out in the cases of John Wilkes and John Entick, 18th century journalists (121-123). Double jeopardy protections, also, are much more common to those geographical areas falling under the influence of English Common Law.

In regards to culture, Hume would argue that universal rights, morality, and assumptions are "oughts" (i.e. what people want to be true instead of what actually is true). This want, or manufactured morality, can be the creation of culture or religious upbringing. Because these three rights find themselves unequally distributed among the various cultural regions in the Comparative Constitutions Project, there is, indeed, an argument to be made that they are the result of a more localized morality. In light of Knight's (1996) findings, it is also clear that these three rights, at least, are subject to Stamos' (2015) argument that some human rights are a result of the evolving values of western civilization and are therefore found to be more commonly adopted among those countries most heavily influenced by the West. Luke's (1994) argument, could also be valid in these cases from the information gathered in this study. All

three of these rights have outliers when rates of adoption are compared against form of government. Outside of these rights, however, and some influence on the rights to a speedy trial and an impartial tribunal, most rights in this study were adopted without correlation to the form of government under which each constitution operated. The reason for these few aberrations might benefit from further scrutiny but there was no further corroboration of Luke's argument.

Based on the results of this analysis, we might ask which protections for accused persons the framers of the Universal Declaration accurately identified as "universal." It appears that they chose universally defensible rights in the protection against cruel and unusual punishment, in the protection against arbitrary arrest, in the requirement for a fair tribunal, and in the presumption of innocence of accused parties. All of these rights enjoyed significant support in all aspects of this study. Furthermore, there was strong support for protections against arbitrary arrest and for provisions for a public trial. Six of the seven rights outlined in the Universal Declaration, therefore, were strongly supported. Even ex-post facto protections, the least supported of the UDHR rights, still enjoyed some support and can be argued to at least exist in the *modern* human conscience. If we compare those rights which were in the Universal Declaration against those that were not, those rights that were included possessed, by and large, a much stronger argument for universality. Additionally, the three rights that are least defensible in this study are all rights that were not included in the Universal Declaration, and have their main ascription elsewhere. Nor were some of the other rights with lesser support for universality a part of the Universal Declaration. The only glaring omission in the UDHR seems to be the lack of a specified right for due process in criminal proceedings. It is possible, however, as discussed before, that this is covered by the other rights for accused persons which implicitly reflect the existence of a required and regular process in criminal justice proceedings. There is enough support in ancient

and modern law codes that consideration for a speedy trial, right to call and confront witnesses, right to appeal, and a right to counsel would enjoy a strong argument to be considered for inclusion in the UDHR, as well.

I hope that this study has built additional foundations for those rights of accused persons outlined in the Universal Declaration of Human Rights. If such a foundation can be built upon an awareness of the existence of human rights through time, coupled with their adoption across cultures, then there is hope that certain human rights have an additional supporting argument for universality--that they are common to majority of humanity, and that a careful look at historical and modern laws can make that clear to us. Some might think that the extra support is not needed, and that universal human rights are self-evident--on their way to continual expansion and acceptance around the world. I am not so optimistic. I see an opportunity for human rights to be eroded in the face of political upheaval and the exercise of emergency powers in an increasingly dangerous world. Even here in the United States, where we frequently feel insulated from such changes, we need look no further than 9/11 to see how a sudden fear and push for security can change our perception of how human rights for accused persons might be protected. Additionally one need only read some of the recent reports from human rights watch groups to see that there are gross aberrations from what is outlined in the Universal Declaration occurring daily around the world. Rights for accused persons are being swept away for convenience sake, sacrificed upon the altar of misinterpreted dogma, or traded in for a guarantee of safety and security. Since we are increasingly unable to make singular appeal to religion and philosophy to argue for their continued protection, I believe that it is important to defend these rights for accused persons, as currently found in the Universal Declaration, and elsewhere, through any other plausible means, including those outlined in this project.

In the end, I hope that this study provides such means and, perhaps, a better answer to the question posed by Senator Marco Rubio to the future Secretary of State, when he challenged him to explain why one country should have a different view of human rights than another. It is an answer that I hope will include an appeal to that which is common to the conscience of all mankind—that which we can observe humanity having chosen, time and again, across continents, cultures, religions, and forms of government. This may be the closest we can ever come to guessing what would be valued if we all came forward, collectively, behind a veil of ignorance, seeking to elucidate that which is both widely accepted and reasonable, in a united concept of justice.

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